In the Court of Appeal of Alberta

Citation: T.L. v. Alberta (Child, Youth and Family Enhancement Act, Director), 2009 ABCA 182

Date: 20090515
Docket: 0803-0241-AC
0803-0250-AC
Registry: Edmonton

Between:

T.L.,
R.M. and J.S.

Respondents (Plaintiffs)

and -

Her Majesty the Queen In Right of Alberta as represented by
The Director of Child Welfare

Appellant (Defendant)

and -

The Public Trustee of Alberta

Appellant (Defendant)

Restriction on Publication: No one may publish any information serving to identify a child or guardian of a child who has come to a Minister's or a director's attention under the *Child, Youth and Family Enhancement Act*. See the *Child, Youth and Family Enhancement Act*, s. 126.2.

The Court:

The Honourable Madam Justice Constance Hunt
The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice Jack Watson

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice D.R. Thomas
Dated the 19th day of February, 2008
Filed on the 19th day of September, 2008
(2008 ABQB 114; Docket: 0403 12898)

Memorandum of Judgment

The Court:

[1] T.L. was born on July 19, 1972. In an affidavit sworn on November 23, 2004, she deposed that from 1979 to 1986 she suffered lengthy periods of sexual and physical abuse at the hands of her stepfather. Throughout that time, she and her family were under the supervision of the Department of Social Services. The abuse ended when T.L., her mother and her sister sought refuge in the Women's Shelter in Edmonton. At that time, T.L. became the subject of a permanent guardianship order.

[2] T.L. deposed that the abuse was reported to officials acting under the authority of the Director of Child Welfare, and in 1988 her stepfather was charged with a number of counts of physical and sexual abuse and gross indecency. He was convicted in 1990.

[3] The Respondent maintains that she did not know that she could sue the Appellants and did not know that she could apply for crimes compensation. The Respondent contends that, as her guardian, the Director of Child Welfare failed to protect her legal rights. She alleges that the Appellants at no time advised her of those legal rights to sue or claim for crimes compensation, and at no time hired a lawyer to represent her interests.

[4] She deposed that her counsel had been contacted by approximately 250 people who are similarly situate and whose allegations are said to be of the same order.

[5] On the strength of her deposition, a class action suit was brought and certified.

[6] The certified common issues are the following:

> (i) Did the [Appellants], between 1966 and the certification date, owe a duty to some or all of the various types of class members to protect their legal rights by taking steps to obtain compensation on their behalf, and if so, what was the nature of that duty?
>
> (ii) What policies, practices and systems did the Director of Child Welfare and the Public Trustee have in place between 1966 and the certification date relating to the prosecution of civil claims on behalf of children in care?
>
> (iii) Was the existence of, absence of, or content of the policies of the Director of Child Welfare and the Public Trustee relating to the protection of the civil rights of children in care at any time between 1966 and the certification date so egregious or highhanded as to justify an award of punitive damages?

(iv) If the answer to question (iii) is affirmative, what quantum of punitive damages should be paid, and to whom?

(v) Did the Director of Child Welfare, in its operation of the child welfare system, and the Public Trustee, insofar as it was involved in that system, at any time between 1966 and the certification date fraudulently conceal any breach of duty by them to the class members?

[7] The Director of Child Welfare argues that the chambers judge erred in law by failing to apply the correct test under s. 5(2) of the ***Class Proceedings Act***, S.A. 2003, c. C-16.5 or made a palpable or overriding error by improperly applying that test.

[8] The Public Trustee argues that the chambers judge erred by certifying the action as a class proceeding and by adding it as a party.

[9] The thrust of the Director of Child Welfare's submission is that the chambers judge erred in concluding that the mere presence of common issues mandated certification. Put another way, this Appellant maintains that over-emphasis on common issues by the chambers judge resulted in a failure to give proper effect to the mandatory factors in s. 5(2) the ***Class Proceedings Act***.

