Court File No. CV-11-420734

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding under the *Class Proceedings Act, 1992*

B E T W E E N :

ROBERT SEED

Plaintiff
(Moving Party)

- and -

HER MAJESTY THE QUEEN
IN RIGHT OF THE PROVINCE OF ONTARIO

Defendant
(Responding Party)

FACTUM OF THE DEFENDANT,
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
(Motion for Certification returnable April 10 – 13, 2012)

March 19, 2012

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TABLE OF CONTENTS

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FACTUM OF THE DEFENDANT

PART I – OVERVIEW

1. This is a motion brought by the Plaintiff seeking certification of this proceeding as a class action under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA"). The action underlying this motion relates to the alleged mistreatment of students at W. Ross MacDonald School for the Blind (Ross MacDonald), a school operated by the Government of Ontario (the "Crown") for children with visual disabilities. The facility was in operation from 1872 until the present.

2. The plaintiff is seeking to certify as a class all persons who attended or resided at Ross MacDonald between January 1, 1951 and the present day (Student Class), along with the spouses, children, grandchildren, parents, grandparents, and siblings of persons who attended or resided at Ross MacDonald between March 31, 1978, and the present day (Family Class).

3. This class action should not be certified in the manner proposed by the plaintiff. Certain of the plaintiff's claims do not disclose reasonable causes of action. The only reasonable cause of action asserted in the statement of claim is for operational negligence relating to occurrences at Ross MacDonald after 1963, the year the *Proceedings Against the Crown Act, 1962-63,* S.O. 1962-63, C. 109 came into force. The following claims do not disclose a reasonable cause of action:

(a) breach of fiduciary duty claims prior to the 1963 enactment of the *Proceedings Against the Crown Act, 1962-3*, S.O. 1962-3, c. 109 (*"Proceedings Against the Crown Act (1963)"*). Prior to this date, the Crown was immune from claims for damages;

(b) breach of fiduciary duty claims both before and after the *Proceedings Against the Crown Act (1963)* came into force. The plaintiff has failed to plead any material facts capable of establishing that the Crown put its own interests ahead of the plaintiff's, a required element of the cause of action; and

(c) negligence claims for allegations of inadequate funding. Funding decisions are "core policy" decisions based on economic, social and political factors, and are immune from suit.

4. In advancing the breach of fiduciary claims, above, the plaintiff relies heavily on the decision in *Slark v. Ontario,* [2010] O.J. No. 5187, leave to appeal denied, which certified similar claims for breach of fiduciary duty prior to and after the passage of the *Proceedings Against the Crown Act (1963).* The Crown respectfully submits that the *Slark* decision is inconsistent with appellate authority as well as principles of statutory interpretation, and it should not be followed by this Honourable Court.

5. In addition to the fundamental flaws in the alleged causes of action, the Plaintiff has also over-reached by defining the proposed classes without any evidentiary basis in the record for doing so. The Plaintiff has the burden of adducing some evidence to support the scope of the classes. In this case, there is no evidence in the record disclosing the existence of a Student class after 1985, or a Family class at all.

6. Finally, it would not be appropriate to certify as common issues whether the Court can make an aggregate assessment of damages. Even if the Plaintiff were to succeed at trial on any of the proposed common issues concerning liability, it would still be necessary to separately establish causation of harm and quantification of damages for each individual class member. These claims cannot reasonably be determined without proof by individual class members and cannot be assessed on an aggregate basis.

PART II – THE FACTS

No Evidence to Support the Proposed Classes

7. Although the Plaintiff seeks to certify a Student Class for the period between January 1, 1951 and the present day, the evidence before the court is much more limited. The only evidence on this motion regarding events and activities involving the Student Class at Ross MacDonald is evidence for the period 1951 to 1985. There is no evidence for the period after 1985 up to the present. Similarly, the Plaintiff seeks to certify a Family Class for the period between March 31, 1978, and the present day. There is no evidence to support the certification of the Family Class.

PART III – LAW AND ARGUMENT

8. The question at the certification stage is a procedural question – namely, whether the action is appropriately prosecuted as a class action.

> ***Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, Defendant's Book of Authorities, Tab 1, para. 16**

9. In order for the action to be certified as a class proceeding, the plaintiff must satisfy the court that each of the requirements of subsection 5(1) of the CPA.

> ***Hollick, ibid*, Defendant's Book of Authorities, Tab 1, para. 16**

I. Section 5(1)(a) – Is there a Reasonable Cause of Action?

10. The test to be applied under s. 5(1)(a) of the CPA is the same as that applied under Rule 21 of the Rules of Civil Procedure: assuming the allegations pleaded can be proved, is it "plain and obvious" that claim cannot succeed. The claim is to be read generously with

allowance for inadequacies due to drafting deficiencies and should not be dismissed simply because it is novel.

> ***L. (A.) v. Ontario (Minister of Community and Social Services)*** **(2006), 83 O.R. (3d) 512, Defendant's Book of Authorities, Tab 2, at para. 17**

11. A claim will be found to be legally insufficient when it fails to set out all the necessary legal elements of a cause of action, where it fails to plead material facts to support the asserted cause of action, or where the allegations in the pleading are simply conjecture, assumptions or speculation unsupported by material facts.

