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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 THE DEFENDANT, HIS MAJESTY THE KING IN RIGHT OF ALBERTA**

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INTRODUCTION AND OVERVIEW

1. The legal claim against Alberta and the request to certify this action as a class proceeding are fundamentally flawed.

2. The allegations against Alberta are grounded in public statements, general advertising, and public health measures that encouraged – but never mandated – Albertans to receive a Covid-19 vaccine during the public health emergency of the Covid-19 pandemic.

3. Alberta is not the manufacturer of a Covid-19 vaccine; Alberta is not the regulator of the Covid-19 vaccines; and Alberta is not the party administering the Covid-19 vaccines to Albertans. Yet, the Plaintiff seeks to impose liability on Alberta for injuries arising from the Covid-19 vaccine, on the novel and dubious grounds that statements to the public by the Premier, the Chief Medical Officer of Health, and other high-level government officers somehow negated individuals Albertan's ability to consider, in consultation with their health care provider, the risks and benefits of receiving the Covid-19 vaccine.

4. The Covid-19 pandemic was the single largest public health crisis in the last 100 years and it affected all aspects of Albertans' lives. Once Covid-19 vaccines became approved and available in Canada, they were one aspect of government's response to the pandemic.

5. Encouraging individuals to receive the Covid-19 vaccine to reduce the negative health effects of the virus, protect the health care system, and return society to normalcy was not improper, contrary to Alberta's public health responsibilities, or gives rise to any private law claim.

6. The novel allegations in the Plaintiff's claim do not at law establish any of the plead causes of action, and it is plain and obvious the claim against Alberta is bound to fail.

7. Alberta concedes that Ms. Sakamoto is an appropriate representative plaintiff, but the facts pled in this claim, and the evidence before the Court, establish none of the other certification requirements have been met.

THE PLEADINGS AND FACTS

8. Throughout the five-times amended statement of claim (the "Claim"), the pleading make numerous bald, sweeping allegations against both of "the Defendants" collectively, often without particularizing any conduct by Alberta giving rise to the allegation. These allegations, and the lack of any material facts supporting the allegations, require careful scrutiny to discern the basis for the allegations against Alberta.

9. At its core, the Claim against Alberta is based on public statements given by high-level government officers, on advertising to the public, and on public health measures, which encouraged Albertans to choose to receive a Covid-19 vaccination.

10. The specific examples in the Claim of the public statements and advertising were statement given at press conferences Premier Jason Kenny and by the Chief Medical Officer of Health, Dr. Hinshaw, as well as social media posts and advertising encouraging Albertans to get vaccinated against the Covid-19 virus.[1]

11. The Claim alleges the Alberta's public responses had the effect of negating the otherwise informed consent Albertans provided to their health care professional when they choose to receive a Covid-19 vaccination.

12. The Claim goes on to allege that the public statements and advertising somehow prevented individuals from accessing information about the Covid-19 vaccine.[2]

13. The final basis of the Claim against Alberta is that the Restriction Exemption Program, established through a Chief Medical Officer of Health Order, "coerced" individuals to receive a Covid-19 vaccination. This Program was only in place

[1] The 5 x Amended Statement of Claim, filed July 02, 2025 ["the Claim"], at paras 61 to 63
[2] The Claim, at paras 58, 59 and 64

between September 16, 2021 and February 8, 2022. It was a voluntary program that allowed participating businesses to be exempt from public health restrictions if they confirmed patrons had: i) proof of a Covid-19 vaccination; or ii) a recent negative Covid-19 test result; or iii) a medical exemption letter.[3]

14. The first case of Covid-19 in Canada was confirmed on January 25, 2020, with the virus first appearing in Alberta on March 5, 2020.[4]

15. The World Health Organization declared Covid-19 to be a global pandemic on March 11, 2020 with Alberta declaring a Public Health State of Emergency on March 17, 2020.[5]

16. The Covid-19 virus was infectious and deadly. The Covid-19 pandemic was an indisputable public health emergency that affected virtually every aspect of Albertan's lives.[6]

17. To respond to the Covid-19 pandemic, Alberta, like all governments across Canada, grappled with the difficult and urgent task of developing life-saving measures.[7]

18. One such measure was the Covid-19 vaccine, which first became available in Alberta on December 14, 2020.[8] The Covid-19 vaccine helps prevent people from getting sick from the virus, and in those that do become infected, makes the illness less severe.[9]

19. Covid-19 vaccines were developed and manufactured by a number of pharmaceutical corporations (identified in the Claim as the "Vaccine Manufactures"). The Covid-19 vaccines were approved and licenced by Health

[3] The Claim, at para 66, and Chief Medical Officer of Health Order 43-2021
[4] Affidavit of Dr. Kristin Klein, filed September 19, 2025 ["Dr. Klein Affidavit"], at para 11
[5] Dr. Klein Affidavit, at para 12
[6] *Taylor v Newfoundland and Labrador*, 2026 SCC 5, ["*Taylor*"] at paras 5 and 23
[7] *Taylor*, at para 5
[8] Dr. Klein Affidavit, at para 20.
[9] Dr. Klein Affidavit, at para 16

Canada, first under an Interim Order and then, as of September 16, 2021, under the *Food and Drug Regulation*.[10]

20. On June 1, 2021, the National Advisory Committee on Immunization provided guidance and advice to Health Care Professionals and the public on the interchangeability of authorized Covid-19 vaccines for the first two doses. Subject to some qualifications, the recommendation and guidance was that individuals could interchange the two doses of the vaccine.[11]

21. The Covid-19 vaccine was provided to Albertans through Alberta's immunization program operated pursuant to the *Public Health Act* and the *Immunization Regulation*. Alberta's immunization program relates to all approved vaccines, not only the Covid-19 vaccine.[12]

22. Alberta's role through the immunization program includes, among other things:

    i. Procuring provincially funded vaccines;
    ii. Set immunization eligibility and schedules; and
    iii. Monitoring adverse events following immunization.[13]

23. The decision to receive a Covid-19 vaccine (like all vaccines) ultimately rests with each individual.[14]

24. During the pandemic, the Covid-19 vaccine was actually administered to Albertans by public health nurses employed by Alberta Health Services, by pharmacists, or by doctors.[15] These Health Care Professionals are individually required, as part of their professional responsibilities, to:

    i. Comply with the Immunization Regulation and policies;

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[10] Dr. Klein Affidavit, at paras 19 and 26
[11] Dr. Klein Affidavit, at para 42 and Exhibit E
[12] Dr. Klein Affidavit, at para 49
[13] Dr. Klein Affidavit, at para 54 and Exhibit K
[14] Dr. Klein Affidavit, at para 48 and Affidavit of Gene Smith, filed September 19, 2025 ["Smith Affidavit"], at para 11
[15] Dr. Klein Affidavit, at para 44. As of July 1, 2025 the responsibility for public health nurses administering vaccines became the responsibility of Alberta, at para 8.

ii. Obtain informed consent from the patient prior to administering the vaccine; and

iii. To report both the immunization and any adverse events.[16]

25. Obtaining informed consent from the patient is required of the Health Care Professional because all vaccines, including the Covid-10 vaccines, carry some risk of adverse health events following immunization.

26. Alberta provides guidance to Health Care Professionals on which populations are recommended to be immunized and those whom immunization may be contraindicated, but it is the responsibility of the Health Care Professional to discuss the risks and benefits of the vaccine, and to assess each patient, to obtain that patient's informed consent to receive the vaccine.[17]

27. To obtain informed consent, each Health Care Professional is required to assess the patient's individual state of health and any factors that might increase the risk of an adverse event following immunization. Prior to administering the vaccine, the Health Care Professional is to discuss with the patient:

i. The known risks of the disease;

ii. The benefits of the vaccine;

iii. the expected side effects of the vaccine; and

iv. The known possible adverse events following the immunization.[18]

28. The *Public Health Act* and the *Immunization Regulation* requires Health Care Professionals to report various occurrences in the immunization process. For instance, a Health Care Professional is required to report instances when:

i. Immunization is recommended but the patient does not consent;[19]

ii. Immunization is determined to be contraindicated the patient;[20]

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[16] Dr. Klein Affidavit, at para 55
[17] Dr. Klein Affidavit, at paras 15 and 55 to 59
[18] Dr. Klein Affidavit, at para 59
[19] *Immunization Regulation*, Alta Reg 182/2018 ["*Immunization Regulation*"] at ss 2(1)(a)
[20] *Immunization Regulation*, at ss 2(1)(b)

iii. Immunization is consented to and provided to the patient.[21]

29. Health Care Professional are also legally required by the *Public Health Act* to report any adverse events following immunization. An adverse event following immunization is defined in the *Immunization Regulation*, but can be summarized as a health occurrence that is:

i. life threatening, could result in permanent disability, requires hospitalization, or is otherwise serious;
ii. unusual or unexpected; or
iii. cannot be explained by anything in the patient's medical history.[22]

30. A Health Care Professional who becomes aware of an adverse event following immunization must report it to a centralized immunization program which was operated by Alberta Health Services during the pandemic.[23] A patient may also report an adverse event following immunization.[24]

31. Alberta Health Services is in turn required to report the adverse event following immunization to Alberta.[25] Alberta then compiles and reports the adverse events following immunization to the Public Health Agency of Canada through the Canadian Adverse Events Following Immunization Surveillance System.[26]

32. The Canadian Adverse Events Following Immunization Surveillance System is a federal, provincial and territorial public health, post-market, vaccine safety surveillance system. The reporting and monitoring of adverse events following immunization is used to monitor the safety of vaccines, identify previously unknown adverse events, and to provide timely information to help Health Care Professionals make immunization-related decisions.[27]

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[21] *Public Health Act*, RSA 2000, c P-37 ["*Public Health Act*"], at ss 18.3
[22] *Public Health Act*, at s 18.4 and *Immunization Regulation* at s 1(2)
[23] Dr. Klein Affidavit, at para 68
[24] Dr. Klein Affidavit, at para 73
[25] Dr. Klein Affidavit, at para 70
[26] Dr. Klein Affidavit, at para 83
[27] Dr. Klein Affidavit, at paras 78, 79, 83 and 85

33. The information on adverse events following immunization is used by the National Advisory Committee on Immunization, which releases guidelines and makes recommendations on obtaining a Covid-19 vaccine.[28] While the National Advisory Committee on Immunization may make recommendations, Alberta makes the decision on what Covid-19 vaccine is available and recommended within the province.[29]

34. Since the Covid-19 vaccination has been available to the public, up until January 5, 2024, Health Canada reported the number of adverse events following a Covid-19 immunization. Of the over 105 million doses administered in Canada, 0.06 percent of people have experienced an adverse event. 0.011 percent of all doses of the Covid-19 vaccination resulted in a serious adverse event.[30]

35. There are a number of different types of adverse events that have been identified and monitored following a Covid-19 vaccination. These include non-serious adverse events, such as headaches, chills, and vaccination site pain.[31]

36. The most common adverse event following a Covid-19 vaccination was tingling and prickling, which occurred at a rate of 0.0076 percent of doses administered.[32]

37. While all adverse events following immunization are reported, importantly, not all adverse events are caused by the vaccine. Adverse events following immunization can be experienced by a patient for a number of different reasons, including:

    i. Vaccine product-related reactions;
    ii. Vaccine quality defect-related reactions;
    iii. Immunization error-related reactions;
    iv. Inappropriate usage-related reactions;
    v. Immunization anxiety-related reactions; or
    vi. A coincidental event.[33]

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[28] Dr. Klein Affidavit, at paras 46 and 47
[29] Dr. Klein Affidavit, at para 48
[30] Dr. Klein Affidavit, at paras 96 and 97 and Exhibit CC
[31] Dr. Klein Affidavit, at para 98 and Exhibit DD
[32] Dr. Klein Affidavit, at para 99, referred to as parasthesia
[33] Dr. Klein Affidavit, at para 92

38. Determining whether an adverse event is caused by the Covid-19 vaccine requires an individual assessment of each patient who experienced the adverse event.[34]

39. Take for example cases of myocarditis, which have been identified through monitoring and reporting as an adverse event following a Covid-19 immunization.[35] Myocarditis can also be caused by a number of other factors unrelated to the Covid-19 vaccine. It can be caused by being infected with viruses, bacteria, fungi or parasites. It can also be caused by medicines, autoimmune conditions, and some cancer treatments. Myocarditis can also be caused by the Covid-19 virus itself.[36]

40. Throughout the pandemic, Alberta monitored and made public – and continues to monitor and make public – information statistics about the number of doses of the Covid-19 vaccine administered and the number and type of adverse events.[37]

41. During the Covid-19 pandemic, and once the Covid-19 vaccines became available, senior members of the Alberta government provided information to the public encouraging Albertans to choose to get vaccinated. Coupled with these statements, the Alberta government ran advertising campaigns – aimed at the general public – encouraging Albertans to choose to get vaccinated.[38]

42. The Alberta government ran the advertising campaigns between February 2021 and June 2022. The advertising consisted of posts on social media platforms, search engine marketing, online display advertising, radio and television advertisements, and direct mailing.[39]

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[34] Dr. Klein Affidavit, at para 102
[35] Dr. Klein Affidavit, at para 101, where myocarditis has been reported 1,231 times out of the over 105 million doses administered, or in approximately 0.0011 percent of doses
[36] Dr. Klein Affidavit, at para 103
[37] Dr. Klein Affidavit, at paras 104 - 106
[38] Smith Affidavit, at paras 7 and 22
[39] Smith Affidavit, at paras 12 - 17

43. The advertising encouraged Albertans to receive the Covid-19 vaccine with the goal of reducing adverse health effects on Albertan, ease the strain on the health care system, and allow public health measures to be eased or removed.[40]

44. While the Claim sets out various "Vaccine Campaigns" by "the Defendants", none of those specific campaigns were conducted by Alberta.[41]

