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Docket: CI 18-01-15633
(Winnipeg Centre)
Indexed as: Boucher et al. v.
The Government of Manitoba et al.
Cited as: 2023 MBKB 182

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

STANLEY BOUCHER,	)	William G. Percy
PETER PAUL CHARTRAND and	)	Israel A. Ludwig
RUTH ESTER CHARTRAND,	)	Wayne M. Onchulenko
plaintiffs,	)	Alexander Krush
- and -	)	Deborah A. Yeboah
	)	Adam Kaplan (Articling Student-At-Law)
	)	for the plaintiffs
	)	
JOHN DOE, MARY ROE, and	)	Jim R. Koch
THE GOVERNMENT OF MANITOBA,	)	Lisa D. Y. Cupples
	)	Coral D. Lang
	)	for the defendants
	)	
	)	Judgment Delivered:
defendants.	)	December 12, 2023

GRAMMOND J.

INTRODUCTION

[1] The plaintiffs seek an order certifying this action as a class proceeding and appointing the plaintiff Ruth Ester Chartrand as the representative plaintiff of the class

pursuant to ***The Class Proceedings Act***, C.C.S.M. c. C130 ("***Act***"). The defendants opposed the certification request.

[2] The plaintiffs alleged that the proposed class, comprised of Indigenous students, suffered mental, psychological, physical, sexual, emotional, verbal, spiritual, linguistic and/or cultural abuse at schools in Manitoba, for which the defendant the Government of Manitoba (the "Provincial Government") is liable.

[3] The plaintiffs argued that neither the Indian Residential Schools[1] or Federal Indian Day School[2] Settlement Agreements addressed abuses suffered by individuals who attended schools run by the Provincial Government. The plaintiffs alleged that "Provincial Day Schools" were, at least in part, regulated, funded, controlled, maintained and/or managed by the Provincial Government.

THE CERTIFICATION CRITERIA

[4] To decide the plaintiffs' motion, I must determine whether the certification criteria set out in s. 4 of the ***Act*** have been satisfied, as follows:

> **Certification of class proceeding**
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> 4 The court must certify a proceeding as a class proceeding on a motion under section 2 or 3 if
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> (a) the pleadings disclose a cause of action;
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> (b) there is an identifiable class of two or more persons;
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> (c) the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members;
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> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues; and

[1] The Indian Residential Schools Settlement Agreement issued on March 8, 2006.
[2] The Federal Indian Day School Settlement Agreement issued on May 13, 2019.

(e) there is a person who is prepared to act as the representative plaintiff who

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the class and of notifying class members of the class proceeding, and

(iii) does not have, on the common issues, an interest that conflicts with the interests of other class members.

[5] I must also consider s. 7 of the ***Act***, which provides:

Certain matters not bar to certification

7 The court must not refuse to certify a proceeding as a class proceeding by reason only of one or more of the following:

(a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;

(b) the relief claimed relates to separate contracts involving different class members;

(c) different remedies are sought for different class members;

(d) the number of class members or the identity of each class member is not ascertained or may not be ascertainable;

(e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

[6] In ***Hollick v. Toronto (City)***, 2001 SCC 68, the court set out general principles surrounding the certification of class proceedings, including:

a) class proceedings legislation should not be interpreted in an overly restrictive manner, and should be construed generously to realize its

underlying goals, including judicial economy[3], access to justice, and behaviour modification (at paras. 14 and 15);

b) a certification motion focuses upon the form of the action, in terms of whether it is appropriately prosecuted as a class action, and not on whether the claim is likely to succeed (at para. 16); and

c) the proposed representative of the class must show "some basis in fact" for each of the certification requirements (at para. 25).

[7] In ***Walls et al. v. Bayer Inc.***, 2005 MBQB 3[4], the court stated that the evidentiary threshold for meeting the statutory criteria is low (at para. 19), that the court must fulfill a gatekeeper function, and that it must consider the evidence in light of the statutory criteria (at para. 22). In addition, the court should consider the form and procedure of the action, but not its substance or merits (at para. 22).

[8] In ***Pro-Sys Consultants Ltd. v. Microsoft Corporation***, 2013 SCC 57, the court stated:

> [100] The *Hollick* standard of proof asks not whether there is some basis in fact for the claim itself, but rather whether there is some basis in fact which establishes each of the individual certification requirements. McLachlin C.J. did, however, note in *Hollick* that evidence has a role to play in the certification process … [and] that "… the class representative will have to establish an evidentiary basis for certification."…
>
> …
>
> [104] … there is limited utility in trying to define "some basis in fact" in the abstract. Each case must be decided on its own facts. There must be sufficient facts to satisfy the applications judge that the conditions for certification have been met to a degree that should allow for the matter to proceed on a class basis without

[3] More particularly, the court stated at para. 15 that "… by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis."
[4] Affirmed 2005 MBCA 93, leave to appeal to SCC refused, [2005] S.C.C.A. No. 409 (QL).

> foundering at the merits stage by reason of the requirements of s. 4(1) of the *CPA* not having been met.

[9] In ***Anderson et al. v. Manitoba et al.***, 2015 MBCA 123, the court stated that "[t]he certification of an action is an interlocutory, procedural step and does not predict the success of the final action; nevertheless, there must be some evidentiary basis upon which a judge can assess the criteria outlined in section 4 of the [***Act***]" (at para. 30).

[10] As McKelvey J. stated in ***Pisclevich v. Manitoba***, 2018 MBQB 52, class proceedings are meant to provide a fair and efficient resolution of common issues of fact and law, as well as fair compensation for all, while avoiding a multiplicity of similar actions that could lead to inconsistent results (at para. 7). McKelvey J. also stated that:

> [8] For an action to be certified as a class proceeding, it is necessary that there be a cause of action that is shared by an identifiable class from which common issues arise: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 at paras. 38-42. It is also important to remember that on a motion such as this, the question is not whether the plaintiffs' claims are likely to be successful on the merits. The important factor is whether the claims can appropriately be brought as a class proceeding. In essence, the purpose of a certification motion is to determine how the litigation will transpire. Indeed, the law does not impose an onerous burden on an applicant at the certification stage. There need only be the establishment of a "prima facie case" or "arguable case".

[11] To summarize, and as I stated in ***Weremy v. The Government of Manitoba***, 2020 MBQB 85, a certification motion is, in essence, a screening mechanism to determine whether a claim should proceed as a class action.

[12] I will add that I have decided this motion on the basis of the evidence before me and the law as it exists at present. The plaintiffs' counsel made submissions on the importance of reconciliation efforts with Indigenous people, and the Provincial Government's publicly stated commitment to that very important initiative, including the

enactment of ***The Path to Reconciliation Act***, C.C.S.M. c. R30.5. With the greatest of respect to the plaintiffs, the affiants, and the putative class members, the importance of reconciliation and the recognition of abuses suffered by Indigenous people, while sacrosanct, do not relax either the certification requirements set out in the ***Act*** or the degree of rigour that I must apply to decide whether this action should be certified as a class action. In other words, the importance of reconciliation does not alter the legal framework pursuant to which I must decide, and have decided, this procedural motion.

