Court File No. C68263

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

LISA CAVANAUGH, ANDREW HALE-BYRNE, RICHARD VAN DUSEN, MARGARET GRANGER and TIM BLACKLOCK

Plaintiffs/Respondents

and

GRENVILLE CHRISTIAN COLLEGE, THE INCORPORATED SYNOD OF THE DIOCESE OF ONTARIO, CHARLES FARNSWORTH, BETTY FARNSWORTH, JUDY HAY, Executrix of the Estate of J. ALASTAIR HAIG and MARY HAIG

Defendants/Appellants

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PART I – ORDER UNDER APPEAL

1. This is an appeal from the Judgment of Justice Leiper dated April 24, 2020 following a 23-day trial of the common issues brought by the representative plaintiffs against the defendants. Her Honour ordered and adjudged that the defendants: (1) owed a duty of care to the plaintiff class, (2) breached said duty of care to the class, (3) owed a fiduciary duty to the plaintiff class; (4) breached said fiduciary duty; and (5) that the defendants' conduct merited an award of punitive damages.

PART II – OVERVIEW

2. This was the first common issue trial of institutional abuse in Ontario. It became a large-scale individual issues trial. While Her Honour ultimately concluded the defendants had breached their duty of care to the entire class, her reasons show only individual breaches of the standard of care in individual circumstances to individual students. Her Honour identified no class-wide practices that fell below the standard of care, nor did she find of class-wide practices that could foreseeably cause mental injury. The evidence shows no such class-wide breach occurred.

3. The defendant Grenville Christian College was a Christian boarding School. The class consists of boarding students who attended between 1973 and 1997. The claim alleged Grenville's policies and practices directly exposed the class to the risk of physical and emotional harm. The defendants admitted the existence of a duty of care to take reasonable steps to protect students from actionable harm and a fiduciary duty not to cause harm through acts of disloyalty. The common issue trial addressed whether there had been a class-wide breach of such duties.

4. The parties' witnesses effectively described two different Schools. The plaintiffs' witnesses described a horror movie: a boarding School controlled by dictatorial headmasters and the conservative Christian sect they adhered to. Witnesses testified to being paddled until they bled, subjected to constant verbal abuse, public humiliations, punishments for perceived

transgressions. Female students were subjected to sexist slurs, and their clothing and bodies were heavily policed.

5. The defendants' witnesses described a severe School with conservative Christian values, but one in which the staff genuinely cared and where most thrived. They denied witnessing or knowing of physical or verbal abuse. They denied extreme teachings on sex and sexuality. They denied harsh or arbitrary discipline They denied hearing sexist or homophobic slurs directed at students. The female witnesses all testified to being well-treated and respected. This evidence was critical to determining class-wide conduct. Her Honour effectively ignored it.

6. Her Honour addressed the claim of systemic negligence in relation to five impugned disciplinary practices. Her reasons do not show a finding of class-wide negligence in relation to any practice. Rather, Her Honour found individual breaches of the standard of care, and distinct class-wide practices that did not fall below the standard. Her Honour further erred by: (1) disregarding the defence evidence on class-wide practices; (2) mis-applying the expert evidence; and (3) failing to recognize that the evidence did not support a *foreseeable* risk of mental injury throughout the class period.

7. Her Honour made conclusory findings of class-wide abuse. To reach such a finding Her Honour needed to address the defence evidence. She did not. Her findings further fail to identify a class-wide breach of the standard of care or any analysis of how such a breach could cause foreseeable mental injury to the class. Ultimately, she did not make the necessary findings to establish a class-wide breach of the duty of care.

PART III – RELEVANT FACTS

BACKGROUND

8. This is a class action brought by former boarding students of Grenville Christian College. They claimed damages from the School, and from the estates of two former headmasters, Alistair

(or "Al") Haig and Charles Farnsworth. The plaintiff class is defined as "students who attended and resided at Grenville Christian College between September 1973 and July 1997, excepting the children and grandchildren of the individual defendants." Only secondary School students resided at Grenville. The class totals 1,360 former boarding students (the "Class").[1]

9. The plaintiffs claimed that Grenville and its former headmasters, in the operation of the School, failed to meet the standards of care and fiduciary obligations owed to the Class and are liable to the members of the Class who suffered injury as a result .[2]

10. The Divisional Court certified five common issues to be decided at this trial:

1. Did the defendants owe a duty of care to the plaintiff class?
2. Did the defendants breach the duty of care owed to the plaintiff class?
3. Did the defendants owe a fiduciary duty to the plaintiff class?
4. Did the defendants breach their fiduciary obligations to the plaintiff class?
5. Does the conduct of the defendants merit an award of punitive damages?[3]

11. The Appellants admitted common issues 1 and 3. The Respondents and Appellants agreed that the applicable duties were:

> Duty of Care: Grenville owed a duty of care to the plaintiffs and the class members to take reasonable steps to care for and ensure their safety and to protect them from actionable physical, psychological and/or emotional harm and provide them with a safe, secure learning environment.
>
> Fiduciary Duty: Grenville owed a fiduciary duty to the plaintiffs and class members to refrain from harmful acts involving disloyalty, bad faith or self-interest.[4]

12. The risk of actionable harm was a critical component of the duty of care. The action was fought on this basis.

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[1] Reasons for Judgment of Justice Leiper dated February 26, 2020 ("Reasons"), para 1, Appeal Book and Compendium ("ABC"), Tab 3, pp 27-28; Order of Divisional Court, February 24, 2014, ABC, Tab 7, pp 123-127
[2] Reasons para 5 – 7, ABC, Tab 3, p 28
[3] Order of the Divisional Court, February 24, 2014, ABC, Tab 7, pp 123-127
[4] Reasons para 11, 12, ABC, Tab 3, p 29

BREACH OF THE DUTY OF CARE OWED TO CLASS

13. To show a breach of the duty of care, the plaintiffs needed to establish: (1) a breach of the standard of care; (2) that could foreseeably cause (3) actionable physical or mental injury. They needed to establish such a breach on a class-wide basis.

(i) Standard of Care

14. The Respondents led two expert witnesses. Only one of them, Dr. Axelrod, was a standard of care expert. Dr. Axelrod opined on the standard of care for private and public Schools in Ontario during the Class Period in relation to educational and disciplinary practices, laws, regulations and policies and the obligations of Schools and teachers with respect to the health and welfare of the students.[5]

(ii) Foreseeable (iii) Actionable Mental Injury

15. Her Honour correctly found that the agreed upon duty of care included a duty to avoid causing reasonably foreseeable mental injury.[6] Whether harm is "reasonably foreseeable" is an objective test. The question is whether someone in the defendant's position ought reasonably to have foreseen the harm to the class of plaintiffs. The analysis is properly focused on whether the harm was foreseeable prior to its occurrence, not with the aid of 20/20 hindsight.

***Rankin (Rankin's Garage & Sales) v. J.J.*, 2018 SCC 19, paras 46, 53**

16. "Actionable" mental injury involves serious trauma or illness - there must be more than a transient mental state that falls short of injury.[7] *Saadati v Moorehead* establishes the legal threshold for actionable mental injury:

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[5] Reasons paras 135 -144, ABC, Tab 3, pp 59-60
[6] Reasons paras 16-17, ABC, Tab 3, p 30
[7] Reasons para 16, 17, ABC, Tab 3, p 30

> While allegations of injury to muscular tissue may sometimes pose challenges to triers of fact, many physical conditions such as lacerations and broken bones are objectively verifiable. Mental injury, however, will often not be as readily apparent. Further, and as *Mustapha* makes clear, mental *injury* is not proven by the existence of mere psychological *upset*. While, therefore, tort law protects persons from negligent interference with their mental health, there is no legally cognizable right to happiness. Claimants must, therefore, show much more — that the disturbance suffered by the claimant is "serious and prolonged and rise[s] above the ordinary annoyances, anxieties and fears" that come with living in civil society (*Mustapha*, at para. 9). [Emphasis Added]

***Saadati v. Moorhead*, 2017 SCC 28, para 37**

17. Dr. Barnes opined for the plaintiffs about psychology, the abuse of children, institutional abuse, and the impacts of childhood abuse, maltreatment, and trauma. This was relevant to what conduct could foreseeably cause mental injury. She was not called to give evidence on the standard of care, nor was she so qualified. As will be seen, Her Honour consistently treated Dr. Barnes' evidence as establishing the standard of care.[8]

18. Importantly, Dr. Barnes′ opinion did not relate to the Class Period. Indeed, Dr Barnes erroneously believed the Class Period extended into 2007. Her evidence, based on the 2016 Ontario Child Welfare Eligibility Spectrum, reflected "the values and ideas and notions of abuse as of 2016" which she described as "The most current ideas, yes". She swore:

> Q. And I'm suggesting to you that notions of what constitutes abuse, particularly psychological or emotional abuse, have evolved considerably in those 20 or 30 or 40 years, up till 2016 when these guidelines were issued.
> A. I guess the ideas have evolved.
> Q. And you have not indicated anywhere in your report whether these 2016 guidelines reflect the values with respect to abuse that existed in the 70s or 80s, have you?
> A. I haven't tried to make a determination in the report about that.[9]

[8] Reasons paras 251-259, 275, 288, 292-293, 305, 307, 312, ABC, Tab 3, pp 78, 79, 82, 85, 86, 88, 89, 90

[9] Transcript of Evidence ("TRN"), Dr. Rosemary Barnes, Vol 2, p 532 ln 28 – 32, p 564 ln 16 – p 566 ln 31, ABC, Tab 12, pp 203, 205-207; Exhibit 15 Eligibility Spectrum, ABC, Tab 30, pp 412-512

[Emphasis Added]

19. Thus Dr. Barnes' evidence on what constituted abuse did not relate to the Class Period. This left the Court with no evidence that the Appellants ought to have reasonably foreseen, during the Class Period, that their conduct would cause emotional harm. Her Honour did not address this.

