COURT FILE NUMBER	1914 00167
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, LE DIOCESE DE SAINT-PAUL and/or THE DIOCESE OF SAINT-PAUL, ST. LOUIS PARISH and BOARD OF TRUSTEES OF LAKELAND ROMAN CATHOLIC SEPARATE SCHOOL DIVISION
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 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.

6. Additionally, the common issue requirement under section 5(1)(c) of the *CPA* is not met, as there is no basis in fact to support the proposed common issues against Alberta. Given the individual nature of the class members' claims, an examination of any duty and standard of care Alberta may have owed to provide oversight in the varying circumstances of each individual claim, there is no commonality within the class.

7. As individual issues will predominate in any claim against Alberta, the preferable procedure requirement pursuant to section 5(1)(d) of the *CPA* is also not met.

8. On this basis, certification against Alberta should be denied and the action dismissed.

<u>Procedural Timeline:</u>

9. After the Plaintiff filed their supplemental brief on November 28, 2023, 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 understood that the Plaintiff would file an amended certification application after receipt of the defendant's submissions, which would amend the class definition and class period, and narrow the proposed common issues.

10. On March 27, 2024, Alberta filed and served their Response brief to the Plaintiff. On the understanding that only the agreed upon changes would be reflected in a filed certification application and the pleadings correspondingly amended, Alberta opposed certification on the basis that there was no reasonable cause of action against Alberta as required by section 5(1)(a) of the *CPA,* but did not oppose the certification criteria set out in sections 51(b) – 5(1)(e) of the *CPA.*[1]

11. On April 12, 2024, the Plaintiff filed their Reply brief, wherein the Plaintiff sought as an alternative remedy, leave to amend their pleadings to satisfy any deficiencies in her claim. As a result, the parties agreed, and the Court granted leave, to adjourn the certification hearing, originally scheduled for April 23-24, 2024, to allow time for the Plaintiff to prepare amendments to her pleadings.

12. On June 3, 2024, the Plaintiff filed an Amended Amended Statement of Claim and Amended Certification Application. The amended pleadings expanded the allegations against Alberta, as further described below. As a result, on May 24, 2024, counsel for Alberta notified Plaintiff counsel that Alberta may now object to Certification on the basis of section 5(1)(c) and 5(1)(d) of the *CPA* (Common Issues & Preferable Procedure).

13. On June 11, 2024, a case management order was pronounced whereby deadlines for additional evidence, cross-examinations, and briefs were set out.

14. On June 12, 2024, Alberta filed and served the Affidavit of Nathan Freed in response to the Plaintiff's Amended Certification Application. Plaintiff Counsel cross-examined Mr. Freed on his Affidavit on July 22, 2024.

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

15. On August 2, 2024, the Plaintiff filed and served a further supplemental brief.

16. For ease of the Court's reference, this supplemental brief of Alberta is intended to entirely replace Alberta's response brief, filed March 27, 2024, so that the Court and parties only need to refer to a single written argument on behalf of Alberta. The changes made to Alberta's brief since March 27, 2024, reflect Alberta's position in response to the Plaintiff's amended pleadings (both the Statement of Claim and the Certification Application) filed June 3, 2024 and corresponding submissions. For clarity, this brief is in response to the Plaintiff's Amended Certification Application and the supplemental brief filed November 28, 2023, reply brief filed April 12, 2024, and recent supplemental brief filed August 2, 2024.

The Pleadings:

17. The Plaintiff pleads that the Day School on the Kehewin Cree Nation was closed by the Government of Canada in 1964. The children who attended the school were transported to and from Bonnyville to attend the Ecole Notre Dame Schools until 1975.[2]

18. Throughout the class period the Ecole Notre Dame School was within various School Districts. The Amended Amended Statement of Claim (the "Claim") pleads that:

    a. In 1943 the Lac La Biche School Division was formed;[3]

    b. In 1971 the Beaver River School District No. 5460 assumed jurisdiction;[4]

    c. On September 25, 1980 the Lakeland Roman Catholic School District No. 150 was established.[5]

19. 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.[6]

20. 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."[7] The

[2] Amended Amended Statement of Claim filed June 3, 2024, at para 18
[3] Amended Amended Statement of Claim, at para 16
[4] Amended Amended Statement of Claim, at para 17
[5] Amended Amended Statement of Claim, at para 19
[6] Amended Amended Statement of Claim, at para 21.
[7] Amended Amended Statement of Claim, at para 27

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.

21. 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.[8]

22. The Claim makes general allegations of abuse against the Class committed by "agents" of the Defendants.[9] The Claim defines "agents" to include the: "operators, managers, administrators, doctors, nurses, clinicians and all other staff members of Ecole Notre Dame Schools."[10]

23. In addition to naming Alberta as a Defendant, the Claim also names as defendants:

    a. The Attorney General of Canada;

    b. Le Diocese de Saint Paul and/or the Diocese of Saint-Paul, St. Louis Parish; and

    c. The Board of Trustees of Lakeland Roman Catholic Separate School Division.

24. The recent amendments to the Claim continue to make broad allegations against Alberta under the headings of Negligence, Vicarious Liability and Breach of Fiduciary Duty.[11] The general claims include bare allegations that Alberta owed duties to the Class Members through the alleged:

    a. "governance and support" of the Ecole Notre Dame Schools;[12]

    b. "care and control" of class members;[13] and

    c. obligations "delegated" to Alberta by Canada under the relevant legislation and by way of agreement.[14]

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[8] Amended Amended Statement of Claim, at paras 28 - 29
[9] Amended Amended Statement of Claim, at paras 23, 24, 31, and 32
[10] Amended Amended Statement of Claim, at para 1(b)
[11] Amended Amended Statement of Claim, at paras 50-71 & 88-95.
[12] Amended Amended Statement of Claim, at para 51
[13] Amended Amended Statement of Claim, at para 52
[14] Amended Amended Statement of Claim, at para 53

25. There are no facts plead relating to any "governance and support" of the Ecole Notre Schools by Alberta, no facts on how, or in what manner, Alberta exercised care and control of the class members, and no actual provision of any legislation delegating any obligation from Canada to Alberta, or any particulars of any such agreement. The allegations against Alberta continue to lack any factual foundation in the Amended Amended Statement of Claim.

Facts in Evidence

26. In support of the Plaintiff's certification application, 64 affidavits, most of which are from proposed class members, were filed.[15] All the affidavits outline various alleged abuses committed by teachers and, in some instances, by other students, at the Ecole Notre Dame Schools.

27. In no affidavit is there any allegation, information, or evidence, relating to any employee or agent of Alberta. There is no allegation, information or evidence of any complaints made to Alberta about the Ecole Notre Dame Schools, or any other basis in fact for how Alberta:

   a. "Governed and supported" the Ecole Notre Dame Schools;

   b. Had "care and control" over any class member or any facts as to any relationship between Alberta and any class members at all;

   c. Entered into any agreement with Canada, or any information regarding any such agreement at all during the class period.

