Court of King's Bench of Alberta

Citation: Cardinal v Alberta, 2025 ABKB 270

Date:
Docket: 1801 18051
Registry: Calgary

Between:

May Sarah Cardinal

Plaintiff

- and -

His Majesty the King in Right of Alberta

Defendant

Reasons for Decision
of the
Honourable Justice R.A. Neufeld

I. Overview

[1] May Sarah Cardinal has issued a Statement of Claim against His Majesty the King in Right of Alberta, herein referred to as the "Government" or "Alberta". She seeks certification under the *Class Proceedings Act*, SA 2003, c C-16.5 ("*CPA*") on behalf of Indigenous women who were sterilized in public, government-owned hospitals in Alberta without their informed consent between 1972 – 2018. Specifically, she alleges that these women were sterilized on the basis of coercion, duress, and lack of information.

[2] In Ms. Cardinal's case, when she was seven months pregnant with her second child, she underwent a tubal ligation. Her doctor informed Ms. Cardinal's husband that this surgery should be done. Ms. Cardinal says that she went into surgery largely uninformed. She was not made aware of the permanence of the procedure, nor was she advised of any other alternatives to this surgery. Ms. Cardinal does not remember providing her written consent for this procedure and

she recalls feeling pressured by her husband and physician into undergoing the tubal ligation. Seven other potential class members have attested to being sterilized during the class period, under a variety of individual circumstances. In each case they regret having been sterilized. The circumstances, including reasons for sterilization and evidence of consent as per medical records and questioning, vary as between the potential class members.

[3] Ms. Cardinal takes the position that throughout the proposed class period, the Government of Alberta (the "Government," or "Alberta") was responsible for healthcare in the province, and, in turn, for setting the policies that medical practitioners were to follow.

[4] Prior to 1972, sterilization of "mentally defective" persons could be ordered by the Eugenic Board of Alberta. The board was first constituted under the *Sexual Sterilization Act*, SA 1928, c 37. The most recent iteration of that statute was the *Sexual Sterilization Act*, RSA 1970, c 341. In this decision, I will refer to the various iterations of this legislation simply as the "*Sexual Sterilization Act*".

[5] Despite the repeal of that statute in 1972, Ms. Cardinal asserts that Indigenous women continued to be sterilized at a disproportionate rate without consent in provincially-funded hospitals due to a program of coerced sterilization and discrimination.

[6] Ms. Cardinal alleges that the Government was aware of this pervasive issue and created an environment where those in the medical field were comfortable with such practices. She argues that the Government had a constitutional responsibility to provide healthcare and should have taken remedial steps after the *Sexual Sterilization Act* was repealed to ensure that sterilizations did not take place without proper and informed consent.

[7] Since the Government did not take any action, she argues that it should be held liable for systemic negligence. She also claims that the Government is liable for breaching the class's ss 7 and 15 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 ("*Charter*") rights.

[8] The Government opposes certification. It acknowledges responsibility for providing Albertans with healthcare but says that this does not translate to a private duty of care or a constitutional responsibility to monitor hospitals and their day-to-day decisions. Physicians are regulated by legislation and governed by the College of Physicians and Surgeons of Alberta ("CPSA"). The CPSA is largely responsible for setting and enforcing ethical standards. Physicians are ultimately responsible for obtaining a patient's informed consent.

[9] The Government takes the position that although there may be situations where a physician performed a sterilization without the individual's informed consent, there is a myriad of reasons why this may have occurred. They submit that there is no basis upon which the Court can conclude that such sterilizations were a result of Government action or inaction, or that the Government condoned doctors performing these procedures due to underlying racism toward Indigenous women.

[10] Alberta argues that Ms. Cardinal's claims have no possibility of success at trial, and certification should be denied.

[11] To decide this application, I must determine whether each of the five criteria for certification under the *CPA* have been met. I have decided that they have not, as it is plain and obvious that the pleadings do not to disclose a cause of action in negligence or breach of the *Charter of Rights and Freedoms*. My reasons follow.

II. Legal Framework

[12] Class actions are creatures of statute, in this case, the *CPA*: ***Stevens v Ithaca Energy Inc***, 2019 ABQB 474 at para 8. One of the benefits of class action proceedings is that they provide "a mechanism for redressing wrongful conduct and discouraging its repetition that might not otherwise be available through individual actions": ***Stevens*** at para 8. They can also be a more accessible avenue for individuals who have claims against a common defendant. Class action proceedings, when properly grounded, encourage efficient litigation of similar issues: ***Stevens*** at para 8.

[13] At the certification stage, the Court need not assess the merits of the case. Rather, the Court exercises a limited gatekeeper function, including weeding out cases that are clearly unmeritorious: ***Stevens*** at para 10.

[14] One element of this assessment is to determine whether, assuming the facts as pleaded are true, the pleadings disclose a cause of action: ***Warner v Smith & Nephew Inc***, 2016 ABCA 223, leave to appeal to SCC refused, 2017 CanLII 4192 (SCC) at para 12; ***Pro-Sys Consultants Ltd v Microsoft Corporation***, 2013 SCC 57 at para 63; ***Atlantic Lottery Corp Inc v Babstock***, 2020 SCC 19 at para 14. This requirement is typically satisfied unless it is "plain and obvious" that the claim cannot succeed: ***Alberta v Elder Advocates of Alberta Society***, 2011 SCC 24 ["***Elder Advocates***"] at paras 4 and 20; ***Warner*** at para 12.

[15] The ultimate question is procedural and calls on the Court to see if a class proceeding is the preferred litigation procedure: ***Stevens*** at para 10; ***Warner*** at para 15. However, certification is not simply a "formality" or "rubberstamp". The certification applicant must satisfy the Court that each of the statutory criteria have been met before an action can be certified.

III. Requirements for Certification

[16] Section 5(1) of the *CPA* sets out the five requirements to certify a class action:

> Class certification
>
> 5(1) In order for a proceeding to be certified as a class proceeding on an application made under s 2 or 3, the Court must be satisfied as to each of the following:
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> (a) the pleadings disclose a cause of action;
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> (b) there is an identifiable class of 2 or more persons;
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> (c) the claims of the prospective class members raise a common issue, whether or not the common issue predominates over issues affecting only individual prospective class members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a person eligible to be appointed as a representative plaintiff who, in the opinion of the Court,
>
> (i) will fairly and adequately represent the interests of the class,

> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and notifying class members of the proceeding, and
>
> (iii) does not have, in respect of the common issues, an interest that is in conflict with the interests of other prospective class members.

[17] These requirements must all be met, and if they are, the Court must certify the action as a class proceeding: ***Spring v Goodyear Canada Inc***, 2021 ABCA 182 at para 17. As stated in ***Setoguchi v Uber BV***, 2023 ABCA 45, leave to appeal to SCC refused, 2023 CanLII 62020 (SCC) at para 19, "[t]he first requirement – that the pleadings disclose a cause of action – is satisfied through review of the pleadings; the other four require an adequate evidentiary record, establishing "some basis in fact" for the certification order.

IV. Application of Certification Criteria

A. Do the pleadings disclose a cause of action?

[18] This certification criterion is based on the same standard of proof as a motion to strike or dismiss: ***Pro-Sys Consultants*** at para 63. At this point, the Court must rely on the pleadings, and these are "...construed generously and liberally allowing for deficiencies that are not radically deficient": ***Starratt v Mamdani***, 2017 ABCA 92 at para 10. If the facts as pleaded could lead to a remedy for the plaintiff, the requirement is met: ***Starratt*** at para 10.

