Court of Queen's Bench of Alberta

Citation: LC v Alberta, 2017 ABQB 93

Date:
Docket: 0703 10836
Registry: Edmonton

Between:

LC, EMP by her Litigation Representative Phillip Tinkler, DC by his next friend LC and CC by her next friend LC

Applicant/Plaintiff

- and -

Her Majesty the Queen In Right of Alberta and Metis Settlements Child & Family Services, Region 10

Respondent/Defendant

Restriction on Publication

Identification Ban – See the *Child, Youth and Family Enhancement Act,* section 126.2.
No one may publish the name or photograph of a child, or of the child's parent or guardian, in a way that reveals that the child is receiving, or has received, intervention services.
NOTE: This judgment is intended to comply with the restriction so that it may be published.

Memorandum of Decision of the Honourable Mr. Justice Robert A. Graesser

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I. Nature of Application

[1] In ***LC v Alberta***, 2016 ABQB 15 [***Certification Decision***], I provisionally certified this action as a class proceeding. The applicant, EMP, is the representative plaintiff for the child class

members in the action. She seeks advanced costs from Her Majesty the Queen in Right of Alberta (HMQ). This type of application is typically referred to as an ***Okanagan*** application as the test for advanced costs was set by the Supreme Court in ***British Columbia (Minister of Forests) v Okanagan Indian Band***, 2003 SCC 71, [2003] 3 SCR 371 [***Okanagan***].

II. Background

[2] This action has a long and complex history that has been discussed at length in other decisions I have made as case management judge, including: ***LC v Alberta (Metis Settlements Child & Family Services, Region 10))***, 2011 ABQB 12; ***LC v Alberta (Metis Settlements Child & Family Services, Region 10)***, 2011 ABQB 42, 509 AR 72 [***LC mini-Okanagan***]; ***Certification Decision***. It is thus unnecessary for me to repeat in any detail the facts I have found in these and the many other decisions I have made in this matter.

[3] HMQ has appealed the ***Certification Decision*** to the Court of Appeal, and it is unclear as to whether or the extent to which the action will be allowed to proceed as a class proceeding.

[4] In brief, this class action is the "failure to file" lawsuit against HMQ arising out of its failure to file care plans in a timely way or, in some cases, at all, for children in government care under temporary guardianship orders (TGOs). It is a somewhat parallel action to the "failure to sue" class action in ***TL v Alberta***, 2008 ABQB 114, affirmed at 2009 ABCA 182, which has been proceeding slowly towards settlement.

[5] EMP sued the Director of Child & Family Services alleging that the Director failed to file a service plan within 30 days after EMP's TGO was granted and that, consequently, the TGO was rendered a nullity and EMP's continued apprehension was unlawful, following the Court of Appeal decision in ***TS v Alberta (Director of Child Welfare)***, 2002 ABCA 46.

[6] I previously ordered that HMQ pay advanced costs for EMP to consult counsel and obtain legal advice as to: 1) the merits of her claims, 2) various strategies as to how best to advance such claims, and 3) how to amend pleadings as necessary to convert her claims into a proposed class action: ***LC mini-Okanagan*** at paras 82-83. I indicated at that time that EMP would need to re-apply for any additional advanced costs: ***LC mini-Okanagan*** at paras 83, 95.

[7] Following my initial advanced costs order, counsel for EMP brought separate applications to certify the action as a class action and for advanced costs through to the end of trial.

[8] For reasons driven by the availability of case management in this matter, EMP (and LC, as representative plaintiff for the parent and guardian class) elected to proceed with the certification application first, putting the advanced costs application on hold pending the results of the certification application.

[9] EMP successfully certified her action in the ***Certification Decision*** and was appointed as the representative plaintiff for the child class members. Following certification, counsel for EMP re-iterated that he would cease to act for the child class members unless HMQ paid advanced costs. Consequently, EMP now brings this ***Okanagan*** application.

[10] There have been a number of applications along the path of this application, including an application by HMQ to compel production of retainer agreements between EMP and counsel and an application to strike portions of Philip Tinkler's affidavit in support of this application. Mr. Tinkler is EMP's litigation representative. These decisions are reported at ***LC v Alberta***, 2016

ABQB 491, ***LC v Alberta***, 2016 ABQB 512, ***LC v Alberta***, 2016 ABQB 554, and ***LC v Alberta***, 2016 ABQB 557.

