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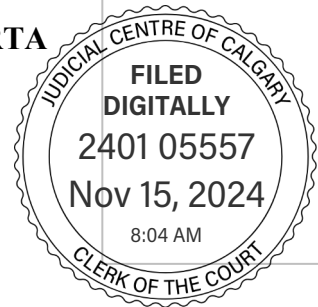
PLAINTIFF CARRIE SAKAMOTO

DEFENDANTS ATTORNEY GENERAL OF CANADA AND HIS
MAJESTY THE KING IN RIGHT OF ALBERTA

DOCUMENT **BRIEF OF THE ATTORNEY GENERAL OF
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PART I – OVERVIEW

1. Concurrent to filing its submissions on this sequencing motion, the Attorney General of Canada (Canada) has filed its motion to strike this claim. Canada takes no position on when it's motion to strike should be heard. Canada contends, however, that Canada's and Alberta's motions to strike should be heard together. Hearing these motions together is consistent with efficiency (time and cost saving), including the efficient use of scarce judicial resources. This is so because the Plaintiff makes the same claims of negligence, negligent misrepresentation, misfeasance in public office, breach of fiduciary duty, and conspiracy against both Alberta and Canada, often in the same paragraph or even the same sentence. Both Defendants are public authorities, and stand in the same position vis-à-vis the Plaintiff. There is considerable advantage to considering whether the Plaintiff's claims disclose a cause of action against them once, rather than on two separate occasions.

PART II - FACTS

2. The Amended Amended Amended Statement of Claim (Claim) in this matter makes the following claims against both Alberta and Canada:
 - a. Negligence, negligent misrepresentation, and breach of duty to warn at paras 2, 6, 11, 39, 87 to 105 of the Claim;
 - b. Misfeasance in public office at paras 106 to 114 of the Claim;
 - c. Breach of fiduciary duty at para 21, and 115 to 124 of the Claim; and
 - d. Conspiracy at paras 6 and 125 to 135 of the Claim.
3. Often the Claim simply makes allegations against “the Defendants” without distinguishing between Canada and Alberta. For example, the Plaintiff alleges that the Defendants misrepresented the safety and efficacy of the covid vaccines,¹ and that the Defendants owed the Plaintiff a duty of care.² There are many other examples.³
4. In addition, the Claim makes nebulous claims of breach of public duty and breach of legal duty, against both Defendants (paras 8 and 84 of the Claim) and against Canada alone (at paras 79 and 82 of the Claim).

PART III – ISSUES

Should Alberta’s motion to strike be heard (well) in advance of the certification motion?

5. Canada takes no position on Alberta’s motion to have its motion heard (well) in advance of the certification motion as opposed to immediately before the certification motion.

Should Canada’s and Alberta’s motions to strike be heard at the same time?

6. This Court will need to decide on the motion to strike and whether the Claim discloses a reasonable cause of action. Because almost all the same claims are made against both Canada

¹ Claim at para 6.

² Claim at para 102-105.

³ See Claim at para 1, 2, 4-8, 50-52, 56-58, 60, 77, 83-94, 96-99, 102-105, 111, 122, 125-136, 139

and Alberta, it is most cost-and-time efficient, including the efficient use of scarce judicial resources, that Canada's motion to strike should be heard at the same time as Alberta's motion.

PART IV - SUBMISSIONS

Canada is Entitled to Bring a Motion to Strike

7. Although it may be unnecessary to say so, Canada is entitled to bring a motion to strike these proceedings. The *Rules of Court*, which permit motions to strike, apply to class actions.⁴ Canada is concurrently filing a motion to strike this matter.

Court Discretion – When to Schedule a Motion to Strike

8. This Court has discretion about when to schedule motions to strike.⁵ Canada takes no position about whether its motion to strike should be heard well in advance of the certification motion, or immediately preceding it. Either timing is agreeable to Canada.
9. When exercising its discretion, the Court should consider the judicial economy and cost-and time-effectiveness, among other factors, of the proposed means of proceeding.⁶

Common Issues

10. One aspect of Alberta's motion to strike the claim is that Alberta is not legally responsible for the actions of Alberta Health Services. Leaving that issue aside, the claims against Canada and Alberta are deeply entwined.
11. It is useful to consider the nature of the allegations made.

A. Negligence, negligent misrepresentation, and breach of a duty to warn

12. Negligence and negligent misrepresentation require that the alleged tortfeasor owe a private law duty of care to the plaintiff.⁷ An alleged breach of a duty to warn is essentially the same

⁴ *Stewart v Enterprise Universal Inc.*, [2010 ABOB 259](#) at para 25.

⁵ *Perez-Nana v Cargill Ltd.*, [2022 ABOB 283](#) at para 6.

⁶ *WP v Alberta*, [2014 ABCA 404](#) at para 20.

⁷ *R v Imperial Tobacco Canada Ltd.*, [2011 SCC 42](#), [2011] 3 SCR 45 at para 37, 38 [“*Imperial*”].

as the negligent misrepresentation claim.⁸ Both governments are public authorities, and therefore the two governments' positions vis-à-vis the Plaintiff are very similar. The position of both Canada and Alberta is that, at law, a private duty of care cannot be established.⁹ The question of whether these Defendants owe a duty of care in the circumstances should be determined once, rather than on two separate occasions.

