Form 27
[Rule 6.3]

Clerk's Stamp

COURT FILE NUMBER	2401 05557
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	CARRIE SAKAMOTO
DEFENDANTS	ATTORNEY GENERAL OF CANADA and HIS MAJESTY THE KING IN RIGHT OF ALBERTA **Brought under the *Class Proceedings Act*, S.A. 2003, c C-16.5**
DOCUMENT	**BRIEF OF THE DEFENDANT, HIS MAJESTY THE KING IN RIGHT OF ALBERTA**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

JOHN-MARC DUBE
ALBERTA JUSTICE
LEGAL SERVICES DIVISION
9th FLOOR, PEACE HILLS TRUST
10011 – 109 STREET
EDMONTON, AB T5J 3S8
TELEPHONE: 780-427-1295
FACSIMILE: 780-427-1230
EMAIL: [redacted]
File: 43209

TABLE OF CONTENTS

I. INTRODUCTION

1. The Defendant, His Majesty the King in right of Alberta ("Alberta") applies to determine when its application to strike the Plaintiff's claim may be heard. Alberta requests that the Court determine if the Amended Amended Amended Statement of Claim (the "Claim") discloses a cause of action against it prior to the Plaintiff's certification hearing.

2. The Plaintiff's proposed class action seeks damages from both Alberta and Canada on behalf of the class of individuals in Alberta who received a Covid-19 vaccine beginning from December 9, 2020 forward, and who allegedly suffered injury, damage and losses as a result of the vaccine.

3. The Claim against Alberta is novel. Alberta's alleged liability rests not on allegations it was the governmental regulating body for the Covid-19 vaccines, but on public statements made by various officials about the vaccines. Additionally, the Claim seeks to impose liability on Alberta for the actions of Alberta Health Services, a legally separate corporate entity.

4. Determining when any pre-certification application will be heard in a proposed class proceeding is in the discretion of the Court.

5. In this Action, having the Court hear Alberta's application to strike the claim prior to the certification application is the most efficient and fair method to fully resolve the issue for all the parties and the Court.

6. Alberta has strong grounds to bring an application to strike and the application has the potential to fully dispose of the Claim. At the very least, Alberta's application will significantly streamline and clarify any remaining issues to be dealt with at a certification hearing. It will serve to avoid any late amendments sought immediately prior or during the certification hearing in an attempt to cure any deficiencies. Certainty as to the pleadings prior to certification will remove any potential for delay and ensure fairness. Hearing the application to strike before any steps are taken in answer to a certification application will further the overarching objectives of economy of the parties and judicial efficiency.

7. Given the similar test applied to Alberta's application to strike and the cause of action requirement at section 5(1)(a) of the *Class Proceedings Act*, Alberta accepts that it would be bound by the Court's determination of whether a cause of action exists (subject to the parties' right of appeal) and would not relitigate that portion of the certification test (if the claim against Alberta survives). Neither the cause of action determination nor the efforts of the parties and the Court would be duplicated.

II. THE LAW ON SEQUENCING APPLICATIONS

8. The Court retains discretion on when to hear any pre-certification application in an action brought pursuant to the *Class Proceedings Act*.[1]

9. An action brought pursuant to the *Class Proceedings Act*, but which has not yet been certified, has been described as "an action with ambition."[2] Justice Martin in *Stewart v*

[1] *Kowch v. Gibraltar Mortgage Ltd.*, 2013 ABQB 317, at para 11
[2] *MacKinnon v National Money Mart Co*, 2004 BCCA 472, at para 33

Enterprise Universal Inc. indicated a pre-certified action is a hybrid action, drawing on the *Class Proceedings Act* and the *Rules of Court*.[3]

10. While a certification application may often be the first step in a proposed class proceeding, the *Class Proceedings Act* specifically contemplates that the *Rules of Court* apply to class proceedings.[4] A defendant applying to strike a proposed class proceeding, pursuant to Rule 3.68, does not create conflict or inconsistency with the *Class Proceedings Act*.