20. Dr Barnes opined that there are four categories of child abuse: (1) physical abuse; (2) sexualized abuse; (3) neglect; and (4) psychological abuse (i.e., emotional harm). Abuse of any kind increases the risk of later psychological difficulties. The degree of risk depends on numerous factors including the frequency and severity of maltreatment and the vulnerability of the child.[10]

21. Dr. Barnes provided the following definition of "emotional harm":

> 3(e) Emotional Harm. "Emotional harm involves a repeated pattern of caregiver behaviour or extreme incidents that encourages the individual to believe that he or she is worthless, flawed, unloved, unwanted, endangered, or a value only in meeting an other's needs."[11]
> [Emphasis Added]

22. She agreed that all elements of this definition needed to be present before one could say there was abuse. Emotional harm could take various forms including: (1) spurning, (2) terrorizing, (3) isolating, (4) exploiting, and (5) denying emotional responsiveness.[12] Each form of emotional harm had its own definition.

23. This was the necessary threshold for emotional harm under the agreed upon duty of care. However, as will be seen, Her Honour did not apply this threshold in determining whether class-wide conduct posed a foreseeable risk of emotional harm.

(iii) Class-Wide Basis

24. This action was certified on the basis of systemic negligence. In *Cloud v Canada*, this Court

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[10] TRN Dr. Barnes, Vol 2, p 488 ln 31 –p 491 ln 5, ABC, Tab 12, pp 194-197
[11] TRN Dr. Barnes, Vol 2, p 575 ln 28 – p 576 ln 8, ABC, Tab 12, pp 208-209
[12] TRN Dr. Barnes, Vol 2, p 576 ln 15 - p 579 ln 19, ABC, Tab 12, pp 209-212

held that the focus of such a common issue trial ought to be on conduct of as it affects all class members, and how and for what purpose they ran the School. Although evidence from individuals that speaks to systemic conduct may be relevant, findings of causation and extent of harm must await the individual trials to follow. As will be seen, the common issues trial devolved into whether individual abuse occurred. Effectively, it was an individual issues trial *writ large*.

***Cloud v. Canada (Attorney General)*, 2004 CanLII 45444 (ON CA), para 71**

25. Her Honour framed the plaintiffs' systemic negligence claim as an "unreasonable institution" case where the School's "operational characteristics" directly leads to harm, as was the case in *Cloud.* The trial judge distinguished the plaintiffs' claim from so-called "rogue actor cases" where the School had inadequate policies to protect against abuse towards individual students. [13]

26. The plaintiffs in *Cloud* alleged the defendant residential School was "run in a way that was designed to create an atmosphere of fear, intimidation and brutality" and thus all students suffered. Both parties led evidence on Grenville's atmosphere. The Appellants argued that the atmosphere to which all students were exposed ought to be the focus of the systemic negligence analysis.

***Cloud v. Canada (Attorney General)*, 2004 CanLII 45444 (ON CA), para 66**

27. Her Honour declined to adopt this approach. She instead chose to focus on how Grenville "ran the School":

> 25. The plaintiffs claim is that the evidence about Grenville's operations, including its discipline policies and practices, fell below the standard of care and could reasonably have been foreseen to lead to the risk of harm in the form of emotional trauma to students. The harm is not alleged to have come about because of a "prevalent atmosphere of repression, fear, humiliation and degradation."
> […]
> 27. The parties called evidence on these features of life at Grenville during the class period. Although there was evidence tendered about the atmosphere at the School as

[13] Reasons, paras 18-21, ABC, Tab 3, p 30

> experienced by various students, this class action concerns the practices and policies at Grenville. As in *Cloud*, the Divisional Court certified the Grenville action based on allegations of systemic negligence in how the defendants ran the School and not on the basis that every member of the class suffered the same or any of the abuse alleged by the plaintiffs: Cavanaugh at para. 24; Cloud at para. 58.

28. Her Honour did not define what it meant to be "systemically negligent" in the context of a common issue trial. However, the plaintiffs in their closing submissions did: "systemic negligence is negligence not specific to any one victim but rather to the class of victims as a group. It arises when individual acts, omissions, and/or decisions are directed towards a general, rather than specific set of circumstances. The impugned acts or omissions are said to be negligent because they create or maintain a system that is inadequate to protect the class from the alleged harm. To establish systemic negligence, the plaintiff must show that the systemic negligence of the institution created the necessary context for the acts complained of and the harm sustained."[14]

29. Her Honour did not have the benefit of this Court's recent guidance in *Brazeau v Canada*. In that decision, the Court held that a class-wide duty of care "can only be made out if the duty relates to the avoidance of the same harm for each class member". It cannot succeed if based upon a "series of discrete breaches of duty". This Court went on to hold that a duty arising from the implementation of policy involved "different acts in different circumstances and in relation to different individuals" and thus was not a class-wide duty. This was negligence at the "operational" level that turned on individual circumstances.

***Brazeau v. Canada (Attorney General)*, 2020 ONCA 184, paras 118, 120**

THE EVIDENCE

30. The trial became a contest about what happened to the individual students; whether they were abused and what life was like for them. The Respondents called evidence from two expert

[14] Closing Submissions of the Representative Plaintiffs para 109, 110, 111, ABC, Tab 31, p 605

witnesses, 12 former students and 3 former Grenville staff. The Appellants called 10 former students, three former Grenville staff and no expert evidence. Her Honour initially observed that "in many respects, the witnesses for all parties testified consistently about the operations of Grenville. In other ways, different students had markedly different experiences at the School." By the end of her Reasons, however, she found, "the evidence of what life at Grenville was like was remarkably consistent among the plaintiff and defendant witnesses". This was not the case. [15]

31. The Appellants said in their opening statement that the Court would "wonder whether the two sides went to two different Schools." They contrasted the plaintiffs' picture of Grenville as a "house of horrors" with their witnesses who said it was a strict School that, while occasionally excessive, offered them an excellent moral and academic education.[16]

32. As the Appellants disputed the Respondents' specific descriptions of events and challenged the credibility of their witnesses, Her Honour assessed the credibility of each Respondent witness. She found each one credible. This analysis formed the foundation of her decision. She did not assess the credibility of any of the Appellant's witnesses. [17]

(i) History and Character of Grenville

33. In asking whether the evidence established that Grenville's practices and policies fell below the standard of care for boarding Schools, Her Honour made the following findings.

34. In 1969, Betty and Charles Farnsworth and Al and Mary Haig founded the Berean Christian School just east of Brockville, Ontario. In 1974 the School became Grenville Christian College. Around that time, the School adopted the ideas of an American Christian community called the

[15] Reasons para 31, 329, ABC, Tab 3, pp 32, 93, 94; Ex 3 Agreement on Facts, Chronology and Definitions, ABC, Tab 29, pp 402-411; Exhibit Book ("EB"), Tab 3, p 1054
[16] Reasons para 332, ABC, Tab 3, p 94
[17] Reasons para 32-134, ABC, Tab 3, pp 33-59

Community of Jesus ("COJ").[18]

35. The COJ's philosophy required members to live in openness, honesty and giving and receiving correction. As such Grenville's staff regularly performed "light sessions" where they confronted each other to correct sinful ways of thinking and behaving.[19] The COJ doctrine became the foundation for Grenville's approach. Tough love was the dominant theme and obedience to authority was expected from all students. Joan Childs, a former administrator, testified that the COJ ideology intended to "break down" its students so to give them a mature Christian life.[20]

36. Grenville promoted itself as an authority in matters of respect and Christian values. In 1974, Al Haig described the School as follows:

- We have strong discipline in an atmosphere of straightforward love and concern for every student;
- We have been able to cut through all teenage rebellion;
- There is an excellent spirit of cooperation and respect in our School this year;
- We have found that old-fashioned honesty in dealing with students is the best policy;
- The students not only accept this discipline, they respect and appreciate it.[21]

37. Grenville admitted 200 to 300 students annually; most were boarding students in grades 7 to 13. Students could have additional responsibilities as student leaders and prefects. Sometimes prefects were assigned to oversee students who were being disciplined and were expected to report students for infractions. Prefects could also assess demerit points against fellow students which would lead to discipline for those who accumulated too many demerit points.[22]

38. The witnesses agreed that many staff members were caring and compassionate people.

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[18] Reasons para 4, 146-163, ABC, Tab 3, pp 28, 61-64
[19] Reasons para 151-153, 178-183, ABC, Tab 3, pp 61, 62, 66
[20] Reasons paras 159-160, 168, ABC, Tab 3, p 63 65
[21] Reasons para 164, 242, ABC, Tab 3, pp 64, 77
[22] Reasons para 175-177, ABC, Tab 3, p 66

Grenville's strict regimentation was believed to make the students better Christians.[23]

