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[Indexed as: White v. Canada (Attorney General)]

Between: William White, Plaintiff And Attorney General of Canada, Defendant And Navy League of Canada and Ralph Bremner, Conrad Eugene Sundman, Beverley Richard Wilson, and Evelyn Anderson, Executrix of The Estate of Clarence Allan Anderson, Deceased, Third Parties

2004 A.C.W.S.J. 23730

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2004 BCSC 99

File No. S005157 Vancouver

British Columbia Supreme Court

Cullen J.

JANUARY 23, 2004, DECIDED

[para1]

CIVIL PROCEDURE -- Class actions -- Certification --Plaintiff suing defendants for historical sexual abuse in the military -- Plaintiff applying to have claim certified as class action -- Application granted -- Claim meeting tests as outlined in Class Proceedings Act, R.S.B.C. 1996, c. 50 -- Fact that individual claims may differ not sufficient to reject application -- Court could reconsider matter if claims diverge

The plaintiff commenced the within action against the Attorney General of Canada for alleged incidents of sexual abuse which occurred while the plaintiff was a military cadet between the years of 1967 and 1977. The intention was to have the action certified as a class proceeding. The defendants argued that there was no cause of action as it was barred under the Crown Liability and Proceeding Act, (Can.) or that the cause of action was statute barred under s. 269 of the National Defence Act

(Can.). The argument of the defendants was rejected by both the supreme court and the court of appeal. The issue here was whether the matter was one which was appropriate for certification.

HELD: Certification granted. The issue of whether there was an identifiable classof two or more persons had to be resolved in favour of the plaintiff. The plaintiff's claim in systemic negligence raised common issues justifying certification in keeping with the requirements of the Class Proceedings Act, R.S.B.C. 1996, c. 50. There was no preferable procedure available. Accordingly, certification seemed appropriate at this stage. That being said, it was possible that the individual claims would diverge to such an extent that a class action would become unworkable. If that developed, the court could reconsider this issue.

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Counsel for the Defendant: L.D. Lachance

Counsel for the Third Party, B. Wilson: J. Shields and M. Wynn

Counsel for the Third Party, R. Bremner: I.D. Aikenhead, Q.C.

Counsel for the Third Party, E. Anderson: A. Mackay

Counsel for the Third Party, Navy League J. Langevin

Counsel for the Third Party, C. Sundman: R.W. Mostar

A.F. Cullen, J.

1 These reasons proceed from an application brought by the plaintiff, William White, under the Class Proceedings Act, R.S.B.C. 1996, c. 50 (" CPA "), s. 2, seeking certification of this action as a class proceeding. The applicationwas divided into two parts. The first part was concerned with whether the pleadings on which certification was sought disclosed a cause of action in accordance with the requirement of section 4(1) (a) of the CPA and whether the action was nonetheless barred by a limitation. That application was resolved in favour of the plaintiff by ruling dated August 6, 2002 (4 B.C.L.R. (4th) 161), upheld by the Court of Appeal by reasons dated January 15, 2003 (2003 BCCA 53).

2 The second part of the application came on for hearing before me on September 29, 30 and October 1, 2003.

3 The second part of the application concerns whether the preconditions to certification under section 4(1)(b), (c) and (e) inclusive are met, and whether certification of the action as a class proceeding would be the preferable procedure under 4(1)(d) in light of the considerations set forth in section 4(2) of the CPA . Section 4 of the CPA reads as follows:

4 (1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:

(a) the pleadings disclose a cause of action;
(b) there isan identifiable class of 2 or more persons;

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

(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;

(e) there is a representative plaintiff 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, an interest that is in conflict with the interests of other class members.

(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:

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

(b) whether a significant number of the members of the class have a valid interest in individually controllingthe prosecution of separate actions;

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

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

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

4 The provisions of s. 6 and s. 7 of the CPA also have application to a consideration of the certifiability of this action as a class proceeding. Those sections read as follows:

6 (1) Despite section 4 (1), if a class includes a subclass whose members have claims that raise common issues not shared by all the class members so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court must not certify the proceeding as a class proceeding unless there is, in addition to the representative plaintiff for the class, a representative plaintiff who

(a) would fairly and adequately represent the interests of the subclass,

(b) has produced a plan for the proceeding that sets out a workablemethod of advancing the proceeding on behalf of the subclass and of notifying subclass members of the proceeding, and

(c) does not have, on the common issues for the subclass, an interest that is in conflict with the interests of other subclass members.

(2) A class that comprises persons resident in British Columbia and persons not resident in British Columbia must be divided into subclasses along those lines.

7 The court must not refuse to certify a proceeding as a class proceeding merely because of one or more of the following:

(a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;

(b) the relief claimed relates to separate contracts involving different class members;

(c) different remedies are sought for different class members;

(d) the number of class members or the identity of each class member is not known;

(e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

5 A general background to this application was set out in my reasons for judgment of August 6, 2002 (4 B.C.L.R. (4th) 161, 2002 BCSC 1164, 1-4 and 16-21),which I reproduce below:

This action is brought under the Class Proceedings Act, R.S.B.C. 1996, c. 50, seeking certification of the proceeding as a class proceeding, an order that the plaintiff class "is comprised of all former members of the Canadian Sea Cadets, Captain Vancouver Corps, at HMCS Discovery who suffered sexual abuse or sexual misconduct between 1967 and 1977," and an order that the individual plaintiff William White be appointed representative of that class.

The nature of the claim being pursued by the plaintiff is for negligence in breach of the defendant's obligation "to take reasonable measures in the operation or management of the cadet program at HMCS Discovery to protect cadets from misconduct of a sexual nature by employees, agents or other cadets at HMCS Discovery".

The issues said to be common for the plaintiff class are as follows:

(1) Was the defendant in breach of an obligation for failing to take reasonable measures in the operation or management of the cadet program at HMCS Discovery to protect the cadets from misconduct of a sexual nature by employees, agents or other cadets at HMCS Discovery?

(2) If the answer to common issue no. 1 is "yes" wasthe defendant guilty of conduct that justifies an award of aggravated or punitive damages?

(3) If the answer to common issue no. 2 is "yes" what amount of aggravated or punitive damages is to be awarded?

This application for certification has been divided into two parts, the first of which concerns the issue of whether the pleadings disclose a cause of action as required by s. 4(1)(a) of the Class Proceedings Act . These reasons relate only to that issue.

.. .

The plaintiff's claim is set forth in his statement of claim and elaborated upon in his affidavit sworn March 6, 2002 filed in support of this application.

The plaintiff asserts he was a member of the Royal Canadian Sea Cadets at HMCS Discovery between 1968 when he was 13 or 14 years of age, and 1971 when he was 17 or 18. During that time frame he was repeatedly sexually assaulted by representatives or employees of the defendant in the following manner:

(a) fondling his genitals and masturbating him;

(b) forcing him to fondle the genitals and masturbate a representative of the Defendant;

(c) performing fellatio on him;

(d) attempting to force him to perform fellatio on a male individual;

(e) anal penetration;

(f) forcing and persuading him to watch another representative of the Defendant encourage sexual assaults and sexual abuse of other young cadets.

According to the plaintiff's affidavit, his sexual abuse took place at the hands of two officers at HMCS Discovery: Clarence Anderson and Ralph Bremner. The plaintiff asserts that he was abused by both Anderson and Bremner on the HMCS Discovery premises and by Anderson at Anderson's home as well.

It is the plaintiff's principal position that the sexual abuse he describes in his statement of claim and affidavit was made possible by the circumstances which arose out of the relationship between the HMCS Discovery officers and the Sea Cadets under their authority, and by the absence of any countervailing controls, procedures or conditions put in place by the defendant to prevent or impede the development or continuation of the offending conduct which stemmed from that relationship. The plaintiff's position is that the circumstances imposed a duty of care on the defendant in relation to the plaintiff and its failure to institute any such conditions or controls constituted a breach of the standard of care entailed by that duty.

The natureof the liability claimed by the plaintiff is set out in paragraphs 9, 10, 11 and 12 of his statement of claim which reads as follows:

9. The Defendant by virtue of its control over and operation of HMCS Discovery and the Royal Canadian Sea Cadets, Captain Vancouver Corps was at all material times negligent or in breach of its fiduciary duty to the Plaintiff, which includes:

(a) a failure to have in place management and operations procedures that would have reasonably prevented the sexual abuse and misconduct;

(b) a failure to take reasonable measures in the operation or management of the Royal Canadian Sea Cadet program to protect the Cadets from the abuse or misconduct of a sexual nature by the servants, agents, representatives or employees of the Defendant;

(c) a failure to adequately, properly and effectively supervise the Royal Canadian Sea Cadet program at HMCS Discovery and its servants, agents, representatives or employees;

(d) a failure to use reasonable care in assuring the safety, wellbeing and protection of the minors enrolled in the Royal Canadian Sea Cadet program;

(e) a failure to establish or implement standards of conduct for its servants, agents, representativesor employees to ensure that they do not injure or endanger the wellbeing of any Royal Canadian Sea Cadet;

(f) a failure to provide for the Royal Canadian Sea Cadet Corps a program or any system through which sexual abuse is recognized and reported;

(g) a failure to provide for a complaint procedure which would pursue the complaint with due diligence without endangering the Royal Canadian Sea Cadet complainant;

(h) a failure to establish a control procedure which would monitor the actions of its servants, agents, representatives or employees;

(i) a failure to properly vet and screen its servants, agents, representatives or employees;

(j) a failure to implement reasonable standards of monitoring its servants, agents, representatives or employees;

(k) the creation of an environment which encouraged or fostered silence and obedience when such sexual abuse or misconduct arose;

(l) a failure to exercise any supervision or direction over its servants, agents, representatives or employees with respect to the use of alcohol, which was permitted or encouraged to be consumed by minors;

(m) a failure to exercise any supervision or direction over its servants, agents, representativesor employees with respect to pornography which was offered to the Royal Canadian Sea Cadets, who were minors, by the Defendant's servants, agents, representatives or employees;

(n) a failure to investigate or report such conduct to law enforcement agencies after such sexual abuse was reported or, alternatively, after it was known or should have been known by the Defendant;

(o) the creation of an environment of obedience and respect to its servants, agents, representatives or employees who were in a position of power regarding the minors and allowing that power to be abused, and the environment of obedience and respect to be exploited.