11. Where a defendant seeks to bring an application pursuant to the *Rules of Court* within a proposed class proceeding – such as Alberta's application to strike pursuant to Rule 3.68 – the Court "may make any order it considers appropriate respecting the conduct of a class proceeding to ensure the fair and expeditious determination of the proceeding."[5]

12. There is nothing inherently improper with a defendant bringing an application to strike a claim prior to certification. Importantly, "there is nothing in the *Class Proceedings Act* that prevents final applications from being heard first."[6] Courts have the discretion to consider each application in the context of the action as a whole, based on the unique facts of each case. As Justice Graesser recently held in *Martindale v Mercon Benefit Services*:

> Class Proceedings do not require an expedited approach to certification applications. They do not take priority over other types of litigation. All are subject to the foundational rules. In most cases large amounts of money are involved in class proceedings. Defendants are entitled to

[3] *Stewart v Enterprise Universal Inc.* 2010 ABQB 259, at para 25
[4] *Class Proceeding Act*, SA 2003, c C-16.5, at s. 41
[5] *Class Proceedings Act*, SA 2003, c C-16.5, at s. 13
[6] *Class Actions in Canada*, Mr. Ward Branch, (Canada Law Book *at paras. 4.1397 et seq*), cited in *Kowch v. Gibraltar Mortgage Ltd.*, 2013 ABQB 317 at para 12

> make striking applications and summary dismissal applications to narrow the scope of the potential action, and to ensure that the statement of claim on which the action will proceed if certified is clear and discloses recognizable causes of action.[7]

13. When considering when to schedule pre-certification motions, the Court will exercise its discretion on the unique facts of the case before it.[8] However, the overarching considerations when exercising that discretion relate to efficiency and fairness.[9]

14. The non-exhaustive list of factors a Court can consider are often referred to as the "*Cannon Factors*", after the decision of Justice Strathy of the Ontario Superior Court of Justice in *Cannon v Funds for Canada Foundation*.[10] Courts have noted the *Cannon Factors* are particularly helpful in determining the sequencing of a striking application.[11] The factors include:

    a. Whether the motion will dispose of the entire proceeding or will substantially narrow the issues to be determined;
    b. The likelihood of delays and costs associated with the motion;
    c. Whether the outcome of the motion will promote settlement;
    d. Whether the motion could give rise to interlocutory appeals and delays that would affect certification;
    e. The interests of economy and judicial efficiency; and

---

[7] *Martindale v Mercon Benefit Services*, 2023 ABKB 35, at para 44
[8] See for example, *Nette v Stiles*, 2009 ABQB 153, at para 14; *Carlson v Transalta Corporation*, 2018 ABQB 343, at para 7 and *Stewart v Enterprise Universal Inc.*, 2010 ABQB 259, at para 26
[9] *Perez-Nana v Cargill Limited*, 2022 ABQB 283, at para 6
[10] *Cannon v Funds for Canada Foundation*, 2010 ONSC 146, at para 15
[11] *Forster v Monsanto Company* 2020 BCSC 1376, at para 57, and *Martindale v Mercon Benefit Services*, 2023 ABQB 35 at para 49

f. Generally, whether scheduling the motion in advance of certification would promote the "fair and expeditious determination" of the proceedings[12]

15. In considering the factors, the Court "must obviously have a view to the nature of the action and the nature of the preliminary motion."[13] This requires considering the strength of the pre-certification motion as a preliminary threshold issue.[14]

16. At a sequencing application, the Court is not to make any determination on the merits of the application, however the strength of the defendant's argument is a factor to be considered when the Court is asked to exercise its discretion.[15]

III. ALBERTA'S APPLICATION TO STRIKE IS STRONG

17. Alberta's application to strike the Claim is *prima facie* strong. As noted above, the Claim brought against Alberta is novel in that it seeks damages from Alberta for its alleged conspiratorial participation in a "comprehensive false, misleading and deceptive misinformation campaign"[16] which "prevented access to the information necessary for members of the public to understand and assess critical issues about the safety and efficacy of the Covid Vaccines, the medical consequences of refusing the Covid Vaccines, alternative treatments to the Covid Vaccines and the application of each of these factors to individual

[12] *Carlson v Transalta Corporation*, 2018 ABQB 343, at para 10; Summarized differently in *Perez-Nana v Cargill Limited*, 2022 ABQB 283, at para 6
[13] *Perez-Nana v Cargill*, 2022 ABQB 283, at para 7
[14] *Perez-Nana v Cargill*, 2022 ABQB 283, at para 7
[15] *Li v British Columbia*, 2017 BCSC 1616, at para 32 and *Carlson v Transalta Corporation*, 2018 ABQB 343, at paras 14 - 17
[16] Amended Amended Amended Statement of Claim, at para 50

personal medical profiles".[17] The Claim also seeks to impose, contrary to clear legislation, liability against Alberta for the acts of an independent corporation, namely Alberta Health Services.[18]

