

COURT FILE NUMBER 1914-00167
COURT COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE ST. PAUL
PLAINTIFF/APPLICANT CYNTHIA IRIS YOUNGCHIEF

DEFENDANTS/
RESPONDENTS THE ATTORNEY GENERAL OF CANADA, HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA, DIOCESE SANCTI PAULI, ST. LOUIS PARISH and LAKELAND ROMAN CATHOLIC SCHOOL DISTRICT NO. 150

DOCUMENT **BRIEF OF THE APPLICANT/PLAINTIFF IN SUPPORT OF APPLICATION FOR CERTIFICATION**

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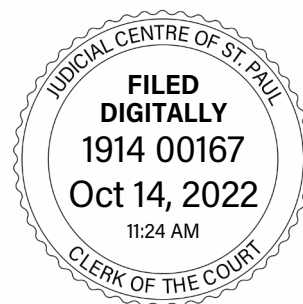


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PART I: OVERVIEW

1. The Plaintiff, Cynthia Iris Youngchief, (the "**Applicant**") applies to this Honourable Court, with the consent of the Defendants, for certification of this action as a Class Proceeding on behalf of the proposed Survivor Class and Family Law Class (collectively the "**Classes**") as defined in this Action's Amended Statement of Claim, filed 27 August 2020 (the "**Action**"), and Application for Certification of Class Proceeding (the "**Application**"), filed herewith. The Applicant further seeks the appointment of Cynthia Iris Youngchief as Representative Plaintiff for the Classes in addition to such other Orders as set out in the Application.

2. Section 5 of the *Class Proceedings Act*, RSA 2003, C-16.5 (the "**CPA**") provides that this Honourable Court shall certify a proceeding as a class proceeding if it is satisfied that five conditions are met. For the reasons below, the Applicant submits that each of the requisite conditions are satisfied, and therefore the Application for Certification of Class Proceeding should be granted.

PART II: FACTUAL SUMMARY

3. In 1884, amendments to the *Indian Act* made it mandatory for Aboriginal Children to attend a day school, industrial school, or residential school. The government undertook a policy of "aggressive assimilation" with regard to educating Aboriginal persons such as the Applicant.

4. In 1964 the Government of Canada ceased operation of its Indian Day School on Kehewin Cree Nation and began transporting children from Kehewin Cree Nation to and from the nearby Town of Bonnyville to attend Ecole Notre Dame Schools. This practice of transporting Kehewin students to Ecole Notre Dame Schools continued to 1975.

5. The Defendants established, funded, oversaw, operated, supervised, controlled, maintained and supported Ecole Notre Dame Schools through common national and provincial policies and procedures. These policies and procedures resulted in Ecole Notre Dame Schools participating in state-sanctioned physical abuse and shaming in addition to sexual and psychological abuse.

6. The Applicant and Survivor Class were subjected to such abuse over an approximate 10-year period between 1970 and 1980 (the “**Class Period**”).

7. The Defendants failed to establish and implement adequate policies and procedures to oversee the actions of the Ecole Notre Dame Schools resulting in the Survivor Class being physically harms and emotionally traumatized.

8. The Applicant therefore seeks certification of the Survivor Class and Family Law Class so that the Defendants may be held accountable for the injuries and damages caused to the Class Members as a result of their negligence.

PART III: ISSUE

9. The sole issue is whether the Application satisfies the five preconditions of Rule 5(1) of the *CPA* such that the Action shall be certified as a class proceeding. These five preconditions can be summarized as follows:

- a. Do the pleadings disclose a cause of action;
- b. Is there an identifiable class of two or more persons;
- c. Do the claims of the prospective class members raise a common issue;
- d. Is a class proceeding the preferable procedure for the fair and efficient resolution of the common issues; and
- e. Is there a person eligible to be appointed as representative plaintiff for the Classes?