[19] The two causes of action in this class action are negligence and a breach of ss 7 and 15 of the *Charter*. The negligence claim is based on alleged systemic negligence. That term has been defined (in the context of a claim for historical sexual abuse at a government-owned and operated school for the deaf) as "...the failure to have in place management and operations procedures that would reasonably have prevented abuse": ***Rumley v British Columbia***, 2001 SCC 69 at para 30.

[20] Ms. Cardinal alleges that the Government owed a duty of care to Indigenous women to prevent systemic discrimination and assaults in the form of coerced sterilizations at public hospitals throughout Alberta over the 46-year claim period. The Statement of Claim alleges that the Government failed to ensure that doctors were not carrying out coerced sterilizations, failed to investigate the disproportionately high number of Indigenous women who were being sterilized, failed to provide adequate remedial training to healthcare workers following the repeal of the *Sexual Sterilization Act*, and was careless, reckless, wilfully blind, or active in promoting coerced sterilizations.

[21] The Statement of Claim pleads that proximity has been made out because the Government was responsible for public hospitals, authorized healthcare workers to operate the hospitals, trained these individuals, and owed a non-delegable duty to the class members. Ms. Cardinal also relies on the *sui generis* fiduciary relationship between the Government and Indigenous people in Alberta.

[22] The second cause of action is that the Government discriminated against the class members contrary to s 15 of the *Charter* by failing to protect them from coerced sterilization, being wilfully blind or reckless as to the policy and/or pattern of discrimination in the province, and by funding the institutions which sterilized the class members without their consent. Ms.

Cardinal submits that the impact of this treatment is the devaluation of the dignity of Indigenous women, who have historically been subjected to disadvantage, prejudice and stereotyping.

[23] Ms. Cardinal also states that there have been breaches of the class members' s 7 *Charter* rights because coerced sterilizations caused them physical and psychological injuries, and this procedure was arbitrary and disproportionate.

[24] Ms. Cardinal's pleadings assert that the Government's post-*Charter* conduct cannot be saved under s 1 of the *Charter*.

[25] In response to the negligence claim, the Government argues that its statutory duty to provide healthcare to all Albertans does not, in and of itself, give rise to a private law duty of care: ***Elder Advocates*** at para 68. It argues that the plaintiff has failed to point to a statutory source for the alleged duties of care owed by the Government. In ***Elder Advocates*** at para 72, the Court held that providing a service is insufficient on its own to establish proximity between a government and the class. As such, the Government submits that there is no statutory basis for this alleged duty. Even if there was, the Government states that there should be no duty of care due to public policy considerations, which includes "...virtually unlimited exposure of the government to private claims": ***Elder Advocates*** at para 74.

[26] Alberta emphasizes that the plaintiff failed to provide specific facts to establish the negligence claim, including the number of doctors who allegedly performed coerced sterilizations and any facts to establish that the doctors were employees rather than independent contractors. It also argues that there are no facts pleaded to support a claim of systemic negligence, but only bare allegations.

[27] Following argument of the certification application, our Court issued its decision in ***Youngchief v The Attorney General of Canada***, 2025 ABKB 35. At the joint request of counsel, additional submissions were heard regarding that decision, in which Neilson J dismissed an application for certification as against Alberta. In doing so, he found that the claimants lacked the proximity to Alberta necessary to ground a duty of care for actions taken by a school district charged with providing educational services to Indigenous children. Under the various iterations of the *School Acts* (including the *School Act*, RSA 1955, c 297 and the *School Act*, RSA 1970, c 329, collectively referred to as the "*School Acts"*) during the proposed claim period, educational services were the responsibility of school districts, not the provincial government: ***Youngchief*** at paras 24-25.

[28] The Government cites ***BigEagle v Canada***, 2021 FC 504, aff'd 2023 FCA 128, leave to appeal refused 2024 CarswellNat 2139 in denying the existence of a fiduciary duty in this case. Specifically, the Government argues that the principle of a *sui generis* fiduciary duty cannot apply because this must relate to a specific interest that is "distinctly Aboriginal": ***Manitoba Metis Federation Inc v Canada (Attorney General)***, 2013 SCC 14 at para 53. Healthcare services are individualized and apply to the entire population, making it difficult to classify health interests as "distinctly Aboriginal": ***Manitoba Metis Federation*** at para 53.

[29] In terms of the *Charter* claims, the Government argues that these are bare assertions and there is no nexus between the alleged discrimination and legislation or state action. Because physicians are not state actors, their conduct does not attract *Charter* liability: ***Lewis v Alberta Health Services***, 2022 ABCA 359, leave to appeal to SCC refused 2023 CanLII 49297 (SCC), at paras 28 and 30).

1. Assessment

a. Negligence

[30] The fundamental question raised by this application is whether the plaintiff (and by extension the proposed class members) have a viable cause of action against Alberta. This question must be answered on the assumption that the facts as pled are true, but leaving aside bare allegations contained in the Statement of Claim. The evaluation of whether a cause of action exists is also made in the context of the statutory and regulatory regimes in force at the time of the alleged wrongdoing. If it is plain and obvious that no cause of action is disclosed in the pleadings, certification cannot be granted.

[31] For an action in negligence (systemic or otherwise) to succeed, the plaintiff must satisfy the Court that the defendant owed them a private duty of care; that the defendant's conduct breached the standard of care required at law; and that as a result, the plaintiff suffered foreseeable damage: ***Mustapha v Culligan of Canada Ltd***, 2008 SCC 27 at para 3.

[32] In ***Donoghue v Stevenson***, 1932 CanLII 536 (FOREP) the House of Lords introduced to the common law of tort a single comprehensive principle - the principle of negligence. From that point on, liability in negligence would lie in circumstances where the actions of the defendant caused reasonably foreseeable harm to his or her neighbour. However, mere foreseeability of harm was not sufficient. The relationship between the defendant and the plaintiff must also have been one of close and direct proximity or neighborhood for an actionable duty of care to be found: ***Cooper v Hobart***, 2001 SCC 79 at para 22.

[33] Where the alleged tortfeasor is a government, as is the case here, distinctions must be drawn between activities or powers exercised on behalf of the public writ large and circumstances where there is a relationship between the government and a citizen that is close enough in proximity to impose a duty of care that is enforceable under the law of negligence.

[34] In ***Cooper***, the SCC confirmed the analytical approach to be used in determining the issue of proximity. It did so in the context of a proposed class action by mortgage investors against the Registrar of Mortgage Brokers - a statutory regulator under the *Mortgage Brokers Act,* RSBC 1996, c 313 ("*Mortgage Brokers Act*"). The plaintiff alleged that the Registrar breached a duty of care to investors by not suspending a rogue broker's licence, and by not notifying investors of the Registrar's investigation. The Supreme Court of Canada upheld the decision of the British Columbia Court of Appeal to deny certification on the basis that the pleadings did not disclose a cause of action.

[35] In reaching its decision, the Supreme Court revisited the analytical approach for determining a private duty of care set out in the classic case of ***Anns v Merton London Borough Council***, [1978] AC 728. The initial question is whether, in the circumstances, it was reasonably foreseeable that the plaintiff might be harmed by the defendant's conduct. The next question is whether the relationship between the plaintiff and defendant was sufficiently proximate to make it just to impose liability. Where the relationship has already been considered in analogous cases, a detailed assessment of proximity may be unnecessary, but even then, defining the relationship may involve several factors including expectations, representations, reliance and the property or other interests involved: ***Cooper*** at para 34. Collectively, these questions form the first stage of the ***Anns/Cooper*** test.

