



[2022] 2 F.C.R. D-11

## INDIGENOUS PEOPLES

*Related Subjects: Crown; Practice; RCMP*

Appeal from Federal Court order (2021 FC 656) certifying action as class proceeding — Amended statement of claim alleging respondent, Aboriginal living in Northwest Territories, assaulted, insulted by RCMP officers following arrest, sustaining lasting physical, psychological harm as a result — Respondent commencing proposed class proceeding — Putative class described as “All Aboriginal Persons . . . who allege that they were assaulted . . . while being held in custody or detained by RCMP Officers in the Territories” — Relief sought including declaratory, monetary relief for systemic negligence, breach of fiduciary duty, breaches of *Canadian Charter of Rights and Freedoms*, ss. 7, 15 — Appellant submitting conditions for certification not met — With respect to first criterion (reasonable cause of action) amended statement of claim repeatedly referring to “establishment” of RCMP in Territories as giving rise to liability in systemic negligence — Decision to establish RCMP as police force in Territories falling squarely within definition of “core policy decision” — Supreme Court of Canada establishing that “core policy decisions” of legislative, executive branches shielded from liability for negligence — Therefore plain, obvious that decision to establish RCMP in Territories cannot be subject of claim in systemic negligence — Portions of amended statement of claim pleading establishment as part of systemic negligence claim should be struck — Matter remitted to motion judge to resolve any issues as to what if any further portions of pleading impermissibly advancing claim targeting “core policy” decisions — Motion judge also erred in concluding not plain, obvious that breach of fiduciary duty cause of action would fail — Supreme Court stating that “party asserting the [fiduciary] duty must be able to point to a forsaking by the alleged fiduciary of the interests of all others in favour of those of the beneficiary, in relation to the specific legal interest at stake” — Respondent not doing so here — First certification condition met, but only in relation to systemic negligence claim (as pruned) and Charter claims — As to second criterion (identifiable class) motion judge noted that class definition based on claiming to have suffered injury, loss, or damage as a result of alleged misconduct could be accepted — This was first time Federal Court of Appeal had to consider appropriateness or inappropriateness of claims-based class definitions — Claim-based class definition applied in this case sufficiently objective having regard to purposes of defining class — Motion judge not erring on “identifiable class” issue — Turning to third criterion (whether the claims of the class members raise common questions of law or fact) with two exceptions, no palpable, overriding error in motion judge’s conclusion some basis in fact for common questions certified — First exception flowing from conclusion claim for breach of fiduciary duty cannot be certified — Question directed to this cause of action should therefore be set aside — Second exception relating to motion judge’s certification of question concerning aggregate damages — Record before motion judge, litigation plan, contained no evidence of any method for conducting aggregate assessment — In face of such factual vacuum, no basis in fact for certifying common question related to assessment of aggregate damages — Amendment to certification order therefore required to delete common question on aggregate damages — Such deletion not precluding common issues trial judge from concluding that requirements for aggregate award of damages met and from making aggregate award — Finally, motion judge not erring with respect to the last two criteria (class action preferable procedure; adequate representative plaintiff) — Appeal allowed in part; certification order set aside, remitted to Federal Court to be amended in accordance with these reasons.

CANADA (ATTORNEY GENERAL) V. NASOGALUAK (A-188-21, 2023 FCA 61, Laskin J.A., reasons for judgment dated March 17, 2023, 41 pp.)