[13] The defendants acknowledged that the re-amended statement of claim (the "Claim") discloses a cause of action in assault, battery, sexual assault, and sexual battery, and that the plaintiff Ruth Ester Chartrand is an acceptable representative plaintiff. I will address each of the section 4 criteria, however, as follows.

DOES THE CLAIM DISCLOSE A CAUSE OF ACTION?

[14] In ***Soldier v. Canada (Attorney General)***, 2009 MBCA 12, the court stated:

> [42] All allegations of fact in the statement of claim, unless patently ridiculous or incapable of proof, must be accepted as proved. The statement of claim must be read as generously as possible with a view to accommodating any inadequacies in the allegations due to drafting. Evidence is not admissible on the question of whether there is a cause of action aside from the pleadings themselves. … While that is a low standard, there must be some air of reality to the cause of action. It cannot be entirely speculative.

[15] In ***Pro-Sys***, the court confirmed that a claim discloses a cause of action unless, assuming all facts pleaded to be true, it is plain and obvious that the claim cannot succeed.

[16] In this case, the plaintiffs have pleaded the following causes of action:

a) assault and battery;

b) sexual assault and sexual battery;

c) negligence;

d) breaches of Indigenous rights, the ***Indian Act***, R.S.C., 1985, c. I-5, and fiduciary duty;

e) loss of language and loss of culture; and

f) breaches of ss. 7, 12 and 15 of ***The Charter of Rights and Freedoms***.

[17] The Provincial Government acknowledged, and I agree, that the essential elements of the causes of action of assault and battery and sexual assault and sexual battery are sufficiently pleaded for the purposes of certification, such that the s. 4(a) criterion is met. Similarly, the Provincial Government has acknowledged that the allegations of vicarious liability for those wrongs are pleaded sufficiently.

[18] I will comment, however, upon the other causes of action as follows.

Negligence

[19] The requirements for a negligence claim are well-established, and include the presence of a duty of care, a breach of the standard of care, and damages caused by the breach.[5] On its face, the Claim in this case reflects those bare elements.

[20] Having said that, and as the Provincial Government submitted, the Claim does not reflect any material facts[6] that underlie the plaintiffs' negligence claim aside from the particulars of alleged abuses suffered by each of the named plaintiffs, and a series of alleged breaches of the standard of care.

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[5] ***1688782 Ontario Inc. v. Maple Leaf Foods Inc.***, 2020 SCC 35, at para. 18.

[6] Court of King's Bench Rule 25.06(1) provides that every pleading shall contain a concise statement of the material facts on which the party relies for a claim.

[21] Having said that, given the low threshold that applies to this aspect of certification, and the generous approach that should be taken, I am satisfied that the Claim as filed reflects a cause of action in negligence.

Breach of Indigenous Rights, Breach of Fiduciary Duty, and the Indian Act

[22] The plaintiffs pointed to several cases including ***Grassy Narrows First Nation v. Ontario (Natural Resources)***, 2014 SCC 48, where the court stated that when a provincial government exercises Crown power, it must do so in conformity with the honour of the Crown, and subject to the fiduciary duties that lie upon the Crown when dealing with Indigenous interests. The plaintiffs submitted that in this case, the exercise of the Provincial Government's power to regulate the education of Indigenous students would necessarily entail a non-delegable fiduciary duty towards those students to take steps to monitor, influence, safeguard, secure and otherwise protect the vital interests of the class.

[23] The plaintiffs also relied upon ***Alberta v. Elder Advocates of Alberta Society***, 2011 SCC 24, where the court stated that an *ad hoc* fiduciary duty will arise where there is: an undertaking by an alleged fiduciary to act in the best interests of an alleged beneficiary, a defined person or class of persons vulnerable to the fiduciary's control, and a legal or a substantial practical interest of the beneficiary that stands to be adversely effected by the alleged fiduciary's exercise of discretion or control.

[24] The plaintiffs argued that these requirements are met in this case, such that the Provincial Government owed a fiduciary duty to Indigenous students at school. The plaintiffs also argued that once a fiduciary duty was established, there was also an

obligation to preserve the safety, bodily autonomy, security, language, culture and spirituality of the Indigenous students.

[25] The Provincial Government argued that although there is a fiduciary relationship between the Indigenous community and the Provincial Government as a whole, a fiduciary duty could not have arisen in this case, because there is no allegation that it undertook to act in the best interests of Indigenous students to the exclusion of all others. Moreover, there is no authority for the proposition that the Provincial Government's role in public education rises to the level of a fiduciary duty. As such, the Claim for breach of fiduciary duty cannot possibly succeed.

[26] The Provincial Government pointed to ***Flette et al. v. The Government of Manitoba et al.***, 2022 MBQB 104, where Edmond J. (as he then was) considered a claim for breach of fiduciary duty in the context of funding child welfare and protection in Manitoba. He concluded that although a fiduciary relationship existed between the Provincial Government and First Nations communities, no such relationship necessarily existed in the context of funding child welfare and protection in Manitoba. He also noted that, as stated in ***Alberta***, an undertaking to act in an alleged beneficiary's interests will typically be lacking where a government exercises its power or discretion.

[27] Edmond J. concluded that imposing a fiduciary relationship upon the Provincial Government was inherently at odds with its duty to act in the best interests of society as a whole, and that if he concluded otherwise, all decisions relating to the use of public resources could be challenged by a vulnerable person who may be adversely affected by

a government decision. In other words, he was not satisfied on the facts of the case that there was a limited or special circumstance where a fiduciary duty arises.

[28] Although Edmond J.'s conclusions may apply to this case, I am mindful of my role on this motion, and that certification ought not to be denied unless it is plain and obvious that a cause of action will not succeed. Given that a generous approach ought to be taken on a certification motion, and the low threshold that applies, I have concluded that breach of fiduciary duty (whether a non-delegable duty to Indigenous people or an *ad hoc* duty) is pleaded sufficiently in the Claim. This is so despite the fact that, again, the material facts recited in the Claim are lacking and no specific particulars of the alleged breaches of fiduciary duty or Indigenous rights are provided.

[29] I am not prepared to certify, however, a claim for a breach of the ***Indian Act***, because although the Claim includes a few vague references to breaches of statutory duties, in the prayer for relief and a list of the damages alleged to have been suffered, the body of the Claim reflects no reference to the nature of the statutory breaches, or to the provisions in the ***Indian Act*** upon which the plaintiffs rely[7].

Loss of Language and Culture

[30] The plaintiffs acknowledged that no Canadian court has yet recognized either loss of language or loss of culture as a recoverable tort. Having said that, in ***Brown v. Canada (Attorney General)***, 2017 ONSC 251, the court stated that the Government of "…Canada had a common law duty of care to take reasonable steps to prevent on-reserve Indian children in Ontario, who had been placed in the care of non-[A]boriginal

[7] Pursuant to Rule 25.06(3), where a claim is founded on an act, the specific sections relied upon shall be pleaded.

foster or adoptive parents, from losing their [A]boriginal identity" (at para. 85). In addition, in ***McLean v. Canada***, 2019 FC 1075, the court-approved settlement included compensation for denigration for the use of Indigenous languages and culture in the school setting.