> ***Hunter v. Bravener*****, [2003] O.J. No. 1613 (C.A.), Defendant's Book of Authorities, Tab 3, at paras. 3-5**
>
> ***Deep v. Ontario*****, [2004] O.J.No. 2734 (S.C.J.), aff'd [2005] O.J. No. 1294 (C.A.), Defendant's Book of Authorities, Tab 4, at para. 33**

12. Bald allegations of legal conclusions are not facts and are insufficient for the purpose of pleading.

> **Rule 25.06(8) of the *Rules of Civil Procedure***
>
> ***Gilbert v. Gilkinson et al.*****, [2005] O.J. No. 5347 (C.A.), leave to appeal to S.C.C. ref'd, [2006] S.C.C.A. No. 67, Defendant's Book of Authorities, Tab 5, para. 9**
>
> ***Deep v. Ontario, supra*****, Defendant's Book of Authorities, Tab 4, para. 38**

Three of the plaintiff's claims do not, in whole or in part, constitute a reasonable cause of action and should be struck

1. The Pre-1963 Claim for Breach of Fiduciary Duty should be Struck

13. Historically, at common law, the King could not be sued in his own courts. This immunity had both a substantive and procedural component. As a matter of procedure, no jurisdiction existed in any court to entertain an action against the Crown unless the King consented. In Ontario, the procedural immunity from suit came to an end with the passage of

the *The Petitions of Right and Crown Procedure Act, 1872* (Petitions of Right Act) which provided a statutory basis for bringing an action against the provincial Crown. A version of that statute was in force in Ontario until September 1, 1963, when the *Proceedings Against the Crown Act* (PACA) came into force.

> ***The Petitions of Right and Crown Procedure Act, 1872***
>
> ***Rudolph Wolff & Co. Ltd. and Noranda Inc. v. Canada*, [1990] 1 S.C.R. 695, Defendant's Book of Authorities, Tab 6, para. 9**
>
> **Hogg and Monahan, *Liability of the Crown*, 3rd Ed., Defendant's Book of Authorities, Tab 7, at p. 4**

14. Prior to 1963, in all cases where the relief sought was a direct remedy against the Crown's estate, the party was required to use the petition of right procedure. "Petition of right" referred to both the form of pleading (similar to a statement of claim) and to the proceeding itself. Under the petition of right proceeding, a fiat had to be granted before the court had jurisdiction to hear a proceeding by petition of right. The fiat was an endorsement by the Crown's representative on the petition stating: "let right be done".

> ***Canada v. Central Railway Signal Co.*, [1933] S.C.R. 555, Defendant's Book of Authorities, Tab 8, at p. 6 (QL)**
>
> **Hogg and Monahan, *Liability of the Crown*, 3rd Ed., Defendant's Book of Authorities, Tab 7, at p. 7**

15. The petition of right was only available to seek relief against the Crown in certain cases. Contract and property claims were brought against the Crown under the petition of right procedure routinely. As noted by Holmested and Langton in *The Judicature Act of Ontario* (1940):

> "Apart from special statutory provision the only cases in which the procedure by petition of right is available are (1) where the land or goods or money of the suppliant have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or, if restitution cannot be given, compensation in money, or (2) when the suppliant's claim arises out of

> contract, as for goods supplied to the Crown or to the public service, and (3) where the supplicant's claim is for statutory compensation, as when a statute imposes a liability upon the Crown to pay for the use and occupation of property."
>
> **D. A. MacRae, Ed., *Holmested and Langton on The Judicature Act of Ontario*, 5th Ed. (Toronto, The Carswell Company, Limited, 1940), Defendant's Book of Authorities, Tab 9, at p. 1661**

16. Fiats for claims based on personal injury and property damage were routinely refused, not because of a procedural bar, but because of the Crown's substantive immunity derived from the principle that "the King can do no wrong". The Crown's substantive immunity was with respect to supposed civil and criminal acts of the Crown and the Crown's servants. In *Tobin v. the Queen*, the court noted that:

> "The maxim that the King can do no wrong is true in the sense that He is not liable to be sued civilly or criminally for a supposed wrong. That which the Sovereign does personally, the law presumes will not be wrong: that which the Sovereign does by command to his servants, cannot be a wrong in the Sovereign, because, if the command is unlawful, it is in law no command, and the servant is responsible for the unlawful act, the same as if there had been no command."
>
> ***Tobin v. The Queen* (1864), 143 E.R. 1148, Defendants' Book of Authorities, Tab 10, at p. 9 (QL)**
>
> ***Rudolph Wolff & Co. v. Canada*, [1990] 1 S.C.R. 695, Defendants' Book of Authorities, Tab 6, at para. 9**
>
> **Halsbury's Laws of England, first ed., vol. 6 (1909), Defendants' Book of Authorities, Tab 11, at p. 374**

17. Even in cases where the Crown lifted the procedural bar by issuing a fiat permitting a petition of right to proceed to court, the relief sought was not granted because the Crown did not waive its substantive immunity by waiving its procedural immunity.