10. Further, the Defendant owed to the Royal Canadian Sea Cadets, as minors in its care, a fiduciary duty and a duty of care to care for and protect the Royal Canadian Sea Cadets, and to act in their best interests at all material times.

11. In breach of its duty of care and fiduciary duty, the Defendant failed to operate the Royal Canadian Sea Cadets, Captain Vancouver Corps in such a manner as to provide a safe social and developmental environment for the minors, particulars of which include:

(a) failing to adequately, properly and effectivelysupervise or direct the social environment and the conduct of its servants, representatives, agents or employees to ensure that no harm befell the Royal Canadian Sea Cadets;

(b) failing to protect the Royal Canadian Sea Cadets from any person which endangered or was injurious to the health and wellbeing of the Royal Canadian Sea Cadets;

(c) failing to use reasonable care in assuring the safety, wellbeing and protection of the Royal Canadian Sea Cadets at HMCS Discovery;

(d) failing to use reasonable care in assuring the safety, wellbeing and providing for the best interests of the Royal Canadian Sea Cadets;

(e) failing to provide a safe social environment for the Royal Canadian Sea Cadets;

(f) failing to set or implement standards of conduct for its representatives, agents or employees to ensure the wellbeing and safety of the Royal Canadian Sea Cadets;

(g) failing to provide the Royal Canadian Sea Cadets, Captain Vancouver Corps with a program and system through which abuse is recognized and reported;

(h) failing to educate the Royal Canadian Sea Cadets in the use of a system through which abuse is recognized and reported;

(i) failing to pursue complaints with duediligence;

(j) on learning of a complaint that a representative, agent or employee has engaged in conduct contrary to the Criminal Code of Canada, failing to report such conduct and the particulars thereof to the appropriate law enforcement agency;

(k) failing to provide proper and reasonable intervention and treatment for the Royal Canadian Sea Cadets who were affected by such sexual abuse.

12. In general, and in breach of its duty of care and fiduciary duty the Defendant operated or caused to be operated the Royal Canadian Sea Cadet program at HMCS Discovery whereby cadets suffered sexual abuse as a result of its systemic negligence and breach of fiduciary duty, the failure of which is not to have in place management and operations procedures that would reasonably have prevented the sexual abuse.

...

The defendant resists the plaintiff's claim of "systemic" negligence in its statement of defence as follows:

8. With respect to paragraph 9 of the Claim in particular, he does not admit that Her Majesty owed the alleged duties. In the alternative, he says that to the extent Her Majesty may have owed duties to the Plaintiffs such duties were not breached.

9. With respect toparagraph 12 of the Claim in particular, he denies the allegation of systemic negligence which is not a recognizable cause of action and is unknown at law, and in any event, does not give rise to a claim of vicarious liability for which the Crown is liable, and therefore no cause of action for the alleged systemic negligence exists against the Crown either as alleged or at all. He pleads and relies upon the provisions of the said Crown Liability and Proceedings Act, and in particular, Subsection 3(a) and Section 10 thereof.

10. In further answer to paragraph 12 and to the Claim as a whole, he does not admit the allegations of fact contained therein, either as alleged or at all and he specifically denies Her Majesty is vicariously liable for the alleged injuries, loss and damages which are not admitted but specifically denied. He further denies that such alleged injuries, loss and damages resulted from any negligence, breach of fiduciary duty, or any other duty owed to the Plaintiffs by Her Majesty, Her servants, employees, agents, or representatives.

6 For the present application, the plaintiff relies on the affidavits of William White sworn March 6, 2002 and September24, 2003, of John N. Laxton sworn March 6, 2002 and Detective Sean Trowski of the Vancouver City Police sworn September 25, 2003.

7 The defendant relies on two affidavits of Ward Bansley sworn October 26, 2002 and September 17, 2003 respectively, an affidavit of Jacques Lecours sworn September 8, 2003 and an affidavit of Leslie Day sworn September 12, 2003.

8 Between the first application and the second application, the defendant brought third party proceedings against the Navy League of Canada, Ralph Bremner, Conrad Sundman, Richard Wilson and Evelyn Anderson, executrix of the estate of Clarence Anderson. The Navy League of Canada was represented at this hearing and it relied on the affidavit of Douglas Thomas sworn September 24, 2003 in support of its position opposing certification.

9 The plaintiff challenges the standing of the third parties at these certification proceedings and in the common issues trial.

10 The additional evidence tendered in relation to this part of the certification application in the affidavits of Lecours, Day, Bansley, Thomas, White and Trowski add some dimension to the issues under consideration.

11 Accordingto Jacques Lecours, a Lieutenant Commander in the Canadian Armed Forces, presently holding the position of National Sea Cadet Co- ordinator, the Sea Cadet organization came under the direction of the Minister of National Defence for Naval Services in 1941 and became known as Royal Canadian Sea Cadets in 1942. Local Sea Cadet organizations are known as Royal Canadian Sea Cadet Corps followed by their name - in the present case, RCSCC - Captain Vancouver. Lt. CDR. Lecours deposed that the RCSC organization became a joint operation of the Navy League of Canada - a "completely private organization" and the Department of National Defence. According to Lt. Cdr. Lecours, between 1967 and 1977 there were as many as 21 positions within either government or the military establishment potentially "involved in issuing, drafting and/or amending orders and regulations for the administration of the RCSC organization which would include duties and responsibilities of RCSC officers" and "could also be directed and duties and responsibilities of non RCSC military personnel who might be tasked to support the RCSC organization."

12 Lt. CDR. Lecours deposed that until January 1, 1968 officers working exclusively as Sea Cadet officers were so appointed by the Minister of National Defence. After January 1, 1968 they "became commissioned officers holding one reserved designation or another". They eventually "were designated as officers on the Cadet Instructor's List" (CIL-Sea Officers). These officers were subject to the same code of service discipline in the relevant National Defence Act and they were governed by other orders and regulations applying generally to Canadian Forces officers.

13 The CIL Officers worked exclusively in the Sea Cadet organization. Other regular military personnel could have some involvement with the RCSC program, although not typically in an administrative or supervisory role.

14 Lt. CDR. Lecours deposed that the particular tasks of CIL Officers could be dependent on the particular interests or skills of the officer and I infer that the tasks therefore were not tied to the particular position held.

15 Leslie Day, a Paralegal Specialist employed with the Department of National Defence ("DND") deposed to the personnel records of the five alleged perpetrators of the sexual abuse within the RCSC (Captain Vancouver) duringthe period at issue: namely; Edward Simpson, Clarence Anderson, Ralph Bremner, Conrad Sundman and Richard Wilson. According to the records in question, Simpson was with the RCSC-Captain Vancouver as an officer from 1956 to February 14, 1977; Anderson from 1963 to April 1, 1976; Bremner from 1966 to September 17, 1983; Sundman from December 31, 1970 to February 27, 1978 and; Wilson was Commanding Officer of RCSC Captain Vancouver from May 1964 to July 1968 when he resigned. Wilson "may have acted as some form of liaison officer for cadets in 1969 and 1970" but had no official duties thereafter, although he retained a reserve commission until 1983. He was Vice-President of the B.C. Mainland Division of the Navy League in 1971, 1972 and 1974. According to Ms. Day, any involvement he had with RCSC after 1970 was in his capacity as a representative of the Navy League.

16 There are apparently no local records for the RCSCC Captain Vancouver for the relevant time period. They may have been damaged or destroyed by a flood in 1991. Similarly, no contemporaneous summaries of the various Crown servants directly or indirectly involved with operating the RCSCC Captain Vancouver between1967 and 1977 have been found.

17 To her affidavit, Ms. Day attached a chart with "Summarized estimates of the identities of as many of the servants within the Royal Canadian Navy, the Canadian Armed Forces and the Federal Government...that were in the chain of command for RCSCC Captain Vancouver between 1967 and 1977." There were 51 individuals identified in Ms. Day's chart.

18 She also confirmed that there were "at least 16 administrative documents and administrative orders" which were implemented or amended during the time in question "which may be relevant" to the action. She also attested to the presence of "numerous Queen's regulations and orders that may also be relevant". The content of the documents, regulations and orders was not revealed.

19 Mr. Bansley's second affidavit of September 17, 2003 detailed his understanding of the status of the criminal charges arising out of an investigation into the allegations of sexual assault at RCSCC Captain Vancouver based, apparently, on a review of the report to Crown Counsel made in connection with that investigation.

20 According to Mr. Bansley, of 130 people interviewed by the police, 35 (and one other he is aware of) claimed to have been sexually assaulted as Sea Cadets. The alleged assailants were Clarence Anderson, Ralph Bremner, Conrad Sundman, and Richard Wilson. Ted Simpson, who was named by the plaintiff in his affidavit of September 6, 2002 as involved in the sexual abuse along with the four others, was not named in the report to Crown Counsel as an assailant.

21 Sundman pleaded guilty to "sexual assault" offences of 14 complainants "at various times and in various locations during the 1970's". Mr. Bansley attached some extracts from Sundman's sentencing hearing of January 19, 2001.

22 Ralph Bremner pleaded not guilty to "sexual assault" offences of 5 complainants in the 1960's and 1970's and was convicted in relation to 4 of them. The trial judge's reasons for judgment were attached to Mr. Bansley's affidavit.