[11] This ***Okanagan*** application was eventually heard on October 11, 2016 and I reserved decision. Following the hearing of the application, HMQ filed an affidavit from Melissa Ferreira sworn November 1, 2016. Her affidavit was filed to clarify issues relating to the ability of people who were at some time under TGOs to access their Provincial Court and Child Welfare files to determine if care plans were filed for them within the time frames required by statute.

[12] Ms. Ferreira's affidavit led to an application to cross-examine her. A cross-examination took place before me on November 16, 2016. That in turn led to the filing of a supplemental brief on behalf of EMP on November 18, 2016.

III. The Test for Advanced Costs

[13] ***Okanagan*** held that "the power to order interim costs is inherent in the nature of the equitable jurisdiction as to costs, in the exercise of which the court may determine at its discretion when and by whom costs are to be paid" (para 35).

[14] The Supreme Court expounded on the test in ***Little Sisters Book & Art Emporium v Canada (Commissioner of Customs & Revenue Agency)***, 2007 SCC 2, [2007] 1 SCR 38 [***Little Sisters***], and in ***R v Caron***, 2011 SCC 5, [2011] 1 SCR 78 [***Caron***].

[15] Despite the discretion recognized by the Supreme Court, it held that the following three requirements be met before a court can order advanced costs:

> 1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial — in short, the litigation would be unable to proceed if the order were not made.
>
> 2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
>
> 3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases: ***Okanagan*** at para 40.

[16] If these requirements are met, a court can exercise its discretion to determine if there is "no other way to prevent the identified injustice": ***Little Sisters*** at para 74. This extraordinary remedy should only be granted in "sufficiently special" cases where "it would be contrary to the interests of justice to deny the advanced costs application": ***Caron*** at para 37.

IV. Positions of the Parties

The Applicant

[17] Counsel for EMP argues that the facts of this case meet the test in ***Okanagan***, ***Little Sisters***, and ***Caron***.

[18] In terms of impecuniosity, counsel submits that EMP does not have sufficient assets to fund this litigation. Counsel also argues that while fundraising from class members might

typically be required, in this case it is impossible because EMP cannot determine who is a child class member as that information is effectively being withheld by the respondent.

[19] In addition, counsel argues that the class members in this case likely do not have readily disposable assets as most are from disadvantaged socioeconomic backgrounds and some are still minors.

[20] Even if a few wealthy class members were found, EMP submits that ***Keewatin v Ontario (Minister of Natural Resources)***, 2006 CanLII 35625 (ONSC) at paras 76-79 [***Keewatin***], and ***Daniels v Canada***, 2011 FC 230, 387 FTR 102 at paras 35-36 [***Daniels***], establish that the child class would still be impecunious as it would be unreasonable for a few individuals to carry the financial burden for an entire class.

[21] Counsel for EMP will not act solely on a contingency basis. He requires a reasonable measure of advanced costs to enable him to proceed with the action. He submits that he has been unable to find any alternative source of funding, including an "extensive and exhaustive" but ultimately unsuccessful search for counsel willing to act on a purely contingency basis. Counsel thus submits that EMP is impecunious and an advanced costs order is the only way for this claim to proceed.

[22] In terms of the second element, EMP argues that this case has *prima facie* merit. EMP submits that the ***Certification Decision*** indicated that only causes of action with a reasonable likelihood of success would be certified. EMP thus suggests that the Court's decision to certify causes of action in unlawful detention, negligence, breach of fiduciary duty, abuse of public office, and ss 7 and 9 *Charter* violations demonstrates that this case has *prima facie* merit. EMP also notes that the unlawful detention claim is actionable *per se* without any need to prove injury or damages, which reinforces the strength of this claim.

