

Case Name:

W.W. v. Canada (Attorney General)

**Between
W.W., plaintiff, and
Attorney General of Canada, defendant**

[2002] B.C.J. No. 1821

2002 BCSC 1164

Vancouver Registry No. S005157

**British Columbia Supreme Court
Vancouver, British Columbia**

**Cullen J.
(In Chambers)**

Heard: May 27, 2002.

Judgment: August 6, 2002.

(91 paras.)

Practice -- Class actions, certification, appointment of representative plaintiff -- Crown -- Torts by and against Crown -- Negligence by Crown -- Sexual abuse by employees.

Application by the plaintiff W.W. for certification of the action against the Attorney General of Canada as a class proceeding, with the class to be comprised of all former members of the Canadian Sea Cadets at HMCS Discovery who suffered sexual abuse between 1967 and 1977. The claim alleged systemic negligence on the part of Canada for breaching an obligation to take measures in the operation of the cadet program to protect cadets from misconduct of a sexual nature. Canada argued that, relying on the Crown Liability and Proceedings Act, the claim did not disclose a cause of action since it was based on negligence rather than vicarious liability. Canada also argued that the claim was barred by being outside the six-month limitation period under the National Defence Act.

HELD: Application allowed. The decision to authorize the formation of cadet organizations, administer them and determine which officers will be in command was subject to the duty to use due care. Systemic negligence, pleaded by W.W., was negligence which arose when individual acts or omissions were directed towards a general rather than a specific set of circumstances. As such, W.W.

established a cause of action not negated by the Crown Liability and Proceedings Act. The limitation period under the National Defence Act did not apply because the alleged negligence in relation to the protection of cadets from sexual abuse did not correlate to the exercise of military or departmental powers or duties.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, ss. 4(1)(a).

B.C. Crown Proceeding Act, s. 2(a), 2(b), 2(c), 2(d).

Crown Liability and Proceedings Act, s. 3(a), 3(a)(i), 3(a)(ii), 3(b), 3(b)(i), 3(b)(ii), 24, 24(a), 24(b).

British Columbia Rules of Court, Rules 19(1), 19(24)(a).

National Defence Act, s. 43, 43(1), 43(2), 43(3), 269, 269(1), 269(2).

Public Authorities Protection Act, s. 7(1).

Counsel:

R.D. **Gibbens**, for the plaintiff.

J.A.M. Bowers, Q.C., M. Molloy and W. Bansley, for the defendant.

CULLEN J.:--

I. INTRODUCTION

1 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 W.W. be appointed representative of that class.

2 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".

3 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" was the 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?

4 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.

5 By alleging a negligent failure to protect the plaintiff and others against harm rather than by alleging vicarious liability for the intentional acts of the defendant's servants which caused the harm, the plaintiff has framed his action against the Attorney General of Canada in such a way as to render it conducive to the resolution of issues common to the class of plaintiffs he seeks to represent. The defendant says that in so framing his action the plaintiff has stepped outside of the private law duties owed to him (and the class he seeks to represent) created by the Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50 ("CLPA") and its predecessor the Crown Liability Act, S.C. 1952-53, c. 30.

6 The defendant also asserts that the six month limitation period set out in s. 269 of the National Defence Act, R.S.C. 1985, c. N-5 applies so as to statute bar this action.

7 The plaintiff says the applicable limitation period is that set forth in the B.C. Limitation Act, R.S.B.C. c. 266, section 3(4)(k) and (l), which accommodates this action.

II. THE CAUSE OF ACTION

8 The test for whether the pleadings disclose a cause of action is the same as that governing the application of Rule 19(24)(a) of the Rules of Court B.C. Reg. 221/90, i.e. whether it is "plain and obvious", assuming the facts pleaded to be proved, that there is "no reasonable cause of action." See *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980 per Wilson J.

9 In making a determination under R. 19(24)(a) whether there is a question to be tried, the court must have regard for the pleadings as they stand or as they might be amended without consideration of the novelty or complexity of the question which they raise. See *Kripps v. Touche Ross & Co.* (1992), 69 B.C.L.R. (2d) 62 (C.A.).

10 In part, the plaintiff's claim against the Crown is framed as what has been described as "systemic" negligence. See *Rumley et al. v. British Columbia*, [2001] S.C.J. No. 39; (1999), affirming 72 B.C.L.R. (3d) 1 (C.A.); reversing in part (1998) 65 B.C.L.R. (3d) 382 (B.C.S.C.). In fact the statement of claim in the present case is similar to that in *Rumley* insofar as it is based on "the failure to have in place management and operations procedures that would reasonably have prevented the abuse." See *Rumley* 72 B.C.L.R. (3d) 1 (C.A.) at 8 per Mackenzie J.A.

11 The Crown bases its position that no reasonable cause of action is disclosed by these pleadings on the distinction between the unlimited potential liability of the Provincial Crown established by the B.C. Crown Proceeding Act, R.S.B.C. 1996, c. 89 and its predecessor, S.B.C. 1974, c. 24, under which *Rumley* was brought, and the lesser potential liability of the Federal Crown established by the CLPA under which the present case is brought.

