SUPREME COURT OF YUKON

Citation: *GX v Yukon (Government of)*, 2023 YKSC 51

Date: 20230906
S.C. No. 22-A0097
Registry: Whitehorse

BETWEEN:

GX, by their Guardian ad litem, YY and
TA by their Guardian ad litem BB in a representative capacity on behalf of all students and former students of Jack Hulland Elementary School who were subject to holds and restraints and/or who were locked in a room and/or placed in seclusion between January 1, 2002 and June 30, 2022

PLAINTIFFS

AND

Government of Yukon, Department of Education
Jack Hulland Elementary School Council of Attendance Area #22

DEFENDANTS

Before Chief Justice S.M. Duncan

Counsel for the Plaintiffs	James R. Tucker, Luke Faught, Stephanie Dragoman, Joe Fiorante, David G.A. Jones and Naomi J. Kovak
Counsel for the Defendant, Government of Yukon, Department of Education	I.H. Fraser and Lesley Banton

REASONS FOR DECISION

I. INTRODUCTION

[1] Two former students of Jack Hulland Elementary School ("JHES") allege they were subject to holds and restraints and were locked in a room and/or placed in seclusion while they were at school. They have commenced an action through their litigation guardians against the Yukon government, Department of Education ("Yukon government") for harm they say was caused to them by these experiences.

[2] This application by the plaintiffs to continue this action as a representative proceeding is brought on behalf of all students at JHES who experienced holds, restraints and seclusion and/or being locked in a room while at the school at some point between January 1, 2002, and June 30, 2022.

[3] The plaintiffs claim that the Yukon government allowed these practices at JHES to continue during the operative period, contrary to the applicable standard of care and their fiduciary obligations to the students. The absence of oversight of JHES practices by the Yukon government, including JHES's failure to develop and/or ensure implementation of appropriate policies and procedures relating to the use of holds, restraints and involuntary seclusion, contributed to the breach of the duty of care and of fiduciary duty. The plaintiffs also claim that the Yukon government is liable for the torts of assault, battery and false imprisonment for the same practices. They allege that by allowing these practices to continue, the Yukon government was the cause of harm and injury to them for which they are entitled to damages.

[4] There is no class action or representative action legislation in the Yukon, unlike many other jurisdictions in Canada. This action was started under Rule 5(11) of the *Rules of Court* of the Supreme Court of Yukon which provides:

> Where numerous persons have the same interest in a proceeding, other than a proceeding referred to in subrule (17), the proceeding may be commenced and, unless the court otherwise orders, continued by or against one or more of them as representing all or as representing one or more of them.

[5] The Supreme Court of Canada wrote in *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 ("*Dutton*") at para. 34: "[a]bsent comprehensive [class action] 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". This approach was adopted and followed by this Court in *Fontaine et al v Canada et al*, 2006 YKSC 63 ("*Fontaine*") at paras. 32 and 34, and in a preliminary ruling in this action. The principles in *Dutton*, as well as the growing body of case law in jurisdictions with class action legislation, where appropriate, will guide the determination of this application. Although technically this proceeding is a representative proceeding under Rule 5(11), I will refer to it in this decision as a class action or class proceeding, for ease of reference.

[6] There are four conditions for certifying a class proceeding (*Dutton*). In this application, two of these conditions are in dispute: 1) whether there are one or more issues of fact or law common to all class members and 2) whether success for all class members is required. The Yukon government has conceded the other two conditions. I will address all of them in these reasons.

[7] Also disputed in this case is whether the Court should exercise its discretion not to certify this class action even if it meets the four *Dutton* conditions because it would not be fair or efficient. Put differently, the Yukon government disputes that a class proceeding is the preferable procedure for the litigation of this matter. In a jurisdiction like the Yukon where there is no class action legislation requiring the Court to consider whether a class proceeding is the preferable procedure, the Court can still exercise discretion to deny the certification application if it is of the view there is a better process for the fair and efficient resolution of the dispute. The Yukon government argues this proceeding is best resolved by way of a case managed joinder of individual actions.

[8] In the following I will briefly review the background – the claim and defence as well as the evidence provided on this application by the proposed plaintiffs. I will then

review the common law test for certification and the legal principles to be applied. Next, I will address the legal principles and arguments about the common issues, whether success for all class members is required, and whether discretion should be exercised to proceed with a different form of dispute resolution. Finally, I will briefly address the other two undisputed conditions for certification.

II. BRIEF CONCLUSION

[9] There are sufficient common issues in the plaintiffs' claim to justify the certification of this matter as a class action. Success for some class members will not conflict with other class members who may not be successful. The class proceeding is a more efficient, economical, and accessible way of proceeding than a joinder of individual actions. The class definition is clear as suggested with the exception of an amendment to the starting date, and the representative plaintiffs can adequately represent the class.

[10] The question of whether the staff committed the torts of assault, battery and forcible confinement will not be certified as a common issue. The other proposed common issues will be certified.

III. BACKGROUND

a) General

[11] Any factual findings in this decision are for the purpose of this application only. A court makes no findings of fact on the merits of the case in a certification application (*Pro-Sys Consultants Ltd v Microsoft Corporation,* 2013 SCC 57 ("*Microsoft*") at paras. 99, 102, 105).

[12] The following background is from the pleadings and the affidavits filed on this application.

[13] JHES is a public elementary school in Whitehorse, with students from Kindergarten to Grade 7.

[14] The plaintiffs say that since 2002, holds, restraints, and involuntary seclusion were regularly used at JHES in circumstances where there was no risk of imminent harm to the student or someone else. In or around 2008, a classroom was modified to include several small enclosed (except for the top) cubicles, with enough room for a desk and chair, and a glass door. The classroom was called the “Study Hall” or “the Nest”. I will use these terms interchangeably. Students were sent to the cubicles in the Nest for varying periods of time and often without direct supervision. At some point a video surveillance camera was installed allowing the students in the Nest to be observed remotely.