> ***Fitzpatrick* v. *The King*, [1925] O.J. No. 27 (H.C.J.), aff'd [1926] O.J. No. 38 (C.A.), Defendant's Book of Authorities, Tab 12, at para. 64**

Equitable Claims Against the Crown

18. Equitable claims for damages were also not enforceable against the Crown before PACA came into force. With respect to equitable claims against the Crown, Clode noted:

> "At the present time, and in the face of numerous petitions of right claiming equitable relief against the Crown which have been represented and allowed to proceed in the Court of Chancery, it seems late to say that there is no authority for making claims enforceable, and yet with some qualification such a statement would be substantially correct … .
>
> It is quite true … that a suppliant may sometimes obtain relief by process issuing from the Chancery, as ancillary to and in aid of his common law right, instead of following out the usual procedure upon petition of right; but they do not show that a suppliant was ever entitled to equitable relief where he had non-enforceable right at common law … . (emphasis added)

Walter Clode, *The Law and Practice of Petitions of Right* (London: William Clowes and Sons, 1887), Defendant's Book of Authorities, Tab 13, at p. 141

19. In *Richard v. British Columbia,* a class action brought on behalf of persons who resided at a residential facility, the Court of Appeal rejected the argument that claims based on breach of fiduciary duty could lie against the Crown prior to the enactment of the British Columbia *Crown Proceedings Act* in 1974, the British Columbia counter-part of PACA:

> "Nor, in my view, do the authorities cited by the appellants support the proposition a claim could lie in equity against the Crown for damages, prior to the enactment of Crown proceedings legislation. While there was in England a limited class of cases in which the courts of equity permitted an action for a declaration for legal title, as shown by Hodge v. Attorney-General (1839) , 3 Y. & C. Ex. 343, 160 E.R. 734 (Exch.), and Pawlett v. Attorney-General, these cases did not provide a direct remedy against the estate of the Crown. (emphasis added)

***Richard v. British Columbia* (2009), 93 B.C.L.R. (4th) 87 (C.A.); leave to appeal refused, [2009] S.C.C.A. No. 274, Defendant's Book of Authorities, Tab 14, at para. 49**

Fiduciary Duty Obligations of the Crown

20. The type of claim for breach of fiduciary duty being pursued in this proceeding is also of recent origin. Historically, fiduciary relationships were found to exist in certain categories of relationship (trustee-beneficiary, agent-principal etc.) and generally arose only with regard to obligations originating in a private law context. Public law duties did not typically give rise to a fiduciary relationship. In 1984, however, the Supreme Court in *Guerin v. Canada* expanded the scope for fiduciary duty by holding that the existence of a fiduciary duty must be determined based on the nature of the relationship in question, not the specific category of actor involved. Based on this approach, the Crown's status was itself no longer a reason to remove it from the sphere of fiduciary obligations. In short, before the Supreme Court's decision in *Guerin* in 1984, the fiduciary claim being asserted in this proceeding was unknown to the law.

> ***Guerin v. Canada*, [1984] 2 S.C.R. 335, Defendant's Book of Authorities, Tab 15, at paras. 102-104**
>
> ***Slark (Litigation guardian of) v. Ontario*, [2010] O.J. No. 5187 (S.C.J.); [2010] No. 5172 (Div. Ct.) motion for leave to appeal dismissed, Defendant's Book of Authorities, Tab 16A, at para. 117**

The Crown is immune for alleged breaches of pre-1963 fiduciary duty claims

(i) *Proceedings Against the Crown Act (1963)*

21. The 1963 PACA came into force on September 1, 1963. Although section 3 of the 1963 Act authorized proceedings against the Crown by way of action for claims that formerly had to proceed by way of petition of right, sections 27 and 28 of the 1963 Act (re-enacted as sections 28 and 29 under the 1970 Act) preserved Crown immunity from action and the petition of right regime with respect to claims that existed before September 1, 1963, as follows:

> 28. No proceedings shall be brought against the Crown under this Act in respect of any act or omission, transaction, matter or thing occurring or existing before the 1st day of September, 1963.
>
> 29.(1) A claim against the Crown existing on the 1st day of September, 1963 that, if this Act had not been passed, might have been enforced by petition of right may be proceeded with by petition of right, subject to the grant of a fiat by the Lieutenant Governor as if this Act had not been passed.
>
> **Proceedings Against the Crown Act, S.O. Ch. 109, 1962-63, ss. 3, 5(1), 28, 29**

22. The Court of Appeal has confirmed that sections 28 and 29(1) are interrelated and must be read together. Section 28 is a general prohibition against proceedings respecting anything that occurred prior to September 1, 1963. Section 29(1) provides an exception to the general prohibition, however, for those claims that were already "existing on the 1st day of September, 1963", and that "might have been enforced by petition of right."

> ***S.M. v. Ontario,* [2003] O.J. No. 3236 (C.A.), Defendant's Book of Authorities, Tab 17, at para. 45**

23. When the words "existing on the 1st day September, 1963" are read together with the words "might have been enforced by petition of right" the meaning of the section is clear: a party was only entitled to the relief that could be enforced by petition of right *as of September 1, 1963*. As the law stood on that date, the fiduciary duty claim being pursued in this proceeding is not a claim which "might have been enforced by petition of right" because the cause of action simply did not exist and was not recognized prior to *Guerin*.