12 The relevant portions of the B.C. Crown Proceeding Act, reads as follows:

2. Subject to this Act,

(a) proceeding against the government by way of petition of right is abolished,

- (b) a claim against the government that, if this Act had not been passed, might be enforced by petition of right, subject to the grant of a fiat by the Lieutenant Governor, may be enforced as of right by proceeding against the government in accordance with this Act, without the grant of a fiat by the Lieutenant Governor,
- (c) the government is subject to all the liabilities to which it would be liable if it were a person, and
- (d) the law relating to indemnity and contribution is enforceable by and against the government for any liability to which it is subject, as if the government were a person.

13 The 1996 version is substantially the same as that in the earlier legislation.

14 The relevant provisions in the CLPA, read as follows:

- 3. The Crown is liable for the damages for which, if it were a person, it would be liable
 - (a) in the Province of Quebec, in respect of
 - (i) the damage caused by the fault of a servant of the Crown, or
 - (ii) the damage resulting from the act or a thing in the custody of or owned by the Crown or by the fault of the Crown as custodian or owner; and
 - (b) in any other province, in respect of
 - (i) a tort committed by a servant of the Crown, or
 - (ii) a breach of duty attaching to the ownership, occupation, possession or control of property.
- 10. 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 successors.

15 It is the Crown's contention that the crucial difference between the applicable provisions of the Federal and Provincial legislation is that the Federal Crown can only be found vicariously liable for the acts or omissions of its servants or agents, whereas the British Columbia legislation provides for direct as well as vicarious liability. The Crown's submission is succinctly stated in its written argument as follows:

- 32. By virtue of section 3(b)(i) of the CLPA, The Crown's liability is entirely vicarious and can only be engaged for torts committed by a servant of the Crown. Further, by virtue of section 10 of the CLPA, no proceedings lie against the Crown for the torts of its servants or agents "unless the act or omission would apart from the provisions of the Act have given rise to a

cause of action in tort against that servant or the servant's personal representatives.

33. Consequently, in so far as the Plaintiff bases his claim on systemic negligence, his claim must fail as the liability of the Crown is entirely vicarious and must be based on acts or omissions of specific servants, not the Crown's systemic failings.

(i) The Plaintiff's Claim

16 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.

17 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.

18 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.

19 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.

20 The nature of 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, representatives or 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, representatives or 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 effectively supervise 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 Sa 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 due diligence;
 - (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.

(ii) The Defence

21 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 to paragraph 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.

(iii) The Issue

22 The dominant issue is whether, assuming the facts pleaded by the plaintiff to be proven, the CLPA permits an action in negligence where the defendant arguably failed to prevent its servants from sexually assaulting or sexually abusing minors over whom they exercised authority and control.

(iv) Discussion

23 The defendant says it does not. Counsel for the Crown submits the plaintiff's claim is one based on direct rather than vicarious liability and as such it falls outside the scope of the CLPA and the nature of the liability which attaches to the Queen in Right of Canada under that Act.

24 The Crown relies on *Warwick Shipping Ltd. v. The Queen*, [1982] 2 F.C. 147 (Fed. Ct.). In that case the Crown was sued in negligence for allegedly failing to properly dredge a channel leading into a harbour, causing the plaintiff's ship to run aground. The court ruled that because the plaintiff could not establish liability on the part of any individual Crown servant it could not establish vicarious liability as was necessary under s. 3(1)(b) of the Crown Liability Act, R.S.C. 1970, c. 38 (equivalent to s. 3(b)(i) of the CLPA).

25 The Crown in the present case submits the plaintiff's case suffers from the same deficiency in that vicarious liability is not alleged; rather the basis of the action, being "systemic" negligence, is one of direct liability which does not fall within the embrace of the CLPA. In making its submission, the Crown relies on commentary on *Warwick Shipping in Liability of the Crown*, 3d Ed., by Peter W. Hogg and Patrick Monaghan, (Toronto: Carswell, 2000) at 134 as follows:

In *Warwick Shipping v. Canada* (1983), the owner of an oil tanker that had run aground sued the Crown in right of Canada, alleging negligence in the failure of the Crown to properly dredge a channel into a harbour. The plaintiff could not establish negligence on the part of any individual Crown servant, and so could not establish vicarious liability. If the Crown had been fully liable, it would have been arguable that the Crown was under a duty to provide a safe approach to the harbour, or to provide a system of appropriate warnings to incoming vessels; and such a duty could have been the basis of the direct liability of the Crown. But the Crown was able to stifle this line of argument by pointing to section 3(1)(b) of the federal Crown Liability Act. The only possible head of direct liability was "in respect of a breach of duty attaching to the ownership, occupation, possession or control of property". Since the part of the sea where the accident occurred was not in the "ownership, occupation, possession or control" of the Crown, the Crown could not be liable. That was the outcome of the case, even though the Crown did dredge, mark and chart the area where the accident occurred, and had arguably done so without taking reasonable care.