[15] Evidence was filed by the plaintiffs in the form of affidavits from the following people:

i. parents of students who experienced holds, restraints, and seclusion without the parents’ full knowledge of the extent and frequency;

ii. former students and potential class members describing the holds, restraints and seclusion, and their understanding of the reasons for them;

iii. a former school counsellor at JHES who wrote “restraints and seclusion were routinely used on students in situations where there was no risk of imminent harm to a student or staff member”;

iv. a former school superintendent who reviewed documentation (called Workplace Risk Assessments and incident reports) spanning many years, showing the use of physical force to remove children from classrooms for non-compliance, the inappropriate use of restraints, and the use of unsupervised seclusion as a form of discipline, as well as concerns raised by Student Support Services about the misuse of holds on students at JHES and misunderstandings by staff of non-violent crisis intervention training;

v. the expert evidence of Dr. Nadine Bartlett, an assistant professor at the University of Manitoba in the department of Educational Administration, with expertise in special education and the use of physical restraints and seclusion in schools and education policy, describing policies, procedures and acceptable standards of practice for the use and oversight of holds, restraints and seclusions in Canadian elementary schools as emergency response procedures, as distinct from behavioural management strategies, and the possibility of assessing the adequacy of the JHES' practices against such acceptable standards.

[16] The two representative plaintiffs attended JHES for some years, starting in 2015 and 2017. TA and his mother describe TA being held and dragged by staff members while he was in an emotionally distressed state. Both TA and GX describe being forcibly removed from the classroom and taken to the Nest on numerous occasions, often unsupervised and often for prolonged periods of time. The parents understood the Nest was a "safe space" or quiet space where the children could emotionally regulate and

calm down. GX understood that the Study Hall was a punishment that could be avoided if he behaved better. Often, he was watched through a camera. TA's visits to the Nest appear to have begun as early as Kindergarten or Grade one.

[17] The evidence of other former students and their parents who are potential class members is similar: they were subject to physical restraints, forcibly taken or escorted to the Study Hall/Nest when they refused to do their schoolwork or were otherwise disobedient. They understood it was punishment for misbehaving in class. They describe prolonged periods in the Study Hall, sometimes as long as three hours, including during recess or lunch.

[18] The proposed class is described as:

> All students and former students of Jack Hulland who were subject to holds and restraints and/or who were locked in a room and/or placed in seclusion between January 1, 2002 and June 30, 2022 (the "Class" or "Class Members").

[19] The defendant, Yukon government (through the Department of Education and the Minister of Education) is responsible for the operation and management of any school where there is a School Council or Committee in place, under the *Education Act*, RSY 2002, c 61.

[20] The plaintiffs have settled their claims against the defendant School Council so they are no longer actively participating in this litigation except according to the terms of settlement.

b) Statement of Claim

[21] The second amended statement of claim ("statement of claim") alleges the following causes of action – negligence, breach of fiduciary duty, liability for the torts of

assault, battery, and false imprisonment, and vicarious liability for acts and omissions of the staff of JHES.

Negligence

[22] The plaintiffs allege the Yukon government owed a duty of care to students of JHES to provide and ensure a safe learning environment, free of assault, battery, forcible confinement, false imprisonment and corporal punishment, and to minimize the risk of physical and mental harm to students. The Yukon government knew or ought to have known about the existence and implementation of the "forcible confinement policy" or any policies at JHES that directed and permitted the use of holds and restraints on and seclusion of students, including the construction and use of the Nest. The claim also alleges the Yukon government failed to provide adequate measures to supervise and oversee the implementation of these policies at JHES and failed to protect students from physical and emotional harm as a result.

Fiduciary duty

[23] The plaintiffs allege the Yukon government – specifically the Department of Education and the Minister of Education – is in a special relationship with students of JHES and the proposed class members were a vulnerable group because they are minors. The Yukon government breached its fiduciary obligations to the students because it failed to provide a learning environment free of corporal punishment and failed to prevent the use of holds and restraints on and seclusion of the students.

Torts of assault, battery, and false imprisonment

[24] The plaintiffs allege that all class members who were subjected to holds were assaulted, battered, or falsely imprisoned. All those who were locked or barred in the Nest or another room at JHES were falsely imprisoned.

Vicarious liability

[25] The Yukon government is alleged to be vicariously liable for the actions of the staff at the JHES, including the use of holds and restraints on, and seclusion of the plaintiffs and class members. The staff who implemented the policies and practices at issue were all employees of the Yukon government.

c) Defence

[26] The following summary of the Yukon government's defence is taken primarily from their oral and written submissions at the hearing of this application. An amended statement of defence was filed after argument on this hearing concluded and while this decision was being written. The plaintiffs objected to my consideration of the amended statement of defence. The Yukon government advised the amendments were consistent with its submissions at the oral hearing and were made for clarification. I have relied on the Yukon government's oral and written submissions of their defence for the purposes of this application.

[27] Essentially, the Yukon government states they are not "running away" from their responsibilities raised by the allegations in this proceeding. Their primary objection is to the form of proceeding: they say it should not be a class action, but individual actions joined and case managed together. The Yukon government accepts liability for harm once the torts of assault, battery or false imprisonment are proved. They state their

liability for the torts can only be determined by an assessment of the individual facts in each instance.

IV. LEGAL PRINCIPLES

a) Conditions and Evidentiary Basis for Certification of Class Action at Common Law

[28] The conditions for certification of a class proceeding where there is no class action legislation are set out in *Dutton*. These were adopted and confirmed in the Yukon in *Fontaine* and in an earlier decision in this case (*GX v Yukon (Government of)*, 2023 YKSC 22):

i. the class must be capable of clear definition;

ii. there must be issues of fact and law common to all class members;

iii. success for one class member must mean success for all, in the sense that all class members will benefit from the successful prosecution of the action to some extent and success for one class member must not mean failure for another; and

iv. the class representative must adequately represent the class.