(ii) Daily Schedule and Interactions Between Staff and Students

39. Staff involved themselves in the boarding students' lives. Grenville's schedule was highly structured, with students attending Chapel sometimes twice daily, classes, study hall and extracurricular activities. Staff supervised students during mealtimes. Students were assigned chores which included kitchen duties, dormitory cleaning, general maintenance, and cleaning.[24]

40. Grenville published rules for its students in a handbook. Rules governed every part of the students' lives. Grenville had academic rules, rules about the School uniform and rules against smoking, drinking and drug use. There were rules about deportment and punctuality. There were some less precise rules such as the requirement to "conform to the spirit of the Grenville family". The girls were subject to detailed clothing rules. Participation in all aspects of the School life was mandatory. Students were not consulted in the adoption of the rules. "Grenville was not a democracy." The rule book did not specifically spell out potential disciplinary actions.[25]

41. In addition, there were unwritten rules that left some students bewildered. Failing to abide by these unwritten rules could attract discipline or "correction". Students could be subject to internal suspensions, known as being on "Discipline" or "D", even if they followed the written rules. The School valued and emphasized submission to all authority. Infractions of the rules often included public disciplinary sessions, known as public "light sessions" where students were called up in front of their peers. Students were present for punishments of others for breaches of the unwritten rules. The School had a "code of honour" which required students to report themselves for wrongdoing and to tell other students to report themselves. Students were encouraged to report

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[23] Reasons para 189, ABC, Tab 3, p 68
[24] Reasons para 190-192, ABC, Tab 3, p 68
[25] Reasons para 193-196, 240-241, 193, ABC, Tab 3, pp 68, 69, 76, 77

on other students for transgressions if the other student did not report themselves and were at times disciplined for failure to do so.[26]

42. There were few zones of privacy or personal autonomy for students whose personal belongings were subject to searches. They were monitored for looking "cheerful" or displaying an appropriate attitude. Their conversations, attitudes, clothing and relationships were monitored. Their sleeping arrangements were subject to change from time to time.[27]

43. The unwritten rules included the expectation that boys and girls not form couples and would stay 6 inches apart from one another. Students were disciplined for showing mild interest or friendship with members of the opposite gender.[28]

44. Grenville emphasized sexual abstinence. Female students were to cover their bodies, seek to avoid being physically attractive and take responsibility for the "lust" of boys. The Haigs and Farnsworths used denigrating and gendered terms for girls and women who dressed or behaved provocatively, such as whores, bitches in heat, Jezebels, and harlots. Some described feeling fear and shame about their bodies arising from these terms. Not all former students who testified recalled these teachings. The School taught boys that masturbation was wrong and homosexuality was a sin. There were demeaning epithets and actions towards male students believed to be gay.[29]

45. Dr. Axelrod testified that Grenville's operational philosophy was unlike any other educational institution in Ontario at the time. He described the values stated in a 1981 Grenville document as harsh, categorical, unusual, repressive and an unsophisticated assertion about human behaviour. He did not say that this philosophy was harmful or breached the standard of care.[30]

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[26] Reasons para 197-199, 203, 236, ABC, Tab 3, pp 69, 70, 75, 76
[27] Reasons para 206, ABC, Tab 3, p 71
[28] Reasons para 207, 208, 209-214, ABC, Tab 3, pp 71, 72
[29] Reasons para 215-233, ABC, Tab 3, pp 72-75
[30] Reasons para 244-249, ABC, Tab 3, pp 77-78

46. Her Honour found that with Grenville's structure, practices, culture, rules and norms established during the Class Period, Grenville functioned as a "total institution" – an institution where children live apart from their families for extended periods of time and are completely reliant on institutional staff. Dr. Barnes testified total institutions pose an inherent risk to subjecting children to "disconnection, degradation or powerlessness." There was no suggestion that the Appellants ought to have known this during the Class Period. Her Honour did not ask whether it was appropriate to apply a construct created in the year 2000 to the Class Period, 1973 - 1997. There was no evidence that the Appellants knew or reasonably ought to have known that they were operating a "total institution". Nor was there evidence that they might be placing their students at risk of harm as a result. Her Honour did not otherwise explain the relevance of this finding to whether Grenville had breached its duty to the class.[31]

(iii) The Appellants' Evidence

47. Absent from Her Honour's lengthy factual findings is any detailed account of the defence witnesses' evidence. The 10 former students who testified for the defense had all thrived at Grenville. They all denied experiencing or witnessing any conduct they saw as abusive. They denied there was a pervasive sense of fear and insecurity. Rather, several said Grenville could be "intense" given its strict rules and high expectations. Some likened it to the military. Discipline could be too severe and harsh. Public light sessions, in which students were stood up in front of their peers and chastised for wrongdoings, were humiliating for the students subjected to them. Students who did not fit the Grenville mold could struggle. This was particularly so for gay and non-Christian students. However, no one experienced or witnessed arbitrary enforcement of the rules, abusive corporal punishment, students made to perform degrading tasks, or students targeted

[31] Reasons para 257-259, ABC, Tab 3, p 79

with sexist or homophobic slurs. Their evidence was relevant to what was class-wide conduct.

48. Liam Morrison's (1973-1980) parents sent him to Grenville because he was barely passing his classes at his public School. After his first year at Grenville, he was top of his class. According to Liam, Grenville had clear and equally applied rules. It was a little like bootcamp. He had no complaints about being put on Discipline. He never saw students made to perform degrading chores. He did witness students stood up and told what they were doing wrong. This was humiliating for the student, and made Liam want to keep his head down. He was paddled once, and felt it was on the lenient side. He never saw any inappropriate physical discipline. Liam remembered other boys who had been paddled joking about it afterwards. [32]

49. Julie Lowe (1985-1988) went to Grenville after struggling in public School. She found Grenville was strict but friendly. Her grades improved. Like her own home, Grenville had consequences for breaking the rules. She did not believe it enforced the rules arbitrarily. Julie was twice put on Discipline, which she felt was appropriate. She never saw anyone forced to perform degrading chores. She never saw any corporal punishment or inappropriate physical contact. Julie felt well treated as a female student and she never heard staff use sexist epithets. Female staff would discourage girls from wearing inappropriate clothing or acting inappropriately, just as Julie's own mother did. She was once suspended for kissing a boy, but no one demeaned her for it. Julie enjoyed her time at Grenville and in her observations, so did most other students.[33]

50. Marc Bergeron (1987-1990) testified that Grenville gave him self-confidence and showed him what he was capable of. While he had been failing in public School, at Grenville his grades

[32] TRN Liam Morrison, Vol 4, p 949 ln 16 – p 951 ln 20, p 952 ln 20-30, p 980 ln 10-19, p 976 ln 3 – p 977 ln 20, p 984 ln 17-28, ABC, Tab 24, pp 334-336, 337, 340, 338-339, 341

[33] TRN Julie Lowe, Vol 6, p. 1725 ln 21 – p. 1726 ln 11, p. 1728 ln 20-25, p 1730 ln 9 – p 1734 ln 12, 1736 ln 13 – p 1738 ln 19, ABC, Tab 19, pp 286-287, 289, 291-295, 296-297, 297-298

improved significantly. Grenville had an "intense" atmosphere, reminiscent of his later time at military college. However, Marc denied living in a state of fear and anxiety. He believed that while most students got along, some did not and were quite anxious. Non-Christian or gay students would have had more intense experiences at Grenville, "because aspects of the culture were really hostile." Fr Farnsworth's sermons sometimes used sexist epithets and there were pervasive negative comments about homosexuality in "a very late eighties Christian light." Marc never heard staff use homophobic slurs. He did on occasion see students, like Margaret Granger, publicly shamed. He was glad it was not him who had been stood up. Marc never saw anyone forced to perform degrading chores, nor did he witness any arbitrary treatment.[34]

51. When Byron Gilmore (1977-1982) was in public School, he was told he would not amount "to a hill of beans". At Grenville, Byron received individual instruction, positive encouragement and formed deep friendships. He said that, a little like the army, Grenville had a lot of rules and a culture of doing what you were told. Byron acknowledged that in some cases the use of the paddle and the public light sessions were excessive. These punishments sometimes outweighed the crime. He never saw students forced to perform demeaning chores or staff verbally abusing students.[35]

52. Simon Best (1984-1998), now a doctor and faculty member at John Hopkins Medical Centre in Baltimore, characterized Grenville as an intellectually demanding School that modeled the humility of Christian life. It was a massive part of his upbringing. According to Simon, Grenville's rules were well known and not enforced arbitrarily. He never saw staff treat students in an abusive or degrading manner. While the School took a literal interpretation of the New

[34] TRN, Marc Bergeron, Vol 6, p 1760 ln 18 – p 1762 ln 18, p. 1775 ln 1 – ln 26, p 1779 ln 1 – ln 9, p. 1790 ln 31 – 1791 ln 21, p 1795 ln 18 – p 1797 ln 15, p 1782 ln 17 – p 1787 ln 13, p 1803 ln 21 – 1804 ln 9, ABC, Tab 13, pp 218-220, 221, 222, 229-230, 231-233, 223-228, 234-235

[35] TRN Byron Gilmore, Vol 7, p 1822 ln 20 – p 1824 ln 3, p 1827 ln 8 – p 1828 ln 20, p 1831 ln 24 – p 1834 ln 18, ABC, Tab 18, pp 276-278, 279-280, 281-284