[31] The Provincial Government acknowledged that s. 35 of the ***Constitution Act, 1982*** provides constitutional protection for aboriginal language rights, and that this cause of action can be advanced, in theory. In this case, however, the Provincial Government argued that on the face of the Claim, there are no material facts pertaining to the plaintiffs that underlie the cause of action, to enable an assessment of whether it can succeed at trial.

[32] I agree that the Claim is silent as to material facts that relate to any of the three plaintiffs regarding a loss of language or culture. In fact, the Claim contains no material facts that pertain to the plaintiffs' Indigenous languages or cultures, aside from describing them as Métis, and there is no allegation that any of the plaintiffs lost their language or culture at school. Instead, the Claim reflects that "class members" were exposed to a program of denigration, abuse, and violence for speaking their language and practicing their culture. In addition, two of the six affiants deposed that their experiences at school caused them to lose their culture and language.

[33] Again, for the purposes of this motion, and only because of the low threshold that applies, I am satisfied that the Claim reflects a sufficient basis for the unrecognized torts of loss of language and loss of culture. In other words, although the material facts underlying these causes of action have not been pleaded, it is not plain and obvious that

the claims cannot succeed for the purposes of this motion. In addition, I accept that the allegations of vicarious liability for those wrongs are pleaded sufficiently for certification purposes.

Charter Breaches

[34] Sections 7, 12 and 15 of the ***Charter*** relate to, respectively:

a) life, liberty and security of the person;

b) the right not to be subjected to any cruel and unusual treatment or punishment; and

c) the right to the equal protection and equal benefit of the law, without discrimination, including on the basis of race, national or ethnic origin, colour, or other identifying characteristics.

[35] The Claim reflects in the prayer for relief a request for a declaration that the defendants violated the plaintiffs' and class members' rights under the ***Charter***. In addition, the Claim reflects that the Provincial Government owed duties under the ***Charter*** and breached those duties due to the abuses suffered by the class. In other words, the Claim reflects only very general material facts that underlie the alleged ***Charter*** breaches and all of those facts overlap with either the allegations of assault, battery, sexual assault, and sexual battery or loss of language and loss of culture.

[36] In ***Johnson v. MacDougall***, 2019 BCSC 743 (affirmed BCCA, leave to SCC denied) the court considered a motion to strike a claim under the ***Charter*** in an action that raised a current claim for sexual abuse. The court stated:

> [51] In the present case, the pleaded consequences of the sexual assaults are the same as the *Charter* breaches. The impacts upon the plaintiffs of the alleged wrongs do not differ as between the tort and Charter wrongs.

…

> [52] I agree with the applicants that in addition to the compensatory aspect of the relief sought for both tort and *Charter* breach, the aspect of vindication and deterrence, can be found within tort damages, if awarded.

[37] The plaintiffs submitted that there are no adequate alternative causes of action or remedies in tort covering s. 15 of the ***Charter***, which relates to discrimination.

[38] Pursuant to the principles articulated in ***Johnson***, I agree with the Provincial Government that even if the deficiencies in the ***Charter*** claims as pleaded were addressed, those claims are duplicative and unnecessary, and should not be certified. More particularly, the pleaded consequences of the ***Charter*** claims, including under s. 15, are the same as the alleged wrongs and damages sought in tort.

IS THERE AN IDENTIFIABLE CLASS OF TWO OR MORE PERSONS?

[39] Section 4(b) of the ***Act*** requires that there be "an identifiable class" in a class action, which serves three purposes, described in ***Western Canadian Shopping Centres Inc. v. Dutton***, 2001 SCC 46, as follows:

> 38 … First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria.
>
> [emphasis added]
> [citations omitted]

[40] In addition, as Chief Justice McLachlin stated in ***Hollick***:

> 17 … The … question, therefore, is whether there is an identifiable class. In my view, there is. The appellant has defined the class by reference to objective criteria; a person is a member of the class if he or she owned or occupied property inside a specified area within a specified period of time. Whether a given person is a member of the class can be determined without reference to the merits of the action. While the appellant has not named every member of the class, it is clear that the class is bounded (that is, not unlimited). There is, therefore, an identifiable class …
>
> [emphasis added]
>
> …
>
> 21 ... There must be some showing, … that the class is not unnecessarily broad — that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended.
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> [emphasis in original]

[41] I am also mindful of s. 7(d) of the ***Act***, and more specifically, that I must not refuse to certify a class proceeding because the number of class members or the identity of each class member is not ascertained or may not be ascertainable.

[42] In ***Weremy***, I stated that the class definition must be connected to the common issues raised by the causes of action asserted, without a determination of the merits of the claims. Moreover, a proposed class will not be considered overly broad because it may include persons that ultimately will not be found to have a claim against the defendant.

[43] In the notice of motion filed on November 15, 2021, the plaintiffs proposed the following class definition:

> All Indigenous persons who attended Provincial Day schools and suffered abuse, including mental, physical, sexual, emotional, verbal, spiritual or cultural abuse, from the employees and/or agents of the Day Schools.

and the following definition of a "Provincial Day School":

> A school that was, at least in part, funded, controlled and managed by the Province of Manitoba where Indigenous children were made to attend; including in this definition [a list of 26 specific schools].

[44] In the motion brief filed on July 28, 2022, the plaintiffs proposed the following class definition:

> All Indigenous Children who attended a Day School.

and the following definition of a "Provincial Day School":

> [Schools which] were, at least in part, regulated, funded, controlled, maintained, and/or managed by the Province of Manitoba. Their pupils included Indigenous Children".

[45] In the Claim (and more specifically in amendments provided to the court on September 27, 2022), the plaintiffs proposed the following class definition:

> The "Proposed Class" is composed of all Indigenous children who attended a Day School as defined [below].

and the following definition of "Provincial Day Schools":

> [S]chools, at least in part, funded, controlled, and managed by The Province of Manitoba. Indigenous children were made to attend the said schools.

[46] In their reply motion brief filed on April 27, 2023, the plaintiffs stated:

> [The Provincial Government]'s Brief erroneously suggests that the current class definition is "all Indigenous children who attended a Day School"; rather, the defining feature of the class is that they have suffered some abuse, including mental, physical, sexual, emotional, verbal, spiritual, or cultural abuse. An Indigenous child who merely attended a Day School but suffered no abuse is not included in the class.

[47] Taking into account these various definitions and having heard from counsel in oral submissions, I have concluded that the plaintiffs actually sought to define the class as follows:

> All Indigenous students who attended Provincial Day School[8] in Manitoba (excluding federal residential or day schools) and were alive as of August 5, 2016[9].

[48] The plaintiffs filed as evidence in support of certification affidavits from six individuals who attended different schools in Manitoba for distinct time periods that span from 1950 to 1974. Each of the affiants deposed that they were abused[10] at school, whether physically, sexually, emotionally, or otherwise. There are no exhibits attached to any of the affidavits.