18. As pled, the Claim makes allegations relating to "the Defendants' unlawful, negligent, inadequate, improper, unfair and deceptive practices and misrepresentation[s] related to… their warning, marketing, promotion and distribution of Covid vaccines."[19] The allegations against Alberta relate to public comments and campaigns regarding the Covid-19 vaccines.[20]

19. Given the class is defined as those who received a Covid-19 vaccine and suffered injuries as a result, the underlying basis for the Claim is that the actions of Alberta "vitiated" class members' otherwise "full and informed consent" to receive a Covid-19 vaccine.[21]

20. Importantly, Alberta is not the manufacturer of the Covid-19 vaccines.[22] Alberta is likewise not the approving body, nor the regulator, of the Covid-19 vaccines.[23] Alberta is not the responsible party that administered the Covid-19 vaccines to individuals and thus was not the responsible party for obtaining the informed consent of class members.[24]

---

[17] Amended Amended Amended Statement of Claim, at para 59
[18] Amended Amended Amended Statement of Claim, at para 17
[19] Amended Amended Amended Statement of Claim, at para 1
[20] Amended Amended Amended Statement of Claim, at paras 50 to 61
[21] Amended Amended Amended Statement of Claim, at paras 51, 52, 58, 61, 94, 98, 99, 122, 125, 128, 134
[22] The manufacturers of the Covid-19 vaccines are identified in the Amended Amended Amended Statement of Claim at paras 27 to 31 but the Plaintiff has not named the manufactures as Defendants in this Action
[23] The regulating agency for the Covid-19 vaccines is Health Canada, pursuant to the *Food and Drugs Act*, R.S.C., 1985, c F-27, at section 30.1. See Amended Amended Amended Statement of Claim at paras 21 – 26 and 106 - 110
[24] Amended Amended Amended Statement of Claim, at para 63

A. Alberta Health Services is a Separate Legal Entity

21. The Claim pleads four causes of action: negligent misrepresentation; misfeasance in public office, breach of fiduciary duty, and conspiracy.

22. The Claim also includes Alberta Health Services within the definition of "Provincial Defendants" for which Alberta is alleged to be liable.[25]

23. Before turning to the causes of action, Alberta has an extremely strong *prima facie* case that Alberta Health Services is a separate and distinct legal entity from Alberta. Allowing Alberta's application to strike the pleadings against it relating to any acts or omissions of Alberta Health Services would serve to clarify and narrow the issues in dispute and identify the proper parties to this Action, prior to any certification application.[26]

24. At all times during the class period, Alberta Health Services was and is a corporation created under legislation, specifically the *Regional Health Authorities Act,* as a provincial regional health authority.

25. Section 3(3) of the *Regional Health Authorities Act* stated:

> **3(3)** A regional health authority is a corporation consisting of its members.[27]

---

[25] Amended Amended Amended Statement of Claim, at para 17. The "Provincial Defendant" also includes Dr. Deena Hinshaw, the Chief Medical Officer of Health.
[26] The Plaintiff initially named Alberta Health Services as a Defendant in the Action, but filed a Consent Partial discontinuance against Alberta Health Services on March 13, 2024, on a without costs basis, pursuant to an agreement reached between the parties.
[27] *Regional Health Authorities Act*, RSA 2000, c R-10, at s 3(3)

26. Without altering the legal personhood of Alberta Health Services, the *Regional Health Authorities Act* was amended to create the *Provincial Health Agencies Act* on May 30, 2024.[28]

27. Section 1.93(1) of the *Provincial Health Agencies Act* confirms that:

> **1.93(1)** A provincial health agency is a corporation consisting of its members.[29]

28. Section 3(c) of the *Proceedings Against the Crown Act* makes it clear that Alberta is not liable for the acts or omissions of crown corporations. Section 3(c) states:

> **3** Except as otherwise provided in this Act, nothing in this Act
> (c) subjects the Crown to proceedings under this Act in respect of a cause of action that is enforceable against a Corporation or other agency owned or controlled by the Crown.[30]

