

Court of Queen's Bench of Alberta

Citation: T.L. v. Alberta (Child, Youth and Family Enhancement Act, Director), 2010 ABQB 203

Date:
Docket: 0403 12898
Registry: Edmonton

Between:

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

Plaintiffs

- and -

Her Majesty the Queen in Right of Alberta as represented by
The Director of Child Welfare and the Public Trustee

Defendants

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.

**Memorandum of Decision
of the
Honourable Mr. Justice D.R.G. Thomas**

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I. Introduction

[1] The Plaintiffs represent a class of people who, while under the care of the Defendant the Director of Child Welfare ("Child Welfare"), allegedly suffered harm or injury at the hands of third parties. The Plaintiffs claim that Child Welfare and the Public Trustee had a duty to prosecute their claims for compensation arising out of these injuries but failed to do so. I certified this Action as a class proceeding under the *Class Proceedings Act* ("the *C.P.A.*") on February 19, 2008 in *T.L. v. Alberta (Child, Youth and Family Enhancement Act, Director)*, 2008 ABQB 114. The class certification was upheld by the Court of Appeal in *T.L. v. Alberta (Child, Youth and Family Enhancement Act, Director)*, 2009 ABCA 182.

[2] This class proceeding is under case management. On December 2 and 3, 2009, I heard three applications brought before me by the Plaintiffs, Child Welfare and the Public Trustee, respectively. On January 20, 2010, I issued a decision on the Plaintiffs' application for advice and directions with respect to describing privileged records and solicitors files in their Affidavit of Records: *T.L. v. Alberta (Child, Youth and Family Enhancement Act, Director)*, 2010 ABQB 49.

[3] The Plaintiffs' application was in response to the Defendants' application for a further and better Affidavit of Records. I now turn to consider the latter application, excepting the issues related to privileged records which were dealt with in my January 20, 2010 decision.

II. Factual Background to this Application

[4] On January 8, 2009, the parties entered into a Consent Order which provided that the parties "shall have 90 days following the Court of Appeal Decision to file their Affidavits of Records." The Court of Appeal's decision was rendered on May 15, 2009 and as such, the 90 day period expired on August 13, 2009. On August 14, 2009, Plaintiffs' counsel forwarded an Affidavit of Records sworn by J.S., one of the representative Plaintiffs.

[5] Concerns about the Plaintiffs' Affidavits of Records were raised at a case management meeting held on August 17, 2009. On October 26, 2009, Plaintiffs' counsel provided a draft Amended Affidavit of Records for J.S., which was largely unchanged from the original affidavit. On the same date, Plaintiffs' counsel also forwarded a draft Affidavit of Records for R.M., one of the other representative plaintiffs, which was identical to the draft Amended Affidavit of J.S.

[6] On November 2, 2009, counsel for the Plaintiffs provided the Defendants with a filed copy of the Amended Affidavit of Records of J.S (the "Amended Affidavit"). On November 30, 2009, the Plaintiff T.L. filed and served an Affidavit of Records (the "T.L. Affidavit").

III. Positions of the Parties

[7] The Defendants are seeking two orders: firstly, to compel the representative Plaintiff R.M. to file an Affidavit of Records, and secondly, to compel J.S. and T.L. to file a further and better Affidavit of Records. The Defendants argue that the Plaintiffs have failed to comply with the Consent Order of January 8, 2009, as the original affidavit filed by J.S. was outside of the 90 day period specified in the Consent Order. Further, the Defendants point out that no Affidavit of Records has been filed on behalf of the representative R.M, and no explanation has been offered for the failure to do so.

[8] The Defendants also argue that the Amended Affidavit and the T.L. Affidavit are deficient. In its application for a further and better Affidavit of Records, Child Welfare and the Public Trustee seek the following specific documents from each of the representative Plaintiffs:

- (a) all child welfare records relating to the Plaintiffs (Child Welfare only);
- (b) all records relating to the Public Trustee (Public Trustee only);
- (c) all records relating to the Plaintiffs' injuries;
- (d) all records relating to the Plaintiffs' medical and psychological condition at all materials times;
- (e) all records relating to any crimes or torts committed against the Plaintiffs;
- (f) all records relating to any actions, applications or proceedings brought by, or on behalf of the Plaintiffs, to recover compensation;
- (g) all records relating to any considerations or steps taken by the Plaintiffs, or others on behalf of the Plaintiffs, to recover compensation; and
- (h) any records relating to the financial ability of the third party abusers.

(Collectively the "Requested Records")

[9] The Defendants argue that the Requested Records are relevant and material to the determination of the common issues; for example, the question of whether the Defendants owed a duty to the class members to protect their legal rights by taking steps to obtain compensation on their behalf, and the nature of that duty depends on certain circumstances such as the degree of control or custody exercised by the Defendants, the merits of the tort or crime, and the mental and physical state of the individual class member. Since the *C.P.A.* limits discovery to the representative Plaintiffs, the Defendants argue that they must be able to test these representative

cases through document and oral discovery in order to draw from each both facts and associated legal argument that is supportive of the Defendants' position on the common issues.