45. During the Covid-19 pandemic, continuing until the present, a large and varied amount of information on the Covid-19 vaccines were available to the public from all manner of different sources.[42] Individual Albertans had access to and received information both in favour of, or critical of, the Covid-19 vaccines from sources that include some or all of:

    i. The government of Alberta;
    ii. The government of Canada;
    iii. Governments of other provinces;
    iv. Governments of other Countries, including the United States;
    v. Scientific organizations;
    vi. Grassroots organizations;
    vii. Family, friends, and other private individuals;
    viii. Private businesses;[43]
    ix. Personal Medical Professionals.[44]

46. With Health Canada's approval of Covid-19 vaccines, the government of Canada established the Vaccine Injury Support Program in December 2020. This Program provides compensation to individuals across Canada who have experienced a serious and permanent injury as a result of a vaccine, including the Covid-19 vaccine.[45]

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[40] Smith Affidavit, at para 7 and 11. See Dr. Klein Affidavit at paras 16 – 18 and Exhibit A and Exhibit B showing unvaccinated individuals were more likely to require hospitalization and ICU admission as a result of a Covid-19 infection.
[41] The Claim, at para 61 and Smith Affidavit, at paras 18 - 21
[42] Smith Affidavit, at para 9
[43] Smith Affidavit, at para 9
[44] Questioning on Affidavit of Carrie Sakamoto, filed September 12, 2025, at pg 12, line 26 – pg 13 – line 18
[45] Smith Affidavit, at para 30

47. Canada's Vaccine Injury Support Program is a "no fault" program that provides compensation regardless of the responsibility or fault for the injury. Claimants have up to three years to submit a claim and the compensation provided can include injury indemnities and loss of income.[46]

48. By applying for compensation under the Vaccine Injury Support Program, claimants are specifically not required to waive their right to bring any litigation against any party for their vaccine injury.[47]

THE CERTIFICATION TEST

49. Section 5(1) of the *Class Proceedings Act* sets out the five criteria required for an action to be certified as a class proceeding, namely:

    a. The pleadings disclose a cause of action;
    b. There is an identifiable class of 2 or more persons;
    c. The claims of the prospective class members raise a common issue;
    d. A class proceeding would be the preferable procedure for the fair and efficient resolution of any common issues; and
    e. There is a person eligible to be appointed as a representative Plaintiff.

    (the "Certification Test")[48]

50. The burden is on the plaintiff to meet each of the five components of the Certification Test. Other than the cause of action, the remaining portions of the Certification Test each require a plaintiff to show "some basis in fact" for those criteria.[49]

51. The Courts have resisted attempting to define "some basis in fact" in the abstract. Instead, each case must be decided on its own facts.[50]

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[46] Smith Affidavit, at para 31, 33 and 34
[47] Smith Affidavit, at para 35
[48] *Class Proceedings Act*, SA 2003, c C-16.5 at s. 5(1)
[49] *Hollick v Metropolitan Toronto (Municipality)*, 2001 SCC 68 ["*Hollick*"], at para 25
[50] *Pro-Sys*, at para 104

52. The Certification Test largely considers the procedure in which the action will be prosecuted, however a Court can consider substantive aspects of the claim (on the appropriate standard) at the preferable procedure portion of the Certification Test.[51]

53. The Courts have consistently held that certification acts as an important screening device. The standard for assessing evidence at certification specifically does not require a determination of the merits of the claim, "nor does it involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny."[52]

54. As the Court of Appeal stated in *Spring v Goodyear Canada Inc*.:

> While certification remains a low hurdle, it is nonetheless a hurdle. There needs to be "some basis in fact" to support the claim. Claims should not be certified, however if there is a complete absence of evidence to support the claim.[53]

55. It is not the proper role of the Courts to "enter the ring" and attempt to remedy any aspect of the certification application not met by the plaintiffs.[54]

NO CAUSE OF ACTION EXISTS AGAINST ALBERTA

The *Public Health Act* Provides Immunity to the Plaintiff's Claim

56. The pleadings in this Claim do not disclose any cause of action against Alberta as required by section 5(1)(a) of the *Class Proceeding Act*. Certification of the Claim against Alberta must fail on this basis and the Claim as a whole should be dismissed.

57. A plaintiff must plead sufficient facts to establish that each cause of action alleged against each defendant is not bound to fail. In *Gariepy v Shell Oil Co.* Justice Nordeimer of the Ontario Superior Court considered the principles to be applied when determining whether the cause of action test in a certification application will

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[51] *AIC Limited v. Fischer*, 2013 SCC 69 ["*AIC Limited*"]at para 4
[52] *Pro-Sys,* at para 103
[53] *Spring* at para 40
[54] *Andriuk v Merrill Lynch Canada*, 2014 ABCA 177 at para 12

be met where pleadings allege multiple causes of action against multiple defendants. The Court held:

> Not only is it necessary to demonstrate a cause of action against each named defendant, in my view it is also necessary that every cause of action alleged against a particular defendant be demonstrated.[55]

58. The test for determining if the pleadings disclose a cause of action under section 5(1)(a) of the *Class Proceedings Act* is the same that applies to an application to strike the claim. The cause of action will be struck out where it is "plain and obvious" that the plaintiff's claim cannot succeed.

59. In order to meet this certification criteria, a plaintiff must demonstrate, having regard to the pleadings, viewed against the background of the (assumed) alleged facts that the claims pled are not bound to fail.

60. While the threshold to strike is high and pleadings should be interpreted liberally, needless litigation should be avoided and the court has a duty to apply the rule as it is intended.[56] If the alleged facts do not disclose a cause of action in light of existing law, those portions of the pleadings should be struck out.[57]

61. The Supreme Court of Canada outlined the general principles that should inform the application of rules on striking pleadings in *R v Imperial Tobacco Canada*:

> A motion to strike for failure to disclose a reasonable cause of action proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven: *Operation Dismantle Inc. v. The Queen*, 1985 CanLII 74 (SCC), [1985] 1 S.C.R. 441, at p. 455. No evidence is admissible on such a motion: r. 19(27) of the Supreme Court Rules (now r. 9-5(2) of the Supreme Court Civil Rules). It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted…

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[55] *Gariepy v Shell Oil Co*. [2002] O.J. No. 2766; 2002 CarswellOnt 2270, at para 33

[56] *Setoguchi v Uber BV*, 2023 ABCA 45 *["Setoguchi"]*, at paras 44 - 46

[57] *Tottrup v. Alberta (Minister of Environment)*, 2000 ABCA 121 at para 9

> Related to the issue of whether the motion should be refused because of the possibility of unknown evidence appearing at a future date is the issue of speculation. The judge on a motion to strike asks if the claim has any reasonable prospect of success. In the world of abstract speculation, there is a mathematical chance that any number of things might happen. That is not what the test on a motion to strike seeks to determine. Rather, it operates on the assumption that the claim will proceed through the court system in the usual way — in an adversarial system where judges are under a duty to apply the law as set out in (and as it may develop from) statutes and precedent. The question is whether, considered in the context of the law and the litigation process, the claim has no reasonable chance of succeeding.[58]

62. More recently, the Alberta Court of Appeal in *Setoguchi v Uber BV* confirmed the approach to be taken when conducing an analysis of the cause of action under section 5(1)(a) of the *Class Proceedings Act*. The Court held:

> Although the section 5(1)(a) test is a low bar, it should not be treated as a perfunctory exercise. "Courts have no jurisdiction to ignore the plain text of an enactment and make this criterion completely disappear": *Bruno* at para 68. There are compelling reasons for a court to carefully consider whether the pleadings pass the plain and obvious test, by carefully scrutinizing whether the facts as pleaded establish the requisite elements of each cause of action.[59]

63. The Plaintiff pleads a number of causes of action against Alberta:

a. Negligent Misrepresentation;
b. Negligence;
c. Misfeasance in Public Office;
d. Fiduciary Duty; and
e. Conspiracy to Commit Assault and Battery.

64. Reviewing the facts as pled against the established legal tests confirms it is plain and obvious that each cause of action is bound to fail. While the facts pled are assumed to be true, the Court should carefully scrutinize the alleged facts. Two examples in the Claim are illustrative of this need:

a. At paragraph 63(a), the Plaintiff sets out a quote given by Dr. Hinshaw at a press conference. The reproduced quote in the Claim is a small portion of Dr.

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[58] *R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42 ["*Imperial Tobacco*"], at para 22 and 25

[59] *Setoguchi* at para 44

Hinshaw's statement and does not reproduce the portion of her statement in which she specifically spoke about adverse events following immunizations, and that receiving the Covid-19 vaccine remained each Albertan's choice.[60]

b. At paragraph 44, the Plaintiff sets out the raw number of adverse events following immunization and deaths reported by Health Canada as of January 5, 2024. However, the Claim does not set out number of adverse events and deaths as a portion of the number of Covid-19 doses administered.[61]

65. The Plaintiff's causes of action are statutorily barred by section 66.1 of the *Public Health Act*. Section 66.1 holds that no action for damages may be brought against Alberta, a Minister, an employee of Alberta, or the Chief Medical Officer of Health (among others, including health practitioners), for "anything done by that person in good faith while carrying out duties or exercising powers" under the *Act* or *regulation*.[62]

66. This immunity clause in the *Public Health Act* was interpreted and applied by the Courts in *Frank v Alberta Health Services*. In *Frank*, Justice Kubik dismissed a claim in negligence brought against a health practitioner who, it was alleged, negligently administered a vaccine causing injury.[63]

67. The Court held that the immunity provision at section 66.1 was meant to protect the listed individuals and entities that were carrying out duties or exercising powers under the *Public Health Act*. The intent of the *Public Health Act* and its regulations with respect to immunizations was the "protection of public health, including the preventative care against communicable diseases which may affect large segments of the population." [64]

68. The Court of Appeal upheld the dismissal of the claim, finding the *Public Health Act* was directed at "public", not "private" concerns and that:

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[60] Smith Affidavit, at para 23
[61] See Dr. Klein Affidavit, at paras 94 - 97
[62] *Public Health Act*, section 66.1
[63] *Frank v Alberta Health Services*, 2018 ABQB 541 ["*Frank ABQB*"] at para 3
[64] *Frank ABQB*, at para 18

there is a public benefit to having a significant level of vaccination against communicable diseases within the larger community.[65]

69. In *Ingram v Alberta*, Justice Romaine also considered the purpose of the *Public Health Act* in a challenge to Chief Medical Officer of Health restrictions issued during the Covid-19 pandemic. The purpose of the *Public Health Act* was described as "the regulation of public health emergencies, including the spread of communicable diseases."[66]

70. This immunity clause clearly captures both the high-level members of the government of Alberta – including Premier Kenny and Dr. Hinshaw – as well as the Health Care Professionals who administered the Covid-19 vaccines to the class members.

71. The Plaintiff can only get around the immunity clause in the *Public Health Act* if there are sufficient facts plead that could establish bad faith. There are no such facts in the Claim, which contains only bare allegations that may, at best, amount to negligent conduct.

72. Where a claim is required to meet a heightened *per se* liability threshold, the claimant must plead sufficient facts that, if proven, would be sufficient to establish the higher threshold.[67]

73. It is not enough for a plaintiff to plead legal conclusions or assert conclusory phrases such as "deliberately or negligently" or "callus disregard". These bald conclusions are not material facts, and allowing claims to proceed on the basis of sweeping allegations would be to permit a plaintiff to embark on a fishing expedition.[68]

74. Here, to establish bad faith, the Plaintiff must plead sufficient material facts of "dishonesty, ill will, malice or improper or ulterior motives" or "acts so markedly

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[65] *Frank v Alberta Health Services*, 2019 ABCA 332, at para 6
[66] *Ingram v Alberta*, 2023 ABKB 453, at para 12
[67] *Henry v British Columbia*, 2015 SCC 24, at para 43
[68] *Merchant Law Group v Canada Revenue Agency*, 2010 FCA 184 ["Merchant Law Group"], at para 34

inconsistent with the relevant legislative context that a court cannot reasonably conclude that they were performed in good faith."[69]

75. The Claim contains insufficient pleadings to establish dishonesty by Premier Kenny, Dr. Hinshaw, or any other Alberta government official when making public statements encouraging Albertans to choose to get vaccinated against the Covid-19 virus.

76. It must be recalled that the public statements by Alberta officials related to the Covid-19 vaccines which had been regulated and approved by Health Canada. And encouraging vaccination of Albertans to limit the spread of a novel communicable disease is entirely consistent the purpose of the *Public Health Act*.

77. The Plaintiff disagrees with the science underlying the statements made by Alberta officials regarding the safety and efficacy of the Covid-19 vaccine, and on the information contained in those statements.[70] These allegations, at best, even when taken as true, are allegations of only negligence. As seen in *Frank*, allegations of negligence are not sufficient to pass the bad faith threshold required for a claim relating to a duty or power exercised under *Public Health Act*.

78. The Plaintiff also alleges Alberta "suppressed" information about adverse events following the Covid-19 information.[71] This is again a bald allegation with no material facts to support it. The Plaintiff does not plead any facts as to why, how, or in what manner, Alberta suppressed adverse event information. The allegation is also specifically contrary to the legal requirements of Health Care Professionals set out in the *Public Health Act* and the *Immunization Regulation*.[72]

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[69] *Scherle v Treadz Auto Group Inc.*, 2019 ABQB 987, at paras 253 – 254, citing *Enterprise Sibeca Inc v Frelighsburg*, 2004 SCC 61, at para 26

[70] For example, see the Claim, at paras 58, 64, 97, 98, 102, 104, 105, 106, 115 116, 133, and 142.