Testament's condemnation of homosexuality, Simon never heard staff call students derogatory terms like faggot or queer. Simon believed some students struggled and reacted against Grenville's strict rules, however he did not feel there was a pervasive sense of fear.[36]

53. William ("Lenny") Newell (1978-1981) credited Grenville for helping shape who is he today. Grenville had clear rules and consequences for breaking them. Lenny did not see any special treatment in how the rules were applied. Lenny was put on Discipline three times, which he felt was warranted for his actions. He was paddled once and did not find it excessive. He never heard staff yell abuse at students, call female students sexist epithets, or use homophobic slurs. He recalled seeing students on occasion called out for transgressions, which was humbling for the student singled out. Lenny did not fear his sins would be exposed or that he would be targeted for minor transgressions. He did not believe other students had such fears either.[37]

54. Emma Postlethwaite (1981-82, 1986-87) was struggling socially when she came to Grenville. After her first year, she was a more confident and better person. Emma never experienced or witnessed any mistreatment while at Grenville. She never felt a sense of fear or intimidation. The other students seemed generally happy. Emma believed Grenville's rules were appropriate for a co-ed boarding School. While romantic relationships were prohibited, Emma knew girls with boyfriends who never got in trouble. She never saw any students made to perform denigrating chores, nor did she hear any Grenville staff use sexist epithets or any other offensive words. She was never taught that women were to blame for being sexually assaulted.[38]

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[36] TRN Simon Best, Vol 5, p 1480 ln 4 – 14, p 1482 ln 4 – p 1483 ln 13, p. 1485 ln 1 – p 1486 ln 16, ABC, Tab 14, pp 237, 239-240, 241-242

[37] TRN William Newell, Vol 7, p 1861 ln 27 – 1870 ln 32, p 1877 ln 20 – 28, p 1893 ln 1 - 29, ABC, Tab 25, pp 343-352, 355, 356

[38] TRN Emma Postlethwaite, Vol 8, p 2202 ln 4 – p 2203 ln 20, p 2209 ln 14 – 32, p 2213 ln 15 – 2216 ln 14, p 2219 ln 20 – 32, p 2221 ln 15 – 2223 ln 4, p 2226 ln 14- 25, ABC, Tab 26, pp 358-359, 360, 361-364, 365, 366-368, 369

55. Lucy Postlethwaite (1985-1988) testified that at Grenville she excelled academically and overcame her shyness. To her, Grenville was a normal high School. Lucy denied experiencing an atmosphere of fear and intimidation. Most students seemed genuinely happy. She never saw any conduct she would describe as abusive. She never felt staff were on the constant lookout for faults or sins. She never witnessed staff denigrating students or students being made to perform chores without the proper tools. She denied being taught that women were responsible for being sexually assaulted. Lucy emphatically denied ever hearing sexist epithets, saying she would never have gone to a School where staff used such terms. Grenville had a rule against romantic relationships, but no one cared. Lucy had a boyfriend and was never disciplined.[39]

56. David Webb (1984-1987) said he came to Grenville because he was not reaching his full academic potential. David was put on Discipline twice; it left no impact on him. He never saw students made to do chores without the proper tools. He recalled his cousin being stood up and singled out for having a haughty attitude. David thought, "I never want that to happen to me". He was not aware of any corporal punishment. He never heard staff use sexually derogatory terms.[40]

57. Robert Creighton (1984-1987), now a Broadway actor, said Grenville's staff encouraged him to succeed and expected him to perform at a top level. Grenville's high expectations, however contributed to the intensity of the experience. While at times discipline could be excessive, Robert did not feel that it was abusive. Sometimes students were publicly told to "shape up". This happened to Robert on one occasion. He characterized these moments as "intense". The general

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[39] TRN Lucy Postlethwaite, Vol 8, p 21 p 2131 ln 28 - p 2132 ln 15, p 2133 ln 5 – 24, p 2136 ln 26 - p 2141 ln 18, p 2142 ln 29 – p 2144 ln 4, p 2146 ln 26 – p 2147 ln 17, p 2150 ln 32 – 2151 ln 2, p 2196 ln 6 – 18, ABC, Tab 27, pp 371-372, 373, 374-379, 380-382, 384-385, 386-387, 388

[40] TRN David Webb, Vol 9, p 2535, ln 14-24, p 2541 ln 4 – p 2544 ln 31, p 2545 ln 28 – p 2547 ln 29, p 2549 ln 30 – 2550 ln 20, p 2553 ln 20- 23, p 2578 ln 11 – 29, ABC, Tab 28, pp 390, 391-394, 395-397, 398-399, 400, 401

atmosphere was one of real comradery and deep friendships. The staff wanted the best for him. [41]

58. The three teachers and administrators who testified for the defense said Grenville's goal was to provide students with a quality Christian education in a structured environment. It was open about its discipline policies to prospective students and their parents, and ensured students knew the rules. They acknowledged some practices could be hard for students, but they all denied knowing of any demeaning or abusive treatment.

59. Donald Farnsworth, Charles Farnsworth's son, was a Grenville student (1973-1976), then a teacher and administrator (1980-2000). Grenville's goal was to provide quality education in a Christian environment. While Grenville had an academic program, many other students were enrolled because they were underachieving or misbehaving and needed a more structured environment. Staff went over the rules with students at the beginning of each year. The severity of discipline depended on the nature of the infraction and whether there was repeat behaviour. There were times that a student would be stood up and confronted with a problem, and sometimes other staff or students would join in. This could be unpleasant. In the years the paddle was used, it was employed only as last resort. Don strongly denied ever hearing students forced to perform demeaning punishment or students being verbally abused.[42]

60. In his twenty years at Grenville (1979-2003), Ken MacNeil worked as a math teacher, principal, and headmaster. Grenville's mission was to provide a rigorous education with a Christian focus. Ken would advise prospective students of Grenville's forms of discipline.

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[41] TRN Robert Creighton, Vol 9, p 2324 ln 21-31, p 2332 ln 5 – 29, p 2334 ln 3 – p 2335 ln 9, p 2336 ln 23 – p 2337 ln 5, p 2338 ln 10-20, p 2356 ln 13 – 24, p 2378 ln 2 – p 2379 ln 23, p 2382 ln 4 – p 2384 ln 9, ABC, Tab 16, pp 248, 249, 250-251, 252-253, 254, 255, 257, 258-260

[42] TRN Don Farnsworth, Vol 7, p 1907 ln 5 – 10, p 1910 ln 14 - 26, p 1915 ln 29 – p 1916 ln 29, p 1920 ln 28 – p 1921 ln 13, p 1926 ln 10 – 26, p 1928 ln 1 – p 1929 ln 19, p 1931 ln 5 – 1933 ln 23, ABC, Tab 17, pp 262, 263, 264-265, 266-267, 269, 270-271, 272-274

Discipline was controlled by the headmaster and deans. While there was no policy or code governing discipline, it did not seem unfair or arbitrary. Ken denied the children of donors were treated differently. Ken never saw or heard of students made to perform demeaning or unsafe work tasks. Corporal punishment was used very rarely. Students were occasionally publicly confronted on their behavior, which could be tough for the student to endure. Sometimes, other students were invited to participate. Ken never received any major complaints from parents about discipline. Grenville did not have formal sexual education, though homosexuality was discouraged. He never heard staff use sexist epithets against female students. Abuse was contrary to Grenville's principles and policies, but Ken acknowledged abuse may have occasionally resulted from Grenville's approach. He did not believe there was generally an abusive element to discipline at Grenville.[43]

61. Gordon Mintz worked at Grenville (1984-1999) in numerous capacities including as a teacher. Grenville attracted a variety of students, from the gifted to the troubled. The School provided a structured Christian environment that "had positive pressure to push forward, to maximize the gifts that each of us are given." Parents knew they were subscribing to Christian values. Gordon acknowledged that staff were paranoid about providing a "solid Christian teaching in terms of sexuality" and that this preoccupation was not as healthy as it could be. Gordon never witnessed any corporal punishment while at Grenville. He never witnessed mean-spirited discipline, preferential treatment, verbal abuse, or sexist epithets. Gordon admitted that there were occasional "excesses" at Grenville, such as showing students the School boiler as "the flames of

[43] TRN Ken MacNeil, Vol 7, p 1938 ln 16 – p 1939 ln 5, p 1945 ln 2 – ln 30, p 1955 ln 2 – p 1956 ln 25, p 1957 ln 16 – p 1963 ln 15, ABC, Tab 20, pp 300-301, 302, 303-304, 305-311; TRN Vol 8, p 2111 ln 19 – 30, p 2098 ln 17 – p 2099 ln 13, p 2104 ln 3 – 11, p 2121 ln 32 – p 2122 ln 25, ABC, Tab 20, pp 315, 312-313, 314, 316-317

hell", however he did not believe the overall Grenville experience was abusive.[44]

(iv) Disciplinary Practices

62. Her Honour turned to Grenville's in-School disciplinary practices. She considered five discrete practices, which she called "impugned disciplinary methods", in relation to the standard of care. In so doing, she asked whether "Grenville was systemically negligent because of its practices?"