26 In my view, the context of *Warwick Shipping* is somewhat different from that of the case at bar as it turns on a finding of lack of duty of any Crown servant to a third party in the particular circumstances of that case. The critical finding in *Warwick Shipping* was not that there was no negligence on the part of any individual Crown servant, rather it was that no duty of care existed between the Crown servant or the Crown and any third parties in respect of the dredging of the channel because the channel was natural.

27 For the case at bar to parallel the *Warwick Shipping* case, it would be necessary to conclude as a matter of law on the pleadings that no duty of care rested on any servant or employee of the Crown to ensure that the minors who were invited to participate in the Sea Cadets organization were not, while so involved, exposed to ongoing sexual assaults and/or sexual abuse by those with authority over them.

28 The relevant passage from the trial court's judgment in *Warwick Shipping* is at p. 159:

Since the defendant cannot on the facts of this case be held liable under section 3(1)(b) in so far as the dredging is concerned, any liability covering this activity would have to be founded on section 3(1)(a). On this issue, there exists no duty at law on the part of any servant of the defendant, or of the defendant itself, through any of its servants to remove obstacles to navigation in areas not required to be maintained. There is no requirement at law to maintain natural channels. Since there exists no specific duty to perform, there can be no liability for negligence in the performance of the task to which the duty would relate unless the negligent actions create a more dangerous situation than previously existed and the damage is occasioned as a result of that increased hazard. In addition to this, it has been held in accordance with section 4(2) of the Crown Liability Act, and also previous to that enactment, that the Crown cannot be held liable under section 3(1)(a) unless its servant could have been sued personally, by the person claiming against the Crown, for the negligence relating to the act or the omission complained of.

29 In essence, the line drawn in *Warwick Shipping* intersects those cases where the relationship between the Crown servant or employee and a third party gives rise to a duty of care, and those where it does not.

30 The importance of that distinction was emphasized by Kerwin and Rand JJ. in *Cleveland-Cliffs SS. Co. v. The Queen* (1957), 10 D.L.R. (2d) 673 (S.C.C.). In his judgment Kerwin J. stated at 677, as follows:

Under the relevant terms of the Crown Liability Act the appellants must show that they would have a cause of action in tort against some servant of the Crown and this has not been done. It is true that in answer to a request from the solicitors for the appellants the Deputy Minister of Transport declined to name the officers of the Crown charged with the inspection and maintenance of the channel or the installation and maintenance of buoys to indicate the channel and with the issuance of notices to mariners, but, by consent, Frank C.G. Smith, the Dominion hydrographer, was examined for discovery and no application was made under the Rules of the Exchequer Court for the examination of any other officer. In view of the appellant's contention that they were at least entitled to a new trial so that they might take the necessary steps for that purpose or in order to secure the names of anyone against whom within the meaning of the Crown Liability Act, the appellants could show that they would have a cause of action in tort, I have considered the matter anxiously and have come to the conclusion that relief should not be granted on any terms. There was no duty owing to the appellants on the part of the Dominion hydrographer to take soundings in the East Entrance Channel and in the circumstances of this case, I am unable to envisage any possible duty to the appellants resting upon any other servant of the Crown, the breach of which could form the basis of a cause of action against him. The case of *Grossman & Sun v. The King*, [1952] 2 D.L.R. 241, [1952] 1 S.C.R. 571, is distinguishable as there Nicholas, the airport maintenance foreman, was held to owe a duty to Grossman.

31 In the same case Rand J. went on to discuss the rule in *Grossman & Sun v. The King*, *supra*, at 679-10:

The primary duty of the Crown servants is to the Crown; and the circumstances in which the servant can, at the same time, come under a duty to a third person are extremely rare. The rule laid down in *Grossman & Sun v. The King*, [1952], 2 D.L.R. 241, 1 S.C.R. 571 is, as I interpret it, this: that the servant from the nature of his specific duty, a duty immediately related to action of the third person, is chargeable with knowledge that the latter, in his own conduct, is justifiably relying on the performance by the servant of that duty, and that the servant is chargeable with accepting the obligation toward the third person. In other words, between them a *de facto* relation of reliance and responsibility is contemplated. There are no such circumstances here.

32 Thus the presence or absence of a duty of care in the pleadings is an issue that requires determination in the present case.

33 In *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145, Cory J. explained how a private law duty of care arises from a public authority's exercise of statutory powers. In doing so he quoted (at 1155) from the decision of Lord Wilberforce in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), describing the test utilized to determine whether the Crown owed a duty of care to third parties:

First one has to ask whether, as between the alleged wrong doer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise....

34 In *Lewis*, supra, at 1155, Cory J. also cited a passage from Wilson J.'s judgment in *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2, in which she followed the test set out by Lord Wilberforce in *Anns*, supra, and "described the two different forms of statutory discretion and the potential liability for negligence entailed by each in this manner:"

1. Statutes conferring powers to interfere with the rights of individuals in which case an action in respect of damage caused by the exercise of such powers will generally not lie except in the case where the local authority has done what the legislature authorized by has done it negligently;
2. Statutes conferring powers but leaving the scale on which they are to be exercised to the discretion of the local authority. Here there will be an option to the local authority whether or not to do the thing authorized but, if it elects to do it and does it negligently, then the policy decision having been made there is a duty at the operational level to use due care in giving effect to it.

