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COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	ST. PAUL
PLAINTIFF	CYNTHIA IRIS YOUNGCHIEF
DEFENDANTS	THE ATTORNEY GENERAL OF CANADA, HIS MAJESTY THE KING IN RIGHT OF ALBERTA, DIOCESE SANCTI PAULI, ST. LOUIS PARISH and LAKELAND ROMAN CATHOLIC SCHOOL DISTRICT NO. 150
DOCUMENT	**BRIEF**

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Introduction

1. The Plaintiff, Cynthia Youngchief, seeks to certify her claim as a class action on behalf of indigenous students who attended the Ecole Notre Dame Schools in Bonnyville between 1966 and 1974.

2. While the Plaintiff and the class allege various abuse occurred at the schools during the class period, including physical, psychological and sexual abuse, the claim pleads no material facts that His Majesty the King in right of Alberta ("Alberta"), or anyone that Alberta is responsible for at law, committed the abuse, or operated and managed the schools.

3. The legislation in force during the class period specifically contemplates that the School Board, a separate legal entity from Alberta, was responsible for operation and management of the schools, and for the hiring and disciplining of teachers and staff.

4. The legislative provisions confirm that the Alberta does not owe a duty of care to the proposed class members and in any event the pleadings do not allege any material facts that could ground any cause of action against Alberta.

5. Therefore, the Plaintiff is unable to meet the certification test set out in section 5 of the *Class Proceedings Act ("CPA")*, as her claim does not disclose a cause of action as required by section 5(1)(a). On this basis, certification against Alberta should be denied and the action dismissed.

Agreement to Narrow the Issues and Amend the Pleadings:

6. After the Plaintiff filed its supplemental brief, the parties had various without prejudice discussions relating to the scope of the certification application. As a result of these discussions, and as indicated at the Case Management Conference on March 19, 2024, Alberta understands that the Plaintiff intends to file an amended certification application after receipt of the defendant's submissions, which will amend the class definition and class period, and will narrow the proposed common issues.

7. Alberta's brief is based upon the understanding the Plaintiff's amended certification application will reflect the following changes:

a. In the Plaintiff's original application sought certification of a "Survivor Class" and a "Family Class." The amended class definition will remove the Family Class.

b. The Plaintiff's original class period was defined from "approximately 1970 – 1980". The amended class definition will be the "start of the school year in 1966 to the end of the school year in 1974."

c. The amended common issues will be limited to:

i. Whether and to what extent, each of the Defendants were involved in the operation and management of the schools

ii. Whether each of the Defendants owed a duty to the Plaintiff; and

iii. Whether there was a breach of that duty

8. On the basis that the proposed changes will be reflected in a filed certification application and the pleadings correspondingly amended, Alberta does not oppose the certification criteria set out in the following sections of the*CPA*:

a. Section 5(1)(b) – identifiable class

b. Section 5(1)(c) – Common Issues

c. Section 5(1)(d) – Preferable Procedure

d. Section 5(1)(e) – Representative Plaintiff[1]

9. However, the Statement of Claim – as filed or as may be amended – does not disclose a reasonable cause of action against Alberta as required by section 5(1)(a) of the *CPA*. Therefore, certification should be denied as against Alberta and the action against Alberta dismissed.

10. After receiving the Defendant's submissions, should the Plaintiff opt to not amend the certification application and the pleadings, Alberta reserves the right to dispute the Plaintiff has satisfied her onus with respect to the certification criteria set out in sections 5(1)(b) – 5(1)(d) of the *CPA*.

[1] *Class Proceedings Act*, SA 2003, c C-16.5, at s 5

The Pleadings:

11. The Plaintiff alleges that the Survivor Class members were subjected to physical, psychological and sexual abuse while at the Ecole Notre Dame Schools during the class period.[2]

12. The Plaintiff alleges causes of action in negligence and breach of fiduciary duty.

13. In addition to naming Alberta as a Defendant, the Amended Statement of Claim (the "Claim") also names as defendants:

    a. The Attorney General of Canada;

    b. Diocese Sancti Pauli and St. Louis Parish; and

    c. Lakeland Roman Catholic Separate School District No. 150.