1. Placing students on discipline status or on "D";
2. Corporal punishment (paddling);
3. Public shaming and staff confrontations with students;
4. The Boiler Room ("Flames of Hell");
5. Grenville's views and teachings regarding sexuality[45]

PART IV - ISSUES

1. Did Her Honour err in law by finding that the operation of the School involved all members of the School community in an abusive, arbitrary environment that supports a finding that Grenville engaged in systemic negligence?
2. Did Her Honour err in law in determining that Grenville was systemically negligent because of its "impugned disciplinary methods";
3. Did Her Honour err in law in finding that the defendants had breached their fiduciary obligations to the class members?
4. Did Her Honour err in finding that the defendants' conduct merited an award of punitive damages?
5. How to Proceed to Individual Issue Trials?

PART V – LAW & ANALYSIS

ISSUE 1: HER HONOUR ERRED IN FINDING GRENVILLE INVOLVED ALL MEMBERS IN AN ABUSIVE, ARBITRARY ENVIRONMENT

63. While Her Honour purported to analyze systemic negligence in relation to the five specific impugned methods of discipline, she ultimately found a class-wide breach of the duty of care and

[44] TRN Gordon Mintz, Vol 9, p 2430 ln 11 – p 2432 ln 14, p 2436 ln 4 – 30, p 2527 ln 14 – 27, p 2440 ln 10 – 19, p 2442 ln 7 – p 2443 ln 4, p 2527 ln 14 – 28, ABC, Tab 23, pp 323-325, 328, 332, 329, 330, 331, 332

[45] Reasons para 260, 261, ABC, Tab 3, pp 79-80

of class-wide harm:

> Grenville applied its philosophies in a hierarchical milieu, enlisting its staff and other students as part of the enforcement of those precepts. In so doing, it involved all members of the School community in an abusive, arbitrary environment that lacked policies or controls on the application of its various forms of discipline to ensure that students would not suffer harm. The number of students who testified about harm and of teachers who described this as a part of the culture, rather than as one-off incidents that were addressed by the headmasters, supports a finding that Grenville engaged in systemic negligence.
>
> […]
>
> Grenville knowingly created an abusive authoritarian and rigid culture which exploited and controlled developing adolescents who were placed in its care. In doing so it caused harm to some students and exposed others to the risk of harm. The finding of systemic negligence is a finding that the defendants' conduct deviated from established standards on a class wide basis.[46] [Emphasis Added]

64. She found maltreatment and abuse perpetrated on students' bodies and minds in the name of COJ values of submission and obedience that was "class-wide and decades-wide" [Emphasis Added]. She thus found "that Grenville engaged in systemic negligence." She ultimately ordered that the Appellants had "breached the duty of care owed to the plaintiff's class."[47]

65. In finding this class-wide breach of duty, Her Honour failed to wrestle with the Appellants' evidence. Their evidence was that Grenville was a harsh and strict religious environment, but not an abusive one. They all denied witnessing physical or verbal abuse, degrading punishments, arbitrary punishment or a general atmosphere of fear and insecurity. It was a harsh environment, but one in which they had thrived. Others were mistreated and ought not to have been. This was the alternative to the pan-abusive environment that would support a finding of systemic negligence. Her Honour failed to consider this alternative and erred in so doing.

66. Rather than grappling with the Appellants' evidence, Her Honour dismissed it by relying

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[46] Reasons para 320, 329 364-369, ABC, Tab 3, pp 92, 93, 94, 99, 100

[47] Judgment of April 24, 2020, ABC, Tab 5, pp 115-118; Reasons, paras 341, 364, ABC, Tab 3, pp 96, 99

on Dr. Barnes' opinion about resiliency, finding that "differently situated people will have different reactions to the same conditions" [Emphasis Added]. She effectively found that the Appellants' witnesses had experienced the same milieu but reacted differently. This was not their evidence nor could it be reasonably seen as such. They described a fundamentally different School. Her Honour's finding is palpably wrong.[48]

67. Dr. Barnes' opinion further had no bearing on the evidence of the three teachers and administrators who testified for the Appellants. They all denied pervasive abuse. Her Honour nonetheless ignored their evidence. She made no findings against their credibility or reliability.

68. Her Honour's conclusion that there was class-wide abuse further failed to apply the legal test for class-wide systemic negligence. The defendants owed the class a duty to take reasonable steps to care for and ensure the safety of class members and to protect them from actionable physical, psychological and/or emotional harm. Her Honour's reasons do not identify a class-wide breach of the standard of care – i.e., acts or omissions directed towards the entire class. She further did not apply Dr. Barnes' definition of emotional harm or determine whether there was a foreseeable risk of mental injury resulting from such a class-wide breach. Instead, Her Honour effectively approached this as an individual trial *writ large* – ascribing the individual experiences of the plaintiffs' witnesses to the entire class.

ISSUE 2: DID HER HONOUR ERR IN DETERMINING THAT GRENVILLE WAS SYSTEMICALLY NEGLIGENT BECAUSE OF ITS "IMPUGNED DISCIPLINARY METHODS"?

69. The Trial Judge approached the question of whether Grenville was systemically negligent in its impugned disciplinary methods in two steps. First, she determined whether there was conduct at Grenville that fell below the standard of care. Second, she asked whether the "harms" were

[48] Reasons para 334, ABC, Tab 3, pp 94, 95

"systemic". Neither party suggested this approach. Her Honour did not cite any law for it.

70. The Trial Judge misled herself by starting with an analysis of individual practices. The issue was whether Grenville's class-wide practices breached the standard of care and risked foreseeable, actionable harm. Her Honour consequently confused the issue of class-wide and individual negligence. She did not apply the expert evidence to the standard of care or actionable harm in relation to class-wide conduct. Ultimately, her findings do not support a class-wide breach of the duty of care.

(i) Discipline Status: Being Put on "D"

71. Her Honour first examined Grenville's practice of internal suspension called being on "Discipline" or on "D". She found students could be put on D for breaking the rules or having a bad attitude. Students were taken out of class, not permitted to wear the School uniform, and assigned work duties. The length of time on Discipline varied. There was evidence it could last several days or longer. Discipline ended when the student's attitude had changed or had shown enough remorse. There was no written policy governing its implementation.[49]

72. Students on Discipline were socially ostracized: they were not to speak or be spoken to by their fellow students and ate separately. They were supervised by staff or student prefects. At times they had to sleep separately. They had to make up their missed assignments outside of class. Students could also be subject to "correction sessions".[50]

73. The additional chores were often necessary tasks, such as dishwashing duties or pot scrubbing. At other times, students were given meaningless, humiliating, or painful chores. One group of students were made to run early in the morning and called "Cold Grits" because they

[49] Reasons para 262-263, ABC, Tab 3, p 80
[50] Reasons para 264-266, ABC, Tab 3, p 80

needed warming up to be good. [51]

74. Her Honour found that five students were placed on "extended discipline", lasting from two weeks to the summer break. She found six examples of "humiliating or painful/physically harmful forms of work discipline" but said that not all the witnesses were subject to harsh discipline. Eleven of the Appellants' witnesses, including three staff members denied ever experiencing or witnessing such forms of excessive discipline. Her Honour did not consider this evidence in determining whether there was a class-wide practice.[52]

75. Her Honour then turned to the expert evidence and concluded that some of the reported practices were in breach of the standard of care:

> Dr. Axelrod testified that a practice of having students work for excessively long periods of time under unsafe conditions would be unique and not meet the standard of care.
>
> Dr. Barnes gave opinion evidence that abuse arises where there is cruel and inappropriate treatment including menial and degrading work jobs for days at a time. Dr. Barnes testified that tasks such as scrubbing a dumpster with a toothbrush, cutting grass with scissors or picking up leaves by hand could also constitute cruel and inappropriate treatment.
>
> Dr. Barnes testified that the isolation of students from peers that accompanied being placed on discipline amounted to "spurning" and also falls within the definition of abuse.
>
> I accept the expert evidence of Drs. Axelrod and Barnes that the disciplinary methods to which the former students testified, including the evidence of enforced isolation from peers, silence and in some cases, excessively lengthy or

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[51] Reasons para 267, ABC, Tab 3, p 80

[52] Reasons paras 271-272, ABC, Tab 3, p 81; TRN Liam Morrison, Vol 4, p 950 ln 9 p 951 ln 4, ABC, Tab 24, pp 335-336 ; Julie Lowe, Vol 6, p 1725 ln 30 – p 1734 ln 13, ABC, Tab 19, pp 286-295; Marc Bergeron, Vol 6, p 1775 ln 9 – 26, ABC, Tab 13, p 221; Ken MacNeil, Vol 7, p 1960 ln 10 – ln 23, ABC, Tab 20, p 308; Byron Gilmore, Vol 7, p 1832 ln 6 – 12, ABC, Tab 18, p 282; Donald Farnsworth, Vol 7, p 1931 ln 5 – 17, ABC, Tab 17, p 272; William Newell, Vol 7, p 1864 ln 27 – p 1865 ln 4, ABC, Tab 25, pp 346-347; Lucy Postlethwaite, Vol 8, p 2146 ln 26 – p 2147 ln 8, p 2143 ln 22 – p 2144 ln 5, ABC, Tab 27, pp 384-385, 381-382; Emma Postlethwaite, Vol 8, p 2226 ln 14 – 25, ABC, Tab 26, p 369; David Webb, Vol 9, p 2543 ln 3 – p 2544 ln 31, ABC, Tab 28, pp 393-394; Gordon Mintz, Vol 9, p 2442 ln 8-15, ABC, Tab 23, p 330

> degrading, painful or dangerous forms of work duties also fell below the standard of care.[53]

76. Her Honour erred in relying on Dr. Barnes' evidence to determine a breach of the standard of care, which she was not qualified to opine on. Further, Her Honour did not find that, in breach of the agreed upon duty of care, it was foreseeable during the Class Period that such practices could cause actionable harm.