[29] A court has the discretion not to certify a class action even if all four conditions are met. The test for not certifying is similar to the preferable procedure test required in some class action legislation: efficiency and fairness must be balanced and an assessment of the relative advantages of a class action over other forms of litigation must be made.

[30] A court decides at a certification hearing whether the action can proceed as a class action. The certification application is primarily a procedural one. It does not involve any adjudication on the merits of the action, any weighing of the evidence or

consideration of the strength of the case (*Microsoft* at paras. 99, 102, and 105). There is no need to resolve conflicting facts or evidence (*Hollick v Toronto (City)*, 2001 SCC 68 ("*Hollick*") at paras. 24-25; *Microsoft* at paras. 99-102).

[31] The evidentiary standard to be met for certification is low. The court must find there is some basis in fact for each of the certification requirements (*Good Guys Recycling Inc v 676083 BC Ltd*, 2023 BCCA 128 at para. 71). The Court is not required to determine whether the acts underlying the common issues actually occurred at this stage. The court must be satisfied that the matter can continue as a class proceeding without "foundering at the merits stage" because the certification requirements have not been met (*Microsoft* para 104).

b) Purpose of class actions

[32] Class actions offer three important advantages over a multiplicity of individual suits: judicial economy, access to justice, and behaviour modification. The Court in *Dutton* stated:

> [27] … First, **by aggregating similar individual actions**, **class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis.** The efficiencies thus generated free judicial resources that can be directed at resolving other conflicts, and can also reduce the costs of litigation both for plaintiffs (who can share litigation costs) and for defendants (who need litigate the disputed issue only once, rather than numerous times): …
>
> [28] Second, **by allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually.** Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied: …

> [29] Third, **class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public**. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery. Cost-sharing decreases the expense of pursuing legal recourse and accordingly deters potential defendants who might otherwise assume that minor wrongs would not result in litigation: … [citations omitted; emphasis added]

c) Common issues of fact or law

[33] Whether or not there are common issues in this matter is the primary source of the dispute between the parties in this application.

[34] The threshold to achieve commonality is low. The plaintiffs must show by some basis in fact that there are one or more common triable factual or legal issues that, once determined, will advance the litigation (*Finkel v Coast Capital Savings Credit Union*, 2017 BCCA 316 at para. 22; *Doucet v The Royal Winnipeg Ballet (c.o.b. Royal Winnipeg Ballet School)*, 2018 ONSC 4008 ("*Doucet*") at para. 14). The common issue or issues should avoid duplication of fact finding or legal analysis of an issue. In this way it fulfills two of the class action purposes: facilitating judicial economy and improving access to justice (*Doucet* at para. 86).

[35] The common issues need not predominate over the individual issues, but the class members' claims must share a substantial common ingredient to justify a class action. The court must examine the significance of the common issues as they relate to the individual issues (*Microsoft* at para. 108).

[36] Not every common issue must be determinative of liability for every class member and every defendant. The resolution of a common issue does not have to be

sufficient to support relief (*Campbell v Flexwatt Corp.* (1998), 98 BCAC 22 at para. 53). However, the common issue or issues must advance the resolution of every class member's claim (*Doucet* at para. 86). This does not necessarily equate to each class member succeeding on each common issue. It is not necessary that all class members benefit to the same extent, or even benefit at all. However, success for one class member must not result in the failure for another (*Vivendi Canada Inc v Dell'Aniello*, 2014 SCC 1 ("*Vivendi*") at para. 45). The resolution of the common issue must not give rise to conflicting interests among class members.

V. PROPOSED COMMON ISSUES

[37] The plaintiff has identified the following common issues in this case:

i. Did the staff commit the torts of assault, battery, and/or false imprisonment when subjecting the class members to holds, restraints, and/or seclusion?

ii. Did the defendant owe a duty of care to the plaintiffs?

iii. Did the defendant breach the duty of care owed to the plaintiffs?

iv. Did the defendant owe fiduciary obligations to the plaintiffs?

v. Did the defendant breach its fiduciary obligations to the plaintiffs?

vi. Is the defendant vicariously liable for the conduct of the staff of JHES?

vii. Does the conduct of the defendant merit an award of punitive damages?

a) Yukon government position

[38] The four proposed common issues emphasized in bold have not been conceded by the Yukon government. The Yukon government has conceded the proposed common issues in ii, iv and vi: they agree they owe a duty of care to the plaintiffs, they owe fiduciary duties to the plaintiffs, and they are vicariously liable for the conduct of the

JHES staff. The effect of their admissions on the preferability of a class action proceeding will be discussed below.

[39] The Yukon government argues that the remaining proposed common issues will not advance the litigation in a sufficiently meaningful way for a significant number of class members. They say resolution of each of the remaining proposed common issues depends on individual findings of fact for each claimant. They argue this case is distinguishable from the other institutional abuse cases (such as: *Rumley v British Columbia*, 2001 SCC 69 ("*Rumley*"); *Cavanaugh v Grenville Christian School*, 2014 ONSC 290 ("*Cavanaugh* 2014 ONSC 290"); *White v Canada (Attorney General)*, 2004 BCSC 99 ("*White*"); *Cloud v Canada (Attorney General)* (2004), 73 OR (3d) 401 ("*Cloud*"); *Liptrot v Vancouver College Limited*, 2023 BCSC 346 ("*Liptrot*")) because the existence of an actionable wrong in this case has not been proved or admitted. In the other systemic negligence cases, the Yukon government says it was established or agreed that the underlying conduct was an actionable wrong in and of itself. What remained was to establish that the actionable conduct occurred, an individual exercise. According to the Yukon government, the common issues in the other institutional abuse cases was whether the institution was vicariously liable for the wrongful acts of its employees, or liable in negligence or breach of fiduciary duty stemming from their failure to discover or prevent the actionable conduct.