29. The Claim makes allegations of specific actions of Alberta Health Services for which it claims Alberta is liable. For example, the Claim makes allegations with respect to:

a. The administration of the Covid-19 vaccines;[31]

b. The delivery of safe, high-quality health care in Alberta;[32] and

c. The offering of monetary incentives and rewards to the public.[33]

---

[28] Amended through the *Health Statutes Amendment Act*, 2024, SA 2024, c 10, at s 40
[29] *Provincial Health Agencies Act*, RSA 2000, c P-32.5, at s 1.93(1)
[30] *Proceedings Against the Crown Act*, RSA 2000, c P-25, at s 3(c)
[31] Amended Amended Amended Statement of Claim at paras 40 and 46
[32] Amended Amended Amended Statement of Claim at paras 49
[33] Amended Amended Amended Statement of Claim at paras 60 and 94

30. At the case management conference on October 16, 2024 the Plaintiff relied upon the decision of *Alberta Health Services v Johnston ("Johnston")*[34] to suggest that Alberta is liable for the actions of Alberta Health Services.

31. The *Johnston* decision clearly does not stand for this proposition, which would be directly contrary to the legislative provision in the *Proceedings Against the Crown Act* cited above. Interestingly, Alberta Health Services is the party to the *Johnston* action, not His Majesty the King in right of Alberta.

32. *Johnston* did not consider the legal relationship between Alberta and Alberta Health Services for the purpose of civil liability. It considered whether Alberta Health Services was a "government actor" for the purpose of bringing a defamation claim against an individual citizen.[35]

33. There is no case law or other authority that has found Alberta is liable for the acts or omissions of Alberta Health Services.

34. Determining whether the Plaintiff's allegations relating to the actions of Alberta Health Services are sustainable at law against Alberta will create significant efficiencies as it will limit and resolve any issues in dispute between Alberta and the class. It will therefore reduce the evidentiary requirements, the need for argument, and the issues in dispute at any required certification hearing.

---

[34] *Alberta Health Services v Johnston*, 2023 ABKB 209
[35] *Alberta Health Services v Johnston*, 2023 ABKB 209, at paras 47 - 59

B. Causes of Action

35. In addition to removing allegations that are properly made against a third party, there are strong grounds that Alberta's application to strike will resolve the entire claim against it given the facts and causes of action pled by the Plaintiff.

i. Negligent Misrepresentation

36. The Plaintiff claims damages against Alberta for negligent misrepresentation relating to the public statements regarding Covid-19 vaccines.

37. The Supreme Court of Canada set out the elements required to establish a claim for negligent misrepresentation in *Queen v Cognos Inc*. A plaintiff must show:

a. There is a duty of care based on a "special relationship" between the representor and representee;
b. The representation in question must be untrue, inaccurate or misleading;
c. The representor must have acted negligently in making the said misrepresentation;
d. The representee must have relied, in a reasonable manner, on said negligent misrepresentation; and
e. The reliance must have been detrimental to the representee in the sense that damages resulted.[36]

[36] *Queen v Cognos Inc.* [1993] 1 S.C.R. 87, 1993 CanLII 146 (SCC), at para 34

38. For the purpose of this application, it is clear that, at the very least, there are not sufficient facts in the Claim to establish a duty of care based on a special relationship between Alberta and the class.

39. The Claim is grounded on public statements or omissions by Alberta made to the public at large. The facts alleged to create a proximate relationship are that the class was "citizens, taxpayers and consumers of information."[37]

40. The Supreme Court of Canada in *Knight v Imperial Tobacco Canada Ltd.* specifically found that public statements by governments do not establish a special relationship to ground a duty of care for negligent misrepresentation. The Court found that public statements by Canada to the general public that low-tar cigarettes were less hazardous did not create a special relationship between Canada and cigarette consumers as the statements did not amount to a direct relationship.[38]

41. As in *Knight*, there are no facts pled of specific interactions between Alberta and the Plaintiff or the class. Additionally, there is no legislative scheme that Alberta is alleged to be subject to that may establish a proximate relationship.

42. Given the Supreme Court of Canada authorities, Alberta has a strong case that the facts pled in the Claim do not, at law, satisfy the requirements for a negligent misrepresentation claim.