[23] On the third element, EMP submits that the issues in this case transcend individual interests and are of sufficient public importance that they warrant advanced costs. EMP argues that there are hundreds, if not thousands, of child class members potentially affected by this case. According to EMP, societal interests in this case are particularly pressing as it relates to the government allegedly unlawfully confining children, many of whom were Aboriginal, and then attempting to conceal this wrongdoing from children, their parents, and the court. As there is an ongoing interest in ensuring that HMQ and Alberta Child Services follow the law and take responsibility when errors are made, EMP submits that this case transcends private interests and is of societal importance.

[24] On the final residual question – whether I should exercise my discretion to order this exceptional remedy – EMP argues that this case involves serious injustice to her and the other child class members that cannot and will not be remedied unless advanced costs are ordered. EMP thus submits that advanced costs should be ordered despite the fact this is an extraordinary remedy.

[25] EMP cited the following cases in support of their position:

> ***TS v Alberta (Director of Child Welfare)***, 2002 ABCA 46, 299 AR 290;
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> ***LC v Alberta (Metis Settlements Child & Family Services, Region 10)***, 2011 ABQB 42, 509 AR 72;
>
> ***British Columbia (Minister of Forests) v Okanagan Indian Band***, 2003 SCC 71, [2003] 3 SCR 371;

Little Sisters Book & Art Emporium v Canada (Commissioner of Customs & Revenue Agency), 2007 SCC 2, [2007] 1 SCR 38;

R v Caron, 2011 SCC 5, [2011] 1 SCR 78;

Keewatin v Ontario (Minister of Natural Resources), 2006 CanLII 35625 (ONSC);

LC v Alberta, 2016 ABQB 151, 2016 CarswellAlta 443;

1985 Sawridge Trust v Alberta (Public Trustee), 2012 ABQB 365, 543 AR 90;

Daniels v Canada, 2011 FC 230, 387 FTR 102;

Northwest Territories (Commissioner) v Paul, 2014 NWTSC 68, 2014 CarswellNWT 79;

Chief John Fletcher v Canada (Attorney General), 2011 ONSC 5196, [2011] OJ No 6569 (QL);

Fletcher v HMTQ in right of Ontario, 2012 ONSC 2701;

Fontaine v Canada (Attorney General), 2014 BCSC 2531;

Fontaine v Canada (Attorney General), 2015 ONSC 7007;

Fontaine v Canada (Attorney General), 2016 ONSC 4328;

Lakhoo v Lakhoo, 2015 ABQB 357, 62 RFL (7th) 24;

Lakhoo v Lakhoo, 2016 ABCA 200;

DWH v DJR, 2011 ABQB 119, 516 AR 134;

Roncarelli v Duplessis, [1959] SCR 121, 16 DLR (2d) 689;

United Nurses of Alberta v Alberta (AG), [1992] 1 SCR 901, 89 DLR (4th) 609;

Wells v Newfoundland, [1999] 3 SCR 199, 177 DLR (4th) 73;

WAM v Alberta (Child, Youth and Family Enhancement Act), 2016 ABQB 486;

Hryniak v Mauldin, 2014 SCC 7, [2014] 1 SCR 87; and

British Columbia Government Employees' Union v British Columbia (AG), [1988] 2 SCR 214, 53 DLR (4th) 1.

[26] I have reviewed all cases provided by EMP in coming to my decision here.

The Respondent

[27] HMQ argues that the facts of this case do not fulfill any of the requirements set out in ***Okanagan***, ***Little Sisters***, and ***Caron***.

[28] In terms of impecuniosity, counsel for HMQ argues that EMP and child class members have not fulfilled their obligations to assist in funding the litigation and to seek sources of funding prior to seeking advanced costs. HMQ also argues that there is inadequate evidence and disclosure to prove impecuniosity: ***Northwest Territories (Commissioner) v Paul***, 2014 NWTSC 68, 2014 CarswellNWT 79 at para 28 [***Northwest***], ***R v Black Pine Enterprises Ltd***, 2001 BCSC

1849 at paras 3-4 [***Black Pine***]; ***Metrolinx v Canadian Transportation Agency***, 2010 FCA 45, [2010] FCJ No 192 (QL) at para 10; ***Little Sisters*** at para 40, ***Dominion Bridge Inc (Trustees) v Retirement Income Plan of Dominion Bridge***, 2004 MBCA 180, 190 Man R (2d) 225 at paras 19-22; ***Gitxsan First Nation v British Columbia (MNR of Forests)***, 2005 BCSC 994, [2005] BCJ No 1531 at para 70.