14. The Plaintiff pleads that the Day School on the Kehewin Cree Nation was closed by the Government of Canada in 1964. The children were transported to and from Bonnyville to attend the Ecole Notre Dame Schools until 1975.[3]

15. Throughout the class period the Ecole Notre Dame School was within various School Districts. The Claim pleads that:

    a. In 1943 the Lac La Biche School Division was formed;[4]

    b. In 1971 the Beaver River School District No. 5460 assumed jurisdiction;[5]

    c. On September 25, 1980 the Lakeland Roman Catholic School District No. 150 was established.[6]

16. The Claim fails to plead any specific facts, allegations, or a theory of wrongdoing specifically against Alberta. In fact, the only mention of Alberta in the Claim is at paragraph 10, which

[2] Amended Statement of Claim, filed August 27, 2020 at para 21.
[3] Amended Statement of Claim, at para 18
[4] Amended Statement of Claim, at para 16
[5] Amended Statement of Claim, at para 17
[6] Amended Statement of Claim, at para 19

simply describes Alberta as having "jurisdiction, authority, and control over Alberta Education."[7]

17. Throughout the Claim, the Plaintiff makes broad factual allegations against "the Defendants" as a whole which are not particularized against Alberta or any one Defendant. The generalized allegations are that:

    a. **the Defendants** failed to implement appropriate policies and procedures to prevent physical harm and sexual abuse;[8]

    b. **the Defendants** failed to establish and implement mechanisms to complain and seek assistance against school staff members, who are **the Defendant's** agents;[9] and

    c. **the Defendants** failed to establish and implement adequate policies and procedures to oversee the actions of school staff members.[10]

18. The Claim also alleges that the "majority" of class members were subjected to "segregation and mistreatment" and "sub-standard education compared to non-aboriginal pupils."[11] The Claim does not set out specific factual allegations relating to the segregation, mistreatment of standard of education received, or which Defendant is alleged to have engaged in those acts or omissions.

19. The Plaintiff pleads her specific experience at the Ecole Notre Dame Schools involved:

    a. Being strapped with a thick leather belt by a single, specific teacher; and

    b. Experiencing generalized racism, degradation and name calling.[12]

20. While the Plaintiff points to a specific teacher as having committed physical abuse against her, the Claim makes general allegations of abuse against the Class committed by "agents" of the Defendants.[13] The Claim defines "agents" to include the: "operators, managers,

[7] Amended Statement of Claim, at para 10
[8] Amended Statement of Claim, at para 23
[9] Amended Statement of Claim, at para 24
[10] Amended Statement of Claim, at para 25
[11] Amended Statement of Claim, at para 27
[12] Amended Statement of Claim, at paras 28 - 29
[13] Amended Statement of Claim, at paras 23, 24, 31, 32, and 37

administrators, doctors, nurses, clinicians and all other staff members of Ecole Notre Dame Schools."[14]

21. Similar to the lack of factual specifics against Alberta, the alleged legal duties are plead as being common to all defendants.

22. With respect to the negligence cause of action, the pleadings allege that:

    a. **the Defendants** owed a duty of care through its operation and management of the Ecole Notre Dame Schools;[15]

    b. **the Defendants**, through its Agents, exercised care and control over the class members.[16].

23. With respect to the fiduciary duty cause of action, the pleading allege that the class members fiduciary relationship with **the Defendants** was established as the Class Members were in a "relationship of trust, reliance, and dependence."[17]

24. The Claim goes on to make the bald allegation that "the Class Members were within the knowledge, contemplation, power or control of **the Defendants**, and were subject to the unilateral exercise of its Agents' power or discretion."[18]

25. Many of the remaining paragraphs relating to the fiduciary duty claim only make allegations against Canada, including references to Indian Day Schools, the Federal *Indian Act* and "agents" of Canada.[19]

***School Act* Statutory Scheme**

26. The *School Act* governed the delivery of education during the class period, from the start of the 1966 school year until the end of the 1974 school year. Two versions of the *School Act* were in force during the relevant times. The 1955 version of the *School Act*[20] ["*School Act*

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[14] Amended Statement of Claim, at para 1(b)
[15] Amended Statement of Claim, at para 30. While the Claim states the duty relates to the "establishment, funding, oversight, operation, supervision, control, maintenance and support" of the Schools, the proposed revised common issues will only address the "operation and maintenance" of the Schools.
[16] Amended Statement of Claim, at para 31
[17] Amended Statement of Claim, at para 36
[18] Amended Statement of Claim, at para 37
[19] Amended Statement of Claim, at paras 40 – 44 and 47
[20] *School Act*, RSA 1955, c 297

1955"] was in force until 1970 when a new version came into force[21] ["*School Act 1970"*] [referred to collectively as the "*School Acts*"].