(ii) *Slark* should not be followed

24. The Plaintiff relies upon *Slark et al v. HMQ et al*, in support of his pre-1963 fiduciary duty claim against the Crown. In *Slark* the court refused to strike out the claim for the pre-

1963 period. The Crown respectfully submits that in reaching this result, the Court misinterpreted section 29(1) of PACA, and failed to apply the law as it existed before September 1, 1963.

***Slark, supra*, Defendant's Book of Authorities, Tab 16A**

25. Instead of examining the law as it stood on September 1, 1963 when PACA was enacted to determine whether the Crown was immune from the claim, Cullity J. asked himself what the petition of right regime would be *now*, if PACA had not been passed and the law continued to evolve:

> "I see no reason why the second condition [s. 29(1)] – that looks to the availability of a petition of right if PACA had not been enacted – should require the court to go back in time and speculate about whether a court sitting in August, 1963 would, or would not, have granted a petition of right for such a claim in respect of an unknown cause of action. I believe it is perfectly consistent with the words of section 29(1), more realistic, and more consistent with the evolution of Crown liability as described by Holdsworth – as well as the developments in the law governing fiduciary duties since 1963 – to ask what the position would *now* be if the Act had not been passed." (emphasis added)

***Slark, supra*, Defendant's Book of Authorities, Tab 16A, at para. 121**

26. With great respect, the Court's interpretation of section 29(1) violates fundamental principles of statutory interpretation and should not be followed. The Court's interpretation effectively renders section 28 meaningless. If the section 29(1) subset of claims that are exempted from the general prohibition in section 28 is permitted to expand with the "evolution of Crown liability" since 1963 than there would cease to be any classes of claims barred by section 28.

27. Equally problematic is the fact that the analysis in *Slark* requires considerable speculation as to how Crown liability would have developed over decades if PACA were not passed. Contrary to the Court's assertion, above, trying to predict *how the law would have evolved* over many decades is a great deal more speculative than examining relevant decisions and treatises from the period up to 1963 to determine what the law *was* as of that date. The latter analysis is not in fact "speculative" but rather is an entirely reasonable and rational analysis based on the historical record. Indeed, in this case, no speculation is required at all. It is accepted that breach of fiduciary claims did not lie against the Crown until the Supreme Court's decision in *Guerin* in 1984.

28. The speculation required by the Court's analysis as to how the Crown immunity would have evolved absent PACA is inconsistent with the very purpose of sections 28 and 29(1). As confirmed by the Court of Appeal in *S.M. v. Ontario*, "ss. 27 and 28 [now 28 and 29] of the 1963 Act *preserved* Crown immunity from action and the petition of right regime with respect to claims that existed on September 1, 1963" [emphasis added]. The analysis in *Slark* requires the assumption that, despite the plain intent of the 1963 Act to *preserve* Crown immunity for events occurring before 1963, the drafters instead intended to retroactively subject the Crown to new forms of Crown liability, conceived decades later based on speculation about how the law *would have developed had PACA not been passed,* with the result that Crown immunity for pre-1963 conduct is not *preserved* but rather *eroded.* With respect, this interpretation is flatly contradicted by the plain wording and purpose of sections 28 and 29.

***S.M. v. Ontario, supra,* Defendant's Book of Authorities, Tab 17, at para. 2**

(iii) *Cloud v. Canada*

29. The other case the Plaintiff relies upon is *Cloud v. Canada*. *Cloud* does not support the Plaintiff's claim. In *Cloud* the Court of Appeal allowed the claim for breach of fiduciary duty to proceed even for claims which pre-dated the enactment of the federal *Crown Liability and Proceedings Act* in 1953. On this point, the Court of Appeal accepted the conclusion of Cullity J., in dissent at the Divisional Court, that the claims for breach of fiduciary duty could proceed because they:

> " ... were claims in equity that were not affected by the provisions of the Crown Liability Act, 1953, and which might have been brought in the Exchequer Court before, or after, May 14, 1953 under the provisions of the Exchequer Court Act."
>
> ***Cloud et al. v. Canada (Attorney General)*, [2003] O.J. No. 2698 (Div. Ct.), rev'd [2004] O.J. No. 4924 (C.A.); leave to appeal ref'd, [2005] S.C.C.A. No. 50, Defendant's Book of Authorities, Tab 18A, at para. 42**

30. *Cloud* is, thus, distinguishable from the claim in this case because the federal *Exchequer Court Act* allowed a claim in equity to proceed prior to the enactment of the federal Crown liability statute in 1953. The ability to bring such an action was derived solely from statute. There is, in Ontario, no similar statute which would have allowed a claim based in equity to proceed prior to PACA coming into force. Moreover, in *Cloud* the Court of Appeal did not fully address the question of immunity from equitable claims because of a concession by counsel for the Crown.

> ***Rudolph Wolff & Co. v. Canada, supra*, Defendant's Book of Authorities, Tab 6, at para. 9**
>
> ***Cloud, supra*, (C.A.), Defendant's Book of Authorities, Tab 18B, at para. 42**

31. The Plaintiff has conceded that the Crown is immune from claims based in tort for the

period prior to September 1, 1963. Similarly, the Plaintiff's pre-1963 claim based on breach of fiduciary duty does not disclose a reasonable cause of action and should be struck out.