[36] Where a *prima facie* duty of care has been established, the next stage is to decide whether there are policy considerations that would negate imposing a private duty of care in the circumstances: ***Cooper*** at para 37.

[37] The Court held that the relationship between an investor and the Registrar had not been considered in previous cases.

[38] It was therefore necessary to more closely examine the relationship between the plaintiff and the Registrar. The Court did so by focusing on the functions of the Registrar under the *Mortgage Brokers Act*.

[39] It found that when examining the structure of the *Mortgage Brokers Act* and the responsibilities of the Registrar, there was nothing in the legislation to create a relationship or duty owed to individual investors. Rather, the duties were of a public facing nature - promoting a fair and functional market. Therefore, even though carelessness by the Registrar might cause foreseeable losses to investors, those losses could not be recovered through an action in negligence as no private duty of care existed.

[40] Following ***Cooper***, our Court had occasion to decide whether a private duty of care is owed by Alberta to medical patients under its healthcare regime: ***Waap v Alberta***, 2008 ABQB 544.

[41] In that case, an action was brought against various doctors for medical malpractice. The plaintiffs alleged that delay in Mr. Waap's cancer diagnosis by his doctors caused him serious adverse health effects. They also brought action against Alberta, as represented by the Premier and the Minister of Health to obtain reimbursement of costs of treatment in Europe. They alleged that Alberta was negligent in failing to provide necessary CT or pre-cancer scanning so that Mr. Waap could have surgery quickly in Alberta. Their pleadings asserted that Alberta had a duty to provide reasonable and proper health care services to Albertans, failed to provide reasonable access to quality health care services, failed to ensure that reasonable and proper health care and medical treatment was made available, failed to provide adequate standards of care and failed to employ a sufficient number of competent physicians: ***Waap*** at para 146

[42] The Court applied the ***Cooper/Anns*** framework for determining proximity. It held that the duty of care alleged by the plaintiff did not fall within any recognized category of proximity; that absent pleading of any contact or involvement by provincial government officials, the pleadings contained no material facts to support an actual proximate relationship. Proximity could not be established on Alberta's statutory duties, and no *prima facie* duty of care.

[43] Alberta's statutory duties and the resulting finding were summarized by the Court in ***Waap*** as follows at paras 152 and 155:

> 152. In Alberta, the relevant legislation does not impart to the Minister of any Ministry official the authority to supervise the day to day operations of hospitals or their medical or nursing staff. The governing legislation is the *Hospitals Act*, R.S.A. 2000, c. H-12 and the *Regional Health Authorities Act*, R.S.A. 2000, c. R-10. The *Hospitals Act* grants hospital boards "absolute and final authority in respect of all matters pertaining to the operation of the hospital" (s. 10(1)). The *Regional Health Authorities Act* sets out that the regional health authorities shall promote and protect the health of the population in their regions, assess the health needs of the region, determine priorities and allocate resources within their

> regions, promote the provision of health services responsive to the needs of individuals and communities, and support the integration of services and facilities within the region. It gives the regional health authorities final authority in the region in respect of these matters. In my view, these two Acts create no private rights....
>
> 155. In my view, these extensive statutory provisions do not create a private law duty of care. They are not aimed at private individuals but rather are geared toward the protection of the public. Therefore, it is plain and obvious that the plaintiffs cannot succeed on the first stage of the *Cooper* test. In light of this conclusion, it is unnecessary to consider the second stage of the test. However, in the event of an appeal and as the matter was fully argued before me, it is useful to comment on the test.

[44] Justice Nation continued to find that even if there was a *prima facie* duty of care, the claim would fail under the second stage of the ***Cooper/Anns***, test. Government's duty to protect the health of its residents is owed to the public at large, and associated funding is a matter of policy: ***Waap*** at paras 156-162.

[45] Other Canadian Courts have reached similar conclusions in respect of claims made against government for negligence within the healthcare system.

[46] In ***Attis v Canada (Health)***, 2008 ONCA 660, leave to appeal to the SCC dismissed 2009 Can LII 19874 at para 34, similar findings were made in the context of a class action certification application. The underlying action arose from the alleged failure of Health Canada to prohibit silicone gel breast implants from reaching the market. It alleged that Health Canada knew or ought to have known that such devices constituted a danger to patients.

[47] The applications judge denied certification, finding that the claim was akin to arguing that the government had a "duty to govern" in a particular fashion. On appeal, the Ontario Court of Appeal agreed that this was a "manifest policy decision" which is not subject to liability: at ***Attis*** at para 19. The Minister's role under the enabling statute was to protect the people of Canada as a whole, not individuals: ***Attis*** at para 54.

[48] In ***Eliopoulos Estate v Ontario (Minister of Health and Long-Term Care)***, 2006 CanLII 37121 leave to appeal to the SCC refused 2007 CanLII 19108 at para 17, the Ontario Court of Appeal commented that in general, the statutory scheme governing hospitals "confers a mandate on the Minister to act in the broader public interest and does not create a duty of care to a particular patient."

[49] In ***Elder Advocates***, the Supreme Court of Canada denied an appeal of a decision to refuse certification of a negligence action against Alberta. The claim arose from alleged overcharging of long-term care facility residents. The plaintiff alleged that Alberta was negligent in failing to properly supervise billing of food charges. Those facilities were subject to oversight by Alberta under the *Nursing Homes Act* and regulations and the *Hospitals Act* and regulations.

[50] The statutory scheme was described as follows at para 70:

> In this case, the legislative scheme does not impose a duty on the Crown to act in relation to the class members with respect to the accommodation charges. A review of the relevant provisions discloses a general duty on the Minister to provide insured health care services: *Alberta Health Care Insurance Act*, s. 3.

> However, the plaintiffs have failed to point to any duty to audit, supervise, monitor or administer the funds related to the accommodation charges in the provisions. The *Nursing Homes Act* imposes no positive duty on the Crown but grants only permissive monitoring powers. Reporting requirements are discretionary (i.e. at the demand of the Minister). While they flow up the chain of command (i.e. the RHA or operator must report to the Minister), the *Minister* need not respond: *Nursing Homes Act*, ss. 12 and 19. The same is true of the Act's regulations (*Nursing Homes General Regulation* and *Nursing Homes Operation Regulation*) and the *Regional Health Authorities Act*, ss. 9, 13, 14 and 21, and accompanying regulations; as in the *Hospitals Act*, ss. 25-27 and 29, and its regulations. This case is distinguishable from *Brewer Bros. v. Canada (Attorney General)*, 1991 CanLII 13565 (FCA), [1992] 1 F.C. 25 (C.A.), relied on by the plaintiffs, where the statute in question imposed on the public authority *a positive duty* to act.

[51] The Court held that neither the statute nor Alberta's conduct in supervising seniors care created a relationship of proximity sufficient to ground a private duty of care, stating at paras 71-73:

> [71] For these reasons, I conclude that the legislative scheme does not impose a duty of care on Alberta. However, the claimant class also argues that Alberta's conduct established a relationship of sufficient proximity to support a duty of care. They rely generally on the fact that Alberta supervised, monitored and administered the accommodation fees. More particularly, they emphasize that Alberta directed the health authorities to charge the class members the maximum accommodation charge, without regard to the actual cost of accommodation and meals, and that information about the rates was communicated by the health authorities directly to the class members at the direction of Alberta. This, they argue, is sufficient to create a relationship of proximity.
>
> [72] In the absence of a statutory duty, the fact that Alberta may have audited, supervised, monitored and generally administered the accommodation fees objected to does not create sufficient proximity to impose a prima facie duty of care. As stated in *Broome*, at para. 40:
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> > Even if the statute ought to be interpreted so that there was a duty to inspect the Home, on the record before me, the statute gives no direction as to the purpose or scope of such inspections, imposes no standards to be applied and requires no action to be taken as a result of an inspection. No authority is cited for the proposition that such a bare duty of inspection would be sufficient to support a finding of proximity between the Director and the children. [Emphasis added.]
>
> The specific acts alleged — that Alberta directed the charges and that the health authorities communicated them to members of the claimant class — fall under the rubric of administration of the scheme. As in *Broome*, the mere supplying of a service is insufficient, without more, to establish a relationship of proximity between the government and the claimants.