[29] HMQ also disputes the assertion that potential class members cannot access their child welfare files and therefore cannot determine if they are members of the child class.

[30] On the second ***Okanagan*** requirement, HMQ submits that this claim does not have sufficient *prima facie* merit. The materials provided do not elaborate on this point and instead indicate that this is for the reasons reviewed on certification.

[31] On the issue of public importance, HMQ argues that this lawsuit does not transcend EMP's individual interests. The issue of non-filing of service plans was already addressed in ***TS v Alberta (Director of Child Welfare)***, 2002 ABCA 46, 299 AR 290 [***TS***]. HMQ thus argues that this is just a historical damages claim. According to HMQ, historical damages are not 'sufficiently special' to justify advanced costs particularly as the historical flaws which led to this litigation have been rendered moot by subsequent legislation. Consequently, HMQ submits that the only effect this case will have on society at large is to deplete already depleted public coffers.

[32] In addition to these reasons, HMQ contends that EMP's case would have been less expensive if it had been a test case on the 'failure to file' issue instead of a class action. HMQ argues that the government should not be forced to pay for EMP's strategic choice, and thus submits that I should not exercise my discretion by awarding advanced costs.

[33] For all of these reasons and the reasons in HMQ's brief, HMQ maintains its position that EMP has not established that advanced costs should be ordered.

[34] HMQ cited the following cases in support of their position:

LC v Alberta, 2016 ABQB 151, 2016 CarswellAlta 443;

LC v Alberta (Metis Settlements Child & Family Services, Region 10), 2011 ABQB 42, 509 AR 72;

British Columbia (Minister of Forests) v Okanagan Indian Band, 2003 SCC 71, [2003] 3 SCR 371;

Little Sisters Book & Art Emporium v Canada (Commissioner of Customs & Revenue Agency), 2007 SCC 2, [2007] 1 SCR 38;

Traverse v Manitoba, 2013 MBQB 150, 2013 CarswellMan 330;

Northwest Territories (Commissioner) v Paul, 2014 NWTSC 68, 2014 CarswellNWT 79;

Metrolinx v Canadian Transportation Agency, 2010 FCA 45, [2010] FCJ No 192 (QL) at para 10;

R v Black Pine Enterprises Ltd, 2001 BCSC 1849;

R v Malik, 2003 BCSC 1439, [2003] BCJ No 2167;

International Relief Fund for the Afflicted and Needy (Canada) v Canada (Public Safety and Emergency Preparedness), 2015 FC 435, 2015 CF 435;

Douglas Lake Cattle Co v Nicola Valley Fish and Game Club, 2015 BCSC 120, 2015 CarswellBC 168;

Pictou Landing First Nation v Nova Scotia (Attorney General), 2014 NSSC 61, 2014 CarswellNS 159;

Jeffrey v London Life Insurance Co, [2008] OJ No 3428, 2008 CarswellOnt 5169;

Cannon v Funds for Canada Foundation, 2013 ONSC 7686, [2013] OJ No 5825;

A (W) v St. Andrew's College, [2008] OJ No 352, 2008 CarswellOnt 421 (Sup Ct J);

Dominion Bridge Inc (Trustees) v Retirement Income Plan of Dominion Bridge, 2004 MBCA 180, 190 Man R (2d) 225;

Gitxsan First Nation v British Columbia (MNR of Forests), 2005 BCSC 994, [2005] BCJ No 1531;

D(S) v Alberta (Minister of Human Services), 2013 ABPC 29, 2013 CarswellAlta 225;

Carter v Canada (Attorney General), 2015 SCC 5, [2015] 1 SCR 331;

LC v Alberta, 2015 ABQB 84, 2015 CarswellAlta 169;

R v Caron, 2011 SCC 5, [2011] 1 SCR 78;

Daniels v Canada, 2011 FC 230, 387 FTR 102; and

Charkaoui, Re, 2004 FC 700, 2004 CF 900.

[35] I have reviewed all cases provided by HMQ in coming to my decision.

