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Nunavunmi Maligaliuqtiit
NUNAVUT COURT OF JUSTICE
Cour de justice du Nunavut

Citation: ***RPC1 et al. v. the Attorney General of Canada et al., 2020 NUCJ 22***

Date: 20200615
Docket: 08-16-772
Registry: Iqaluit

Plaintiffs: **RPC1, RPC2 and RPC3**
-and-

First defendant: **The Attorney General of Canada**
-and-

Second defendant: **The Commissioner of Nunavut**
-and-

Third defendant: **The Commissioner of the Northwest Territories**

Before: The Honourable Mr. Justice Paul Bychok

Counsel (Plaintiffs): S. Cooper, L. Moore, A. Regal, M. Grzybowska
Counsel (First defendant): A. Fox
Counsel (Other defendants): R. Baxter

Location Heard: Iqaluit, Nunavut
Date Heard: February 14, 2020
Matters: Class action certification application pursuant to the common law and Rule 62 of the *Rules of the Supreme Court of the Northwest Territories*, NWT Reg. R-010-96

REASONS FOR JUDGMENT

(NOTE: This document may have been edited for publication)

I. INTRODUCTION

- [1] This case involves claims for damages brought by former students of Maurice Cloughley against the governments of the Northwest Territories and Nunavut.¹
- [2] Between 1967 and 1981, Mr. Cloughley had been a teacher in several of our isolated communities. He was later charged with 22 sexual offences against some of his former students. In 1996, Mr. Cloughley—as part of a mid-trial negotiated plea agreement—pleaded guilty to nine of those charges while the remaining 13 charges were stayed. The Court sentenced Mr. Cloughley to 10 years in prison.
- [3] The origins of this civil case date back to 30 September 2008 when 37 of Mr. Cloughley’s former students started two separate civil actions. The next step relevant to my decision happened on 16 December 2016 when three of the plaintiffs filed an Originating Notice with the Court. In the Notice, the plaintiffs seek the Court’s permission to certify a class action civil suit seeking damages on behalf of all of Mr. Cloughley’s victims or their estates.
- [4] The plaintiffs’ pleadings² do not indicate the legal authority under which they have filed their application. However, in their written submission, plaintiffs’ counsel states that the application is made pursuant to the common law and Nunavut’s *Rules of Court*.³
- [5] The certification application proceeded through several procedural stages⁴ and was argued before me on 14 February 2020. I reserved my decision. These are my reasons for judgment.

¹ The plaintiffs’ claim against the Government of Canada was discontinued on 14 February 2020. The third plaintiff has also asked the Court for leave to discontinue her claim.

² Pleadings are “Statements in writing served by each party alternatively to his opponent, stating the facts relied on to support his case and giving all details his opponent needs to know in order to prepare his case in answer”. John A. Yogis, Q.C. *Canadian Law Dictionary* (Barron’s, 1983), page 163. Examples include notice of action, statement of claim, statement of defence, counterclaim, reply to the counterclaim and requests for further disclosure.

³ *Chambers Brief in Support of Application* filed 8 December 2016 at para 19.

⁴ One of these procedural stages involved an application to the Court seeking to protest the identity of the plaintiffs. That application was granted by the Court on 5 September 2017.

II. WHY A CLASS ACTION?

- [6] Class actions in civil cases in Canada are a late twentieth century development. A class action permits a small number of representative plaintiffs to prosecute—in this case claims for damages—on behalf of a larger and identifiable class or group of people.
- [7] There are a number of compelling reasons why a class action may be an appropriate procedure. Class actions may facilitate access to justice for plaintiffs who otherwise might not be able to afford to prosecute their claim. Class actions may be an effective vehicle to sanction civil wrongdoing when the cost of prosecuting a claim is greater than the individual cost of the damages. Class actions also promote the efficient use of scarce judicial resources.⁵

III. CLASS ACTION CERTIFICATION LAW IN NUNAVUT

A. The common-law *Dutton* criteria apply in Nunavut

- [8] Unlike most of Canada's jurisdictions, Nunavut has not passed class action legislation. Class actions in Nunavut are permitted by virtue of the common law. The common-law foundation for class actions is found in the decision of the Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v. Dutton* (*Dutton*).⁶

⁵ *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, 272 NR 135 at paras 26-29 [*Dutton*].