28. Alberta filed the affidavit of Nathan Freed in response to the certification application. Mr. Freed is an executive director with Alberta Education. Mr. Freed's evidence is that:

   a. Alberta is not and was not involved during the class period with the operation and management of the Ecole Notre Dame Schools, or any individual schools in Alberta;[16]

   b. The operation and management of schools is the responsibility of the school board;[17]

[15] A number of affidavits are from individuals who attended the Ecole Notre Dame Schools outside the proposed class period of 1966 to 1974 and would therefore not be class members. For example, Raymond Joseph Cardinal attended from 1958 to 1961, before the class period. Jacqueline Angie Watchmaker attended in 1983, after the class period.

[16] Affidavit of Nathan Freed, filed July 12, 2024 ["Freed Affidavit"] at paras 8 - 10

[17] Freed Affidavit, at paras 8 - 10

c. At no time has Canada delegated any authority to Alberta for the education of Indigenous students, including class members who attended the Ecole Notre Dame School;[18]

d. While unable to locate any specific agreement that might apply to the Ecole Notre Dame Schools, the practice during the class period was for Canada to enter into agreements with the responsible school board for the education of Indigenous students who attended schools within the school board's jurisdiction;[19]

e. Alberta was not a party to any agreement between Canada and a school board. The agreements set out the various responsibilities and obligations of Canada and the school board with respect to educating Indigenous students.[20]

f. Alberta would provide their approval to the agreement once it was executed by the parties;[21]

29. Mr. Freed's evidence was not seriously challenged on cross-examination. When answering questions, Mr. Freed confirmed, given the historical nature of the claim, that to the best of his knowledge:

a. Alberta has no involvement with the day to day operation and management of schools as that is the legal responsibility of the school board;[22]

b. Alberta has only "some level of oversight" over a school board, in that Alberta sets province wide policy and legislation, but school boards are "responsible for ensuring their policies and practices and programs are in alignment with legislation";[23]

c. There is no delegation from Canada to Alberta. Instead, any delegation for the education of Indigenous students is from Canada to the local school board;[24]

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[18] Freed Affidavit, at para 11
[19] Freed Affidavit, at para 12
[20] Freed Affidavit, at para 12 and sample agreements found at Appendix A to Appendix D of Exhibit A.
[21] Freed Affidavit, at para 12
[22] Questioning of Nathan Freed, July 22, 2024 ["Freed Questioning"], at pg 11, line 5 – pg 12, line 1 and pg 14, line 5 – pg 15, line 21
[23] Freed Questioning, at pg 12, line 23 – pg 14, line 4
[24] Free Questioning, at pg 18, line 5 – pg 19, line 13

d. The approval by Alberta of the agreements between Canada and the school board does not provide "oversight" of any party by Alberta, but is to ensure Alberta is aware of the existence of the agreements;[25]

e. Any funding for the education of Indigenous students would be paid by Canada directly to the responsible school board and Alberta would not be an intermediary;[26]

***School Act* Statutory Scheme**

30. 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*[27] ["*School Act 1955*"] was in force until 1970 when a new version came into force[28] ["*School Act 1970*"] [the "*School Acts*" when referred to collectively].

31. Both the *School Act 1955* and the *School Act 1970* allowed for the establishment of School Districts across the Province.[29] Each School District had a School Board, which operated as independent corporate entities, legally distinct from Alberta.[30]

32. 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;[31]

b. Designate principals for schools;[32]

c. Employ teachers;[33]

d. Suspend or dismiss teachers for gross misconduct, neglect of duty, or refusal or neglect to obey any lawful order of the board;[34]

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[25] Freed Questioning, pg 20, line 21 – pg 21, line 4
[26] Freed Questioning, pg 26, line 27 – pg 27, line 19
[27] *School Act*, RSA 1955, c 297
[28] *School Act*, RSA 1970, c 329
[29] *School Act 1955*, at s 4; and *School Act 1970*, at s 14
[30] *School Act 1955*, at s 74; and *School Act 1970*, at s 30(1)
[31] *School Act 1955*, at s. 179; and *School Act 1970*, at s 65(3)(d).
[32] *School Act 1955*, at s. 370; and *School Act 1970*, at s.82.
[33] *School Act 1955*, at s. 332(1), 339, and 348; and *School Act 1970*, at s. 73, 75 and 78.
[34] *School Act 1955*, at s. 350; and *School Act 1970*, at s.79.

e. Provide health services and safeguards to pupils;[35]

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…;[36]

g. Enter into agreements for the education of Indigenous students not residing within District's boundaries.[37]

33. The *School Act 1955* and *School Act 197*0 specifically do not:

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 of 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

34. Based on the revisions that were made in the Amended Amended Statement of Claim and Amended Certification Application, 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)) and representative plaintiff (section 5(1)(e)).

35. However, Alberta disputes the certification criteria in the *CPA* relating to cause of action (section 5(1)(a)), common issues (section 5(1)(c)), and preferable procedure (section 5(1)(d)).

Section 5(1)(a) - No Reasonable Cause of Action Against Alberta

36. 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.

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[35] *School Act 1955*, at s. 182; and School Act 1970, at s.147
[36] *School Act 1955*, at s. 180 (d)(i); and *School Act 1970*, at s. 65 (3)(a)
[37] *School Act 1955*, at s 178(6) coming into force through amendments contained in SA 1956 c 49, at s. 11 and further amended by SA 1957 c 85 at s. 9(b); and *School Act 1970*, at s 160

37. 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.[38]

38. 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.[39]

39. 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.[40]

40. The Supreme Court of Canada outlined the general principles that should inform the application of rules on striking pleadings in *Knight v Imperial Tobacco Canada Ltd*. 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

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

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].[41]

41. 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.[42]

42. The relevant versions of the *School Acts* exclude a cause of action against Alberta for the treatment of students within a school. As outlined above, the *School Acts* do not impose any duty or requirement upon Alberta or the Minister of Education for the treatment of students, the employment of teachers or school staff, or the operation, management, oversight or governance of schools, as broadly alleged by the Plaintiff. Pursuant to the *School Acts*, these duties lie with the legally independent School Board.

43. In *A.H. v Alberta* ("*A.H.*")[43], 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.

44. *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

[41] *Knight v Imperial Tobacco Canada Ltd.*, 2011 SCC 42, at para 22 & 25.
[42] *Setoguchi v Uber BV*, 2023 ABCA 45, at para 44
[43] *A.H. v Alberta*, 2020 ABCA 54

was "endowed with responsibilities imposed by the *[School] Act*, and was required to exercise their duties and responsibilities in compliance with the *Charter*."[44]

45. 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.[45]

46. 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.[46]

47. The *School Acts* make it clear that school staff members are employees of the School Board.[47] A school staff member is not an agent of Alberta and no direct or vicarious liability flows to Alberta for any act or omission of a school staff member.

48. It is the responsibility of the School Board, pursuant to the *School Acts,* to supervise, and when appropriate, discipline or terminate teachers.[48] 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.