PART IV: LEGAL ARGUMENT

A. Overview of certification test

10. The test for certification of a class proceeding is well established and requires the Plaintiff to satisfy all five of the above-mentioned preconditions.¹ This onus is satisfied “if the Plaintiff shows ‘some basis in fact’ for each of the certification proconditions, other

¹ *VLM v Dominey*, 2022 ABQB 299 at para 11 [*VLM*]

than the cause of action requirement in s5(1)(a), which is decided based on the pleadings alone”.² If the Plaintiff satisfies these five preconditions, “the action must be certified”.³

11. Pursuant to section 6(2) of the *CPA*, an inquiry at the certification stage of a class proceeding is purely procedural and ought not to turn into a preliminary review of the merits of the claim.⁴

12. The Supreme Court of Canada (the “**SCC**”) has stated that the evidentiary burden of “some basis in fact” is less than a balance of probabilities and focusses on “whether the action can properly proceed as a class action”.⁵

B. The pleadings disclose a cause of action

13. The test for whether the pleadings disclose a cause of action is similar to the test used for striking actions. The Applicant will satisfy this requirement unless “it is plain and obvious that the Plaintiff’s claim is bound to fail, assuming the facts alleged in the pleadings are true”.⁶

14. Section 5(1)(a) of the *CPA* is intended “to ‘winnow out actions which are clearly frivolous or manifestly unfounded’ not to determine whether the cause of action is appropriate for a class proceeding”.⁷ This is a “very low bar”.⁸

15. The Applicant assert that the Defendants breached their respective common law, fiduciary, and/or statutory duties of care owed to the Classes through their direct or indirect establishment, funding, control, and/or maintenance of the Ecole Notre Dame Schools throughout the Class Period. Furthermore, the Defendants knew, or ought to have known, that the Class Members would suffer injury and damages as a result of their respective misfeasance and/or nonfeasance.

16. The Action therefore meets the low threshold required by section 5(1)(a) of the *CPA*.

² *VLM* at para 11; see also *AIC Limited v Fischer*, 2013 SCC 69 at paras 39-43, 48-49 [*Fischer*].

³ *Spring v Goodyear Canada Inc*, 2021 ABCA 182 at para 17 [*Goodyear*].

⁴ See *Goodyear* at para 18.

⁵ *Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2013 SCC 57 at para 99, 101-102 [*Pro-Sys*].

⁶ *VLM* at para 17.

⁷ *Fisher v Richardson GMP Ltd*, 2019 ABQB 450 at paras 32-33 [*Richardson*].

⁸ *VLM* at para 19.

C. There is an identifiable class of 2 or more persons

17. The second precondition for certification is that there be an “identifiable class of 2 or more persons”.⁹ As stated by the SCC, “the class must be capable of clear definition”¹⁰ and “based on objective criteria and bear on a rational connection to the claims, causes of action, and common issues. It must not be overly broad”.¹¹ However, “[i]t is not necessary that every class member be named or known.”¹²

18. Clear identification of a class “is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgement.”¹³

19. Both the Survivor Class and Family Law Class are clearly identifiable based on objective criteria given the Action’s precise definitions proposed for each class:

- a. Survivor Class: all Aboriginal persons, wherever they may now reside or be domiciled, who attended Ecole Notre Dame Elementary School and/or Ecole Notre Dame High School in Bonnyville, Alberta, and operated by the Defendant(s) during the Class period; and
- b. Family Law Class: all Persons who are a spouse or former spouse, child, grandchild, parent, grandparent, brother or sister of a Survivor Class member and the spouse of a child, grandchild, parent, grandparent, brother or sister of a Survivor Class member.

20. First, the Survivor Class and Family Law Class are defined with respect to objective criteria based on ethnicity, alma matter, and family status respectively. Membership in the Survivor Class requires a person to be Aboriginal and to have attended either the Notre Dame Elementary School and/or Notre Dame High School during the Class Period. Membership in the Family Law Class requires a familial tie, as defined in the *Family Law Act*, to a member of the Survivor Class. Membership in either

⁹ *CPA* at s 5(1)(b).