35 Section 43 of the National Defence Act R.S.C. 1970, C. N-4 provided for the establishment of cadet organizations. It read as follows:

- 43.(1) The Minister may authorize the formation of cadet organizations under the control and supervision of the Canadian Forces to consist of boys of not less than twelve years of age who have not attained the age of nineteen years.
- (2) The cadet organizations mentioned in subsection (1) shall be trained for such periods, administered in such manner, provided with materiel and accommodation under such conditions and shall be subject to the authority and command of such officers as the Minister may direct.
- (3) The cadet organizations mentioned in subsection (1) are not comprised in the Canadian Forces. R.S., c. 184, s. 44; 1966-67, c. 96, s. 20.

36 In my view, the present case falls into the second category set out in Wilson J.'s judgment in *Kamloops*, supra. The section of the National Defence Act authorizing the Minister of Defence to establish and administer the cadet organizations is clearly discretionary as was the authority of the

Ministry in Highways and Transportation in Lewis, *supra*, which led Cory J. in that case to conclude that it too fell into the second category.

37 In Lewis, *supra*, the Supreme Court of Canada found that the Crown in Right of the Province owed a duty of care to users of the highways in British Columbia when it embarked on maintenance operations. After application of the Anns test and determining which category of statutory discretion was being exercised in accordance with Kamloops, *supra*, Cory J. for the majority concluded as follows:

The private law duty established by the Anns test "stands alongside" this statutory authority and is applicable once the Ministry makes a policy decision to undertake maintenance work on the highways. The Ministry clearly made the requisite policy decision when it decided to stabilize the rock slope adjacent to the highway. The Crown conceded at trial that the maintenance work undertaken by Cerka involved only operational activities capable of attracting liability in negligence. This exercise in statutory discretion thus gave rise to a duty on the Ministry to use due care at the operational level in performing the operational work.

38 In *Swinamer v. Nova Scotia (A.G.)*, [1994] 1 S.C.R. 445, in concurring reasons, McLachlin J. (as she then was) referred to "the matter of the source of the duty of care which lies on public authorities." (p. 449) After finding the appeal fell into the second category of statutory discretion set out in Kamloops, *supra*, McLachlin J. added at p. 450:

There is no private law duty on the public authority until it makes a policy decision to do something. Then and only then does a duty arise at the operational level to use due care in carrying out the policy. On this view a policy decision is not an exception to a general duty, but a precondition to the finding of a duty at the operational level.

39 In the present case, while the decision to authorize the formation of cadet organizations, to administer them, and to determine which officers they will be subject to the command of, all falls within the discretion conferred by s. 46 of the National Defence Act, how that decision is carried out is operational and subject to the duty to use due care. The proximity of the cadets, all of an age from 12 to 18 and subject to the authority and command of adult officers in a distinctly hierarchical military organization, to those charged with the responsibility of implementing the decision to form and administer the organization is clearly one "such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a prima facie duty of care arises." (see Anns, *supra*)

40 Thus unlike the Warwick Shipping case which the Crown relies on in its submissions, there is, in the present case, at least a basis for claiming a prima facie duty of care. The issue is whether the liability that potentially flows from that duty of care is negated by the CLPA as is submitted by counsel for the Crown.

41 The position of the Crown, that the asserted breach of the standard of care, being "systemic" rather than individual in nature, establishes, potentially, no more than a direct liability from which the CLPA provides immunity, requires careful scrutiny. In *Rumley, (B.C.C.A.)*, *supra*, Mackenzie J.A. appears to draw the same distinction which the Crown seeks to make, between vicarious liability and

"systemic" negligence in the context of examining the commonality of issues necessary to support certification (at 8-9):

In my respectful view these conclusions fail to adequately recognize the limited grounds on which the class claims are advanced. The plaintiffs do not rely on vicarious liability which might require the identification of individual perpetrators of sexual assault and a determination of whether the misconduct was within the course and scope of their employment. Determination of the status and number of individual perpetrators is not essential to the issues of liability.

...

Claimants will not have to prove that the abuse was caused by a particular staff member or other students in the absence of a claim for vicarious liability. In essence the claims will be based on systemic negligence, the failure to have in place management and operations procedures that would reasonably have prevented the abuse. That is a limited ground of negligence but the plaintiffs 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.

42 On their face, Mackenzie J.A.'s observations appear to distinguish systemic negligence from vicarious liability, the implication being that the former represents direct liability from which the Crown in Right of Canada is immune by virtue of the CLPA; however reading them in context establishes that the distinction he drew was between vicarious liability for the intentional torts of the wrongdoers and the systemic negligence allegedly involved in the failure to protect the students of the school from those wrongdoers. That distinction does not necessarily imply that "systemic" negligence is a matter of direct as opposed to vicarious liability, only that it is distinct from vicarious liability for intentional wrongdoing.