2. The Pleadings do not support a Breach of Fiduciary Duty Claim

32. Quite apart from the Crown immunity for breach of fiduciary claims pre-1963, the claim for breach of fiduciary duty should be struck in its entirety because the material facts as pleaded in the Statement of Claim are incapable of establishing a breach of that duty.

33. Simply stated, it is a requirement in a claim for breach of fiduciary duty to plead facts capable of establishing that the Crown put its own interests ahead of the plaintiff's in committing the alleged acts of wrong-doing. The Plaintiff has failed to plead any such facts. As such, the pleading fails to disclose a reasonable cause of action and should be struck in its entirety.

> ***K.L.B v. British Columbia***, **[2003] S.C.J. No. 51 (S.C.C.), Defendant's Book of Authorities, Tab 19, at paras. 48 and 49**
>
> ***E.D.G. v. Hammer***, **[2003] 2 S.C.R. 459, Defendant's Book of Authorities, Tab 20, at para. 23**
>
> ***Lac Minerals Ltd. v. International Corona Resources Ltd.***, **[1989] 2 S.C.R. 574, Defendant's Book of Authorities, Tab 21, at paras. 32-35, 116 and 117, 145**
>
> ***Girardet v. Crease & Co.*** **(1987), 11 B.C.L.R. (2d) 361, Defendant's Book of Authorities, Tab 22, at p. 2 (QL)**
>
> ***A.(C.) v. Critchley*** **(1998), 166 D.L.R.(4th) 475 (B.C.C.A.), Defendant's Book of Authorities, Tab 23, at para. 74**
>
> ***Bristol & West Building Society v. Mothew***, **[1998] Ch. 1 (C.A.), Defendant's Book of Authorities, Tab 24, at p. 14 (QL)**

34. In *K.L.B. v. British Columbia*, the Supreme Court of Canada considered allegations that the Crown had breached its fiduciary duty in the manner in which it supervised foster

children who were allegedly abused in their foster homes. The Court emphasised that equity does not duplicate common law causes of action, and where the essence of the misconduct is negligence, a claim for fiduciary duty will not be founded:

> "What then is the content of the parental fiduciary duty? This question returns us to the cases and the wrong at the heart of breaches of this duty. The traditional focus of breach of fiduciary duty is breach of trust, with the attendant emphasis on disloyalty and promotion of one's own or others' interests at the expense of the beneficiary's interests. Parents stand in a relationship of trust and owe fiduciary duties to their children. But the unique focus of the parental fiduciary duty, as distinguished from other duties imposed on them by the law, is breach of trust. Different legal and equitable duties may arise from the same relationship and circumstances. Equity does not duplicate the common law causes of action, but supplements them. Where the conduct evinces breach of trust, it may extend liability but only on that basis. As I wrote in *Norberg v. Wynrib*, [1992] 2 S.C.R. 226: 'In negligence and contract the parties are taken to be independent and equal actors, concerned primarily with their own self-interest... . The essence of a fiduciary relationship, by contrast, is that one party exercises power on behalf of another and pledges himself or herself to act in the best interests of the other' (p. 272).
>
> I have said that concern for the best interests of the child informs the parental fiduciary relationship. As La Forest J. noted in *M. (K.) v. M.(H.), supra,* at p. 65. But the duty imposed is to act loyally, and not to put one's own or others' interests ahead of the child's in a manner that abuses the child's trust. This explains the cases referred to above. The parent who exercises undue influence over the child in economic matters for his own gain has put his own interests ahead of the child's in a manner that abuses the child's trust in him. The same may be said of the parent who uses a child for his sexual gratification or a parent who, wanting to avoid trouble for herself and her household, turns a blind eye to the abuse of a child by her spouse. The parent need not, as the Court of Appeal suggested in the case at bar, be consciously motivated by a desire for profit or personal advantage; nor does it have to be her own interests, rather than those of a third party, that she puts ahead of the child's. It is rather a question of disloyalty – of putting someone's interests ahead of the child's in a manner that abuses the child's trust. Negligence, even aggravated negligence, will not ground parental fiduciary liability unless it is associated with breach of trust in this sense."(underlining in original)

***K.L.B, supra,* Defendant's Book of Authorities, Tab 19, at paras. 48 and 49**

35. Applying this reasoning to the facts in *K.L.B.*, the Court concluded:

> "Returning to the facts of this case, there is no evidence that the government put its own interests ahead of those of the children or committed acts that harmed the children in a way that amounted to betrayal of trust or disloyalty. The worst that can be said of the Superintendent is that he, along with the social workers, failed properly to assess whether the children's needs and problems could be met in the designated foster homes; failed to discuss the limits of acceptable discipline with the foster parents; and failed to conduct frequent visits to the homes given that they were overplaced and had a documented history of risk ...The essence of the Superintendent's misconduct was negligence, not disloyalty or breach of trust. There is no suggestion that he was serving anyone's interest but that of the children. His fault was not disloyalty, but failure to take sufficient care.
>
> I would therefore uphold the Court of Appeal's conclusion that the government did not breach its fiduciary duty to the appellants." (emphasis added)

***K.L.B, supra*, Defendant's Book of Authorities, Tab 19, at paras. 50 and 51**

36. In a number of cases, defendants have successfully brought motions to strike claims in similar situations in which the plaintiff has failed to plead, as part of the breach of fiduciary duty claim, that the defendant has put its interests above those of the plaintiff in committing the alleged breach of fiduciary duty.