23 Richard Wilson has been charged with "sexual assault" offences in relation to 4 former Cadets. Several of the charges involve assaults during "private hiking trips" and several occurred outside the time frame for which the certification is sought.

24 All told, according to Mr. Bansley, the convictions against Sundmanand Bremner and the charges against Wilson involve a total of 17 potential class members. Abuse allegations made against Anderson excluding those of the plaintiff involve an additional 10 complainants, occurring at his house, at HMCS Discovery, in a car, and on a military boat.

25 There were 6 complainants including the plaintiff whose complaints did not result in any criminal charges.

26 Mr. Bansley attested that 14 plaintiffs have launched individual actions against Canada on the basis of vicarious liability for the intentional torts of sexual assault and specific incidents of negligence by Crown servants.

27 Two of the individual plaintiffs have settled their claims. The remaining 12 are represented by one counsel and have set a trial date for February 2005.

28 In his second affidavit of September 24, 2003, the plaintiff deposed that he was aware of "at least 2 individuals outside of Vancouver who have suffered sexual assault as Cadets at HMCS Discovery during the relevant period and who have not been interviewed by the police or participated in the criminal proceedings."

29 In his affidavit, Detective Trowski, who was responsible forthe "Cadet Abuse File" deposed that he spoke to 63 individuals who claimed to have suffered sexual abuse while they were in the Cadet program at HMCS Discovery.

30 Douglas Thomas is the Executive Director of the Navy League of Canada. He deposed that the only member of the Navy League alleged to be involved with the sexual assaults is Richard Wilson, who would not have direct contact with Sea Cadets as part of his duties with the Navy League. Mr. Thomas deposed there are few existing records regarding volunteers with the Navy League in the period between 1967 and 1977.

31 Issue is joined by the defendant on each of the requirements set out in section 4(1)(b), (c) and (e) and on whether under 4(1)(d) certification of a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues in light of the provisions of s. 4(2).

32 It is clear that the plaintiff has the burden of demonstrating the requirements of section 4(1) and (2) of the CPA are met to justify a certification of this action. Because, to a certain degree, the necessary analysis of those requirements in relation to the present case is governed by theposition taken by the defendant in resisting the plaintiff's application, I have used as a starting point the defendant's identification and characterization of the issues and then gone on to consider the plaintiff's position essentially as a response. In doing so, I have not lost sight of on whom the burden lies.

33 To a significant extent, the defendant's position with regard to whether the requirements of each of ss. 4(1)(b), (c), (d) and (e) are met amount to variations on a single theme, the essence of which is that the common issue identified by the plaintiff is so broad that its resolution would not advance the case in any meaningful way and that, in any event, the issue of whether a duty of care existed or was breached (a question which is closely related to the question of what standard of care governed at given times and in given circumstances), is not susceptible to resolution in a way that is other than highly individual.

34 The defendant's position, put summarily, is that given the "variables" in the structure of the Sea Cadets organization, the diversity of the complainants, the perpetrators, their supervisors and the circumstances of abuse, when mixedwith the "unique statutory liability of the Federal Crown"

would inevitably lead to a class proceeding becoming unmanageable and "a monster of complexity and cost". The defendant submits the common issues trial "would deteriorate into individual inquiries", in any event, "comprehensive individual trials would still be required for each and every plaintiff", and certification would prolong resolution of individual claims without advancing them meaningfully.

35 The defendant submits that evidence of the evolving structure and changing personnel involved in the administration of the Royal Canadian Sea Cadets is salient in a consideration of whether this action should be certified, as are the various orders and regulations governing them.

36 The defendant points out that two separate provisions governed the existence of the Sea Cadets organization during the time frame in question: section 44(1) and (2) of the National Defence Act, R.S.C. 1952, c. 184,and section 43(1) and (2) of the National Defence Act, R.S.C. 1970, c. N-4. As well, counsel for the defendant pointed out that there was a change in command structure in the transition between the two Acts following the unification of the original three armed forces into the Canadian Forces. In the result, according to the defendant's evidence, there were twenty-one different positions in each year between 1967 and 1977, the period for which the certification is sought "from the Governor-General down to the commanding officer", any one of whom could have been involved with orders or regulations governing the administration of the Sea Cadets and/or the supervision and control of Sea Cadet officers. The defendant also relies on evidence that the reporting structure within the chain of command changed many times within the relevant period, and as well tasks assigned to personnel could vary over time depending on the individual qualities of the officers involved.

37 The defendant also asserts a lack of any clear documentary evidence of personnel or responsibilities during the time frame and a lack of evidence of the various Navy League employees/agents involved with the Sea Cadets during the relevant periods.

38 As far as the sexual abuse and misconduct alleged is concerned, the defendant submits it is significant that there were five alleged abusers over the eleven years, whose positions varied over that time and that the alleged abuse took place in various places with different degrees of connection to the Sea Cadet program.

39 The defendant's position is that the evidence of the significant variation of orders, regulations, structure, positions, and personnel in the administration of the Sea Cadets and the variety of offenders/abusers, their positions and the locations of their offences over the period identified, contribute to the complexity of attempting to unite this action with others and contribute to the difficulty of finding a common factual nexus capable of connecting all the potential actions effectively, with some assurance they could proceed with efficiency.

40 It is the defendant's position that these issues of fact, therefore, should condition any analysis whether each of the requirements under section 4(1)(b) to (e) are met.

i. 4(1)(b) - The Identifiable Class

41 It is the defendant's position that the plaintiff's proposed class definition is fatally deficient because a determination of membership depends on the merits of the case; that it is "unclear and over-inclusive" because it fails to connect the sexual abuseat issue to the Sea Cadet program. Further the defendant submits that it defies clear understanding because it fails to put the class definition on an objectively discernable basis such as "a specific geographical area" as in the Jericho Hills

School in L.R. v. British Columbia (1999), 72 B.C.L.R. (3d) 1, 180 D.L.R. (4th) 639 (B.C.C.A.), aff'd [2001] 3 S.C.R. 184 and therefore invites too much diversity to permit the commonality necessary for certification.

42 The defendant submits the present case is akin to the circumstances in M.C.C. v. Canada, [2001] O.T.C. 767, [2001] O.J. No. 4163 (Sup. Crt.)(Q.L.). In that case, the court observed at 63 that:

... There is an assumption implicit in the student class definition that the defendants owed identical duties to each student, and to the extent these duties were breached against one, they were breached against all. The circumstances and experiences of the students are far too diverse to support that assumption.

43 The defendant says in the present case some of the allegations as disclosed by criminal proceedings againsttwo of the five alleged abusers (Bremner and Sundman) reveal a diversity of circumstances and locations too broad to support "any assumption that an identical and relevant or 'useful' duty of care was owed by the Crown or a Crown servant to cadets who were abused".

44 The defendant pointed to evidence in the criminal proceedings that some abuse occurred at overnight functions on large military bases, some on overnight cruises, some at daytime functions on military bases, some at functions at public places, some with off-duty officers at their homes, and some with former officers during a private camping trip. The defendant seeks to distinguish the allegations in the present case from those in L.R., supra, where the circumstances were limited to abuse committed at the school by staff on students.

45 In response to the defendant's position with regard to the presence of an identifiable class, the plaintiff's position is that the statement of claim very clearly confines the action to those suffering abuse by employees, agents, or other cadets at HMCS Discovery, and moreover, if there is a need to amend the class definition to be both more precise and independentof the merits of the lawsuit, the court has the authority to do so, and counsel for the plaintiff cites Harrington v. Dow Corning Corp. (1996), 22 B.C.L.R. (3d) 97 (B.C.S.C.).

46 With regard to the defendant's assertion that the class is too diverse and too broadly based to found a common factual nexus justifying certification because of the differing geographical and other circumstances of the alleged abuse, the plaintiff's position is in effect that the essential connecting theme does not depend on where the abuse took place or whether the alleged abusers were formally on duty, but rather is based on the relationships arising out of the establishment of an organization granting its employees, agents, or servants power and authority over 12 -18 year old boys in contemplation of a variety of different circumstances.

47 With regard to MCC v. Canada, the plaintiff submits it has little or no application to the present case, as it did not concern certification in relation to sexual abuse but involved a breadth of issues from assault to breach of aboriginal treaty rights and did not exclusively concern "systemic" breaches of duty.

48 In my view, the issueof whether there is an identifiable class of two or more persons must be resolved in favour of the plaintiff. To the extent the class definition is imprecise or dependent on the merits of the case, it can and should be amended by reading that the plaintiff class "is comprised of all former members of the Canadian Sea Cadets who claim to have suffered sexual abuse or from

sexual misconduct between 1967 and 1977 from employees, agents, or other cadets of the Canadian Sea Cadets, Captain Vancouver Corps, HMCS Discovery".

49 Insofar as the defendant's argument that the definition at issue encompasses circumstances which are too broad and diverse to properly found a class action certification is concerned, I do not agree. The question of where the abuse is alleged to have taken place or whether the abuser was formally on duty at the time is not germane to the issue raised by the pleadings, which is whether there was a failure to take reasonable measures to prevent such abuse from taking place, not whether there was a failure to prevent individual instances of abuse in a variety of circumstances at various locations. It would presumably be in the contemplation of those charged with the responsibility of administering the cadet program that the 12 - 18 year old cadets would be exposed to their officers in different circumstances, both on and off the HMCS Discovery premises and at various times. The issue is, given the broad range of potential circumstances in which the cadets could be interacting with their officers, whether there was sufficient proximity and foreseeability of harm to engage a duty of care, and if so, whether the steps taken to prevent the harm met the standard of care.