77. Foreseeability is assessed objectively from the defendants' perspective before the harm occurred. Dr. Barnes' opinion on emotional harm was based on 2016 standards. Thus, there was no evidence on what the defendants' ought to have reasonably foreseen throughout the class period. Her Honour never turned her mind to this question and made no findings as a result.

78. Her Honour also did not apply Dr. Barnes' definition of emotional harm as a "repeated pattern or extreme incidents of abusive behaviour." Neither did she apply Dr. Barnes' definition of spurning and isolation. Isolation involved "consistently denying" the child opportunities for interaction. Spurning included "consistently" singling out a child for criticism, punishment, or chores. The evidence did not show a class-wide practice of Discipline that met these definitions.[54]

79. However, having found that some forms of discipline reported by the students fell below the standard of care, Her Honour then turned to whether the "harms" were "systemic". She found:

> Were these Harms Systemic?
> **276.** I have concluded that these practices of putting students "on discipline" were systemic: the administration applied these practices to enforce the rules, expectations and norms around attitude for Grenville students. They applied to boarding students as a form of internal "suspension" from School. These practices were created and applied by the headmasters. They also incorporated the philosophies and challenges which the staff had learned from the COJ and practiced among themselves. In addition to incorporating sometimes harsh or painful elements, these punishments were arbitrarily meted out. There was no written policy or protocols about the nature of the work jobs, the length of time, limits on

[53] Reasons para 262-271, 272, 273, 274, 275, ABC, Tab 3, pp 80, 81, 82
[54] TRN Dr. Barnes, Vol 2, p 498 ln 9 – p 500 ln 23, p 575 ln 28 – p 576 ln 8, p 582 ln 30 – p 583 ln 9, ABC, Tab 12, pp 200-202, 208-209, 214-215

> what students could be asked to do, no avenues of appeal or protest and at times, disregard to student health and safety during these disciplinary stints. These, practices were part of how Grenville was operated.[55]

80. The plaintiffs described two concepts of systemic negligence: (1) the institution itself was negligent in how the School was run; (2) negligent practices that were class-wide by placing the entire class at risk of actionable harm. It is unclear what type of systemic negligence Her Honour is speaking of in her decision. The breaches of the standard of care were in respect to forms of Discipline that she acknowledged were not class wide. The decision to put a student on Discipline and the form such Discipline took was necessarily directed at specific individuals in specific contexts. Such decisions were not directed towards a "general set of circumstances". Individual breaches of the standard of care cannot sustain a finding of class-wide systemic negligence.

81. Her Honour did list aspects of Grenville's operations that were arguably class-wide: e.g., COJ philosophies, arbitrary application of discipline, and the absence of written policy or protocols governing discipline. However, she did not find such practices were a breach of the standard of care. She further did not address the Appellants' evidence that Discipline was not arbitrary. She needed to do so to find it was a class-wide practice.

82. Dr. Axelrod's evidence also did not support a finding that these class-wide practices were a breach. His evidence was that private Schools had wide latitude in discipline up to the point of not violating the *criminal code* or falling into a category of abuse. Dr. Axelrod did say that public Schools kept records of corporal punishment for accountability purposes. Such records would allow Schools to respond to allegations of abuse. Dr Axelrod did not say this was part of the standard of care, or that this was the practice of private Schools.[56]

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[55] Reasons para 276, ABC, Tab 3, p 82 83

[56] Reasons para 143, ABC, Tab 3, p 60; TRN Paul Axelrod, Vol 5, p 1415 ln 15 – p 1416 ln 24, p 1424 ln 21 – p 1425 ln 1, p 1447 ln 25 – p 1448 ln 31, ABC, Tab 11, pp 174-175, 177-178, 181-182

83. Ultimately Her Honour found individual breaches of the standard of care in Grenville's implementation of Discipline. She did not find such individual breaches created a risk of actionable harm. She did not find that Grenville's policies of Discipline amounted to a class-wide breach of the duty of care. There was thus no class-wide systemic negligence.

(ii) Corporal Punishment

84. In addressing corporal punishment, Her Honour found that in the late 1960s the Ministry of Education recommended that corporal punishment play no role in the disciplinary process. Many Schools adopted this guidance, but Grenville did not. Dr. Axelrod's evidence was, in fact, that by 1973 Toronto was the only School board to have banned corporal punishment. Private Schools largely abandoned the practice by the 1980s.[57]

85. Her Honour found that Grenville employed the paddle throughout the Class Period from 1973 until the mid-80s or "possibly" into the 1990s. This disregarded the balance of the Appellants' evidence as to the class-wide practice. While Ken McNeill guessed that Grenville stopped using the paddle in the 1990s, Don Farnsworth swore he administered the last paddling in the early 1980s. No student testified to being paddled after 1982. Seven defence witnesses who attended Grenville in the 80s and 90s said they had no knowledge of it occurring.[58]

86. Her Honour did find that corporal punishment was lawful throughout the class period. There were, however, limits. Corporal punishment was to be administered "without malice,

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[57] Reasons para 286, ABC, Tab 3, p 85; TRN Dr. Axelrod, Vol 5, p 1453 ln 9 – p 1460 ln 21, ABC, Tab 11, pp 183-190

[58] Reasons para 278, ABC, Tab 3, p 83; TRN Julie Lowe, Vol 6, p 1736 ln 13-27, ABC, Tab 19, p 296; Mark Bergeron, Vol 6, p 1787 ln 10-12, ABC, Tab 13, p 228; Emma, Vol 8, p 2221 ln 29 – p 2222 ln 2, ABC, Tab 26, pp 366-367; Simon Best, Vol 5, p 1481 ln 5-12, ABC, Tab 14, p 238; Robert Creighton, Vol 9, p 2332 ln 6-10, ABC, Tab 16, p 249; David Webb, Vol 9, p 2550 ln 17-20, ABC, Tab 28, p 399; Lucy Postlethwaite, Vol 8, p 2144 ln 26 – p 2145 ln 1, ABC, Tab 27, p 382-383; Philip Mailey, Vol 4, p 1145 ln 23-25, ABC, Tab 21, p 319; Ken MacNeil, Vol 7, p 1961 ln 7 – 10, ABC, Tab 20, p 309

caprice, or in bad humour" and in the manner of a "kind, firm, judicious parent."[59]

87. The Plaintiffs' witnesses said the paddle was used for breaches of the written rules or for having a bad attitude. Some students described injury, pain and bleeding from the strokes given to them. Some were paddled pants-down or pants-and-underwear-off. Others were paddled over their clothes without enough force to cause them injury. Her Honour listed seven examples of boys paddled hard enough to cause them to suffer for days.[60]

88. The Appellants conceded that excessive use of the paddle fell below the standard of care. However, whether individual students experienced excessive paddling was not a class-wide issue. Her Honour did not find that students who were not excessively paddled were at risk of harm. She further found that female students were not paddled.[61]

89. Dr. Axelrod testified that simply using the paddle met the standard of care, but excessive forms did not. Her Honour made the following findings of how excessive use of the paddle fell below the standard of care:

> 288. I accept the evidence of Dr. Axelrod and Dr. Barnes that the excessive use of the paddle (as to number of strokes and causing injury and prolonged pain) at Grenville fell below the standard of care, and in particular because of the following:
> - it was applied arbitrarily and inconsistently;
> - there was an absence of policy as to what breaches would lead to its use;
> - there was an absence of recordkeeping as to its use or to act as a check on any abuse of this power;
> - students were placed at risk of harm: injury and/or pain, depending on how Charles Farnsworth felt about the student;[62] [Emphasis Added]

90. Her Honour was correct that Grenville had no written policy or protocol governing the use of the paddle. However, there was no evidence that the lack of such a policy breached the standard

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[59] Reasons para 142, 143, 144, ABC, Tab 3, p 60
[60] Reasons para 283 - 284, ABC, Tab 3, pp 84-85
[61] Reasons para 277, 281, 283, 284, 294, ABC, Tab 3, pp 83, 84, 85, 86
[62] Reasons para 285-288, ABC, Tab 3, pp 85-86; TRN Dr. Axelrod, Vol 5, p 1423 ln 16 – p 1425 ln 16, ABC, Tab 11, pp 176-178

of care. Dr. Axelrod's evidence was that public Schools normally recorded the use of the paddle to rebut later allegations of abuse. He did not say this was the standard of care for a private School during the class period.[63] Her Honour further disregarded the Appellants' evidence that paddling was not arbitrary and was used as a last resort.