¹⁰ *VLM* at para 28 citing *Western Canadian Shopping Centres v Dutton*, 2001 SCC 46 at para 38 [*WCSC*]

¹¹ *VLM* at para 29.

¹² *VLM* at para 28 citing *WCSC* at para 38.

¹³ *WCSC* at para 38.

of these classes is sufficiently narrow and there is no ambiguity as to who will qualify to be a member of either class.

21. Second, the pleadings for this Action claim that these classes were directly harmed as a result of the Defendants' misfeasance and/or nonfeasance. This created a rational connection between the proposed common issues – whether the Defendants owed and breached common law duties of care, fiduciary duties, statutory duties, and/or Aboriginal rights through their establishment, funding, control, and/or maintenance of Ecole Notre Dame Schools during the Class Period, resulting in any quantum of damages – to both the Survivor Class and Family Law Class.

22. Mere variance between class members with respect to the extent or type of injuries suffered, or the nature or source of the common law, fiduciary or statutory breach, should not be a bar to certification under section 5(1)(b):

Chief Justice McLaughlin held that there was an identifiable class since a person was a member of the class if he or she owned or occupied property inside a specified area within a specified period of time. Since the class was clearly defined, she held that it was a class within the meaning of Section 5 (1)(b) of the Class Proceedings Act.

This finding in *Hollick* indicates how low the threshold is for this branch of the certification process...

In this case, the proposed class is factually similar to the class in *Hollick* as it is defined as people living in a certain geographic area at a specified time. Since the class in *Hollick* satisfied the requirements of the Act even though it included people who suffered damage from one or more of several causes or no damage at all as well as people who may be unable to eventually prove damages, I am satisfied that the class as defined by the plaintiff in this action meets the requirements of Section 5 (1)(b) of the Act."¹⁴

[Emphasis added]

23. Pursuant to section 7 of the *CPA*, the Court may appoint additional representative plaintiff(s) if it is satisfied that a subclass exists whose members have claims that raise

¹⁴ *McLaren v City of Stratford*, 2005 CanLII 19801 (ONSC) at paras 28-30, commenting on *Hollick v Toronto (City)*, 2001 SCC 68.

common issues not shared by all class members. The subclass representative plaintiff must satisfy similar criteria with respect to the subclass.

24. The Family Law Class has claims and rights of recovery arising from common issues not shared by all members of the Survivor Class by virtue of, *inter alia*, the common law, the *Family Law Act*, and the *Fatal Accidents Act* and should therefore be approved as a subclass pursuant to section 7 of the *CPA*.

25. While the number of Survivor Class and Family Law Class members is not yet fully known, the *CPA* does not require that all members of a class be ascertained or ascertainable at the time of certification.¹⁵

26. The requirement for an identifiable class is met on the basis of the class definitions proposed by the Applicant.

D. The claims raise common issues

27. The third criteria pursuant to s.5(1)(c) of the *CPA* requires that “the claims of the prospective class members raise a common issue, whether or not the common issue predominates over issues affecting only individual prospective class members”. [Emphasis added]

28. The SCC has “reaffirmed the principles set out in its earlier decision in *Dutton*, by explaining that ‘the underlying question is whether allowing the suit to proceed as a [class action] will avoid duplication of fact-finding or legal analysis’.”¹⁶ [Emphasis added]

29. In *Pro-Sys*, the SCC summarized these principles in the following manner:

- a. The commonality question should be approached purposively.
- b. An issue will be “common” only where its resolution is necessary to the resolution of each class member’s claim.
- c. It is not essential that the class members be identically situated *vis-à-vis* the opposing party.
- d. It not necessary that common issues predominate over non-common issues. However, the class members’ claims must share a substantial

¹⁵ *CPA* s8(d); *WCSC* at para 38.