50 The differing circumstances of the alleged abuse do not unduly diversify or complicate the duty or standard of care at issue in the present case. It must be remembered that the nature of the negligence asserted in the present case is "systemic -- the failure to have in place management and operations procedures that would reasonably have prevented the abuse" (see L.R., (S.C.C.), 30) and as such it encompasses "acts, omissions or decisions ... directed towards a general rather than a specific set of circumstances" which "are said to be negligent because they create or maintain a system which is inadequate to protect the plaintiff class from the harm alleged". (see White v. Canada A.G. (No. 1), 47-48 (S.C.)).

51 The assumption underlying the defendant's submissions as to the diversity of the circumstances in which the abuse is alleged to have occurred appears to be that each separate circumstance engages a different duty of care and a different standard of care which must be individually analyzed and determined to establish the negligence pleaded, and accordingly renders the identification of the class complicated and problematic.

52 The defendant's position fails to recognize that the cause of action at issue does not depend on the individual circumstances in which the abuse has been alleged, but rather it depends on the presence or sufficiency of management and operations procedures that would reasonably have prevented abuse from occurring, given the inherent nature of the relationship of the officers to the cadets and the range of circumstances in which they could be expected to interact. In that context, I do not see that the geographical location of the abuse or whether the abusers were in some formal sense "on duty" at the time of the alleged abuse has much to do with the negligence alleged or would seriously complicatethe common issue or issues.

53 The distinction between the present case and MCC v. Canada, supra, relied on by the defendant is significant. In MCC, the essence of the plaintiff's claims for which certification was sought was a forced cultural dislocation from their aboriginal communities and "various forms of physical abuse" all of which necessarily involved a welter of diverse issues and experiences that could not, in the court's view, be rationally or meaningfully distilled into a unifying class definition encompassing a common duty and standard of care. That is different from the present case where the definition of the class is with reference to a single common experience sexual abuse - and the duty and standard of care encompassed by the class definition relates to this common experience. The asserted

fact that the sexual abuse, at least as thus far revealed in the criminal proceedings, occurred at different locations, in different circumstances, does not in my opinion affect the coherence or utility of the definition as advanced, although arguably it may have an impact at the causation stage of the inquiry which is bound to involve individual issues.

54 I conclude the class definition as amended establishes an "identifiable class of two or more persons" within the meaning of section 4(1) (b) of the CPA that is clear, that has a rational relationship to the common issues, and that is not unnecessarily broad or diverse so as to render determination of the common issues unduly complicated or require undue individual analysis of specific victims, perpetrators, or circumstances of abuse.

ii. 4(1)(c) - Common Issues - Does the plaintiff's claim in systemic negligence raise common issues justifying certification?

55 Section 1 of the CPA defines "common issues" as "common but not necessarily identical issues of fact", or "common but not necessarily identical issues of law that arise from common but not necessarily identical facts".

56 The question for determination at this stage is not the ultimate merit of the issues advanced as common to the plaintiff class and thus worthy of certification. Rather it is whether the issues as advanced, although framed so as to encompass the interests of all potential members of the plaintiff's class, nonetheless, necessarily engage an assessment of evidence that is individual to thecircumstances of each member of the plaintiff class such that the action would inevitably collapse into individual proceedings.

57 The parties are sharply divided on that question. It is the plaintiff's position that the common issues as framed essentially parallel the issues certified by the Court of Appeal in L.R. v. British Columbia, supra, upheld by the Supreme Court of Canada. The plaintiff submits section 4(1)(c) expressly contemplates certification of common issues even in circumstances where individual issues may predominate over the common issues, so long as the common issues "will move the litigation forward" and counsel for the plaintiff cites Endean v. Canadian Red Cross Society (1997), 148 D.L.R. (4th) 158 (B.C.S.C.) in support of that proposition.

58 The defendant's position is essentially that while the issue as framed may in an abstract or general way identify a common theme, what is required to "move the litigation forward" is a resolution of issues made individual by significant variations in potential evidence relating to different abusers, different members of the plaintiff's class, and different circumstances givingrise to the complaints at issue. The defendant's position is that while there may be common issues, they are not "useful", in that they are not necessary to the resolution of each member's claim, and are not specific, substantial, or clear. The defendant cites Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534 at 39 and L.R. v. British Columbia, [2001] 3 S.C.R. 184, supra, at 29 in support of that proposition.

59 The defendant's position is perhaps best captured by McLachlin C.J.C.'s observation in L.R. v. British Columbia (S.C.C.), supra, at 29. It reads as follows:

There is clearly something to the appellant's argument that a court should avoid framing commonality between class members in overly broad terms. As I discussed in Western Canadian Shopping Centres, supra, at para. 39, the guiding question should be the practical one of "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis". It

would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in themost general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient.

60 McLachlin C.J.C. went on to find that such was not the situation in L.R. v. British Columbia . Her reasons at 30 read as follows:

I cannot agree, however, that such are the circumstances here. As Mackenzie J.A. noted, the respondents' argument is based on an allegation of "systemic" negligence -- "the failure to have in place management and operations procedures that would reasonably have prevented the abuse" (pp. 8-9). The respondents assert, for example, that JHS did not have policies in place to deal with abuse, and that JHS acted negligently by placing all residential students in one dormitory in 1978. These are actions (or omissions) whose reasonability can be determined without reference to the circumstances of any individual class member. It is true that the respondents' election to limit their allegations to systemic negligence may make the individual component of the proceedings more difficult; clearly it would be easier for any given complainantto show causation if the established breach were that JHS had failed to address her [Emphasis start] own[Emphasis end] complaint of abuse (an individualized breach) than it would be if, for example, the established breach were that JHS had [Emphasis start] as a general matter[Emphasis end] failed to respond adequately to some complaints (a "systemic" breach). As Mackenzie J.A. wrote, however, the respondents "are entitled to restrict the grounds of negligence they wish to advance to make the case more amenable to class proceedings if they choose to do so" (p. 9). [emphasis in original]

61 The issue therefore, insofar as the application of s. 4(1)(c) is concerned, is to what extent is the present case distinct from L.R., given that the common issue as framed is more or less the same, resting on the commonality of an assertion of "systemic" negligence.

62 The defendant's position that the issues in this case do not meet the requirements of commonality is partly founded on the difference between "direct" liability for systemic negligence to which the Crown in right of the Province in British Columbia is susceptible, and "vicarious" liability which is the (more limited) basis to which the Crown in right of Canada is susceptible in the case at bar.

63 The distinction between direct and vicarious liability and its significance was litigated and resolved in the first part of these proceedings, where it was determined that a claim of systemic negligence was not a claim involving "direct" liability because it rested on the acts or omissions of Crown servants, agents or employees acting in the scope of their employment.

64 The defendant's argument in the present case is that because the plaintiff must show the liability of an individual Crown servant to engage the defendant's vicarious liability, the inquiry necessarily must focus on the individual duty of care owed by that servant to the whole plaintiff class, as well as on a breach of that particular servant's duty.

65 In these submissions the defendant overemphasizes the individual nature of the duty of care raised by the pleadings in the present case and as well misconstrues the distinction between direct and vicarious liability.

66 The pleadings raise the issue of negligence compendiously referred to as "systemic" -- "the failure to have in place management andoperations procedures that would reasonably have pre-

vented ... abuse". The duty of care in such a case is not personal to individual Crown servants. It is essentially organizational, not in the sense of being direct, but in the sense of flowing from the raison d'etre of the organization and the relationships and activities that it reasonably encompasses. Thus, the proper focus in determining whether a duty of care exists is, to a large extent, the nature or purposes and activities of the organization that the individual servants are a part of.

67 While the role of an individual Crown servant may be relevant in determining whether and to what extent a duty of care spawned by the organization fell upon him, it is not his relationship to individual class members or their circumstances that is determinative in the case of systemic negligence. Rather, it is the general relationship created between the Crown servants in question and the cadets belonging to the Sea Cadet organization given its structure, objectives and activities.

68 In London Drugs Ltd. v. Kuehne & Nagel International Ltd., [1992] 3 S.C.R. 299, which the defendant relies on for the proposition that establishing a duty of care is an exercise in examining particular circumstances not dependent upon "predetermined categories and blanket rules" (London Drugs Ltd., supra at 408), what was at issue was whether employees who negligently damaged a customer's transformer stored in the employer's warehouse owed a duty of care to the customer, in circumstances where the employees were performing the "very essence" of the employer's contractual obligations to the customer. In that case, Iacobucci J., delivering the majority judgment, rejected the argument advanced by the employees that in such circumstances they did not owe a duty of care to the customer. In finding that a duty of care existed, Iacobucci J. observed (ibid.):

Our law of negligence has long since moved away from a category approach when dealing with duties of care. It is now well established that the question of whether a duty of care arises will depend on the circumstances of each particular case, not on pre-determined categories and blanket rules as to who is, and who is not, under a duty to exercise reasonable care.

69 In its submissions, the defendant has read too much into IacobucciJ.'s comments in London Drugs Ltd., supra . In eschewing the categorical approach in that case, Iacobucci J. was not prescribing an examination of individual relationships within each case (e.g. each employee to each customer) to find a duty of care, rather he was identifying the need to rest a finding of a duty of care on an examination of the context of the relationships which arise in individual cases. Thus in London Drugs Ltd., supra, the close relationship between the employees and the employer's customer giving rise to a duty of care was established by reasonable foreseeability that an employee's negligent handling of the customer's transformer would result in damage to the customer's property.

70 A parallel between the present case and London Drugs Ltd., supra, can be drawn, not by looking at the relationship between each officer and each cadet, depending on the position held by the officer from year to year, as the defendant submits, but simply by looking at whether it was reasonably foreseeable that negligence in the operation of the Sea Cadets program would result in harm to members of the plaintiff class. On that footing, in my opinion, the question of theexistence of a duty of care can be broached and resolved in the case at bar without pursuing the individual issues and circumstances as submitted by the defendant.