[71] For example, see the Claim, at paras 7, 119, 142 and 165

[72] *Public Health Act*, at s 18.4 and *Immunization Regulation*, at Part 2

79. True, the Plaintiff does use the phrase “bad faith” in a few (three) instances in the Claim with respect to Alberta’s conduct. In none of those instances does the Plaintiff set out any facts that could establish the legal requirement for bad faith:

a. At paragraph 152 of the Claim, the Plaintiff alleges Alberta promoted and supported “coercive” vaccine orders, such as the Restriction Exemption Program. There are no facts plead that implementing this program through the CMOH Order was done with malice, ill will or reckless to the legislative purpose of the *Public Health Act*. To the contrary, it’s clear that encouraging vaccination to respond to a communicable disease affecting all aspects of society is wholly inline with the purpose of the *Public Health Act*. Further, a review of the CMOH Order confirms it is a voluntary program and had exemptions to obtaining a Covid-19 vaccine, such as a negative Covid-19 test or a medical exemption.

b. At paragraph 161 of the Claim, the Plaintiff alleges Dr. Hinshaw acted in bad faith in stating a Covid-19 vaccine would stop the public from getting infected and stop transmission of the virus. This is a bald allegation and there are no facts pled of malice or ill will by Dr. Hinshaw in making this statement. Taken as true, this alleged fact may attempt to prove negligence, which is insufficient to establish bad faith.

c. At paragraph 162 of the Claim, the Plaintiff alleges Dr. Hinshaw acted in bad faith (and negligently), in stating to the public they could mix-and-match Covid-19 vaccines. This allegation again alleges, at best, only negligence given Health Canada recommended mixing-and-matching of Covid-19 Vaccines.

80. The Claim, read liberally and as a whole, does not set out any, or sufficient, material facts, to establish that any official, officer or employee of Alberta acted in bad faith. Without such material facts in the pleadings, the Claim as a whole is bound to fail given the broad immunity found in section 66.1 of the *Public Health Act.*

81. Even if the pleadings sufficiently allege bad faith to meet the heightened *per se* liability threshold, the Plaintiff must additionally plead sufficient facts to establish the required elements of each alleged causes of action. As with the allegations of bad faith, the Claim fails to do so. Even taken the pleadings as true, the Claim discloses no cause of action at law against Alberta.

Negligent Misrepresentation

82. The Claim does not disclose a legal cause of action against Alberta in negligent misrepresentation and this cause of action is bound to fail.

83. In situations outside a contractual relationship, a claim for negligent misrepresentation requires pleadings of facts to disclose sufficient proximity and foreseeability, and policy considerations that do not negate liability.[73]

84. The Supreme Court of Canada in *Queen v Cognos Inc*. set out the five factors required to establish a claim for negligent misrepresentation. They are:

a. There must be a special relationship between the representor and the representee;
b. The representation in question must be untrue, inaccurate, or misleading;
c. The representor must have acted negligently in making the misrepresentation;
d. The representee must have relied, in a reasonable manner, on the negligent misrepresentation; and
e. The reliance must have been detrimental to the representee in the sense that damages resulted.[74]

Binding Precedent Establishes No Proximity

85. The Claim against Alberta relates to statements given by high-level government officials to the general public. No previous duty of care has been recognized as being owed to the public (or a segment of the public) in such circumstances. The Claim is novel and requires and assessment under the *Anns/Cooper* test to

[73] *Imperial Tobacco,* at para 35
[74] *Queen v Cogos Inc.*, 1993 CanLII 146 (SCC) [1993] 1 SCR 87, at pg 110

determine if sufficient proximity, foreseeability and policy considerations would establish or negate a duty of care.[75]

86. Before moving to a full *Anns/Cooper* analysis, the Court can consider whether the case falls within an analogous situation. As the Supreme Court of Canada held in *Childs v Desormeaux*, a consideration of an analogous situation "simply captures the basic notion of precedent."[76]

87. There is ample precedent in analogous cases to find no duty of care exists against Alberta in the circumstances alleged in this Claim. Precedent confirms that no proximity or special relationship exists between Alberta and the class for statements given to the public.

88. The leading precedent in this regard is the Supreme Court of Canada decision in *R v Imperial Tobacco*. In *Imperial Tobacco*, tobacco companies brought a third-party claim against Canada in the context of a class action brought against them by consumers of light or mild cigarettes. The basis of the third-party claim against Caada was statements made to the public about the health effects of low-tar cigarettes.[77]

89. The Supreme Court of Canada struck the tobacco companies third party claims on the basis that it was plain and obvious that Canada did was not in special relationship with the public to establish proximity when making the public statements.[78]

90. The Plaintiff suggests that proximity in negligent misrepresentation claims turns on "foreseeability and reasonable reliance, not physical closeness or direct interaction."[79] This is a misstatement of the law. A claim for negligent misrepresentation requires a plaintiff to plead facts of a "special relationship" between the parties to meet the proximity requirement. Proximity is a separate

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[75] *Cooper v Hobart*, 2001 SCC 79 ["*Cooper*"] at para 30
[76] *Childs v Desormeaux*, 2006 SCC 18, at para 15
[77] *Imperial Tobacco*, at paras 6 - 7
[78] *Imperial Tobacco*, at para 48
[79] Plaintiff's Certification Brief, at para 113

analysis from foreseeability and is concerned with the relationship between the parties. It requires the parties to be in close and direct relationship.[80]

91. In *Imperial Tobacco*, the public statements by Canada – health related public statements regarding low-tar cigarettes – did not ground a proximate relationship between Canada and that class. The public statements did not create a specific interaction required to establish proximity.[81]

92. This finding is directly analogous to this Claim which challenges Alberta's health related public statements regarding the Covid-19 vaccines. These public statements do not give rise to specific interactions between Alberta and the class, just as Canada's statements did not give rise to a specific interaction or a proximate relationship in *Imperial Tobacco*.

93. Where there are no specific interactions, a finding of proximity may still be found through the governing statute.[82] In *Imperial Tobacco*, the governing statute [the *Department of Health Act*] also did not ground a proximate relationship with a portion of the public.

94. Where the relevant statute established only general duties to the public, no proximity to establish a private law duty of care will be found.[83]

95. The governing statute with respect to the Claim against Alberta is the *Public Health Act*. As the title of this *Act* suggests, it is directed at the public at large – not any individual or segment of the public. It is difficult to imagine legislation that is directed more towards to the public at large, and not a discreate segment of the population, than the *Public Health Act*.

96. The purpose of the *Public Health Act* is to regulate and manage communicable diseases that have the potential to affect the public. The *Public Health Act* and the *Immunization Regulation* set out the reporting requirements for Health Care Professionals so that the immunizations and adverse events can be monitored.

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[80] *Cooper*, at paras 22, 30 and 31
[81] *Imperial Tobacco*, at para 49
[82] *Imperial Tobacco*, at para 49
[83] *Imperial Tobacco*, at para 50

97. This is wholly inline with the broader purpose of the *Public Health Act* to respond to communicable diseases and prevent, detect, assess, and mitigate public health risks.

98. Given the broad public purpose of the *Public Health Act*, it creates no proximate relationship between Alberta and any individual or class of persons.

99. The Plaintiff points to section 14(1)(a) of the *Public Health Act* in an attempt to ground a proximate relationship.[84] Section 14(1) of the *Public Health Act* sets out the powers of the Chief Medical Officer of Health.[85] Far from establishing a close and direct relationship with an individual or class of individuals who suffered adverse events following an immunization, section 14(1)(a) requires the Chief Medical Officer of Health to monitor the public health conditions of Albertans as a whole and to make recommendations to the Minister and health agencies to protect and promote the health of the public.

100. The Chief Medical Officer of Health is answerable to the Minister but otherwise exercises discretionary powers to make recommendations concerning public health matters. There is no basis in the plain reading of the *Public Health Act*, or gleamed from its purpose, for the Plaintiff's logical leap that section 14(1)(a) imports a duty on the Chief Medical Officer of Health to make recommendations to the Minister that are "grounded in accurate, current, and honest assessment of the available health data."[86]

101. Even if such a requirement was imposed on the Chief Medical Officer of Health, the recommendations set out in section 14(1)(a) are to the Minister – not to the public, to individuals, or to any class of individuals. And there is nothing in the *Public Health Act* requiring the Minister to accept and implement any recommendation of the Chief Medical Officer of Health made under section 14(1)(a).

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[84] Plaintiff's Certification Brief, at paras 94 and 95

[85] *Public Health Act*, at s. 14(1)

[86] As argued in the Plaintiff's Certification Brief, at para 95

102. The Plaintiff's reliance on the *Health Information Act* is even more misplaced. The *Health Information Act* has no bearing or application to the allegations in the Claim. In fact, the *Health Information Act* is not even pled in the Claim but only appears in the Plaintiff's Certification Brief.

103. The purpose of the *Health Information Act* is set out at section 2 of that *Act*.[87] It includes the protection of privacy of individual health information[88] and to enable individual health information to be shared and accessed (where appropriate) to provide health services and manage the health system.[89]

104. The Courts have interpreted the purpose of the *Health Information Act* as intending to protect individual privacy in health information, while recognizing the competing value of permitting use of the health information.[90]

105. The Plaintiff relied on section 61 of the *Health Information Act*, which requires custodians to take reasonable care to ensure the accuracy of individual's health information before releasing it.[91]

106. The Plaintiff suggest that the public statements by Alberta officials encouraging vaccination was a "disclosure" under section 61 of *Health Information Act*. On a plain reading of section 61 and the *Health Information Act*, this is clearly incorrect. "Health information", as referenced in section 61, is defined in section 1(k) as diagnostic, treatment and care information, or registration information.[92]

107. Section 61 relates to the use and disclosure of an individual's personal medical information. It does not relate to broad, general statements encouraging the general public to choose to receive a vaccine. It does not relate to the provision of information of a medical or scientific nature broadly to the public. And in any event,

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[87] *Health Information Act*, RSA 2000, c H-5, ["*Health Information Act*"] at s 2
[88] *Health Information Act*, at s 2(a)
[89] *Health Information Act*, at s 2(b)
[90] *Innovative Health Group Inc. v Calgary Health Region*, 2006 ABCA 184, at para 19 and *JK v Gowrishankar*, 2019 ABCA 316, at paras 10 - 11
[91] *Health Information Act*, at s 61
[92] *Health Information Act*, at s 1(k)

a breach of the *Health Information Act,* like breach of any statute, does not create a private law claim.[93]

108. The Plaintiff can point to no specific interaction and no statutory basis to establish a special relationship with Alberta required to ground proximity.

109. In fact, courts have adopted the reasoning in *Imperial Tobacco* to strike actions similar to the Plaintiff's Claim for lack of proximity. In *Adam, Abudu v Ledesma-Cadhit*, the Ontario Superior Court struck a claim against Ontario based on public statements encouraging the public to receive an immunization for the H1N1 virus that was posing a significant public health risk. The plaintiff's daughter in *Adam, Abudu* received the vaccine, which was alleged to have caused her death.[94]

110. In striking the claim in *Adam, Abudu*, the Court held that general representations to the public, relied upon by the plaintiff, were insufficient to create a proximate relationship. Similarly, no proximate relationship existed for a "duty to warn" the public about the risks of the vaccine, as any such duty was to the public at large.[95]

111. In *Adam, Abudu*, the plaintiff claimed proximity was established because the daughter was part of a "specific, identifiable group" of individuals with hypersensitivities that were particularly vulnerable to vaccine-related injuries. The Court found that such a broad group was not "readily defined or sufficiently discrete" to differentiate them from the public at large as "hypersensitivities, side-effects or reactions are inherent in any vaccination."[96]

112. Here, the Plaintiff and the class are defined only by their adverse reaction to the Covid-19 vaccine. The class is not differentiated from the public at large, to whom the public statements were made, and therefore, no proximity is established.

113. More recently, in *Hartman v Attorney General of Canada*, the Ontario Superior Court struck a claim where the plaintiff's son allegedly died as a result of the

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[93] *Queen v Saskatchewan Wheat Pool*, 1983 CanLII 21 (SCC), [1983] 1 SCR 205 ["*Saskatchewan Wheat Pool*"] at pg 225

[94] *Adam, Abudu v Ledesma-Cadhit*, 2014 ONSC 5726 ["*Adam, Abudu*"] at paras 1 and 19

[95] *Adam Abudu*, at paras 148 - 151

[96] *Adam, Abudu*, at paras 152 and 159

Covid-19 vaccine. Similar to the Plaintiff's Claim, the claim in *Hartman* was based in part on "negligent, reckless, and false representations" by Canada about the Covid-19 vaccine's safety and efficacy.[97]

114. In finding no proximity existed in *Hartman*, the Court found that no private law duty of care to individual members of the public existed for decisions made in the handling of health emergencies impacting the general population.[98]

115. The Plaintiff pleads proximity is established as class members are "citizens, taxpayers, and consumers of information."[99] This is clearly insufficient to establish any proximate relationship with Alberta.

116. No proximate relationship exists between Alberta and the class based on any specific interactions through the public statements relating to the Covid-19 vaccines and the *Public Health Act* also does not create any close and direct, special relationship.

117. Based on the lack of proximity, the Plaintiff's negligent misrepresentation claim against Alberta is bound to fail.

Public Policy Considerations

118. It is also plain and obvious that the negligent misrepresentation claim fails based on residual policy considerations at the second stage of the *Anns/Cooper* test. These considerations are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system, and society more generally.[100]

119. The Claim fails on residual policy ground for three reasons: i) it challenges core policy decisions; ii) it would have a chilling effect on good governance; and iii) it would create indeterminate liability.

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[97] *Hartman v Attorney General of Canada*, 2025 ONSC 1831 ["*Hartman*"] at para 13
[98] *Harman*, at para 65
[99] The Claim, at para 122
[100] *Cooper*, at para 37

Core Policy Decisions

120. The Courts from *Imperial Tobacco*, *Adam, Abudu*, and *Hartman* also struck the respective claims on the basis that the public statements by the governments were core policy decisions immune from negligence liability.