91. Her Honour's reasons also referred to other forms of physical discipline. One student saw a staff member throw a student to the ground and two others testified to having their ears pulled. Relying on Dr. Barnes' evidence, Her Honour found that these "instances of assault fell below the standard of care." Dr. Barnes did not give standard of care evidence. In any event, this conduct did not relate to the entire class but to a few individual students. Her Honour did not estimate the scope of this type of corporal punishment. The defence witnesses denied witnessing such conduct.[64]

92. Having found that excessive paddling and instances of assault fell below the standard of care, Her Honour then turned to whether such 'harm' was systemic:

> The evidence was that the senior administration determined who received physical discipline. From the beginning, physical punishments were included as part of this School's new "tough love" program. This use of physicality, and inclusion of humiliating aspects (including paddling boys with their pants down) aligned with the stated values of the School. These were not isolated events. The fact that not all students experienced the same discipline (e.g. there do not seem to be examples of girls being paddled), or that some experienced lighter versions of this punishment, speaks more to the evidence of some degree of arbitrariness, or of favoritism for the sake of the School's reputation, than to a conclusion that these were non-systemic, isolated cases of abuse in an otherwise well-meaning and well run institution.
>
> The use of strict discipline was embedded in the operational policy as directed by the operating minds of Grenville: headmasters Haig and Farnsworth. I find that the use of the paddle for the years it was employed at Grenville was a systemic practice.[65] [Emphasis Added]

93. Her Honour notably did not find that excessive paddling or assaults (i.e., the breaches of

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[63] TRN Dr. Axelrod, Vol 5, p 1416 ln 1-23, ABC, Tab 11, p 175
[64] Reasons para 289-293, ABC, Tab 3, p 86
[65] Reasons para 294, 295, ABC, Tab 3, p 86

the standard of care) were systemic. Indeed, she acknowledged corporal punishment was not class wide. However, she ultimately found that "use of the paddle" was systemic because it was embedded in Grenville's operational policy of "strict discipline".

94. Dr. Axelrod did not say that "strict discipline" or having a "tough love" program breached the standard. Indeed, Dr. Axelrod's evidence was that private Schools had substantial latitude in employing discipline and that use of the paddle *simpliciter* met the standard of care. There was thus no finding of class-wide systemic negligence.[66]

95. Those students who were excessively paddled have individual claims against Grenville (subject to any limitation periods). However, the common issue trial was to determine class-wide negligence. The practices Her Honour found were below the standard of care were not directed towards a "general set of circumstances" but individual ones. Her Honour ought not to have decided this issue against the Appellants.

(iii) <u>All School Assemblies and Correction Sessions</u>

96. Grenville corrected students' real or perceived misbehaviour either in small groups of staff and/or students or by publicly standing up students at Chapel and the dining room to be publicly reprimanded. The public sessions happened approximately four to six times a year. They could last hours or days and sometimes regular class times were interrupted as a result. The sessions caused students to feel embarrassed and humiliated. Other students and prefects were invited to join in the process. At times, the entire student body was required to be silent for hours at a time.[67]

97. The evidence as accepted by Her Honour disclosed three categories of students with respect to the School assemblies and correction sessions: 1) the targets themselves; 2) those who were encouraged to participate contrary to their own values; and 3) the observers.

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[66] TRN Dr. Axelrod, Vol 5, p 1447 ln 25 – p 1448 ln 10, ABC, Tab 11, pp 181-182
[67] Reasons para 296, 298, ABC, Tab 3, pp 86, 87

98. Dr. Axelrod testified that the practice of publicly humiliating students for either behavioural or attitudinal issues was "unheard of in other educational venues". He said this type of treatment constituted abuse and fell below the standard of care. Her Honour found "[t]he defendants conceded this point." They did not concede that involving other students in this type of conduct towards their fellow students was foreseeably damaging. They argued that a line should be drawn between the observers and the targets of these humiliating practices.[68]

99. Relying on Dr. Barnes' evidence, Her Honour found that these public sessions amounted to abusive treatment known as "spurning" and fell below the standard of care. Dr. Barnes further said that "forcing others in this case the prefects and students encouraged of (sic) humiliating their fellow students… can cause shame and self-loathing."[69]

100. Her Honour then found that these 'harms' were systemic:

> The defendants concede that the School harmed students who were stood up in front of their peers to be humiliated. However, the defendants submit that a line should be drawn between the observers and the targets of these humiliating practices. I do not accept that submission. The uncontradicted expert evidence from Dr. Barnes on the nature of the public humiliations was that harm can be experienced by both those on the receiving end of the attention, but also by those who are encouraged to participate, thus violating their own moral codes and shaming their peers. There was also expert evidence from Dr. Barnes, that being exposed to an institution in which punishment could be arbitrary or harsh can be damaging: As Dr. Barnes put it: "Children do not have to experience arbitrary or excessive punishment to want to avoid it. They just have to witness enough of it to understand that they could be next." I accept the expert evidence from Dr. Axelrod and Dr. Barnes. I find that the School assemblies and correction sessions with students fell below the standard and in the case of the assemblies, I decline to limit further recourse only to those who were singled out for this form of punishment.[70]

101. Dr. Barnes' above opinion was predicated on how total institutions create a harmful "atmosphere of fear and insecurity". Her Honour, however, declined to address the defence's

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[68] Reasons para 296, 298, 301, 302, 307, ABC, Tab 3, pp 86, 87, 88, 89
[69] Reasons para 303, 304 and 305, ABC, Tab 3, p 88
[70] Reasons para 307, ABC, Tab 3, p 89

substantial body of evidence on School atmosphere. Nor did Her Honour incorporate her finding that Grenville was a total institution into her systemic negligence analysis.[71]

102. Insofar as the observers were concerned, Dr. Barnes did not say their experience of wanting to avoid the punishment rose to the level of foreseeable emotional harm. Indeed, there was no evidence that they might be "harmed" on a class-wide basis given Dr. Barnes' definition of emotional harm. Her Honour did not apply this definition to the evidence of class-wide conduct. Nor did she find there was a risk of foreseeable mental injury.[72]

103. In any event, this issue did not engage the entire class. The correction sessions were individualized, and their intensity varied with the circumstances. As Dr. Barnes opined regarding the private correction sessions, whether there was abuse depended on what was said, the timing and the circumstances. Thus, this is not a question directed towards a "general set of circumstances" and therefore cannot be class wide negligence.[73]

104. Her Honour considered the above argument but rejected it as an attempt to "undermine the findings of commonality" made at certification.[74] It did no such thing. The commonality requirement for certification determines whether there is some basis in the evidence that the proposed suit will avoid duplication of fact finding or legal analysis. It does not prevent a defendant from arguing at the common issue trial the evidence does not support a finding of class-wide harm. Such a fundamental misapprehension of the purpose and nature of a common-issue trial taints the entirety of Her Honour's findings relating to class-wide practices.

***Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, para 108**

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[71] TRN Dr. Barnes, Vol 2, p 484 ln 22 – p 485 ln 20, ABC, Tab 12, pp 192-193
[72] Reasons para 309, ABC, Tab 3, p 89
[73] TRN Dr. Barnes, Vol 2, p 580 ln 23 - 27, ABC, Tab 12, p 213
[74] Reasons para 308, ABC, Tab 3, p 89

(iv) The Boiler Room and the "Flames of Hell"

105. There was evidence that students were, on four occasions, shown the furnace flames and told that if they did not behave, they would go to hell. Her Honour found such conduct fell below the standard of care and was abusive. She did not find foreseeable mental injury or that Grenville was systemically negligent.[75] This was a purely individual issue.

(v) Grenville's Views and Teachings Regarding Sexuality

106. The plaintiffs argued that Grenville's views concerning sexuality amounted to abuse and fell below the standard of care.[76] This included but was not limited to the use of demeaning epithets for girls and women including "sluts, whores, Jezebels, bitches in heat." Her Honour, relying on Dr. Barnes' evidence, found the following "features of life" were acts of "sexualized abuse" that could cause emotional trauma:

- Requiring sexual confessions;
- Berating students for inciting lust or being lustful;
- The use of derogatory terms such as temptress, bitches in heat, sluts, prostitutes;
- Requiring girls to bend over, front and back, to check for coverage of bathing suits;
- Humiliating students over expressions of romantic or sexual feelings towards other students;
- Vilification of homosexuality; and
- An unbalanced view of and preoccupation with sexuality as sin.[77]

107. Her Honour did not find these "features of life" were class-wide nor did she address conflicting defence evidence on the prevalence of such practices. She went on to make distinct findings as to the class-wide practices at Grenville:

> 315. The defendants concede there was evidence of the preaching against homosexuality and the use of gendered epithets concerning girls. The Grenville policies and practices concerning clothing, hair, manners of walking, music,

[75] Reasons para 310-312, ABC, Tab 3, pp 89, 90
[76] Reasons para 313-319, ABC, Tab 3, pp 90-92
[77] Reasons para 313-314, ABC, Tab 3, p 90

> separation of boys and girls, denigrating language, and discipline in multiple forms for breaches of these norms, all these features amounted to a practice applied to the class of students. There were public prayers for students thought to be homosexual and intense "conversion" sessions with Charles Farnsworth that frightened and harmed gay students. Former students testified to physical and emotional impacts: shame, humiliation, isolation, fear and anxiety, weight loss, weight gain. Although all were not necessarily affected in the same way, this was the culture at Grenville and the governing belief system. [Emphasis Added]