71 Similarly, the "reasonability" of the acts or omissions underlying the claims of systemic negligence does not depend on a consideration of "the circumstances of any individual class member" as McLachlin C.J.C pointed out in L.R. v. British Columbia, (S.C.C.), supra, at 30. Thus an investigation of the standard of care and the related issue of breach of the duty of care is not unduly entangled in specific circumstances defying resolution as a common issue.

72 The focus at this stage is not, therefore, what individual Crown servants could have done to prevent specific instances of sexual abuse of individual plaintiffs. Rather, the focus is on whether what was done, or omitted to be done, caused or contributed to a system which was, in context, inadequate to guard against a foreseeable risk of harm caused by sexual abuse.

73 Whether the creation or maintenance of an inadequately responsive system was causative of the harm alleged is a distinct question from whether there was systemic negligence. Whether systemic negligence existed is susceptible to resolution as a common issue. Whether it caused the harm alleged is susceptible to resolution in the individual actions.

74 In its submissions, the defendant relied on s. 10 of the Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50 (" CLPA "), which provides as follows:

No proceedings lie against the Crown by virtue of subparagraph 3(a)(i) or (b) (i) in respect of any act or omission of a servant of the Crown unless the act or omission would, apart from the provisions of this Act, have given rise to a cause of action for liability against that servant or the servant's personal representative or succession.

75 It is the defendant's submission that given that the CLPA does not countenance direct liability of the Crown, section 10 removes any doubt that the plaintiff must establish a cause of action against an individual Crown servant, and therefore a specific duty of care owed, and breached, by that servant to each class member, before any liability can accrue to Canada.

76 Insofar as the distinction that the defendant would draw between direct and vicarious liability, it seems to me the whole pointof Cory J.'s statement in Swinamer v. Nova Scotia (A.G.), [1994] 1 S.C.R. 445, quoted in White v. Canada (A.G.) (No. 1) (S.C.), supra, 43 (*1), dismissing such a distinction in the context of a negligence action, is that there is no practical difference between proving "direct" liability and "vicarious" liability for negligence. In either case, negligence must be proved, either through direct evidence or by inference, and, since the Crown "can only act through its servants or agents", proof of negligent acts or omissions is, ipso facto, proof of misconduct for which the Crown is vicariously liable. As to the defendant's submission that the plaintiff is "still required to prove that a duty of care is owed by an individual as yet unidentified Crown servant ... to the particular plaintiffs within the class", that is unduly limiting the concept of vicarious liability where the duty of care is inevitably organizational, not personal.

(*1) 43 In Swinamer, supra, it was submitted that the difference between the Nova Scotia Proceedings Against the Crown Act R.S.N.S., 1989, c. 360 and the Crown Proceedings Act of British Columbia, R.S.B.C. 1979, c. 86(which difference is the same as the difference between the British Columbia Act and the federal Act) distinguished the potential liability of the respective Crowns in the manner urged by the Crown in the present case. Cory J. was dismissive of this argument in the following terms:

I cannot accept this argument. Obviously the Crown can only be liable as a result of the tortious acts committed by its servants or agents since it can only act through its servants or agents. Let us assume, for the purposes of resolving this issue, that the actions complained of by the appellant were indeed negligent. That is to say the failure of the Crown to rely on trained personnel to inspect the trees and the failure of those persons or this personnel to identify the tree in question as a hazard constituted negligence. Yet those very actions or failure to act were those of the Crown's servants undertaken in the course of the performance of their work. If those were indeed acts of negligence

then the Crown would be liable. The arguments of the Crown are regressive and to accept them would severely restrict the ability of injured persons to claim against the Crown. I would add that the United Kingdom'sCrown Proceedings Act, 1947 which was before the court in Anns, supra, is similar to the Nova Scotia statute.

77 In The Liability of the Crown, Hogg and Monahan, 3rd Ed., the learned authors touch on this issue at p. 117:

Now that the Crown is vicariously liable for the torts of its servants, the individual Crown servant need not be sued, and the identification of the individual tortfeasor is no longer essential. In one case, for example, the plaintiff successfully sued the Crown in right of Canada for the loss of a parcel of diamonds in the premises of a customs postal branch. The Court found as a fact that the parcel had been stolen by a Crown servant in the course of employment, although the identity of the thief was never established. The Crown was held vicariously liable for the tort of the unknown Crown servant.

78 The learned authors referred to The Queen v. Levy Brothers, [1961] S.C.R. 189.

79 It goes almost without saying that failing to identify an individual tortfeasor may make proof of the elements of the tort more difficult and undoubtedly less direct, but the point to be taken is simply that, in the case atbar, establishing a duty of care and its correlative standard to determine whether the breaches occurred as claimed, is not exclusively an exercise in assessing the particular circumstances of individual Crown servants. Particularly in the context of a claim of systemic negligence where the issue is not whether particular instances of abuse should have been prevented, but whether sufficient general measures to prevent such abuse were instituted, the need to focus on specific circumstances and individual failings is of secondary importance to the question of whether the Crown, acting through its servants or agents, for example, "failed to respond adequately to some complaints" (see L.R. v. British Columbia (S.C.C.), 30), or otherwise acted incongruously with a prevailing duty or standard of care.

80 The observation of McLachlin C.J.C. in L.R. (ibid.) that the allegations of "systemic" negligence involve a consideration of actions or omissions "whose reasonability can be determined without reference to the circumstances of any individual class member" provides support for the proposition that at the level of determining the viability of the common issues advanced, the properfocus of attention is on the general rather than the specific.

81 The defendant also, in part, bases its position that the issue advanced as common in the present case does not meet that requirement because of the practical effect of the certification in L.R. v. British Columbia .

82 The defendant relies on the judgment of Humphries J. in that case at (2003), 12 B.C.L.R. (4th) 121, 2003 BCSC 234 (L.R. No. 2), in which after amending the common issue to narrow it to reflect what was envisioned by the Court of Appeal in certifying it, Humphries J. at 91 warned the plaintiffs that in doing so she "reached a precarious balance between a potentially workable class proceeding and unmanageable confusion...".

83 In L.R. No. 2, Humphries J. was facing an application for decertification in the face of the defendant's submission that the case "as presently conceived and conducted by the plaintiffs is not the proceedings certified by the Court of Appeal and that it is irredeemably individual and is not manageable as a class proceeding." (supra, 54)

84 The essential problem identified by the defendants in L.R. No. 2 and facedby Humphries J. is set out in paragraph 30 of her reasons for judgment which read as follows:

In my view, it is not useful to begin the analysis of systemic negligence from the assumption that "it is now clear that sexual and physical abuse of children took place at the school throughout its history." That very assertion inappropriately and perhaps erroneously (without having heard the evidence it is too early to tell) informs the analysis of a developing and changing standard of care over 42 years in a way that undermines the potential for conducting this action as a class proceeding. To start from such an all- encompassing assertion necessarily puts the defendant to the task of identifying an unending series of circumstances in order to attempt to answer, refute or admit on a piecemeal basis the facts which underlie that assertion. This renders the proceedings unmanageable because individual complainants are not before the court, the alleged abusers will not be called, and the individual events of sexual misconduct are not in issue, even with regard to the prima facie reliability of the reports concerning them.

85 It was clearly Humphries J.'s opinion that if the certificationwere construed so as to contemplate the need to prove or disprove individual acts of abuse at Jericho Hill School over 42 years, then it would be "irredeemably individual in nature and unsuitable for certification because of the problems identified in paragraph 30 above." (supra, 58)

86 While recognizing the proceeding was "still fraught with the problems recognized by the Court of Appeal" which included "variations in the standard of care for specific situations involving particular students", Humphries J. took some comfort in the view that such variations in any event could "only be dealt with in the context of the causation inquiry in the individual actions" to avoid an analysis "so fragmented as to be useless for the common issue". (supra, 59)

87 In L.R. No. 2 (60), Humphries J. saw the essential issue she was faced with as "whether any general finding that can be made in such a class proceeding can be of any assistance to the members of the plaintiff class who must then prove on an individual basis that they suffered damage and that the systemic breach was the effective cause of their injury".

88 In finding that such a general finding could be made, Humphries J. emphasized the need to focus not on the individual issues but on the common ones and identified the difficulty that plaintiff's counsel in that case had in focussing on the issue of systemic negligence rather than individual issues of abuse.

89 In the result, Humphries J. dismissed the application for decertification, concluding the class proceeding as envisioned by the Court of Appeal could be pursued through "aggressive case management" and "modification of a common issue to reflect the nature of the proceeding as was certified".

90 The defendant's reliance on the reasons of Humphries J. in L.R. No. 2 does not go to the heart of the issue in the case at bar. What is at play in L.R. v. British Columbia is sexual abuse over a 42 year period involving considerably more perpetrators and potential plaintiffs than in the present case. In the case at bar, the time frame is 11 years and 4 or 5 alleged abusers. While in the present case the locations of abuse and circumstances are diffuse, in L.R. it was recognized that there was a variation in circumstances and standards over a considerably longer period of time. The real problem it seems to me that led to the decertification application before Humphries J. and caused her to amend the common issue, was the failure of plaintiff's counsel to properly focus their conduct of the case on the nature of the negligence pleaded - systemic negligence - instead of attempting to address

individual issues only suitable to be dealt with in the context of the causation inquiry in the individual actions.

91 As I see it, while the efficacy of the common grounds advanced in the present case could be subverted by an attempt to focus on issues only properly amenable to resolution at the individual causation stage of the proceedings, it does not follow from the fact that that may have occurred in the aftermath of certification in L.R. v. British Columbia that it will or is likely to occur in the present case where the time frame is narrower and the number of individuals involved significantly less. In any event, there are mechanisms within the CPA that permit an effective response to any attempt by the plaintiff to stray beyond the borders established by the common issue.