¹⁶ *VLM* at para 37.

common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.¹⁷

30. The SCC subsequently clarified a fifth principle stating, “that success for one class member on a common issue need not *necessarily* mean success for all, but success for one member must not mean failure for another.”¹⁸

31. The onus on the Applicant to show “some basis in fact” for the common issue(s) is “lower than the balance of probabilities threshold” but is “more than symbolic”.¹⁹

32. The common issues proposed by the Applicant are outlined at paragraph 1(e) of the Application, filed herewith, and provide as follows:

- i. Did the Defendants, through the direct or indirect establishment, funding, control, and maintenance of the Notre Dame Schools throughout the Class Period owe a duty of care to the Survivor Class and/or Family Law Class, or any member of either Class?
- ii. Did the Defendants, through the direct or indirect establishment, funding, control, and maintenance of the Notre Dame Schools throughout the Class Period breach the requisite standard of care owed by it to the Survivor Class and the Family Law Class, or any member of either Class?
- iii. Did the Defendants, through the direct or indirect establishment, funding, control, and maintenance of the Notre Dame Schools breach a fiduciary duty owed to the Survivor Class or the Family Law Class, or any member of either Class?
- iv. Did the Defendants, through the direct or indirect establishment, funding, control, and maintenance of the Notre Dame Schools breach the aboriginal rights of the Survivor Class and the Family Law Class, or any member of either Class?
- v. Did the Defendants, through the direct or indirect establishment, funding, control, and maintenance of the Notre Dame Schools breach a statutory obligation owed, under the *Indian Act* or any other statute, to the Survivor Class and Family Law Class, or any member of either Class?

¹⁷ *Pro-Sys* at para 108.

¹⁸ *Vivendi Canada Inc v Dell’Aniello*, 2014 SCC 1 at paras 45-46.

¹⁹ *VLM* at para 40, citing *Pro-Sys* at paras 102-103 and *Goodyear* at para 34.

- vi. What injury or damages have the Survivor Class and Family Law Class suffered as a result of the Defendants' malfeasance and/or nonfeasance identified in issues (i) through (v) above?
- vii. Whether aggregate damages are available and, if so, on what basis and in what amount?
- viii. What proportion of culpability should be attributed to each respective Defendant for the injuries and/or damages identified in issues (vi) and (vii) above?

i. Purposive Approach

33. A purposive approach should be taken to determine whether common issues exist which may involve the liberal interpretation of legislation in order to facilitate, rather than stifle, the development and use of class actions as a procedural tool.²⁰

34. The Representative Plaintiff has framed the common issues similarly to those used in similar aboriginal school class actions, most notably *McLean v Canada*, 2019 FC 1075 and *Gottfriedson v Canada*, 2015 FC 706 in which certification was granted. The Applicant submits that the proposed common issues enhance judicial economy, improve access to justice, promote continued behavior modification, avoid inconsistent results, reduce adversity, and increase the likelihood of reaching a fair and equitable result.²¹

35. The first six common issues are all necessary elements to the tort of negligence, dealing with duty of care, standard of care, the Defendants' breach of their respective duties, and the resulting recoverable injury and damages suffered by the Class Members.

36. The determination of whether a duty of care is owed to a class is frequently recognized by the courts as an appropriate common issue in class proceedings. As stated by this Honourable Court, "[w]hen the focus is on the actions of the Defendants, common factual and legal issues arise."²²

37. The determination of causation and damages on an individual level does not prevent the court from determining whether a duty of care was owed and breached on a global basis.²³

²⁰ See *Ayrton v PRL Financial (Alta.) Ltd*, 2006 ABCA 88 at para 24.

²¹ See *TL v Alberta (Director of Child Welfare)*, 2008 ABQB 114 at para 96.

²² *Condominium Plan No. 0020701 v Investplan Properties Inc*, 2006 ABQB 224 at para 70.