> [73] I therefore conclude that, assuming the facts pleaded to be true, the negligence claim is bound to fail at the first step of the *Anns/Cooper* inquiry. Absent a statutory obligation to do the things that the plaintiffs claim were done negligently, the necessary relationship of proximity between Alberta and the claimants cannot be made out.

[52] As was the case in ***Waap***, the Court went on to find that the second stage of the ***Cooper/Anns*** would also have defeated the claim, stating at para 74:

> [74] Were the pleadings to satisfy the first step of the *Anns/Cooper* test, they would fail at the second step, which asks whether the *prima facie* duty of care is negated by policy considerations. Where the defendant is a public body, inferring a private duty of care from statutory duties may be difficult, and must respect the particular constitutional role of those institutions: *Welbridge Holdings Ltd. v. Greater Winnipeg*, 1970 CanLII 1 (SCC), [1971] S.C.R. 957, per Laskin J., as he then was, for the Court. Related to this concern is the fear of virtually unlimited exposure of the government to private claims, which may tax public resources and chill government intervention. It is arguable that to impose a duty of care on the plaintiff class on the facts pleaded would open the door to a claim in negligence by any patient in the health care system with an entitlement to receive funding for health services, whether primary or extended. This raises the spectre of unlimited liability to an unlimited class, decried by Cardozo C.J. in *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931), at p. 444: see *Design Services Ltd. v. Canada*, 2008 SCC 22, [2008] 1 S.C.R. 737, at paras. 59-66.

[53] In ***Youngchief***, a certification application was made to this Court on behalf of Indigenous people who attended a publicly-funded Catholic school. They had been transferred to that school following the closure of a residential school nearer to their homes.

[54] The underlying action was commenced against the Lakeland Roman Catholic Separate School Division, the Diocese of Saint-Paul, the Government of Canada, and the Government of Alberta. Certification was granted as against the first three Defendants. It was refused as against Alberta.

[55] In reaching this decision, the Court reviewed the provisions of the *School Acts*. It concluded that school boards created under the legislation had significant power and authority. The *School Acts* did not confer on Alberta or the Minister of Education the power to control or monitor the management or operation of schools or deem school boards or staff to be agents of Alberta. Nor did the Minister have the power to control school boards.

[56] Justice Neilson also noted the analogous case of ***AH v Alberta (Minister of Education)***, 2020 ABCA 54, wherein our Court of Appeal held that that school boards are separate legal entities from Alberta Education and the Minister had no obligation to monitor day-to-day activities of school board employees.

[57] The Plaintiff argues that ***Youngchief*** is distinguishable because hospital boards and health districts during the claim period were subject to monitoring by the Minister of Health. For example, under the operative versions of the relevant legislation, including the *Alberta Hospitals Act*, RSA 1970, c 174 ("*Hospitals Act* 1970"), *Hospitals Act*, RSA 1980, c H-11 ("*Hospitals Act* 1980"), and *Hospitals Act*, RSA 2000, c H-12 ("*Hospitals Act* 2000"), which will collectively be

referred to as the "*Hospitals Acts*", the Minister of Health had the power to dismiss hospital board members and could review hospital bylaws and investigate hospital operations – powers that were not given under the *School Acts*.

[58] Alberta's power to intercede in hospital operations under the *Hospitals Acts* was somewhat broader than those conferred under the *School Acts* during the time periods in question. For example, each version of the *Hospitals Acts* in force during the claim period of 1972 to 2018 contains a hierarchy of decision-making responsibility that has more tiers than that applying to schools. The Minister of Health received and reviewed hospital bylaws and could appoint board members hospital district However, day-to-day hospital management was overseen by a hospital and hospital district members. Moreover, hospital boards had full and final authority over all matters pertaining to hospital operations.

[59] Therefore, I do not agree that the greater power to intervene in health services matters as compared to school matters makes the ***Youngchief*** decision distinguishable. The statutory schemes are different, but both rest on the foundation that responsibility for day-to-day operation and management of services and facilities belongs with the boards created by statute, not the Government.

[60] This conclusion is consistent with the decision of our Court in ***Waap***, in which it was found that Alberta's statutory framework for delivery of health services does not give rise to a private duty of care owed to individual patients. The bottom line is that in both health care and education the statutory duties of the provincial Government are public-facing, not positive in nature and do not create a private duty of care to patients.

[61] The Statement of Claim does not plead breach of any specified statutory duty of care. In response to Alberta's argument that this is because no such duty exists, the plaintiff argues that the health care legislation in effect during the claim period imposed a "high degree of accountability on Alberta" to provide health care services in a non-negligent manner dating back at least to the 1950's":

(a) The Minister of Health is empowered by statute to establish "an accountability framework" and "reporting requirements" for regional health authorities. The Minister may also authorize any person to "enter and inspect" any provincial hospital and "required the production for examination of any documents or records in the possession" of any provincial hospital.

(b) Regional Health Authorities (currently AHS) shall "protect the health of the population", "assess on an ongoing basis the health needs of the health region", promote the provision f health services in a manner that is responsive to the needs of individuals and communities", and ensure that an auditor is appointed to monitor each provincial hospital. In a policy document interpreting the *Regional Health Authorities Act*, the Defendant clarified these duties including maintaining a concerns resolution process and monitoring, reporting on, and evaluating services.

(c) Public Health Units and Boards shall "study the vital statistics of the Province" and "make investigations and inquiries Respecting [...] the effect of localities, employments, conditions, habits and other circumstances upon the health of the people.

[62] With respect this argument is flawed.

[63] To begin with, it treats "Alberta" as being the same legal entity as health units (or districts) operating within the province over the claim period. This is not the case, and Alberta is the only Defendant in this action.

[64] It also conflates "accountability" between and among different levels of the health care hierarchy with a private duty of care to individual patients receiving medical treatment within that system. Accountability takes many forms, including reporting up the chain of command. It cannot be equated to liability in tort for the purpose of determining proximity under ***Cooper/Anns***.

[65] In its reply to Alberta's proximity argument, the plaintiff also relied on a recent certification decision in Ontario: ***Robertson v Ontario***, 2022 ONSC 5127. The negligence claim being advanced was based on a breach of duty owed by the Province to residents of long-term healthcare facilities during the Covid-19 pandemic.

[66] The motions judge held that the claim could be certified notwithstanding Ontario's arguments regarding lack of proximity. In support of its argument the plaintiff quotes the following passage from ***Robertson***: "The plaintiff's interpretation of the unique language of the *LTHCA* and their submission about a private duty of care may or may not prevail when the issue is argued on the merits on full evidence. But at this stage of the proceedings, I am unable to conclude in any principled fashion that it is plain and obvious that such a submission has zero chance of success and is doomed to fail": para 59.

[67] In my view, ***Robertson*** is of little assistance to the plaintiff.