92 While the reasons of Humphries J. are instructive and helpful in coming to grips with what is properlycontemplated by certification of an action such as the one at bar, her judgment in L.R. No. 2 does not detract from the commonality of the issue as presently conceived and advanced.

93 I conclude therefore that the plaintiff's claim in systemic negligence raises common issues justifying certification in keeping with the requirements of s. 4(1)(c) of the CPA .

iii. 4(1)(d) - Is the class proceeding a preferable procedure?

94 In L.R. v. British Columbia (SCC), supra at 35, McLachlin C.J.C. referred to her reasons for judgment in Hollick vs. Toronto (City) [2001] 3 SCR 158, 28 - 31, concluding in general terms the preferability enquiry is the same under the CPA as with the Ontario legislation and involves two questions. The first question is "...whether or not the class proceeding [would be] a fair efficient and manageable method of advancing the claim". The second is "Whether a class proceeding would be preferable in the sense of preferable to other procedures".

95 McLachlin C.J.C. noted (L.R., ibid.) the CPA, unlike the Ontario legislation, provided "express guidance" on how to approach the preferability question throughthe five factors set forth in s. 4(2). Her analysis of those factors in the context of the issues raised in L.R. v. British Columbia appears in 36 - 39 of her reasons for judgment. Since the plaintiff relies on the parallels between L.R. and the present case, I reproduce those paragraphs below:

The first factor is "whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members": s. 4(2)(a). As I noted above, it seems likely that there will be relevant differences between class members here. It should be remembered, however, that as the respondents have limited their claims to claims of "systemic" negligence, the central issues in this suit will be the nature of the duty owed by JHS to the class members and whether that duty was breached. Those issues are amenable to resolution in a class proceeding. While the issues of injury and causation will have to be litigated in individual proceedings following resolution of the common issue (assuming the common issue is decided in favour of the class, or at least in favour of some segment of the class), in my view the individual issues will be a relatively minor aspectof this case. There is no dispute that abuse occurred at the school. The essential question is whether the school should have prevented the abuse or responded to it differently. I would conclude that the common issues predominate over those affecting only individual class members.

The second factor is "whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions", and the third is "whether the class proceeding would involve claims that are or have been the subject of any other proceedings": s. 4(2)(b), (c). On these factors I would note again that no class member will be able to prevail without

making an individual showing of injury and causation. Thus it cannot be said that allowing this suit to proceed as a class action will force complainants into a passive role. Each class member will retain control over his or her individual action, and his or her ultimate recovery will be determined by the outcome of the individual proceedings on injury and causation (assuming, again, that the common issue is resolved in favour of the class). Further there is little evidence here to suggest that any significantnumber of class members would prefer to proceed individually.

I turn next to the fourth factor, which asks "whether other means of resolving the claims are less practical or less efficient": s. 4(2)(d). On this point I would agree with the Court of Appeal that individual actions would be less practical and less efficient than would be a class proceeding. As Mackenzie J.A. noted (at pp. 9-10), "[i]ssues related to policy and administration of the school, qualification and training of staff, dormitory conditions and so on are likely to have common elements". Further, "[t]he overall history and evolution of the school is likely to be important background for the claims generally and it would be needlessly expensive to require proof in separate individual cases" (p.10). I would also agree with Mackenzie J.A. (and indeed with Kirkpatrick J.) that the JICP does not provide an adequate alternative to a class action. Amongst other limitations, the JICP program limits the recovery of any one complainant to $60,000, and it does not permit complainants to be represented by counsel before the panel. The JICP simply cannot be said to be an adequate alternative to a class proceeding.

The final factor is "whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means": s. 4(2)(e). On this point it is necessary to emphasize the particular vulnerability of the plaintiffs in this case. The individual class members are deaf or blind or both. 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. I am in full agreement, therefore, with Mackenzie J.A.'s conclusion that "[t]he communications barriers faced by the students both at the time of the assaults alleged and currently in the litigation process favour a common process to explain the significance of those barriers and to elicit relevant evidence." As he wrote, "[a] group action should assist in marshalling the expertise required to assist individual students in communicating their testimony effectively" (p.9).

96 The issue of the preferability was also raised in Griffith v. Winter (2002), 23 C.P.C. (5th) 336, 2002 BCSC 1219, aff'd (2003) 15 B.C.L.R. (4th) 390, 2003 BCCA 367. In the Court of Appeal decision which upheld Cole J.'s decision to grant certification of the proceedings, the court at 14 noted the need identified in Hollick v. Toronto (City), supra, to assess the preferability of the class procedure in light of "the litigation as a whole, including the individual hearing stage..." and "to adopt a practical cost benefit approach to this procedural issue and to consider the impact of a class proceeding on class members, the defendants and the court".

97 In upholding the chambers judge, the Court of Appeal made the following observations at 16:

The chambers judge concluded that the common issues could be determined with minimal reference to the circumstances of the individual members. As those common issues turn primarily on the responsibility in law of the Province for the abuse by Winter and the systemic negligence alleged against the Province, I think that the chambers judge's conclusion was reasonable. At the same time he recognized that the assessment of damages would have to take place in individual proceedingsand that those proceedings would take a great deal of time in the litigation. He then went on to weigh the competing interests of individual litigants in controlling the prosecution of their claims as

urged by the Province and the submission that the litigation would proceed more expeditiously through individual actions or joinder.

98 In dealing with the issue of the individual control of litigation, the Court of Appeal at 18 quoted with approval from the chambers judge's reasons for judgment at 38:

While the Province's argument raises valid concerns, it fails to recognize the potential benefits to class members of proceeding with a class action. This type of litigation is clearly difficult and potentially traumatic for those involved. However, the resolution of the common issues, which are limited to broad legal issues, will allow subsequent individual proceedings to proceed more quickly, thus benefiting individual class members. In fact, the resolution of the common issues may ultimately encourage settlement, preventing individual claimants from having to proceed with separate actions. While involvement in the class action may be difficult for some class members, it willbe no more traumatic than involvement in individual litigation. Additionally, class members will have the option of opting-out of the class action if they are not willing to participate in the proceedings.

99 In the present case, despite some similarities between the issues at large in L.R. and Griffith, the defendant takes the position that the plaintiff has not met the burden of establishing that certification would lead to the preferable procedure, in light of the factors set forth in 4(2).

iv. Section 4(2)(a) - Whether common issues predominate over individual issues

100 With respect to s 4(2)(a), the defendant submits first that considering the proceedings as a whole, the common issue is but one of a number of factual and legal issues, and that issue involves "individualistic analysis for each class member for each year and for each servant involved with that class member..." and submits that the common issues trial will deteriorate into a multiplicity of individual issues and individual trials.

101 The defendant says there was no one system in place subject to a simple analysis, instead there was a combination of Navy league administration and procedures and federal Crown administration and procedures changing according to changes in the governing orders and regulations.

102 The defendant also submits on the common issue the plaintiff will have to lead evidence "regarding the specific duties, acts or omissions of specific individuals working within the system(s) at different times."

103 The defendant submits the complexities inherent in assessing systemic negligence with the variables at play over the eleven year span contemplated by the action as in the present case "increase exponentially" and it would be an impossible task to complete the assessment "within a 'common' or general framework". The defendant points to evidence that there was a very high turnover in the positions of authority affecting the Sea Cadet organization during the relevant time frame and submits that that increases the complexity in a class action proceeding.

104 The defendant returns to its theme that the issues at stake are either too broad to be useful in advancing the case meaningfully or those that are narrow enough to be useful require individual enquiries to resolve the common issues.

105 The defendant cites MCC v. Canada, supra, as an example of the former difficulty and Fehringer v. Sun Media Corp. (2002), 27 C.P.C. (5th) 155 (Ont. Sup. Ct. J.) as an example of the latter.

106 For the reasons I have already expressed in dealing with MCC v. Canada on the issue of whether there is an identifiable class capable of clear definition, it is distinguishable from the case at bar.

107 Insofar as Fehringer is concerned, it too is distinguishable because in that case the action was not confined to systemic negligence but included claims based on the defendant's vicarious liability for the intentional torts of its employer, specific acts of negligence, and occupier's liability. Insofar as a claim based on systemic negligence was concerned, the court concluded it was inappropriate for certification because, unlike L.R. v. British Columbia where, according to the judge in Fehringer at 92, "the abuse was established through two separate governmental reports", in Fehringer "Each individual member of the proposed class [would] have to establish she was subject to improper conduct" (21). Further, the court at 22 concluded many of the individuals' claims would give riseto individualized defences, principally limitation defences, and independent enquiries would have to be conducted to determine whether such defences were applicable to each potential plaintiff's claim.

108 In addition, in Fehringer, the basis of the claim of systemic negligence related to encounters between the defendant's employee, a photographer who took pictures of women for publication in the defendant's newspaper as "Sunshine Girls". It was asserted that within the context of these encounters he subjected the women to "harassment, intimidation, breach of privacy and inappropriate contact, conduct and remarks during photographic sessions." Not surprisingly the court found the issues in that case among other things too individualistic for certification.

109 In the case at bar, by contrast, it was established at the first stage of the proceedings that limitation periods were not an issue with regard to any potential plaintiffs and that the only basis for the claims being advanced is systemic negligence, which in my opinion does not require an assessment of individual plaintiff's claims as appears clear from McLachlin C.J.C.'s comments in L.R. v. British Columbia (SCC) 30 referred to in 60 of these reasons. Moreover, although the court in Fehringer relied on McLachlin C.J.C.'s assertion that there was no dispute that abuse occurred at JHS, as appears from Humphries J.'s reasons in L.R. No. 2, there is a dispute on that issue, a fact that did not deter Humphries J. from concluding the common issues trial could proceed without litigation of the individual claims of abuse.