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's Crown Proceedings Act, 1947 which was before the court in *Anns*, *supra*, is similar to the Nova Scotia statute.

44 It was the Crown's submission in the present case that Cory J.'s disposition of the distinction between the two acts was obiter dicta, that it was not explicitly adopted by those who wrote concurring reasons and it has not been cited as binding authority in any subsequent decision. Counsel for the Crown submitted that the dicta of Cory J. in *Swinamer* ought not to govern the disposition of the issue in the present case.

45 As I read the passage from Cory J.'s judgment in *Swinamer*, he is essentially saying that a court cannot find a breach of the standard of care in a vacuum. There must be evidence of some acts or omissions which constitute the negligent failure to discharge the duty of care that exists before liability can be established. The concept of direct liability for negligence in the absence of any negligent individual action or omission is difficult to grasp. The need to prove direct liability for negligence may arise, in circumstances as those in *Warwick Shipping* or *Cleveland-Cliffs*, where the Crown servant although arguably negligent owes no duty to the plaintiff and hence would not be individually liable, but that is a different situation from what is at issue here.

46 Even in the case of *Rumley*, in which the concept of systemic negligence is predominant, it is clear that individual action said to be negligent is at the heart of the asserted liability. In *Rumley* (S.C.C.), *supra*, *McLachlin C.J.C.*, in the context of discussing the need to ensure that certification is refused if issues are common only when stated in the most general terms, wrote as follows at para. 30:

I cannot agree, however, that such are the circumstances here. As *Mackenzie J.A.* noted, the respondent's argument is based on the allegation of "systemic" negligence - "the failure to have in place management and operations procedures that would reasonably have prevented the abuse". 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 respondent's election to limit their allegations to systemic negligence may make the individual component of the proceedings more difficult; clearly it would be easier for any given complainant to show causation if the established breach were that JHS had failed to address her own complaint of abuse (an individualized breach) than it would be if, for example, the established breach were that JHS had as a general matter failed to respond adequately to some complaints (a "systemic" breach). As *Mackenzie J.A.* wrote, however, the respondents "are entitled to restrict the grounds of negligence they wish to advance to make the case more amenable to class proceedings if they chose to do so" (p. 9).

47 In the foregoing paragraph, it seems to me, *McLachlin C.J.C.* identifies the essence of what constitutes "systemic" negligence. It is not negligence that occurs without any individual acts, omissions or decisions, rather it is negligence which arises when individual acts, omissions or decisions are directed towards a general rather than a specific set of circumstances.

48 The examples cited by *McLachlin C.J.C.*, of failing to have policies in place to deal with abuse, or negligently placing all residential students in one dormitory, are attributable acts or omissions which could give rise to individual liability in the presence of a duty of care. The fact that the neg-

ligence is described as "systemic" does not imply that it is unattributable to an individual or individuals, rather it implies that the impugned acts or omissions are said to be negligent because they create or maintain a system which is inadequate to protect the plaintiff class from the harm alleged.

49 As McLachlin C.J.C. pointed out in *Rumley* (S.C.C.), *supra*, pleading systemic negligence may give rise to problems in proving causation in individual cases. However, that is not the same as saying there is no reasonable cause of action.

50 In the case at bar the plaintiff is proceeding on the basis of systemic negligence and breach of fiduciary duty. He is not relying on any assertion of vicarious liability for the intentional wrongdoing of any servants or agents of the defendant. Before me the plaintiff did not press his claim insofar as it is based on allegations of breach of fiduciary duty.

(v) Conclusion

51 In my opinion, the claim for breach of fiduciary duty is not well founded, and I conclude that the pleadings do not disclose such a cause of action as required by s. 4(1)(a) of the Class Proceedings Act and accordingly that portion of the claim is not suitable for certification as a class action proceeding.

52 In connection with the claim for systemic negligence I find that the plaintiff has established a cause of action, not negated by the Crown Liability and Proceedings Act. While I accept there may be problems associated with proving causation or even a breach of the standard of care, those problems, although perhaps affecting the ultimate success of the plaintiff's claim, are not such as to deprive him of the opportunity of pursuing it.

53 I am mindful of the defendants' submissions concerning the plaintiff's alleged failure to plead all material facts. The proceedings at this point are at a relatively early stage. My task is to determine whether the pleadings as they stand or may be amended, disclose a cause of action.

54 It may become necessary for the plaintiff, once the discovery process is underway or completed to provide particulars of his claim to the defendant. It seems to me however that it is premature to determine this action on a failure to particularize the specific facts which the plaintiff will ultimately rely on, provided the general facts meet the requirement of rule 19(1). In my view, that threshold has been achieved and I would not give effect to the defendant's submissions on this point.

III. THE LIMITATION PERIOD

(i) The Issue

55 As earlier noted, the Crown relies on s. 269 of the National Defence Act which creates a six month limitation period for actions, prosecutions or other proceedings arising out of acts or defaults in execution of the Act.