[68] The claim against Ontario was made under different statutes and alleged negligence on the part of different Ministries. These included the Minister of Health and the Chief Medical Officer acting under the *Health Protection and Promotion Act*, RSO 1990 c. H.7 ("*HPPA*") and the Minister of Long-Term Care, acting under the *Long-Term Care Act*, 2007 SO 2007, c 8.

[69] The *Long-Term Health Care Act* applied to elder care facilities and had been substantially revised following a 2019 inquiry to acknowledge the government's commitment to facility residents. Its preamble included unique language directed at protection of residents under care and it was that unique language that formed the basis for an argument that was not doomed to fail as to a private duty of care owed by the Minister of Long-Term Care.

[70] The *HPPA* applied to the full spectrum of health care and public health and in similar fashion as the healthcare legislation in Alberta, (as discussed in ***Waap***) was public-facing. The Court's decision regarding the alleged duty of care under the *HPPA* was succinct:

> There can be no private law duty of care claim as against the CMOH based on statutory language because it is plain and obvious that the directive-makings powers under the *HPPA* are to be exercised in the public interest. There is no mention or identification of any discrete group that may require or command special attention. I therefore conclude that the allegation that a private law duty of care is owed to LTC residents based on the *HPPA* is doomed to fail. I note there is no suggestion to the contrary.

[71] In summary, I agree with the Defendant that the Statement of Claim does not disclose a private duty of care under the health care statutory regime during the claim period. Under that

legislation there is no close and direct relationship between Alberta and the proposed class members. There is also no pleading of any direct interface between the plaintiff and provincial government officials or employees. As was the case in ***Waap***, no *prima facie* statutory duty of care is established on the pleadings.

[72] To extend such a duty here would expose government in similar circumstances to unbounded liability for claims of medical negligence (including failure to obtain informed consent). This would risk inviting intervention by government in the physician/patient relationship across the health care system with no clear purpose given the professional and ethical oversight already exercised by the College of Physicians and Surgeons and the redress already available under the law of negligence against physicians. Accordingly, the second stage of the ***Cooper/Anns*** test would also not be met here.

[73] In argument, two non-statutory sources of proximity were offered by the plaintiff: Alberta's historical legacy of state-sponsored sexual sterilization and the *sui generis* fiduciary duty owed by the Crown to Indigenous Canadians. I turn to those next.

[74] To support its proximity claim, the plaintiff presented a nuanced and creative argument based on the history of state-sponsored sexual sterilization in Alberta. The argument starts with the proposition that disproportionately high numbers of Indigenous women were sterilized without consent under the *Sexual Sterilization Acts* (with authorization of the Eugenics Board) relative to the general population of the province- particularly in the later years of the board's existence. It attributes that disproportionality to racial discrimination fostered by government policy.

[75] The argument goes on to posit that on repeal of the *Sexual Sterilization Act*, disproportionate numbers of Indigenous women continued to be sterilized without consent at Alberta hospitals. This continued practice is attributed to racism and government inaction post-1972 to correct the legacy effect of the previous policies and legislation.

[76] There is therefore a common "orbit" of proximity which supports imposition of a private duty of care under the law of negligence.

[77] Before addressing the merits of this proximity argument, it is necessary to comment briefly on the pre-1972 statutory regime relating to sexual sterilization in Alberta. This is a dark chapter of Alberta's history, and one that is shared by many other jurisdictions across North America that embraced the precepts of the eugenics movement in the mid-twentieth century.

[78] As discussed in ***Muir v Alberta***, 1996 CanLII 7287 ABQB, the basic premise of that movement was that society would benefit if mentally "defective" people were not allowed to procreate. Such people were considered by eugenics proponents to be a drain on public resources because of the cost of institutionalization. They were also considered to be inclined toward criminality.

[79] In Alberta, sexual sterilization would most commonly be performed on persons confined in institutions such as the Red Deer Provincial Training School for the Mentally Defective on referral by facility administrators (the Eugenics Board had authority to approve or refuse discharge from mental health facilities). Originally, consent was required of the patient or their parent, and in the case of married persons, by their spouse. In 1937, this was later changed to permit the board to authorize sterilizations without consent where the patient lacked capacity in addition to those who had provided consent. The criteria for board authorization were that the

Board be unanimously of the opinion that procreation would result in inherited mental deficiency or would involve risk of mental injury to such person or their progeny.

[80] According to the plaintiff, academic research completed by Dr. Timothy Christian indicates that Indigenous persons were disproportionately sterilized during the 44-year tenure of the Eugenics Board. The findings of Dr. Christian discussed by the plaintiff in their brief demonstrate a spike in sterilization occurring in the final years of the Board's existence. During this time, Indigenous peoples made up 3.4% of Alberta's population, but 25.7% of the patient population who were sterilized. The percentage of these sterilization authorizations that were preceded by informed consent is not clear.

[81] In 1972, Alberta's newly-elected government repealed the *Sexual Sterilization Act*. In doing so, the government strongly repudiated the eugenics movement and emphasized its commitment to introduce a Bill of Rights for the protection of Albertans: ***Muir*** at p. 39.

[82] The Statement of Claim states that the Class is comprised of all Indian, non-status Indian, Inuit and Metis women who were sterilized in Alberta prior to December 14, 2018 without their proper and informed consent. However, the application for certification as amended on January 15, 2025 seeks certification only for the time period of June 2, 1972 to December 14, 2018.

[83] The Plaintiff alleges that although the *Sterilization Acts* had been repealed, Alberta continued to condone and promote coerced sterilization of Indigenous women at its hospitals by failing to take action to protect them from such practices. Specifically, it failed to investigate disproportionately high numbers of Indigenous women who were undergoing sterilization and failed to provide remedial training to health care workers post-repeal of the *Sexual Sterilization Acts*. More generally it alleges that Alberta failed to ensure that hospitals were not carrying out a "program" of coerced sterilization or sexual assault, and was careless, wilfully blind, deliberately accepting of or actively promoting a policy of coerced sterilization or sexual assault. These allegations underpin the claim of systemic negligence.

[84] As discussed earlier, the statutory framework under which health care services were performed during the claim period did not impose a positive duty on the Government to take any measures to ensure that patients were dealt with in a particular fashion. This includes investigation of statistical variances among races receiving certain medical treatment and remedial training or other measures to address root causes of those variances.

[85] To ground a relationship of proximity outside of the statute, the plaintiff would need to plead material facts outside of the statutory framework to disclose a private duty of care. A bare allegation of complicity in a "program" of coerced sterilization or sexual assault is attention-grabbing, but it is not sufficient. Nor is a legacy of sexual sterilization of mentally "defective" persons sufficient to infer, without properly pled material facts, that there was a continuation of pre-1972 practices, and that the root cause of disproportionality (racism among medical practitioners) was the same. Such facts are not pleaded and without them it is impossible for the opposing party and the court to determine the "who, what, where, when and why" of the negligence claim. This includes the proximity component.

[86] I would add that even if such material facts had been pled, this theory of proximity has another basic obstacle: it flies in the face of case authority regarding the scope of the Court's power *vis a vis* governmental activity. It would impose an obligation under the law of negligence for Alberta to exercise its legislative and/or regulatory power in a particular way.

[87] I accept that it was open to Alberta to take legislative or regulatory action to reinforce the need for informed consent to sterilization of Albertans following the repeal of the odious *Sexual Sterilization Act*. Such actions could have focused on the Indigenous community, particularly if Alberta knew (or ought to have known) of a disproportionate number of authorized procedures on Indigenous women prior to 1972 and thereafter as alleged in the statement of claim.