²³ *Walls v Bayer*, 2005 MBQB 3 at paras 56-61.

38. The seventh and eighth common issues deals with the method of damages and the Defendants' individual level of culpability towards the classes.

39. The underlying facts for each member of their respective class are the same and so the same analysis applies to each Class Member. The legal issues revolve around common facts arising out of the Defendants' direct or indirect establishment, funding, control, and maintenance of the Notre Dame Schools throughout the Class Period affected all of the putative Class Members in a similar way and can be resolved as common issues.

ii. Resolution of issue necessary for resolution of each class member's claim

40. "A class member's claim must share a substantial common ingredient to justify a class action and an issue will only be 'common' if 'its resolution is necessary to the resolution of each class member's claim'."²⁴ [Emphasis added]

41. The common issues in the case at bar are designed in such a manner so as to establish the contours of basic standards of care, fiduciary duties, and statutory duties owed to Aboriginal attendants of the Ecole Notre Dame Schools. The Applicant submits that a determination of common law, fiduciary, and/or statutory breach will necessarily be linked to the overall manner in which the schools were established, funded, controlled, and maintained and will therefore impact every class member by mere virtue of their having attended the Ecole Notre Dame Schools, or being a family law member of an Aboriginal attendee of the Ecole Notre Dame Schools. In this respect, the claims of all class members benefit from the proposed framing of the common issues.

iii. Class members need not be situated identically vis-à-vis the opposing party

42. The Plaintiff submits that in this particular case, the similarities between the proposed Survivor Class members vis-à-vis the Defendants far outweigh any individualistic differences. Even when the SCC was presented with a claim argued to be "inescapably individualistic", the Court concluded that "these differences are not

²⁴ *Bruno v Samson Cree Nation*, 2021 ABCA 381 at para 103.

insurmountable” and “question[ed] the extent to which differenced between class members should be taking into account at this [certification] stage”.²⁵

43. In a similar case, the SCC stated:

[A]n issue can constitute a substantial ingredient of the claims and satisfy s. 5(1)(c) even if it makes up a very limited aspect of the liability question and even though many individuals issues remain to be decided after its resolution. In such a case the task posed by s. 5(1)(c) is to test whether there are aspects of the case that meet the commonality requirement rather than to elucidate the various individual issues which may remain after the common trial.²⁶

44. Every member of the proposed Survivor Class was a minor, of Aboriginal descent, originating from a common community, and attending a finite list of schools in a relatively narrow time frame. Every Survivor Class member was tasked with the common and fundamental journey of discovering their identity while interacting with, or under the care of, one or more of the Defendants and subject to the Defendants’ abuse during the Class Period.

45. Similarly, every member of the proposed Family Law Class is related, within the parameters of the *Family Law Act*, to a member of the Survivor Class and has been profoundly negatively impacted by the resulting generational traumas and harms inflicted on the Survivor Class by the Defendants.

iv. Common issues need not dominate over individual issues

46. In *WCSC*, the SCC stated:

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...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.²⁷

²⁵ *Eaton v HMS Financial Inc*, 2008 ABQB 631 at para 99, quoting *Rumley v British Columbia*, 2001 SCC 69 at para 28, 33.

²⁶ *Cloud v Canada (Attorney General)*; 2004 CarswellOnt 5026, 247 DLR (4th) 667 at paras 52-53, referencing *Hollick v Metropolitan Toronto (Municipality)*, 2001 SCC 68.

²⁷ *WCSC* at para 39.

47. The Applicant submits that the proposed common issues of standards of care, fiduciary duties, and statutory provisions, along with their respective breaches, represent a substantial common ingredient towards advancing the claims of each Class Member and form the basis through which further individual issues, such as physical or sexual abuse claims, necessarily flow.

