

Clerk's Stamp:

COURT FILE NUMBER 1914-00167

COURT COURT OF KING'S BENCH OF ALBERTA

JUDICIAL CENTRE ST. PAUL

PLAINTIFF/APPLICANT CYNTHIA IRIS YOUNGCHIEF

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

DOCUMENT **REPLY BRIEF OF THE
PLAINTIFF/APPLICANT IN RESPONSE
TO THE BRIEF OF THE RESPONDENT,
HIS MAJESTY THE KING IN RIGHT OF
ALBERTA**

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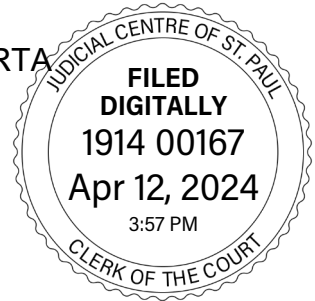


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PART I: OVERVIEW

1. This is in response to the brief (the “**Brief**”) filed by His Majesty the King in Right of Alberta (“**AB**”).
2. AB seeks an order dismissing the Application for Certification of Class Proceeding, filed 29 September 2022 (the “**Application**”), with costs.
3. The group of individuals categorized for the purpose of this class action consists of 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, during the Class Period (the “**Survivor Class**” or “**Class Members**”).
4. The Applicant concurs with AB respecting what is stated at paragraphs 6 and 7 of its Brief.
5. The Applicant relies on the facts set out in the Application and Action. The Applicant seeks leave to amend the Action in response to concerns raised in the AB Brief. This would enable the Action to be amended rather than dismissed as against AB.
6. The Applicant further relies upon the Affidavit of Cynthia Iris Youngchief, filed 27 August 2020, in response to AB’s argument that the Application does not meet the five preconditions to certification.
7. Section 5 of the *Class Proceedings Act*, RSA 2003, C-16.5 (the “**CPA**”) provides that this Court must certify an action as a class proceeding if satisfied that the five preconditions are met.¹ The Applicant submits that each of the requisite conditions are satisfied and that the Application for Certification must therefore be granted as against each of the Defendants.
8. AB says that the Applicant fails to satisfy the first precondition for certification of this Action as a class proceeding under section 5(1)(a) of the *CPA*, requiring that pleadings disclose a cause of action. AB maintains that failure to satisfy this requirement must result in dismissal of the certification application.

¹ TAB 1- Book of Authorities of His Majesty the King in Right of Alberta

9. The Applicant contends that AB's negligence in developing and enforcing appropriate policies and procedures to monitor the conduct at Ecole Notre Dame Schools directly led to the physical harm and emotional trauma experienced by the Survivor Class.

10. The Applicant and the Survivor Class were subjected to such abuse over a period from the start of the school year in 1966 to the end of the school year in 1974 (the "**Class Period**").

11. The Applicant seeks certification of the Survivor Class to ensure that AB is held accountable for the injuries and damages inflicted upon the members of the Survivor Class.

PART II: POINTS IN ISSUE

12. The sole issue is whether the Application satisfies the five preconditions of Rule 5(1) *CPA* to certify the Action as a class proceeding.

13. AB contends that the Applicant fails to meet the initial precondition for certification. The Applicant responds that the initial precondition is satisfactorily met, and that the entirety of the five-part precondition test is also satisfied.

PART IV: LEGAL ARGUMENT

A. The pleadings disclose a cause of action

14. In response to paragraphs 28, 29, 37, 42, 43, and 47 of the AB Brief, section 160 of the *School Act*, RSA, 1970 states that:

A board with the prior approval of the Minister may:

(b) enter into an agreement with the Government of Canada or any agency or person having responsibility for the education of Indian children to educate Indian children or children of members of the Canadian Forces or

of other persons employed by the Government of Canada in a school or schools of the district or divisions and receive consideration thereafter”²

15. The Applicant maintains that while AB was not directly involved in day to day operation of the school, they would have had to agree to take on responsibility for indigenous children under s.114 of the former legislation.³

16. The issue is not the involvement of AB, but rather the specificity with which their actions are documented in the pleadings. Granting the Applicant the opportunity to amend would allow a description of the roles and responsibilities that AB had concerning complained of events at the school(s).

17. The Action pleads that the Defendants knew or ought to have known of injuries and damages sustained by the Survivor Class which could foreseeably lead to harm. The current specificity of the pleading may not fully delineate the knowledge of AB, but this does not negate their liability. Without the ability to amend the Action to incorporate additional facts, the Court will be unable to assess any duty of care AB owed, and whether there was a breach of such duty. These are foundational aspects of establishing a claim of negligence. Vitiating the opportunity to amend the Action would deny the Court the full scope of facts needed to evaluate the negligence claim, potentially overlooking any statutory and tort liability.