49. 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*

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[44] *A.H.*, at para 3
[45] *A.H.,* at paras 4 and 16
[46] Amended Statement of Claim, at paras 22, 23, 24 and 25.
[47] *School Act 1955*, at s 330 and *School Act 1970*, at s 73
[48] *School Act 1955*, at ss 350, 370 and 374 and *School Act 1970*, at ss 78 and 79

Acts, the Minister of Education did not owe a duty of care to parents of students wrongfully charged certain school fees.[49]

50. 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*.[50]

51. 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[51] and then expressed policy concerns with finding that a government could be liable to private individuals for the actions of an independent school board.[52] 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.

52. The *School Acts* delegated broad powers to the School Boards with respect to the operation, management and oversight of individual schools. There are no provisions of the *Schools Acts* that establish any responsibility or requirement by Alberta for the "governance or support" of individual schools. Individual schools, such as the Ecole Notre Dame Schools, fall under the governance and oversight of their respective School Boards.

53. 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 and the class members for

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[49] *Wiggins v British Columbia*, 2009 BCSC 121 ("*Wiggins*"), at para 24
[50] *Wiggins*, at par 34
[51] *Wiggins*, at paras 42-43
[52] *Wiggins*, at para 46

any governance, support or oversight 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

54. As seen in the decisions of *A.H.* and *Wiggins*, the claim against Alberta does not fall within an establish category confirming a duty of care. Both the Alberta Court of Appeal and the British Columbia Supreme Court have found that no duty of care exists in the circumstances alleged in the Plaintiff's claim.

55. Generally, where Courts have found that the same or an analogous relationship does not create a prima facia duty of care, the Court will not repeat the analysis and will find that no duty of care exists based on prior authority.[53]

56. It should be held, based on the prior authority of *A.H.* and *Wiggin*s, that Alberta does not owe a duty of care to the class. However, a full two stage duty of care analysis confirms that Alberta does not owe such a duty.

57. Additionally, the Plaintiff's Claim generally fails to plead facts to support a negligence cause of action against Alberta.

58. 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.[54]

59. The general allegations made against Alberta in the Claim remain vague, conclusory, not supported by pled facts, and are contrary to the applicable legislation.

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[53] *Taylor v Canada (Attorney General),* 2012 ONCA 479, at para 73 and *Knight v Imperial Tobacco Canada Ltd.,* 2011 SCC 42, at para 37
[54] *Tottrup,* at para 11

60. For instance, the Claim alleges that "[u]nder the applicable legislation during the Class Period, Canada delegated authority to Alberta for the schooling of Class members. Alberta was thereby delegated responsibility for Indigenous children within its education system via an agreement with Canada."[55]

61. However, the Plaintiff fails to plead any statements of fact to substantiate the assertion that such an agreement between Alberta and Canada existed, or to specify what responsibilities were allegedly delegated to Alberta. While not specifically in the pleadings, the Plaintiff's Reply Brief dated April 12, 2024, cites section 160 of the *1970 School Act*, to support the allegation that such an agreement existed. However, section 160 of the *1970 School Act*, provides the authority for School Boards (not Alberta) to enter into agreements with Canada for the education of Indigenous children. .

62. In the face of, and contrary to, the *School Acts,* which clearly assigned the duties to School Boards, the Plaintiff has provided no pleadings of fact that an agreement would have existed to reassign those statutorily imposed duties from the School Boards to Alberta.

63. Aside from the allegation Alberta was delegated duties from Canada, the Plaintiff alleges generally that Alberta owed a duty of care to the Class Members through its governance and support of Ecole Notre Dame Schools and that Alberta exercised care and control over the Class members.[56] The Plaintiff goes on to allege Alberta breached its duties to the Class Members by failing to ensure they were in an abuse free environment, failing to prevent abuse and harm, failing to investigate abuse after it was reported, and failing to exercise reasonable supervision over employees.[57]

64. However, these general claims lack a factual foundation regarding what governance or supervisory authority Alberta is alleged to have had over the day to day operations of the schools, and how such authority would have amounted to a sufficiently proximate relationship between Alberta and the Class members to found a duty of care.

65. As the Supreme Court of Canada confirmed in *Cooper v Hobart*, the pleadings must disclose sufficient proximity between the parties to establish a *prima facie* duty of care. This requires a "close and direct relationship" between the parties.[58]

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[55] Amended Amended Statement of Claim at para 53.
[56] Amended Statement of Claim at paras 51-52 & 55-56.
[57] Amended Amended Statement of Claim at para 58-61.
[58] *Cooper v Hobart*, 2001 SCC 79, at paras 31 - 34

66. 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.[59]

67. At best, the *School Acts* set out a general role for the Minister to oversee the provision of education across the Province at a high level, including passing regulations, creating school districts and divisions, and receiving financial information from the school boards.[60]

68. 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.

69. 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.[61]

70. 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.[62]

71. In that case, 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.[63]

72. Following *Odhavji*, Courts have routinely held that a government's general oversight responsibilities under legislation does not establish a proximate relationship or duty of care between the government and affected individuals or even a class of affected individuals.

73. In *Nette v Stiles*, the plaintiff sought to certify a class action against a number of parties, including Alberta in relation to harms suffered from negligent chiropractic care. The relevant

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[59] *Cooper*, at para 43. See also *De Visser v Canadian Llama & Alpaca Association*, 2005 ABCA 1, at para 5
[60] *School Act 1955*, at ss 4, 207, and 444; *School Act 1970*, at ss 12, 14 and 70
[61] *Hill v Hamilton-Wentworth (Regional Municipality) Police Service Board*, 2007 SCC 41, at paras 29 - 30
[62] *Odhavji Estate v Woodhouse*, 2003 SCC 69, at para 69
[63] *Odhavji*, at paras 70 - 72

legislation devolved the regulation of chiropractic care to the College, leaving Alberta only an oversight role.[64]

74. Analogous to the allegations in this claim, the plaintiff in *Nette* alleged Alberta owed a duty of care as it had a responsibility for the delivery and administration of health care services, failed to adequately monitor chiropractic services, and failed to take action after receiving complaints.[65]

75. Justice Belzil struck the claim against Alberta finding there was no proximate relationship between Alberta and the injured individuals. An oversight and supervisory role, where legislation devolves authority over the activity in question to a separate legal entity, does not establish a private law duty of care and raised policy issues that would negate the establishment of any duty of care.[66]

76. In this action, the *School Acts* devolve the operation and management of individual schools to independent School Boards. The allegations in the Claim against Alberta relate to the oversight and supervision of the School Board actually operating the Ecole Notre Dame Schools. As found in *Nette*, such a general oversight role does not create a proximate relationship between Alberta and students at the Ecole Notre Dame Schools forming the class.In another example with similar facts as alleged in this Claim is the British Columbia Court of Appeal decision in *Aksidan v. Canada (Attorney General).* In *Aksidan*, the appellants argued that Canada owed a duty of care to Indigenous students who were sexually assaulted by a teacher at an Elementary School in Kincolith, British Columbia, between 1979 and 1983. The basis of the claim rested on Canada's responsibility for the education of Indigenous students under the *Indian Act*.[67]

77. In *Aksidan,* the school, located on reserve land and managed by School District No. 92 ("SD92"), was constructed and maintained by Canada but operated by SD92 under a 1969 Agreement between Canada and British Columbia. Under the 1969 Agreement, British Columbia established SD92, which then undertook the education of the Indigenous children of Kincolith. This agreement delegated exclusive control over the education of Indigenous

[64] *Nette v Stiles*, 2009 ABQB 422 ["*Nette*"], at paras 1 and 34
[65] *Nette*, at para 15
[66] *Nette*, at paras 34 - 40
[67] *Aksidan v Canada (Attorney General)*, 2008 BCCA 43 ["*Aksidan BCCA*"], at para 1

children to the Province, and thereby, SD92 including the employment and supervision of teachers.[68]

78. Interestingly, in *Aksidan*, the plaintiffs did not name the Province of British Columbia as a defendant and the Province was not a party to the claim.