48. The proposed common issues are framed in such a way as to predominate over, and form the necessary condition for, issues particular to individual class members.

v. Success for one class member does not mean failure for another

49. Following *Pro-Sys*, the SCC clarified the fifth principle by stating, “that success for one class member on a common issue need not *necessarily* mean success for all, but success for one member must not mean failure for another.”²⁸

50. In the case at bar, a determination on whether the Defendants breached any duties owed to the Class members will materially benefit each class member and advance their individual claims accordingly.

51. This Honourable Court has confirmed that “a common issue does not have to answer a claim completely, as long as its resolution materially advances the litigation.”²⁹ Here, a determination of the common issues will not only advance the Action, it will establish a *prima facie* negligence claim for each Class Member.

E. A class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues

52. The fourth precondition pursuant to s.5(1)(d) of the *CPA* is that a class proceeding is the preferable procedure for the fair and efficient resolution of the common issues. The SCC has stated that “preferability must be examined in reference to the three principal aims of the class action regime: ‘...judicial economy, access to justice, and behaviour modification’”.³⁰

53. In addition to the statutory framework provided in s.5(2) of the *CPA*, the Alberta

²⁸ *Vivendi Canada Inc v Dell’Aniello*, 2014 SCC 1 at paras 45-46.

²⁹ *Condominium Plan No. 0020701 v Investplan Properties Inc*, 2006 ABQB 224, at para 70 [*Investplan*].

³⁰ *Pro-Sys* at para 137.

Court of Appeal adopted an overall analytical framework for determining if a class proceeding is suitable:

A class proceeding is the preferable procedure if it presents a fair, efficient and manageable method of determining common issues, and if such determination will advance the proceeding in accordance with the goals of achieving judicial economy, access to justice, and behaviour modification... The essence of the inquiry is to assess the common and individual issues contextually, and consider the impact of the individual issues on the trial process, including fairness to plaintiffs, defendants and the court. The inquiry focuses on two questions: firstly, would the class action be a fair, efficient and manageable method of advancing the claim; and secondly, would the class action be preferable to all other reasonably available means of resolving the claims of class members... As such, the preferability analysis requires the court to look at all reasonably available means of resolving the class members' claims, such as joinder, test cases, consolidation and so on, and not just at the possibility of individual actions...

In summary, preferability involves a balancing of all the interests of the parties and of the Court and may include an assessment of the economics of the litigation, the number of individual issues to be dealt with, the complexities if there are third party claims and the alternative means available for adjudicating the dispute...³¹

i. Common questions predominate over any individual questions

54. The Action is regarding how the Defendants' negligently established, funded, oversaw, operated, supervised, controlled, maintained, and/or supported Ecole Notre Dame Schools through common national and provincial policies and procedures. Evidence shows that as a result of the Defendants' conduct, Class Members were subjected to frequent physical, psychological, and sexual abuse in addition to other harms.

55. While each putative Class Member lived their own personal experienced during the Class Period, the individual issues in this case are limited to the extent of harm each Class Member suffered and how much in damages they are entitled to. The common questions regarding the Defendants' misfeasance and nonfeasance significantly

³¹ *Sullivan v Golden Intercapital (GIC) Investments Corp*, 2014 ABQB 212 at para 41, citing *L(T) v Alberta (Director of Child Welfare)*, 2009 ABCA 182 at para 26.

predominate over any individual questions and determining the factual and legal issues in a class proceeding would promote judicial economy and favours certification.

ii. No valid interest in individually controlling separate actions

56. Based on feedback from within her community, the Applicant suggests that a significant number, if not all, of the putative Class Members are in favour of a class proceeding. However, even if some Class Members were not in favour of the Action, and preferred bringing their own individual actions, the fundamental factual and legal issues being determined would remain the same. Thus, there can be no valid interest in individually controlling the prosecution of separate actions.

iii. Claims have not been the subject of other proceedings

57. The Applicant is not aware of any claim within the Action that is, or has been, the subject of any other proceeding.

iv. A class proceeding is the most practical and efficient means of resolving the claims and is the simplest means of obtaining the relief sought