> ***R.J.G. v. Canada (Attorney- General)*, [2004] S.J. No. 468 (Sask.C.A.), leave to appeal ref'd, *Gardypie v. Canada (Attorney General)*, [2004] S.C.C.A. No. 425, Defendant's Book of Authorities, Tab 25, at para. 28**
>
> ***Cooper v. Atlantic Provinces Special Education Authority*, [2008] N.S.J. No. 466 (N.S. C.A.), Defendant's Book of Authorities, Tab 26, at para. 21**
>
> ***F.P. v. Saskatchewan* [2004] S.J. No. 251 (Sask. C.A.), Defendant's Book of Authorities, Tab 27, at paras. 61 and 62**
>
> **See *contra Grant v. Canada (Attorney General)*, [2005] O.J. No. 3796 (S.C.J.), Defendant's Book of Authorities, Tab 28**

37. In *Slark*, Cullity J. reached a conclusion that is in direct conflict with the numerous authorities referred to above. In that case, the allegations against the Crown in support of the breach of fiduciary duty claim included allegations that the Crown failed to adequately respond to complaints, failed to adequately fund the facility, failed to respond adequately to

allegations of sexual abuse, and hired caregivers and others who were not adequately qualified to meet the needs of the residents.

***Slark, supra,* Defendant's Book of Authorities, Tab 16A**

38. In considering these allegations, Cullity J. acknowledged that "[t]he pleading of breach of fiduciary duty here does not fit altogether happily with the analysis in *K.L.B.* to the extent that it identifies the duties breached as a general obligation to act in the best interests of the residents of Huronia and a duty to exercise reasonable care". Nevertheless, he then went on to conclude that:

> "...the particularized allegations in this case extend to allegations of intentional abuse and are not limited to assertions of a failure to exercise due care. Reading the pleading generously, they are tantamount to allegations that the Crown not only ignored the interests of the residents but also acted to their detriment intentionally – in the sense that it had knowledge of the circumstances and foresight of the consequences to the residents of Huronia.
>
> It does not seem to me to be plainly and obviously wrong that a fiduciary who ignores the interests of the beneficiaries of the relationship – and intentionally acts contrary to them – has failed to give those interests due priority, and has thereby breached its duties of loyalty and good faith."

***Slark, supra,* Defendant's Book of Authorities, Tab 16A, paras 147 and 148**

39. The Crown respectfully submits that Cullity J. applied the wrong principle and erred in his reasoning, and therefore, the decision in *Slark* should not be followed. Cullity J. appears to have focussed on the pleading regarding intention – the allegation that the Crown *knew* of alleged abuse and mistreatment but did not respond adequately – as a sufficient basis for the breach of fiduciary duty pleading. However, an allegation of intentional conduct, even if it amounts to negligent conduct, does *not* amount to an allegation of dishonesty, disloyalty

or breach of trust which puts the Crown's interest ahead of the plaintiff's, a required element to establish a claim for breach of fiduciary duty.

40. In the statement of claim before the court on this motion there are no facts plead that would establish that the Crown acted in its own self-interest and against the interests of the students. There are no facts plead that would establish that Crown's interests were promoted by allowing the Plaintiff to be harmed. The essence of the alleged misconduct on the part of the Crown is negligence, not disloyalty or breach of trust. For this reason, the entire claim for breach of fiduciary duty with respect to the Student Class should be struck.

3. No Cause of Action in Negligence for Lack of Funding

41. The Plaintiff's claim in this proceeding is based, in part, on an allegation that the Crown was negligent in its funding of Ross MacDonald. The Plaintiff has claimed that the Crown: "failed to provide adequate financial resources or support to properly care and provide for Ross MacDonald students".

Plaintiff's Motion Record, Statement of Claim, para. 46(j)

42. The pleading regarding the alleged inadequacy of funding for Ross MacDonald should be struck because there is be no private law duty of care owed with respect to Crown funding decisions.

43. In determining whether a reasonable cause of action exists for alleged negligence in funding decisions, the court must assess whether a private law duty of care exists based on the well-known Cooper/Anns test:

> 1. At the first stage, two questions arise: (i) was the harm that occurred the reasonably foreseeable consequence of the defendant's act and (ii) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The question is whether the circumstances disclose reasonably foreseeable harm and proximity sufficient to establish a prima facie duty of care. Mere foreseeability is not sufficient. The two parties must also be sufficiently proximate to one another.
>
> 2. At the second stage, if the plaintiffs are successful in establishing a prima facie duty of care, the question is whether there exist any residual policy considerations that justify denying liability.

***Cooper v. Hobart*, [2001] S.C.R. 537, Defendant's Book of Authorities, Tab 29, at paras. 30, 37-38**

44. Courts have long-recognized the need to immunize the policy decisions of the government from tort liability. Policy decisions, as contrasted with operational decisions, are based on social, political or economic factors.