---

[37] Amended Amended Amended Statement of Claim, at para 95
[38] *Knight v Imperial Tobacco Canada Ltd.*, 2011 SCC 42, at paras 49

ii. Misfeasance in Public Office

43. The second cause of action alleged by the Plaintiff is misfeasance in public office. The facts pled in the Claim with respect to this cause of action are generally set out in paragraphs 106 to 114 of the Claim. The majority of the pled facts are directed only against the Federal Minister of Health – not against Alberta.[39]

44. The pleadings of misfeasance against Alberta are made collectively against both Defendants. The Claim alleges that "the Defendants' reckless indifference or willful blindness" with respect to the public statements regarding the Covid-19 vaccine resulted in foreseeable injury to the class.[40] These are bald assertions without any corresponding facts pled.

45. The Supreme Court of Canada confirmed the test for misfeasance in public office in *Odhavji Estate v Woodhouse*. This cause of action requires:

    a. Deliberate unlawful conduct in the exercise of public functions; and
    b. Awareness that the conduct is unlawful and likely to injure the Plaintiff.[41]

46. Alberta is not the party responsible for regulating the Covid-19 vaccines. Therefore, the Plaintiff is unable to point to any "exercise of a public function" by Alberta to establish a claim for misfeasance in public office.

[39] Amended Amended Amended Statement of Claim, at paras 106 - 110
[40] Amended Amended Amended Statement of Claim, at paras 111 - 114
[41] *Odhavji Estate v Woodhouse*, 2003 SCC 69, at para 32

47. Again, the allegations against Alberta relate to public statements made by various government officials. There are no statutory or prerogative powers that are alleged in the Claim to have been abused or exceeded.

48. Flowing from this, there are no facts pled in the Claim that: the public statements made by Alberta were unlawful; and that the public statements by Alberta were made recklessly or intentionally to injure the Plaintiff or the class.[42]

49. Insofar as the Plaintiff pleads the intention of the public statements by Alberta were to "influence public confidence in Covid Vaccines and maintain trust in public health authorities"[43] this fact, which would be assumed true in a striking application, on its face does not establish Alberta acted recklessly or unlawfully with an intent to injure the Plaintiff or the class.

50. Alberta has a strong case that the facts pled in the Claim do not, at law, satisfy the requirements for a misfeasance in public office claim.

iii. Breach of Fiduciary Duty

51. Thirdly, the Plaintiff alleges a cause of action for breach of fiduciary duty. To sufficiently plead a breach of fiduciary duty in the government context, a Plaintiff must establish:

    a. An undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary;

[42] *Odhavji Estate v Woodhouse*, 2003 SCC 69, at para 30
[43] Amended Amended Amended Statement of Claim, at paras 6, 57, 122

b. A defined person or class of persons vulnerable to a fiduciary's control; and

c. A legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control[44]

52. There are no pleadings in the Claim suggesting Alberta gave an undertaking – either flowing from a statute or by implication of the relationship between Alberta and the class.[45] On this basis alone, Alberta has a strong *prima facie* case that the Claim does not disclose a fiduciary duty cause of action.

iv. Conspiracy

53. The Plaintiff's final cause of action against Alberta alleges damages arising from a conspiracy relating to the Covid-19 vaccines.

54. At various points in the Claim, the Plaintiff alleges the Defendants' conduct "amounts to a conspiracy to commit assault and battery."[46] The Plaintiff has not named as Defendants the various individuals or legal entities (doctors, nurses, pharmacists) who actually committed the alleged assault and battery by injecting the class with the Covid-19 vaccine.

55. The seminal case on the tort of conspiracy is the Supreme Court of Canada case of *Canada Cement LaFarge Ltd. v British Columbia Lightweight Aggregate Ltd.* To establish the tort of conspiracy, a Plaintiff must show:

---

[44] *Elder Advocates of Alberta Society v Alberta*, 2011 SCC 24, at para 36
[45] *Elder Advocates of Alberta Society v Alberta*, 2011 SCC 24, at paras 43 - 48
[46] Amended Amended Amended Statement of Claim, at paras 52 and 125

a. Whether the means used by the defendants were lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or

b. Where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiffs and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.[47]

56. The Claim fails to plead any fact to establish either of the prongs of the tort of conspiracy. The Claim does not plead any facts that the predominant purpose of Alberta's (or Canada's for that matter) public statements was to injure the Plaintiff or class members. Amendments made by the Plaintiff in an attempt to rectify this would be directly contradictory to other alleged facts included in the Claim.