[10] The Public Trustee argues that she should not have been named as a Defendant. She also submits that a class proceeding is inappropriate because: none of the representative plaintiffs have a reasonable cause of action against the Public Trustee who could only have responsibilities to a very small portion of the proposed class; the issues involved make the claims inherently individual; and there are overriding privacy issues with respect to Public Trustee files.

JUDICIAL HISTORY IN THE COURT OF QUEEN'S BENCH

[11] On October 26, 2005, T.L. applied for certification of the action against the Director of Child Welfare under the ***Class Proceedings Act***. In a lengthy decision, Slatter J. (as he then was) determined that certification would be inappropriate without the necessary and appropriate third parties being joined to the action: ***T.L. v. Alberta (Director of Child Welfare)***, 2006 ABQB 104, [2006] A.J. No. 163. He dismissed the application, but granted T.L. leave to resubmit it at a later date. Slatter J. identified a number of issues and made the following determinations (at para. 151):

"(a) the proceeding discloses a cause of action.

(b) the following class can be identified as an appropriate class of plaintiffs:

All persons who suffered personal injury while a minor as a result of a tort by a third party, and between July 1, 1966 and June 29, 2004 were in the actual custody of the Defendant:

> i) as a permanent ward,
>
> ii) under a Permanent or Temporary Guardianship Order, or
>
> iii) under a Permanent Guardianship Agreement,
>
> and the Defendant did not commence a civil action or make a Victims of Crime application to obtain compensation on their behalf.
>
> (c) there must be a subclass for non-resident members of the class who are not residents of Alberta on the date of certification.
>
> ...
>
> (e) the proposed representative plaintiff is suitable, but the proceedings should not be certified unless approximately two or three other suitable representative plaintiffs are proposed as well.
>
> (f) while the advantages in this case will be marginal, a class proceeding would be the preferable procedure for deciding the common issue, excepting only that there are certain other parties who must necessarily be joined to the action before it can be certified. ..."

[12] Slatter J. also identified the Public Trustee as a potential defendant: at para. 144.

[13] T.L. then applied to Thomas J. to add three plaintiffs, to add the Public Trustee as a defendant, and to amend the statement of claim. At the same time, Thomas J. certified the proceeding as a class action, which is the subject of this appeal. In doing so, Thomas J. changed the definition of the class somewhat, added the respondents R.M. and J.S. as representative plaintiffs, added the Public Trustee as a defendant, and created a subclass for non-resident members of the class. In substance, he adopted the reasons of Slatter J.

LEGISLATION

[14] Sections 5(1) and 5(2) of the ***Class Proceedings Act*** read as follows:

> "5(1) In order for a proceeding to be certified as a class proceeding on an application made under section 2 or 3, the Court must be satisfied as to each of the following:

(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, whether or not the common issue predominates over issues affecting only individual prospective class members;

(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;

(e) there is a person eligible to be appointed as a representative plaintiff who, in the opinion of the Court,

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

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

(iii) does not have, in respect of the common issues, an interest that is in conflict with the interests of other prospective class members.

(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the Court may consider any matter that the Court considers relevant to making that determination, but in making that determination the Court must consider at least the following:

(a) whether questions of fact or law common to the prospective class members predominate over any questions affecting only individual prospective class members;

(b) whether a significant number of the prospective class members have a valid interest in individually controlling the prosecution of separate actions;

> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means."

Section 34(4) of the ***Child, Youth and Family Enhancement Act***, R.S.A. 2000, c. C-12 reads as follows:

> "34(4) If the Court makes a permanent guardianship order, the director is the sole guardian of the person of the child and the Public Trustee is the sole trustee of the estate of the child."

STANDARD OF REVIEW

[15] In ***Windsor v. Canadian Pacific Railway***, 2007 ABCA 294, 79 Alta. L.R. (4th) 244 at paras. 14-15, this Court stated that when the question of preferability involves the application of the ***Class Proceedings Act*** to factual underpinnings, it is a question of mixed law and fact for which the applicable standard of review is palpable and overriding error. ***Windsor*** is analogous to this case because one of the issues regarding preferability was whether the case management judge failed to give appropriate weight to the predominance of individual issues, the same concern that permeates the Director of Child Welfare's submissions in this appeal. As noted, a chambers judge's exercise of discretion is reviewable on the reasonableness standard.