27. Both the *School Act 1955* and the *School Act 1970* allowed for the establishment of School Districts across the Province.[22] Each School District has a School Board, which operated as independent corporate entities, legally distinct from Alberta.[23]

28. Both the *School Act 1955* and the *School Act 1970* granted the School Boards the responsibility and power to:

    a. Make rules for the management and operation of schools, and make the rules available to teachers and principals;[24]

    b. Designate principals for schools;[25]

    c. Employ teachers;[26]

    d. Suspend or dismiss teachers for gross misconduct, neglect of duty, or refusal or neglect to obey any lawful order of the board;[27]

    e. Provide health services and safeguards to pupils;[28]

    f. Keep in force a policy of insurance for indemnifying the board and its employees in respect of claims for damages for death or personal injury…;[29]

    g. Enter into agreements for the education of Indigenous students not residing within District's boundaries.[30]

29. The *School Act 1955* and *School Act 197*0 specifically no not:

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[21] *School Act*, RSA 1970, c 329
[22] *School Act 1955*, at s 4; and *School Act 1970*, at s 14
[23] *School Act 1955*, at s 74; and *School Act 1970*, at s 30(1)
[24] *School Act 1955*, at s. 179; and *School Act 1970*, at s 65(3)(d).
[25] *School Act 1955*, at s. 370; and *School Act 1970*, at s.82.
[26] *School Act 1955*, at s. 332(1), 339, and 348; and *School Act 1970*, at s. 73, 75 and 78.
[27] *School Act 1955*, at s. 350; and *School Act 1970*, at s.79.
[28] *School Act 1955*, at s. 182; and School Act 1970, at s.147
[29] *School Act 1955*, at s. 180 (d)(i); and *School Act 1970*, at s. 65 (3)(a)
[30] *School Act 1955*, at s 321; and *School Act 1970*, at s 160

a. Give Alberta or the responsible Minister the power to control or monitor the management or operation of schools;

b. Deem the School Boards or school staff to be agents of Alberta or the responsible Minister; nor

c. Give Alberta or the responsible Minister the power to control the activities of School Board

Certification Criteria Not in Dispute

30. As indicated above, based on the proposed revisions to the class definition, class period and common issues, Alberta does not dispute that the Plaintiff has provided some basis in fact to meet the certification criteria in the *CPA* relating to: an identifiable class (section 5(1)(b)); common issues (section 5(1)(c)); preferable procedure (section 5(1)(d)); and representative plaintiff (section 5(1)(e)).

Disputed Certification Criteria – No Reasonable Cause of Action Against Alberta

31. The pleadings do not disclose a cause of action as against Alberta, as required by section 5(1)(a) of the *CPA*. Therefore certification of this action against Alberta must fail.

32. The test for determining if the pleadings disclose a cause of action under section 5(1)(a) of the *CPA* is the same that applies to an application to strike the claim. The cause of action will be struck out where it is "plain and obvious" that the plaintiff's claim cannot succeed.[31]

33. In order to meet this certification criteria, a plaintiff must demonstrate, having regard to the pleadings, viewed against the background of the (assumed) alleged facts that the claims pled are not bound to fail.[32]

34. While the threshold to strike is high and pleadings should be interpreted liberally, needless litigation should be avoided and the court has a duty to apply the rule as it is intended. If the alleged facts do not disclose a cause of action in light of existing law, those portions of the pleadings should be struck out.[33]

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[31] *Elder Advocates of Alberta Society v Alberta*, 2011 SCC 24 ("*Elder Advocates*"), at para 20
[32] *Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2013 SCC 57 ("*Pro-Sys*"), at para 63
[33] *Tottrup v. Alberta (Minister of Environment)*, 2000 ABCA 121 ("*Tottrup*") at para 9

35. The Supreme Court of Canada outlined the general principles that should inform the application of rules on striking pleadings in *R v Imperial Tobacco Canada*. At paragraph 22, the Court held:

> A motion to strike for failure to disclose a reasonable cause of action proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven: Operation Dismantle Inc. v. The Queen, 1985 CanLII 74 (SCC), [1985] 1 S.C.R. 441, at p. 455. No evidence is admissible on such a motion: r. 19(27) of the Supreme Court Rules (now r. 9-5(2) of the Supreme Court Civil Rules). It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted…
>
> Related to the issue of whether the motion should be refused because of the possibility of unknown evidence appearing at a future date is the issue of speculation. The judge on a motion to strike asks if the claim has any reasonable prospect of success. In the world of abstract speculation, there is a mathematical chance that any number of things might happen. That is not what the test on a motion to strike seeks to determine. Rather, it operates on the assumption that the claim will proceed through the court system in the usual way — in an adversarial system where judges are under a duty to apply the law as set out in (and as it may develop from) statutes and precedent. The question is whether, considered in the context of the law and the litigation process, the claim has no reasonable chance of succeeding [emphasis added].[34]

36. Recently, the Alberta Court of Appeal in *Setoguchi v Uber BV* confirmed the approach to be taken when conducing an analysis of the cause of action under section 5(1)(a) of the CPA. The Court held:

> Although the section 5(1)(a) test is a low bar, it should not be treated as a perfunctory exercise. "Courts have no jurisdiction to ignore the plain text of an enactment and make this criterion completely disappear": *Bruno* at para 68. There are compelling reasons for a court to carefully consider whether the pleadings pass the plain and obvious test, by carefully scrutinizing whether the facts as pleaded establish the requisite elements of each cause of action.[35]

37. The relevant versions of the *School Acts* exclude a cause of action against Alberta for the treatment of students within a school. The *School Acts* do not impose any duty or

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[34] *Knight v Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para 22 & 25.
[35] *Setoguchi v Uber BV*, 2023 ABCA 45, at para 44

requirement upon Alberta or the Minister of Education for the treatment of students. Instead, a cause of action (if any) would lie against the legally independent School Board.

38. In *A.H. v Alberta* ("*A.H.*")[36], the Alberta Court of Appeal considered whether a cause of action for breach of *Charter* rights existed against the Minister of Education for the improper treatment of a student while at school. No cause of action against Alberta was found to exist.

39. *A.H.* arose from allegations that a special needs student was placed in an isolation room without parental consent. The claim against Alberta alleged that the Minister of Education was "endowed with responsibilities imposed by the *[School] Act*, and was required to exercise their duties and responsibilities in compliance with the *Charter*."[37]

40. The Court of Appeal upheld the Chambers Justice's decision to strike the claim against Alberta, holding that:

> The Minister is under no obligation to monitor the day-to-day activities of employees of a school board and ensure their compliance with school board policies. A school board is a corporation and has a separate legal status from that of Alberta Education...
>
> There is no arguable cause of action here. The appellants have not identified any act on the part of the Minister that breaches any duty the Minister owed them or was imposed on the Minister by the *School Act*. If there is a cause of action here, it is against the school board and its employees.[38]

41. The reasoning in *A.H.* applies equally to the Plaintiff's claims here. The Claim alleges physical, psychological and sexual abuse of class members while at the Ecole Notre Dame Schools, committed by school staff members.[39]

42. The *School Acts* make it clear that school staff members are employees of the School Board.[40] A school staff member is not an agent of Alberta and no liability flows to Alberta for any act or omission of a school staff member.

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[36] *A.H. v Alberta*, 2020 ABCA 54
[37] *A.H.*, at para 3
[38] *A.H.* at paras 4 and 16
[39] Amended Statement of Claim, at paras 22, 23, 24 and 25.
[40] *School Act 1955*, at s 330 and *School Act 1970*, at s 73

43. It is the responsibility of the School Board, pursuant to the *School Acts,* to supervise, and when appropriate, discipline or terminate teachers.[41] Therefore, allegations of physical, psychological or sexual abuse committed by school staff members and any allegation relating to the failure to supervise teachers, may give rise to a cause of action against the School Board, but not against Alberta.