[88] Nonetheless it has long been accepted that absent a statutory duty of care, it is only when government moves beyond the realm of policy and into the operational arena that a private duty of care may arise to those who are directly affected by those operations. Governmental knowledge of a financial, economic, social or political problem, and the jurisdiction to address that problem through legislation policy or investigative initiatives do not give rise to a private duty of care: ***Nelson v Marchi***, 2021 SCC 41 at paras 22-24, 48, 50 and 52; ***Attis*** at para 34.

[89] I find that while creative, it is plain and obvious that the "orbit" theory of proximity has no prospect for success.

[90] The plaintiff also argues that denial of certification would be inconsistent with the trend of case law across Canada dealing with historical wrongs perpetrated by the Crown on Indigenous people. Courts have certified many such actions and have in doing so recognized the special relationship between the Crown and Indigenous Canadians.

[91] I agree that the class action process can be a valuable tool for reconciliation. It provides an opportunity to assess a claim and determine compensation in an organized manner and with the assistance of the Court. Class proceedings in respect of residential schools across Canada is an obvious example of that.

[92] Indigeneity is not, however, a stand-alone basis for imposing a private duty of care under the law of negligence. This includes claims grounded on the *sui generis* fiduciary duty of the Crown toward Indigenous peoples.

[93] The nature and scope of the Crown's fiduciary duty to Indigenous Canadians has been the subject of many decisions as Indigenous rights have been articulated by our courts. For a *sui generis* fiduciary relationship to be created in the Indigenous context, two criteria must be met: (1) a specific or cognizable Aboriginal interest and (2) a Crown undertaking of discretionary control over that interest.

[94] In the ordinary course, specific and cognizable Aboriginal interests are ones that that are distinctly Aboriginal as opposed to individual. They are communal interests held by the collective, most commonly associated with interests in land: ***Ontario (Attorney General) v. Restoule***, 2024 SCC 27 at para 235; ***Manitoba Metis Federation*** at para 53.

[95] In ***BigEagle***, an application for certification was made by family members on behalf of murdered and missing Indigenous women and two-spirited individuals. The underlying claim was that the Government of Canada was vicariously liable for the systemic negligence of the RCMP in fulfilling their duties to protect a vulnerable population. Certification was denied. In doing so, the court explained from paras 114-117 why the construct of a *sui generis* fiduciary duty could not ground a claim for a private duty of care to individuals:

> It is uncontroversial that there is a special relationship between Indigenous people and Canada. However, <u>the duty of loyalty as set out in Alberta Elders has not been extended to all Indigenous people in all situations</u>. In Alberta Elders the context of the duty is in terms of land rights and, possible, where there is a private

duty being carried out by the government. Clearly, on these facts the RCMP are only performing a public duty. Further, the Plaintiff does not reproduce the quote in context, and cuts off the end in her submissions completely changing the meaning:

> For similar reasons, where the alleged fiduciary is the government, it may be difficult to establish the second requirement of a defined person or class of persons vulnerable to the fiduciary's exercise of discretionary power. The government, as a general rule, must act in the interest of all citizens... In the Aboriginal context, an exclusive duty **in relation to Aboriginal lands** is established by the special Crown responsibilities owed to this sector of the population and none other. Similarly, where the government duty is in effect of a **private duty** being carried out by government, this requirement may be established. **Outside such cases**, a specific class of persons to whom the government owes an exclusive duty of loyalty **is difficult to posit.**
>
> (*Alberta Elders*, at para 49, emphasis added)

Fiduciary duty is not a cloak that settles on all Indigenous peoples in all situations. I think it is unfair to project this antiquated idea that Indigenous people are "wards of the state" (*St Ann's Island Shooting and Fishing Club Ltd v Canada* [1950' SCR 211, [1950] 2 DLR 225). In *Alberta Elders*, after surveying many of the cases relied on by the plaintiff for this proposition, Chief Justice McLachlin states:

> The unique and historic nature of Crown-Aboriginal relations described in these cases negates the plaintiff class' assertion that they serve as a template for the duty of the government to citizens in other contexts. The same applies to the only other situation where a Crown fiduciary duty has been recognized-such as where the Crown acts as the public guardian and trustee.
>
> (*Alberta Elders*, at para 40)

[96] I agree with and adopt the reasoning of the Federal Court concerning the scope of the Crown's *sui generis* fiduciary duty to Indigenous Canadians, as affirmed by the Federal Court of Appeal.

[97] Indigenous Canadians are valued members of society. Much remains to be done to achieve reconciliation, including redress of historical wrongs. Nonetheless, under the law of negligence, government generally owes the same obligations to individual Indigenous Canadians as it owes to all others.

[98] In conclusion, I find it plain and obvious that the Statement of Claim does not disclose a cause of action in negligence against Alberta - systemic or otherwise.

b. Charter Violations

[99] As discussed above, the plaintiff alleges two *Charter* breaches pursuant to s 7 and s 15 of the *Charter*. The plaintiff first alleges that Indigenous women in Alberta were the victims of

discrimination based on, amongst other grounds, their race, spirituality, and gender. The plaintiff submits that Alberta failed to take measures to prevent that discrimination from being manifested in disproportionately high rates of sterilization both before and after the 1972 repeal of the *Sexual Sterilization Act* and both before and after the enactment of the *Charter* in 1982. Additionally, the plaintiff alleges that the coerced sterilizations violated the Class Members' right to life, liberty and security of the person.

[100] The Government argues that the plaintiff did not plead any facts that would support either a s 7 or s 15 claim. They submit that the plaintiff has not established that any action or enactment of the Province interfered with their *Charter* rights. The Government argues that the plaintiff's *Charter* claims are "bare assertions" that cannot ground an action for a *Charter* breach. The Government also raises the issue of doctors not being government actors, that the care provided by physicians does not attract *Charter* liability.

[101] The plaintiff's allegations are unsupported by material facts in the Statement of Claim. I would agree with the Government's submissions that there are no facts pled that support the plaintiff's statements about policies of discrimination nor the patterns of such discrimination which are being relied upon to ground her *Charter* claims. I cannot discern from the pleadings any facts that would tend to support a finding that doctors in the province, while continuing to perform sterilizations on Indigenous women, were conducting such procedures as government actors.

[102] The plaintiff does not identify any legislative or other government action that constituted a *Charter* breach. She only identifies actions by private actors (physicians) in undertaking sterilization surgery without informed consent. Courts have consistently held that "physicians acting in the regular course of providing care are not government agents" and therefore not subject to *Charter* obligations: ***Lewis*** at paras 28 and 30. While not fatal to the certification request, it should also be noted that the sterilization complained of by Ms. Cardinal was performed in or around 1977- before the enactment of the *Charter*.

[103] I find that the pleadings do not disclose a cause of action for breach of the *Charter*.

[104] Because each of the criteria for certification under s 5(1) must be met, the application must be dismissed. Consideration of the remaining factors is not required. I will nevertheless comment briefly on those criteria, as in some instances they demonstrate the procedural difficulties that arise when proximity between the plaintiff and defendant is tenuous or absent.

B. Is there an identifiable class of two or more persons?

[105] To meet this requirement, the plaintiff must demonstrate "some basis in fact" to show that there is an identifiable class: ***Hollick v Toronto (City)***, 2001 SCC 68 at para 25. This is a low threshold and only requires a minimum evidentiary basis: ***Flesch v Apache Corporation***, 2022 ABCA 374 at para 28. The class definition must be "objectively determinable and rationally connected to the matters at hand in the action" without any reference to the merits of the case: ***Bruno v Samson Cree Nation***, 2021 ABCA 381 at paras 85-86.