[49] The Provincial Government raised the following arguments relative to the scope of the proposed class definition:

a) although the putative class might share a common cause of action, they attended different schools in different school districts, in different time periods;

b) the putative class alleged different forms of abuse, perpetrated by different alleged tortfeasors, who had different relationships to the Provincial Government;

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[8] I will comment upon the definition of "Provincial Day School" below.

[9] Counsel advised at the hearing that although they did not identify a start date for the class definition, the proposed end date of class membership was people who were alive on August 5, 2016 (two years before the claim was filed on August 5, 2018).

[10] Counsel acknowledged, and I accept, that in this case as in either of the federal actions, any student who was not abused would not have a claim. Having said that, any criteria of "abuse" in the class definition is improper because it is not an objective criteria and depends on the outcome of the litigation, as referenced in ***Western***, ***Hollick*** and ***Weremy***.

c) not all of the affiants suggested that the abuse they suffered was motivated by a racial animus;

d) there is no evidence correlating the alleged abuse to specific actions taken by the Provincial Government;

e) the affiants attested to a broad belief that the Provincial Government had authority over the schools, but provided no details; and

f) there is no evidence that any of the affiants reported abuse to anyone, at any time.

[50] In other words, the Provincial Government submitted that the plaintiffs have not advanced any criteria that would allow for a determination of what schools may be included within the scope of the class definition[11]. The Provincial Government argued that the plaintiffs intend to include in the class definition every public school that has existed in Manitoba (except federal residential or day schools), which is a very broad scope, because it would necessarily include all schools that have ever operated within the geographical limits of the Province of Manitoba, for all time periods, regardless of whether there were issues at the schools. In addition, the class members would include virtually every person who attended public school in Manitoba at any time, and identifies as Indigenous.

[51] I have considered the various definitions of "Provincial Day School" put forward by the plaintiffs. In the notice of motion the plaintiffs provided a list of 26 schools at issue,

[11] I note that the Provincial Government is responsible for the regulation of private and home schools in Manitoba, in addition to public schools. The plaintiffs have not sought to include either private or home schools in the class definition, and those schools would be excluded from the proposed class.

and in April 2023 they provided a revised list of over 80 schools[12]. The plaintiffs submitted that the lists of schools provided to date are "non-exhaustive", because additional claimants from additional schools have been coming forward regularly and seeking to be added to the proposed class.

[52] The Provincial Government acknowledged, and I accept, that at all material times, legislation was in effect that required school attendance for all Manitoba children under a certain age. Having said that, the evidence before me reflects that, unlike the federal residential and day school systems, the Provincial Government has never owned, managed, or operated schools that were established specifically to provide education to Indigenous children.

[53] Ms. Chartrand acknowledged, on cross-examination, that she attended a public school also attended by non-Indigenous children who lived close to the school. Similarly, another of the affiants, Louise Wilfreda Hourie, deposed that one of the schools she attended was a public school, also attended by non-Metis children.

[54] I reject, therefore, the aspect of the definition of "Provincial Day School" that singles out Indigenous children as being "made to attend", and as such, I reject the use of the phrase "Provincial Day School" within the class definition. Rather, the appropriate term to use is "public school".

[12] The list is attached to the affidavit of a legal assistant, which was filed improperly, after cross-examinations were conducted and without the consent of the defendants or leave of the court. Nevertheless, I have considered the affidavit as evidence in support of the motion. I note, however, that the list includes several schools outside Manitoba and several federally operated schools.

[55] To the extent that a definition of the phrase "public school" is necessary, the appropriate definition is set out in the plaintiffs' motion brief, as follows:

> [Schools that] …were, at least in part, regulated, funded, controlled, maintained, and/or managed by the Province of Manitoba. Their pupils included Indigenous Children.

[56] I agree with the Provincial Government that the plaintiffs seek to include within the class definition every public school that has existed in Manitoba, except federal residential or day schools. Certainly, every public school in Manitoba could have been attended by Indigenous children who would form part of the proposed class in this case. That scope is extremely broad, particularly given that the class period spans well over 100 years.

[57] I note also that the plaintiffs' draft litigation plan defines "class members" as "[a]ll Metis, Inuit, Status Indian, or Non-Status First Nation Children". The plaintiffs have not proposed to define any of those terms more specifically, and have not advanced a position on whether, as suggested by the Provincial Government, a proposed class member could be included by simply identifying as Indigenous. This issue would have to be explored further if the Claim was certified.

[58] The Provincial Government also argued that the proposed end date of the class definition is not appropriate for certification purposes, because the claimants alive as at that date are unknown. In addition, since Manitoba is an opt-out jurisdiction, the full scope of the class would not be known until all potential claimants have come forward and the oldest claimant is identified. The Provincial Government also noted that before 1950, there was no "Proceedings Against the Crown" legislation in place. As such, prior to that date it was more difficult to make a claim against the Provincial Government and

a different legal analysis would have to be conducted than after that legislation was enacted.

[59] I have concluded that the plaintiffs' proposed class definition would include any Indigenous student who ever attended a public school in Manitoba (excluding federal residential schools or day schools) from the establishment of Manitoba as a province until 2016. Construing the applicable legislation generously, I have also concluded that, although the proposed definition contains certain objective criteria (for example, that the schools were in the Province of Manitoba), it is both imprecise and unnecessarily broad, because its membership is not readily definable or discernable as required for certification. In other words, as referenced in ***Hollick***, the class could be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of a proposed common issue. In addition, I have considered whether to allow certification on the condition that the proposed class definition be amended, but I have concluded that I am not in a position to do so given the broad and imprecise evidence before me. Moreover, as set out below, the Claim does not raise a common issue that can be certified.

DO THE CLAIMS OF THE CLASS MEMBERS RAISE A COMMON ISSUE?

[60] The plaintiffs must establish that the claims of class members raise common issues. The plaintiffs have proposed the following common issues relative to the causes of action that I have determined may be certified:

Battery/Assault and Sexual Battery/Assault

a) Are John Doe and Mary Roe liable to the plaintiffs and the class for battery,

assault, sexual battery, and/or sexual assault?

Vicarious Liability

b) Is the Provincial Government, through the establishment, regulation, funding, control, management, and maintenance of schools in Manitoba throughout the class period, vicariously liable for the tortious actions and omissions of John Doe and/or Mary Roe?

Negligence

c) Did the defendants, through the establishment, regulation, funding, control, management, and maintenance of schools in Manitoba throughout the class period owe a duty of care to the class members?

d) Did the defendants, through the establishment, regulation, funding, control, management, and maintenance of schools in Manitoba throughout the class period, breach a duty of care owed by them to the class members?

Breach of Fiduciary Duty

e) Did the defendants, through the establishment, regulation, funding, control, management, and maintenance of schools in Manitoba throughout the class period, breach a fiduciary duty owed by them to the class members? and

Loss of Language and Loss of Culture

f) Are the defendants, through the establishment, regulation, funding, control, management, and maintenance of schools in Manitoba throughout the class period, liable for the class's loss of culture and language?