[40] In this case, the Yukon government says the harm complained of may not be actionable in all cases. There may be legal justifications or defences for the holds, restraints or seclusion, depending on the facts of each case. A hold, restraint or seclusion in one situation may be inappropriate and actionable, while in another

situation, it may be an appropriate and reasonable response to a student's difficult behaviour. An individual inquiry is essential in every case in order to determine if the torts occurred, or if there are valid legal defences. A series of repeated individual harms is not commonality (*Doucet* at para. 101; *Hollick* at paras. 27-32; *Chadha v Bayer Inc* (2003), 63 OR (3d) 22 (CA) at paras. 25, 52, 65, 68).

[41] The Yukon government likens this case to *Fehringer v Sun Media Corp*, [2002] OJ No 4110 (Ont Sup Ct) ("*Fehringer*") aff'd (2003), 39 CPC (5th) 151 (Ont Sup Ct). The plaintiffs, who were women photographed as "sunshine girls" for the Toronto Sun newspaper, alleged sexual assault and sexual harassment by a photographer employed by the defendant newspaper. The court denied certification on the basis there were no common issues because the individual inquiries would have to be examined first. Otherwise, the proposed common issues of vicarious liability and systemic negligence would have to be determined in a factual vacuum, or by an examination of each claim individually.

[42] The Yukon government's position also follows the reasoning of the court in *Doucet*, a case similar but with some distinguishing features on its facts to *Fehringer*. In *Doucet*, an individual defendant, an employee of the Royal Winnipeg Ballet School who was an instructor as well as a photographer, allegedly engaged in misconduct at photo shoots of ballet students at the school. The school was alleged to be vicariously liable for his acts, negligent in failing to supervise him, and in failing to act when they knew of his misconduct. The court found the common issues included whether the individual photographer and the school owed a duty of care to the dancers, and if so, what was the applicable standard of care for both. However, the court held the issue of whether

there was a breach of the standard of care required a determination of the individual facts of each case. Without fully explaining why it required an individual assessment in each case, the judge in *Doucet* wrote that the case was unlike "a train crash, where the railroad company's liability could be determined for all the passengers on the train with the quantification of their damages to be determined at the individual issues trials" (at para. 93). The Yukon government advances a similar argument here.

[43] The Yukon government argues that to find that breaches of the standard of care and of fiduciary duty occurred, it is first necessary to find there has been an actionable wrong. This is an individual exercise. Absent a finding that a tort has been committed in an individual case, they say there can be no finding of breach (*Fehringer* at para. 25).

[44] The Yukon government further states that once an actionable wrong in an individual class member's case has been found to occur, it will accept responsibility for damages arising from that actionable wrong. However, if after an individual assessment no actionable wrong is found, then there can be no systemic or any other liability on the Yukon government's part, because no recoverable damages have been suffered. In other words, even if there is harm, there is no liability because of a successful defence to the tort claim.

[45] Whether or not an actionable wrong is found to occur, the Yukon government says no systemic issue is in dispute in this case. Counsel for the Yukon government stated in oral submissions that the plaintiffs had not claimed in negligence, although they acknowledge the systemic negligence claim in their written submissions.

b) Plaintiffs' position

[46] The plaintiffs say the Yukon government's arguments against the common issues misconstrue the nature of their claim and the issues before the Court. They say their allegations related to the systemic conduct will advance the claims of the class members because the Court will determine if the relevant policies, practices, rules or procedures, or their absence, created harm for the class members. This is similar to the other institutional abuse cases where common issues related to the breaches of standard of care and fiduciary duty were certified. The plaintiffs say those systemic issues do not require individualized assessment of claims. They are not contingent on a finding of underlying actionable conduct (i.e. assault, battery, false imprisonment). That is a conflation of the causation element of the claim with the analysis of the breach of the standard of care. It is not necessary for causation and harm, admittedly individual issues in this case, to be determined first.

[47] The plaintiffs say the alleged harmful institutional conduct is similar to that in the case of *Cavanaugh* 2014 ONSC 290. In that case, the policies and procedures at the school were the alleged source of harm. Some of the alleged underlying tortious conduct may not necessarily have constituted an actionable wrong in and of itself. For example, there were also allegations of ostracism, interrogation, indoctrination in fanatical religious teachings and a failure to accommodate learning disabilities. This conduct was alleged to have been condoned or encouraged by the institution's policies and procedures. The court found that the allegations of harm from the policies and procedures at the school, or their absence, gave rise to common issues. The

determination of causation and actual harm and its quantification was left to individual assessments.

[48] The plaintiffs argue *Cavanaugh* is analogous to the case at bar because the common issues in both involve the consideration of matters such as the scope of the duties owed by the defendants to class members, particularly relating to discipline; the practices and policies, if any, that existed at the schools and their impact on those duties; any practices or policies that should have been in place to prevent harm; whether certain of the schools' alleged disciplinary practices were systemic and a breach of the schools' duties to its students.

VI. ANALYSIS

a) Common Issue iii -was there a breach of the duty of care?

[49] The Yukon government has mischaracterized the plaintiffs' claims of systemic negligence and breach of fiduciary duty. This case is similar to *Liptrot* (and other institutional abuse cases such as *Rumley*, *Cloud*, *White*) where "the plaintiff seeks to establish, not just that abuse occurred, but that the institutional defendants and [the individual tortfeasor] are legally responsible because of their systemic decisions, actions, policies and practices" (*Liptrot* at para. 140). The Yukon government's arguments misunderstand the role played by the institutional policies, procedures and practices both in the claims of the case at bar and in the other institutional abuse cases. As well they have overlooked how the standard of care applicable to all students affects the tort liability.

[50] The following elaborates on the plaintiffs' claims in negligence summarized above. The plaintiffs allege that the policies, procedures and practices related to holds,

restraints and involuntary seclusion, or the absences of policies about them, are harmful to the class members. The policies, or absence of them, failed to prevent harm from occurring to the class members, or, put another way, they created a risk of harm to the class as a whole. The plaintiffs allege that the Yukon government knew of and authorized, condoned, or encouraged those policies. In the alternative they ought to have known of the policies and that failure was negligent or reckless.