V. Analysis & Decision

[36] I find that the three required conditions for advanced costs have been made out:

1. EMP and the child class are impecunious and will not be able to advance this claim unless advanced costs are ordered;

2. EMP and the child class have a *prima facie* meritorious claim; and,

3. The issues raised by this claim transcend individual interests, are of public importance, and have not been resolved in previous cases.

I further find that it is appropriate for me to exercise my discretion to order advanced costs in this case.

Issue 1: Impecuniosity

[37] As noted in ***Little Sisters*** "the impecuniosity requirement from ***Okanagan*** means that it must be proven to be impossible to proceed otherwise before advanced costs will be ordered"

(para 71). This typically requires "scrupulous disclosure of the financial position of the party seeking advanced costs so that a court's decision to grant those costs from the public purse demonstrates to the public why such an unusual order is necessary": ***Northwest*** at para 28.

[38] There are numerous reasons why EMP and child class members cannot proceed without an advanced costs order in this case.

A. The Representative Plaintiff is Unable to Fund the Litigation

[39] EMP is a minor currently represented by her litigation representative. I already found in ***LC mini-Okanagan*** that EMP, as an individual, is impecunious. All evidence shows that she has no assets. She is therefore unable to pay for, or contribute to, the costs of this litigation. This has not been challenged by HMQ.

[40] I recognize that EMP has not gone through many of the steps suggested in cases like ***Black Pine***, referenced by HMQ in their brief. These include saving money, borrowing money, obtaining employment, looking for counsel willing to work at legal aid rates, exhausting efforts to use assets she owns, and paying some of the costs herself.

[41] In the case of EMP, and on the information that has been provided about her, these suggestions amount to an exercise in futility.

B. The Child Class Members are Unable to Fund the Litigation

[42] Financial disclosure from a group seeking advanced costs is typically required so that courts are not made to speculate as to the group's ability to fund litigation: ***Northwest*** at para 28.

[43] While ***Northwest*** was not a class action, the principles regarding group disclosure as discussed in ***Northwest*** are largely applicable here. ***Northwest*** dealt with one individual representing the interests of the Treaty 11 *Metis*, similar to how a representative plaintiff represents the interests of their entire class.

[44] I think it is safe to take judicial notice of the fact that Legal Aid in Alberta is experiencing or continues to experience a financial crisis regarding its funding, and pursing funding for a civil class proceeding seeking damages would undoubtedly be a wasted effort. I do not think that the Supreme Court in ***Little Sisters*** is setting down a mandatory requirement that Legal Aid be approached. In paragraph 49 of that decision, the Supreme Court sets out the imperative: that the applicant explore all possible funding options. That does not require an applicant for advanced costs to be able to present a checklist of negative responses to hopeless requests.

[45] Similarly, fundraising campaigns undoubtedly cost money. HMQ criticizes EMP for not using the website set up for the purposes of this litigation for fundraising efforts. It is unclear whether HMQ would have been happy to cover Mr. Tinkler's time and disbursements for fundraising. Perhaps "crowdfunding" might have been attempted to raise funds. These are at best speculative ideas. I recognize that the onus is on the applicant to show that she has exhausted attempts to find funding. But it seems to me that the test should be described as exhausting all "reasonable" funding options.

[46] Since ***Little Sisters***, the Supreme Court has made other pronouncements concerning the litigation process and the pursuit of justice, most notably in ***Hryniak v Mauldin***, 2014 SCC 7, [2014] 1 SCR 87. I need only repeat paragraph 1 of that decision:

> [1] KARAKATSANIS J. — Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.

[47] I recognize that is a case about summary judgment. However, the principles espoused in that decision concerning timeliness, fairness, and affordability are applicable to the justice system as a whole.

[48] There is certainly theoretical merit in HMQ's concerns that there has been no attempt to raise funds from other members of the child class. However, I find that this failure is mainly the fault of HMQ.

[49] In effect, HMQ has created a system where hundreds if not thousands of potential class members cannot reasonably ascertain whether they are in fact class members. Consequently, EMP is largely unable to find other class members who might be able to help fund this claim. I will not penalize EMP for HMQ's bureaucratic systems and resource constraints.