[61] The plaintiffs also proposed a series of common issues that relate to general damages, specific damages, punitive damages, interest, and the distribution of damages.

[62] The Provincial Government raised the following arguments relative to the proposed common issues that pertain to liability:

a) the majority of the schools attended by proposed class members were operated and controlled by distinct legal entities such as school divisions and school districts, and not by the Provincial Government, so it is not a proper defendant in this matter; and

b) the evidence filed by the plaintiffs does not raise common questions of fact or law that will meaningfully advance the claims of the class members.

[63] The ***Act*** reflects the following definition of "common issues":

> "**common issues**" means
>
> (a) common but not necessarily identical issues of fact, or
>
> (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

[64] In ***Hollick***, the court stated:

> 18 A more difficult question is whether "the claims . . . of the class members raise common issues", as required by s. 5(1)(c) of the *Class Proceedings Act*, 1992. As I wrote in *Western Canadian Shopping Centres*, the underlying question is "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis". Thus an issue will be common "only where its resolution is necessary to the resolution of each class member's claim" (para. 39). Further, an issue will not be "common" in the requisite sense unless the issue is a "substantial . . . ingredient" of each of the class members' claims.

[65] In ***Frohlinger v. Nortel Networks Corporation,*** [2007] O.J. No. 148 (QL), 2007 CanLII 696 (ON SC), the court stated that:

> [25] … the core of a class proceeding is the element of commonality. It is implicit in that concept that the cause of action, the scope of the class, and the

common issues are inextricably inter-related. Indeed, the first three criteria for certification as a class proceeding … may be stated in a single sentence as follows: There must be a cause of action, shared by an identifiable class, from which common issues arise.

[66] In ***Pro-Sys*** the court stated:

[108] In *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, this Court addressed the commonality question, stating that '[t]he underlying question is whether allowing the suit to proceed as a [class action] will avoid duplication of fact-finding or legal analysis' (para. 39). I list the balance of McLachlin C.J.'s instructions, found at paras. 39-40 of that decision:

(1) The commonality question should be approached purposively.

(2) An issue will be 'common' only where its resolution is necessary to the resolution of each class member's claim.

(3) It is not essential that the class members be identically situated *vis-à-vis* the opposing party.

(4) It [is] not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.

(5) Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

…

[110] … In order to establish commonality, evidence that the acts alleged actually occurred is not required. Rather, the factual evidence required at this stage goes only to establishing whether these questions are common to all the class members.

[67] In ***Vivendi Canada Inc. v. Dell'Aniello***, 2014 SCC 1, the court stated:

[44] In *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184, this Court confirmed the principles from *Dutton*. … The Court also stated that a question can remain common even though the answer to the question could be nuanced to reflect individual claims: para. 32.

[45] Having regard to the clarifications provided in *Rumley*, it should be noted that the common success requirement identified in *Dutton* must not be applied inflexibly. A common question can exist even if the answer given to the question might vary from one member of the class to another. Thus, for a question to be

> common, success for one member of the class does not necessarily have to lead to success for all the members. However, success for one member must not result in failure for another.
>
> [46] *Dutton* and *Rumley* therefore establish the principle that a question will be considered common if it can serve to advance the resolution of every class member's claim. As a result, the common question may require nuanced and varied answers based on the situations of individual members. The commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent. It is enough that the answer to the question does not give rise to conflicting interests among the members.

The Provincial Government is not the Proper Defendant

[68] I will comment first upon the Provincial Government's argument that it is not a proper defendant in this matter. Certainly, it is not my role on a certification motion to determine whether the Provincial Government is a proper defendant in this matter, or whether any of its proposed defences have merit. Rather, I must determine whether that question represents a common issue that can be determined at a common issues trial.

[69] The plaintiffs argued that at all material times the Provincial Government had control over public schools, and both the authority and ability to act relative to the abuses suffered by Indigenous students, but failed to do so.

[70] The Provincial Government acknowledged that at all material times:

a) the operation of public schools was governed by legislation;

b) it had a responsibility to provide education for all students in Manitoba if they were not part of a federally run school;

c) it provided funding to public schools in Manitoba; and

d) it controlled the issuance of teaching certificates to teachers in Manitoba.

[71] In addition, the evidence before me reflects that the Provincial Government was responsible for:

a) paying teachers;

b) the provision of operational funding and capital support for public schools;

c) making operational decisions including the duration of the school year, the hours of the school day, and the days of the school week;

d) determining the geographical size of the area from which a public school drew students;

e) overseeing what was taught in public schools;

f) overseeing school districts and school boards, including the right to intercede in their decisions;

g) overseeing inspectors who attended at public schools once or twice per year until 1967, and who had the authority to suspend teaching certificates; and

h) the transportation of students to and from school.

[72] Having said that, the Provincial Government advanced evidence that its role with respect to education in Manitoba has changed over time. More particularly:

a) between 1870 and 1890, a Board of Education comprised of religious representatives was empowered to control schools in Manitoba;

b) from and after 1890:

(1) financial responsibility for public schools in Manitoba was shared between the Provincial Government and various municipalities throughout the province; and

(2) Kindergarten to grade 8 education was organized on the basis of small school districts, each of which had corporate status and were established, reorganized, or dissolved by the local municipal council;

c) from 1911, the school districts were controlled by boards of trustees;

d) from 1952 to 1965, pursuant to legislation, the Provincial Government established and maintained "special schools" in unorganized territories where there was no school district and it was inexpedient to establish one because they were unable to sustain themselves financially[13];

e) in 1959, 2,500 school districts in Manitoba were amalgamated into 47[14] school divisions;

f) from 1959 to 1967, school divisions were responsible for high school education while school districts were responsible for elementary school education. In 1967, school divisions assumed responsibility for both high school and elementary school education;

g) since approximately 1959, school districts and school divisions have been:

(1) established as separate corporate legal entities distinct from the Provincial Government;

(2) controlled by elected school boards of trustees;

(3) responsible for providing schooling to children within a particular geographic region;

[13] In 1965, the special schools became the Frontier School Division.
[14] There have since been further amalgamations and at present there are 37 school divisions in Manitoba.

(4) required to follow the requirements of provincial legislation, with a degree of autonomy regarding the determination of a wide variety of operational matters within public schools; and

(5) responsible for hiring teachers.

[73] The Provincial Government argued that there is no evidence connecting the alleged abuse of Indigenous students to its regulation, funding, control, maintenance and/or management of public schools, including the policies in place at a given time, the training of staff, or any other specific deficiencies. Rather, the plaintiffs appear to make a general allegation that if an abuse was perpetrated as against a student in a Manitoba public school, the Provincial Government is strictly liable for that wrong.

[74] Nevertheless, the Provincial Government advanced evidence regarding the schools attended by the six affiants, including that those schools varied by geographical region, by the responsible school division or district, and by the time period in which they operated. The Provincial Government's evidence also reflects that two of the affiants attended what is now the Prairie Rose School Division, two attended what is now the Frontier School Division, one attended what is now Winnipeg School Division #1, and one of the affiants attended a school for which the Provincial Government cannot find any records.