108. Her Honour accepted Dr. Axelrod's evidence that Grenville's "teachings" concerning sexuality were harmful and abusive practices, contrary to the standard of care. Dr Axelrod's evidence on teaching in general was that Grenville "engaged in teaching practices that were abusive and that were at odds with the standards practiced in the public and private Schools of Ontario at the time." He was no more specific than that. He further opined that while some Schools may have shared similar religious views to Grenville's about homosexuality, the difference was that at Grenville these views were accompanied by hostile treatment, abusive language and out of the ordinary explanations for the cause of homosexuality.[78]

109. Her Honour then found, based on both experts' opinions, that there was a foreseeable risk of emotional harm. This was the only time she turned her mind to foreseeability.[79]

110. Her Honour erred in failing to distinguish between proximity and foreseeability. She treated the "proximity considerations" in *Saadati v Moorehead* as establishing foreseeability of mental injury. The Appellants had admitted proximity in acknowledging the existence of a duty of care, but denied foreseeable mental injury. Her Honour's analysis was conclusory and tainted by her confusion of proximity with foreseeability.[80]

111. There was no evidence of foreseeable mental injury during the class period. Dr. Axelrod

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[78] Reasons para 316, ABC, Tab 3, p 91
[79] Reasons para 319-321, ABC, Tab 3, pp 91-92
[80] Reasons para 319, ABC, Tab 3, pp 91-92

opined on the standard of care, not foreseeable emotional harm.[81] Dr. Barnes' evidence was based on 2016 standards of abuse and was not evidence of what was foreseeable during the Class Period. In addition, Dr. Barnes swore that emotional harm involves a repeated pattern of caregiver behaviour or extreme incidents that encourages the individual to believe that he or she is worthless, flawed, unloved, unwanted, endangered. Whether teachings on sexuality were abusive depended on "what was said" and "on the context in which it was said." Teaching *simpliciter* thus did not rise to the level of foreseeable emotional harm. Her Honour never considered this definition in dealing with "emotional harm". She never applied it to the class-wide conduct.[82]

112. Her Honour then examined whether there had been systemic harm:

> The plaintiffs have established on a balance of probabilities that sexualized abuse was part of the Grenville belief system. All students were exposed to these norms and attitudes—the extent of that exposure and the impact on individual students are not the subject of this common issues.[83] [Emphasis Added]

113. Her Honour acknowledged that three defence witnesses, Lucy Postlethwaite, Emma Postlethwaite and Julie Lowe did not hear sexist epithets or teachings condemning homosexuality. She did not acknowledge the evidence of other former students and staff members who also denied the use of sexist epithets and extreme teachings condemning homosexuality.[84]

114. Her Honour held that this evidence was not determinative as her findings of sexualized

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[81] TRN Dr. Axelrod, Vol 5, p 1390 ln 24-28; p 1437 ln 16 – p 1438 ln 2, ABC, Tab 11, pp 173, 179-180

[82] TRN Dr. Barnes, Vol 2, p 496 ln 29 – p 497 ln 6; p 587 ln 7 - 25, ABC, Tab 12, pp 198-199, 216

[83] Reasons para 327, ABC, Tab 3, p 93

[84] TRN Gordon Mintz, Vol 9, p 2442 ln 13-21, ABC, Tab 23, p 330; Robert Creighton, Vol 9, p 2335 ln 32- p 2336 ln 10, p 2378 ln 26 – p 2379 ln 23, ABC, Tab 16, pp 251-252, 256-257; David Webb, Vol 9, p 2553 ln 20-23, ABC, Tab 28, p 400; Ken MacNeil, Vol 7, p 1963 ln 11-14, ABC, Tab 20, p 311; Don Farnsworth, Vol 7, p 1931 ln 17-24, ABC, Tab 17, p 272; Simon Best, Vol 5, p 1482 ln 15-30, ABC, Tab 14, p 239; Brian Gilmore, Vol 7, p 1832 ln 13 – p 1833 ln 9, ABC, Tab 18, pp 282-283; William Newell, Vol 7, p 1872 ln 31 – p 1873 ln 9, p 1870 ln 26-32, ABC, Tab 25, pp 353-354, 352

abuse was "broader" and "included instances of sexualized abuse stemming from the beliefs at Grenville that sex outside of marriage is sinful, homosexuality is sinful, and sexual assault is a result of girls or boys inciting lust".[85] Such "beliefs" are not the class-wide practices identified in paragraph 315 nor the teachings that breached the standard of care in paragraph 316. There was no evidence that such beliefs breached the standard of care for a private Christian School.

115. Her Honour further found that Lucy, Emma and Julie could not speak for the entire class and that the balance of the evidence "confirmed the use of the terms." [Emphasis Added] That such terms were used does not establish a class-wide practice. Her Honour's analysis shows she was focused on the individual issue of whether derogatory terms were used – not whether it was a class-wide practice.

116. As with the other impugned disciplinary practices, Her Honour found individual conduct that fell below the standard of care. This does not establish a class-wide breach of the duty of care.

ISSUE 3: DID THE DEFENDANTS BREACH THEIR FIDUCIARY OBLIGATIONS TO THE STUDENTS?

117. Her Honour's finding that the Appellants had breached their fiduciary duty was conclusory, effectively predicated on her analysis for systemic negligence.[86] Indeed, taken at face value, Her Honour's conclusions at paragraphs 353-355 suggests that any and all discipline, no matter how warranted and no matter how in keeping with the discipline of other private Schools of the day, constituted a breach of duty because, in her view, it was in furtherance of the values of the Community of Jesus, which she regarded as objectionable. The conclusion is troubling in the extreme. In fact, the evidence from the administration witnesses for both the plaintiffs and

[85] Reasons para 323, ABC, Tab 3, p 93
[86] Reasons para 352-354, ABC, Tab 3, pp 97-98

defendants was that Grenville operated in good faith for the best interests of its students.[87]

ISSUE 4: DID THE DEFENDANTS' CONDUCT MERIT AN AWARD OF PUNITIVE DAMAGES?

118. Her Honour's finding of a class-wide marked departure from the standard of care is tainted by the errors in her systemic negligence analysis. These issues are co-extensive.[88]

ISSUE 5: HOW TO PROCEED TO INDIVIDUAL ISSUE TRIALS?

119. The common issues in systemic negligence claims may require "nuanced" answers. Her Honour answered the question of whether the defendants breached a standard of care with a simple "Yes". This answer is ultimately useless for individual issue trials, where claimants will have to establish that this breach of the standard of care caused them harm. The action is effectively no further ahead now than it was prior to the common issues trial. Her Honour's broad answers will inevitably lead to litigation over the meaning of her Reasons, which can be read as giving any student who attended Grenville an individual claim.[89] This misunderstands the nature of a common issues trial. On this basis alone, the order cannot stand.

***Rumley v. British Columbia*, 2001 SCC 69 at para 32**

PART VI - ORDER SOUGHT

120. The Appellant asks that the appeal be allowed with costs and that:

a. the judgment be set aside and the class proceeding be dismissed with costs;

b. in the alternative, returning the matter to a trial before a different judge;

c. in the further alternative, varying the Judgment to specify and narrow the acts of the Appellants that breached the applicable standard of care compared to that found by

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[87] TRN Ken MacNeil, Vol 7, p 1957 ln 17-29, ABC, Tab 20, p 305; Don Farnsworth, Vol 7, p 1920 ln 28 – p 1922 ln 24, ABC, Tab 17, pp 266-268; Gordon Mintz, Vol 9, p 2433 ln 2 – p 2434 ln 24, ABC, Tab 23, pp 326-237; Joan Childs, Vol 1, p 123 ln 30 – p 124 ln 11 p 224 ln 6 – 13, ABC, Tab 15, pp 244-245, 246; Margaret Mayberry, Vol 2, p 358 ln 6 - 30, ABC, Tab 22, p 321

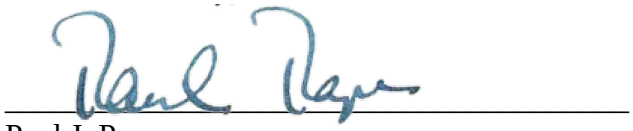
[88] Reasons para 368, ABC, Tab 3, p 100

[89] Reasons para 354, ABC, Tab 3, pp 97-98

the Learned Trial Judge;

d. Such further and other relief or direction as This Honourable Court may deem just.

September 16, 2020 ALL OF WHICH IS RESPECTFULLY SUBMITTED



Paul J. Pape

CERTIFICATE

Counsel certifies that an order under subrule 61.09(2) is not required.

Counsel estimates that the time for argument of the appeal, not including reply, is 2.5 hours.

SCHEDULE "A"

Rankin (Rankin's Garage & Sales) v. J.J., 2018 SCC 19, paras 46, 53
Saadati v. Moorhead, 2017 SCC 28, para 37
Cloud v. Canada (Attorney General), 2004 CanLII 45444 (ON CA), para 66, 71
Brazeau v. Canada (Attorney General), 2020 ONCA 184, paras 118, 120
Pro-Sys Consultants Ltd. v. Microsoft Corporation, 2013 SCC 57, para 108
Rumley v. British Columbia, 2001 SCC 69 at para 32

SCHEDULE “B”

n/a

CAVANAUGH et al
Plaintiffs/ Respondents

v.

HAIG and GRENVILLE CHRISTIAN COLLEGE et al
Defendants/Appellants

Court File No. C68263

COURT OF APPEAL FOR ONTARIO

Proceedings commenced in Toronto

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