121. *In Imperial Tobacco,* the core policy decision based on the impugned public statements was Canada's policy to encourage people who continued to smoke to switch to low-tar cigarettes.[101]

122. In *Adam, Abudu,* the core policy decision was the promotion of the H1N1 public vaccination program aimed at mitigating the public health threat of a potential influenza pandemic.[102]

123. In *Hartman*, the public statements were a core policy decision as an expression of an effort to protect the general public during a pandemic.[103]

124. The Supreme Court of Canada *Nelson (City) v Marchi*, recently confirmed the factors to be considered when determining if a claim challenges a core policy decision.[104] The four factors are:

    a. The level and responsibility of the decision-maker:

        The higher the decision-maker is within the executive and the close to a democratically-accountable official, the more likely the decision will be a core policy decision.[105]

    b. The process by which the decision was made:

        Where the process is deliberate, requires debate, involved input from different levels of authority, and was intended to have broad prospective application, the more likely it will be a core policy decision[106]

    c. The nature and extent of budgetary considerations:

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[101] *Imperial Tobacco*, at para 95
[102] *Adam, Abudu*, at paras 161 - 163
[103] *Hartman,* at paras 73 and 78
[104] *Nelson (City) v Marchi*, 2021 SCC 41 ["*Nelson (City)*"], at para 3
[105] *Nelson (City)*, at para 62
[106] *Nelson (City)*, at para 63

Decisions affecting the budgetary allotments for government departments or agencies will fall more towards core policy decisions.[107]

d. The extent the decision was based on objective criteria:

Where a decision weighs competing interests and requires value judgments – rather than being based on technical standards – it will more likely be a core policy decision.[108]

125. The impugned public statements by Alberta government officials are the expression of a core policy decision similar to *Imperial Tobacco*, *Adam, Abudu*, and *Hartman* as they sought to encourage public vaccination in response to a pandemic and public health emergency affecting all aspects of society.

126. Considering the four *Nelson (City)* factors confirms the public statements are core policy decisions.

a. The statements were given by elected and high-level government officials, being the Premier, Ministers, and the Chief Medical Officer of Health;

b. The statements involved input and debate, and were meant to have broad, prospective application;

c. The decision affected government department budgetary considerations as vaccinated individuals were far less likely to require care within the health care system;

d. Encouraging public vaccination involved a value judgment course of action and not the application of technical standards.

127. As an expression of a core policy of encouraging public vaccination in response to a pandemic, the public statements by Alberta officials are immune from a negligence claim.

[107] *Nelson (City)*, at para 64
[108] *Nelson (City)*, at para 65

Chilling Effect on Good Governance

128. Recognizing a private law duty by Alberta to the class in this circumstance would have a chilling effect on Alberta's ability to respond to public health emergencies.

129. A private law duty of care to individuals who may suffer adverse events following an immunization would create an unreasonable and undesirable burden on the government when making public health decisions, which my their nature must be aimed at the public at large.

130. A private law duty to a segment of society would interfere with sound-decision making and the balancing of competing interests that arise when governments are forced to grapple with the difficult task of developing life-saving public health measures.[109] This is especially the case when a government is called on to respond to a pandemic representing a public health emergency.

Indeterminate Liability

131. Finding a private law duty of care in the circumstances of the Claim would give rise to the specter of indeterminate liability.

132. In *Adam, Abudu* the Court found imposing a private law duty on governments in relation to encouraging vaccination would raise allow potential claims for any individual who suffered an adverse event for any vaccine recommended or made available in a province.[110]

133. The Court in *Adam, Abudu* went on to cite with approval the decision in *Klein v American Medical Systems* to negate a duty of care on indeterminate policy reasons:

> Public health involves placing considerations of collective risk and benefit to a population above consideration as to the possible effects on individuals. Finding a private law duty of care would run counter to the population-based approach of modern public health. Finally, recognizing a duty of care in these

[109] *Adam, Abudu*, at para 163, citing *Eliopoulos Estate v Ontario (Minister of Health and Long-Term Care)*, 2006 CanLii 37121 (ONCA); See also *Taylor v Newfoundland and Labrador*, 2026 SCC 5, at para 5

[110] *Adam, Abudu*, at para 165

> circumstances may open the door potentially to innumerable claims in any number of similar type cases. The nature of drug and device pre-approval testing is such that it is not possible to predict the emergence of long-term adverse events before such products come to market. If Health Canada were held liable for every adverse effect that became apparent during post-marketing surveillance, the courts would be inundated with lawsuits. The proper defendant in such cases is clearly the manufacturer who is responsible for the careful monitoring and long-term safety of the drug or device.[111]

134. This reasoning applies equally here. Imposing a private law duty of care on Alberta would run contrary to modern public health principles and would allow claims against a government that is not responsible for the development, manufacturing or regulation of a vaccine.

135. The concern about indeterminate liability and expanding claims against an improper defendant was set out in the recent decision of this Court in *Cardinal v Alberta*. In *Cardinal*, Justice Neufeld dismissed a certification application which sought to impose liability on Alberta for claims of Indigenous women who were sterilized in public, government-owned hospitals without their informed consent.[112]

136. Similar to the Claim here, *Cardinal* required a consideration of whether the patient provided informed consent to their Health Care Professional for the procedure. The Court found that extending a duty of care to Alberta would:

> expose government in similar circumstances to unbound liability for claims of medical negligence (including failure to obtain informed consent). This would risk inviting intervention by government in the physician/patient relationship across the health care system with no clear purpose given the professional and ethical oversight already exercised by the College of Physicians and Surgeons and the redress already available under the law of negligence against physicians.[113]

137. Health Care Professionals that administer vaccines, such as public health nurses, pharmacists and doctors, all have professional and ethical obligations to

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[111] *Klein v American Medical Systems Inc*. 2006 CanLii 42799 (ONSCDC), at para 37, cited in *Adam, Abudu*, at para 166

[112] *Cardinal*, at paras 1 and 72

[113] *Cardinal*, at para 72

administer the vaccines in a propre manner and to obtain clear informed consent of the patient.

138. Imposing a private law duty on Alberta would invite the government into second guessing the clinical assessment by the Health Care Professional of whether any vaccine is recommended or contraindicated for any specific patient, and whether that individual patient provided their own informed consent.

Negligence

139. In addition to the negligent misrepresentation claim, the Plaintiff alleges general negligence, which include broad allegations against "the defendants" suggesting both Alberta and Canada had a duty with regard to the safety, efficacy and interchangeability of the vaccines, and a duty to warn of the all the risks of the vaccine.[114]

140. The facts in the Plaintiff's Claim against Alberta relate to public statements and messaging encouraging Albertans to get vaccinated against Covid-19.

141. It is unclear from the pleadings in the Claim the additional basis of the general negligence allegations, outside of the negligent misrepresentation claim.

142. The Plaintiff's Certification Brief is of little assistance in articulating the material facts giving rise to a separate general negligence claim against Alberta. The Brief contains allegations that the Premier and provincial public health officers made representations. It is unclear the basis to differentiate this general negligence claim from the negligent misrepresentation claim.

143. Alberta does not regulate or approve the Covid-19 vaccines, which is a federal responsibility. Alberta did not manufacture or sell the Covid-19 vaccines, which was the role of the various vaccine manufactures. Alberta did not administer the Covid-19 vaccine during the pandemic, which was done by public health nurses, doctors, and pharmacists.

[114] The Claim, at paras 127 - 135

144. Insofar as the claim alleges Alberta had a duty to ensure the Covid-19 vaccines were safe, effective and interchangeable, or had a duty to warn Albertans about all the possible adverse events that may follow a vaccination, this is the legislated role of the regulator – here, Canada.

145. There is no statutory scheme imposing any legal responsibility or obligation on Alberta, similar to that of the vaccine regulator, that could ground a proximate relationship between Alberta and the class.

146. While Alberta's relationship is even more distant than that of the regulator, courts have consistently held that even a regulator does not owe a duty to a class of individuals who may suffer an injury as a result of the regulated product.[115]

147. The Plaintiff suggests that the *Public Health Act* and *Health Information Act* "inform the duties" to exercise the public health powers with "reasonable diligence." Informing a duty goes to the standard of care – not to establishing a duty of care. And as noted above, the Supreme Court of Canada decision of the *Queen v Saskatchewan Wheat Pool* confirms no negligence claim arises simply from breach of a statute.[116]

148. The Plaintiff also suggest Alberta's alleged negligence is "compounded" by a failure to implement recommendations in a report commissioned by Alberta. The Covid-19 Task Force Report was released in January 2025.[117]

149. While the Covid-19 Task Force Report was commissioned by and provided to Alberta, it has not been adopted into legislation and there is no legal basis for it to be considered legally binding in a manner that would give rise to a private law duty of care to implement any recommendations.

150. Relying on the same factors that establish no cause of action for negligent misrepresentation – such as a lack of proximity and policy concerns – it is plain

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[115] See *Drady v Canada (Health)*, 2008 ONCA 659, at para 38; *Attis v Canada (Health)*, 2008 ONCA 660, at paras 58 – 59; *Taylor v Canada (Attorney General)*, 2012 ONCA 479, at para 61; and *Adam, Abudu*, at para 134

[116] Plaintiff's Certification Brief, at para 138; *Saskatchewan Wheat Pool*, at pg 225

[117] Plaintiff's Certification Brief, at para 151; and the Claim, at para 145

and obvious the pleadings also do not establish any general negligence claim against Alberta.

Misfeasance in Public Office

151. The Claim alleges a cause of action for misfeasance in public office against Alberta based on the public statement statements by Alberta officials encouraging Albertans to choose to become vaccinated[118], through failure to implement the Covid-19 Task Force Report recommendations[119], and implementing the Restriction Exemption Program through a Chief Medical Officer of Health Order.[120]

152. None of these allegations meet the legal requirement for a misfeasance in public office claim.

153. The test for misfeasance in public office was established by the Supreme Court of Canada in *Odhavji Estate v Woodhouse*.[121] Misfeasance in public office is an intentional tort that can arise in two ways:

> Category A: conduct that is specifically intended to injure a person or class of persons;
>
> Category B: a public officer who acts with knowledge both that she or he has no power to do the act complained of and that the act is likely to injure the plaintiffs;[122]

154. The common elements of both categories are that: i) the public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer; and ii) the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff.[123]

155. Misfeasance in public office is not directed at public officers "who inadvertently or negligently fails adequately to discharge the obligations of his or her office."

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[118] The Claim, at paras 141 - 143
[119] The Claim, at paras 145 - 146
[120] The Claim, at paras 147 - 151
[121] *Odhavji Estate v Woodhouse*, 2003 SCC 69 ["*Odhavji Estate*"]
[122] *Odhavji Estate*, at para 22 and 30
[123] *Odhavji Estate*, at para 23

Instead, the rationale of the tort is that the "exercise of administrative power may be exercised only for the public good and not for ulterior and improper purposes."[124]

156. It is not enough in a misfeasance claim for a plaintiff to plead facts of negligence, mismanagement, poor judgment[125], nor even "negligence with intent."[126] Misfeasance requires an element of bad faith or dishonesty[127] and without sufficient facts plead, a misfeasance claim should be struck.[128]

157. Knowledge that harm to a segment of the public may result from a decision is also not sufficient to ground a misfeasance in public office claim. As the Supreme Court of Canada held in *Odhavji Estate*:

> In a democracy, public officers must retain the authority to make decisions that, where appropriate, are adverse to the interests of certain citizens. Knowledge of harm is thus an insufficient basis on which to conclude that the defendant has acted in bad faith or dishonesty.[129]

158. The Plaintiff's misfeasance claim fails on a number of grounds. First, the Plaintiff can point to no unlawful conduct by any Alberta official. There is nothing in the *Public Health Act* nor the *Health Information Act* that would regulate public statements encouraging vaccination.[130] There is no basis in those *Acts* to import a legal requirement to relating to the accuracy or veracity of broad public statements relating addressing public health concerns.

159. Rather, the public statements support the purpose of the *Public Health Act* of seeking to respond to a public health emergency. They are not unlawful, as required for either category of a misfeasance claim.

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[124] *Odhavji Estate*, at para 26
[125] *Pikangikum First Nation v Nault*, 2012 ONCA 705, at para 77
[126] *Signalta Resources Limited v Alberta Balancing Pool*, 2022 ABQB 190, at para 64. Aff'd at 2022 ABCA 398
[127] *Odhavji Estate*, at para 28
[128] *Merchant Law Group*, at paras 34 and 35
[129] *Odhavji Estate*, at para 28
[130] Plaintiff's Certification Brief, at para 156

160. The Plaintiff relies on the finding that the Chief Medical Officer of Health Order establishing the Restriction Exemption Program was *ultra vires*.[131] The restriction exemption program was in force for approximately four and a half months in late 2021 and early 2022. On its face, a plain reading of the requirements of the Program show it did not compel or mandate individuals to receive a Covid-19 vaccine. Individuals were free to attend participating businesses without proof of a Covid-19 vaccine by showing a recent negative Covid-19 test or a medical exemption.[132]

161. The Plaintiff further relies on an alleged failure by the current Chief Medical Officer of Health to implement recommendations arising from the January 28, 2025 report of the Covid-19 Task Force.[133] There is no legal obligation or requirement on the Chief Medical Officer of Health to implement the recommendations in that Report. In fact, there is no legal obligation or requirement on any person to implement the recommendations in the Report. Failing to do so is not an unlawful act.

162. Second, the Plaintiff has pled no facts to suggest any Alberta official, including Premier Kenny and the former or current Chief Medical Officer of Health, were aware or subjectively reckless to the fact that their conduct was unlawful.