[75] To determine whether the Provincial Government is a proper defendant in the claims of each of the six affiants, then, the court would have to examine the relationship of the Provincial Government to each school during the material time frame for each affiant, which spans from 1950 to 1974 collectively. More specifically, the court would

have to examine what rules and policies were in place between the Provincial Government and each school at the material time. Three examples of the analysis that would be required are as follows.

[76] The proposed representative plaintiff Ruth Ester Chartrand deposed that she attended Gascon School in Oak Point, Manitoba, from approximately the fall of 1952 to 1960. The Provincial Government's evidence reflects that the School District of Gascon No. 996 was formed some time before 1913, and that on April 1, 1967 it was dissolved and amalgamated into the White Horse Plain School Division No. 20. In 2002, another amalgamation resulted in its inclusion in the Prairie Rose School Division. To determine whether the Provincial Government is a proper defendant in Ms. Chartrand's claim, the court would have to examine the relationship as between it and the Gascon School from 1952 to 1960.

[77] The affiant Nelson Joseph Nepinak deposed that he attended Waterhen School from approximately 1971 to 1974, which was part of the Frontier School Division. The Provincial Government's evidence confirmed these details. To determine whether the Provincial Government is a proper defendant in Mr. Nepinak's claim, the court would have to examine the relationship as between it and Waterhen School from 1971 to 1974.

[78] The affiant Louise Wilfreda Hourie deposed that she attended both St. Laurent School in St. Laurent, Manitoba from 1956 to 1961 and Victoria-Albert School in Winnipeg, Manitoba from 1962 to 1963. The Provincial Government's evidence reflects that the St. Laurent School District No. 1416 was formed in 1895 and was merged with other school districts in 1936 to become the Municipal School District of St. Laurent No. 1416.

On April 1, 1967 it was dissolved and amalgamated into the White Horse Plain School Division No. 20, and was later included in the Prairie Rose School Division. The Provincial Government's evidence also reflects that Victoria-Albert School was and remains part of Winnipeg School Division #1. To determine whether the Provincial Government is a proper defendant in Ms. Hourie's claim, the court would have to examine the relationship as between it and each of St. Laurent School from 1956 to 1961 and Victoria-Albert School from 1962 to 1963.

[79] While there would certainly be some overlap in both evidence and legal concepts relative to the claims of these three affiants, it is difficult to envision how the analyses of their claims would constitute common issues to be decided at a common issues trial, because each of the claims involve different geographical regions, different school districts or divisions, and different time periods. To compound this issue further, as at April 26, 2023, the putative class included over 350 individuals, at over 80 different schools, and was characterized as a list that "continues to grow".

[80] In other words, I am not satisfied that a determination of whether the Provincial Government is a proper defendant in any of Ms. Chartrand's, Mr. Nepinak's, or Ms. Hourie's claims will serve to advance the resolution of the claim of any other proposed class member, let alone every class member. I have concluded, therefore, that the proposed class members' claims do not share a substantial common ingredient because they arose in different geographical regions, different school districts or divisions, and in different time periods. These distinctions would preclude a common issues trial with respect to the question of whether the Provincial Government is a proper defendant in

each matter. Accordingly, the Claim as a whole lacks a sufficient connection to the Provincial Government as a defendant for the purposes of certification, and the common issues trial proposed by the plaintiffs would become a series of individual trials, except to the extent that class members attended the same school or school division at the same time.

[81] These facts are different from the federal residential school and day school claims, where there was no layer of school districts or divisions interceding as between the responsibility of the federal government and the Indigenous students. More specifically, in those cases the schools were established, organized, funded, controlled, and maintained by the Government of Canada pursuant to s. 91(24) of the ***Constitution Act, 1867*** and the ***Indian Act***, and the schools were operated by various religious entities. Having said that, in those cases the plaintiffs alleged that a nationwide policy, The Indian Residential School Policy, applied to the schools, which the court found satisfied the commonality requirement. No such policy of widespread application is in evidence in this case.

Common questions of fact or law

[82] I will now comment upon the issue of whether the evidence filed by the plaintiffs raises common questions of fact or law that will meaningfully advance the claims of the class members.

Assault and battery, Sexual assault and sexual battery, and Vicarious liability

[83] In ***VLM v. Dominey***, 2022 ABQB 299, the court stated:

> [78] The Plaintiff has proposed multiple common issues relating to alleged breaches of duty by the Synod and Alberta, all of which have as their foundation the sexual abuse. … But if common issues are identified on this basis, they would

> only have an appearance of commonality but would not be truly common. This is because each instance of sexual assault is unique. These assaults occurred at different times in different places over the span of many years and the nature of the sexual assaults varies considerably from one claimant to the next.
>
> [79] To establish a breach of duty, each individual prospective class member will need to testify as to his experiences at the EYDC and, more specifically, with respect to any sexual abuse that was perpetrated by Dominey and the circumstances of the assaults. Whether these assaults occurred and, if they did, whether the circumstances of the assaults gave rise to a breach of duty can only be determined after specific findings are made in relation to the individual assaults. In relation to any alleged breach of duty, the Court would be required to examine the conduct of Alberta and the Synod in the context of the specific assaults to determine whether one or both Defendants had taken reasonable steps to protect the specific claimant and whether their actions or lack of action gave rise to a breach of duty.
>
> [80] Simply establishing a basis in fact that sexual abuse occurred does not, on its own, permit common issues that are dependent upon the proof of individual instances of sexual abuse. I conclude that no common issues exist with respect to alleged breaches of duty by Alberta and the Synod.

[84] The Provincial Government submitted that the proposed common issues relating to assault, battery, sexual assault, sexual battery, and vicarious liability cannot be certified because they arise from the underlying alleged assault of each proposed class member, which will require findings for each individual, and for each alleged perpetrator, including their relationship to the Provincial Government. I agree.

[85] I will assume that one or more of the plaintiffs can establish that they were assaulted, whether sexually or otherwise, at school. Unfortunately, however, I cannot see how that finding would inform whether any other class member was assaulted. In other words, success for one plaintiff does not establish success for another plaintiff, even where the alleged perpetrator is the same person. In this case, there would be many alleged perpetrators, and although it is impossible to estimate the number of individuals, there could be hundreds of them.

[86] I appreciate that it is not my role on this motion to assess the merits of the plaintiffs' claims for assault and battery, or sexual assault and sexual battery. Having said that, it is difficult to envision how these individual claims would be argued at a common issues trial, or determined by a common answer, given the geographical differences, the different school divisions or districts involved, and the temporal differences advanced by the proposed class members. The volume and breadth of individual issues is simply too large, and outweighs any advantage that could be obtained at a common issues trial. In other words, the objectives of a class proceeding would not be sufficiently advanced through a common issues trial, and as such, notwithstanding s. 7 of the ***Act***, I have concluded that the claims for assault, battery, sexual assault, and sexual battery are by their nature individual claims that should not be certified.

[87] I will comment upon the law of vicarious liability as follows.

