Federal Court of Appeal | Cour d'appel fédérale

Date: 20250529

Docket: A-137-22

Citation: 2025 FCA 105

CORAM: **RENNIE J.A.**
LOCKE J.A.
ROUSSEL J.A.

BETWEEN:

HIS MAJESTY THE KING

Appellant

and

CHEYENNE PAMAMUKOS STONECHILD, LORI-LYNN DAVID, AND STEVEN HICKS

Respondents

Heard at Vancouver, British Columbia, on October 23, 2024.

Judgment delivered at Ottawa, Ontario, on May 29, 2025.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: ROUSSEL J.A.
DISSENTING REASONS BY: LOCKE J.A.

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REASONS FOR JUDGMENT

RENNIE J.A.

[1] The background to this appeal and the issues that it raises are fully set out in the reasons of my colleague Locke J.A., and which I adopt. I also agree with his analysis and disposition of the parties' motions to admit fresh evidence. I, however, come to a different conclusion with respect to the substantive question raised by this appeal. I would allow the appeal as the judge made legal errors in his understanding and application of the preferability criteria.

[2] It is beyond doubt that the objective of class proceedings is to improve access to justice in an efficient and fair manner. Sight must not be lost, however, of the fact that the over-arching objective, one that permeates all elements of the certification criteria, is that of justice. The just adjudication of the issues is not to be sacrificed on the altar of asserted efficiencies, nor is a class action a preferable procedure simply because it has only one defendant. Here, the proposed class action is neither expedient, nor fair, and what was certified was an overly complex and wholly unmanageable proceeding, rife with substantive and procedural problems.

[3] Class actions take place in a context, and requests to certify must be assessed in light of the jurisdiction and powers of courts, but also in respect of the subject matter of the litigation. Child and family services for First Nations children living off-reserve are provided by provincial governments and the child welfare agencies established under their jurisdiction. In some cases, those agencies are, in fact, run by Indigenous communities themselves, but nevertheless remain a matter within provincial legislative competence (*NIL/TU,O Child & Family Services Society v. B.C.G.E.U.*, 2010 SCC 45, at para. 38).

[4] Constitutional considerations aside, the evidence on the certification motion itself tells us that as a matter of fact, decisions about how and where children were placed were made by the provincial governments and their agencies – not Canada. The proposed class action is therefore missing the necessary defendants to fairly adjudicate the central issue, which was whether there was a breach of a duty in placing off-reserve Indigenous children in non-Indigenous homes. As I will explain, the proposed class action asks a question – but does not give the Court the tools to answer the fundamental questions about how a child came to be placed in care, in what

circumstances, by whom, what alternatives were considered and who was consulted. These are the fundamental elements of pleadings (*Mancuso v. Canada (National Health and Welfare)*, 2015 FCA 227).

Preferable Procedure

[5] The preferable procedure for this claim is a proceeding before a court that has jurisdiction to compel the production of documents from the provinces, territories, and child welfare authorities who were, on the basis of the certification motion record and argument before us, de facto responsible, for the delivery of child services to off-reserve Indigenous children. The preferable procedure is also a proceeding before a court that can, if appropriate, apportion liability between the provinces, their agencies and Canada. That court is not the Federal Court.

[6] Each province and territory has legislation that governs the delivery of services to children and families in need. As the Attorney General of Canada notes, for the proposed class period of 1992-2019, there are over 500 pieces of provincial and territorial legislation (statutes, amending statutes, consolidated statutes) pertaining to child welfare in Canada. These do not include the numerous regulations and policies in force at various times over the course of the class period. These statutes have a direct bearing on the substantive question which underlies the proposed class proceeding.

[7] The Federal Court judge brushed aside these substantive and procedural obstacles, reasoning that the prospect of commencing claims in each province was “truly daunting”

(*Stonechild v. Canada*, 2022 FC 914, at para. 84 (*Decision*)). Rather, the judge found that a single, national class proceeding was most efficient and that Canada could "presumably" obtain production orders against the provinces and territories (Decision, at para. 82). Furthermore, the commonality of the questions was "enhanced by the fact that there is a single defendant" (Decision, at para. 46). The judge also found that Canada had not established that a class action in the Federal Court was not preferable.

[8] The errors in this reasoning are patent.

[9] First, it is not the obligation of the defendant to disprove an assertion that a class action is the preferred mechanism to achieve justice. The onus is on the applicant to show that a class proceeding is preferable to any other reasonable means of resolving the claims (*Hollick v. Toronto (City)*, 2001 SCC 68, at paras. 28-31 (*Hollick*)).

[10] This burden is not discharged simply by parroting the objectives of class proceedings; rather it is discharged by explaining, in concrete terms, how the proceedings will unfold, including how documentary and oral discovery will be conducted. Saying that a class action is preferable does not make it so; there is some heavy lifting to be done. The need for "a clear explanation" serves as an important check in considering whether the plaintiff has met the preferable procedure criteria and whether the common questions predominate over questions affecting only individual members (*McCracken v. Canadian National Railway Company*, 2012 ONCA 445, at para. 146).

[11] The judge, on several occasions, reversed the onus, requiring the Attorney General to disprove the bare assertions of the plaintiffs and to prove that the proposed class proceeding was not manageable. As noted above, it is not the defendant's obligation to establish the existence of a better forum. It is the plaintiffs' obligation, an obligation that is not discharged simply by reciting the policy objectives of class proceedings.

[12] Shortly after the completion of the certification hearing, and perhaps recognizing the structural problems in their claim, the plaintiffs commenced identical class proceedings in six provincial superior courts against the provinces, Canada and the provincial agencies. The provincial claims allege the same harms and seek the same damages as this class action.

[13] The judge was advised of this development on the eve of issuing his reasons but chose not to assess its implications. One of those implications is that it could trigger an application by the Attorney General for a stay under section 50, and potentially, section 50.1 of the *Federal Courts Act*, R.S.C., 1985, c. F-7 which reads:

50.1(1) The Federal Court shall, on application of the Attorney General of Canada, stay proceedings in any cause or matter in respect of a claim against the Crown where the Crown desires to institute a counter-claim or third-party proceedings in respect of which the Federal Court lacks jurisdiction.	**50.1(1)** Sur requête du procureur général du Canada, la Cour fédérale ordonne la suspension des procédures relatives à toute réclamation contre la Couronne à l'égard de laquelle cette dernière entend présenter une demande reconventionnelle ou procéder à une mise en cause pour lesquelles la Cour n'a pas compétence.