⁶ *Ibid.* See also *Fontaine v. Canada (Attorney General)*, 2006 NUCJ 24, 2006 CarswellNun 28 [*Fontaine*].

B. The common-law test for class action certification

- [9] First, the applicants must establish that there is a cause of action against the defendants. Then, they must satisfy the four criteria outlined in *Dutton*.
1. The members of the proposed class must be clearly defined and able to be identified.
 2. There must be issues of fact or law common to all members of the class.
 3. If one class member is successful, then all class members must be successful.
 4. The representative plaintiffs must be able “vigorously and capably” to represent the entire class.⁷
- [10] These *Dutton* common-law criteria were applied in Nunavut in a previous class action certification in *Fontaine v. Canada (Fontaine)*.⁸ They apply equally to the facts of this case.

C. Rule 62

- [11] I turn now to Rule 62 of the *Rules of Court*. The Rule states as follows:

Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all.⁹

- [12] What is meant by the term “common interest” is not defined in the *Rules*.

⁷ *Ibid*, *Dutton* at paras 38-41.

⁸ *Fontaine*, *supra* note 6.

⁹ N.W.T. Reg. R-010-96, duplicated for Nunavut by *Nunavut Act*, S.C. 1993, c. 28, section 29.

[13] As we saw above in paragraph 4, the plaintiffs have submitted that Rule 62, in effect, provides for an identical proceeding as a *Dutton* common-law class action. This interpretation of *Fontaine* was shared in this case by counsel for the Government of Canada who submitted:

In *Fontaine v Canada*, Justice Kilpatrick noted that there is no class action legislation in Nunavut, but that common law class actions can proceed in the Nunavut Court of Justice pursuant to Rule 62 and the Court's inherent jurisdiction to regulate its proceedings.¹⁰

[14] With respect, I do not believe that *Fontaine* provides a solid legal basis for that conclusion. What the court actually said in *Fontaine* was "It is left to the common law and this Court's inherent jurisdiction to regulate any proposed class action".¹¹ The court in *Fontaine* then simply recited Rule 62 verbatim before referring immediately to the applicable *Dutton* common-law test criteria present in that case.

[15] There is no analysis in *Fontaine* of the common interest criterion in Rule 62 and how it compares to the fourfold *Dutton* criteria. Nor did the court explicitly state that Rule 62 opens the door to the *Dutton* common-law class action. Rule 62 is simply cited by the court, but is then left dangling on its own, so to speak.

[16] The cryptic reference to Rule 62 in *Fontaine* may appear to suggest that the court believed Rule 62 to be all but equivalent to the common law criteria in *Dutton*. In my view, however, it remains moot whether the common interest test found in Rule 62 is identical in substance to the common-law class action criteria in *Dutton*. A plain reading of Rule 62 would suggest a less restrictive path to joining the claims of similarly placed plaintiffs than the fourfold *Dutton* common law criteria. As this issue was not argued before me, and it is not necessary to decide this issue to dispose of this case, I will not comment upon it further.

¹⁰ *Written Submissions of the Attorney General of Canada* filed 30 August 2017, para 22.

¹¹ *Fontaine*, *supra* note 6, at para 4.

D. The certification hearing is procedural only

[17] The task of the certification judge is to determine whether the circumstances justify proceeding with the case as a class action. The hearing does not permit the judge to decide on the likelihood of the plaintiffs' success. The evidentiary standard, then, is low.¹² The test has been stated in several ways. The plaintiffs "need only establish a prima facie or arguable case".¹³ The certification judge must permit a claim to go forward unless it is "plain and obvious that the claim cannot succeed."¹⁴

E. The certification criteria must be applied generally

[18] The certification judge must apply the *Dutton* conditions generously to achieve the overriding goals of access to justice, behaviour modification and efficient use of judicial resources.¹⁵

F. The application involves a cost-benefit analysis

[19] The certification judge should account for

the benefits the class action offers in the circumstances of the case as well as any unfairness that class proceedings may cause. In the end, the court must strike a balance between efficiency and fairness.¹⁶

G. There is flexibility to accommodate individual issues

[20] In cases where individual interests arise, a court may impose special procedures once the common issues have been decided.¹⁷

H. The critical importance of notice

[21] A class action certification only binds a member of the class if they receive notice of the application and are given an opportunity to opt out.¹⁸

¹² Warren K. Winkler *et al.*, *The Law of Class Actions in Canada*, (Canada Law Book, 2014), page 24 [*Winkler et al.*].