79. The plaintiffs contended that despite the ultimate delegation to SD92, the delegation did not extinguish Canada's duty of care to the Indigenous students at the School.[69]

80. The trial judge in *Aksidan* dismissed the appellants' claims, finding that the risk of sexual assault was not foreseeable by Canada when the responsibility for the school was delegated to the SD92, which included the responsibility for and supervision of teachers employed by SD92.[70]

81. The appeal in *Aksidan* was also dismissed, with the court concluding that Canada's delegation of control under the 1969 Agreement precluded any residual duty of care that could apply in this case. The Court of Appeal also rejected alternative claims of breach of fiduciary duty and vicarious liability finding that Canada fulfilled its obligations and that any supervisory duty connected to the education of Indigenous students "should not be obscured by claims of vague residual responsibilities of Canada."[71] Any liability for the assaults rested with SD92 who was the teacher's employer.[72]

82. The same reasoning that was applied to absolve Canada of liability in *Aksidan* applies in this case to strike the Plaintiff's claims against Alberta. The alleged abuse of students by school staff at the Ecole Notre Dame School was not reasonably foreseeable for Alberta given the responsibility for the schools was delegated under the *School Acts* to the school board. Further, even accepting the allegation that Canada delegated responsibility to Alberta – for which no specific facts are pled – such a delegation would not create a duty of care when there is a complete further delegation to an independent School Board by the *School Acts*.

[68] *Aksidan* BCCA, at paras 2, 7 and 8
[69] *Aksidan v Canada*, 2006 BCSC 1008, ["*Aksidan BCSC*"], at paras 36 and 37
[70] *Aksidan* BCSC, at para 3, 60 - 65
[71] *Akisdan* BCCA, at para 18.
[72] *Akisdan* BCCA, at para 18.

83. Unlike Canada in *Aksidan*, Alberta did not have jurisdiction over the education of Indigenous children to begin with. Alberta is therefore, further removed from the Class Members than Canada was to the Plaintiffs in *Akisdan.* The unsupported claims that Alberta held residual oversight or supervisory responsibilities which give rise to a duty of care to the Class Members are bound to fail.

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

85. 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.[73]

86. 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 against Alberta. To the contrary, the existing case law, the provisions of the *School Acts*, and sound public policy reasons, confirm there is no duty of care between Alberta and the Class.

<u>The Plaintiff's Vicarious Liability Claim Against Alberta is Bound to Fail</u>

87. In order for the Plaintiff's vicarious liability 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 was vicariously liable to the Class.

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[73] *Wiggins,* at para 46.

88. In the case of *K.L.B. v. British Columbia*, the Supreme Court of Canada outlined the criteria for vicarious liability:

> To make out a successful claim for vicarious liability, plaintiffs must demonstrate at least two things. First, they must show that the relationship between the tortfeasor and the person against whom liability is sought is sufficiently close as to make a claim for vicarious liability appropriate. This was the issue in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.,* [2001] 2 S.C.R. 983, 2001 SCC 59, where the defendant argued that the tortfeasor was an independent contractor rather than an employee, and hence was not sufficiently connected to the employer to ground a claim for vicarious liability. Second, plaintiffs must demonstrate that the tort is sufficiently connected to the tortfeasor's assigned tasks that the tort can be regarded as a materialization of the risks created by the enterprise. This was the issue in *Bazley,* supra, which concerned whether sexual assaults on children by employees of a residential care institution were sufficiently closely connected to the enterprise to justify imposing vicarious liability. These two issues are of course related. A tort will only be sufficiently connected to an enterprise to constitute a materialization of the risks introduced by it if the tortfeasor is sufficiently closely related to the employer [emphasis added].[74]

89. In the Claim, the Plaintiff alleges Alberta was vicariously liable for the school staff, having created an enhanced the risk of wrongful conduct by the school staff, having given school staff the control and opportunity to abuse and harm Class members, and having put the school staff in a position of intimacy and power over the Class members.[75]

90. There is no factual foundation for the Plaintiff's allegations of vicarious liability against Alberta. Again, the *School Acts* delegated authority to independent School Boards to operate schools and to employ and manage school staff. There was no authority for Alberta to oversee, place, give or restrict opportunities to school staff in this case. At no time have school staff been employees, agents or even contractors of Alberta. There is simply not a relationship of proximity, or any material relationship at all between Alberta and the school staff to reasonably sustain a claim for vicarious liability.

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[74] *K.L.B. v. British Columbia*, 2003 SCC 51, at para 19.
[75] Amended Amended Statement of Claim, at paras 64-65 & 67.

91. As noted above, the rules under which schools, teachers and principles were managed and operated were made by School Boards, not Alberta. [76] As such, to the extent that the Ecole Notre Dame Schools posed risks to the Class Members that materialized, Alberta could not have been the enterprise that was responsible for the creation of that risk.

92. The Plaintiff has provided no pleadings of fact to explain how and for what reason Alberta would have had a relationship of proximity with school staff at the Ecole Notre Dame Schools despite the *School Acts*, which provide that no such relationship existed.

93. As such, the Plaintiff's claims of vicarious liability against Alberta cannot survive the cause of action test.

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

94. In order for the Plaintiff's fiduciary claim to survive the cause of action test, the Plaintiff must plead the necessary facts to establish that Alberta owed the Class a fiduciary duty.

95. 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*.[77]

96. 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."[78]

97. 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;

   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.[79]

[76] *School Act 1955*, at s. 179; and *School Act 1970*, at s 65(3)(d).
[77] *Elder Advocates*
[78] *Elder Advocates*, at paras 27-28
[79] *Elder Advocates*, at para 36

98. 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."[80]

99. 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.[81]

100. 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.[82]

101. In a governmental context, where it is alleged that the "undertaking" flows from legislation, the statutory language must clearly support it.[83] "The mere grant to a public authority of discretionary power to affect a person's interests is not enough to create an undertaking."[84]

102. 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 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

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80 *Elder Advocates*, at para 37
81 *Elder Advocates*, at para 43
82 *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71 at para 124
83 *K.L.B. v. British Columbia*, 2003 SCC 51 at para 40.
84 *Johnson v British Columbia (Attorney General)*, 2022 BCCA 82 at para 140 citing *Elder Advocates* at para 45.