B. Misfeasance in public office

13. This tort requires first, deliberate and unlawful conduct in the public officer's capacity as a public officer; and second, the public officer must be aware that the conduct was unlawful and likely to harm the plaintiff. Put another way, the tort involves the deliberate disregard of official duty coupled with knowledge that the misconduct is likely to harm the plaintiff.¹⁰ Once again, the question of whether the Claim discloses a cause of action in misfeasance should be determined once, rather than on two separate occasions.

C. Breach of fiduciary duty and concealment and equitable fraud

14. The well-known case of *Alberta v Elder Advocates*¹¹ addresses fiduciary duty within the government context. A fiduciary duty from government requires an undertaking covering specific private law interests to which the beneficiary has pre-existing, distinct, and complete legal entitlement.¹² General impacts on well-being or security do not create a fiduciary relationship.¹³ Further, "no fiduciary duty is owed to the public as a whole."¹⁴ Once again, the two governments are in a similar position vis-à-vis the Plaintiff. The parties should make representations, and this Court consider whether the pleadings disclose a cause of action in fiduciary duty, once, not twice.

⁸ *Imperial* at para [105](#).

⁹ *Imperial* at para [43](#); *Attis v Canada (Health)*, [2008 ONCA 660 \(CanLII\)](#); *Taylor v Canada*, [2020 ONSC 1192](#) at para [622](#); *The Los Angeles Salad Company Inc. v. Canadian Food Inspection Agency*, [2013 BCCA 34 \(CanLII\)](#); *Cooper v Hobart*, [2001 SCC 79, \[2001\] 3 SCR 537](#).

¹⁰ *Odhavji Estate v. Woodhouse*, [2003 SCC 69 \(CanLII\)](#), [\[2003\] 3 SCR 263](#) at para 23.

¹¹ *Alberta v Elder Advocates of Alberta Society*, [2011 SCC 24 \(CanLII\)](#), [\[2011\] 2 SCR 261](#) at paras [37-41](#), [51](#), [59](#), ["*Elder Advocates*"].

¹² *Elder Advocates* at para [51](#).

¹³ *Elder Advocates* at para [51](#).

¹⁴ *Elder Advocates*, at para [50](#).

D. Conspiracy claim at para 125-135 of the Claim

15. It is obvious, given the allegation that Canada and Alberta conspired together, that whether these allegations disclose a cause of action should be determined together.

E. Conclusion

16. The key principles of judicial economy and efficiency lead to the conclusion that this Court should consider only once whether the five claims above, made against both Alberta and Canada, disclose a reasonable cause of action. No countervailing principles suggest that there are any advantage to this Court considering the same questions twice.

17. As previously noted, the Claim makes vague allegations of breach of “public duty” or breach of “legal duty” against both Alberta and Canada, and sometimes just against Canada. These are not private law causes of action at law. Breach of “legal duty” perhaps is intended to refer to breach of statute. The case law is clear that breach of statute is not a tort.¹⁵ Moreover, a review of the relevant statutes show that what the Plaintiff terms Canada’s “duties” are in fact discretionary decisions at law.¹⁶

18. Accordingly, these claims should not affect when the motions to strike are heard in this matter.

¹⁵ *The Queen (Can) v Saskatchewan Wheat Pool*, [1983 CanLII 21 \(SCC\)](#), [1983] 1 SCR 205.

¹⁶ For example, the Claim states at para 79(b) and (d) that the Minister of Health has a legal duty under the *Food and Drugs Act*, s. 21.3(1) and 21(2) to recall therapeutic products and to disclose confidential business information, in certain circumstances. In fact, the Minister of Health has the discretion to recall the product or disclose confidential information in those circumstances. At para 79(c), a duty is claimed to arise from s. 9(1) of that Act. In fact, that section does not mention the Minister at all.

PART V - COSTS

19. Canada has taken no position about when Alberta's motion to strike should be heard. In the circumstances, regardless of the outcome of this application, Canada does not seek costs and asks that no costs be awarded against Canada.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Submitted this 14th day of November, 2024.



Barry Benkendorf

List of Authorities

Jurisprudence

1. *Alberta v Elder Advocates of Alberta Society*, [2011 SCC 24 \(CanLII\)](#), [\[2011\] 2 SCR 261](#) [“*Elder Advocates*”].
2. *Attis v Canada (Health)*, [2008 ONCA 660 \(CanLII\)](#)
3. *Cooper v Hobart*, [2001 SCC 79](#), [\[2001\] 3 SCR 537](#)
4. *Odhayji Estate v. Woodhouse*, [2003 SCC 69 \(CanLII\)](#), [\[2003\] 3 SCR 263](#)
5. *Perez-Nana v Cargill Ltd.*, [2022 ABQB 283](#)
6. *R v Imperial Tobacco Canada Ltd.*, [2011 SCC 42](#), [\[2011\] 3 SCR 45](#) [“*Imperial*”].
7. *Stewart v Enterprise Universal Inc.*, [2010 ABQB 259](#)
8. *Taylor v Canada*, [2020 ONSC 1192](#)
9. *The Los Angeles Salad Company Inc. v. Canadian Food Inspection Agency*, [2013 BCCA 34 \(CanLII\)](#)
10. *The Queen (Can) v Saskatchewan Wheat Pool*, [1983 CanLII 21 \(SCC\)](#), [\[1983\] 1 SCR 205](#).
11. *WP v Alberta*, [2014 ABCA 404](#)