18. AB’s objection to the class certification is predicated upon an alleged lack of detail in the pleadings. The pleadings do not yet fully detail AB’s specific actions because such granular information is beyond the Applicant’s knowledge at this stage. There has been no opportunity to discover the precise nature of the relationship between the Plaintiff and the Defendants. This problem is especially acute given the intrinsically historical nature of the claims being advanced.

² [The School Act, RSA 1970, c. 100, s.160](#)

³ [Indian Act, R.S., c.149, s. 114](#)

19. If AB held any legal or actual authority over Notre Dame, as the Applicant has claimed, then AB would share vicarious responsibility for the misconduct of any staff member upon Class Members.

20. AB essentially demands a level of proof from the Applicant that is not required at this juncture. The Applicant says that the necessary details will come to light during the discovery phase, which will further substantiate the pleaded claims.

21. Though the pleadings allege the Government of Canada's ("**Canada**") overarching responsibility, AB shares this responsibility. Canada's delegation of authority did not absolve AB of its own duties. Rather, it functioned with Canada's permission and under its policies, evidencing a shared liability.

22. The proposed common issues are based upon vicarious liability of AB and all Defendants for tortious acts committed against each Class Member of the Survivor Class.

23. The Supreme Court of Canada outlined the criteria for vicarious liability in *B. (K.L.) v. British Columbia 2003 SCC 51, 2003 CSC 51*. For the Applicant to establish vicarious liability, they must first prove that there is a sufficient proximal relationship between the individual who committed the wrongdoing and the party being held responsible. The Applicant must then show that the wrongful act is closely linked to the tasks given to the wrongdoer, to the extent that the act can be seen as a risk that naturally comes with the business or the enterprise's activities⁴

24. The Applicant maintains that AB shares vicarious liability for the actions of employees at Notre Dame School, emphasizing the necessity for their oversight. Although the pleadings also point to Canada as being primarily liable, AB and the School Board share this responsibility.

25. AB demands an evidentiary standard for material facts that cannot be met at the certification stage of proceedings. By insisting upon such proof, AB is effectively constructing a defense without formally pleading one. This sidesteps the procedural rights

⁴ [B. \(K.L.\) v. British Columbia 2003 SCC 51, 2003 CSC 51, at para 19](#)

of the Applicant to engage in the discovery process before being required to furnish such detailed facts.

26. The bar for establishing a reasonable cause of action is set lower at this point to ensure that meritorious claims are not prematurely dismissed. Canada consents to certification and the Diocese, which arguably has less of a connection to the Notre Dame School than AB, is unopposed to certification subject to terms agreed to by counsel for the parties. This illustrates the reasonableness of proceeding to document discovery without imposing the onerous requirement of detailed proof from the Applicant at the certification phase.

27. The Applicant's right to engage in document discovery must be preserved, reflecting both the procedural safeguards designed to protect Class Members and the established legal threshold for moving the case forward. AB's position misaligns with the principles of fairness and access to justice underpinning the early stages of class action litigation.

PART V: THE TEST TO AMEND A PLEADING

28. Should this Honourable Court find that the Action is insufficiently pleaded to satisfy the first arm of the certification test, then the Applicant applies for leave to amend the Claim to satisfy any deficiencies.

29. The *Alberta Rules of Court, Alta. Reg. 124/2010* allow for amendments to pleadings in a court case. Particularly, Rules 3.62(1) and 3.65 are relevant and applicable to the Applicant's situation here.

30. Chief Justice Wittmann summarized Alberta's approach to amending pleadings in [Dow Chemical Canada Inc. v. Nova Chemicals Corporation 2010 ABQB 524](#), highlighting that, "*Generally, any pleading can be amended no matter how careless or late is the party seeking to amend*"⁵. This principle, acknowledged as the "classic rule," underlines the judiciary's flexibility in allowing amendments or revisions to a pleading ensure fairness

⁵ [Dow Chemical Canada Inc. v. Nova Chemicals Corporation 2010 ABQB 524 at para 20](#)

and justice, as demonstrated in the case of *Balm v. 3512061 Canada Ltd., 2003 ABCA 98*⁶. The classic rule allows amendments to be made at any point in the proceeding, even if they are done late or the result is careless, as long as they do not unfairly disadvantage the opposing party. If any disadvantage does occur, it can be overcome if measures are taken to ameliorate.

31. The classic rule is subject to 4 exceptions:

- a) the amendment would cause serious prejudice to the opposing party, not compensable in costs;
- b) the amendment requested is "hopeless" (an amendment that, if were in the original pleadings, would have been struck);
- c) unless permitted by statute, the amendment seeks to add a new party or a new cause of action after the expiry of a limitation period; and
- d) there is an element of bad faith associated with the failure to plead the amendment in the first instance.

If no exception applies, then the pleadings can generally be amended⁷.