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.[85]

103. 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.[86]

104. 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.

105. In *Cavanaugh v Grenville Christian College* the plaintiff sought to certify an action 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.[87]

[85] *Johnson v British Columbia*, 2022 BCCA 82, at paras 147-148.
[86] 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.
[87] *Cavanaugh v Grenville Christian College*, 2013 ONCA 139, ["*Cavanaugh*"], at paras 8 - 10

106. 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 Provincial Diocese.[88] The fiduciary duty allegations centered on the Diocese's licencing the headmasters to serve as clergy with the church.[89]

107. 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, which included a general allegation against all defendants that the class members were subject to the unilateral exercise of the Defendant's power and control.[90] 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.[91]

108. 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. The Claim makes allegations arising from the day to day operation and management of the Ecole Notre Dame Schools against Canada and Lakeland, but not against Alberta. The claims against Alberta relate only to its "governance and support" of the School.[92]

109. Importantly, the *School Acts* make it clear that Alberta was not the party that managed or operated the Ecole Notre Dame Schools and school staff, teachers and principles of the school were not agents or employees of Alberta.

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

111. The Plaintiff has broadly suggested that Alberta was delegated authority over the class members by Canada, without any particulars. However, the Plaintiff has not pled any facts that demonstrate Alberta at any time, expressly undertook to forsake the interests of all others in favor of the class members in relation to the specific legal interest at stake.

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[88] *Cavanaugh*, at para 78, and 81
[89] *Cavanaugh*, at para 58
[90] *Cavanaugh*, at para 80. See here at the Amended Amended Statement of Claim, at paras 21, 24 - 27
[91] *Cavanaugh*, at para 81
[92] Amended Amended Statement of Claim, at paras 31, 51 and 86,

112. 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 against Alberta is bound to fail.

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

113. The Claim makes a single passing reference to the majority of class members receiving sub-standard education.[93] Sub-standard education is not referenced by the Plaintiff in any of their submissions. From the pleadings and submissions, it is unclear whether the Plaintiff is advancing a stand-alone claim for sub-standard education.

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

115. Courts generally do 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.[94]

116. The exception is when the pleadings allege "conduct sufficiently egregious and offensive to community standards of acceptable fair play."[95]

117. 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.

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

Conclusion – No Reasonable Cause of Action Against Alberta

119. The Plaintiff's Amended Amended Statement of Claim makes broad allegations against Alberta under the headings of Negligence, Vicarious Liability and Breach of Fiduciary Duty and makes a single passing reference to "sub-standard education".

[93] Amended Amended Statement of Claim, at para 28.
[94] *Indian Residential Schools, Re.*, [2000] A.J. No. 638, 2000 CarswellAlta 526, ["*Residential Schools*"], at paras 50 and 55
[95] *Residential Schools*, at para 56

120. However, having regard to the pleadings and in light of existing law, including the *School Acts* and the relevant cases, the Plaintiff's claims against Alberta are bound to fail.

121. The Plaintiff has now amended their pleadings twice, with the latest amendment following the filing and service of Alberta's written submissions. Yet there remains vague, factually unsupported allegations against Alberta that do not establish the requisite elements of any cause of action, and specifically fail to establish how Alberta could owe any duty to the Class members given the relevant sections of the *School Act* delegates the alleged duties to school boards.

122. Accordingly, it is plain and obvious that in the context of the law and the litigation process, the Plaintiff's claim has no reasonable chance of succeeding.

123. As the Plaintiff's claim does not disclose a cause of action as mandated by section 5(1)(a) of the CPA, certification of the Action against Alberta should be denied.

Section 5(1)(c) – Common Issues

124. Section 5(1)(c) of the *CPA* requires the plaintiff to demonstrate that the claims of the proposed class members raise common issues. As the Supreme Court of Canada held in *Western Canadian Shopping Centres v Dutton* with respect to the common issues test:

> The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication or fact-finding and legal analysis. Thus the issue will be "common" only where its resolution is necessary to the resolution of each class member's claim.
>
> Success for one class member must mean success for all.[96]

125. The plaintiff bears the evidentiary burden of showing, based on admissible evidence, "some basis in fact" for the proposed common issues.

126. Specifically, the onus is on the Plaintiff to adduce some basis in fact that (a) the common issue actually exists; and (b) the proposed issue can be answered in common across the

[96] *Western Canadian Shopping Centres Inc. v Dutton*, 2001 SCC 46, at paras 39 and 40.

class.[97] A common issue cannot be dependent upon findings of fact that would have to be made for each class members.[98]

127. While the requirement to show "some basis in fact" is a lower standard than the balance of probabilities threshold applicable in civil cases, certification is an important screening device requiring "more than symbolic scrutiny."[99]

128. There must be some evidence of a basis in fact for each of the proposed common issues that the Plaintiff seeks to have certified as against each defendant.

129. It is also necessary for a plaintiff to show some basis in fact that the proposed common issues would advance the litigation[100] and are a "significant ingredient in each class members claims."[101]

130. In this case, the Plaintiffs have proposed 3 common issues in their Amended Application for Certification:

   a. Whether and to what extent, each of the Defendants were involved in the operation and management of the schools;
   b. Whether each of the Defendants owed a duty to the Plaintiff; and
   c. Whether there was a breach of that duty.

131. Alberta takes no position on whether the plaintiff has met the common issues requirement as against the other defendants in this action. But as they relate to the claim against Alberta, in light of the pleadings in the Amended Amended Statement of Claim, the proposed common issues do not advance the class members' claims against Alberta, are not a significant ingredient of the claim against Alberta and are not common across the class.

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[97] *Doucet v Royal Winnipeg Ballet*, 2018 ONSC 4008, at para 90; *Simpson v Facebook*, 2021 ONSC 968, at para 43; *Mancinelli v Royal Bank of Canada,* 2020 ONSC 1646, at para 120; *Charlton v Abbott Laboratories Ltd*, 2015 BCCA 26, at para 85
[98] *Pasian v Academic Clinician's Management Services*, 2013 ONSC 7787, at para 135
[99] *Microsoft,* at para 103; *Spring v Goodyear Canada Inc., 2021 ABCA 182, at* para 34.
[100] *Warner v Smith & Nephew Inc.*, 2016 ABCA 223, at para 30
[101] *LC v Alberta*, 2017 ABCA 284, at paras 25 - 30

<u>Common Issue # 1 – Alberta's Involvement in the Operation and Management of the Schools</u>

132. The Plaintiff has produced no evidence of any basis in fact that Alberta was involved at all in the operation and management of the Ecole Notre Dame Schools. And importantly, the Amended Statement of Claim does even not raise allegations against Alberta in relation to the operation and management of the Ecole Notre Dame Schools.