[51] The plaintiffs further allege that the implementation of the policies was known, permitted, condoned, or encouraged by the Yukon government. Alternatively, the Yukon government ought to have known about the implementation of the policies and their failure to know was negligent, causing or contributing to harm to the class members.

[52] The plaintiffs similarly claim that the Yukon government's knowledge or putative knowledge about the construction, existence, and use of the Nest for seclusion of the students was negligent and/or reckless and caused or contributed to harm.

[53] The plaintiffs particularized the negligence claim in their statement of claim. In addition to the allegations described above, they claimed the Yukon government:

- failed to provide a learning environment free of violence, including corporal punishment;
- failed to ensure that JHES students with intellectual, communicative, behavioural, physical or multiple exceptionalities were provided programs delivered in the least restrictive and most enabling environment practicable;
- failed to take adequate measures to supervise and oversee the staff who implemented the policies, including the use of holds and seclusion; and

- failed to take adequate measures to protect students from physical and emotional harm, including the holds and seclusion.

[54] All these allegations of negligence are denied by the Yukon government.

[55] I agree with the plaintiffs that the allegations of negligence in this case are similar to those found to be common issues in *Cavanaugh*. In *Cavanaugh v Grenville Christian College*, 2021 ONCA 755, the Court of Appeal, after the common issues trial, disagreed with the defendants that the case was actually about negligence in individual cases. Instead, they found the trial judge properly recognized that systemic negligence involved an assessment of the practices used to run the school, whether these practices were systemic, and the extent to which the practices created a risk of harm to the class as a whole. Individual claims of harm and differences in the effect of the practices on members of the class were for the individual issues stage, if necessary (*Cavanaugh* 2021 ONCA 755 at paras. 77-78). The same approach applies to the case at bar.

[56] This case is also similar to the following other cases of institutional abuse. *Rumley* remains a leading case where the plaintiffs alleged physical, emotional, and sexual abuse occurred at a residential school for the deaf over many years. The Supreme Court of Canada accepted as common issues whether, between 1952–92, the Crown was negligent or in breach of fiduciary duty in failing to take reasonable measures to protect students in the operation or management of the school and whether punitive damages were warranted (paras. 21 and 27). The Court noted that evidence from individuals might be relevant to assessing the defendants' conduct, and that individual findings of causation and harm would inevitably occur in the individual trials to follow. The focus of the common issues trial would be an inquiry into how the

defendants' conduct affected all class members as a group rather than individually. This systemic approach involved questions of how the defendants ran the school over time, including practices or actions contributing to the opportunity for abusive situations, and shortcomings of preventative policies and practices that would reasonably have prevented the abuse.

[57] *Cloud* was a case in which the plaintiffs, who were former students at the Mohawk Institute Residential School, alleged systemic abuse. Following *Rumley*, the Court of Appeal for Ontario decided that an important part of the claims of all class members turned on how the defendants ran the school. The common issues included the allegation that the respondents had punitive policies and practices (e.g., excessive physical discipline) and failed to have preventative policies and practices (e.g., reasonable hiring and supervision), which together resulted in the intimidation, brutality and abuse endured by the students at the residential school (at para. 80).

[58] Similarly, the Court in *White*, where the plaintiffs were former members of the Royal Canadian Sea Cadets who allegedly suffered sexual abuse in Vancouver between 1967–77, found the Crown failed to recognize that the:

> [52] … cause of action at issue does not depend on the individual circumstances in which the abuse has been alleged, but rather … 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. …

[59] In the case at bar, the common issues determination of a breach of the duty of care will advance the litigation in several ways. A duty of care, admitted to be owed in this case, requires a finding of an applicable standard of care. That standard of care

may be established by expert evidence, as proposed by the plaintiffs in this case. A standard of care is breached where the defendant reasonably foresees that its conduct poses a real risk of harm to the plaintiff and proceeds in the face of that risk. A breach of a standard of care will be a breach of the duty of care. Conduct constituting a breach includes the creation of risk and the failure to act in a way that reduces risk. If the policies, practices and procedures in place, or the absence of policies and procedures when they should have been in place, created a risk or failed to prevent, reduce or control the risk of harm, then there will be a finding of breach that applies to all class members. The effect of that breach on the individual class members will be the focus of the individual issues stage of the trial – that is, whether that failure to meet the standard of care caused the harm suffered by each class member, and the proof and quantification of damages. In other words, an initial finding of whether a tort occurred is not necessary in order to advance the claims of all class members.

[60] Further, the common issue of whether there was a breach of the duty of care is connected to whether the underlying tort of assault, battery or false imprisonment occurred. This is because of the causation analysis required for the determination of liability. If the standard of care includes, for example, the requirement of an imminent danger of serious physical harm to self or others before holds, restraints or seclusion can be properly applied, then as long as that standard is followed and upheld by the defendant in an individual case, liability may not arise. The absence or inadequacy of any policies may not have caused any damages if the standard of care has been upheld. However, if the standard of care is not upheld in an individual case, and policies or procedures setting out what is required to comply with the standard are absent or

inadequate, then liability may follow. In that circumstance, there would be less likely to be a defence justifying the tortious conduct.

[61] In both examples, knowledge of the standard of care and what constitutes a breach is necessary before an actionable wrong can be proved. The parameters of appropriate conduct with respect to holds, restraints and seclusion, and the defences to potentially actionable conduct will be determined in part by a finding on the common issues of what is the standard of care and what is a breach. The approach proposed by the Yukon government that a determination of the occurrence of an assault, battery or false imprisonment in each individual case is the first and only question, is not appropriate. This approach overlooks the inter-connection between the standard of care and breach and the existence of a tort.

[62] In the other institutional abuse cases, the connection between a finding of the institution's failure to have proper policies and procedures in place and the harm occurring to the class members needed to be made for liability in negligence or breach of fiduciary duty (other than vicarious liability) to be found. In all those cases, individual issues trials were needed for the class member to show causation and harm, just as is required in this case. This requirement did not affect the certification of common issues.