[88] As I stated in ***Weremy***, in the leading case of ***Bazley v. Curry***, 1999 CanLII 692 (SCC), [1999] 2 S.C.R. 534, the court considered the parameters within which vicarious liability could be imposed upon an employer for sexual abuse by an employee of children in his care. The court stated that vicarious liability is "…known as "strict" or "no-fault" liability, because it is imposed in the absence of fault of the employer". At the conclusion of its analysis on this issue, the court stated:

> 46 In summary, the test for vicarious liability for an employee's sexual abuse of a client should focus on whether the employer's enterprise and empowerment of the employee materially increased the risk of the sexual assault and hence the harm. The test must not be applied mechanically, but with a sensitive view to the policy considerations that justify the imposition of vicarious liability — fair and efficient compensation for wrong and deterrence. This requires trial judges to investigate the employee's specific duties and determine whether they gave rise to special opportunities for wrongdoing. Because of the peculiar exercises of power and trust that pervade cases such as child abuse, special attention should

> be paid to the existence of a power or dependency relationship, which on its own often creates a considerable risk of wrongdoing.

[89] In ***Fehringer v. Sun Media Corp.***, [2002] O.J. No. 4110 (QL), 27 C.P.C. (5th) 155, the plaintiff sought to certify as a common issue the following question: "Is the Sun vicariously liable for the actions of Betts?"[15] The court stated:

> 17 … it is simply not possible to make a blanket determination of the liability of any of the defendants without first engaging in an individual examination of the specific events which underlie each member's claim. … What [Betts] may or may not have done in respect of each putative class member, where and in what circumstances … and other like matters would need to be known to determine any liability of Mr. Betts to that individual. … Any conclusion regarding vicarious liability requires an examination of what happened, where it happened, when it happened, the state of the knowledge of the Sun defendants at the time of the occurrence and like matters.

[90] In other words, and as the court stated in ***K.L.B. v. British Columbia***, 2003 SCC 51, the court must examine the nature of the relationship between the alleged tortfeasor and the person against whom liability is sought, as well as whether the assault was sufficiently connected to the perpetrator's assigned tasks that it was a materialization of the risks created by the enterprise.

[91] In ***VLM***, the court stated:

> [81] Vicarious liability is … dependent upon the circumstances of the individual assaults and is not amenable to common issues. For example, the issue of vicarious liability in relation to a sexual assault that took place during a private spiritual or counselling session may be determined quite differently than an assault that took place during a strip search. In the first case the Synod could potentially have some vicarious liability but not Alberta, whereas in the second instance Alberta may have vicarious liability but not the Synod.

[92] In this case, the six affiants deposed that they were assaulted by one or more of staff, teachers, priests, and nuns at school. The plaintiffs argued that to establish

[15] Betts was a former employee of the Sun and was accused of harassment, intimidation and other torts.

vicarious liability, a wrongdoer need not have been an employee of the Provincial Government, and that as stated in ***John Doe (G.E.B. #25) v. The Roman Catholic Episcopal Corporation of St. John's***, 2020 NLCA 27[16], "…wrongdoers who are authorized to carry out activities which benefit an entity, or who work on the account of an entity, whatever their titles or formal status, can attract liability to that entity".

[93] I accept that vicarious liability can extend to relationships other than that of employer and employee, but the law is clear that in each case, the relationship must be examined to determine whether the parties are sufficiently close to justify the imposition of liability. I also accept that whether the Provincial Government was involved in the day-to-day operations of public schools is not the only factor that the court must consider.

[94] I am mindful of the direction in ***Rumley v. British Columbia***, 2001 SCC 69, and in ***Vivendi*** that a common issue can be answered in a nuanced manner. Having said that, the court in ***Rumley*** cautioned, at para. 29, that a court should avoid certification of issues that are common only when stated in the most general terms, because inevitably those issues will break down into individual proceedings.

[95] Here, the plaintiffs seek a finding of vicarious liability for the acts of many individuals, which on its face is broad in scope, and is dependent upon individual findings of fact. The court would have to review and assess the nature of each legal relationship as between an alleged tortfeasor[17] and the Provincial Government, including whether any assaults were sufficiently connected to the individual tortfeasor's assigned tasks that they

[16] Leave to appeal to SCC refused, 2021 CanLII 1097 (SCC).

[17] I accept that a finding of vicarious liability need not depend upon proof and identification of the wrongdoer, or a determination of the status and number of individual perpetrators (***L.R. v. British Columbia***, 1999 BCCA 689).

were a materialization of the risks created by the Provincial Government. These analyses could vary widely, and in my view too widely to be decided as a common issue.

[96] Again, it is not my role on this motion to assess the merits of the plaintiffs' claim that the Provincial Government is vicariously liable for assault and battery or sexual assault and sexual battery. Having said that, I cannot envision how vicarious liability in this case would be argued at a common issues trial, given the geographical differences, the different school divisions or districts involved, and the temporal differences advanced by the proposed class members. I have concluded that here, the proposed common issue relative to vicarious liability would break down into an assessment of the relationships between the defendant and various personnel at various schools over a lengthy period of time. In the result, there are so many potentially individualized questions to answer that the issue is not common to either all class members or all school personnel, even allowing for nuanced answers and the fact that class members need not be situated identically. I will not, therefore, certify vicarious liability as a common issue for trial.

Negligence, Breach of Fiduciary Duty, and Loss of Language and Culture

[97] The law is clear that the common issues in a class action can include whether a defendant owed a duty of care, and breached the standard of care in connection with that duty.[18] I accept, therefore, that, in theory, a determination of what, if any, duties the Provincial Government owed to Indigenous students, and what, if any, breaches of duty it committed could be determined at a common issues trial, whether in negligence, breach of fiduciary duty, or loss of language and culture.

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[18] ***Rumley***.

[98] The plaintiffs argued that their claims relate to operational matters or the poor implementation of policy decisions, including the inspection of schools, the delegation of tasks to school divisions, and the certification of teachers. In other words, the plaintiffs argued that the Provincial Government was responsible for providing a safe environment for students and failed to do so. Having said that, there is no evidence before me as to any particular policies, deficient or otherwise, upon which the plaintiffs rely relative to any of these causes of action, or the Claim as a whole. Similarly, there is no evidence that any policies were implemented improperly, that any act or omission by the Provincial Government contributed to or resulted in damage to the plaintiffs under any of these causes of action, or that any abuses were ever reported. As such, the plaintiffs have not established some basis in fact for these aspects of the Claim.

[99] The plaintiffs also referred to cases involving systemic negligence, including ***Levac v. James***, 2023 ONCA 73, and ***Canada (Attorney General) v. Nasogaluak***, 2023 FCA 61. Certainly, in that context, common issues can be decided and the particulars of the abuses suffered by each individual can be addressed thereafter. For example, in ***Cloud v. Canada (Attorney General)***, 2004 CanLII 45444 (ONCA), 247 D.L.R. (4th) 667, the court certified a claim involving a federal residential school where the class alleged that the school was run in such a manner that was designed to create an atmosphere of fear, intimidation and brutality, with the aim of promoting the assimilation of Indigenous children. The court stated:

> [80] … An important part of the claims of all class members turns on the way the respondents ran the School over the time frame of this action. The factual assertion is both that the respondents had in place policies and practices, such as excessive physical discipline, and that they failed to have in place preventative policies and practices, such as reasonable hiring and supervision, which together

> resulted in the intimidation, brutality and abuse endured by the students at the School. It is said that the respondents sought to destroy the native language, culture and spirituality of all class members. The legal assertion is that by running the School in this way the respondents were in breach of the various legal obligations they owed to all class members. Together these assertions comprise the common issues that must be assessed in relation to the claim as a whole.