57. To the contrary, and fatal to any claim under the first prong of the tort, the Claim alleges only that the purpose of the various public communications was to "influence public confidence in Covid vaccines and maintain trust in public health authorities."[48]

58. The Claim also does not plead Alberta engaged in unlawful conduct that was known to likely result in injury. Insofar as the Plaintiff relies on the provisions at section 9 of the *Food and Drugs Act,*[49] which regulates the advertisement of drugs, Courts have held that this section applies to drug manufacturers as part of a comprehensively regulated industry.[50] General

---

[47] *Canada Cement LaFarge Ltd. v British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452, 1983 CanLII 23 (SCC), at para 33

[48] Amended Amended Amended Statement of Claim, at paras 57, 122 and 129

[49] *Food and Drugs Act*, RSC 1985, c F-27, at s 9 and Amended Amended Amended Statement of Claim, at paras 48, 79(c) and 83

[50] *Harrison v Afexa Life Sciences Inc*, 2015 BCSC 638, at paras 67 - 100

public statements by government officials about the overall efficacy of a class of drug are not the type of "advertisement" contemplated by and regulated by the *Food and Drugs Act*.

59. Alberta will make more fulsome and detailed submissions regarding the viability of each cause of action at either the striking application or certification, dependent on the outcome of this sequencing application. However, for the purposes of this sequencing application, Alberta submits it has a strong *prima facie* case that the Claim does not disclose a legally recognizable cause of action and that the Claim improperly attempts to impose liability on Alberta for the acts and omissions of a third party.

IV. MOST EFFICIENT AND FAIR METHOD TO DETERMINE THE ISSUES

60. Hearing Alberta's (and Canada's) application to strike the Claim prior to any certification steps being taken is the most efficient and fair method of determining the issues in dispute, aligning with section 13 of the *Class Proceedings Act*.[51] The applications to strike have the potential to fully dispose of the Claim, thus saving the parties and the Court the time and costs of proceeding to a full certification hearing.

61. As set out above, Alberta seeks to strike each and every cause of action alleged against it. Alberta understands that Canada likewise will seek to fully dispose of the claim. As the application to strike is based on the pleadings it can be heard at the Court's first available

[51] *Class Proceedings Act*, SA 2003, c C-16.5, at s 13

date and will provide certainty as to whether any of the causes of action are not doomed to fail.

62. To be clear, Alberta accepts that it would be bound by the Court's determination of the causes of action arising from the striking application and (subject to any of the parties' right of appeal) would not seek to reargue the viability of a cause of action under the section 5(1)(a) test at certification, should the Action proceed to certification.

63. Given that Alberta's striking application addresses all the causes of action and would apply to the entire proposed class, this application is distinguishable from the one brought by the defendants in *Perez-Nana v Cargill*.[52] The Court in *Perez-Nana* refused to allow a pre-certification striking application as there was a real possibility that the claims of only some classes of Plaintiffs would be struck, while others would survive. This would reduce any efficiencies that may have been gained by the application.[53]

64. Justice Belzil in *Nette v Stiles* considered an application by the plaintiff to bifurcate the determination of whether a cause of action against one defendant existed. Finding that even if the pleadings were struck as against one defendant, that the claim against the other defendants would still have to proceed to certification, the Court held that the facts of that case did not warrant granting a pre-certification application.[54]

[52] *Perez-Nana v Cargill*, 2022 ABQB 283
[53] *Perez-Nana v Cargill*, 2022 ABQB 283, at paras 8, 11, 12 and 16
[54] *Nette v Styles*, 2009 ABQB 153, at paras 1 and 18

65. However, Justice Belzil did find that "if it could be argued that an application to determine if the pleadings disclose a cause of action could be dispositive of the entire action, likely bifurcation would be ordered."[55]

66. Where a preliminary motion furthers "the objective of judicial efficiency, or [has] the potential to dispose of the litigation or more efficiently address the general policy objectives of class proceedings, it may be appropriately heard before the certification motion."[56]

67. It is generally accepted by the Courts that "the scale of things tends to be larger in a class action lawsuit. This, in itself, may provide an impetus to entertain dispositive or final motions first."[57]

68. That is the case here, as both Defendants – Alberta and Canada – seek to fully dismiss the Claim, thereby rendering a full certification hearing, with its associated time, evidentiary needs, and costs to the parties and the Court, unnecessary.