44. Similar to *A.H.*, the British Columbia Supreme Court in *Wiggins v British Columbia* determined in a certification application that, based on similar legislation to Alberta's *School Acts*, the Minister of Education did not owe a duty of care to parents of students wrongfully charged certain school fees.[42]

45. The Court held that the British Columbia *School Act* delegated decisions regarding the charging of fees to the School Boards. Where such delegation occurs, no duty of care on behalf of the Minister of Education can exist. The Court stated:

> With respect, nothing in the governing statute itself, the *School Act*, supports that plaintiff's assertion that the Province has a statutory duty to monitor and control the compliance of boards of education with law and policy regarding the charging of school fees. As the defendant submits, the purpose of the *School Act* is to establish a structure for the provision of educational services by independent boards. The statute clearly envisions boards of education as independent, elected bodies that operate with considerable autonomy. As such, the imposition of liability on the Province for the failure to control or monitor the schools or boards is contrary to the scheme of the *School Act*.[43]

46. The Court in *Wiggins* went on to find no sufficient proximity between the province and the class members to support a common law duty of care[44] and then expressed policy concerns with finding that a government could be liable to private individuals for the actions of an independent school board.[45] In the end, the Court dismissed the Plaintiff's certification application on the basis that the pleadings failed to disclose a cause of action against British Columbia.

47. The *School Acts* delegated broad powers to the School Boards with respect to the operation and management of schools. In the Plaintiff's action, the School Board, not Alberta, would be the responsible party, as the *School Acts* do not establish a duty of care between Alberta

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[41] *School Act 1955*, at ss 350, 370 and 374 and *School Act 1970,* at ss 78 and 79
[42] *Wiggins v British Columbia*, 2009 BCSC 121 ("*Wiggins*") at para 24
[43] *Wiggins* at par 34
[44] *Wiggins* at paras 42-43
[45] *Wiggins* at para 46

and the class members for the operation and management of the Ecole Notre Dame Schools or the actions of teachers employed by the School Boards.

The Plaintiff's Negligence Claim Against Alberta is Bound to Fail

48. In addition to any duty of care against Alberta being negated by the operation of the *School Acts*, the Plaintiff's Claim generally fails to plead facts to support a negligence cause of action against Alberta.

49. As observed by the Court of Appeal in *Tottrop v Alberta (Minister of Environment)*:

> In my view, it is not the allegation of a duty at law that is critical, but the facts alleged supporting such a duty. For example, a statement of claim alleging only that "A" breached a duty owed to "B" thereby causing damage does not, in my view, disclose a cause of action. Pleadings are allegations of fact and, in my view, where negligence is alleged, that allegation must be supported by facts capable of sustaining a determination that a duty was owed, that an act or omission occurred breaching that duty, and that damages resulted. On a motion to strike it is the allegations of fact that must be examined to determine whether a cause of action exists.[46]

50. The Claim fails to set out any specific facts against Alberta. Instead, the Claim only makes general allegations against "the Defendants", which themselves are vague and conclusory.

51. In *Gariepy v Shell Oil Co*. Justice Nordeimer considered the principles that apply when determining whether the certification cause of action test will be met where the pleadings alleged multiple causes of action against multiple defendants. The Court held that:

> Not only is it necessary to demonstrate a cause of action against each named defendant, in my view it also necessary that every cause of action alleged against a particular defendant be demonstrated."[47]

52. The general allegations against "the Defendants" fail to plead any material facts that support a negligence cause of action against Alberta. The Claim provides no factual foundation regarding the relationship between the class and Alberta, does not point to any specific act or omission of Alberta or its agent, and does not set out how any act or omission of Alberta caused the damages alleged by the Class.

53. Additionally, there is insufficient proximity between Alberta and the Class to establish a duty of care. As the Supreme Court of Canada confirmed in *Cooper v Hobart*, the pleadings must

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[46] *Tottrup* at para 11

[47] *Gariepy v Shell Oil Co*. [2002] O.J. No 2766; 2002 CarswellOnt 2270, at para 33

disclose sufficient proximity between the parties to establish a *prima facie* duty of care. This requires a "close and direct relationship" between the parties.[48]

54. Where the Defendant is a statutory public authority – such as Alberta in this case – the factors giving rise to a close and direct relationship must arise from the governing legislation.[49]

55. At best, the *School Acts* set out a general oversight role of the Minister, including passing regulations, creating school districts and divisions across the Province, and receiving information from the school boards.[50]

56. It is clear from the *School Acts* that the management and operation of the Ecole Notre Dame Schools was the responsibility of the School Board and its employees. Alberta had no day-to-day involvement with the Ecole Notre Dame Schools and had no personal relationship with the Class.