¹³ *Ibid* at 26.

¹⁴ *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24, 2011 CarswellAlta 763 at para 4 [*Elder Advocates*]. This was a class action certification case.

¹⁵ *Ibid* at 23.

¹⁶ *Dutton*, *supra* note 5, at paras 44, 48.

¹⁷ *Ibid* at para 50.

¹⁸ *Ibid* at para 49.

I. Certification requires impartial judicial oversight

[22] It is not enough for the parties to agree that certification is appropriate. The certification judge must ensure that the foundational conditions have been met, and that certification is appropriate.¹⁹

IV. THE PARTIES' POSITIONS

[23] It was clear to me at the hearing that the lawyers have been communicating regularly to refine the outstanding issues in this case. The parties presented me with a draft certification order which contains the substance of their agreement. I commend counsel for that effort.

A. The plaintiffs

[24] Counsel for the plaintiffs says that they have satisfied all the prerequisite conditions to justify certification. Counsel defined the class as all those students who were taught by Mr. Cloughley between August 1, 1967 and July 30, 1981 and who were sexually assaulted by him.²⁰ Counsel outlined their efforts in determining that the proposed class size “is at least 50”.²¹ Counsel listed the issues common to all members of the class,²² stating that the evidence “on each common issue ... will be identical”.²³ Counsel referred the court to the affidavits filed by the three applicants in which they acknowledged their obligations and potential liability for costs.²⁴

[25] Plaintiffs’ counsel also referred to the detailed affidavit filed by Paul Battaglia, the president and founder of Trilogy Class Action Services (Trilogy).²⁵ The applicants propose to retain Trilogy to administer the claims and devise and implement a notice plan geared towards notifying members of the proposed class.

¹⁹ *Winkler et al.*, *supra* note 12, at page 35.

²⁰ *Chambers Brief in Support of Application*, *supra* note 3, at para 23.

²¹ *Ibid* at para 14. On 14 February 2020, counsel clarified that there are 46 plaintiffs.

²² *Ibid* at para 28.

²³ *Ibid* at para 31.

²⁴ *Ibid* at para 35.

²⁵ Nunavut Schools Sex Abuse Class Action Claims Administration Proposal, being Exhibit A to the affidavit of Shantelle Smith, sworn to on 3 June 2019.

B. The defendants

[26] The governments of the Northwest Territories and Nunavut have retained the same lawyers to represent them. The defendants “do not contest the certification of this action” subject to one point. They object to having the question whether the defendants owed the plaintiffs a “fiduciary duty” of care²⁶ included as a common issue.²⁷

V. ISSUES

[27] There are three issues which I must decide.

- A. Have the plaintiffs satisfied me that class action certification is appropriate in the circumstances of this case?
- B. If the answer to question one is yes, should the list of common issues include reference to a possible breach of a fiduciary duty owed by the defendants to members of the class?
- C. If the answer to question one is yes, are there any special conditions which I ought to include in the certification order?

VI. ANALYSIS

[28] I shall deal with each issue in turn.

A. Have the plaintiffs satisfied me that class action certification is appropriate in all the circumstances?

[29] The pleadings establish a clearly defined class of potential plaintiffs—former students who were sexually abused by Mr. Cloughley. Subject to issue two, the pleadings establish common issues which arose directly from the teacher-student relationship which lies at the heart of the litigation. Clearly, success by one plaintiff will mean success for the other members of the class. Lastly, the plaintiffs have proposed a detailed and reasonable litigation and notice plan—one which will be supervised by the Court.²⁸

²⁶ A fiduciary duty arises when a person “has rights and powers he must exercise for the benefit” of another person. See, John A. Yogis, Q.C. *Canadian Law Dictionary* (Barron’s, 1983), page 87.

²⁷ *Response Brief* filed February 10, 2020 at para 32(i).

²⁸ “Absent comprehensive legislation, the courts must fill the void under their inherent power to settle the rules of practice and procedure as to disputes brought before them”. *Dutton, supra* note 4, at para 34.

[30] I am also satisfied that certification will enhance the ability of some members of the class—who live in remote communities where there are no resident lawyers—to pursue their claim. Given the ongoing vulnerability of our youth in our remote communities, class action litigation may have a beneficial educational impact (behaviour modification). Class action litigation will certainly permit the Court, as well as members of the class, to allocate resources more efficiently than several independent actions.