56 Section 269 reads as follows:

269.(1) No action, prosecution or other proceeding lies against any person for an act done in pursuance or execution or intended execution of this Act or any regulations or military or departmental duty or authority, or in respect of any alleged neglect or default in the execution of this Act, regulations or any such duty or authority, unless it is commenced within six months after the

act, neglect or default complained of or, in the case of continuance of injury or damage, within six months after the ceasing thereof.

- (2) Nothing in subsection (1) is in bar of proceedings against any person under the Code of Service Discipline.

(ii) Discussion

57 The Crown also relies on s. 24 of the CLPA which reads as follows:

24. In any proceedings against the Crown, the Crown may raise
- (a) any defence that would be available if the proceedings were a suit or an action in a competent court between subject and subject; and
 - (b) any defence that would be available if the proceedings were by way of statement of claim in the Federal Court.

58 The Crown submits that s. 269 is applicable to this action and it is, thus, statute barred, because the allegations on which it is based relate to matters that occurred between 1968 and 1977. The Crown's essential submissions in connection with the limitation period are set out its submissions as follows:

87. The Plaintiff's claim in this case is based upon systemic negligence, or the failure to have in place reasonable policies and procedures to prevent the abuse. The establishment of the cadet organization arose from, and was authorized by, section 46 of the National Defence Act. Therefore, the acts of negligence alleged refer to acts of military personal [sic], named or unnamed, that would arise in the course of their employment or intended pursuance of their duties under the National Defence Act. Therefore the allegations of negligence would be barred by section 269(1) of the Act.
88. As argued above, vicarious liability is generally only available as a cause of action if the Crown servant was acting in the course of his duties. And herein lies the nub. To succeed against the Crown for vicarious liability, a plaintiff would have to establish that the actions of the tortfeasor were authorised by the Crown. That being the case section 269 would be available to the individual tortfeasors who allegedly committed the acts leading to the plaintiff's claim, because these acts were done in the course of carrying out duties authorized by the National Defence Act. Therefore, in accordance with 24 of the CLPA, and the legal reasoning in Scaglione, the limitation period in section 269 is available to the Crown in this situation.

59 In support of its position the Crown relies on *Scaglione v. McLean* (1998), 38 O.R. (3d) 464 (Gen. Div.) and *Zimpelmann v. Canada*, [2001] B.C.J. No. 618 (S.C.). In each of those decisions, the court ruled that s. 269 was available to the Crown as a defence in circumstances where the individual acts giving rise to the action occurred outside the six month limitation period. In each case, it was ruled that by virtue of s. 24 of the CLPA the Crown had available to it any defence open to an individual defendant whether or not that defendant was named.

60 In *Scaglione*, the individual defendant, McLean, was alleged to have sexually assaulted the plaintiff. The court held that her claim against him insofar as it was based on the sexual assault, was

not subject to the limitation period as that activity did not fall within the scope of duties or powers contemplated by s. 269(1) of the National Defence Act. The court went on to hold that insofar as it could be said the Crown was vicariously liable for McLean's acts s. 269, similarly, would be unavailable to the Crown as a defence.

61 In *Scaglione*, some of the claims advanced were based in negligence involving a failure to supervise the conduct of the defendant. The court held in those circumstances the acts alleged were ones which would arise in the course of the employment of military personnel which would fall within the ambit of s. 269. In the result the court concluded that the claim of the plaintiff, insofar as the allegations of negligence were concerned, was statute barred by virtue of s. 269(1) of the National Defence Act, but the claim based on vicarious liability for the intentional wrongdoing of the individual defendant could proceed.

62 In *Zimpelmann v. Canada*, supra, Dorgan J. applied *Scaglione v. McLean*, supra, in the context of an action in which the plaintiff alleged that members of the Canadian Armed Forces negligently performed a training exercise, causing her to fall and suffer injury.

63 Pursuant to an application under Rule 18A Dorgan J. ruled that the six month limitation period set forth in s. 269(1) of the National Defence Act was applicable in the circumstances of the case. The issue before Dorgan J. is set forth at para. 10 of her reasons which reads as follows:

The plaintiff does not argue that the members of the Canadian Armed Forces were not acting in accordance with the National Defence Act, but, rather, argues that the Crown cannot be considered a "person" for the purposes of s. 269(1). In support of that contention, plaintiff's counsel cites the cases of *R. v. Canada (Minister of National Defence)*, [1993] N.S.J. No. 385 (N.S.C.A.) and *Way v. Canada* [1993] F.C.J. No. 374 (F.C.T.D.).

64 In ruling that the Crown can be considered a "person" for the purposes of s. 269(1) of the National Defence Act, Dorgan J. relied on *Scaglione v. McLean* and concluded as follows, at para. 12:

Assuming that the defendant in this case is vicariously liable for the actions of its members, I adopted the approach taken by Swinton J. in *Scaglione*. The plain interpretation of s. 24(1)(a) of the Crown Liability and Proceedings Act gives the Crown the right to use any defence that would be open to it if it were an individual defendant. Section 3 of the Act provides that the Crown is liable for actions as if it were a person. It logically follows, then, that the Crown should be permitted to rely on the defences it would be permitted to rely on if it were a person. The decision cited by counsel for the plaintiff simply do not deal with s. 24(1)(a) of the Crown Liability and Proceedings Act. Plaintiff's counsel attempted to distinguish the *Scaglione* decision by stating it dealt with discoverability. However, that issue did not affect the analysis of the two Federal acts undertaken by Swinton J.