57. Where a statutory public authority lacks any day-to-day conduct relating to the complained of activity, the nexus between the parties is weakened and no proximate relationship exists. Therefore, the absence of a personal relationship between the Class and Alberta is an important factor in determining that no proximate relationship exists.[51]

58. The Supreme Court of Canada in *Odhavji Estate v Woodhouse* considered whether a proximate relationship existed between the family of a person harmed by police and the Province for failing ensure compliance with a statutory provision requiring officers to co-operate with an investigation.[52]

59. The Supreme Court of Canada held that the Province was too far removed from the day-to-day conduct of police officers to give rise to a private law duty of care.[53]

60. Given the statutory scheme of the *School Acts*, Alberta's general oversight role under the legislation, and the delegated responsibility of School Board to manage and operate the

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[48] *Cooper v Hobart*, 2001 SCC 79, at paras 31 - 34
[49] *Cooper*, at para 43. See also *De Visser v Canadian Llama & Alpaca Association*, 2005 ABCA 1, at para 5
[50] *School Act 1955*, at ss 4, 207, and 444; *School Act 1970*, at ss 12, 14 and 70
[51] *Hill v Hamilton-Wentworth (Regional Municipality) Police Service Board*, 2007 SCC 41, at paras 29 - 30
[52] *Odhavji Estate v Woodhouse*, 2003 SCC 69, at para 69
[53] *Odhavji*, at paras 70 - 72

Ecole Notre Dame Schools, no proximate relationship can exist between Alberta and the Class.

61. There are also residual policy reasons why a duty of care should not be imposed upon Alberta for the allegations set out in the Claim. As the Court set out in *Wiggins*:

> The contention that the government could potentially be liable to private individuals, not for any action of the government, but for the actions of an independent school board in the course of carrying out government policy, extends accepted boundaries of the duty of care far beyond any scope previously acknowledged at law. For obvious reasons, the policy implications, including indeterminate liability, are significant. Moreover, it places the courts in the position of delineating the scope and extent of the powers of the government and government bodies, a task that clearly lies with the legislature.[54]

62. The Plaintiff's claims of negligence as they relate to Alberta are bound to fail. The bare pleadings do not meet the plain and obvious test and the *School Acts* do not establish or support a cause of action by the class against Alberta. To the contrary, the *School Acts* confirm there is no proximity between Alberta and the Class.

The Plaintiff's Fiduciary Duty Claim Against Alberta is Bound to Fail

63. In order for the Plaintiff's fiduciary claim to survive the cause of action test pursuant to section 5(1)(a) of the *CPA,* the Plaintiff must plead the necessary facts to establish that Alberta owed the Class a fiduciary duty.

64. The leading case on when a fiduciary duty is owed in the government context is the Supreme Court of Canada decision in *Alberta v. Elder Advocates of Alberta Society*.[55]

65. In *Elder Advocates*, the Court set out the general requirements for a fiduciary duty as established in *Frame v Smith* – but went on to note that "vulnerability alone is insufficient to support a fiduciary claim."[56]

66. In the general context of fiduciary duty, the claimant must plead vulnerability arising from the relationship, as well as:

    a. an undertaking by the alleged fiduciary to act in the best interest of the alleged beneficiary;

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[54] *Wiggins* at para 46.
[55] *Elder Advocates*
[56] *Elder Advocates*, at paras 27-28

b. a defined person or class of persons vulnerable to the fiduciaries control; and

c. a legal or substantial practical interest of the beneficiary that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.[57]

67. While these general principles apply in the government context, the Court confirmed that the "special characteristics of governmental responsibilities and functions mean that governments will owe fiduciary duties only in limited and special circumstances."[58]

68. The governmental responsibilities and functions means that an undertaking to act in an alleged beneficiary's best interest will be rare. The duty is one of utmost loyalty to the beneficiary, not to mediate between competing interests.[59]

69. In *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, the Supreme Court of Canada reaffirmed the principles articulated in *Elder Advocates*:

> It is now definitely a requirement of an ad hoc fiduciary relationship that the alleged fiduciary undertake, either expressly or impliedly, to act in accordance with a duty of loyalty. It is critical that the purported beneficiary be able to identify a forsaking of the interests of all others on the part of the fiduciary, in favour of the beneficiary, in relation to the specific interest at issue.[60]

70. In a governmental context, where it is alleged that the "undertaking" flows from legislation, the statutory language must clearly support it.[61] "The mere grant to a public authority of discretionary power to affect a person's interests is not enough to create an undertaking."[62]