***Cooper*, supra, Defendant's Book of Authorities, Tab 29, at para. 38**

45. In *Just v British Columbia*, the Supreme Court considered the nature of policy decisions and noted:

> "True policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors ...
>
> ...
>
> In determining what constitutes such a policy decision, it should be borne in mind that such decisions are generally made by persons of a high level of authority in the agency, but may also properly be made by persons of a lower level of authority. The characterization of such a decision rests on the nature of the decision and not on the identity of the actors. As a general rule, decisions concerning budgetary allotments for departments or government agencies will be classified as policy decisions..."

***Just v. British Columbia*, [1989] 2 S.C.R. 1228, Defendant's Book of Authorities, Tab 30, at paras. 18, 29**

46. More recently, the Supreme Court of Canada had an opportunity in *R. v. Imperial Tobacco Canada Ltd.* to consider what kind of government decisions are protected from suit. The Court stated that:

> "I conclude that "core policy" government decisions protected from suit are decision as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith."
>
> ***R v. Imperial Tobacco Canada Ltd.*, [2011] 3 S.C.R. 45, Defendant's Book of Authorities, Tab 31, at para. 90**

47. In *Mitchell v. Ontario*, the court considered whether the Crown owed a private law duty of care with respect to the funding of hospital services. As infant died while receiving care in an emergency room and the plaintiffs alleged that the infant did not receive proper treatment quickly enough because of reductions in hospital funding and restructuring decisions made by the Premier and the responsible Minister. With respect to the second arm of the *Cooper/Anns* test, the court concluded that:

> "the governing statutes make it clear that the Minister has a wide discretion to make policy decisions with respect to the funding of hospitals. The legislative framework gives the Minister the power to act in the public interest, and in exercising her powers, she must balance a myriad of competing interests. The terms of the legislation make it clear that her duty is to the public as a whole, not to a particular individual."
>
> ***Mitchell (Litigation Administrator of) v. Ontario* (2004), 71 O.R. (3d) 571 (Div. Ct.), Defendant's Book of Authorities, Tab 31, at para. 28**

48. The Divisional Court in *Mitchell* concluded that, even if the plaintiffs could establish a prima facie duty of care, residual policy considerations would justify denying liability because "government actors are not liable for policy decisions." The court observed that: "because of overriding policy considerations, there should be no private law duty of care with respect to decisions affecting health care funding and hospital restructuring."

***Mitchell*, supra, Defendant's Book of Authorities, Tab 32, at paras. 32-33**

See also, *Sagharian (Litigation Guardian of) v. Ontario (Minister of Education)*, [2008] O.J. No. 2009 (C.A.), leave to appeal ref'd, [2008] S.C.C.A. 350, Defendant's Book of Authorities, Tab 33

49. In summary, the alleged inadequacy of funding for Ross MacDonald should be struck from the claim because there can be no private law duty.

II. Section 5(1)(b) -- the Proposed Cass Definition is not Appropriate

50. On a certification motion, the plaintiff must show some "basis in fact" for each of the certification requirements other than that the pleading discloses a cause of action.

***Hollick, supra*, Defendant's Book of Authorities, Tab 1, at para. 25**

***Taub v. Manufacturer's Life* (1998), 40 O.R. (3d) 379; aff'd (1999), 42 O.R. (3d) 576 (Div.Ct.) , Defendant's Book of Authorities, Tab 34, at p. 2 (QL)**

51. The evidence on a motion for certification must meet the usual standards for admissibility.

***Lavier v. MyTravel Canada Holidays Inc.*, [2008] O.J. No. 2753 (S.C.J.); rev'd on other grounds, [2009] O.J. No. 1314 (Div. Ct.), Defendant's Book of Authorities, Tab 35A, at para. 89**

***Risorto v. State Farm Mutual Automobile Insurance Co.*, [2007] O.J. No. 676 (S.C.J.), Defendant's Book of Authorities, Tab 36, at para. 50**

52. The Plaintiff proposes that the class be defined as follows:

(a) all persons who attended or resided at Ross MacDonald between January 1, 1951 to the present day; and

(b) all spouses, children, grandchildren, parents, grandparents, and siblings of person who attended or resided at Ross MacDonald between March 31, 1978 and the present day.

53. This proposed class definition is overly-broad in light of the evidence before the court. There is no evidence before the court with respect to the proposed Student Class for the period between 1985 and the present. There is no evidence at all before the court with respect to the proposed Family Class.

54. The law is well-settled that a certification motion is not an assessment of the merits. However, the Plaintiff must establish some "basis in fact" for each of the certification requirements, other than the requirement that the proceeding disclose a cause of action.

> ***Johnston v. Sheila Morrison Schools*, [2010] O.J. No. 2473 (S.C.J.), Defendant's Book of Authorities, Tab 37, at para. 10**

55. It is for the mutual benefit of the plaintiffs and the defendants that the class be defined appropriately. An over-inclusive class burdens both the representative plaintiff and also the defendant as to what must be proven, and an over-inclusive class may make it more difficult to fairly settle the litigation.