[14] These developments remove the key assumption made by the judge in support of his conclusion that a class proceeding was preferable. They also constitute a recognition that a class

proceeding, in the provincial superior courts, was the only pathway to an efficient and fair adjudication of the issues. That which was, in the view of the judge, “truly daunting” and justified a class proceeding in the Federal Court (Decision, at para. 84), turns out to not be daunting at all.

[15] I note that counsel have advised this Court that all six of the provincial class proceedings are active, with respondents’ counsel taking various steps, including the filing of defence pleadings, certification and authorization timetables, document preservation, and agreements on costs.

[16] But there is a further, and fatal, error in the preferability reasoning.

[17] As a separate Crown entity, Canada does not have possession, power or control over documents and information relevant to the claim. For a court to fairly adjudicate the core issues raised by the plaintiffs, the evidence of the provincial and territorial governments, and the local child welfare agencies that actually made the placement decisions, needs to be before the Court.

[18] The judge side-stepped this and simply reasoned that that evidence would “presumably” be compellable (Decision, at para. 82). No explanation was given in support.

[19] The certification judge erred in not recognizing, at the level of legal principle, the immunity of the provincial crown from discovery in a Federal Court proceeding where the province is not a party.

[20] The Crown, whether in right of Canada or a province, is immune from suit except to the extent that it has expressly waived its immunity. Section 19 of the *Federal Courts Act* reflects this principle, granting as it does jurisdiction to the Federal Court to hear claims involving the provinces where the province has enacted legislation agreeing that the Federal Courts have jurisdiction (see for example: *Saskatchewan (Attorney General) v. Witchekan Lake First Nation*, 2023 FCA 105*).*

[21] Paragraph 46(1)(a)(iii) of the *Federal Courts Act* provides that rules may be enacted for the production of documents by the "Crown". "Crown", in the context of the *Federal Courts Act*, is limited to His Majesty the King in right of Canada (see also *Federal Courts Act*, section 2).

[22] In circumstances such as this, where there are well-established jurisdictional limitations on the power of a court to compel the production of documents that a party asserts are essential to its defence or are necessary for an apportionment of liability, and there is a court with the jurisdiction to compel production, it is difficult to see how proceedings in the former court can be the preferrable proceeding. I note that this is not a case where the impediment to production of evidence can be cured by a favourable exercise of discretion by a motion judge. The question of whether the lack of discovery against a province in the Federal Court can be cured by seeking some form of assistance from a provincial superior court was not raised before us.

[23] Turning to the child welfare agencies, Rules 233 and 238 of the *Federal Courts Rules*, SOR/98-106 provide a mechanism to compel production by non-parties who do not benefit from common law immunity. However, whether a third-party production order would be enforceable

against provincial child welfare agencies would depend on their status as either the Crown, a Crown agent or corporation. The answer to this question could be different in each province, which in turn would have an impact on the evidence before the court, its manageability and fairness.

[24] Similarly, while the Federal Court could issue a subpoena compelling the attendance of a provincial government official at trial, it would not, given that control and ownership of the documents rests with the province, necessarily result in the production of the relevant documents.

[25] The judge attempted to circumvent these impediments by stating that the Crown could not point to a case where production by non-parties was a problem. Again, this was not the Crown's burden to prove as the principle of interjurisdictional immunity is well-established. Where the "non-party" is the provincial crown, the principle of interjurisdictional immunity comes into play. The Federal Court erred in glossing over the distinction between non-parties, against whom discovery can be obtained, and the provincial Crown, against whom it cannot (Rule 233).

[26] The certification judge erroneously relied on *Tippett v. Canada*, 2020 FC 714 (*Tippett*) and Rule 233 of the *Federal Courts Rules* as being dispositive of the Court's jurisdiction to compel provinces as a non-party. In *Tippett*, neither party raised the issue of jurisdiction of the Court to compel production of documents by a province and the issue was not considered. The same is true of *Campeau v. Canada*, 2021 FC 1449, which the certification judge cited for his

consideration of Rules 233 and 238 to compel evidence from a non-party to apportion liability – not with respect to a province and/or territory and not with respect to the essential evidentiary foundation of the entire claim.

[27] My colleague also notes that this problem may not be insurmountable, concluding that the Crown may be able to obtain relevant documents in other ways, such as by motion in the provincial courts. Absent some solid legal foundation on which the Court could be assured that the provinces could be compelled to produce relevant evidence for the case, the preferability criteria cannot be satisfied. More importantly, the defendant would not be able to obtain the documents necessary for its defence. Thus, a possible scenario is that, at some point during the discovery process, the Court could face a motion by the defendant Attorney General to dismiss the case for an abuse of process. This does not further the objectives of access to justice or efficient use of judicial resources.

[28] The certification judge found that "a single proceeding would be particularly important to matters of judicial economy and access to justice" (Decision, at para. 78). The Court was singularly focused on broad aspirational objectives and did not consider how, or indeed, whether, in light of the law, those objectives could be achieved. Rather than asking the requisite tough questions to plaintiffs' counsel as to how the necessary evidence could be obtained, the judge shifted the onus to Canada to prove that there was a better procedure. Rule 334.16(2) of the *Federal Courts Rules* does not require that a defendant satisfy the court that there is a "better proceeding". The judge made an error of law by deeming the respondents' claim preferable by default.

[29] The judge also erred in failing to take into account, as part of the preferability analysis, the vast number of individual issues, and their amplification by the 13 different legal regimes in question.

[30] The certified common issues are only superficially common. While issues such as the existence of a duty of care, breach of that duty or *Charter* breaches appear common in their most general sense, they require extensive individual determination and the involvement and evidence of provincial and territorial child welfare agencies to resolve. Inevitably, should this action be allowed to proceed as a class action, it would break down into 13 individual sub-proceedings, according to the province or territory of residence.