69. The Court faced a similar determination based on similar factors in *Li v British Columbia,* ("*Li*"), where ultimately the British Columbia Supreme Court granted an order allowing the Defendant's summary trial application to be heard before certification. The question to be considered in the summary trial was with respect to the constitutional validity of various sections of British Columbia's *Property Transfer Tax Act*. The Court determined that the

[55] *Nette v Styles*, 2009 ABQB 153, at para 17
[56] *Baxter v. Canada (AG),* 2005 O.J. No. 2165 at para 14 as cited in *Kwicksutaineuk/Ah-Kwa-Mish First Nation v. British Columbia (Minister of Agriculture and Lands*, 2009 B.C.S.C. 1593, at para 62
[57] *Kowch v. Gibraltar Mortgage Ltd*., 2013 ABQB 317, at para 13

defendant's arguments seemed strong[58] and that a resolution of the constitutional issues could entirely dispose of the litigation, or at least, provide a focus on the issues that remained.[59] While the Court noted it was difficult to say whether delay would be increased with the application being heard first, as appeals would likely follow,[60] this did not deter the Court's ultimate sequencing decision in favor of the defendant's pre-certification motion.

70. It is important to note the case of *Li* and other similar cases (see for example, *Consumers' Association et al. v. Coca- Cola Bottling Company et al.,*[61] and *Halliday v Shaw Communications Inc.,*),[62] Courts considered the sequencing of summary trial motions in proposed class actions, wherein evidence would be required. Even then, the Courts allowed the summary trials to proceed before certification.

71. In this sequencing motion, Alberta seeks only to have a striking application heard before the certification application, where no evidence would be required or allowed. This approach would involve minimal additional delay and cost, if any, compared to cases where summary trial evidence was necessary before certification.

72. Even if Alberta's application to strike is not fully successful, it will likely significantly narrow and clarify the issues to be determined at any certification hearing. Any proposed

[58] *Li v British Columbia,* 2017 BCSC 1616, at para 33
[59] *Li v British Columbia,* 2017 BCSC 1616, at para 23
[60] *Li v British Columbia,* 2017 BCSC 1616, at para 24
[61] *Consumers' Association et al. v. Coca- Cola Bottling Company et al.,* 2005 BCSC 1042
[62] *Halliday v Shaw Communications Inc.,* 2019 BCSC 2251

common issues relating to a struck cause of action will no longer need to be argued and the parties will not be required to put forward evidence to support or oppose the common issues.

73. In that manner the pre-certification application to strike may promote settlement or compromise between the parties on the certification criteria, should a certification hearing remain necessary.

74. While Alberta concedes that the risk of appeals from a striking application weighs against granting the pre-certification application, the costs to the parties and the Court associated with resolving the Claim at a striking application will be significantly less than at a full certification hearing, thereby significantly increasing judicial efficiency.

75. Certification hearings, by their nature require significant and costly procedures for litigants and the Courts. At a full certification hearing, the parties would be required to incur the time and costs of producing an adequate record for the Court to determine the certification test. This includes producing likely voluminous affidavits and engaging in lengthy cross examinations.[63]

[63] *Consumers' Association et al. v Coca-Cola Bottling Company et al*. 2005 BSCS 1042, at para 48. See also Justice Graesser's comment in *Martindale v Mercon Benefit Services*, 2023 ABKB 35, at para 46 which confirms the efficiencies gained from reducing the need for production of records at certification which was accepted to be "frequently an enormous task."

76. All such costs would be spared with a successful pre-certification striking application.[64] Additionally, less Court time would be required for a striking application than a full certification hearing.

77. In addition to the cost savings and judicial economy of allowing the pre-certification striking application to proceed, the determination of whether the causes of action against Alberta are bound to fail will promote the fair and expeditious determination of the proceedings.

78. The allegations against Alberta are significant and stigmatizing. The Claim contains not only the polarizing subject of Covid-19 vaccines but allege impropriety by Alberta in responding to the public health emergency brought on by the Covid-19 pandemic.

79. As noted by Justice Martin in *Stewart v Enterprise Universal Inc*., in granting permission for a pre-certification summary judgment application, where allegations are stigmatizing, forcing a defendant to participate in a costly certification hearing is not fair.[65]

V. CONCLUSION

80. Weighing the circumstances of this Action, the allegations in the Claim, the strength of Alberta's application to strike, and the likely efficiencies gained by the parties as well as the Court, heavily favours the Court permitting Alberta (and Canada) to bring a pre-certification application to strike to dispose of the entirety of the claim.