58. At this stage of the analysis, “[i]t is both mandatory and helpful to ask what alternative procedures there are to decide the common issues and to canvass their relative benefits and drawbacks.”³² However, efficiency should not be approached blindly. This Honourable Court stated:

the only advantage of a multi-party action would appear to be that some plaintiffs might be discouraged and walk away, which is an advantage only to the Defendants, and which is not a legitimate reason to refuse certification given the goal of ‘access to justice.’³³

59. In the case at bar, even if alternative individual claims are pursued, the same factual and legal issues will need to be determined, and some individual assessment will be a factor regardless of whether the claims are determined individually or as a class proceeding.³⁴

³² *Investplan* at para 99.

³³ *Investplan* at para 99.

³⁴ *Investplan* at para 100.

60. An individual claim cannot produce the same magnitude of damages as a class proceeding, resulting in less behavior modification on the part of the Defendants. Furthermore, the cost of litigation deters many individuals from bringing a claim resulting in fewer individuals having access to justice. A class proceeding is therefore the most effective way to ensure the fair and efficient resolution of the common issues.

F. The Applicant is eligible to be appointed as Representative Plaintiff

61. The fifth and final precondition that must be satisfied prior to certification is providing a representative plaintiff that:

- a. Will fairly and adequately represent the interests of the class;
- b. Has produced a plan for the proceeding that sets out a workable method in advancing the proceeding on behalf of the class and notifying class members of the proceeding; and
- c. Does not have any conflicting interest, in respect to the common issues, with the interest of the other prospective class members.³⁵

62. For the reasons below, it is respectfully submitted that the Applicant satisfies all three of these requirements and should be appointed as Representative Plaintiff for the Survivor Class and Family Law Class.

v. The Applicant will fairly and adequately represent the interests of the classes

63. A representative plaintiff bears a duty "akin to that of a fiduciary" and "must have adequate knowledge and ability to instruct counsel".³⁶ The SCC has stated:

In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed

³⁵ CPA at s5(1)(e).

³⁶ *Hoffman v Monsanto Canada Inc*, 2005 SKQB 225, at para 337; aff'd 2007 SKCA 47; LTA ref'd 2007 CarswellSask 725 (SCC).

representative will vigorously and capably prosecute the interests of the class.³⁷

64. In the case at bar, the Applicant has experienced firsthand the claims asserted in the Action. As a status Indian under the *Indian Act*, the Applicant attended the Ecole Notre Dame Schools from approximately 1972 to 1975.³⁸

65. During this time, the Applicant personally experienced and witnessed psychological, physical, and sexual abuse resulting in both short and long term harm to herself, her family, and her community, many of which make up the Survivor Class and Family Law Class.³⁹

66. The Applicant has deep roots in her Kehewin community and a vested interest in vigorously advocating for those, like herself, who suffered and/or continue to suffer as a result of the Defendants' conduct.

67. The Applicant has also shown an understanding, from speaking with her legal counsel, of the major steps within the Action and her responsibilities as representative plaintiff and confirms that she is capable and willing to fairly and adequately represent the interests of both the Survivor Class and Family Law Class.⁴⁰

68. As for competence of the Applicant's counsel, the Applicant has retained Grey Wowk Spencer LLP, an established law firm with experience in class action lawsuits. Details regarding counsel have been provided in paragraphs 3-4 of the Litigation Plan, attached to the Application as Appendix "A".

vi. The Applicant has produced a litigation plan

69. The Applicant's Proposed Litigation Plan has been attached to the Application as Appendix "A" and provides, in part, a comprehensive plan regarding timelines, notices, questioning and discovery, settlements, expert evidence.

³⁷ WCSC at para 41.

³⁸ Affidavit of Cynthia Iris Youngchief, filed 27 August 2020 at paras 3-4.