[106] The proposed plaintiff class was originally proposed as:

> All Indian, non-status Indian, Inuit and Métis women who were sterilized in Alberta prior to December 14, 2018, without their proper and informed consent.

[107] Prior to the hearing, the application was amended to include a start period of 1972, when the *Sexual Sterilization Act* was repealed.

[108] Ms. Cardinal argues that the class is defined objectively and allows class members to self-identify. The class is also linked to all the common issues and the definition of the class does not depend on the outcome of the litigation: ***Bruno*** at paras 85-86; ***Western Canadian Shopping Centres Inc v Dutton***, 2001 SCC 46 at para 38. The plaintiff also provided numerous affidavits from proposed class members.

[109] The Government disagrees with this characterization on the basis that the proposed class definition fails to identify individuals with a potential claim for relief, define the parameters of the lawsuit so as to identify individuals who are bound by the result, and describe who is entitled to notice of the action: ***Sun-Rype Products Ltd v Archer Daniels Midland Company***, 2013 SCC 58 at para 57.

[110] Specifically, the Government contends that informed consent is a legal concept that would require a trial and individual assessments. Therefore, it is inappropriate to have a class definition for which a trial would be needed to determine membership, as was the case in ***KO v British Columbia (Ministry of Health)***, 2022 BCSC 573, aff'd 2023 BCCA 289 at para 49. As such, it would be impossible for a class member to self-identify.

1. Assessment

[111] I agree with Alberta that the proposed class would not be appropriate, as it presumes the result of the action. The phrase "without their proper and informed consent" is particularly problematic as it embeds a question of mixed fact and law that would make it difficult to determine who is entitled to notice, and who would be bound by the result.

[112] However, this is not fatal to the application as the class definition could be amended to refer to those women who were sterilized in a public hospital or clinic between 1972 and 2018, and who believe that they did not consent to the sterilization.

C. Common issues

[113] To satisfy this criterion, the claims of prospective class members must raise at least one common issue. "The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis": ***Western Canadian Shopping Centres*** at para 39. A "common issue" must form a substantial ingredient of each person's claim and be necessary to its resolution: ***Western Canadian Shopping Centres*** at para 39. Common issues need not predominate over individual issues: ***Bruno*** at para 102; ***Vivendi Canada Inc v Dell'Aniello***, 2014 SCC 1 at para 45.

[114] Courts have endorsed a pragmatic approach and have stated that certification applicants should be "afforded a degree of latitude in the nature and quality of evidence adduced...in respect of issues such as the...common issues to be tried": ***Willott v Northwynd Resort Properties Ltd***, 2021 ABQB 747 at para 34.

[115] The plaintiff takes the position that she has provided affidavit evidence, expert reports, government investigations, public and media reports, and academic research to create "some basis in fact" for the proposed common issues. The Supreme Court of Canada has, in cases alleging anti-Indigenous discrimination, taken judicial notice of colonialism to provide context

for understanding claims and has relied upon academic and statistical studies to support an inference of discrimination on the merits: ***R v Ipeelee***, 2012 SCC 13 at paras 60 and 62.

[116] In its materials, the plaintiff proposed five common issues:

> (a) By its jurisdiction, funding, oversight and control of Alberta Health Services, and its predecessors, did the Defendant breach a duty of care it owed to the class to protect them from coerced sterilizations?
>
> (b) By its jurisdiction, funding, oversight and/or control of Alberta Health Services, and its predecessors, did the Defendant breach the class' rights as enshrined in and guaranteed by sections 7 and/or 15 of the *Charter*?
>
> (c) If the answer to any of common issues (a) or (b) is "yes", can the Court make an aggregate assessment of the damages suffered by all class members as part of the common issues trial?
>
> (d) If the answer to any of common issues (a) or (b) is "yes", is the Defendant guilty of conduct that justifies an award of punitive damages?
>
> (e) If the answer to common issue (d) is "yes", what amount of punitive damages ought to be awarded?

[117] Given that these issues focus on the defendant's common misconduct, the plaintiff contends that these are all suitable for certification because they can be decided without individualized inquiries into the class members' circumstances: ***Rumley*** at para 30. The class members are all interested in whether the Crown owed a duty of care to them. The plaintiff pointed to several cases where negligence common issues and *Charter* common issues have been certified: see ***Rumley***; ***Tippett v Canada***, 2019 FC 869; ***Brake v Canada (Attorney General)***, 2019 FCA 274; ***Brazeau v Attorney General (Canada)***, 2016 ONSC 7836.

[118] The remaining proposed common issue is regarding damages. Ms. Cardinal argues that this is common to the class and should be certified. In terms of aggregate damages, the Court can make this type of award: *CPA* at s 30. Additionally, aggregate damages have been certified in class proceedings previously: see ***Brake***; ***Brazeau***; ***Paradis Honey Ltd v Canada***, 2017 FC 199. In terms of punitive damages, common issues have also been certified because these damages are based on the defendant's conduct and do not require the class members to provide individual evidence: ***Good v Toronto (Police Services Board)***, 2016 ONCA 250 at para 80; ***Rumley*** at para 34.

[119] Alberta argues that there are no common issues to be tried as the legal issues do not arise from common facts. The allegations span many years and cover numerous geographical areas. During those years, there have been numerous changes to the legislation and structure of healthcare. This would create a situation where the class action could become too large and unwieldly: ***VLM v Dominey Estate***, 2023 ABCA 261 at para 38 ("***VLM***").

[120] Alberta states that the claims lack a substantial common ingredient and there is no policy of widespread application that can be attributed to the Government. It also argues that the plaintiff has made bald allegations that are unsupported by the evidence.

[121] In terms of damages, Alberta argues that a determination of harm will require proof of the individual harm and there is no aggregate that can be applied to the proposed class in this case. It

also expresses concerns with the expert opinion evidence upon which the plaintiff relies to prove aggregate damages.

1. Assessment

[122] The primary purpose of identifying common issues is procedural efficiency. That is, to hive off issues of fact and law that can fairly be tried together in a common issues trial. By doing so in a class proceeding, the litigants and the Court should be able to save time and resources by leaving only individual issues to be determined in subsequent proceedings.

[123] A listing of common issues that basically recites the constituent elements of a claim in negligence or breach of *Charter* rights may sometimes be sufficient for certification, particularly if the essential facts underlying the claims are known. For example, in ***VLM***, a claim for sexual abuse of incarcerated youth at a correctional facility was advanced. The facility was operated by Alberta; the alleged abuser was a priest employed by the Catholic Diocese and the time of that employment was not in issue.

[124] Our Court of Appeal found that the class action should have been certified notwithstanding the highly personal nature of sexual violence. In doing so, it identified several factual issues that could usefully be dealt with in a common issues trial, such as the layout of the correctional facility. It also found that a common issue of mixed fact and law could be tried - the relationship between the three defendants (Alberta, the Diocese, and the priest), and that in that context, the common issue of duty of care and breach of standard of care could also be identified.

[125] The claim before me is far more complex.

[126] The number of potential claimants remains to be seen. To date, eight individuals have self-identified, but the claim period covers 46 years and the entire province. The statutory regime under which health services were provided has changed over the years, as has the organizational structure of Alberta Health Services and its predecessors. So too have hospital boards and governance of denominational and non-denominational hospitals. The CPSA's role in governing the ethical practices of their members during the claims period was largely unexplored in argument but might well have been a central component of a common issues trial if one were to be held.