133. As against Canada and Lakeland, the Plaintiff specifically pleads a failure with respect to the "establishment, funding, oversight, operation, supervision, control, maintenance and support" of the Ecole Notre Dame Schools.[102]

134. By contrast, the pleadings against Alberta relate to a failure with respect to the "governance and support" of the Ecole Notre Dame Schools.[103] The claim against Alberta is essentially for one of a failure of oversight, not for the day-to-day operation or management of the Ecole Notre Dame Schools.

135. As this proposed common issue does not relate to the cause of action alleged against Alberta it does not advance any claim, and is not a significant ingredient of any claim against Alberta.

136. On this basis alone, common issue #1 should not be certified as against Alberta.

137. Additionally, this common issue fails against Alberta as it lacks any evidentiary basis as required to meet the common issues test at certification.

138. There is no basis in fact that Alberta had any role at all in the operation and management of the School. The *School Acts* provide no such basis as the *Acts* are clear that the operation and management of schools is the responsibility the School Board.

139. The affidavit evidence of the proposed Class Members filed by the Plaintiff describes the Class Members' respective experiences of abuse at the hands of teachers, principles, nuns

[102] Amended Statement of Claim, at para 31 (as against Canada) and para 86 (as against Lakeland)
[103] Amended Statement of Claim, at para 51

and other students while attending the Ecole Notre Dame Schools. Twenty-five of the Affidavits name specific school staff as being responsible for the abuse, while the remaining affidavits do not provide specific names.

140. Importantly, none of the Plaintiff's affidavit evidence show the Class Members had any involvement or interaction with any agents, employees or representatives of Alberta at any time. The Plaintiff has adduced no evidence to show Alberta was involved in the Ecole Notre Dame Schools at an operation or management level, or at all, in the face of the *School Acts*, which legislatively preclude Alberta from such involvement.

141. Further, Alberta filed Affidavit evidence in these proceedings confirming Alberta was *not* involved in the operation or management of the Ecole Notre Dame Schools, and that such responsibility rested with the board of trustees of the applicable school division or district of the time. This included the hiring, suspension or dismissal of the teachers at the schools.[104]

142. Without referencing the *School Acts*, the Plaintiff submits that Alberta became involved with operation of the Ecole Notre Dame Schools given the education provisions in the *British North America Act* and by way of the approval of agreements between Canada and the School Boards.

143. At paragraph 16 of the Plaintiff's August 2, 2024 brief, the Plaintiff incorrectly states it is not disputed that the Ecole Notre Dame Schools were "provincially operated between 1966 – 1974." What is not disputed is the fact the Ecole Notre Dame Schools fell under provincial jurisdiction, in that they were public schools, subject to the *School Acts*, where individuals from the greater Bonnyville area – including the class members – attended. But Alberta at no point "operated" the Ecole Notre Dame Schools as the *School Acts* specifically delegated the operation of the schools to the School Board.

144. Given the clear provisions of the *School Acts*, the more general *BNA* provisions do not provide any basis in fact that Alberta operated or managed the Ecole Notre Dame Schools.

[104] Freed Affidavit, at paras 8-10.

145. The address of the Federal Minister of Indian Affairs and Northern Development cited at paragraph 26 of the Plaintiff's August 2, 2024 brief in no way establishes or even suggests Alberta was operating the Ecole Notre Dame Schools. The number of Indigenous students enrolled in provincially operated kindergartens across Canada is irrelevant and has no relationship to who operated a school in Alberta pursuant to the *School Acts*. Instead, the address by the Federal Minister confirms Canada's responsibility and obligation for the education of Indigenous students.

146. In respect of any agreements with Canada for the education of Indigenous students, the best, and only evidence, is that in Alberta, Canada entered into tuition agreements directly with school boards.

147. There is specifically no evidence or basis in fact that there was ever any agreement directly between Canada and Alberta for the operation and management of the Ecole Notre Dame Schools. Alberta does not have the onus of showing the existence, or lack of existence, of such an agreement. Instead, the Plaintiff has not met her onus of showing a basis in fact to support the existence of a common issue based on any such agreement.[105]

148. The level of Alberta's involvement in the development of the tuition agreements is unclear. But the legislation and the evidence is clear that Alberta was not a party to these agreements and only acted to provide approval to the agreements after the parties (Canada and the school boards) executed them.[106] These agreements between Canada and the School Boards set out the various responsibilities and obligations of those two parties but set out no duties or obligations for Alberta.[107]

149. At paragraph 19 of the Plaintiff's August 2, 2024 brief, she correctly cites that Alberta is unable to locate any agreement specific to the Ecole Notre Dame Schools during the class period. In default of an agreement between Canada and the School Board, Alberta would not be deemed to have operation and management of the Ecole Notre Dame School or the responsibility for the education of the class members. The *School Acts* and the *Indian Act* were still in force, with or without an agreement. The School Act still delegated authority to

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[105] Freed Affidavit, at para 11 and Freed Questioning, at page 37, line 19 – 21, page 38, lines 10 -23
[106] Freed Affidavit, at para 12.
[107] Freed Affidavit, at para 11 - 12 and Freed Questioning, at page 18, line 21 – page 20, line 18.

the School Board to operate and manage the Ecole Notre Dame Schools and the *Indian Act* still provided Canada with the responsibility for educating the class members.

150. The Plaintiff incorrectly alleges in her August 2, 2024 brief that Mr. Freed confirmed that Alberta "was involved in the operation and management of schools through supervision of teaching personnel."[108] At questioning, Mr. Freed was directed to the 1972 memo of W.R. Duke, found at Exhibit A of his affidavit. That memo summarized a 1960 agreement between Canada and the Grouard School District, found at Appendix A of the memo.[109]

151. Section 3 of the Grouard Agreement confirms the Federal Minister is given no right of supervision over the curriculum, administration and teaching personnel. Neither the agreement itself nor the memo establish Alberta had responsibility for the day-to-day supervision of teachers. This falls under the legal authority of the School Boards, pursuant to the School Acts.[110]

152. Alberta's only involvement with the "supervision" of teachers is the regulation of the certification of individuals to hold teaching licences in the Province.[111]

153. In the Plaintiff's Brief of August 2, 2024, they submit Alberta "had oversight of the Ecole Notre Dame Schools" and reference the questioning of Mr. Freed, during which he stated: "I guess there's some level of oversight, yeah". As noted above, Alberta acknowledges the *School Acts* provided general, high-level authority for the Minister of Education to pass regulations, create school districts and divisions across the Province, and receive financial information from the school boards.[112] However, these general abilities over schooling in Alberta does not equate to involvement in the operation and management of each and every school in the province.

154. As a government entity, Alberta maintains general statutory authority to oversee and impact various institutions in the province. Such power does not render Alberta an operator and manager of every program, staff member, and facility within these institutions. To the extent the Plaintiff claims Alberta held special involvement with the Ecole Notre Dame Schools

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[108] Plaintiff's brief, at paras 25 and 28
[109] Freed Affidavit, at Exhibit A
[110] See 1955 School Act, at s 182 and 350 and 1970 School Act, at s 79 and 147
[111] Department of Education Act, RSA 1955, C 95, at s. 7(a)(iii) and Department of Education Act, RSA 1970, c 96, at s 7(b)
[112] *School Act 1955*, at ss 4, 207, and 444; *School Act 1970*, at ss 12, 14 and 70

beyond their general government oversight authority, the Plaintiff has provided no evidence to support this claim.