[31] The answer to question one, then, is yes.

B. Should the list of common issues include reference to a possible breach of a fiduciary duty owed by the defendants to members of the class?

[32] Defendants' counsel argued that the pleadings do not establish a cause of action based on any fiduciary duty owed by the defendant governments to the plaintiffs. He based his argument on the *Elder Advocates* case where McLachlin C.J.C. (as she then was) reviewed the law pertaining to fiduciary duty.

[33] Counsel grounded his argument in two points. First, there are only a limited number of circumstances where the government owes a fiduciary duty; for example, in the area of Aboriginal land title. Second, fiduciary duties are “typically not determined on a collective or a group basis ... [any fiduciary duty] would have to be established in the individual trial individual issues in any event” [sic].²⁹

[34] I do not agree. In my view, this case does raise a legitimate and arguable question whether the defendants owed a fiduciary duty of care to Mr. Cloughley's former students.

²⁹ Transcript of Proceedings held on February 14, 2020, pages 15-17.

[35] The classes of fiduciary relationships are not closed. Whether a fiduciary relationship exists, or not, depends upon the circumstances of the relationship.³⁰ Cases of fiduciary duty implicating government will arise only in “limited and special circumstances”.³¹ The requisite analysis – which pertains both to individual and ad hoc class fiduciary relationships³²—must consider the following three factors:

1. The evidence must show that the alleged fiduciary gave an undertaking of responsibility, express or implied, to act in the best interests of a beneficiary.
2. The alleged fiduciary must owe the duty to a defined person or class of persons who are or were vulnerable in that the alleged fiduciary has or had a discretionary power over them.
3. The evidence must show that the alleged fiduciary enjoyed power which may or did affect the beneficiary’s legal or substantial interests.³³

[36] For the purposes of the certification hearing, I must assume that the facts alleged by the plaintiffs are true.³⁴ I take judicial notice that Mr. Cloughley arrived here very shortly after the Inuit were forced off the land by the authorities³⁵ and made to live in artificial and newly created remote settlements.

[37] It is a fact that the authorities undertook to and did establish and maintain localized health care, housing, schools and law and order in these newly created settlements. Henceforth, government exercised colonial power over the Inuit and enforced it, in part, by armed authority. Mr. Cloughley began teaching in Nunavut in August 1967.

[38] The authorities placed Mr. Cloughley in a position of real authority and power over his young Inuit charges. These Inuit children were extremely vulnerable by the very essence and structure of this student-teacher relationship. Mr. Cloughley abused his authority and power over these children.

³⁰ *Elder Advocates*, *supra* note 14, at para 29.

³¹ *Ibid* at para 37.

³² *Ibid* at para 36.

³³ *Ibid* at paras 30-34.

³⁴ *Ibid* at para 6.

³⁵ By “authorities”, I mean the federal and territorial governments.

[39] At face value, each one of the three facets of a fiduciary relationship appear to be present in this case. In the unique and special circumstances of this case, I cannot say that the claim of a fiduciary duty of care owed by the defendants to this class of former students is merely speculative. To put it another way, it is not plain and obvious to me that the plaintiffs' fiduciary duty claim will fail at trial.

[40] The answer to question two, then, is yes.

C. If the answer to question one is yes, are there any special conditions which I ought to include in the certification order?

[41] At the hearing in February, I raised the issue of the many Inuit who find themselves homeless in southern Canada. There are many reasons why people find themselves homeless; including mental health issues and ongoing trauma from childhood sexual abuse. I am concerned lest any of Mr. Cloughley's victims find themselves in that circumstance. Consequently, I further direct that the revised certification order include the following additional notice provision:

The Short-Form Notice (see Schedule "A") will be forwarded for posting to all homeless shelters for men and woman located in Montreal, Ottawa, Winnipeg and Edmonton.

VII. DECISION

[42] I certify the present litigation to proceed as a class action, I allow the fiduciary claim to proceed to trial, and I grant permission to RPC3 to discontinue their action. I also direct the plaintiffs to file forthwith with the Court their Statement of Claim.

[43] Counsel for the plaintiffs will provide forthwith a revised draft certification order for my review and signature.

Dated at the City of Iqaluit this 15th day of June, 2020

Justice P. Bychok
Nunavut Court of Justice