> ***Lavier v. MyTravel Canada Holidays Inc., supra*, Defendant's Book of Authorities, Tab 35A, at para. 105**
>
> ***Hollick, supra*, Defendant's Book of Authorities, Tab 1, at para. 21**

56. The plaintiff in this case has failed to demonstrate that he has restricted the class definition to students and family members with a colourable claim and, as a result, the proposed class does not meet the requirements of s.5(1)(b) of the CPA.

III. Section 5(1)(c) – The Court cannot make an aggregate assessment of the damages

57. It would not be appropriate to certify the issue of whether the Court could make an aggregate assessment of the damages suffered by class members. The statutory prerequisites for the awarding of aggregate damages cannot be satisfied in this proceeding.

Section 24 of the CPA states that:

(1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,

(a) monetary relief is claimed on behalf of some or all class members;

(b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and

(c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

***Class Proceedings Act*, s. 24**

58. The authorities establish that a question relating to an aggregate assessment should not be included if, at the certification stage, the court can determine that one or more of the three prerequisites could not be satisfied even if the other common issues were decided in favour of the plaintiff.

> ***Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 112 (S.C.J.), Defendant's Book of Authorities, Tab 38, at paras. 185 and 186**

59. Winkler J. (as he then was) considered when an aggregate assessment of damages is appropriate in *Bywater v. Toronto Transit Commission*. The motion before Winkler J. was for certification of an action as a class action following a fire in a subway tunnel. The action

advanced claims for personal injury, property damage and claims under the *Family Law Act*. Winkler J. stated as follows, at paras. 18-20:

> "These claims cannot, "reasonably be determined without proof by individual class members" as required by s. 24(1)(c). Furthermore, each individual claim will require proof of the essential element of causation, which, in the words of 24(1) (b), is "a question of fact or law other than those relating to an assessment of damages".
>
> In addition, the assessment of damages in each case will be idiosyncratic. All of the usual factors must be considered in assessing individual damage claims for personal injury, such as: the individual plaintiffs time of exposure to smoke; the extent of any resultant injury; general personal health and medical history; age; any unrelated illness; and other individual considerations. Indeed here, the representative plaintiff was suffering from and experiencing symptoms of food poisoning at the time of the incident. The property damage claims of class members must be assessed individually as the underlying facts will vary from one class member to the next.
>
> . . . Even if by class definition the members of the proposed class have all suffered exposure to smoke, the extent of such exposure and any damage flowing from it will vary on an individual basis."
>
> ***Bywater v. Toronto Transit Commission,* [1998] O.J. No. 4913 (Gen. Div.), Defendant's Book of Authorities, Tab 39, at paras. 18-20**

60. Similarly, the court rejected an attempt to certify a claim for aggregate damages in *Glover v. City of Toronto et al.* In *Glover*, the court considered a proposed class action arising as a result of an outbreak of Legionnaires' disease at a home for the aged. The claim alleged that the plaintiffs suffered harm as a result of delay by the defendants in identifying the source of the outbreak. In rejecting the claim that aggregate damages should be certified as a common issue, Lax J. noted as follows:

> "In my view, this is a case like *Bywater* where causation will be an individual issue. The amount of damages claimed by each class member will vary in accordance with their individual circumstances. Proof of loss will be individual. As I do not believe that there is any reasonable likelihood that conditions (b) and (c) can be met, proposed common issue 3 should not be included as a common issue."
>
> ***Glover v. City of Toronto,* [2009] O.J. No. 1523 (S.C.J.), Defendant's Book of Authorities, Tab 40, at para. 65**

61. In this case, even if the Plaintiff were to succeed at a common issues trial with respect to any of the proposed common issues (a), (b) and (c), it would still be necessary to separately establish causation of harm and quantification of damages for each individual class member. It would be necessary to prove, *inter alia*, whether the individual was subjected to any harmful conduct or actions while a student at Ross MacDonald, whether and to what extent the individual suffered injury as a result of any harmful conduct, and the extent to which any pre-existing conditions may have been a factor in the individual's response to the harm. A highly individualized and idiosyncratic assessment would be necessary before any damages could be quantified. There is no likelihood that s. 24(1)(b) or s. 24(1)(c) could be met with the result that the court should not certify the issue of aggregate damages.

62. With respect to the claim for aggregate damages, this proceeding is different from *Cloud v. Canada* in which a claim for aggregate damages was certified. In that case, there was a proper pleading and proper evidence to support the claim that "the very purpose in running the School as they did was to eradicate the native culture of the students". In *Cloud*, therefore, even at the certification stage, there was a proper pleading and evidence to support the assertion that any and every individual who attended the School had suffered harm by virtue of their having attended a school that was intended to eradicate their culture. In this case, as noted previously, there is neither a pleading nor evidence to support such a suggestion of universal harm resulting from the purpose for which the facility was operated.

***Cloud*, supra, (C.A.), Defendant's Book of Authorities, Tab 18B, at para. 66**

PART IV – ORDER REQUESTED

64. For all of these reasons, the Crown submits that the Plaintiff has not met all the requirements for certification of the proposed class action. In the circumstances, the Crown submits that the certification motion be dismissed.

ALL OF WHICH IS RESPECTFULLY SUMITTED.

Dated: March 19, 2012

John Kelly

William MacLarkey

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Her Majesty the Queen in right of Ontario