[10] In response, the Plaintiffs argue that the Requested Documents do not relate to the common issues and that it is neither required nor appropriate that these records be produced at this point in the litigation. The certified common issues do not require an individual analysis of the circumstances of the representative Plaintiffs; for example, the issue of whether there is a duty and if so, the nature of that duty, is a purely legal concept and ought to be read in conjunction with the class definition. According to the Plaintiffs, it does not require an analysis of the individual representative Plaintiffs' individual claims because at this stage of the proceedings, the tort or crime or the mental or physical state of the individual representatives are not relevant. The Plaintiffs also note that the other common issues are also not dependant on the specific circumstances of the representative Plaintiffs; the second and third common issues would likely be determined on the basis of documentary and oral evidence provided by the Defendants; the fourth issue of whether punitive damages are warranted depends on the blameworthiness of the Defendants and is determined without evidence from individual class members; and the fifth issue regarding fraudulent concealment also relates to the Defendants' own conduct in their overall operation of the child welfare system.

[11] However, the Plaintiffs acknowledge that the Requested Documents relate to questions of individual breaches of duty, limitation periods and causation for the individual plaintiffs, which are matters that will be dealt with at the individual issues phase of the litigation. The facts related to whether there was, in the particular circumstances of a particular plaintiff, a breach of duty is an individual issue that will vary from class member to class member; similarly, matters such as limitation periods, causation and the amount of damages are individual issues to be dealt with on a case-by-case basis during the second stage of the litigation after the determination of the common issues.

IV. Law

[12] The Rules of Court governing Affidavits of Records are:

186.1 For the purpose of this Part, a question or record is relevant and material only if the answer to the question, or if the record, could reasonably be expected

- (a) to significantly help determine one or more of the issues raised in the pleadings, or
- (b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings.

187(1) Every party to proceedings must, in accordance with this Rule, file and serve on all other parties an affidavit of records, unless the Court grants an order under Rule 188.1 permitting a late filing or service of the affidavit.

...

187.1(1) The affidavit of records must be made by the party to the proceedings or, in the case of a corporation, by an officer of the corporation, or by any other person directed by the Court.

(2) The affidavit of records must disclose relevant and material records and must also specify

- (a) which of those records are in the possession, custody or power of the party making the affidavit,
- (b) which of those records, if any, the party objects to produce and the grounds for the objection,
- (c) with respect to the records,
 - (i) which records the party has had in their possession, custody or power,
 - (ii) the time when, and the manner in which, they ceased to be in their possession, custody or power, and
 - (iii) the present whereabouts of the records, so far as the party making the affidavit can so state, either from personal knowledge or on information or belief, and
- (d) that the party has not and has never had any other relevant and material records in their possession, custody or power, so far as the party knows or believes.

(3) If a party has not and has never had any relevant and material records in their possession, custody or power, so far as the party knows or believes, the affidavit must state that fact.

...

189 A party is not entitled to conduct an examination for discovery until that party has filed and served an affidavit of records, or is otherwise permitted to commence examination by order of the Court under Rule 188.1(2)(b).

...

190(1) A party who, without sufficient cause,

- (a) fails to serve an affidavit of records in accordance with Rule 187,
- (b) fails to serve an affidavit of records in accordance with an order of the Court made under Rule 188.1, or
- (c) applies under Rule 188.1 after the time for filing an affidavit of records expires

is liable to pay a penalty in costs to the party adverse in interest of 2 times item 3(1) of Schedule C, or such larger amount as the Court may determine, irrespective of the final outcome of the proceeding.

(2) If there is more than one party adverse in interest, the Court may determine the share of costs to be paid to each.

(3) Costs imposed under this Rule are taxable and payable forthwith.

190.1 If a party fails to serve an affidavit of records in accordance with Rule 187 or in accordance with an order of the Court made under Rule 188.1, the Court may on application by any other party

- (a) strike out all or any of the pleadings of the party in default, or
- (b) impose any other sanction, including an order under Rule 599.1.

...

196(1) On application, if the Court is satisfied that

- (a) a relevant and material record in the possession, custody or power of a party has been omitted from an affidavit of records, or
- (b) a claim of privilege has been improperly made in respect of the record,

the Court may order a further and better affidavit and impose other sanctions, including an order under Rule 599.1.

[13] In determining whether a record is relevant and material, the starting point is the pleadings, which define the issues: *Weatherill Estate v. Weatherill*, 2003 ABQB 69.

[14] However, the application relates to a class proceeding and as such, I also refer to s. 18 of the *C.P.A.* dealing with discovery:

18(1) Parties to a class proceeding have the same rights of discovery under the Rules of Court against one another as they would have in any other proceeding.

(2) After discovery of the representative plaintiff or, in a proceeding referred to in section 7, one or more of the representative plaintiffs, a defendant may, with leave of the Court, discover other class members or subclass members.

...