---

[64] See *Dussiaume v Sandoz Canada Inc*., 2023 BCSC 795, at para 24

[65] *Stewart v Enterprise Universal Inc*., 2010 ABQB 259, at para 42. See also *Consumers' Association et al v Coca-Cola Bottling Company et al,* 2005 BSCS 1042, at paras 77 and 78.

81. The purpose of a striking application is to prevent claims that have no chance of success from proceeding to trial. That purpose is not altered when the Action at play is a class proceeding. "It is not a principle of class action law that weeds should be allowed to ripen and grow, instead of being nipped in the bud."[66]

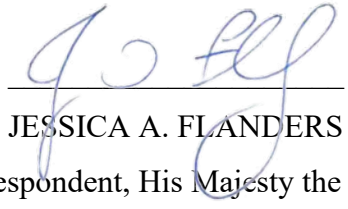
82. Even if some causes of action remain, the application to strike would still promote significant efficiencies at certification and fairness to the parties.

83. Efforts will not be duplicated by hearing the striking application first. They will, however, be streamlined. This is beneficial to the overall objectives of class proceedings.

84. Alberta submits it is appropriate in the circumstances for the Court to hear Alberta's (and Canada's) striking application prior to any further steps being taken in furtherance of certification in these proceedings.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 1st DAY OF NOVEMBER, 2024.

ALBERTA JUSTICE

Per:   

JOHN-MARC DUBE | JESSICA A. FLANDERS | FRANCES CHIU

Counsel for the Defendant/Respondent, His Majesty the King in right of Alberta

[66] *Kowch v. Gibraltar Mortgage Ltd.*, 2013 ABQB 317, at para 14

AUTHORITIES

TAB	AUTHORITY
1.	*Kowch v. Gibraltar Mortgage Ltd.*, 2013 ABQB 317
2.	*MacKinnon v National Money Mart Co*, 2004 BCCA 472
3.	*Stewart v Enterprise Universal Inc.*, 2010 ABQB 259
4.	*Class Proceeding Act*, SA 2003, c C-16.5
5.	*Martindale v Mercon Benefit Services*, 2023 ABKB 35
6.	*Nette v Stiles*, 2009 ABQB 153
7.	*Carlson v Transalta Corporation*, 2018 ABQB 343
8.	*Perez-Nana v Cargill Limited*, 2022 ABQB 283
9.	*Cannon v Funds for Canada Foundation*, 2010 ONSC 146
10.	*Forster v Monsanto Company,* 2020 BCSC 1376
11.	*Li v British Columbia*, 2017 BCSC 1616
12.	*Regional Health Authorities Act*, RSA 2000, c R-10
13.	*Health Statutes Amendment Act*, 2024, SA 2024, c 10
14.	*Provincial Health Agencies Act*, RSA 2000, c P-32.5
15.	*Proceedings Against the Crown Act*, RSA 2000, c P-25
16.	*Alberta Health Services v Johnston*, 2023 ABKB 209
17.	*Queen v Cognos Inc.* [1993] 1 S.C.R. 87, 1993 CanLII 146 (SCC)
18.	*Knight v Imperial Tobacco Canada Ltd.*, 2011 SCC 42
19.	*Odhavji Estate v Woodhouse*, 2003 SCC 69
20.	*Elder Advocates of Alberta Society v Alberta*, 2011 SCC 24
21.	*Canada Cement LaFarge Ltd. v British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452, 1983 CanLII 23 (SCC)
22.	*Food and Drugs Act*, RSC 1985, c F-27
23.	*Harrison v Afexa Life Sciences Inc*, 2015 BCSC 638
24.	*Kwicksutaineuk/Ah-Kwa-Mish First Nation v. British Columbia (Minister of Agriculture and Lands*, 2009 B.C.S.C. 1593
25.	*Consumers' Association et al. v Coca-Cola Bottling Company et al*. 2005 BCCS 1042

26.	*Halliday v Shaw Communications Inc.*, 2019 BCSC 2251
27.	*Dussiaume v Sandoz Canada Inc.*, 2023 BCSC 795