32. None of the four exceptions for denying amendment apply here. Below is an analysis demonstrating why the 4 exceptions are irrelevant to the present case and how amendment is preferable to dismissal.

- a. Serious Prejudice Not Compensable in Costs: Allowing the Applicant's certification does not cause irreversible or significant harm to the Lakeland Catholic that cannot be addressed through legal costs or other compensatory means. The Application does not introduce any new facts or demands that would require extensive additional preparation or delay the proceedings to Lakeland Catholic's significant detriment.
- b. Hopeless Amendment: The Application is not "hopeless" or inherently flawed. The essence of the certification is grounded in valid legal

⁶ [Balm v. 3512061 Canada Ltd., 2003 ABCA 98 at para 43](#)

⁷ [Dow Chemical Canada Inc. v. Nova Chemicals Corporation 2010 ABQB 524 at para 21](#)

principles, not frivolous or irrelevant claims. It carries substantive merit warranting judicial examination rather than outright dismissal and does not fall into the category of amendments that would have been dismissed at the outset for lack of legal foundation.

- c. Adding a New Party or Cause of Action Post-Limitation: The Application does not introduce new parties or causes of action beyond any statutory limitation periods. Instead, it seeks to consolidate existing historical claims within permissible legal frameworks, without breaching time constraints or introducing elements alien to the case's established parameters.
- d. Bad Faith Amendment: The Applicant's move to certify the Application is made in good faith, is aimed at achieving a more efficient and just resolution of the dispute, nor does it manipulate the legal process or unduly pressure the opposing party. There has been no withholding of critical information or strategic delay in this Action. Certification upholds the integrity of the legal process by ensuring that all relevant and like-minded claims are heard collectively, rather than individually to prevent judicial inefficiency and inconsistency.

33. Given that "the correct posture for the Court to adopt is to consider whether the pleadings, as they stand or may reasonably be amended, disclose a question that is not doomed to fail,"⁸ it is crucial to permit amendment to the Action rather than dismissal, particularly in the certification context. This directive underscores a fundamental principle of justice and procedural fairness, emphasizing the Court's responsibility to give due consideration to the potential of the pleadings to establish a valid claim upon reasonable amendment. The Court must err on the side of allowing a case to proceed if there exists a reasonable possibility that the pleadings, once amended, could successfully articulate a cause of action meriting further examination and adjudication. Allowing such amendment provides a pathway to refine and clarify the claims, ensuring that they are presented in the best possible light. This not only aligns with the principle of access to

⁸ [Atlantic Lottery Corp. Inc. v. Babstock, 2020 SCC 19 \(CanLII\), \[2020\] 2 SCR 420 at para 90](#)

justice but also ensures that potentially valid claims are not prematurely extinguished due to procedural technicalities or initial deficiencies in the pleadings.

34. Granting leave to amend enables the Applicant to address any identified shortcomings in the Action and affirms the Court's role in facilitating a fair and just resolution of disputes. The Applicant thus urges the Court to grant leave to amend the Action. This approach not only serves the interests of justice by preserving the potential for the claims to be fully heard and adjudicated but also aligns with the Court's duty to ensure that cases with a viable foundation are not dismissed without being given a fair opportunity to succeed.

PART V: RELIEF SOUGHT

85. The Applicant seeks an Order:

- a. Certifying this Action as a class proceeding;
- b. In the alternative, the Applicant respectfully seeks leave to proceed with Amendments to the Action;
- c. 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;
- d. Appointing Cynthia Iris Youngchief as Representative Plaintiff of the proposed Class;
- e. Stipulating the following common issues for trial:
 - 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;
- f. Approving the proposed Litigation Plan is a workable method of advancing the proceeding on behalf of the Class attached as **Appendix "A"** to the Application with any modifications, additions, or deletions as required by this Honourable Court;

- g. Designating Leighton B.U. Grey, K.C. of Grey Wowk Spencer LLP as exclusive legal counsel for the Survivor 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, payable forthwith, on a scale to be determined by the court after hearing submissions; 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 11th day of April 2024.



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

PART VI: TABLE OF AUTHORITIES

| Tab | AUTHORITIES |
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| 1. | <u><i>School Act, RSA 1970, c 329</i></u> |
| 2. | <u><i>Indian Act, R.S., c.149</i></u> |
| 3. | <u><i>B. (K.L.) v. British Columbia 2003 SCC 51, 2003 CSC 51</i></u> |
| 4. | <u><i>Dow Chemical Canada Inc. v. Nova Chemicals Corporation 2010 ABQB 524</i></u> |
| 5. | <u><i>Balm v. 3512061 Canada Ltd., 2003 ABCA 98</i></u> |
| 6. | <u><i>Atlantic Lottery Corp. Inc. v. Babstock, 2020 SCC 19 (CanLII), [2020] 2 SCR 420</i></u> |