[63] As noted by the court in *White*:

> [127] … 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 understanding of 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.

[64] The case at bar is unlike *Fehringer* relied on by the Yukon government. In *Fehringer*, there was no institutional relationship between the Toronto Sun newspaper and the class members who were "sunshine girls" photographed by the Toronto Sun photographer. Further, the assertions that the photographer subjected the women to "harassment, intimidation, breach of privacy and inappropriate contact, behaviour, conduct and remarks during photographing sessions" (para. 3) were too individualistic in that context for certification (at paras. 21 and 25). Moreover, there were individual defences in that case such as limitations defences, making certification of common issues more difficult.

[65] The Yukon government's argument that this case is distinguishable from the other institutional abuse cases where the underlying conduct was agreed to be tortious conduct is not accurate. As noted by the plaintiffs, in *Cavanaugh*, there were allegations of ostracism, interrogation, and intimidation, not tortious conduct in and of themselves, that did not preclude the certification of common issues related to systemic negligence. Even in *Rumley,* where government reports confirmed that sexual and other abuses had occurred at the institution, that abuse was still disputed in the action, and this did not prevent the Supreme Court of Canada from certifying common issues. In the case at bar, the common issues of the breach of duty of care, including a finding of the standard of care and breach of that standard of care are sufficient to advance the litigation. The individual inquiries of causation and harm will determine whether the torts have been committed.

b) Common Issue v – was there a breach of fiduciary duty?

[66] The claim of breach of fiduciary duty is related to the negligence allegations. The existence of a special relationship between the Yukon government (through the Department of Education and the Minister of Education) and the JHES students, who, as minors, are a vulnerable group, is admitted by the Yukon government. This fiduciary relationship gives rise to fiduciary duties, which the plaintiffs say were breached by the defendant's failure to provide a learning environment free of corporal punishment and by failing to prevent the use of holds, restraints and seclusion on the students. This allegation, like the allegations in negligence, requires a consideration of the institutional policies, procedures and practices, or their absence, and the Yukon government's knowledge of same. This is an appropriate common issue.

c) Common Issue i – Did the staff commit torts of assault, battery and forcible confinement?

[67] I do not agree with the plaintiffs' identification of this question as a common issue. As noted above, while the determination of this question requires a finding of the standard of care and a breach of the standard of care from an institutional perspective, whether or not the staff committed the torts requires individual determinations. To establish a tort requires a breach, causation, and harm. The determinations of causation and harm are conceded by the plaintiffs to be individual issues. Each case needs to be examined on its facts to know whether any breach of the standard of care caused harm in the particular case. It requires first a finding on the common issues and then an individual inquiry. This question will not be certified as a common issue.

d) Common Issue vii – are the plaintiffs entitled to punitive damages?

[68] An award of punitive damages involves an assessment of the defendant's behaviour. The question is whether the defendant's conduct was sufficiently reprehensible or high-handed to warrant punishment. Courts have determined this question is capable of being determined as a common issue. This approach was endorsed in *Chalmers v AMO Canada Company*, 2010 BCCA 560; *Batten v Boehringer Ingelheim (Canada) Ltd*, 2017 ONSC 53 ("*Batten*"). In *Rumley*, the Supreme Court of Canada certified the appropriateness and amount of punitive damages as a common issue. The Court in *Rumley* held that the issues of breach of duty of care and fiduciary duty required assessment of the knowledge and conduct of those in charge of the school over a long period of time, the kind of fact-finding relevant to punitive damages (see also *Cloud* at para. 70; *White* at para. 155 – quoted in *Liptrot* at para. 190). The exception in *Batten* does not apply here. In that case there were no other certifiable common issues and the court found that punitive damages could not be the only common issue. Here I have found other common issues, to which entitlement to punitive damages will be added.

e) Success for one is success for all

[69] The Yukon government argues that the *Dutton* condition that success for one is success for all is not met. They say because it is possible that one plaintiff class member may succeed on all the contested issues and others may fail, certification should be denied. This is not the test set out by the Supreme Court of Canada in *Vivendi,* the leading case on this issue. Not all class members may be successful on the common issues, but this is not a bar to certification, as long as there is no conflict

among class members through the common issues. A common question may require varied answers depending on the situation of the individual members (*Vivendi* at paras. 45-47). The fact that some class members may be unsuccessful in their claim against the defendants does not make the class overbroad (*MacKinnon v Pfizer Canada Inc*, 2021 BCSC 1093 at para. 74, rev'd on other grounds 2022 BCCA 151). This *Dutton* condition is met in this case.

f) Conclusion on Certification Conditions of Common Issues and success for one is success for all

[70] To conclude, paragraphs iii, v, and vii of the proposed common issues require a determination of the Yukon government's knowledge of and authority over the policies, procedures and practices related to the use of holds, restraints and seclusion at JHES. They involve a thorough examination of the policies, procedures, practices and standards of the defendants and whether they were adequate to protect the students from harm.

[71] A determination of the standard of care and breach would involve a consideration of the extent of the duties owed by the defendant to the class members, especially as they relate to discipline. Common issues of this kind will move the litigation forward for all class members and justify the certification as class proceeding. The findings of the applicable standard of care, and whether a failure to meet that standard is negligent, have common ingredients for the whole class. Such findings will prevent duplication of fact-finding and legal arguments at the individual issues stage, where the members of the class must prove they suffered harm and the systemic breach was a cause of the harm to them. This facilitates the goals of judicial economy and access to justice.

[72] The individual issues do not predominate over the common issues and are not required for the common issues determination. As noted by the court in *White* if the common issues are properly pursued, they serve the individual issues both by assisting in their resolution and also by avoiding a duplication of evidence necessary to their resolution (para. 129).

[73] Success for some class members on the common issues does not create a conflict with other class members.