155. In considering the whole of the evidence, there is no basis in fact that Alberta was involved in the operation and management of the Ecole Notre Dame Schools. On the contrary, the pleadings, the evidence and the applicable legislation all confirm Alberta was not involved. Common issue #1 should therefore not be certified as against Alberta.

Common Issues # 2 & 3– Whether Alberta owed a Duty of Care to the Plaintiff and whether Alberta breached that Duty

156. The Plaintiff has not met their evidentiary burden to show there is a basis in fact that Alberta owed a duty of care to the Plaintiff. Further, given the claim against Alberta relates to negligent oversight, the common issues of whether a duty existed, and whether there was a breach of that duty, would vary depending on the individual circumstances for each Class Member's allegation.

157. The Plaintiff's claim focuses on individual instances of physical, psychological and sexual abuse. The evidence put forward by the Plaintiff similarly sets out individual instances of abuse by teachers and staff members.

158. Any finding at a common issues trial of a duty for oversight responsibility, or a common standard of care, would be so generalized that it would not avoid duplication of fact-finding or legal analysis at the subsequent individual issues stage of the proceedings.

159. The negligence claim against Alberta is based on a lack of oversight, governance and support of one individual school within one of many school districts in the Province. The Plaintiff has put forward no evidence or basis in fact relating to any required level of oversight, or how such oversight of an individual school was, or should have been, carried out.

160. The Plaintiff's submissions make reference to Alberta's oversight School Boards and the provision of education in the Province generally. However, the fact that Alberta may have had "some level of oversight" does not establish a basis in fact for the common issue of whether Alberta may have owed a Duty of Care to the Plaintiff.

161. As set out above, the Plaintiff has not pled sufficient facts (where they are assumed to be true) to establish the harms suffered by class members at the hands of individual teachers was foreseeable to Alberta, that a close and direct proximate relationship, or any relationship, existed between the Plaintiff and any agents, employees or representatives of Alberta. On the higher standard applied to the commonality requirement at certification, it is clear that the Plaintiff has failed to provide any basis in fact of the foreseeability of harm or of a proximate relationship to ground the common issue of whether Alberta owes the class a duty of care in negligence.

162. With respect to the other causes of action alleged against Alberta, there is a similar, glaring lack of evidence to suggest any basis in fact that:

   a. Alberta had any relationship with the alleged tortfeasors in relation to the vicarious liability claim, and

   b. Alberta gave an undertaking to class members to act in their best interest in relation to the fiduciary duty cause of action.

163. There is also no basis in fact Alberta breached a duty. There is no evidence or basis in fact of what standard of oversight was required of Alberta given the provisions of the *School Act*. There is no evidence or basis in fact of any failure by Alberta to provide the required oversight. And there is no evidence or basis in fact of any complaints made by class members, or others, to Alberta regarding the operation and management of the Ecole Notre Dame Schools that would have engaged Alberta's alleged oversight duty.

164. A determination of any breach of a duty of care is not common across the class given the individual nature of the claims raised by the Class. This is not a strict liability claim. Determining not only the circumstances of abuse but the level of required oversight in each instance of abuse can not be done on a class wide, common basis.

165. A determination that the Representative Plaintiff suffered the abuse and circumstances around the abuse would first be required. Next, the Representative Plaintiff would have to establish whether Alberta would have reasonably been expected to provide oversight in that specific circumstances and what oversight was actually provided.

166. These are all individual and highly fact specific assessments of the reasonableness of any required oversight and the reasonableness of that oversight.

167. This varying and individual level of potential oversight is even more highlighted given the provisions of the *School Acts*. Pursuant to the *School Acts*, the alleged tortfeasors are not employees of Alberta and any alleged oversight under the Acts does not relate to individual teachers (who are employees of the School Board), or even the Ecole Notre Dame Schools (which are operated within the School Division by the School Board). Alberta's oversight, if any, would be limited to overseeing the School Division.

168. A recent decision of Justice Perell of the Ontario Superior Court is illustrative. In *Stolove v Waypoint Centre for Mental Health Care*, the plaintiff sought certification of a class action against the operator of a mental health facility and the Province of Ontario. The claim against Ontario included allegations of negligence for a failure of oversight with respect to the use of seclusion and restraints on class members.[113]

169. A common issue was proposed relating to whether the defendants, including Ontario, owed a duty with respect to the "condition, implementation and oversight" and whether a breach of any duty occurred.[114]

170. Those common issues were found not to be common across the class, despite superficially appearing to be common. Instead, the duty of care and standard of care analysis depends on and requires individual findings of fact for each class member. Findings of fact for one class member would not assist other class members in proving their own case.[115]

171. Given the nature of the claim was based in negligence, answers for each class member would require individual findings of fact, would not avoid duplication and would not assist class members.[116]

[113] Stolove v Waypoint Centre for Mental Health Care, 2024 ONSC 3639 ["Stolove"], at paras 5, 6, and 9
[114] *Stolove*, at para 353 (common issues 2 – 5)
[115] *Stolove*, at paras 354 – 367
[116] *Stolove*, at paras 373 – 377. See also Thorburn v British Columbia, 2013 BCCA 480, at para 42

172. The Plaintiff has not met its onus of showing any basis in fact that Alberta owed a duty of care or breached any duty of care owed to the class members. Given the nature of the claim against Alberta, any duty or standard of care analysis would vary depending on the various allegations of abuse suffered by Class Members and would not be common. As such, common issues 2 and 3 are not properly certified as against Alberta.

Section 5(1)(d) – Preferable Procedure

173. Where the common issues requirement is not satisfied, the preferable procedure requirement will likewise not be satisfied.[117] Here, the Plaintiff has failed to produce evidence of a basis in fact for any of the proposed common issues as against Alberta. Accordingly, there is equally no basis in fact that this class action is the preferable procedure to advance the class's claim as against Alberta.

174. The preferability analysis allows the Court to consider any matter it considers relevant, and must consider the specific factors set out in section 5(2) of the *CPA*.

175. In assessing whether a class proceeding is preferable, the Court will look at the importance of the common issues in the context of the action as a whole. The preferability inquiry should be conducted through the lens of the three principal goals of class actions: judicial economy, behaviour modification and access to justice.[118]

176. The goal of the *CPA* is fairness to both plaintiffs and defendants, not just plaintiffs. As such, it is imperative to have a scrupulous and effective screening process, so that the court does not sacrifice the ultimate goal of a just determination between the parties on the altar of expediency.[119]

177. The plaintiff has not provided any basis in fact that this class action is the preferable procedure to resolve the claims against Alberta. As noted throughout Alberta's submissions, the allegation against Alberta relate to the oversight, governance and support of a school operated by the School Board. The claims of the class members relate to various individual instances of abuse committed by employees of the School Board.