[50] I do not suggest that HMQ has created this system to thwart this litigation. There are valid privacy reasons for keeping child welfare matters confidential and to have some checks and balances in place. That is so even where someone who has been in government care wishes to review the history of his or her apprehension and treatment through the child welfare system and the courts.

[51] However, delays in accessing information are compounded by the shortage in governmental resources. This is not something that should be visited on EMP.

[52] In its brief in opposition to the advanced costs application, HMQ took pains to point out that access to child welfare files by a person who was formerly under a TGO was not as difficult as I indicated in the ***Certification Decision***.

[53] In that decision at para 266 I stated:

> [266] There are undoubtedly a number of adults who would be included in the "Child Class". On the information before me, it appears that adults seeking access to their own child welfare files have great difficulty in getting access. Outside of access for the purpose of a child welfare proceeding, an affected child must obtain a court order in Queen's Bench permitting access to the file. Someone cannot simply attend the clerk's office in Provincial Court and ask to see his or her file; the Provincial Court apparently has no jurisdiction to permit such access. Therefore, a potentially affected person must commence a proceeding in Queen's Bench and appear in Chambers to obtain such an order.

[54] HMQ's brief describes difficulties in obtaining this information as a "myth", and it states:

> The truth is that anyone can access their Child Welfare file if they make an application under the Freedom of Information and Protection of Privacy Act."

[55] The brief goes on to say:

> As far as the defendant is aware, no child, a former child, a guardian of a child, or a lawyer representing a child has been denied access to a copy of a service plan held on a departmental records, whether filed or not"

[56] HMQ noted that Mr. Lee, counsel for EMP, "could have made an application under s 126.11 of the *Child, Youth and Family Enhancement Act* to obtain a copy of the actual court file."

[57] There is always a risk in litigation that side issues take on a life of their own. This is one of those issues.

[58] Following the hearing, Mr. Lee provided counsel for HMQ a copy of a letter he had sent on September 17, 2007 seeking release of six clients' child welfare files and in particular copies of the court orders and filed service plans.

[59] That prompted Ms. Ferreira's affidavit of November 1, 2016. In her affidavit she noted that on April 8, 2008, Mr. Lee's office was notified that "court orders and service orders filed with the court are excluded from the FOIP Act" so the request was declined.

[60] The effect of Ms. Ferreira's affidavit was to confirm that a FOIP request would not be helpful to a child or parent seeking a copy of a service plan that had been filed. As a result, it would be a waste of time for anyone to pursue a FOIP request, as previously suggested by HMQ.

[61] Ms. Ferreira went on in her November 1, 2016 affidavit to say that this information could be obtained by a simple request made directly to Child and Youth Services, referencing section 126 of the *Child, Youth and Family Enhancement Act*.

[62] I would observe that the section referenced uses "may" and not "shall", such that disclosure is discretionary. It is unclear this discretion will always be used in favour of providing this information to a person seeking to determine if he or she may be part of the child class.

[63] Mr. Lee cross-examined Ms. Ferreira on November 16, 2017. It is not necessary to deal with the cross-examination at any length. Suffice it to say that it was determined that there was a specific person in Child and Youth Services to whom requests should be made and there was a reasonable likelihood that the information would be released. The qualifier to that was the process was anticipated to take eighteen months from the time of the request until the time the information might be released.

[64] The maxim "justice delayed is justice denied" comes to mind. An eighteen month delay for such a simple task is ridiculous. This suggested process is no answer to HMQ's allegation that EMP and her counsel have made no attempts to obtain this information, or that the information is easily obtainable.

[65] An example of how discretion has been exercised in the past is found in the history of applications made by Mr. Lee to Provincial Court for the release of client's files from the court records. Initially, lawyers for HMQ were willing to consent to the release of files. That changed, and Mr. Lee was then, for some reason, forced to make applications for the release of files.

[66] Those applications were opposed, leading to Judge Burch's decision ***SD v Alberta (Minister of Human Services)***, 2013 ABPC 29. In that decision, she held that applications were more appropriately brought in Queen's Bench, and in particular before me as case management judge in one of the actions involving an applicant in her case.