VII. CLASS PROCEEDING IS THE PREFERABLE PROCEDURE

a) Legal Principles

[74] As noted above, the determination of whether a class action is the preferable procedure is not one of the conditions listed in *Dutton*, as it is in many class proceedings statutes. The Court in *Dutton* nonetheless recognized it had a discretion to decline to certify an action even if all the criteria for certification were met:

> [44] Where the conditions for a class action are met, the court should exercise its discretion to disallow it for negative reasons in a liberal and flexible manner, like the courts of equity of old. The court should take into account 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.

[75] The Court in *Fontaine* interpreted the discretion described in this passage from *Dutton* as similar to the test for preferable procedure found in class proceedings legislation: that is, the class proceedings would be a fair, efficient, and manageable method of advancing the class and preferable to other procedures (para. 33). This is the test I will apply, drawing on principles set out in cases where preferable procedure as interpreted in the class proceedings statutes was considered.

[76] *AIC Limited v Fischer*, 2013 SCC 69 ("*AIC*"), remains a leading case on the analysis of preferable procedure. The Supreme Court of Canada held the analysis is to be done in the context of the three main goals of class actions – judicial economy, access to justice, and behaviour modification. Part of the determination is a comparison of the proposed class action proceeding with other litigation processes or procedures that may be available to the plaintiffs.

[77] The burden of establishing that a class proceeding is the preferable procedure is shared. The Supreme Court of Canada in *AIC* described this as follows:

> [48] … [T]he representative plaintiff [must] show (1) that a class proceeding would be a fair, efficient and manageable method of advancing the claim, and (2) that it would be preferable to any other reasonably available means of resolving the class members' claims: *Hollick* at paras. 28 and 31. …

The representative plaintiff is not expected to address:

> [49] … every conceivable non-litigation option in order to establish that there is some basis in fact to think that a class action would be preferable. Where the defendant relies on a specific non-litigation alternative, he or she has an evidentiary burden to raise it. As Winkler J. (as he then was) put it in *Caputo v Imperial Tobacco Ltd.* (2004), 236 DLR (4th) 348 (Ont SCJ): "… the defendants cannot simply assert to any effect that there are other procedures that would be preferable without an evidentiary basis. … It must be supported by some evidence" (para. 67). However, once there is some evidence about the alternative, the burden of satisfying the preferability requirement remains on the plaintiff.

b) Yukon government position

[78] The Yukon government's position on the absence of common issues leads to their argument that a class proceeding is not the preferable procedure. They say for each class member, whether a tort occurred is required to be determined first. If the tort is proved, the Yukon government accepts liability and the remaining question is the

amount of damages. To proceed by way of individual actions is suitable given the nature of the claims. Efficiencies can be created through joinder of the actions and case management. Case management could include such things as directing notice to the public be provided about the action in order to advise potential class members.

[79] Other reasons why they argue a class action is not preferable include: 1) the number of potential plaintiffs in the class is likely to be nine or ten, based on the existing record before the Court; 2) all plaintiffs would be able to rely on the Yukon government's admissions in its statement of defence; and 3) any contingency billing arrangement could become retainers for joint plaintiffs.

c) Plaintiffs' position

[80] The plaintiffs disagree with the Yukon government's characterization of the plaintiffs' claims and the reasons why class proceedings are not preferable. The plaintiffs say the Yukon government has not satisfied their burden of why a joinder of individual actions is preferable because they have provided no evidentiary foundation.

[81] The plaintiffs say the number of potential class members is best provided by the Yukon government due to their admitted responsibility for the operation and management of JHES, their admission that some Workplace Risk Assessment forms were completed and reviewed after incidents of holds or seclusion occurred, and their participation in the RCMP investigation and in their own internal investigation. On the evidence provided through their affidavits, the plaintiffs say there are likely far more than nine or ten class members. In any event even a small class of nine or ten would be preferable where the class members are vulnerable persons, such as minors as in this case.

[82] The plaintiffs say there is no guarantee that the Yukon government will make the same admissions in all of the individual actions. This amounts to a promise and is not a legal requirement. They say that the admissions require certification of the class action in order to ensure they are binding on all the class members. Without certification, there is no guarantee the same admissions will apply in each individual action.

[83] The plaintiffs argue it cannot be assumed that the individual plaintiffs will choose the same counsel or agree to the same fee arrangement. There is no foundation for this assumption. Having several or numerous counsel will complicate the proceedings.

[84] The plaintiffs say a class proceeding is more efficient than individual actions as the common issues will only be litigated once, supporting the goal of judicial economy. The goal of access to justice is more likely to be achieved because individuals with modest claims will not be required to pursue their own actions. There are no case management conference rules for mass tort litigation. By contrast there are well-known procedures and practices developed over many years of class action proceedings that are dependable and workable, including formal notice provisions for potential class members and approvals by the court for legal fees and any settlement. The class proceedings legislation is an evolution of the mandatory joinder procedure. Case managing individual actions joined together has the potential to be overly complex and inefficient, especially where there are no established practices and processes.

d) Conclusion on preferable procedure

[85] Balancing fairness and efficiency in this case, a class action proceeding is the preferable procedure. There is no reason for this Court to exercise its discretion not to

certify this case as a class action, given the finding that the certification conditions have been met for six of seven proposed common issues.

[86] Many cases have been certified as class actions for the purpose of determining certain common issues of liability, even where there are complex issues of causation and damages to be determined on an individual basis (*Jer v Samji*, 2013 BCSC 1671 at para. 197 var'd on other grounds 2014 BCCA 116 and cases quoted therein). The common issues identified here will not need to be relitigated in each of the individual issues trials (*Cavanaugh* 2014 ONSC 290 at paras. 21-22). There would be one set of oral and documentary discoveries on the common issues, and the experts on standard of care and breach of that standard would only need to testify once. This contributes to efficiencies and the goal of judicial economy. The requirement in this case of individual trials for causation and damages does not outweigh the benefits of a class action.