110 I note that in the present case, although there were no governmental reports finding abuse as was the case in L.R., there have been findings by a criminal court of "sexual assault" offences consequent on Sundman's guilty pleas and Bremner's trial and conviction. Whatever position may ultimately be taken by Bremner and Sundman in the present actions, it is worth observing that the findings of criminal complicity are by nature considerably more rigorous than the reports at issue in L.R. v. British Columbia .

111 In the present case, unlike Fehringer, the basis for the claim of systemic negligence is related to a sustained formal hierarchical relationship involving minors, not single encounters involving adults. In my view the former circumstance issignificantly less prone to require individual analysis than the latter in establishing "systemic negligence".

112 In my view, there are considerably more distinctions than parallels between Fehringer and the case at bar for it to be of assistance in resolving the issue of the preferable procedure before me.

113 The defendant submits that in any event the predominance of the individual issues over the common one renders the class procedure inefficient because at most, if systemic negligence is established, that is "only the beginning of the liability inquiry".

114 The defendant points to the plaintiff's need (in addition to systemic negligence) to prove, in order to establish liability, actual abuse, the identity of the abuser and circumstances of the abuse, factual and legal causation for the abuse, vicarious liability for the systemic negligence, the nature and extent of damages and the appropriate amount of compensation for such damages.

115 The defendant also submits that since the Navy League and the individual perpetrators have been added as third parties, issues of allocation of fault and apportionment of liability would have to be resolvedon an individual level.

116 The defendant further submits the issue of damage assessment given the allegations of emotional and psychological harm looms large in the litigation.

117 The defendant relies on a portion of McLachlin C.J.C.'s comments in Hollick, supra, at 32 where she states as follows:

I am not persuaded that the class action would be the preferable means of resolving the class members' claims. Turning first to the issue of judicial economy, I note that any common issue here is negligible in relation to the individual issues...once the common issue is seen in the context of the entire claim it becomes difficult to say that the resolution of the common issue will significantly advance the action.

118 The defendant also submits certification may significantly protract the litigation because of the time associated with resolution of the common issues.

119 In my opinion, the governing factors which lead to McLachlin C.J.C.'s conclusion against certification in Hollick are not as significant in the present case. In Hollick, the claims centered on whether a landfill site owned and operated by the City of Toronto emitted physical andnoise pollution onto the plaintiff's lands and those of other class members.

120 After concluding at 30 - 31 that the question of preferability "...must take into account the importance of the common issues in relation to the claims as a whole" and that the class representative must "demonstrate ... [a class action] would be preferable to other methods of resolving those claims and, in particular, that it would be preferable to the use of individual proceedings ..." and that the court could not "ignore the availability of avenues of redress apart from the individual actions", McLachlin C.J.C. held that in the circumstances of Hollick, a class action was not the preferable procedure.

121 McLachlin C.J.C.'s reasons for rejecting a class action in Hollick tend to distinguish it from the case at bar, while her approval of a class action in L.R. v. British Columbia, supra, provides precedential reasoning of some application to the present case.

122 In Hollick, supra, the utility of the common issues which arose from the claim that the landfill emitted physical and noise pollution onto the lands of the putative class members was characterized by McLachlinC.J.C. as "negligible" in relation to the individual issues. The reason McLachlin C.J.C. saw it as negligible was because "There [was] no reason to think that any pollution was distributed evenly across the geographical area or time period specified in the class definition." (Hollick, 32)

123 By contrast, in L.R., while acknowledging at 33 that there would be "relevant differences between class members" McLachlin C.J.C. concluded at 36 that because the claims were limited to systemic negligence, "the central issues in this suit will be the nature of the duty owed by JHS to the class members and whether that duty was breached".

124 The essential distinction between Hollick and L.R. was the nature of the common issue and its potential to advance the case. It is apparent in Hollick McLachlin C.J.C. viewed the common issue as not conducive to judicial economy because it would not address the inherently diverse nature of the claims advanced. The claims were diverse because they were conditioned by the location of the putative plaintiffs in relation to the landfill, the source of the pollution.

125 In L.R. on the other hand, McLachlin C.J.C. viewed thecommon issue raised by the nature of the claim as a meaningful step in the litigation because its determination one way or the other would contribute to resolution of the individual issues.

126 In particular, at 39 she agreed with McKenzie J.A. in L.R. v. British Columbia (BCCA), supra, at pp 9 - 10 that "[i]ssues related to policy and administration of the school, qualification and training of staff, dormitory conditions and so on are likely to have common elements" and that "[t]he overall history and evolution of the school is likely to be important background for the claims generally and it would be needlessly expensive to require proof in separate individual cases."

127 The nature of the claims in Hollick and L.R. are inherently different. Assessing an assertion of systemic negligence and its effects in the context of allegations of sexual abuse is a different exercise from assessing assertions of physical and noise pollution and its effects on property. In the case of systemic negligence and sexual abuse, it would be very difficult if not impossible to resolve the factual and legal issues of duty and standard of care and even causation, without an understandingof the full context within which the impugned acts and/or omissions of the defendant's servants took place. In such circumstances, the structure of the organization, its participants, its policies, directives, orders and regulations, the formal relationships and the acts and/or omissions at issue, over time, comprising the organization's actual posture in response to assertions of or risk of sexual abuse are inseverable in any meaningful analysis of the presence or absence of systemic negligence, and, as well, to address the issue of causation in individual cases.

128 In the case of pollution, in Hollick, on the other hand, a finding of liability does not depend on an analysis of intangible and interrelated conditions giving rise to the harm alleged, as it is not the conditions giving rise to the pollution but the pollution itself and its manifestly diverse effects on individual land owners which is at the heart of the claim. As such, it is understandable why McLachlin C.J.C. termed the common issue in Hollick as negligible, in contrast to her treatment of the common issue advanced in L.R. v. British Columbia .

129 Insofar as the basis for the present action is seated in "systemic" negligence, it cannot be said that there is any imbalance between the common issues of fact or law and questions affecting individual members only as set out in s. 4(2) (a). There is no question but that there are significant issues to be resolved at the individual stage of the enquiries as counsel for the defendant has pointed out. The issue, however, in the present case, as I see it, is not one of the dominance of the individual issues over the common issue. Rather, it is whether, if the common issue is properly pursued, it serves the individual issues both by assisting in their resolution and also by avoiding a duplication of evidence necessary to their resolution.

130 The experience detailed by Humphries J. in L.R. No. 2 does, in my opinion, raise significant issues of concern with regard to the factors set out in s. 4(2)(a). However, given the narrower ambit of the present action compared to L.R. and the guidance implicit in Humphries J.'s ruling against decertification in that case as to the conduct of the common issues hearing and for the reasons I have attempted to articulate, I do not consider the factor in s. 4(2)(a) to militate againstcertification.

v. Sections 4(2) (b) and (c) - Individual Control of Actions and Claims Involving Other Proceedings

131 Insofar as the factors set out 4(2)(b) and (c) are concerned, the present case is somewhat distinct from L.R. as there are in the present case claims which are the subject of other proceedings and it may be that some members of the class involved in those claims have a valid interest in controlling the prosecution of separate actions. In addition, the potential size of the plaintiff class in L.R. is significantly greater than the potential size of the plaintiff class in the present case.

132 In my opinion, however, the decision of Cole J. and the reasons of the Court of Appeal in upholding his decision in Griffith v. Winter, supra, is apposite to the issues at large in the present case. In particular, the comments of the Court of Appeal quoted at 97 of this judgment, and of Cole J. quoted approvingly by the Court of Appeal as reproduced in 98 of these reasons, are relevant to the issue of the possibility that some members of the class may have a valid interest in controlling the prosecution of separate actions. As was pointed out by McLachlinC.J.C. in L.R. (SCC), supra, because of the individual aspect of this action the plaintiffs will not be forced into a "passive role".

133 Insofar as the related issue of the size of the plaintiff class is concerned, on the evidence before me it appears that the potential size is in the range of 40 to 60 complainants based on Detective Trowski's evidence that he interviewed 63 people who complained of sexual abuse while members of the cadets organization.

134 The numbers at issue are not such as to militate against a class proceeding. In Griffith v. Winter, supra, the number of potential claimants was 15, 3 of whom commenced individual actions. In approving the chambers judge's certification of the action as a class action notwithstanding the size of the class and the pre-existing individual actions, the Court of Appeal at 18 agreed with the chambers judge's conclusions on this point at 38 of his reasons:

While the Province's argument raises valid concerns, it fails to recognize the potential benefits to class members of proceeding with a class action. This type of litigation is clearly difficult and potentially traumatic for those involved. However, the resolutionof the common issues, which are limited to broad legal issues, will allow subsequent individual proceedings to proceed more quickly, thus benefiting individual class members. In fact, the resolution of the common issues may ultimately encourage settlement, preventing individual claimants from having to proceed with separate actions. While involvement in the class action may be difficult for some class members, it will be no more traumatic than involvement in individual litigation. Additionally, class members will have the option of opting-out of the class action if they are not willing to participate in the proceedings.

135 With regard to the potential size of the class, the existence of individual actions and the possibility of some members of the class having a valid interest in controlling the prosecution of separate actions, the state of the evidence in the present case does not distinguish it from Griffith v. Winter, supra and I would not give effect to the defendant's argument with respect to the effect of s. 4(2)(b) or 4(2)(c).

vi. Sections 4(2)(d) and (e) - Whether Other Means Less Practical/Greater Difficulties Created by Certification

136 With respectto the factors set out in s. 4(2)(d) and (e), it is the defendant's position that they encompassed the practicality or efficiency of class proceedings and whether certification will actually create greater difficulties for the plaintiffs.