(4) In deciding whether to grant a defendant leave to discover other class members or subclass members, the Court may take into consideration any matter that the Court considers relevant, but in making its decision the Court must consider at least the following:

- (a) the stage of the class proceeding and the issues to be determined at that stage;
- (b) the presence of subclasses;
- (c) whether the discovery is necessary in view of the defences of the party seeking leave;
- (d) the approximate monetary value of individual claims, if any;
- (e) whether discovery would result in oppression or in undue annoyance, burden or expense for the class members or subclass members sought to be discovered.

[Emphasis added.]

[15] Although s. 18 of the *C.P.A.* focuses on when discovery of other class members is appropriate, I note that one of the factors that a court must consider is the stage of the proceedings. This is an important point which is explored more fully below.

V. Decision

[16] While the traditional starting point for determining relevance and materiality is the pleadings, I am satisfied that the bifurcated nature of class proceedings requires a modified approach. In this case, the class proceeding is still at its first stage and as such, the relevance and

materiality of a record ought to be determined by reference to the common issues. This position is consistent with the *C.P.A.*, which clearly sets out a bifurcated process that distinguishes between the common issues that are shared collectively by all class members, and the individual issues particular to each separate class member. In order to preserve the goals of access to justice and judicial economy, it is imperative to respect the bifurcated process and to not confuse the common issues at the first stage with matters that are best left to the determination of any outstanding individual issues at the second stage.

[17] In *T.L. v. Alberta (Child, Youth and Family Enhancement Act, Director)*, 2008 ABQB 114, I certified the following common issues:

- (i) Did the Defendants Child Welfare and the Public Trustee, 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 Defendants 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 Defendants 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 Defendant Child Welfare, in its operation of the child welfare system, and the Defendant Public Trustee, in so far 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?

[18] I have reviewed the Amended Affidavit and the T.L. Affidavit and agree with the Defendants that the affidavits largely contain:

- (a) pleadings, affidavits, orders, transcripts and argument from other court proceedings,
- (b) excerpts from Child Welfare publications,
- (c) newspaper articles,

- (d) statutes and case law,
- (e) excerpts from Alberta Hansard, and
- (f) transcripts of proceedings before the Law Society of Alberta involving one of Plaintiffs' counsel.

[19] Since I have not had an opportunity to review the actual records referred to in these two affidavits, I am not able to conclude that the records described in the Amended Affidavit and the T.L. Affidavit relate in any way to the common issues. However, that is not the issue before me. Rather, the narrower issue to be determined is whether the Requested Records are relevant and material to the determination of the common issues at this first stage of the class proceedings and, if relevant, whether they should be produced by the representative Plaintiffs.

[20] Subject to the limited production which I will require, I am not satisfied that it is necessary for the representative Plaintiffs to produce all of the Requested Records at this stage of the proceedings. While most of the Requested Records will likely be considered to be relevant and material if this Action proceeds to the second stage to the determination of the individual issues, I accept the argument of the Plaintiffs that many of the Requested Records will not assist the Court in resolving the common issues. The records necessary for determining the common issues are primarily in the hands of the Defendants, including the child welfare records of the representative Plaintiffs.

[21] However, I will order the Plaintiffs to make further and better production of all records which are in their actual possession and which were generated by, or relate in any way to, Child Welfare or the Public Trustee and specifically refer to a particular representative Plaintiff. That type of information is relevant and material and may assist in establishing the factual matrix as to when the representative Plaintiffs came under the authority of, or a relationship developed with, the Defendants. This will provide some context to the common issues, particularly regarding the existence of a duty of care, and is consistent with Slatter J's (as he then was) comments in *T.L. v. Alberta (Director of Child Welfare)*, 2006 ABQB 104 at para. 124. The records which contain this sort of information must be produced by the Plaintiffs in a further and better Affidavit of Records by April 30, 2010.

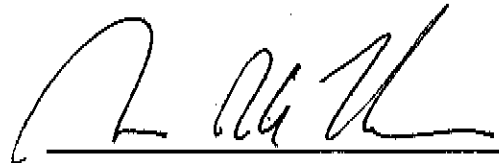
[22] Subject to this limited direction, I otherwise dismiss the applications of the Defendants for a further and better Affidavit of Records for J.S. and T.L.

[23] Finally, I direct that counsel for the Plaintiffs file an Affidavit of Records for R.M. within 30 days of this decision and in accordance with the above direction. Failure to do so will result in a costs award as provided for in Rule 190(1).

[24] The parties may speak to costs, and may seek other advice and directions as may be necessary.

Heard on the 2nd and 3rd day of December, 2009.

Dated at the City of Edmonton, Alberta this 25th day of March, 2010.



D.R.G. Thomas
J.C.Q.B.A. Thomas J

Appearances:

Mr. David A. Klein and
Ms. Nicola Hartigan
(Klein Lyons)
and

Mr. Mark Freeman
(Docken and Company)
for the Plaintiffs

Mr. G. Alan Meikle, Q.C. and
Ms. Susan Bercov
(Alberta Justice, Legal Services)
and

Mr. Ward Branch
(Branch MacMaster)
for the Defendant Child Welfare

Mr. W. Scott Schlosser, Q.C.
(Schlosser Cook)
for the Defendant Public Trustee