163. The extent of the pleadings against Dr. Hinshaw are of allegations of negligence in "providing medical advice regarding the Covid-19 vaccine."[134] Negligence does not establish misfeasance in public office and bald, unsupported allegations of "recklessness" are not sufficient to meet the pleadings requirement.

164. Third, there are no pleadings that any Alberta official was intending to harm any individual or the class when making the public statements encouraging vaccination. That Alberta officials may have been aware that some individuals would experience an adverse events following the immunization, is not sufficient to

[131] Plaintiff's Certification Brief, at para 165
[132] Chief Medical Officer of Health Order, 43-2021, at s 5.5 – 5.8
[133] The Claim, at paras 145 - 147
[134] The Claim, at paras 142 – 143

establish the harm component of a misfeasance in public office claim given the Supreme Court of Canada's comments in *Odhavji Estate*.[135]

165. The Plaintiff is required to plead sufficient facts to show Alberta officials were acting with malice or an improper purpose. Any suggestion that Alberta officials were not encouraging vaccination to respond to the public health emergency of the Covid-19 pandemic and instead were seeking to injure members of the public, would be incapable of belief. If such serious allegation is being made, clear facts in the pleadings are needed. But none exists in the Claim.

166. As the Plaintiff has failed to plead the required facts to give rise to a misfeasance in public office claim against Alberta, this cause of action must be struck.

Fiduciary Duty

167. The Plaintiff has not set out the legal requirements for fiduciary duty cause of action against Alberta. A plaintiff must plead with rigour the legal requirements for a fiduciary duty claim and speculative claims should not be allowed to proceed.[136]

168. Establishing a fiduciary duty in the governmental context will be difficult and only arise in rare, special circumstances.[137]

169. The Plaintiff's Certification Brief sets out an outdated and incorrect test for establishing a fiduciary duty.[138] The Plaintiff's proposed test does not set out the requirement of an undertaking by the fiduciary to act in the best interest of the beneficiary.

170. The leading case on fiduciary duty, including a fiduciary duty in the governmental context is *Alberta v Elder Advocates of Alberta Society*. The correct legal test to establish a fiduciary duty requires a plaintiff to show:

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

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[135] *Odhavji Estate*, at para 28

[136] *Alberta v Elder Advocates of Alberta, 2011 SCC 24* ["*Elder Advocates*"], at para 54

[137] *Elder Advocates*, at paras 37, 48 - 51

[138] Plaintiff's Certification Brief, at para 170, relying on the 1987 decision of *Frame v Smith* and the 1994 decision of *Hodgkinson v Simms*.

b. A defined person or class of persons vulnerable to the fiduciary's control; and
c. A legal or substantial practical interest of the beneficiary that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.[139]

171. The general principles set out in *Elder Advocates* are impacted when a plaintiff claims a fiduciary duty in the governmental context.[140] Vulnerability alone is insufficient to support a fiduciary claim.[141]

172. As a fiduciary duty is one of utmost loyalty, therefore, at the first stage, an undertaking by the government to act in the best interest of an individual or class will typically be lacking. Where the government acts in the public interest and is required to weigh competing interests, the undertaking will not be found.[142] General obligations to the public or sectors of the public will not meet the requirements of the undertaking.[143]

173. If a plaintiff attempts to ground the undertaking in a statute, the legislative language must clearly support it.[144] If the undertaking is alleged to arise through the relationship between the parties, a strong correspondence with the traditional categories of fiduciary relationship (such as solicitor-client, agent-principal, director-corporation, or parent-child) is required.[145]

174. The Claim does not set out any facts to suggest Alberta undertook to act in the class's best interest – either through statute or by implication. The class is not a specifically defined group, other than members of the general public who suffered adverse events following an immunization. There can be no undertaking to the general public that gives rise to a fiduciary duty.

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[139] *Elder Advocates*, at para 36
[140] *Elder Advocates*, at para 41
[141] *Elder Advocates*, at para 28
[142] *Elder Advocates*, at paras 42 - 44
[143] *Elder Advocates*, at para 48
[144] *Elder Advocates*, at para 45
[145] *Elder Advocates*, at para 47

175. The Plaintiff's fiduciary duty cause of action is bound to fail on the first part of the fiduciary duty test. However, it also fails on the second part of the test on the same basis. With respect to the second part of the fiduciary duty test, the Supreme Court of Canada has held that the defined person or group requirement cannot be the public as a whole.[146]

176. Finally, the Plaintiff has not pled sufficient facts to meet the third part of the fiduciary duty test, which requires facts that a legal or practical interest is adversely affected by the fiduciary's discretion or control.

177. It is not enough that an act impacts generally on a person's well-being. The interest must be a pre-existing distinct and complete legal entitlement.[147] The degree of control must be the equivalent to direct administration of the interest, and the ordinary exercise of statutory power does not suffice.[148]

178. The pleadings in the Claim are vague as to the Class's interest that is adversely affected, but it appears to relate to general well-being and avoidance of harm from the Covid-19 vaccine. There is no such pre-existing legal entitlement and, even accepting the pleadings as true, the Claim does not give rise to direct control by Alberta of over that interest.

179. The Plaintiff's fiduciary duty claim should be struck as it fails to plead sufficient facts to establish the limited and special circumstances were such a duty may arise in this governmental circumstance.

Civil Conspiracy

180. The tort of civil conspiracy requires the defendants to have an agreement to engage in a course of conduct with the predominant purpose of injuring the plaintiff, or if the conduct is illegal, to have acted knowingly that injury to the plaintiff is likely to result.[149]

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[146] *Elder Advocates*, at paras 49 - 50
[147] *Elder Advocates*, at para 51
[148] *Elder Advocates*, at para 53
[149] *D'Agnone v D'Agnone, 2017 ABCA 35* ["*D'Agnone*"], at para 19

181. In *Canada Cement LaFarge Ltd. v British Columbia Lightweight Aggregate Ltd*. the Supreme Court of Canada held a civil conspiracy may be found in the following manner:

    a. Whether the means used by the defendants are lawful or unlawful the predominate 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 plaintiff, and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.[150]

182. The Alberta Court of Appeal in *Mraiche Investment Corp v Paul* adopted a restated for the tort of civil conspiracy, being:

    a. An agreement between two or more persons;
    b. Concerted action taken pursuant to the agreement;
    c. i) if the action is lawful there must be evidence that the conspirators intended to cause damage to the plaintiff;
       ii) if the action is unlawful, there must at least be evidence that the conspirators knew or ought to have known that their action would injure the plaintiff;
    d. actual damage suffered by the plaintiff.[151]

183. Facts supporting all the elements of the tort of conspiracy must be present in the pleadings. Bare allegations of a conspiracy not supported by facts will not be sufficient.[152]

184. A conspiracy requires an agreement. While the agreement may be inferred and does not need to be in a specific form, there must be intentional participation in the

[150] *Canada Cement LaFarge Ltd. v British Columbia Lightweight Aggregate Ltd.*, 1983 CanLII 23 (SCC), [1983] 1 SCR 452, at pg. 471
[151] *Mraiche Investment Corp v Paul, 2012 ABCA 95*, at para 40 and cited with approval in *D'Agnone*, at para 21
[152] *Kuprowsky v Fleming, 2025 ABKB 231*, at paras 20 - 22

agreement. The agreement can further a common design and purpose but an agreement is still required.[153]

185. A conspiracy also requires the predominant purpose to be to damage or injure the plaintiff.

186. There are no pleadings in the Claim to establish either that there was an agreement between members of the governments of Alberta and Canada and that the purpose of the agreement was to harm the Plaintiff or segments of society.

187. It is not enough that both Alberta and Canada adopted and even co-ordinated some public health policies and messaging to encourage vaccination against the Covid-19 virus. The Plaintiff must plead sufficient facts to show an intentional agreement between Alberta and Canada to take concerted actions.

188. The Claim alleges the conspiracy resulted in the assault and battery of class members by failing to provide correct or adequate information about the risks of the Covid-19 vaccine.[154]

189. Such allegations at law do not give rise to a claim for assault and battery. The Supreme Court of Canada settled this issue in its 1980 decision of *Reibl v Hughes*, which held:

> In situations where the allegation is that attendant risk which should have been disclosed were not communicated to the patient and yet the surgery or other medical treatment carried out was that to which the plaintiff consented (there being no negligence basis of liability for the recommended surgery or treatment to deal with the patient's condition) I do not understand how it can be said that the consent was vitiated by the failure of disclosure so as to make the surgery or other treatment an unprivileged, unconsented to and intentional invasion of the patient's bodily integrity. I can appreciate the temptation to say that the genuineness of consent to medical treatment depends on proper disclosure of the risks which it entails, but in my view, unless there has been misrepresentation or fraud to secure consent to the treatment, a failure to disclose the attendant risks, however serious, should go to negligence, rather than to battery. Although such a failure relates to an informed choice of submitting to or refusing recommended and appropriate treatment, it arises as the breach of an anterior duty of due care, comparable in legal obligation to

[153] *D'Agnone*, at para 22

[154] The Claim, at para 173, 175 and 176

the duty of due care in carrying out the particular treatment to which the patient has consented. It is not a test of the validity of the consent.[155]

190. The Plaintiff's Claim may give rise to an allegation of negligence against the Health Care Professional who administered the Covid-19 vaccine, but does not give rise to a cause of action of assault and battery.

191. The Plaintiff has also not plead any facts to allege the predominant purpose of any agreement was to injure the Plaintiff. Throughout the Claim, the Plaintiff alleges the information in the public statements provided by Alberta were false and misleading. Nowhere in the Claim is the allegation that the alleged false or misleading statements were made to injure the Plaintiff.

192. The class is not discretely defined but instead is broadly cast as members of the public who suffered adverse events following immunization. An allegation that Alberta government officials intended to harm the class is essentially an allegation that Alberta intended to harm the public as a whole. Such an allegation would be illogical and strain credulity.[156]

193. For the conspiracy cause of action to pass the plain and obvious test at the certification stage, the Plaintiff would have to plead sufficient facts to suggest the purpose of Alberta's public health messaging and measures during the Covid-19 pandemic was not to protect the public and the health care system, but was to harm the public generally or some segment of the public.

194. Such an allegation would be further incapable of belief, given the number of courts – both within Alberta and across Canada – that have taken judicial notice of the Covid-19 pandemic and the Covid-19 vaccines. The Alberta examples include:

    a. In *R v Aiello*, Justice Devlin took judicial notice that "vaccination is a safe and highly effective means of preventing the spread of the coronavirus, the development of Covid-19 infections, and severe illnesses in those that

[155] *Reibl v Hughes*, 1980 CanLII 23 (SCC), [1980] 2 SCR 880, at pgs 891 - 892

[156] *Dorceus v Ontario, 2024 ONSC 7087*, at paras 66 – 69 where the Ontario Superior Court struck a conspiracy claim alleging the Premier of Ontario and others declared a false pandemic and implemented coercive and damaging measures

become infected. The scientific consensus on this fact is notorious and beyond reasonable dispute."[157]

Justice Devlin went on to take judicial notice that "short of ceasing all contact with other humans, vaccination is now proven to be the single most effective method of reducing the risk and prevalence of Covid-19, a disease which has ravaged our society, its institutions, and the physical and mental well-being of all Canadians."[158]

b. In *Sembaliuk v Sembaliuk*, Justice Whitling took judicial notice of fact of the Covid-19 pandemic, its impact on Canadian society generally, and the current state of medical knowledge of the virus, including its mode of transmission and recommended methods to avoid its transmission.[159]

Justice Whitling went on to take judicial notice that "vaccines are the most effective method of reducing the risk and prevalence of Covid-19, and that getting fully immunized offers the best possible protection from the virus, even in the case of persons who have previously contracted the virus."[160]

c. In *TLM v JTM*, Justice Loparco relied on the judicial notice already taken by the Courts with respect to the regulatory approvals of the Covid-19 vaccines and the recommendations of government health officials and the risks of both the Covid-19 virus and the Covid-19 vaccines.[161]

195. These previous judicial finding are not binding on this Court at this application, and the Plaintiff is free to plead allegations that information about the Covid-19 vaccine has evolved. However, the multiple findings of judicial notice set out above confirm the prevailing society knowledge at the time the decisions were made and that it is plain and obvious that the predominant purpose of encouraging vaccination during the Covid-19 pandemic was not to injure any individual or members of the public.

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[157] *R v Aiello*, 2021 ABQB 772 ["*Aiello*"], at para 3
[158] *Aiello*, at para 4
[159] *Sembaliuk v Sembaliuk*, 2022 ABQB 62 ["*Sembaliuk*"], at para 8
[160] *Sembaliuk*, at para 16
[161] *TLM v JTM*, 2022 ABQB 109, at paras 28 - 35

196. With no allegations of an agreement between members of the Alberta and Canada government (or any other party, such other governments, the vaccine manufactures, and Health Care Professionals) to injure the plaintiff or the public, the conspiracy cause of action is bound to fail and should be struck.

THERE IS NO IDENTIFIABLE CLASS

197. The proposed class does not meet the requirements of a proper class definition. Given the nature of the Claim, no amendments to the class definition will satisfy the requirements of the *Class Proceedings Act*.