137 The defendant submits that the plaintiff has the onus of proving that a class action will actually improve access to justice and relies on M.C.C. v. Canada, supra, wherein Vallin J. quoted from Abdool v. Anaheim Management Ltd. (1995), 21 O.R. (3d) 453 at 473 (Div. Ct.):

As a rule, certification should have as its root a number of individual claims which would otherwise be economically unfeasible to pursue. While not necessarily fatal to an order for certification, the absence of this important underpinning will certainly weigh in the balance against certification.

138 The defendant says that there is no evidence of "economic unfeasibility" and the fact that various plaintiffs have instituted individual claims militates against that conclusion. The defendant seeks to distinguish this case from L.R. in which the Court was dealing with plaintiffs who were deaf and for whom individual actions wouldhave been particularly difficult. The defendant also submits that systemic negligence was more necessary in L.R. because of the claims relating to assaults by other students which would not have given rise to an action in vicarious liability.

139 The defendant says the plaintiff has failed to establish a denial or restriction of access to justice if the action were not certified and points to the statement of McLachlin C.J.C. in Hollick at 31, that the court must "look to all reasonably available means resolving class member's claims". The defendant submits individual proceedings are the preferable method in the context of the present action.

140 The defendant further submits that the need for deterrence or behaviour modification which were advanced by the plaintiff in its submissions in support of certification are not issues in the present case because it relates to historical activity under different regulations and orders than currently exist and the "culture" of the organization has significantly changed.

141 The plaintiff's position on the other hand is that the vulnerability of the plaintiffs in the present case is akin to those in L.R., supra, and in Griffith v. Winter, supra, and that there are in effect no meaningful differences. The plaintiff also submits the need and the ability to "bring home" to the potential plaintiffs their access to justice by way of notice under the class proceedings is a significant factor for the court to take into account. The plaintiff further submits the decisions in L.R. and Griffith acknowledge that sexual abuse plaintiffs have hurdles to face that plaintiffs in other actions do not and that this fact alone augurs in favour of certification to diminish the difficulty of proceeding individually.

142 The plaintiff relies on the concept of the general deterrent effect of lawsuits such as this with respect to institutions involved with those particularly vulnerable to sexual abuse, and submits class proceedings represent a process designed to take account of the inherent difficulties in these sorts of cases.

143 While there is a difference between L.R. and the present case, it is a difference in degree rather than in kind. Further, I do not see a significant distinction between the present case and Griffith v. Winter insofar as the vulnerability of the plaintiffsor the difficulties faced by them are concerned. It seems to me the factors which are persuasive in L.R. and Griffith on the issue of improving the vulnerable potential plaintiff's access to justice are persuasive in this case as well. The distinctions that do exist are not sufficiently significant to compel a different result in this case from

either L.R. or Griffith . Thus I do not find cause in s. 4(2)(d)or (e) to gainsay class proceedings as the preferable mode of procedure to individual proceedings.

vii. Section 4(1)(e) - Is the Plaintiff an Adequate Representative Plaintiff

144 The defendant raises the suitability of Mr. White as a representative plaintiff. Mr. White's suitability is dependent on an assessment of the factors set forth in s. 4(1) (e).

145 In Western Canada Shopping Centers, supra, McLachlin C.J.C. stated as follows at 41:

Fourth, the class representative must adequately represent the class. In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurredby the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative needs not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class.

146 In submitting that the plaintiff has not met the burden established by McLachlin C.J.C. above, the defendant points to the evidence that for "unknown reasons" Mr. White's complaints to the police did not result in charges against Mr. Bremner. His complaints against Anderson, of course, were not susceptible to criminal charges as Anderson is deceased. Counsel for the defendant also submits that the plaintiff "has no incentive to pursue evidence in support of any cause of action arising after he left the Sea Cadets in 1971." The defendant also submits that the plaintiff is in a conflict of interest with respect to other members of the class. In support of that submission counsel for the defendant points to what he characterizes as potential difficulties in establishing vicarious liability for systemic negligence, where the alleged tortfeasorssaid to be negligent by failing to implement a system for identifying or reporting sexual abuse were the abusers themselves.

147 Counsel for the defendant points to a potential conflict in the plaintiff leading evidence that those he claims abused him owed the duty of care at issue or that those who owed the duty of care at issue were themselves abusers of others. The defendant's reasoning is simply that it is more difficult to establish vicarious liability for negligence where the acts at the foundation of the negligence were unrelated to the prescribed duties of the tortfeasor. The defendant reasons that if the alleged tortfeasors were also abusers, their failure to set up a system for identifying or reporting sexual abuse was deliberate and not within their prescribed duties and hence the difficulty in establishing vicarious liability.

148 The defendant submits that "where there are multiple intentional tortfeasors (the alleged assailants in this case) working within, and on, the allegedly deficient system, there is no way to remove the resulting conflict between the victims of different tortfeasors. Accordingly, the application for certification in this case should be dismissed as there can be no representative plaintiff for the proposed class".

149 The defendant's submissions go to the fundamental issue of whether systemic negligence can be established in this case. In my opinion, resolution of that issue would require the court to determine the merits of the plaintiff's claim, which is clearly not what is contemplated on the issue of certification. While it may eventually emerge that different plaintiffs have different interests to pursue, at this stage that can only be regarded as an inchoate possibility and it cannot be used to defeat certification. If distinctions do emerge in the course of the common issues, those issues can be dealt

with as they arise and within the provisions of the CPA . See: Western Canada Shopping Centers Inc. supra, 54, 55, and 56.

150 The defendant submits that the plaintiff's litigation plan is unworkable and cites the observation of Winkler J. in Carom v. Bre-X Minerals Ltd. (1999), 44 O.R. (3d) 173, [1999] O.J. No. 1662 at p. 25:

...The production of a workable litigation plan serves a twofold purpose: it assists the court in determiningwhether the class proceeding is indeed the preferable procedure; and, it allows the court to determine whether the litigation itself is manageable in its constituted form. The manageability must be assessed in the context of the entirety of the litigation, not just a common issue trial.

A workable plan must be comprehensive and provide sufficient detail which corresponds to the complexity of the litigation proposed for certification. ...

151 In Carom, supra, Winkler J. went on to observe at p. 25 that in that case:

... the national scope, the nature of the defendants, the uncertainty of the class size and the number of causes of action alleged mark this as litigation of the most complex nature and kind. Accordingly, a comprehensive and detailed litigation plan is required.

152 It is clear on a review of the reasons in Carom, supra, that it involved an action of breadth, scope and complexity, considerably beyond that of the present case. In my view, the comprehensiveness of the case management plan bears some relationship to the complexity, scope and breadth of the case at issue. In the present case, the litigation plan is not unworkable. It does contemplatethe utilization of time frames for disclosure and discovery and the utilization of case management conferences as a method of refining the approach to the common issues trial as the disclosure and discoveries help to shape the issues to be dealt with.

153 It is clear from the affidavit of John Laxton that the plaintiff contemplates the issues of causation and damages being left to individual trials as is the case in L.R., supra . While the plaintiff has not offered a detailed assessment of how the individual issues are to be litigated and reconciled to the common issues trial, that, it seems to me, is a function of the stage this litigation is presently at: prior to disclosure and prior to discoveries. If, as the defendant submits, what emerges through the discovery and disclosure process renders class proceedings unwieldy and not susceptible to a workable plan, it is open for the court to consider whether the class action should continue. At this stage, however, in my opinion, the existing circumstances justify certification of this action as a class proceeding.

154 It is important to acknowledge that uniting claims of systemic negligence based on assertions ofhistorical sexual abuse through the medium of a class proceeding is a relatively new and untested application of the CPA . In the circumstances, I think it is appropriate to note that any prospective judgments about the fitness of such proceedings are bound to be affected by the accumulation of experiences that certification brings. As McLachlin C.J.C. noted in Western Canadian Shopping Centres Inc., supra at 21 and 25, the class action proceeding has its deepest roots in commercial litigation and more recently in the advent of mass production and consumption. Certification of actions such as in the present case is a departure from the traditional focus of the class action proceeding. In holding that certification is warranted I continue to be mindful of the submissions of the defendant relating to the potential difficulties thereby engaged. Great care must be taken to ensure that proceedings will be certified or remain certified only if it is "a fair efficient and manageable method of

advancing the claim" (per McLachlin C.J.C. in Hollick, supra at 28). As Smith J. (as he then was) pointed out in Endean v. Canadian Red Cross Society, supra, at 58:

However, the object of the Act is not to provide perfect justice, but to provide a "fair and efficient resolution" of the common issues. It is a remedial procedural statute and should be interpreted liberally to give effect to its purpose. It sets out very flexible procedures and clothes the court with broad discretion to ensure that justice is done to all parties. As was said in Bendall v. McGhan Medical Corp. (1993), 14 O.R. (3d) 734 at 747 (Ont. Court (General Division)):

Certification is a fluid flexible procedural process. It is conditional, always subject to decertification.

155 In conclusion, I would certify the action as proposed by the plaintiff with respect to the common issue of systemic negligence and whether, if liability is found, punitive damages should be awarded. In keeping with L.R. v. British Columbia, I conclude that the common issue of punitive damages should be deferred until the amount of compensatory damages, if any, has been determined.

156 The final issue relates to whether any or all of the third parties should have standing on the trial of the common issues.

157 As presently constituted, the common issues hearing shouldengage the third parties only negligibly. As I have observed, however, the shape of this litigation will not be fully illuminated until the disclosure and discovery process has concluded. In those circumstances, it seems to me fair to give the third parties leave to apply to participate in the trial of the common issues as they may be advised as was done by Smith J. in Endean vs. Canadian Red Cross Society, supra . Accordingly the third party actions will be stayed until further order of the court pursuant to s. 13 of the CPA .

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