[67] Why HMQ stopped consenting and then began to actively oppose such applications is unclear, but that does not bode well for a favourable exercise of discretion in the child class members' favour in the future.

[68] HMQ argued before me that it offered to provide a consent order to Mr. Lee following the ***Certification Decision*** on receipt of a form "signed personally by the Class Member for whom records are being sought" and presented to HMQ by class counsel.

[69] That offer was made in April, 2016 and was apparently not followed up on by Mr. Lee. The offer was withdrawn by HMQ on October 6, 2016 as a result of HMQ's appeal and the stay that is now in place relating to the action.

[70] Mr. Lee's failure to act quickly on the offer does open him up to some criticism, but for the purposes of this application, which had been made long before this offer, I would simply say it was too little, too late.

[71] It does not address in any way the ability of an unrepresented party to find out by him or herself whether this class action has any relevance to their circumstances.

[72] I also note that many of the child class members either are or were recently children in the care of the state. It is therefore highly unlikely that any of these child class members would be able to contribute any more than a token or nominal amount to this litigation, even if HMQ had disclosed the identities of additional class members.

[73] HMQ suggests that there may be adult members of the child class who can make substantial contributions to the action. That may well be, but having regard to the fact that to date, it has been virtually impossible for anyone to access their records to see the terms of any TGOs and to see if any care plans were filed, this too falls into the pie in the sky category.

[74] While this last point is not determinative of the class's impecuniosity given my earlier findings, I note that even if a small number of class members had significant assets, it is "not appropriate for the court to expect that the few members who might be able to make a contribution exhaust all of their assets for the benefit of the entire group": ***Keewatin*** at para 78; see also ***Daniels*** at paras 35-36.

C. EMP has Fully Explored Alternative Funding Options

[75] EMP must seek other means of funding this lawsuit before being considered impecunious. This might involve seeking public or private litigation funding including seeking counsel willing to take the file on a contingency basis: ***Little Sisters***; ***Northwest***; ***Chief John Fletcher v Canada (Attorney General)***, 2011 ONSC 5196; ***Fontaine v Canada (Attorney General)***, 2015 ONSC 7007 [***Fontaine***].

[76] I am satisfied that EMP has explored "all other possible funding options" as required by ***Little Sisters*** at para 40 due to counsel's numerous attempts to secure litigation funding and counsel willing to take the case on a contingency basis.

[77] As I noted in ***LC mini-Okanagan***, few individuals can afford to undertake litigation against the government other than on a contingency arrangement. The evidence establishes that counsel for EMP will not continue to act solely on contingency largely because he is a sole practitioner and cannot bear the financial burden of advancing this claim without some immediate remuneration. Consequently, EMP properly turned to seeking other methods of funding the litigation.

[78] None of the four private litigation funding groups contacted would provide funding: *Affidavit of Philip Tinkler* at paras 8, 10; *Answer to Undertakings by Mr. Philip Tinkler*, Undertaking 1. This is likely because, as explicitly noted by Lexfund Management Inc, the government has the advantage of financial resource superiority and, "on top of it all, the defendant can change the law": *Answer to Undertakings by Mr. Philip Tinkler*, Undertaking 1 at response from Lexfund Management Inc.

[79] Not-for-profit organizations contacted also would not fund the litigation: *Affidavit of Philip Tinkler* at paras 8, 12.

[80] Most importantly, EMP has put forward evidence that none of the more than 35 counsel contacted in the last three years were willing to take this case strictly on a contingency: *Affidavit of Philip Tinkler* at paras 3, 9, 14. While there were numerous different reasons given, certain counsel again noted the difficultly of litigating against the government including "the prospect that the Government could legislate away the claim": *Answer to Undertakings by Mr. Philip Tinkler*, Undertaking 3 at response from McKenzie Lake Lawyers; see also *Affidavit of Philip Tinkler* at paras 9-12.

[81] The Supreme Court in ***Okanagan*** noted that it was an error to find that a contingency fee arrangement *might* be a viable alternative to funding the litigation when the evidence suggests that hiring counsel on a contingency basis is "unrealistic" (para 44).