[31] This point is brought into sharp relief by the respondents' theory of the case itself. The respondents claim that the content of Canada's duty is reflected by the standards set forth in the legislation "*An Act respecting First Nations, Inuit and Métis children, youth and families,* S.C. 2019 c. 24" enacted by Parliament. This legislation set minimum national standards for the placement of off-reserve Indigenous children. It will be necessary to examine in respect of 13 different jurisdictions, over the 28-year class period, the degree to which provincial government and child welfare agencies conformed with the standards set forth in the legislation.

[32] To answer the questions certified by the Court below and to determine the content and scope of any duty that might have been owed and whether or not it was breached, a court would also have to be in a position to answer the following questions in respect of individual class members:

a) What province or territory the Indigenous child resided in;

b) Which of the over 500 pieces of provincial and territorial child welfare legislation applied when the Indigenous child was placed into care;

c) Which regulations and policies applied at the time the Indigenous child was placed into care;

d) Which provisions applied to the Indigenous child based on the child's status (status Indian, non-status First Nation, Métis, or Inuit);

e) Whether the legislation, regulations, and policies changed during the period of time that the Indigenous child was in care;

f) Whether there were any specific bilateral or trilateral child welfare agreements in place during the relevant time;

g) What child welfare agency or authority was responsible for providing the Indigenous child with child welfare services;

h) Whether it was an Indigenous child welfare agency or authority that was responsible for providing the Indigenous child with welfare services;

i) Whether the legislation, regulations, and policies were complied with by the province, territory, and/or responsible child welfare agency or authority;

j) Whether the province, territory, and/or responsible child welfare agency or authority ever advised Canada that an Indigenous child was taken into care;

k) Whether the applicable federal, provincial, or territorial privacy legislation prevented the sharing of information about the Indigenous child between levels of government and the responsible child welfare agencies or authorities;

l) Did the Indigenous child and/or their biological parents identify as Indigenous;

m) Did the Indigenous child and/or parents identify themselves to provincial/territorial authorities as Indigenous;

n) Did the Indigenous child speak an Indigenous language prior to being taken into care;

o) Did the Indigenous child's biological parents speak an Indigenous language at the time the child was taken into care;

p) Were attempts made to place the Indigenous child with a parent, another adult member of the child's family, and/or with an adult who belongs to the same Indigenous group or community as the child;

q) Was the Indigenous child placed into care of non-Indigenous biological family members;

r) Was the Indigenous child's band or Indigenous community involved with or consulted about the provision of child welfare services; and

s) Was the Indigenous child and/or legal guardians provided with information about their Indigenous identity and any federal benefits that they might be entitled to?

[33] The number of individual issues that must necessarily be addressed to respond to the single "common" issue are overwhelming. The judge did not balance, as part of the preferability analysis, the common question (that is, whether there was a breach of duty by reason of off-reserve Indigenous children being placed in the care of a non-Indigenous family) against the multitude of individual questions. I add that the relevance of these individual questions, framed by counsel for the Attorney General, was not questioned before us.

[34] The certification judge failed to consider whether the questions of law or fact common to the class members predominate over any questions affecting only individual members as set out in Rule 334.16(2)(a). As the Ontario Court of Appeal concluded in *Bayens v. Kinross Gold Corporation*, 2014 ONCA 901 (*Bayens*), it is difficult to establish preferability where individualized inquiries and fact-finding are both necessary and unavoidable. In that case, the Court found that resolution of such questions did not lend itself to a class action, stating that, "the need for numerous individual inquiries undercuts the goal of judicial economy and could overwhelm the resolution of the common issues, producing an inefficient and unmanageable class proceeding" (*Bayens*, at para. 129).

[35] Rather than addressing how these issues would be resolved in a class proceeding without descending into an administrative and management nightmare, the certification judge simply stated that, “the commonality of the questions is enhanced by the fact that there is a single defendant” (Decision, at para. 46).

[36] The lack of homogeneity in the class is not effaced simply by eliminating the defendants necessary for a court to fairly adjudicate the issues. Members of the class were placed into care according to the statutory, regulatory and policy framework of the province where they resided, and then, based on the unique and individual circumstances of their particular situation, through a decision in the hands of the local, regional or provincial child welfare agency. The answers to these many questions and their corollaries must necessarily be answered to give any meaning or context to the abstract common question.

[37] While not necessary to the disposition of this appeal, a caveat is required in respect of the common question as certified. The common issues were held together by the very thin reed of a single question which, was not a legally sustainable question.

[38] The certification judge framed the common or unifying question as follows (Decision, at para. 49):

> The ultimate question in this litigation is whether Canada complied with its constitutional obligations under s 91(24) to “Indians” which could not be delegated to provincial bodies or discharged by provincial legislation.

[39] Head 91(24) of the *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.) (reprinted in R.S.C. 1985, Appendix II, No. 5) does not create obligations; rather, it speaks to legislative authority (*Daniels v. Canada*, 2016 SCC 12, at para. 15, see also *La Rose v. Canada*, 2023 FCA 241). In other words, head 91(24) of the *Constitution Act* does not create a duty to legislate, to create a policy, or to act in any way. A question that does not disclose a reasonable cause of action cannot be a common question.

Conclusion

[40] The fundamental assumption made by the Federal Court judge in his assessment of the preferability criteria was that commencing actions against Canada in different provinces was a "daunting" prospect. Although advised that these actions had been commenced and the assumption was, in fact, incorrect, the Federal Court chose not to recalibrate its analysis of the preferability criteria. In so doing, it erred. We now know that there are active proceedings before the provincial courts raising the same issues.

[41] The respondents offered no explanation as to how the myriad individual issues necessitating the involvement of the provinces and territories and agencies would be resolved. Similarly, there is no explanation as to how a judge will manage the 13 different legal systems that governed the placement of off-reserve Indigenous children, no balancing of the efficiency of class actions in each province, and importantly, no explanation of how the Court would gain access to the evidence and discovery witnesses necessary for a fair trial.