[117] *Cirillo v Ontario, 2019 ONSC 3066*, at para 70
[118] *AIC Limited v Fischer*, 2013 SCC 69 at paras 21 and 22
[119] *Abdool v Anaheim Management Ltd.*, 1998 CarswellOnt 393, (1993), 15 OR (3d) 39 (Ont Sup Ct), at para 51)

178. The Plaintiff has not outlined how she intends to prove a lack of oversight, governance or support by Alberta that caused or contributed to the abuse on a class wide basis. As Justice Slatter held in *LC v Alberta*, where a plaintiff seeks to prove "systemic" negligence by attempting to prove individual acts of negligence, then a class proceeding in unlikely to be the preferable procedure.[120]

179. Should the individual instances of abuse as alleged by the various class members be proven, an individual review of what possible oversight by Alberta could or should have been provided, would be necessary.

180. These are all individual issues that must be examined in each circumstance of alleged abuse. These individual issues would therefore predominate over any general, abstract, common issue relating to Alberta's duty of care or standard of care.

181. While the predominance of individual issues over common issues is only one of the factors a Court is to consider in the preferability analysis, it is a significant one as it speaks to the judicial economy and access to justice considerations.

182. Where a class proceeding will not create efficiencies by significantly advancing class members claims, and where class members will still be required to prove a multitude of individual issues, judicial economy is not realized.[121]

183. Class members access to justice is also not realized as the fairness and efficiencies of a class proceeding are lost when individual issues predominate. Class members are not in a significantly better position after the common issues trial and the defendant's fault, if any, can not be fairly or adequately considered.[122]

184. Given the nature of the Class members' claims against Alberta for an alleged oversight failure, the individual issues predominate over any common issues and the preferability criteria is not met.

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[120] *T.L. v Alberta*, 2006 ABQB 104, at para 105
[121] *Western Canadian Shopping Centres v Dutton*, 2001 SCC 46, at para 27 and Thorburn at paras 48 - 49
[122] *Thorburn*, at paras 50 – 53.

Conclusion

185. The Plaintiff's Claim does not meet all the certification criteria as against Alberta. The Claim fails to meet:

    a. the cause of action test as required by section 5(1)(a) of the *CPA*;

    b. The commonality test as required by section 5(1)(c) of the CPA; and

    c. The preferable procedure test as required by section 5(1)(d) of the CPA

186. The Courts have already held there is no *prima facie* duty of care owed by Alberta to individual students for the actions of school staff. Further, the Plaintiff's Claim does not plead the necessary facts to ground a claim in negligence, vicarious liability, breach of fiduciary duty, or (if alleged), educational malpractice against Alberta..

187. The claims against Alberta are pled as relating to the "governance and support" of Ecole Notre Dame Schools are in essence a claim that Alberta failed in its oversight of the School Board operating the schools.

188. Alberta's general role in Alberta Education pursuant to the *School Acts* does not create any foreseeability of injuries or a proximate relationship between Alberta and the Class.

189. Courts have routinely dismissed "oversight" claims against governments where separate legal entities operated the facility or institution where the harm occurred. 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, where the alleged abuse of the Class Members occurred in this case.

190. The common issues and preferable procedure criteria are also not met in this case as against Alberta. There is no basis in fact to support the common issues as against Alberta. Given both the individual nature of the class members claims and the individual nature of any oversight Alberta might have been required to undertake to address those claims, there is no commonality among the class.

191. As individual issues will predominate in any claim against Alberta, the preferable procedure requirement is also not met.

192. The Plaintiff has failed to meet three of the certification criteria as against Alberta and therefore certification should be denied and the claim dismissed as against Alberta, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 30th DAY OF AUGUST, 2024

Alberta Justice

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

Per: ______________________
Frances Chiu
Counsel for the Respondent,
His Majesty the King in Right of Alberta

Classification: Protected A

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*, SA 1956, c 49
4	*School Act*, SA 1957, c 85
5	*School Act*, RSA 1970, c 329
6	*Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 (CanLII), [2011] 2 SCR 261
7	*Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 (CanLII), [2013] 3 SCR 477
8	*Tottrup v. Lund*, 2000 ABCA 121
9	*Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42
10	*Setoguchi v Uber BV*, 2023 ABCA 45
11	*A.H. v Alberta (Minister of Education)*, 2020 ABCA 54
12	*Wiggins v. British Columbia*, 2009 BCSC 121
13	*Taylor v Canada (Attorney General)*, 2012 ONCA 479
14	*Cooper v. Hobart*, 2001 SCC 79 (CanLII), [2001] 3 SCR 537
15	*De Visser v. Canadian Llama & Alpaca Association*, 2005 ABCA 1
16	*Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41
17	*Odhavji Estate v. Woodhouse*, 2003 SCC 69

18	*Nette v Stiles, 2009 ABQB 422*
19	*Aksidan v Canada (Attorney General), 2008 BCCA 43*
20	*Aksidan v Canada, 2006 BCSC 1008*
21	*Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71
22	*K.L.B. v. British Columbia*, 2003 SCC 51
23	*Johnson v. British Columbia (Attorney General)*, 2022 BCCA 82
24	*Seed v. Ontario*, 2012 ONSC 2681
25	*P. (W.) v. Alberta*, 2013 ABQB 296, 2013 CarswellAlta 875
26	*Cavanaugh v. Grenville Christian College*, 2013 ONCA 139
27	*Indian Residential Schools*, Re., [2000] A.J. No. 638, 2000 CarswellAlta 526
28	*Western Canadian Shopping Centres Inc. v. Dutton, 2001 SCC 46*
29	*Doucet v. Royal Winnipeg Ballet*, 2018 ONSC 4008
30	*Simpson v. Facebook, 2021 ONSC 968*
31	*Mancinelli v. Royal Bank of Canada, 2020 ONSC 1646*
32	*Charlton v. Abbott Laboratories Ltd, 2015 BCCA 26*
33	*Pasian v. Academic Clinician's Management Services, 2013 ONSC 7787*
34	*Spring v Goodyear Canada Inc., 2021 ABCA 182*
35	*Warner v. Smith & Nephew Inc., 2016 ABCA 223*
36	*LC v. Alberta, 2017 ABCA 284*

37	*Department of Education Act, RSA 1955, C 95*
38	*Department of Education Act, RSA 1970, C 95*
39	*Stolove v. Waypoint Centre for Mental Health Care, 2024 ONSC 3639*
40	*Thorburn v. British Columbia, 2013 BCCA 480*
41	*Cirillo v. Ontario, 2019 ONSC 3066*
42	*AIC Limited v. Fischer, 2013 SCC* 69
43	*Abdool v Anaheim Management Ltd., 1998 CarswellOnt 393, (1993), 15 OR (3d) 39 (Ont Sup Ct), at para 51)*
44	*T.L. v. Alberta, 2006 ABQB 104*