[87] While the number of class members is unclear at this time, even nine or ten are sufficient to justify a class action, especially when there are vulnerable potential class members, such as minors. As noted by the court in *Papassay v Ontario*, 2017 ONSC 2023, the representative plaintiffs will enable others with fewer financial resources and less capability of navigating the legal system to have their claims heard (para. 88). Those with more modest claims will not be required to commence and pursue their own action, which may not be economically feasible. This contributes to the goal of access to justice. If there are more than nine or ten in the class, which the plaintiffs say is likely, then individual actions become more unwieldy, less efficient and not judicially economical.

[88] The Yukon government's assurances that its stated admissions would be provided in all individual cases and would contribute to the efficiencies of jointly managed individual actions is a neutral factor. The defendant's admissions contribute to greater efficiencies whether a class action is pursued or not. I agree with the Yukon government that it is highly unlikely that their admissions would not apply in all of the individual actions.

[89] Individual actions could easily result in multiple plaintiffs' counsel and different fee arrangements. This would create inefficiencies for the defendant and the Court because of the higher number of counsel and their potentially different approaches to the litigation. Different plaintiffs' counsel may characterize the allegations differently, emphasize different aspects of the claims, or seek to call different expert evidence on the same or similar issues. Discoveries are likely to be lengthened with the addition of more counsel. By contrast, the participation of one plaintiffs' counsel on behalf of the class contributes to judicial economy by simplifying the pleadings and other litigation procedural steps. It also provides greater access to justice because of one contingency fee arrangement for all class members.

[90] Finally, the Yukon government's suggestion that the case management process would suffice to manage the individual actions successfully is not well-founded. Over the more than 20 years since class actions have been possible both at common law and by statute in Canada, accepted and workable procedures have been created and implemented. These include notice provisions, carrying out documentary and oral discoveries, opt-out procedures, and holding common issues and individual trials. Many of these procedural steps are set out in the plaintiffs' proposed litigation plan. The

Yukon government's suggestion of case managed individual actions joined together would require the development of unique *ad hoc* procedural steps, which could give rise to disagreement among counsel and complicate and lengthen the proceedings. Case management through established class action procedures contributes to judicial economy.

[91] The Court of Appeal of British Columbia in *Nanaimo Immigrant Settlement Society v British Columbia*, 2001 BCCA 75, summarized aptly at para. 20 the practical advantages of class proceedings:

i. case management by a single judge;

ii. class can attract lawyers through the aggregation of potential damages and the availability of contingency fee arrangements;

iii. class members may apply to participate in the class action;

iv. a formal notice program alerts all interested persons to the status of the litigation;

v. simplified structures and procedures for individual issues can be designed by the court;

vi. the court approves any settlement; and

vii. orders and settlements accrue to the benefit of the entire class without resorting to principles of estoppel.

[92] All of these factors are relevant in this case.

[93] Efficiency and fairness are best achieved through a class proceeding in this case. Accepting the common issues identified by the plaintiffs, assessing the proposed class action in the context of the three stated purposes of judicial economy, access to

justice and behaviour modification, and comparing it to individual actions joined and managed together, a class action is the preferable procedure.

VIII. CLASS IS CAPABLE OF CLEAR DEFINITION

a) Legal Principles

[94] This condition determines whose interests may be affected, who requires notice and who may be entitled to relief. The definition of the class must be objective and not dependent upon the merits of the claim. It must not be too narrow nor too broad and must be rationally related to the common issues. There must be at least two members who could self-identify and then prove they are members of the class (*Hollick* at para. 7).

b) Conclusion on Class Definition

[95] There is no dispute in this case that the class is capable of clear definition. It meets the principles set out above.

[96] However, there is one change required at this stage. The earliest date of alleged incidents of the use of holds, restraints and seclusion set out in the affidavits of the proposed plaintiff class members is 2007. The affidavit evidence of the worker at JHES provides the alleged incidents began in 2008-9. The proposed class definition states the alleged incidents commenced on January 1, 2002.

[97] It may be that as this matter proceeds, evidence will emerge that includes years before 2007. However, on the current evidence, I am unable to certify the proposed class earlier than 2007. The proposed definition will be modified accordingly, on the understanding if further evidence supports earlier dates, amendments may be requested.

IX. CLASS REPRESENTATIVES ARE ADEQUATE

a) Legal Principles

[98] The Supreme Court of Canada in *Dutton* (at para. 41) set out the following criteria for the court to consider in determining whether the representatives are adequate:

i. motivation of the representative;

ii. competence of the representative's counsel;

iii. capacity of the representative to bear costs incurred by the representative; and

iv. ability of the representative to vigorously and capably prosecute the interests of the class.

b) Conclusion on Adequacy of the Representatives

[99] Here, there is no dispute that the representative plaintiffs are adequate. There is no evidence of improper motivation, counsel retained are experienced in both class actions and Yukon legal practice, the costs of the litigation are borne by counsel, the representative plaintiffs have confirmed their commitment to and acceptance of responsibility in this case, as well as their understanding of the steps in the litigation. The representative plaintiffs have attached their proposed litigation plans to their affidavits. These plans appropriately address the procedural issues arising in this litigation.

X. CONCLUSION

[100] The plaintiffs' application to certify this proceeding as a class action is granted. All the common law conditions are met for the reasons noted above. Efficiency and

fairness favour a class action proceeding instead of a case managed joinder of individual actions.

[101] The following are the proposed common issues:

i. Did the defendant owe a duty of care to the plaintiffs?

ii. Did the defendant breach the duty of care owed to the plaintiffs?

iii. Did the defendant owe fiduciary obligations to the plaintiffs?

iv. Did the defendant breach its fiduciary obligations to the plaintiffs?

v. Is the defendant vicariously liable for the conduct of the staff of JHES?

vi. Does the conduct of the defendant merit an award of punitive damages?

[102] The proposed class definition is revised to replace January 1, 2002, with January 1, 2007.

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DUNCAN C.J.