[16] As to the second ground of appeal advanced by the Public Trustee, the decision of the chambers judge to add an individual as a defendant is discretionary: ***Foda v. Capital Health Region***, 2007 ABCA 207, [2007] A.J. No. 668 at para. 9; ***Peterson v. Highwood Distillers Ltd.***, 2005 ABCA 248, 47 Alta. L.R. (4th) 225 at para. 16. Accordingly, it must be reviewed on a reasonableness standard: ***Decock v. Alberta***, 2000 ABCA 122, 255 A.R. 234 at para. 13.

[17] In summary, certification decisions involve careful balancing of competing interests and delicate judgment calls. Deference is the order of the day and because the question is one of mixed fact and law the Appellants must show there has been a palpable and overriding error.

[18] The ***Class Proceedings Act*** requires that the Court consider the balance of the common and individual issues in assessing whether to certify a class action. The Director of Child Welfare asserts that the greater the weight of the individual issues, the less amenable is the case to class certification.

[19] The Director submits that the error in approach to the mandatory factor of predominance is apparent in the following passage from the judgment of Slatter J. (endorsed by Thomas J.):

> "It is clear that in this case, while there are common issues, the individual issues will substantially predominate over the common issues. Even after the common issues are decided, there will be a lot of work to be done before it can be determined if any individual class member has a valid claim. Each individual claim will require a 'trial within a trial': see para. 58, *supra*. While the overall benefits will be slight, there is still some practical utility in deciding the common issues once." (at para. 133)

[20] That approach, the Director contends, is contrary to the controlling authority established by the Supreme Court of Canada in ***Hollick v. City of Toronto (City)***, 2001 SCC 68, [2001] 3 S.C.R. 158 at paras. 29-30.

[21] In ***Hollick***, the Court made clear that the question of preferability must take into account the importance of the common issues in reference to the claims as a whole. It is a matter of weighing and balancing the s. 5(2) factors.

[22] The Director of Child Welfare also argues that Thomas J. erred in his approach to the s. 5(2)(b) factor of interest in individual control on the basis that Thomas, J. endorsed Slatter J.'s reasoning at 2006 ABQB 104 at para. 134:

> "[E]ach class member will still retain a significant element of control over his or her claim, simply because the individual issues predominate over the common issues. Even after the common issues are decided, the class members will have a significant amount of control over the adjudication of the individual claims. There is nothing about the common issues that would suggest that the class members have any interest in maintaining control through separate prosecutions. ..."

[23] There is invariably a tension between judicial economy and access to justice. We discern no error in the analysis in respect of this factor that would warrant appellate interference.

[24] Indeed, in the context of an analysis of "other proceedings", pursuant to s. 5(2)(c) of the Act, we reject the submission that the following analysis of Slatter J. constitutes a "fundamental error":

> "... In this case there is not a sharp demarcation between the efficiency of the class proceeding, and the efficiency of hypothetical individual actions. This is again because the individual issues predominate over the common issues. In this particular situation, a

> great deal of the work in resolving the claims is going to have to happen at the individual level, and considered overall the practicality of the competing procedures is not significantly different. Certainly it is more efficient and practical to decide the common issues once and for all, and this factor is also not an impediment to certification, although again the benefits are marginal." (at para. 136)

[25] In fact, recognition that "individual issues predominate over the common issues" is itself not dispositive one way or another of the certification decision. It is but one factor that the court takes into account. In the instant case, that single factor might well favour individual actions, but is hardly determinative upon a weighing and balancing of all factors.