65 The primary distinction between *Zimpelmann*, supra, and the case at bar, is that in *Zimpelmann* there was no question whether the conduct said to found the cause of action fell within the compass of s. 269(1). The only issue was whether in view of ss. 3 and 24 of the CLPA the Crown could be considered a "person" for the purposes of 269(1).

66 In Scaglione, although Swinton J. made a finding that the negligence upon which the plaintiff relied related to acts which occurred in the course of the employment of military personnel, it does not appear that the plaintiff in that case specifically raised the issue that has been raised before me; whether s. 269(1) encompasses all acts or omissions which fall within the duties or powers authorized by the National Defence Act or is limited to those acts or omissions involving a military or departmental duty or authority.

67 The plaintiff submits in the present case that s. 269(1) is part of a class of special limitation clauses the applicability of which are subject to the analysis prevailing in *Des Champs v. Conseil des écoles séparées catholiques de langue française de Prescott-Russell*, [1999] 3 S.C.R. 281; *Abouchar v. Ottawa-Carleton French-language School Board*, [1999] 3 S.C.R. 343; *Berardinelli v. Ontario Housing Corp.* [1979] 1 S.C.R. 275; and *Berendsen v. Ontario*, [2001] 2 S.C.R. 849.

68 It is the plaintiff's submission that those cases establish an analytical framework for determining the crucial question of whether the particular acts, default or neglect alleged to be negligence were done "in pursuance or execution or intended execution of the National Defence Act or regulations or military or departmental duty or authority," as prescribed by s. 269.

69 In *Des Champs*, supra, the Supreme Court of Canada was dealing with a limitation clause in the Public Authorities Protection Act, R.S.O. 1990, c. P. 38 which read as follows:

7--(1) No action, prosecution or other proceeding lies or shall be instituted against any person for an act done in pursuance or execution or intended execution of any statutory or other public duty or authority, or in respect of any alleged neglect or default in the execution of any such duty or authority, unless it is commenced within six months next after the cause of action arose, or, in case of continuance of injury or damages, within six months after the ceasing thereof.

70 There the court was concerned with an action brought by a school superintendent who had been declared redundant by the respondent School Board under the Education Act, R.S.O. 1990, c. E.2. The plaintiff's action was brought eight months after the events giving rise to his cause of action and the respondent school board brought a motion to have his action dismissed, based on the six month limitation period set out in s. 7 of the Public Authorities Protection Act, above. At issue for the court was whether the school board's action in declaring the superintendent redundant and transferring him to a position as a principal of a school was, within the meaning of s. 7, an act, neglect or default done in pursuance or execution or intended execution of any statutory or other public duty or authority such that it could be commenced only within six months after the cause of action arose.

71 In addressing that issue Binnie J. for the majority, noted that the wording of s. 7 of the Public Authorities Protection Act did not give it unlimited scope. In para. 12 of his reasons he wrote as follows:

A few general observations should be stated at the outset. The wording of s. 7 of the Act indicates that the legislature did not intend to throw the protective net of s. 7 around public authorities in Ontario as a matter of status. The reference to the "intended execution of any statutory or other public duty or authority" (emphasis added) limits the protection to public duties and powers and confirms inferentially that a public authority may well have other duties and powers that are

essentially of a private nature. In drawing the line between the public aspects and private aspects, the general principle is that the wording of s. 7 is to be read narrowly and against the party seeking its special protection. This produces an inevitable line drawing exercise that requires the court to examine the nature of the statutory power or duty imposed on the defendant public authority as well as the character of the particular conduct about which the plaintiff complains.

72 It should be noted that s. 269(1) of the National Defence Act although similarly worded to s. 7 of the Public Authorities Protection Act does not draw the same inferential distinction between public and private duties or authority. However, it does refer to "military or departmental duty or authority" which by a similar analysis draws an inferential line between duties of that nature and duties which are not so constituted.

73 It is the plaintiff's submission in the present case that the allegedly negligent acts, default or neglect in relation to the protection of sea cadets from sexual assault and sexual abuse are not intrinsically of a military or departmental duty or authority and hence are not caught by the limitation set forth in s. 269(1).

74 In *Des Champs*, supra, Binnie J.'s analysis of the scope of s. 7 of the Public Authorities Protection Act, although based on the distinction between public and private duties, is of some utility in determining the effect of s. 269(1) of the National Defence Act, specifically whether it operates as a bar to the present proceedings.

75 Bearing in mind that s. 269(1) applies to acts in pursuance or execution or intended execution of the National Defence Act or military or departmental duty or authority, the reasoning in *Des Champs* provides a means of analyzing the relationship of the act in question to the activity protected by the special limitation period set out in s. 269.

76 The approach that Binnie J. recommended in *Des Champs* with respect to s. 7 of the Public Authority Protection Act "or similarly worded limitations statutes" involves a five step analysis.