71. The need for clear statutory language to support the undertaking in the government context was recently highlighted in *Johnson v British Columbia*. In that case, the plaintiff claimed they were sexually assaulted by a correctional officer in a prison operated by the Province. The Court of Appeal struck the fiduciary duty claim and held that:

> The undertaking required in order to establish a fiduciary duty is a serious one: in order to successfully prove the existence of a fiduciary duty, the appellants will ultimately need to demonstrate that the alleged fiduciary gave an undertaking to act in the best interests of the beneficiary, which requires them to have "forsak[en]… the

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[57] *Elder Advocates*, at para 36
[58] *Elder Advocates*, at para 37
[59] *Elder Advocates*, at para 43
[60] *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71 at para 124
[61] *K.L.B. v. British Columbia*, 2003 SCC 51 at para 40.
[62] *Johnson v British Columbia (Attorney General)*, 2022 BCCA 82 at para 140 citing *Elder Advocates* at para 45.

> interests of all others in favour of those of the beneficiary, in relation to the specific legal interest at stake": *Elder Advocates* at paras. 30–31. In order for the claim to have a reasonable prospect of success such that it should not be struck, therefore, the pleadings must raise the existence of such an undertaking. I agree with the Province that the pleadings fail to do so. The pleading does not contain any allegation of an undertaking by the Province to act in accordance with a duty of loyalty. Further, there is no clear statutory language that supports such an undertaking and it cannot be inferred by the nature of the relationship between the Province and inmates.
>
> The appellants' pleadings state that the Province owed fiduciary obligations to the appellants "as a consequence of the power and control it held over each of them, and due to their particular vulnerability at the Institutions." In their oral submissions, the appellants argued that the particular circumstances of the relationship, characterized by vulnerability, power, and control, give rise to the undertaking in this case. These submissions conflate vulnerability and control with the existence of an undertaking. While vulnerability and control must be pled to satisfy the second and third requirements of the *Elder Advocates* framework, they do not constitute a fiduciary undertaking. Indeed, if this were the case then the first component of the framework would serve no purpose.[63]

72. There are instances where courts have certified a fiduciary duty cause of action brought by students alleging physical, psychological and/or sexual abuse. However, these are typically "institutional abuse" claims where the defendant operated and managed the school, had direct control over the students, and the students resided at the school.[64]

73. However, a fiduciary relationship has not been extended to include entities that did not manage or operate the school in question and did not have direct control over students.

74. In *Cavanaugh v Grenville Christian College* the plaintiff sought certification on behalf of a class of former students who resided at a religious school. The plaintiff named as defendants the school, the former headmasters who operated the school, as well as the Provincial Diocese.[65]

75. While the claim against the school and the headmasters was certified, the Ontario Court of Appeal upheld the dismissal of a certification application against the Diocese.[66] The fiduciary

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[63] *Johnson* at paras 147-148.
[64] See for example, *Seed v Ontario,* 2012 ONSC 2681 at paras 5 – 8, 99, and 103 – 106; and *PW v Alberta*, 2013 ABQB 296, at paras 10, 11, 17 and 19.
[65] *Cavanaugh v Grenville Christian College*, 2013 ONCA 139, ["*Cavanaugh"*] at paras 8 - 10
[66] *Cavanaugh*, at para 78, and 81

duty allegations centered on the Diocese's licencing the headmasters to serve as clergy with the church.[67]

76. In finding it was plain and obvious that the Diocese could not owe a fiduciary duty (or a cause of action in negligence) to the class, the Court examined the pleadings. Nearly identical to the Plaintiff's pleadings here, the pleadings in *Cavanaugh* included a general allegation against all defendants that the class members were subject to the unilateral exercise of the Defendant's power and control.[68]

77. There were no material facts supporting the generalized allegation that the Diocese owed a fiduciary duty to the class as no facts were alleged that the Diocese exercised unilateral discretion or power over the class.[69]

78. The Plaintiff's Claim does not plead any facts that could support a claim that Alberta had unilateral discretion or control over the Class, or any control over the Class at all. Importantly, the *School Acts* make it clear that Alberta was not the party that managed or operated the Ecole Notre Dame Schools.

79. Additionally, there is nothing in the *School Acts* that suggests Alberta undertook to act in the Class's best interest.

80. On the basis of the pleadings and the provisions of the *School Acts* it is plain and obvious that the Plaintiff's fiduciary duty claim insofar as it's against Alberta is bound to fail.