[42] The respondents argue that they have a right to choose the defendants that they wish, an argument that found favour with the motion judge. This is true, but it is a choice with consequences, and the judge erred in not taking those into account.

[43] A proceeding is not preferrable because the plaintiffs have chosen it. The preferability inquiry necessarily encompasses the recognition of jurisdictional and procedural impediments to the claim and a consideration of the advantages of the alternatives. There is no finger on the scales in favour of the plaintiffs simply because they have chosen a particular forum; rather, the polar star is that of fairness and efficiency, and that includes being assured that the court will have the necessary evidence before it.

[44] A judge assessing the preferability criteria needs to assess, comprehensively, the legal landscape which governs the claim, and the substantive and procedural implications for the proposed claim. At the end of the day, a Federal Court judge hearing this action on the merits would have neither the means nor evidence necessary to assess liability given the absence of requisite defendants and evidence with respect to individual placement decisions. Any declaration granted would be hollow or empty of meaning.

[45] I have considered the argument that the concerns which I have described are premature, and that a better course is to let the class action proceed and run its course until it runs into the jurisdictional limitations which I have described. I see no merit in this argument. It serves no one’s interest- neither that of the parties themselves or the courts, to invest time and expense in litigation that will run, inevitably, into a brick wall. As noted, the problems are not such that they

can be cured by the exercise of the motions judge's discretion. Nor is it possible to rationalize this course of action against the objectives of efficiency and accessibility that underlie class proceedings.

[46] Given that the alleged breach of duty arises from the asserted gap between provincial government policies and the 2019 legislation, the preferable procedure for the adjudication of this claim entails proceedings before courts that can compel the participation of provinces responsible for the administration and delivery of child and family services to off-reserve Indigenous children at discovery and trial.

[47] Therefore, I would allow the appeal and dismiss the motion for certification with costs in this Court and below.

"Donald J. Rennie"
J.A.

"I agree.
Sylvie E. Roussel J.A."

LOCKE J.A. (Dissenting Reasons)

I. Overview

[48] His Majesty the King (the Crown) appeals a decision of the Federal Court (2022 FC 913 and 2022 FC 914, *per* Justice Michael L. Phelan, hereinafter the Decision) that certified Federal

Court File No. T-620-20 (the Action) as a class proceeding pursuant to Rule 334.16(1) of the *Federal Courts Rules*.

[49] In the Action, the respondents (Cheyenne Pamamukos Stonechild, Lori-Lynn David and Steven Hicks) seek various forms of relief in respect of allegations that, during a period from January 1, 1992 to December 31, 2019, off-reserve Indigenous children were removed from their homes in Canada and placed in the care of individuals, who were not members of the Indigenous group, community or people to which the children belonged, without reasonable steps being taken to protect and preserve their Aboriginal identity.

[50] In the present appeal, the Crown argues that the Federal Court erred in finding that the conditions for certifying a class proceeding were met in this case. Specifically, the Crown argues that the Federal Court erred (i) in finding that the respondents' claims raise common questions of law or fact (as contemplated in Rule 334.16(1)(*c*)), and (ii) in finding that a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact (as contemplated in Rules 334.16(1)(*d*) and 334.16(2)).

[51] In support of its appeal, the Crown moved in August 2023 to present new evidence on appeal and to have it included in the appeal book. The respondents opposed the motion. In the event that the motion was granted, the respondents requested in the alternative that other new evidence also be admitted. By order dated September 8, 2023, Justice Yves de Montigny (as he then was) decided that the motion should be addressed by the panel hearing the merits of the

appeal. At the beginning of the hearing of the present appeal, the Court indicated that all of the new evidence was admitted. Reasons for that decision are put forward herein below.

[52] Also at the beginning of the hearing of the present appeal, the respondents requested that the style of cause be amended to correct the middle name of the first named respondent to "Pamamukos" instead of "Pama Mukos". The Crown consents to this change and I would grant the request.

[53] For the reasons set out below, I would dismiss the present appeal.

II. Federal Court Decision

[54] The Decision concerned the respondents' motion to certify the Action as a class proceeding. The Federal Court noted at paragraph 8 that the Crown accepted that the respondents "have a reasonable cause of action, a certifiable class and appropriate representative plaintiffs", thus meeting the requirements of Rules 334.16(1)(*a*), (*b*) and (*e*). This left in dispute the requirements of Rules 334.16(1)(*c*) and (*d*) concerning, respectively, whether there are common questions of law or fact, and whether a class proceeding is the preferable procedure. The Federal Court then observed as follows at paragraph 9:

> The key issue from the [Crown's] perspective is that the resolutions of the issues raised, "whether through litigation, or, more preferably, out of court settlement, requires the presence and participation of the provinces and territories". The [respondents] seek recovery only against the Federal Crown and only in this Court.

[55] Accordingly, the Decision turned largely on arguments concerning the relative benefits and costs associated with either (i) a single class proceeding before the Federal Court in which the provinces and territories are not parties, or (ii) a series of separate class proceedings before provincial and territorial courts in which the provinces and territories would be parties.

[56] The Federal Court quoted Rule 334.16(1) concerning the requirements for certification, and Rule 334.16(2) concerning factors to consider in relation to the requirement that a class proceeding be the preferable procedure for the just and efficient resolution of the common questions of law or fact (Rule 334.16(1)(*d*)). These provisions are reproduced here:

Conditions	**Conditions**
334.16 (1) Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if	**334.16 (1)** Sous réserve du paragraphe (3), le juge autorise une instance comme recours collectif si les conditions suivantes sont réunies :
(a) the pleadings disclose a reasonable cause of action;	**a)** les actes de procédure révèlent une cause d'action valable;
(b) there is an identifiable class of two or more persons;	**b)** il existe un groupe identifiable formé d'au moins deux personnes;
(c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;	**c)** les réclamations des membres du groupe soulèvent des points de droit ou de fait communs, que ceux-ci prédominent ou non sur ceux qui ne concernent qu'un membre;
(d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and	**d)** le recours collectif est le meilleur moyen de régler, de façon juste et efficace, les points de droit ou de fait communs;
(e) there is a representative plaintiff or applicant who	**e)** il existe un représentant demandeur qui :
(i) would fairly and adequately	**(i)** représenterait de façon

represent the interests of the class,

(ii) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members as to how the proceeding is progressing,

(iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and

(iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.