198. Section 5(1)(b) of the Class Proceeding Act requires that there be an "identifiable class of 2 or more persons."[162]

199. The Supreme Court of Canada in *Sun-Rype Products Ltd. v Archer Daniels Midlands Co*. confirmed that the purpose of the class definition is threefold:

    a. To identify those persons who have a potential claim for relief against the defendants;
    b. To define the parameters of the lawsuit so as to identify those persons who are bound by the result; and
    c. To Describe who is entitled to notice of the action.[163]

200. Given the critical importance of the class definition, the definition must state the objective criteria by which members of the class can be identified, must bear a rational relationship to the common issues asserted by the class members and should not depend on the outcome of the litigation.[164]

201. Flowing from the requirement that the class definition be objective and that it not depend on the outcome of the litigation is that the class definition must not be merits based. As Justice Slatter held in *Warner v Smith & Nephew Inc.*:

> Merits based classes are objectionable because of their circularity. The worst examples are definitions of the class as "all those who have a claim" or "all those who

[162] *Class Proceedings Act*, SA 2003, c C-16.5 at s. 5(1)(b) [Alberta Authorities, TAB 1]
[163] *Sun-Rype Products Ltd. v Archer Daniels Midlands Co.*, 2013 SCC 58, at para 57
[164] Dutton at para 38

are entitled to damages." Under that sort of definition, it is impossible to even know who is in the class until the result is known, after trial.[165]

202. A class definition that is subjective or merits based is not acceptable as it:

i) frustrates efforts to identify the class;

ii) contravenes the policy against considering the merits of a claim at certification; and

iii) creates potential problems of manageability.

203. The class definition should also not be unnecessarily broad so as to include persons who have no claim against a defendant while at the same time, should not be unnecessarily narrow so as to arbitrarily exclude persons with similar claims to those asserted by the class.[166]

204. It is the plaintiff's onus to establish there is a proper class definition. While the Courts have held that this requirement is not overly onerous, the plaintiff must establish some basis in fact to meet the class definition requirements.[167]

205. Here, the Plaintiff proposes the following class definition:

> All individuals who received COVID-19 vaccines (the "Covid Vaccine" or "Covid Vaccines") marketed or manufactured by Pfizer-BioNTech, AstraZeneca PLC, Moderna Inc., Janssen Inc., and Novavax Inc. (the "Vaccine Manufacturers") in the Province of Alberta between December 9, 2020 and the date of certification of this action as a class proceeding, or such other date determined to be appropriate by the Court (the "Class Period"), and who suffered injury (the "Class" or "Class Members").[168]

206. The proposed class definition includes those individuals who received the COVID-19 vaccine and "suffered injury".

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[165] *Warner v Smith & Nephew Inc.*, 2016 ABCA 223 at para 98. See also *Chadha v Bayer Inc.* 2003 Canlii 35843 (ONCA), 63 OR (3d) 22, at para 69

[166] *Windsor v Canadian Pacific Railway Limited*, 2007 ABCA 294, at para 19 and *Rieger v Plains Midstream Canada ULC*, 2022 ABCA 28, at para 67

[167] *Hollick v Toronto (City)*, 2001 SCC 68 ["*Hollick*"], at para 21

[168] Plaintiff's Certification Brief, at para 12; See also 5th Amended Certification Application, filed July 2, 2025 at para 14.

207. The proposed class does not satisfy the class definition requirement as it is overly-broad, not objectively defined and is merits-based, which is objectionable due to its inherently circular nature.

208. First, the proposed class definition is overly broad. The class definition includes the requirement that the individuals who received a vaccine "suffered injury" as a result of the vaccine.

209. Injuries that result of receiving a vaccine can include both serious, long-terms adverse events as well as minor events that are inherent with receiving a vaccination, such as pain from the needle piercing the skin and redness of the injection site.

210. Fundamentally, the problem with the definition including "injury" is whether the class member consented to the Covid-19 vaccine knowing the injury may result. Where a class member was informed that a side effect of the Covid-19 vaccine may be chills, headaches and soreness,[169] agrees to receive the vaccine and then experiences those symptoms, they have not suffered an injury.

211. The class membership would be subjective as class members would be required to each individually determine if they suffered injury that was consistent with their consent to receive the vaccines.

212. Adding a qualifier to "injury" in an attempt to better define the class, such as "significant" or "long lasting", would only serve to make the class definition improperly subjective.

213. The class definition is overly broad is it includes individuals who may have received the Covid-19 vaccine without being aware of or relying on the complained of vaccine campaigns by Alberta. It would include individuals who based their decision to obtain the Covid-19 vaccine after discussions with their family doctor or their family.

[169] Affidavit of Carrie Sakamoto, sworn September 16, 2024, at Exhibit A; Dr. Klein Affidavit, at Exhibit DD

214. Given the large amount of information regarding the Covid-19 vaccine available to the general public,[170] there is no way to objectively limit the class to those individuals that were aware of and relied on Alberta's vaccine campaigns.

215. As the class definition established the class period as running from December 9, 2020 until the certification decision is released (at least the second half of 2026), the class definition also includes individuals who received the Covid-19 vaccine after all of Alberta's vaccine campaigns and public health measures concluded in 2022.[171]

216. Finally, with respect to the overbreadth of the class definition, it includes individuals who may have suffered injuries from the Covid-19 vaccine, not as a result of the inherent nature of the vaccine (which is the basis of the Claim), but due to issues such as a manufacture's quality defect, or an error in the handling or administration of the vaccine.[172]

217. In addition to being overly broad, the class definition suffers from the fundamental, and irredeemable, flaw of being merits based. The Claim is based on the vitiating of informed consent of the individuals who received a Covid-19 vaccine and suffered and injury.

218. The requirement to have suffered injury is clearly merits based: It turns on the outcome of this litigation in that it cannot be known if a class member suffered injury until it is determined whether class members informed consent was vitiated by Alberta's vaccine campaigns.

219. In *Chadha v Bayer Inc.*, the Ontario Court of Appeal considered the propriety of the class definition in a price-fixing class action. Similar to the class definition in this action, in *Chadha* the class definition included "all persons in Canada who have suffered loss or damage as a result of the defendants' agreement to wrongfully increase or maintain the price of iron oxide and black pigment."[173] The Ontario

[170] Smith Affidavit, at 9
[171] Smith Affidavit, at para 17 and the Claim at para 46
[172] Dr. Klein Affidavit, at para 92
[173] *Chadha v Bayer Inc.* [2003] O.J. No. 27, 2003 CanLii 35843 (ONCA) ["*Chadha*"], at para 6

Court of Appeal held the class definition in *Chadha* was not acceptable and did not meet the certification requirements as it was "not objective, but turns on the outcome of the litigation."[174]

220. Some actions have attempted to circumvent the merits-based class definition by defining the class as individuals who "claim" to have suffered losses. While the Plaintiff has not defined the class in such a way, and has not sought to amend their class definition, amending the class here to include those who "claim to have suffered injury" is equally problematic.

221. In *Paron v Alberta,* the plaintiffs sought to certify an action by landowners relating to the water level in an adjacent lake.[175] The class definition included "all residents who claim that their use and enjoyment of their land or the value of their lands were adversely affected."[176]

222. The Court in *Paron* found the class definition did not meet the requirements of section 5(1)(b) of the *CPA* as "class members can not be identified without first determining who suffered harm, and that determination is integrally dependant upon the merits of the action."[177]

223. No matter how the class is attempted to be defined, the fundamental nature of the class requires impermissible proof relating to informed consent and causation of the injury as a result of the COVID-19 vaccine and Alberta's vaccine campaigns.

224. Certification of this action should be denied on the basis that the Plaintiff has failed to articulate a proper class definition.

THERE ARE NO COMMON ISSUES

225. Section 5(1)(c) of the *Class Proceedings Act* requires a plaintiff to demonstrate the claims of the proposed class members raise common issues.[178]

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[174] *Chadha*, at para 69
[175] *Paron v Alberta (Minister of Environmental Protection)*, 2006 ABQB 375 ["*Paron*"], at paras 1 – 3
[176] *Paron*, at para 40
[177] *Paron*, at para 60
[178] *Class Proceedings Act*, SA 2003, c C-16.5, at s 5(1)(c)

226. The underlying issue with respect to the common issues test was articulated by the Supreme Court of Canada in *Western Canadian Shopping Centres v Dutton*:

> The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding and legal analysis Thus the issue will be "common" only where its necessary to the resolution of each class member's claims.
>
> Success of one class member must mean the success for all.[179]

227. A common issue does not need to be determinative, but it must advance the litigation and be a substantial ingredient of each class member's claim.[180]

228. A common issue should not be framed in overly broad or general terms. Courts should ensure a proposed common issue is truly common, and not simply made to appear common by the manner in which it is posed. As the Supreme Court of Canada held in *Rumley v British Columbia*:

> It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceedings less fair and less efficient.[181]

229. A plaintiff bears the evidentiary burden of showing, based on admissible evidence, "some basis in fact" for the commonality of each of the common issues. This requirement is a low standard and is not a determination of the merits. However, a plaintiff is required to meet this standard at certification, which serves as a meaningful screening device. More than symbolic scrutiny and a superficial level of analysis of the evidence is required.[182]

230. In addition to establishing some basis in fact for the commonality of each common issues, a plaintiff must establish that a common issue actually exists.[183]

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[179] *Western Canadian Shopping Centres Inc. v Dutton*, 2001 SCC 46 ["*Dutton*"] at paras 39 and 40
[180] *Fisher v Richardson GMP Limited*, 2022 ABCA 123, at para 37
[181] *Rumley v British Columbia*, 2001 SCC 69, at para 29
[182] *Pro-Sys Consultants Ltd. v Microsoft Corp.*, 2013 SCC 57 ["*Pro-Sys*"], at para 103
[183] *Lillyman v Bumble Bee Foods LLC.*, 2024 ONCA 606, at paras 67 – 70 and *Jensen v Samsung Electronics Co. Ltd.* 2023 FCA 89, at paras 81, 90, and 91

231. Where a common issue alleges or relates to intentional misconduct or dishonesty, it is especially important for the plaintiff to provide some basis in fact to support the existence of the common issue.[184]

232. Where a common issue relates to a proposed cause of action that was determined to be bound to fail, those common issues will not significantly advance the action and should not be certified.

233. Without further amending the certification application, the Plaintiff has proposed revised common issues in the Certification Brief. However, none of these proposed common issues meet the certification requirements. These common issues relates to causes of action that are bound to fail, that are not common across the class, do not significantly advance the action or do not even exist.

234. Common issue 15(a) asks whether the "defendants" conduct constitutes negligent misrepresentation. There are a number of sub-common issues proposed. However, neither the general common issue nor the sub-common issues satisfy the common issues requirement.

235. A common issue asking whether Alberta's conduct constituted negligent misrepresentation would require some basis in fact to establish the commonality of the required elements of that tort. That would include not only some basis in fact for the special relationship between Alberta and the class, but also that the class reasonably relied, in a reasonable manner, on the representations.

236. There is no basis in the evidence before the Court to establish the common issue at 15(a)(i) which inquires into general public statements about "safety", "efficacy" or "interchangeability" can be determined across the class. Each class member will subjectively consider, based on their unique circumstances, what is safe and what is effective.

237. Further, asking whether Alberta failed to disclose "material risks" of the Covid-19 vaccine, or whether Alberta minimized "risks, uncertainties, regulatory limitations, or emerging safety concerns" requires an examination of the known and available

[184] *Spring v Goodyear Canada Inc.*, 2021 ABCA 182 ["Spring"], at para 40

evidence relating to the Covid-19 virus and the Covid-19 vaccine at any particular point in time when an individual class member consented to receive the vaccination.

238. The Plaintiff has provided no basis in fact to establish what the “material risks”, “uncertainties”, “regulatory limitations”, or “emerging safety concerns” associated with COVID-19 vaccines were for the class and throughout the class period. This includes what the “known limitations” of interim approval process and adverse event reporting systems were, especially with respect to Alberta, which is not involved in the interim approval process of the Covid-19 vaccine.

239. The common issues at paragraph 15(a)(ii) and 15(a)(iii) are equally problematic. There is no basis in fact regarding vaccines being “medical treatments” or “therapeutic interventions” rather than vaccines.

240. It is not clear how this question would significantly advance class members claims. Whether any characterization of the vaccine affected the “public understanding”, “risk perception” and “consent” is inherently an individual, subjective assessment required of each class member. As is whether a class member considered any public statements “authoritative.”

241. For common issue 15(a)(iv) there is no basis in fact that Alberta owed or breached any statutory duties – owed to the class – under the *Public Health Act* or the *Health Information Act*. Assuming the Plaintiff is seeking an answer to the alleged breach of section 14 of the *Public Health Act* and section 61 of the *Health Information Act*, the Plaintiff has provided no basis in fact that any private duty to the class arises from these sections, or how a breach of those sections would significantly advance the claims.

242. Common issue 15(a)(v) asks whether the public statements created an “erroneous impression” of the Covid-19 vaccines that were “reasonably relied upon”. Again, this question is inherently individualistic and requires an individual assessment of whether each class member held the “erroneous impression” and “reasonably relied upon that impression.

243. More generally with respect the negligent misrepresentation common issue, the reasonable reliance on any public statements to choose to receive the Covid-19 vaccine is an individual issue that cannot be determined across the class. Determining whether one class member may have reasonably relied upon the public statements does not assist in determining whether any other class member reasonably relied on those same (or different) public statements.

244. The common issues at 15(b) ask whether "the defendants" conduct constituted negligence. To significantly advance the action, both this common issue, and the negligent misrepresentation common issue, require some basis in fact to establish Alberta officials acted in bad faith given the immunity clause found in section 66.1 of the *Public Health Act*.

245. There is absolutely no basis in fact to suggest any Alberta official acted in bad faith. The Court should engage its role in conducting a meaningful screening at certification to refuse any such proposed common issue for lacking <u>any</u> basis in fact.

246. There is also no basis in fact that Alberta did not collect, monitor, assess, disclose and communicate vaccine-related information, balanced public health information, or information on known adverse events during the class period. Alberta has a distinct role in public heath from that of Canada, or health care providers. There is no basis in fact that Alberta prevented the collection or reporting of adverse events and at all times Alberta has made information on adverse events following a Covid-19 vaccination publicly available.

247. This question requires a factual assessment of the scientific information known about the Covid-19 virus and the Covid-19 vaccine as it evolved over the pandemic up until the present. This assessment is not common across the class.