³⁹ Affidavit of Cynthia Iris Youngchief, filed 27 August 2020 at paras 9-14.

⁴⁰ Affidavit of Cynthia Iris Youngchief, filed 27 August 2020 at paras 18-22, 24.

vii. The Applicant has no competing interests

70. The Applicant does not have any conflicting interests with other members of the Survivor Class or Family Law Class.⁴¹ The Applicant will continue to use her best efforts, in conjunction with counsel's guidance, to represent the interests of each class objectively and fairly to ensure that any potential conflicts that may arise are dealt with quickly and fairly.⁴²

PART V: RELIEF SOUGHT

71. Based on the foregoing, the Applicant seeks an Order:

- a. Certifying this Action as a class proceeding;
- b. Defining the "Survivor Class" as follows:
 - all Aboriginal persons, wherever they may now reside or be domiciled, who attended Ecole Notre Dame Elementary School and/or Ecole Notre Dame High School in Bonnyville, Alberta (the "**Notre Dame Schools**") during the Class Period;
- c. Defining the "Family Law Class" as follows:
 - all Persons who are a spouse or former spouse, child, grandchild, parent, grandparent, brother or sister of a Survivor Class member and the spouse of a child, grandchild, parent, grandparent, brother or sister of a Survivor Class member;
- d. Appointing Cynthia Iris Youngchief as Representative Plaintiff of the proposed Classes;
- e. Stipulating the following common issues for trial:
 - i. Did the Defendants, through the direct or indirect establishment, funding, control, and maintenance of the Notre Dame Schools throughout the Class Period owe a duty of care to the Survivor Class and/or Family Law Class, or any member of either Class?
 - ii. Did the Defendants, through the direct or indirect establishment, funding, control, and maintenance of the Notre Dame Schools throughout the Class Period breach the requisite standard of care

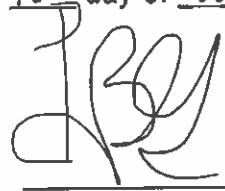
⁴¹ Affidavit of Cynthia Iris Youngchief, filed 27 August 2020 at para 23.

⁴² Affidavit of Cynthia Iris Youngchief, filed 27 August 2020 at para 17.

- owed by it to the Survivor Class and the Family Law Class, or any member of either Class?
- iii. Did the Defendants, through the direct or indirect establishment, funding, control, and maintenance of the Notre Dame Schools breach a fiduciary duty owed to the Survivor Class or the Family Law Class, or any member of either Class?
 - iv. Did the Defendants, through the direct or indirect establishment, funding, control, and maintenance of the Notre Dame Schools breach the aboriginal rights of the Survivor Class and the Family Law Class, or any member of either Class?
 - v. Did the Defendants, through the direct or indirect establishment, funding, control, and maintenance of the Notre Dame Schools breach a statutory obligation owed, under the *Indian Act* or any other statute, to the Survivor Class and Family Law Class, or any member of either Class?
 - vi. What injury or damages have the Survivor Class and Family Law Class suffered as a result of the Defendants' malfeasance and/or nonfeasance identified in issues (i) through (v) above?
 - vii. Whether aggregate damages are available and, if so, on what basis and in what amount?
 - viii. What proportion of culpability should be attributed to each respective Defendant for the injuries and/or damages identified in issues (vi) and (vii) above?
- f. Approving the proposed Litigation Plan attached as **Appendix "A"** to the Application with any modifications, additions, or deletions as required by this Honourable Court;
 - g. Designating Grey Wowk Spencer LLP as exclusive legal counsel for the Survivor Class and Family Class;
 - h. Staying any other putative class actions relating to this class proceeding pending further order of this Honourable Court;
 - i. Granting costs of this Application; and

- j. For any such further and other relief as counsel may request and this Court may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED ON THIS 13th day of October,
2022.



Leighton B.U. Grey, Q.C.
Counsel for the Applicant/Plaintiff

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