équitable et adéquate les intérêts du groupe,

(ii) a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du groupe et tenir les membres du groupe informés de son déroulement,

(iii) n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les points de droit ou de fait communs,

(iv) communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au dossier.

Matters to be considered

(2) All relevant matters shall be considered in a determination of whether a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact, including whether

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

(b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate proceedings;

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

Facteurs pris en compte

(2) Pour décider si le recours collectif est le meilleur moyen de régler les points de droit ou de fait communs de façon juste et efficace, tous les facteurs pertinents sont pris en compte, notamment les suivants :

a) la prédominance des points de droit ou de fait communs sur ceux qui ne concernent que certains membres;

b) la proportion de membres du groupe qui ont un intérêt légitime à poursuivre des instances séparées;

c) le fait que le recours collectif porte ou non sur des réclamations qui ont fait ou qui font l'objet

proceeding;	d'autres instances;
(d) other means of resolving the claims are less practical or less efficient; and	**d)** l'aspect pratique ou l'efficacité moindres des autres moyens de régler les réclamations;
(e) the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.	**e)** les difficultés accrues engendrées par la gestion du recours collectif par rapport à celles associées à la gestion d'autres mesures de redressement.

[57] The Federal Court noted that the threshold for certification is low, and the parties do not appear to take issue with that. The Federal Court stated that the respondents had to show "some basis in fact" for each of the requirements for certification (other than the requirement that the pleadings disclose a cause of action); the certification stage is not meant to be a test of the merits of the action: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477 at paras. 99-100, *Hollick*, at para. 25. Again, the parties do not appear to take issue with this statement of the law.

[58] The Federal Court addressed the issue of common questions of law or fact at paragraphs 40 to 73 of the Decision. The Federal Court noted the Crown's argument that the common questions listed by the respondents were only theoretically common and would in reality require overwhelming individual assessments. The Crown also argued that the involvement of the provinces and territories in child welfare issues would take the claim outside of a workable common issues claim.

[59] In addressing this argument, the Federal Court quoted from this Court's decision in *Wenham v. Canada* (*Attorney General*), 2018 FCA 199, 429 D.L.R. (4th) 166 (*Wenham*), at paragraph 72:

> Further, the task under this part of the certification determination is not to determine the common issues, especially not without a full record and full legal submissions on the issue, but rather to assess whether the resolution of the issue is necessary to the resolution of each class member's claim. Specifically, the test is as follows:
>
> > The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significant [*sic*] of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit.
>
> (*Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at para. 39; see also *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3, at paras. 41, 44-46.)

[60] In assessing the common questions listed by the respondents, the Federal Court found that they could be distilled into four main issues:

1. Canada's alleged systemic negligence, its delegation to provinces and territories and the Court's ability to make an aggregate assessment of damages.

2. Canada's alleged breaches of ss. 7 and 15 of the *Charter* and the entitlement to s. 24 *Charter* damages.
3. Canada's alleged unjust enrichment by avoiding the cost of a proper system to protect and preserve the Aboriginal identity of claimants as well as the Court's ability to assess and make a restitution order.
4. Canada's liability for punitive damages.

[61] At paragraph 68 of the Decision, the Federal Court concluded that it was not convinced that the issues are only theoretically common. It went on to certify 15 common questions under the above-listed four main issues.

[62] The Federal Court addressed the question of whether a class proceeding was the preferable procedure at paragraphs 74 to 93 of the Decision. At paragraph 75, the Federal Court quoted again from *Wenham* this time at paragraphs 77 and 78, concerning the proper approach to determine preferability:

> The test, from *Hollick* at paras. 27-31, is well-summarized in Mr. Wenham's memorandum as follows:
>
> > (a) the preferability requirement has two concepts at its core:
> >
> > > (i) first, whether the class proceeding would be a fair, efficient and manageable method of advancing the claim; and
> > >
> > > (ii) second, whether the class proceeding would be preferable to other reasonably available means of resolving the claims of class members;
> >
> > (b) this determination requires an examination of the common issues in their context, taking into account the importance of the common issues in relation to the claim as a whole; and
> >
> > (c) the preferability requirement can be met even where there are substantial individual issues; the common issues need not predominate over individual issues.
>
> The preferability of a class proceeding must be "conducted through the lens of the three principal goals of class action, namely judicial economy, behaviour

> modification and access to justice": *Fischer* [*AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949] at para. 22.

[63] The Federal Court also noted that the Supreme Court of Canada in *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184 at paragraph 30 confirmed that an action based on allegations of systemic wrongs may proceed by way of class action even if there are aspects requiring individual assessment.

[64] Considering the non-exhaustive factors laid out in Rule 334.16(2) (reproduced at paragraph 56 above), the Federal Court concluded that "a single proceeding would be particularly important to matters of judicial economy and access to justice": see paragraph 78 of the Decision. The Federal Court found that the Crown had not established (i) that a class action in this matter would not be manageable, (ii) that the Crown could not defend its position, or (iii) that a class proceeding in the Federal Court with national coverage was not the preferred proceeding.

[65] The Federal Court dismissed the argument that the Crown could face difficulty, in an action in that court, in securing evidence from the provinces in support of its defence. The Federal Court relied on *Tippett*, in which production orders had been issued against the province of British Columbia. It concluded as follows at paragraph 82 of the Decision: "[t]he same principled approach would presumably apply in respect to other non-party provinces and territories in this class proceeding. At this stage, it cannot be said that Canada cannot adequately defend this proposed class proceeding."

[66] The Federal Court also dismissed the Crown's argument that separate proceedings before provincial and territorial superior courts would be preferable, finding the prospect of 13 legal actions across the country "truly daunting – particularly for the [respondents]" (see paragraph 84 of the Decision). The Federal Court cited the example of the "lengthy and multi-jurisdictional nature of the Sixties Scoop litigation" as a cautionary tale (see paragraph 88 of the Decision). The Federal Court found that a single proceeding with national scope would be simpler and more efficient.