77 In my opinion the latter four steps set forth by Binnie J. and modified to suit the distinction between s. 269(1) of the National Defence Act and s. 7 of the Public Authorities Protection Act are helpful to an analysis of the applicability of the former section to the cause of action in the present case.

78 Those steps as set out in *Des Champs* are as follows:

2. What was the public authority doing, and pursuant to what duty or power was it doing it?
3. Is the power or duty relied on as part of the plaintiff's cause of action properly classified as entailing "a public aspect or connotation" or on the other hand is it more readily classifiable as "private executive or private administrative ... or subordinate in nature" (per Estey J. in *Berardinelli* at p. 283)?
4. Is the activity of the defendant public authority that is the subject matter of the complaint "inherently of a public nature" or is it more of "an internal or operational nature having a predominantly private aspect" (per Estey J. in *Berardinelli* at p. 284 (emphasis deleted))?

5. Looking at it from the plaintiff's perspective does the plaintiff's claim or alleged right "correlate" to the exercise by the defendant public authority of a public power or duty or does it relate to the breach of public duty or does it complain about an activity of a public character thus classified?

79 It seems to me that if, in the present case, the analytical framework of the above four steps is changed to focus on the "military" or "departmental duty or authority envisioned by s. 269 of the National Defence Act instead of the "public" duty or authority of s. 7 of the Public Authorities Protection Act, the steps are helpful in determining whether s. 269(1) operates as a defence available to the Crown as it was in *Zimpelmann, supra*, and *Scaglione, supra*.

80 In my view, the analysis recommended in *Des Champs* applied to s. 269(1) does not justify a conclusion that the limitation period applies to the cause of action pleaded in the present case.

81 It is difficult to see how the activity at issue could be said to fall within the prescribed duty or authority subject to special limitation in s. 269(1) even though it may legitimately fall within the scope of the National Defence Act. As is made clear in *Des Champs*, a special limitation clause such as that in s. 269(1) is to be construed strictly and against the party relying on it.

82 In the case at bar, the assertion upon which the cause of action is based is "a failure 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."

83 Referring back to the analysis in *Des Champs*, the question is: does the plaintiff's complaint, or the right he asserts, correlate to a military or departmental duty, and if so is it nevertheless "more readily classifiable as ... subordinate in nature" and hence not susceptible to the special limitation period established in s. 269(1).

84 In my opinion, the right at issue - the protection of cadets from sexual assault - does not correlate to either a "military or departmental" duty or authority within the meaning of s. 269(1).

85 "Military" is defined in the National Defence Act as "relating to all or any part of the Canadian Forces". "Department" is defined as meaning the Department of National Defence.

86 Section 43(3) of the National Defence Act, R.S.C. 1970, c. N-4 specifically provided that cadet organizations were not part of the Canadian Forces.

87 Section 43 authorized the formation of cadet organizations under the control and supervision of the Canadian Forces and provides for their training, administration and provision with materiel and accommodation and while, no doubt, the duty of care which the plaintiff asserts to exist arises out of these provisions, protection from sexual assault does not thereby become a "military or departmental" duty or authority any more than the specific decision complained of in *Des Champ*, to declare the plaintiff redundant and place him in a lesser role, constitutes a "public duty" as required to engage the limitation period on s. 7 of the Public Authorities Protection Act.

(iii) Conclusion

88 To put the issue in the context established by *Des Champs*, s. 269(1) does not apply to all the acts or omissions of the defendant's servants or agents performed in the course of their employment. It does not apply when the plaintiff's claim correlates to the exercise of essentially non-military or

non-departmental powers or duties or to the exercise of a power or duty which although perhaps military or departmental is primarily or predominantly subordinate in nature.

89 Military and departmental duty and authority relate to those matters comprehended by the National Defence Act. If, for example, the harm complained of occurred to a cadet as a result of a negligently run training exercise, s. 269(1) might apply, as training is specifically contemplated by the National Defence Act and relates to its purposes. Sexual assault, on the other hand, obviously is neither contemplated by the National Defence Act nor is it related to its purposes and accordingly any duty or authority which is invoked to deal with it is not of a "military or departmental" nature.

90 Even if the acts or omissions complained of could be said to correlate to a military or departmental duty or authority, protecting cadets from sexual assault or abuse arises only incidentally from the duty and authority to train, supervise, administer and provide materials and accommodation to them under s. 43 of the National Defence Act. It is subordinate to the purpose for which the section exists and, using the Des Champ analysis is not susceptible to the special limitation period set out in s. 269(1). It follows, as counsel for the defendant has conceded, that since s. 269(1) does not apply, ss. 3(4)(k) and (l) of the B.C. Limitation Act govern this action and do not permit a limitation defence.

91 I conclude therefore, that the plaintiff's claim, insofar as it rests on assertions of systemic negligence, establishes a cause of action and is accordingly suitable to be considered for certification under the Class Proceedings Act.

CULLEN J.

cp/qi/i/qldrk/qlsng/qlbrl