[100] The class membership in ***Cloud*** was bounded, and the common issues applied to all class members, but the allegations in that case are distinguishable from the Claim, including the alleged degree of proximity between the plaintiffs and the defendants. In this case, neither the Claim nor the affidavit evidence contain allegations of institutional abuse or systemic negligence. For example, there is no allegation that the Provincial Government implemented practices or systems that promoted abuse. I have concluded that, to the extent that the plaintiffs allege the Provincial Government failed to protect them while at school, the Provincial Government's role must be examined in each instance to determine whether the necessary requirements are met, including whether any injury was reasonably foreseeable.

[101] I have concluded that were the court to consider the Claim in negligence, breach of fiduciary duty, or loss of language and culture, including vicarious liability for any of those causes of action, the same issues would arise in those analyses that I described above in the context of whether the Provincial Government is a proper defendant in this action. In other words, the relationship of the Provincial Government to each school would have to be examined to determine potential liability, which would be very difficult, if not impossible, to do at a common issues trial, given the different geographical locations of the various schools, the different school divisions or districts involved, and the different time periods in which class members attended school. In other words, the sheer volume

and breadth of the individual issues would outweigh any advantage that could be obtained at a common issues trial.

Conclusion – Common Issues

[102] The plaintiffs have failed to establish some basis in fact that there are common questions of fact or law that will meaningfully advance the claims of the class members at a common issues trial. Rather, the plaintiffs seek to advance a collection of individual claims.

WOULD A CLASS PROCEEDING BE THE PREFERABLE PROCEDURE FOR THE FAIR AND EFFICIENT RESOLUTION OF THE COMMON ISSUES?

[103] In ***Pisclevich***, McKelvey J. stated:

> [45] It is necessary for a class proceeding to be the preferable process for the resolution of the plaintiffs' claims. It must represent a fair, efficient and manageable procedure that is preferable to any alternative method of resolving the claims, such as would be the case with individual actions. As was indicated in *Hollick* at paras. 28-31, the two core elements of the preferable procedure inquiry include (1) whether the class action would be a fair, efficient and manageable method of advancing the claim; and (2) whether a class action would be preferable to other reasonably available means of resolving the class members' claims. These elements include the policy objectives of access to justice, judicial economy, and the modification of the behaviour of the wrongdoers. It is necessary to look at possible alternatives and adopt a practical cost-benefit approach to this procedural issue.

Access to Justice

[104] The court in ***Western*** stated that: "…by allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually".

[105] The plaintiffs argued that the proposed class members in this case are unable to bring their own individual claims, given their collective lack of financial means, and the

remote locations in which some of them reside, where they cannot access the court or counsel. The plaintiffs submitted that the existence of these barriers is substantiated by virtue of the fact that these claims have not been pursued to date, and that if this Claim does not proceed as a class action, the proposed class will never be compensated for the wrongs they suffered.

[106] Conversely, the Provincial Government argued that a class action in these matters may inhibit the plaintiffs' collective access to justice, because the common issues may take longer to resolve than would individual claims. This claim was filed in July 2018, and the certification motion was not heard until 2023, whereas a legitimate individual claim could have been responded to and addressed more quickly.

[107] I accept that the proposed class in this case may well be comprised of many vulnerable individuals with a variety of health or other issues, who may have no means to fund litigation. As such, a class proceeding may be the only means by which these individuals can bring forward their allegations. Having said that, and unfortunately, for the reasons set out above, the Claim cannot be certified as written. If, however, the proposed class definition and proposed common issues could be certified, I would accept that for reasons related to access to justice, a class action would be the preferable procedure to be pursued.

Judicial Economy

[108] In ***Western***, the court stated that "…by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding

and legal analysis. The efficiencies thus generated free judicial resources … and can also reduce the costs of litigation" for all parties.

[109] Unfortunately, given the individualized nature of the Claim due to geography, different school districts or divisions, and timing, I have concluded that there is no judicial economy to be gained by certifying the Claim as a class action. As written, the issues raised in the Claim are far too broad, and a class action is not the preferable procedure to be pursued.

Behaviour Modification

[110] The court in ***Western*** stated that:

> [29] …class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery.

[111] In this case, the Provincial Government acknowledged that safety in public schools is a public interest objective to be advanced in the absence of a class action.

[112] Although the plaintiffs have filed no evidence relative to what past or current behaviour ought to be modified, I accept that there are opportunities for both behaviour modification and deterrence in this matter, because the Provincial Government continues to have some authority over public schools in Manitoba, many if not all of which are attended by Indigenous students. Having said that, for the reasons set out above, the Claim cannot be certified as written.

IS THE PLAINTIFF A SUITABLE PERSON TO ACT AS A REPRESENTATIVE PLAINTIFF?

[113] A representative plaintiff must represent the interests of the class fairly and adequately, must produce a workable plan for the class proceeding, and must not have a conflicting interest with other class members on the common issues.

[114] In ***Western*** the court stated:

> [41] … The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class.

[115] The Provincial Government did not oppose the appointment of Ruth Ester Chartrand as the representative plaintiff in this matter.

[116] Having said that, the Provincial Government argued that the plaintiffs' litigation plan is vague, in that it does not reflect either the scope of documentary disclosure that would be required, in terms of policies, manuals, or other documents for each school in the province, or how the parties would access those records, which are held by individual school divisions or school districts that are not parties to the Claim. The Provincial Government also questioned how material witnesses would be identified, and what expert evidence would be necessary, submitting that these matters should be determined before certification, not after. The plaintiffs submitted that the litigation plan is not in final form, and can be reviewed and agreed upon after certification.

[117] Having reviewed Ms. Chartrand's affidavit, I am satisfied that there is some basis in fact upon which I can conclude that she would fairly and adequately represent the interests of the class, and that she has interests in common with the proposed class

members. Accordingly, if this matter were certified, Ms. Chartrand could be appointed as the class representative. The plaintiffs' proposed litigation plan, however, would have to be revised and particularized.

CONCLUSION

[118] I am not satisfied that the requirements of s. 4 of the ***Act*** have been met to a sufficient degree that this Claim must be certified as a class proceeding as filed. As such, the motion is dismissed.

[119] Having said that, I would encourage the plaintiffs and their counsel to reconsider the nature and scope of the Claim and the proposed common issues, with regard to s. 9 of the ***Act*** which speaks to refusals to certify.

[120] If costs cannot be agreed upon, counsel may seek an appearance to make submissions.

_____

J.