The Plaintiff's Sub-Standard Education Claim Against Alberta is Bound to Fail

81. The Claim makes a single passing reference to the majority of class members receiving sub-standard education.[70] Sub-standard education is not referenced by the Plaintiff in her submissions. From the pleadings and submissions, it is unclear whether the Plaintiff is advancing a stand-alone claim for sub-standard education.

82. The Claim does not indicate which Defendant is alleged to have provided the sub-standard education (and does not even make a generalized allegation against all defendants). The

[67] *Cavanaugh*, at para 58
[68] *Cavanaugh*, at para 80. See the Claim at para 37
[69] *Cavanaugh*, at para 81
[70] Amended Statement of Claim, at para 27

Claim also fails to provide any facts at all relating to the allegation of sub-standard education.

83. Courts generally not accepted a stand-alone tort of "educational malpractice" given such a claim would raise non-justiciable public policy issues and would have difficulty establishing a proximate relationship between the parties.[71]

84. The exception for when such claims may survive a striking application is when the pleadings allege "conduct sufficiently egregious and offensive to community standards of acceptable fair play."[72]

85. There are no facts plead in the Claim support a claim of sub-standard education at all, let alone any facts that Alberta's conduct was sufficiently egregious and offensive to warrant a claim of educational malpractice by the "majority" of the class members.

86. To the extent the Plaintiff claims a stand-alone tort of educational malpractice, the claim against Alberta is bound to fail.

Conclusion

87. The Plaintiff's Claim does not meet all the certification criteria as against Alberta. The Claim fails to meet the cause of action test as required by section 5(1)(a) of the *CPA*.

88. The Plaintiff's Claim does not plead the necessary facts to ground a claim in negligence, breach of fiduciary duty, or (if alleged), educational malpractice against Alberta. Indeed, the Claim fails to plead any material facts as against Alberta at all.

89. Insofar as the generalized claims against the Defendants may be attributable to Alberta, they are answered wholly by the provisions of the *School Acts* in force at the relevant times. The *School Acts* create School Boards which are separate legal entities from Alberta and are legislatively tasked with the operation and management of schools, including the Ecole Notre Dame Schools.

90. Additionally, the Claim fails to plead any facts which might support a claim in negligence, fiduciary duty or sub-standard education.

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[71] *Indian Residential Schools, Re.*, [2000] A.J. No. 638, 2000 CarswellAlta 526, ["*Residential Schools*"] at paras 50 and 55

[72] *Residential Schools*, at para 56

91. As no cause of action against Alberta survives the certification test, certification should be denied and the underlying claim dismissed as against Alberta with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 27 DAY OF MARCH, 2024

Alberta Justice

Per: John-Marc Dube
John-Marc Dube
Counsel for the Respondent,
His Majesty the King in Right of Alberta

Per: _____
Francis Chiu
Counsel for the Respondent,
His Majesty the King in Right of Alberta

Table of Authorities

Tab	Authorities
1	*Class Proceedings Act*, SA 2003, c C-16.5
2	*School Act*, RSA 1955, c 297
3	*School Act*, RSA 1970, c 329
4	*Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 (CanLII), [2011] 2 SCR 261
5	*Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 (CanLII), [2013] 3 SCR 477
6	*Tottrup v. Lund*, 2000 ABCA 121
7	*Setoguchi v Uber BV*, 2023 ABCA 45
8	*A.H. v Alberta (Minister of Education)*, 2020 ABCA 54
9	*Wiggins v. British Columbia*, 2009 BCSC 121
10	*Gariepy v. Shell Oil Co.*, 2002 CarswellOnt 2270
11	*Cooper v. Hobart*, 2001 SCC 79 (CanLII), [2001] 3 SCR 537
12	*De Visser v. Canadian Llama & Alpaca Association*, 2005 ABCA 1
13	*Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41
14	*Odhavji Estate v. Woodhouse*, 2003 SCC 69
15	*Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71
16	*K.L.B. v. British Columbia*, 2003 SCC 51

17	*Johnson v. British Columbia (Attorney General)*, 2022 BCCA 82
18	*Seed v. Ontario*, 2012 ONSC 2681
19	*Cavanaugh v. Grenville Christian College*, 2013 ONCA 139
20	*Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42
21	*P. (W.) v. Alberta*, 2013 ABQB 296, 2013 CarswellAlta 875
22	*Indian Residential Schools,* Re., [2000] A.J. No. 638, 2000 CarswellAlta 526