III. Issues and Standard of Review

[67] As indicated at paragraph 50 above, the Crown takes issue with the Federal Court's conclusions that (i) the respondents' claims raise common questions of law or fact, and (ii) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact.

[68] The Crown acknowledges that the appellate standards of review apply in the present appeal. This means that questions of law are reviewed on a standard of correctness, but findings of fact and questions of mixed fact and law, from which no question of law is extricable, are not reversed absent a palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. A palpable error is one that is obvious; an overriding error is one that goes to the very core of the outcome of the case: *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, [2012] F.C.J. No. 669, at para. 46 (and cited with approval in *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352, at para. 38).

IV. Analysis

A. *Preliminary Issue: Motion to Introduce New Evidence*

[69] Before considering the merits of the present appeal, it is necessary to address the Crown's motion to introduce new evidence, as well as the respondents' alternative request, in the event that the motion is granted, to introduce other new evidence. As noted above, the Court indicated at the beginning of the hearing of the present appeal that all of the new evidence was admitted. These are the reasons I put forward for that decision.

[70] The new evidence advanced by the Crown concerns proposed class proceedings filed by the respondents' counsel in six provinces between May 2022 and February 2023 in respect of claims similar to those made by the respondents in the Action. This new evidence arose after the respondents had argued before the Federal Court that separate proceedings before provincial and territorial courts would be an insurmountable obstacle to having their claim decided.

[71] The other new evidence, advanced in the alternative by the respondents, concerns the Crown's contestation of liability and class certification of proposed class proceedings in some provinces, despite the Crown asserting during oral submissions before the Federal Court in this case that provincial proceedings were preferable to a federal proceeding.

[72] The parties agree that a motion to introduce evidence should be decided on the basis of the principles set out in *Palmer v. The Queen* (1979), [1980] 1 S.C.R. 759, 106 D.L.R. (3d) 212,

at 775. The applicable test was summarized in *Coady v. Canada (Royal Mounted Police)*, 2019 FCA 102, at para. 3:

> The test governing such requests is well-established and requires that the party seeking to adduce fresh evidence establish that the evidence: (1) could not have been adduced at trial with the exercise of due diligence; (2) is relevant in that it bears on a decisive or potentially decisive issue on appeal; (3) is credible in the sense that it is reasonably capable of belief; and (4) is such that, if believed, could reasonably have affected the result in the court below… If the evidence fails to meet the foregoing criteria, the Court still possesses a residual discretion to admit the evidence on appeal. However, such discretion should be exercised sparingly and only in the "clearest of cases", where the interests of justice so require.
>
> [References to authorities omitted.]

[73] The respondents argue that the Crown's motion should be dismissed because it fails to meet the second and fourth criteria above, *i.e.* that the new evidence is relevant and that, if believed, it could reasonably have affected the result in the Federal Court. The respondents argue that the provincial claims are different in scope from the Action, and seek relief against different parties. The respondents also argue that the Federal Court was already aware of two of the provincial proceedings when it issued the Decision. Finally, the respondents note that the Crown has not consented to certification of any of the provincial proceedings.

[74] The bar is not high to meet either of the disputed criteria for admission of new evidence. The second criterion requires merely that the new evidence bear on an issue that is potentially decisive. The fourth criterion requires merely that the new evidence could reasonably have affected the result.

[75] In my view, while the relevance of the new evidence is marginal, it does bear on an issue that, before deciding the appeal on its merits, is potentially decisive. It concerns an issue that is central to the present appeal: the relative practicalities, and hence preferability, of a single federal class proceeding versus multiple provincial class proceedings. I conclude therefore that the second criterion is met. I am of the same view for the same reasons concerning the other disputed criterion of whether the new evidence could reasonably have affected the result. This view applies to the new evidence advanced by the Crown, as well as the new evidence advanced in the alternative by the respondents.

B. *Common Issues*

[76] The Crown argues that the Federal Court erred in several respects in concluding that the respondents met the requirement for some basis in fact that their claims raise common questions of law or fact.

[77] The Crown begins by arguing two overarching errors in law. The first is that the Federal Court stated at paragraph 49 of the Decision that the ultimate question in the Action is "whether Canada complied with its constitutional obligations under s 91(24) [of the *Constitution Act, 1867*] to 'Indians' which could not be delegated to provincial bodies or discharged by provincial legislation." The Crown argues that subsection 91(24) does not create a duty. In my view, this argument is of limited assistance to the Crown since a duty of this kind is clearly put in issue in the Action, even if subsection 91(24) is not the source of that duty.

[78] The second overarching error argued by the Crown is that the Federal Court focused on misconceived benefits of a single class proceeding against one defendant. The Crown argues that the Federal Court should instead have focused on thoroughly assessing the issues and particular facts in this case. Though the Crown characterizes this as an error of law, I see it rather as a challenge to the Federal Court's assessment of the evidence, which this Court will not disturb in the absence of a palpable and overriding error. As explained below, I am not convinced that the Federal Court misunderstood or failed to undertake the required legal analysis in this case.

[79] The specific errors that the Crown asserts are as follows:

A. Certifying common issues that are only superficially common and require extensive individual determinations;

B. Certifying common issues that are not rationally connected to the pleaded causes of action; and

C. Certifying common issues that are not supported by "some basis in fact".

[80] I will address each of these in turn.

(1) Superficially Common Issues

[81] The Crown argues that the issues raised by the respondents are only superficially common and require extensive individual determination and evidence of provincial and territorial child welfare agencies, which overwhelm any common issues.

[82] The Federal Court was aware of this argument and commented on it at paragraphs 41 and 68 of the Decision. Accordingly, this is not a question of a legal error in neglecting to consider a relevant issue. Rather, the Crown is effectively taking issue with the Federal Court's weighing of the relative importance of the common issues and the individual issues at play. This is a question of mixed fact and law, which this Court will not disturb absent a palpable and overriding error. I see no such error here. The Federal Court appears to have understood and considered the parties' arguments on this point. Whether I, or any judge of this Court, would have reached the same conclusion on this question is not relevant.