248. Common issue 15(b)(v) asks whether Alberta was negligent or reckless in failing to implement the Covid-19 Task Force findings. There is no basis in fact that implementing the findings of the Task Force would significantly advance the action. The Report was issued in January 2025, so, at best it would only apply to any

class member who suffered an adverse event following a Covid-19 vaccination after that date.

249. There is no basis in fact that the finding and recommendations in the Report are legally binding or establish a requisite standard of care. The Report itself is inadmissible opinion evidence. No author of the Report has been qualified as an expert witness in this action.

250. The Report itself does not otherwise meet the criteria for expert evidence set out in *White Burgess Langille Inman v Abbot and Haliburton*.[185] Expert witnesses have a duty to the court to provide fair, objective, and non-partisan assistance, and must be aware of this duty.[186] The Report was commissioned by Alberta's Premier, not pursuant to a duty to the court in this action.

251. Further, the opinions expressed in the Report on which the Plaintiff seeks to rely are not within the expertise of any medical professional and are not necessary to assist the trier of fact. The Plaintiff purports to rely on the Report's findings that "public messaging was coercive, infection-acquired immunity was downplayed, and vaccination was prioritized through mandates rather than individualized medical judgment."[187] These are not inferences from scientific information outside the knowledge of the judge, but "ultimate issues" in this case, determinations of which are exclusively within the function the judge.[188]

252. Common issues 15(b)(vi), 15(b)(ix), 15(b)(x) all relate to questions about the Vaccine Injury Support Program. There is no basis in fact to certify any common issue with respect to Alberta regarding a federal compensation program. There is no basis in fact that Alberta was involved in the design, implementation or administration of that Program.

253. In any event, resolving any issues regarding the design, implementation and administration of the Vaccine Injury Support Program would not significantly

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[185] *White Burgess Langile Inman v Abbott and Haliburton Co.*, 2015 SCC 23 ["White Burgess"]
[186] *White Burgess* at para 10
[187] Plaintiff's Certification Brief, at para 56.
[188] *R v Mohan, 1994 SCC 80*, [1994] 2 SCR 9, at pg 11

advance claims of class members and are more akin to a public inquiry into the program's effectiveness.

254. Common issue 15(c), 15(d), and 15(e) are general common issues relating to the misfeasance, fiduciary duty and conspiracy causes of action. They are improperly framed in the highest level of abstract, while also not accurately reflecting the elements of the legal test for those causes of action. They therefore do not significantly advance the class members claims.

255. For instance, common issue 15(c) asks if liability for misfeasance in public office is established by Alberta "knowingly or recklessly disregarding" statutory duties and foreseeable harm with respect to its Covid-19 vaccination policies. This is not the required test for misfeasance in public office, which also requires an intentional act by an office holder to harm a plaintiff (or knowing harm was likely).

256. Similarly, a fiduciary duty requires more than simply "assuming extraordinary control of public health decisions" and "withholding material risk" or "undermining informed consent" It requires at the very least an undertaking to act in the plaintiff's best interest.

257. More generally, common issue 15(d) asks whether Alberta "breached" its fiduciary duty – assuming such a duty exists. However, a breach of a fiduciary duty requires a defendant to have "exploited the plaintiff for their direct or indirect personal gain."[189]

258. There is absolutely no evidence that any Albera official exploited the plaintiff or the class for their personal gain, and certainly no basis in fact for this common issue.

259. Common issues 15(f) and 15(g) raise issues of voluntariness in choosing to receive the Covid-19 vaccine and reasonable reliance on public statements, and information provided. Whether any individual class member was aware of or relied upon any statements, guidance or information is at its core an individual issue that can only be determined through an individual assessment. Different class

[189] *C.A. v Critchley*, 1998 CanLII 9129 (BCCA), at para 85. More recently at *Proudfoot v Bryant*, 2025 BCSC 1437, at paras 157 – 159.

members would have had access to and relied on different information from different sources in deciding to receive the Covid-19 vaccine. Whether such information affected the "voluntariness" of that decision is inherently subjective and personal to each class member. Such a determination cannot be done on a class-wide basis.

260. Common issues 15(h) relates to class wide damages. Aggregate damages can be awarded in class proceedings pursuant to section 30 of the *Class Proceedings Act*, but only if there are no questions of fact or law remaining (other than those relating to the assessment of monetary relief), and in the opinion of the Court can "reasonably be determined without proof by individual class members."[190]

261. Even accepting the Plaintiff's common issues there are a host of questions of fact and law that would remain that would require determinations by individual class members. Aggregate class-wide damages are inappropriate and this common issue should not be certified.

262. As the Plaintiff has not established any cause of action, aggregate damages is not a certifiable common issue: The Supreme Court of Canada has confirmed that aggregate damages require an antecedent finding of liability.[191]

263. Even if this Court finds the Plaintiff has made out cause(s) of action, the Plaintiff has not shown any methodology which offers a realistic prospect of establishing loss on a class basis, as required.[192]

264. No such methodology is possible here because the relevant circumstances were dynamic over the proposed class period. Those circumstances included: changes in scientific knowledge of the Covid-19 virus; successive CMOH Orders; fluctuating infection rates; the introduction and operation of the Restriction Exemption Program; changes in vaccine availability; evolving recommendations on dosing and "mix-and-match" use; shifting rollout schedules; the imposition and lifting of

[190] *Class Proceedings Act*, at ss. 30
[191] *Pro-Sys,* at para 131
[192] *Virani v Uber Portier Canada Inc,* 2023 ABKB 240 ["Virani"] at para 62, citing *Pro-Sys* at para 118.

mask mandates; evolving knowledge regarding mask efficacy and COVID-19 transmission generally, implementation of employer-mandated vaccination policies, and so on.

265. These variables changed materially and rapidly over the class period—especially during the declared public health emergency in Alberta. As a result, class members were vaccinated at different points along a continuously evolving factual and regulatory timeline. As in *Cardinal*, such temporal and regulatory variation among members of the proposed class is fatal to certification.[193] It precludes the requisite "common ingredient" to ground common issues across the proposed class.

266. Likewise, the indeterminate nature, type, and combination of potential injuries represented within the proposed class precludes a "common ingredient."

267. In these circumstances, certification of aggregate damages as a common issue will not achieve the purpose of a representative action to avoid duplication of fact-finding or legal analysis.[194]

268. Common Issue 15(i) asks whether any Defendants should pay punitive, exemplary, or aggravated damages to the class.

269. The Court of Appeal rejected certification of punitive damages as a common issue in Warner *v Smith*, a class action against the manufacturer of a hip implant, reasoning:

> It is easy to plead a claim for punitive damages, but there is nothing on this record to suggest that there is any air of reality to that claim. The defendant went through the extensive approval process required to have a medical appliance used in Canada. Careful instructions were issued to surgeons about the appropriate use of the appliance and its use was continuously monitored. Even if it turns out that product should never have been placed on the market, there is nothing that remotely suggests that punitive damages would be available. This is not a suitable common issue at this time.[195]

270. There is likewise no basis in fact for the punitive or exemplary damages claim against Alberta. Alberta neither approved nor regulated the COVID19 vaccines,

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[193] See *Cardinal v Alberta*, 2025 ABKB 270 ["*Cardinal*"], at para 126

[194] *Dutton,* at para 39

[195] *Warner v Smith & Nephew Inc,* 2016 ABCA 223, at para 106 (emphasis added).

much less manufactured them. Alberta procured provincially funded vaccines, set immunization eligibility and schedules, and monitored adverse events following immunization as part of its pandemic response strategy.[196]

271. While the Plaintiff emphatically argues Alberta should have issued different communications about the vaccines and should have balanced risk of adverse events differently within its overall pandemic response, there is no evidence that Alberta, or any of its agents or officers, engaged in "harsh, vindictive, reprehensible and malicious" conduct towards proposed class members to justify an award of punitive damages.[197] The Plaintiff offers nothing more than a dubious inference of wrongdoing based on *ex-post facto* vaccine-related injuries, but no evidence of culpable misconduct assessed at the time the impugned decisions were made. The common issue relating to punitive damages.

272. Aggravated damages, by their very nature are not suitable for determination on a class-wide basis. Aggravated damages are based on harms causes to a plaintiff's emotions by reprehensible or outrageous conduct.[198] Aggravated damages therefore are based on an individual assessment of each class member and can not be determined across the class.

A CLASS PROCEEDING IS NOT THE PREFERABLE PROCEDURE

273. The Plaintiff must provide some basis in fact that a class proceeding is the preferable procedure for the fair and efficient resolution of the common issues as compared to other reasonably available means of resolving class members claims.[199]

274. Where the common issue requirement is not satisfied, the preferable procedure requirement will likewise not be satisfied.[200] Where some common issues are

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[196] Dr. Klein Affidavit, at para 54 and Exhibit K

[197] *Honda Canada Inc. v Keays*, 2008 SCC 39 (CanLII) at para 68, citing *Vorvis v Insurance Corporation of British Columbia*, 1989 CanLII 93 (SCC). See also *Virani*, at para 63.

[198] *Whiten v Pilot Insurance Co.* 2002 SCC 18, at para 116

[199] *Class Proceedings Act*, at s 5(1)(d) and *AIC Limited,* at para 48

[200] *Cirillo v Ontario*, 2019 ONSC 3066, at para 70

found, the Court will look to the importance of the common issues in the context of the action as a whole.[201]

275. The Plaintiff must show that a class proceeding would be a fair, efficient and manageable method for advancing the claim. When comparing the various alternative methods of resolving the class members claims, the court compares the competing possibilities through the lens of the goals of class proceedings, including behaviour modification, judicial economy and access to justice.[202]

276. When conducting the preferability analysis the Court can consider any matter it considers relevant but must consider the factors set out in section 5(2) of the *Class Proceeding Act*. Importantly, this includes whether questions of fact or law common to the class members would predominate over any questions affecting only individual class members.[203]

277. Whether individual issues predominate over any common issues is not necessarily determinative of the preferable procedure requirement, but it is a significant consideration.[204] Where class members would not be in a martially improved position after a common issues trial – with substantial individuals issues requiring resolution – a class proceeding will not be the preferable procedure.[205]

278. Where a claim inevitably will require an individualistic inquiry into the nature, degree and consequences of a class members claims, a class proceeding will not be the preferable procedure, even if the class action could be said to address some systemic wrong by a defendant.[206]

279. A class action will not be preferable where the resolution of class members claims will break down into substantial individual trials needed to determine the individual characteristics of each class member's claim. Instead of providing the procedural

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[201] *Setoguchi v Uber BV*, 2023 ABCA 45, at para 64
[202] *AIC Limited*, at para 48
[203] *Class Proceedings Act*, at s 5(2)(a)
[204] *Thorburn v British Columbia (Public Safety and Solicitor General)*, 2013 BCCA 480 ["*Thorburn*"] at para 48
[205] *Thorburn*, at para 51
[206] *Dennis v Ontario Lottery and Gaming Corporation*, 2013 ONCA 501, at paras 58 - 59

efficiencies sought by a class actions, such a claim would "become monsters of complexity and cost."[207]

280. Where individual issues predominate, the goals of class actions are not met. Class members who may have a valid claim for an adverse event are denied access to justice as they have to wait for the resolution of common issues that leave them in no better situation than an individual trial and still having to prove substantial aspects of their claim. Judicial economy is also not realized as the class proceeding would be inefficient, unmanageable, costly and unfair.

281. The monetary claims of class members are not particularized but, on the assumption that each suffered a severe adverse event following their immunization, the claims would not be nominal.

282. As the Supreme Court of Canada held in *Western Canadian Shopping Centres Inc. v Dutton*, class proceedings are typically used as an aggregating tool which allows individuals with relatively small claims to reduce litigation costs by dividing them over a large number of plaintiffs. In this manner, class proceedings serve the interest of access to justice, judicial economy and behaviour modification.[208]

283. The large quantum of losses of each potential class member negates the need for a class proceeding as each claim, if each claimant wished to bring it, would be economical to do so. As the Supreme Court of Canada held in *Hollick v Toronto (City)*:

> if individual class members have substantial claims against the respondent, we should expect that they will be willing to prosecute those claims individually.[209]

284. While individual trials (or test cases) are often the comparator for a proposed class proceeding, the preferability requirement is broad enough to also encompass consideration of non-litigation means of resolving class members claims. As the Supreme Court of Canada held in *AIC Limited v Fischer*, preferability can:

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[207] *Thorburn*, at para 51
[208] *Western Canadian Shopping Centres* at paras 27 - 29
[209] *Hollick,* at para 34

> take into account all reasonably available means of resolving a class members claims, including avenues of redress other than court actions. An alternative process need not necessarily decide the precise legal and/or factual questions raised by the common issues provided that it effectively resolves the class members claims[210]

285. The very nature of the class members claims and the evidence on the record for this application confirm that the preferable procedure is not a class action, but allowing individuals who claim to have a vaccine injury to seek compensation through the Vaccine Injury Support Program and, if the individual should so choose, through individual actions.

286. It is helpful at the outset of the preferability analysis to recall the nature of the Claim against Alberta. Fundamentally, the Claim against Alberta relates to the provision of public statements and information by Alberta government officials on the "safety" and "efficacy" of the Covid-19 vaccine. The statements alone do not give rise to a Claim, which necessarily goes on to alleges that class members considered and relied on this information to such an extent to negate the informed consent they provided to their Health Care Professional when they chose to receive the vaccine.

287. The first issue that will break down into required individual issues relates to the information consumed and relied upon by any class member when choosing to receive the Covid-19 vaccine.

288. The extent that any class member actually received the information from Alberta officials and relied on that information, as well as the extent the class members received information from other sources and relied on that information will have to be determined.