[26] We endorse the following analytical framework adopted by Thomas J.:

> "A class proceeding is the preferable procedure if it presents a fair, efficient and manageable method of determining common issues, and if such determination will advance the proceeding in accordance with the goals of achieving judicial economy, access to justice, and behaviour modification: ***Carom v. Bre-X Minerals Ltd.*** (1999), 44 O.R. (3d) 173 (S.C.J.), at para. 257, aff'd 46 O.R. (3d) 315 (Div. Ct), appeal granted in part on other grounds (2000), 51 O.R. (3d) 236 (C.A.), leave to appeal dismissed [2000] S.C.C.A. No. 660 ["***Carom***"]. The essence of the inquiry is to assess the common and individual issues contextually, and consider the impact of the individual issues on the trial process, including fairness to plaintiffs, defendants and the court. The inquiry focuses on two questions: firstly, would the class action be a fair, efficient and manageable method of advancing the claim; and secondly, would the class action be preferable to all other reasonably available means of resolving the claims of class members: see ***Paron****, supra* at para. 90. As such, the preferability analysis requires the court to look at all reasonably available means of resolving the class members' claims, such as joinder, test cases, consolidation and so on, and not just at the possibility of individual actions: ***Hollick****, supra* at para. 31.
>
> In summary, preferability involves a balancing of all the interests of the parties and of the Court and may include an assessment of the economics of the litigation, the number of individual issues to be dealt with, the complexities if there are third party claims and the alternative means available for adjudicating the dispute: ***Condominium Plan No. 0020701****, supra* at para. 89."
>
> (at paras. 98 & 99)

[27] The chambers judges adopted a careful, purposive approach in setting the criteria for certification. The s. 5(2) factors were considered in the context of the overall case, inclusive of the common issues, and in a manner consistent with the approach taken by Winkler J. in ***Carom v. Bre-X Minerals Ltd.*** (1999), 44 O.R. (3d) 173 (S.C.J.) at 239:

> "The proper approach to be taken in considering whether a class proceeding is the preferable procedure for resolving the common issues is to have regard to all of the individual and common issues arising from the claims in the context of the factual matrix. A class proceeding is the preferable procedure where it presents a fair, efficient and manageable method of determining the common issues which arise from the claims of multiple plaintiffs and where such determination will advance the proceeding in accordance with the goals of judicial economy, access to justice and the modification of the behaviour of wrongdoers.
>
> As with the other criteria for certification there is an interaction between the common issues and the preferable procedure. In order for an issue to constitute a common issue in a class proceeding, the resolution of the issue must be capable of advancing the litigation in a legally material way. Thus in order for a common issue trial, and hence a class proceeding, to be the preferable procedure it must advance the litigation in such a way that the goals of the Act are met." [emphasis added]

[28] As evidenced by the plaintiffs' litigation plan, the ***Class Proceedings Act*** provides innovative and effective means of dealing with individual issues that would not be available in an ordinary lawsuit. Indeed, that is the position taken by the Ontario Court of Appeal in ***Cloud v. Canada (Attorney General)***, 2004 O.J. No. 4924 (Ont. C.A.) para. 90:

> "... In addition, s. 25 contemplates a variety of ways in which individual issues may be determined following the common issues trial other than by the presiding trial judge. Thus at this stage in the proceedings, when one views the common issues trial in the context of the action as whole, there is no reason to doubt the conclusion that the class action is a manageable method of advancing the claim."

[29] The case law establishes that the policy reasons behind class proceeding legislation are access to justice, judicial economy and behaviour modification. Accordingly, it is proper to take into account the fact that many of the class members are vulnerable and may have limited resources. Allowing the case to proceed as a class action could assist in reducing the barriers they may face in bringing individual suits.

[30] The reasons of the chambers judges, read as a whole, demonstrate that they were alive to the individual issues arising in this case. They concluded that, on balance, there were a sufficient number of common issues, the resolution of which would move the litigation forward for the class. Included in the latter category is the common issue of limitation periods.