[83] My view is the same concerning the Crown's criticism of the Federal Court's conclusion at paragraph 46 of the Decision that the commonality of the questions is enhanced by the fact that there is a single defendant. I see no legal error in the Federal Court having considered this fact, and I also see no palpable and overriding error in the Federal Court's analysis here.

(2) Issues Not Rationally Connected to Pleadings

[84] Here, the Crown argues that the Federal Court made a palpable and overriding error in finding a rational connection between the common issues and the pleadings. This argument relies on a characterization of the respondents' claims being based on a breach of a Crown duty to legislate (which was not pleaded), and allegations of negligence at the policy level.

[85] I am not convinced that it is fair to characterize the respondents' claims as being based on an alleged breach of a duty to legislate, or that the Federal Court otherwise erred in finding a rational connection between the respondents' pleadings and the certified common questions.

[86] The Crown also relies on the last sentence of paragraph 66 of the Decision, which refers to a broad common issue of the Crown's application of its policy. The Crown appears to consider all 15 of the certified common questions listed at paragraph 73 of the Decision as being under the umbrella of the single broad common issue referred to at paragraph 66. Reviewing the Decision as a whole, and in the absence of a clear effort by the Crown to address those 15 separate certified common questions, I am not convinced that the Crown has properly characterized the common issues.

(3) Issues Not Supported by Some Basis in Fact

[87] The Crown argues that the Federal Court certified the common issues in the absence of any evidence or support for a basis in fact. It argues that this constitutes a failure to consider a required element of the legal test, which is reviewable on a standard of correctness.

[88] However, as noted at paragraph 57 above, the Federal Court recognized that the respondents had to show some basis in fact for each of the requirements for certification. I am not convinced that the Federal Court failed to follow the law as it described it. Therefore, I conclude that, as with other issues in this appeal, this is not really an argument of a legal error. Rather, it is effectively a dispute over whether the evidence was sufficient to meet the low bar for certification of a class proceeding. This is a question of mixed fact and law to which the standard of review of palpable and overriding error applies. I see no such error.

(4) Conclusion on Common Issues

[89] In my view, the Federal Court made no reviewable error in its analysis of the requirement that the respondents' claims raise common issues of law or fact.

C. *Preferability*

[90] The Crown argues that the Federal Court made the following errors in its examination of the issue of preferable procedure:

A. Reversing the onus;

B. Failing to consider the predominance of individual issues;

C. Failing to consider the Court's limited jurisdiction over the actors that are at the heart of the claim;

D. Finding that provincial claims would amount to an insurmountable obstacle; and

E. Finding that the respondents' claim was a preferable procedure over a properly constructed class proceeding in a provincial court that included the province as a defendant.

[91] I discuss each of these issues below.

(1) Reverse Onus

[92] The Crown argues that the Federal Court made a legal error by reversing the onus on the respondents to establish that the requirements for certification are met. The Crown points specifically to paragraph 83 of the Decision in which the Federal Court found that the Crown had

not satisfied it, nor had the Crown advanced a case, that there was a better proceeding that could address the respondents' claim.

[93] I do not accept that the Federal Court applied the wrong onus on preferability. Paragraph 78 of the Decision indicates that the Federal Court considered the respondents' arguments on the relevant factors for preferability (as set out in Rule 334.16(2)) and was satisfied that a class proceeding was preferable. One of the relevant factors is whether "other means of resolving the claims are less practical or less efficient". Reading the Federal Court's analysis of the preferability issue as a whole, it is clear that it was satisfied that this factor was met. To me, the Federal Court's reference at paragraph 83 (as well as at paragraph 79) to what the Crown had not established does not indicate a reversal of onus on the respondents. Rather, it indicates that the Crown's arguments on the issue, such as they were, had been considered.

[94] I am not convinced that, as the Crown asserts, the Federal Court became singularly focused on a class proceeding and declined to fully assess the shortcomings of the claims in the Federal Court. As with many of the Crown's arguments, I find that they are effectively taking issue with the Federal Court's consideration of the evidence and the parties' respective positions. I see no basis on which to intervene in this regard.

(2) Predominance of Individual Issues

[95] The Crown argues that the Federal Court failed to consider whether the questions of law or fact common to the class members predominate over any questions affecting only individual

members (as contemplated in Rule 334.16(2)(*a*)), and that this failure represents a legal error reviewable on a standard of correctness.

[96] As noted in the previous section of this analysis, the Federal Court considered the relevant factors for preferability as set out in Rule 334.16(2). It listed those factors at paragraph 29 of the Decision, including whether the common questions predominate over questions affecting only individuals. There is every reason to conclude that the Federal Court had that factor in mind when making its decision.

[97] As indicated at paragraph 82 above, the Federal Court was aware of and considered the Crown's argument that individual issues would overwhelm common issues in the Action.

[98] In view of the foregoing, I conclude that the Federal Court considered all of the relevant factors for preferability. The factor of whether common questions predominate over questions affecting only individuals is essentially the other side of the coin of whether individual issues would overwhelm common issues. The Federal Court's silence on the former factor in discussing preferability, after having considered the latter in the context of common issues, is insufficient to convince me that it failed to consider that factor. I add that the predominance of common questions over questions affecting individuals is not a requirement, but merely a factor to be considered: *Wenham*, at para. 72, *Hollick*, at para. 30.

(3) Jurisdiction of the Federal Court over Key Actors

[99] The Crown argues that, while a class proceeding might be the proper vehicle for the respondents' claims in appropriate circumstances, that is not the case here. It asserts that, because the respondents' claims are limited to the Federal Crown's liability, the participation of the provinces and territories (which actually provided the child welfare services in issue, and which have relevant documents and information in their possession, power or control) cannot be secured.

[100] As indicated in the extract from the Decision quoted at paragraph 54 above, the Federal Court was well aware that this was a key issue from the Crown's perspective.