289. The public information available during the pandemic and the class period regarding the Covid-19 vaccine is myriad and not limited to that provided by

[210] *AIC Limited*, at para 19, citing *Hollick*, at para 31

Alberta. The Covid-19 pandemic hit society during the internet age, where Albertans consume information from all manner of sources, including from:

a. The government of Alberta;
b. The government of Canada;
c. The governments of other provinces;
d. The governments of other countries;
e. Independent news organizations, both within Alberta, within Canada, and outside of Canada;
f. Scientific organizations;
g. Grassroots organizations;
h. Private individuals, such as family, friends, co-workers, and acquaintances;[211] and
i. Personal Physicians.[212]

290. On the Plaintiff's theory that Alberta's public statements vitiated informed consent as Alberta held out the Covid-19 vaccine to be safe and effective, each class member would be required to establish that they consumed and relied on information from Alberta, rather than or in addition to any other source of information.

291. For example, Ms. Sakamoto spoke with her family physician prior to receiving the vaccine. Did other class members also speak to their family physician regarding the safety and efficacy of the Covid-19 vaccine and rely on that information before providing their informed consent.

292. The Plaintiff pleads and cited the "we are in it together" and the "#this is our shot" vaccine campaigns as examples of false, misleading and deceptive misinformation campaigns that enticed and coerced class members to take the Covid-19 vaccine.[213] However, neither of these campaigns were operated by Alberta. The "we are in it together" campaign was operated by a private individual in

[211] Smith Affidavit, at para 9
[212] Questioning on Affidavit of Carrie Sakamoto, pg 12, line 26 – pg 13, line 18
[213] Claim, at paras 57, 61(b) and 61(c)

cooperation with Calgary business organizations.[214] The "#this is our shot" campaign was a grassroots campaign by health care workers in the United States.[215]

293. Alberta is not liable for the information provided on the safety and efficacy of the Covid-19 vaccine by Calgary business organizations or health care workers in the United States.

294. Even assuming the Plaintiff can establish that the Covid-19 vaccines were not "safe" or "effective" or "interchangeable", parcelling out what information any class member relied upon to come to that conclusion to provide informed consent is a fundamental individual issue required of all class members.

295. Throughout the Claim the Plaintiff suggests that Alberta failed to provide information to the public on possible adverse events following a Covid-19 vaccination.

296. Further, each class member will have to establish their own reliance on the public messaging by Alberta. This entails determining whether each class member believed the Covid-19 vaccine was "safe" and "effective." Determining whether a medical product is safe and effective in order to provide informed consent is inherently a subjective assessment.

297. The Claim cites a January 20, 2021 press conference by Dr. Hinshaw. Even the cited portion of the press conference in the Claim mentions risk of the Covid-19 vaccine and that getting immunized is each Albertan's choice.[216] Not cited in the Claim, but immediately following the cited portion in the same press conference, Dr. Hinshaw states there have been 18 adverse events following immunization of the more than 95,000 doses.[217]

[214] Smith Affidavit, at para 20
[215] Smith Affidavit, at para 21
[216] The Claim, at para 63(a)
[217] Smith Affidavit, at para 23

298. A class member who relied on the January 20, 2021 press conference would have information from Dr. Hinshaw that an adverse event occurred in approximately 0.019 percent of doses administered.

299. In the same vein, the Claim cites a June 21, 2021 press conference in which Dr. Hinshaw stated the Pfizer and Moderna vaccines had approximately 90 percent effectiveness.[218]

300. Whether any individual class member accessed the January 20, 2021 and June 21, 2021 press conferences and determined a 0.019 percent risk of an adverse event for a 90 percent effective vaccine was acceptable to provide their informed consent is an individual assessment need for any class member to establish reliance on the statement.

301. Even taking as true the statistics provided in the Claim regarding the deaths and adverse events arising from the Pfizer trial data that the Covid-19 vaccine caused 1,223 deaths and 42,086 injuries (out of an unknown number of doses),[219] it would have been open for any individual to be aware of those risks and still consent to receiving the Covid-19 vaccine. Again, this is a inherently subjective, individual issue that requires determination on the Plaintiff's theory of liability.

302. Fundamentally, the source and nature of the information each class member was aware of and relied on goes to the issue of whether each class member provided informed consent.

303. It is the legal and professional obligation of the Health Care Provider to obtain a patient's informed consent.[220] Any public statements by any party (Alberta, Canada, anyone else), would not relieve the Health Care Provider of this obligation.

304. Whether informed consent has been provided for any medical procedure, including receiving a Covid-19 vaccination, is a fact-based determination. A

[218] The Claim, at para 63(g)
[219] The Claim, at para 101(a)
[220] *Hollis v Dow Corning Corp.*, 1995 CanLII 55 (SCC), [1995] 4 SCR 634, at para 24. Dr. Klein Affidavit, at para 55(c) and 61 - 63

process undertaken by a Health Care in one circumstance may be found to be informed consent where in another it might not.[221]

305. The Health Care Professional must provide adequate information to each patient, including the nature of the proposed treatment and any material, special, unusual risks. The extent to which information is required to be provided to each patient depends on "a myriad of factual circumstances".[222]

306. The individual legal nature of evaluating informed consent is reflected in the policy and practices for the administration of the Covid-19 vaccine. Prior to administering a Covid-19 vaccine, the Health Care Professional is required to do an individual assessment of the patient's state of health, a consideration of the vaccine's biopage, and whether any contraindications or precautions are present.[223]

307. If, on the Plaintiff's theory, class members were not afforded sufficient information to provide informed consent, that does not in-and-of-itself establish liability. Each class member would have to individually establish causation. As the Ontario Court of Appeal held in *Denman v Radovanovic*:

> A patient alleging lack of informed consent must not only prove that the information provided was inadequate but must also establish causation. Specifically, a patient must prove that (1) they would not have undergone the procedure had they been adequately informed; and (2) a reasonable person in the patient's position would not have undergone the procedure if given adequate information.[224]

308. In assessing causation in this case would require both a subjective assessment of whether each class member would have consented and a modified objective test, which considers what a reasonable person in circumstance of each class member would have consented.

309. This highly individualized and fact specific assessment would be required for each class member through individual trials.

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[221] *Reid v Maloney*, 2011 ABCA 355, at para 10
[222] *Denman v Radovanovic*, 2024 ONCA 276 ["*Denman*"], at para 45
[223] Dr. Klein Affidavit, at paras 57 - 59
[224] *Denman*, at para 47

310. In the Plaintiff's Claim, the issue of causation, requiring individual assessments relates, relates not only to whether informed consent was provided but also whether the Covid-19 vaccine was the cause of each class members injuries.

311. The basis of the Plaintiff's Claim is that the Covid-19 vaccine itself is unsafe and caused the class members injuries.[225]

312. Experiencing an adverse event following an immunization does not establish that the vaccine caused the injury. Adverse events that are reported and monitored can be caused by factors other than the vaccine itself and determining a causal relationship between an adverse event and a vaccine is difficult[226].

313. The adverse event following immunization can be caused by:

    a. A vaccine product related reactions – this is the basis of the Plaintiff's Claim where the injury is caused or precipitated by one or more inherent properties of the vaccine;
    b. Vaccine quality defect-related reactions – the injury is caused by one or more quality defects of the vaccine as provided by the manufacturer;
    c. Immunization error-related reactions – the injury is caused by the inappropriate handling, prescribing or administration of the vaccine;
    d. Inappropriate usage-related reactions – the injury is caused by the handling, prescribing or administration of the vaccine for the purpose other than what the vaccine was licenced and approved for;
    e. Immunization anxiety-related reactions – the injury is caused by anxiety about the immunization; and
    f. Coincidental event – the injury occurs after vaccination but is caused by something other than the vaccine, an immunization error or anxiety.[227]

[225] The Claim, at paras 40, 47 – 53 for example
[226] Dr. Klein Affidavit, at para 92, 93 and 102
[227] Dr. Klein Affidavit, at para 92 and Exhibit Z

314. Even if a class member has experienced an adverse event, they would individually have to establish the injury was a result of the inherent property of the Covid-19 vaccine.

315. Injuries suffered as a result of individual instances of a manufacture's quality defect in the vaccine, or the improper handling or prescribing of the vaccine, would not fall within the Plaintiff's theory of liability against Alberta. It may be that the class member would have a claim against the vaccine manufacturer or the Health Care Professional who mishandled or misprescribed, but on the allegations in the Claim, there is no cause of action against Alberta.

316. An inherently difficult situation to determine, even on an individual basis are coincidental adverse events. An illustrative example of this difficulty would be a class member claiming to have suffered myocarditis after receiving the Covid-19 vaccine.

317. Myocarditis has been determined to be an adverse event of special interest arising from the Covid-19 vaccine. However, myocarditis can be cause by a host of other reasons not related to the Covid-19 vaccine. This can include infections from the Covid-19 virus itself: infections from bacteria, fungia or parasites; infections from HIV, parvovirus B-19, or human herpes virus 6; or from medicines autoimmune conditions or cancer treatments.[228]

318. Even if a class member developed myocarditis some time after receiving the Covid-19 vaccine, to succeed in his or her claim, the class member will have to establish on a balance of probabilities that the vaccine was the cause of the injury – not just that the vaccine could not be excluded as the possible cause.[229]

319. Factually complex individual assessments into the cause of each class member's injury will be required to determine if it was in fact caused by the vaccine or one of the other many causes of the disease.

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[228] Dr. Klein Affidavit, at para 103

[229] *Adam v Ledesma-Cadhit*, 2021 ONCA 828, at para 57

320. The individual issues required to resolve each class members claims will predominate over any common issues that may be found. Given the substantial individual's issues, a class proceeding is not the preferable procedure to resolve class members claims.

321. Instead, the preferable procedure is to allow individual class members to take advantage of compensation offered through the Vaccine Injury Support Program, and, if they should choose, to bring an individual action. Ms. Sakamoto has taken this route and has received compensation from the VISP for her injuries.

322. While the Vaccine Injury Support Program may have flaws, it provides compensation to individuals who experienced a serious and permanent injury as a result of receiving a vaccine.[230] There are important benefits to the Vaccine Injury Support Program that factor into the preferability analysis:

    a. It is a no fault program – compensation can be provided to individuals if their injury is caused by the inherent properties of the vaccine (as alleged here), or if the injury was caused by a manufactures defect or mishandling of the vaccine.

    Under the no-fault program, individuals can be compensated where the responsible party for the injury was a manufacturer or Health Care Professional, parties that may owe a duty of care to the individual but are not named in this Claim.

    Also under this no-faut program, individuals could receive compensation even where the responsible party acted in good faith and would not have to overcome any immunity argue raised by operation of section 66.1 of the *Public Health Act*.

    b. Causation of the injury is made by a committee of independent medical experts, rather than in the adversarial context of litigation.[231]

    c. Individuals can submit a claim to the program within three years of the injury, rather than the two years under the *Limitations Act*.[232]

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[230] Smith Affidavit, at para 30 and Exhibit M

[231] Smith Affidavit, at para 32

[232] Smith Affidavit, at para 33. *Limitations Act*, RSA 2000, c L-12, at s 3(1)

d. Individuals can receive compensation for their injury, income replacement, and reimbursement for costs and medical expenses, representing similar compensation for general damages, loss of income claims and special damages that may be awarded by the Courts.
e. Importantly, applying for compensation under the Vaccine Injury Support Program does not prevent an individual from pursuing litigation in the Courts.[233]

323. If an individual who suffers an adverse event following immunization applied to the Vaccine Injury Support Program, and in their individual circumstance, feels they are fully compensated, then their claim is resolved.

324. If the individual feels they are not full compensated, are unsatisfied with the process, or simply choose not to apply at all, the individual has recourse to the Courts to bring an action against any party (Alberta, Canada, the Vaccine Manufactures, the administering Health Care Professional, etc.) who may be liable for their injury.

325. This procedure will be more efficient and fair to class members who can control their own litigation as they attempt to establish the requisite elements of a cause of action, including that their specific injury relating to the Covid-19 vaccine was caused by the action of whichever defendant they decided to sue.

2. This procedure will allow greater access to justice for individuals seeking redress from an injury claimed to arise from the Covid-19 vaccine and will ensure judicial resources are not misallocated to an inefficient and costly process.

CONCLUSION

326. The Claim against Alberta is misconceived and legally untenable. All the causes of action are bound to fail.

[233] Smith Affidavit, at para 35

327. Alberta's role in the Covid-19 vaccinations both during and after the Covid-19 pandemic does not give rise to any cause of action towards Ms. Sakamoto, the proposed class, or any other member or segment of the public.

328. Alberta exercised public health duties owed to the public during a public health emergency the likes of which had not been seen in our lifetime. Public statements by Alberta government officials encouraging individuals to get vaccinated against the Covid-19 disease do not change the underlying legal requirements of informed consent and clearly did not amount to a forced vaccination campaign where individuals lost their autonomy and Health Care Professionals were relieved of their legal and professional obligations.

329. Ms. Sakamoto's health condition is undeniably tragic and has clearly had a profound impact on her life. However, Ms. Sakamoto's circumstance, and the circumstances of the proposed class, cannot and does not give rise to any claim against Alberta.

330. The nature of the Claim means it cannot be brought on a class-wide basis and the well-established requirements of an objectively defined class and common issues that advance all class members claims are not met.

331. Given the significant and fundamental individual's issues that predominate for all class members claims, the goals of a class proceeding would not be realized. The preferable procedure to resolve class members claims is applying for compensation through the Vaccine Injury Support Program and individual actions.

332. This certification application should be dismissed against Alberta. As there is no cause of action properly plead, the action should also be dismissed with costs.

All of which is respectfully submitted, this 10th day of April, 2026.

John-Marc Dube
_____
John-Marc Dube
Counsel for the Defendant,
His Majesty the King in right of Alberta

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