[127] As discussed, one theory of proximity advanced by the plaintiff and the proposed class members posits that the number of Indigenous women who were sterilized under the authorization of the Eugenics Board was disproportionately high relative to the general population. They allege that disproportionately high numbers of sterilizations continued to take place after 1972. Consequently, it was not enough that Alberta repealed the *Sexual Sterilization Act*, but there was a duty owed to Indigenous women to take additional measures to combat the culture of racism among medical practitioners. The materials provided by the plaintiff in support of such contentions is of questionable evidentiary value aside from showing that there is a general concern over reports of coerced sterilization - something that tends to support the belief of the prospective class members that they were victimized. Much historical ground would have to be covered at trial if the action was to be certified. Some could be dealt with as common issues, leaving the circumstances of each individual sterilization claim to be litigated separately.

[128] At a minimum, the following common issues would need to be dealt with at the common issues trial:

(1) What was the legal and functional relationship between the Government, Alberta Health Services and its predecessors, hospital boards, physicians, and patients between 1972 and 2018?

(2) Were Indigenous women disproportionately subject to sterilization under the authority of the Eugenics Board prior to 1972, and if so, why?

(3) Were Indigenous women disproportionately subject to sexual sterilization after 1972, and when the *Charter* was enacted in 1982? If so, why?

(4) What measures, if any, were taken by Alberta over the claim period to ensure that sterilizations were only to be performed with the informed consent of the patient?

(5) What measures were taken by Alberta, if any, over the claim period, to ensure that sterilization of Indigenous women would only be performed with the patient's informed consent?

(6) What measures were taken by Alberta Health Services and its predecessors, hospital boards, and the CPSA to ensure that medical procedures, including tubal ligations, would only be performed with the informed consent of the patient, including Indigenous patients?

(7) Did Alberta owe a private duty of care to Indigenous women to protect them against being subjected to sterilization. without their informed consent?

(8) Did Alberta's standard of care vary across the province? If so, did the Alberta breach the requisite standard of care across the province or in any specific region?

[129] Had a private duty of care or *Charter* breach been found, I would have required further submissions from the parties on these and other potential common issues (including aggregate damages). I would not have certified a class proceeding based on the common issues proposed by the plaintiff.

D. Preferable procedure

[130] Under this criterion, a class proceeding must be the preferable procedure for the fair and efficient resolution of the common issues. It must also be preferable to any other reasonably available process: ***Setoguchi*** at para 63. This comparative exercise requires courts to consider three principal goals: judicial economy, behaviour modification and access to justice: ***Hollick*** at para 27. However, this does not mean that the plaintiff needs to address every conceivable non-litigation option to establish that a class action proceeding would be preferable: ***AIC Limited v Fischer***, 2013 SCC 69 at para 49.

[131] The plaintiff argues that a class proceeding is the only realistic means of resolving the claims. The proposed class is very vulnerable and faces significant barriers to access to justice. A class proceeding would alleviate some of these barriers and give a vulnerable group of people some means to achieve a remedy: ***VLM*** at para 42.

[132] Individual actions are nearly economically impossible because the cost of litigation. A class proceeding is the only way to further the goals of judicial economy and efficiency because dozens of individual proceedings dealing with these questions would strain scarce judicial resources. There is also a concern that there could be conflicting judicial decisions. A class

action proceeding will help "avoid duplication of fact-finding or legal analysis": ***Western Canadian Shopping Centres*** at para 39.

[133] The plaintiff contends that not only is a class proceeding the preferable procedure in these circumstances, but it is also the superior method.

[134] Alberta argues that the plaintiff has not proven that a class proceeding would be more effective than an individual proceeding. The claim is incredibly broad, and there is no single course of conduct that has given rise to the alleged breaches: ***Cirillo v Ontario***, 2021 ONCA 353, application for leave to appeal refused, 2022 CanLII 10377 (SCC) at para 65. A class proceeding would not be fair or manageable, nor would it serve the objectives of judicial economy or access to justice: ***KO*** at paras 56-57. As such, the Government opposes certification on the basis that a class proceeding is not the preferable means of resolving issues.

1. Assessment

[135] Because of the extremely broad nature of this claim and the absence of any single course of conduct by the Government that gives rise to a *Charter* breach or action in negligence, this action would be difficult, if not impossible to manage in a fair and efficient manner. That difficulty would be magnified under a class proceeding because of the novelty of the claim, coupled with its geographical, temporal and organizational scope. Individual trials would face similar obstacles, but there would at least be an opportunity to evaluate the role of Alberta in the context of a single set of facts, and from that, findings of precedential value could assist in resolving similar claims elsewhere in the province. However, pursuing redress through individual trials would be expensive and a potential barrier to access to justice for those who wish to place blame at the feet of the Government rather than their treating physicians.

[136] I would not have denied the application because of preferability alone, but I would have expressly left the door open for certification to be revisited during case management.

E. Is the plaintiff a suitable representative plaintiff?

[137] Generally, a suitable plaintiff is one who will fairly and adequately represent the interests of the class, has produced a litigation plan, and does not have an interest that conflicts with other class members in terms of common issues: *CPA* at s 5(1)(e). The representative plaintiff need not be "typical" or the "best" possible representative: ***Ayrton v PRL Financial (Alta) Ltd***, 2006 ABCA 88 at para 16.

[138] Ms. Cardinal's counsel argues that she adequately represents the interests of the entire class and has been involved in this litigation since the beginning. While she is not a mirror of the entire class, she can represent the class's interests fairly. There are no conflicts of interest, and she has presented a litigation plan that represents what has worked in the past. While plaintiff's counsel acknowledges that the litigation plan is a work in progress, they argue that it is sufficient to move forward at this stage and the Government has not provided a better alternative.

[139] The Government argues that Ms. Cardinal is not an appropriate representative plaintiff. For one, she underwent a sterilization roughly five years prior to the *Charter*, and since the *Charter* does not apply retroactively, she cannot personally advance the proposed common issues related to the *Charter*. The Government acknowledges that a representative plaintiff does not need to be tied to each cause of action but takes the position that there are other individuals who would be better representative plaintiffs in this action than Ms. Cardinal.

[140] Additionally, the Government argues that the litigation plan contains deficiencies that must be addressed if this action is certified.

1. Assessment

[141] I am satisfied that Ms. Cardinal would be a suitable representative plaintiff. She has no apparent conflict of interest and has demonstrated a willingness to participate in the litigation to date.

[142] For reasons explained earlier, the complexity of this claim would have necessitated extensive case management. The litigation plan proposed does not reflect or accommodate that challenge. I would have directed the plaintiff to present a suitably detailed plan for consideration of the defendant and ultimate review by the Court. Certification would have been subject to such a condition.

V. Conclusion

[143] I find it plain and obvious that the claim against Alberta has no prospect for success. The assertion of a private duty of care under the law of negligence is not supported by material facts. The claim seeks to have the court impose a duty on Alberta to have taken actions during the claims period under the common law of negligence. However, I find in this case that there is no positive statutory duty to act, a lack of a close and direct relationship of proximity, and no case authority which would support such a duty being imposed.

[144] The application is dismissed.

[145] Should the Respondent decide to seek costs it may do so within thirty days of this decision by way of written submissions, not to exceed 4 pages exclusive of authorities. The Applicant will have 14 days thereafter to reply, with the same page limit.

Heard on the 20th and 21st days of January, 2025.
Further submissions heard on the 13th of February, 2025.
Dated at the City of Calgary, Alberta this 7th day of May, 2025.

R.A. Neufeld
J.C.K.B.A.

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