[31] Sections 5(2)(d) and (e) of the ***Class Proceedings Act*** deal with the question of whether there are other and better means of resolving the claims of potential class members. In the context of the action as a whole, the chambers judges concluded that the class action was a manageable method of advancing the claims.

[32] The litigation plan proffered by the Respondents embraces innovative and effective means of dealing with individual issues as contemplated by the ***Class Proceedings Act*** which would be available in a plethora of ordinary lawsuits. At the same time, the resolution of common issues will prevent repetitive factual inquiries in individual claims.

[33] Insofar as the Public Trustee's second argument is concerned, my view is that the response advanced at paras. 47 and 48 of the Respondents' factum has merit:

> "Pursuant to the *Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12, s. 34(4) the Public Trustee is sole trustee of the estate of a child subject to a Permanent Guardianship Order. In *[V.B.] v. Alberta (Minister of Children's Services*) the Court explained the role of the Public Trustee derived from this statute:
>
> > [13] It is not disputed that the Plaintiff V.B. as the natural mother of the infant Plaintiffs, would prima facie be a guardian of her children: *Domestic Relations Act*, R.S.A. 2000, c. D-14, s. 50. However, it is clear from s. 34(4) of the Act that once the Court makes a Permanent Guardianship Order, the director becomes the sole guardian to the exclusion of any others who might have a claim to guardianship. Of more importance to the present issue is s. 34(4) of the Act, which provides that the Public Trustee is the sole trustee of the estate of the child. I interpret this to mean that all assets of the child (including choses in action and potential claims) vest in the Public Trustee. Since the Permanent Guardianship Orders were never appealed, they raise an issue estoppel, and the Plaintiff V.B. is not a guardian of the infant Plaintiffs, and the Public Trustee is their sole trustee.
> >
> > [emphasis added]
>
> ...

> [16] ... [T]he statute makes it clear that the Public Trustee is prima facie the person who should be advancing this claim on behalf of the infant Plaintiffs. The Public Trustee does not of course have to advance any and all claims that an estate under his care might possess: the Public Trustee is entitled to assess claims to see if they are of sufficient merit to justify the expense and risks of prosecution. If the Public Trustee comes to the conclusion that the claims are not sufficiently meritorious, or cannot be economically pursued, then the Public Trustee (like any other litigant) is entitled to abandon the cause of action. In the context of child welfare cases, the Public Trustee, in consultation with the director of Child Welfare, should also consider whether the litigation is in the best interests of the children. These decisions can be supervised by the Court, if necessary, but the primary decision-making power rests with the Public Trustee."

[34] We also agree with the reasons of Thomas J. in addressing the argument that the claims against the Public Trustee brought by the representative Plaintiffs are bound to fail because of a limitation defence. That reasoning, which relies on s. 2(4) of the ***Class Proceedings Act***, is set out at para. 78 of his reasons:

> " I do not see any significant difference between the arguments raised by the Public Trustee and those considered by Slatter J. in ***T.L. #1***. Even if the claims of the Representative Plaintiffs against the Public Trustee were statute-barred, this does not mean that there would be no class members with valid claims against the Public Trustee. It is not necessary for a representative plaintiff to be identically situated with each and every member of the class; as mentioned earlier, the C.P.A. allows the certification judge <u>the discretion to appoint a representative plaintiff who is not even a class member</u>, if to do so would avoid a substantial injustice to the class. <u>Therefore, I find that although the claims of the Representative Plaintiffs may indeed prove vulnerable to limitation defences, the claims are still sufficiently viable at this stage of the certification proceedings to allow the addition of the Public Trustee as a defendant to this Action</u>."
>
> [emphasis added] (Factum of the Respondents, p. 24)

[35] On this record there is no error of law nor any misapprehension of the facts by the chambers judges that warrants appellate interference. The appeal is dismissed.

Appeal heard on February 5, 2009

Memorandum filed at Edmonton, Alberta
this 15th day of May, 2009

As authorized: Hunt J.A.

Berger J.A.

Watson J.A.

Appearances:

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