[101] I accept that documents and information relevant to the Action may be in the possession, power or control of the provinces and territories, and not otherwise available to the Federal Crown. However, even if the Federal Court does not have the power to compel production of such relevant documents and information from the provinces and territories, it does not necessarily follow that the Crown will not be able to obtain them to assist with its defence. Moreover, these facts are not determinative on the question of certification of a class proceeding. Rather, they are among the issues that the Federal Court had to consider.

[102] Accordingly, it is necessary to determine whether the Federal Court made a reviewable error on this issue. That is to say, this Court must consider whether the Federal Court made an error of law, or if it made a factual error that is palpable and overriding.

[103] The Crown asserts that the Federal Court erred in its discussion of *Tippett* at paragraph 82 of the Decision. As noted at paragraph 65 above, the Federal Court cited *Tippett* as a precedent wherein the Federal Court issued orders compelling the production of documents by a province (British Columbia) that was not a party to the proceeding. The Court then stated as follows: "[t]he same principled approach would presumably apply in respect to other non-party provinces and territories in this class proceeding. At this stage, it cannot be said that Canada cannot adequately defend this proposed class proceeding."

[104] The Crown notes that the issue of the jurisdiction of the Federal Court to compel production from a province was not considered in *Tippett* because neither party raised it. The Crown argues that the Federal Court erred "in failing to conduct [its] preferable procedure analysis on a full and accurate understanding of how this matter could proceed in the Federal Court." The Crown continues as follows: "The [Federal Court] presumed the compellability of provinces and territories, and this served as an answer to Canada's objections to the appropriate and complete resolution of the claim requiring the participation of the provinces."

[105] I am not convinced that the Federal Court presumed the compellability of the provinces and territories or that it otherwise made an error of law in its discussion of *Tippett*. It did not mischaracterize the decision. It simply omitted to discuss a distinction in *Tippett* that the Crown argues was important. The Federal Court's reasoning, especially as reflected in the last sentence of paragraph 82 of the Decision (reproduced at the end of paragraph 103 above), seems to have been that it was not convinced that the non-compellability of the provinces and territories would prejudice the Crown in defending the Action since the Federal Court did not have an example of

a situation in which such non-compellability had been a problem. I see no error in this reasoning. Even if the Federal Court does not have the power to compel production of documents and/or information from the provinces or territories, the Crown may be able to obtain relevant documents and/or information in other ways. For example, the Crown might obtain an order of a provincial court at its request, or at the request of this Court prompted by the Crown.

[106] I am likewise not convinced that the Federal Court made any palpable and overriding errors on this issue. It heard and considered the Crown's arguments thereon and reached a conclusion that, in my view, was open to it. It did not minimize the need for production of the documents in question. Rather, it was not convinced, based on the law and the evidence, that there was a serious obstacle to such production. I disagree with the view expressed by my colleague Rennie J.A. (at paragraph 45 above) that the litigation would inevitably run into a brick wall. I see no basis for such a view.

[107] Further, it was open to the Federal Court to take into account, as it did, the Crown's refusal to answer questions on cross-examination concerning this issue and the absence of provinces as parties to the Action. At paragraph 45 of the Decision, the Federal Court stated as follows: "[t]he [Crown's] failure to respond to questions related to jurisdiction and delegation detracts from the force of its submissions that the role of the provinces somehow makes the [respondents'] claim impossible or impractical to pursue in this Court."

(4) Insurmountable Obstacle of Provincial Actions

[108] The Federal Court understood that a key consideration in determining whether a class proceeding in that court would be the preferable procedure was whether it would be preferable to a series of provincial and territorial proceedings, with the provinces and territories as parties. The respondents took the position that having to prosecute 13 separate actions, instead of a single action, would constitute an insurmountable obstacle, and that it was absurd for the Crown to argue that such an approach was preferable. As alluded to at paragraph 66 above, the Federal Court apparently agreed, characterizing the prospect as truly daunting, particularly for the respondents (see paragraph 84 of the Decision).

[109] The Crown argues that its new evidence concerning proposed class proceedings filed by the respondents' counsel in six provinces concerning claims similar to those in the Action demonstrates that this approach does not constitute an insurmountable obstacle, and is not daunting at all.

[110] The Crown appears to be principally concerned with the compellability of provinces and territories if they are parties in provincial and territorial proceedings versus the Federal Court's limited jurisdiction to compel them in the Action. I have addressed that concern in the previous section of this analysis. The remaining question is whether the Federal Court erred in relying on the prospect of several separate provincial actions being daunting when concluding that a single class proceeding in the Federal Court would be preferable.

[111] In the end, whether such a class proceeding is the preferred procedure for the just and efficient resolution of the common questions of law or fact, as contemplated in Rules

334.16(1)(*d*) and (2), is a question of mixed fact and law. Accordingly, it is reviewable on a standard of palpable and overriding error. The same is true of whether a series of provincial actions would be daunting. Though the Crown makes a case for the possibility that a different decision maker using different evidence might have reached a different conclusion, I am not convinced that the Federal Court made any palpable errors in this regard.

[112] It is not the role of this Court to decide whether or not a class proceeding is preferable. Rather, this Court should limit itself to determining whether the Federal Court's conclusion in that regard was tainted by error. I disagree with my colleague Rennie J.A. (see paragraph 40 above) that filing six provincial proceedings necessarily contradicts the Federal Court's conclusion that filing and pursuing 13 such proceedings would be daunting.

(5) Efficiency of Class Proceeding in Federal Court

[113] The Crown's submissions on this point of mixed fact and law raise a number of arguments against the efficiency of a class proceeding in the Federal Court (as compared to separate provincial and territorial proceedings), but they do not, in my view, establish a palpable error.

(6) Conclusion on Preferability

[114] For the foregoing reasons, it is my view that the Federal Court made no reviewable error in its analysis of the preferability requirement.

V. Conclusion

[115] I would order that the Crown's motion to introduce new evidence, as well as the respondents' alternative request to introduce other new evidence, be granted for the reasons set out above.

[116] I would dismiss the appeal without costs. I would also amend the style of cause so that the middle name of the first-named respondent reads as "Pamamukos" instead of "Pama Mukos".

"George R. Locke"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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