[82] It is unrealistic that EMP's case *might* be advanced by counsel solely on a contingency basis, particularly due to HMQ's resources and unique ability to attempt to legislate away this claim. To deny a finding of impecuniosity on the basis that there *might* be counsel who would take this case on contingency when all information before me suggests otherwise would, according to the Supreme Court in ***Okanagan***, "call for appellate intervention" (para 44).

[83] As noted in ***Fontaine***, the entrepreneurial model of funding class actions through counsel does not always provide access to justice (para 7). In ***Fontaine***, none of the 18 counsel contacted would take the case solely on a contingency basis (paras 7, 86-88). Nonetheless, as the applicant in ***Fontaine*** had unsuccessfully sought counsel on a contingency basis, she was considered to be impecunious and advanced costs were ordered (para 98).

[84] I similarly find that EMP's numerous attempts to find litigation funding and counsel on a contingency basis demonstrate that no other realistic option exists for bringing the issues to trial other than an advanced costs order.

[85] HMQ notes that EMP has not sought new counsel since the ***Certification Decision***. Consequently, one might argue that there are now likely to be lawyers who are prepared to take on this class proceeding because Mr. Lee has done the heavy lifting in getting this action certified.

[86] While this is possible, I find this prospect unlikely on the evidence before me for numerous reasons.

[87] First, there has been no apparent rush of counsel volunteering to step in or help out.

[88] Second, HMQ has appealed the certification decision so there is no certain pot of gold at the end of the action (assuming success).

[89] Third, the government still has significant resources at its disposal for opposing this action. This was a significant reason expressed by certain counsel for not pursuing this claim.

[90] Fourth, and most importantly, HMQ still has the power to legislate its way out of this action. It arguably tried to do so shortly after the ***TS*** decision. That is one of the exceptional factors that make this a compelling case in which to award advanced costs. HMQ has not committed to live by the ultimate decision, whatever and whenever that is (if a commitment now could bind future governments). This was a key reason why many firms and litigation funders would not take the claim purely on contingency. This reason still exists.

[91] Given the evidence before me and these powerful disincentives for anyone, whether a lawyer or a funding organization, to take this action on a full contingency basis, I find it to be unrealistic that counsel might take this case on contingency and therefore find that EMP is impecunious.

Issue 2: *Prima Facie* Merit

[92] As I found in ***LC mini-Okanagan*** at paras 79 and 81, EMP acting individually has a *prima facie* meritorious claim.

[93] In the ***Certification Decision***, I found that the numerous causes of action advanced by the child class have a reasonable likelihood of success (paras 88-90, 109, 128-129, 183). These include: (i) breaches of s 7 and s 9 *Charter* rights, (ii) abuse of public office or misfeasance of public office, (iii) breach of fiduciary duty, (iv) negligence and breach of duty relating to the preparation and filing of care plans, and (v) unlawful confinement. I also concluded that EMP as representative plaintiff for the child class has a reasonable case: ***Certification Decision*** at para 269.

[94] While I have not prejudged this case, I find that the child class's claims have *prima facie* merit. I therefore find that EMP and her class's claims are of "at least sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means": ***Okanagan*** at para 40.

Issue 3: Public Importance

[95] The public importance aspect of the ***Okanagan*** test has three elements: 1) the issues raised transcend the individual interests of the particular litigant; 2) the issues raised are of public importance; and 3) the issues raised have not been resolved in previous cases: ***Caron*** at para 44; see also ***Okanagan*** at para 40. I find that all three of these elements are met in this case.

[96] Given the nature of this class action lawsuit, the issues raised have effects beyond EMP and even beyond other child class members – the issues are of public importance. As I found in ***LC mini-Okanagan*** at paras 80-81:

> There is a public interest in understanding the Director's actions and inactions in EMP's and similar situations. Government action should be scrutinized by an informed public. EMP's claims raise a serious public interest having regard to the decision in ***T.S.*** and subsequent legislative responses or reactions to that decision.
>
> ....
>
> It is difficult to think of circumstances more compelling for advanced costs to assist [persons] such as EMP.... She is still a child; she has a *prima facie* meritorious claim against the Crown; her claim arose while she was a temporary ward of the state; the Crown was at the time in a fiduciary relationship to her; her claim arose out of the alleged breach by the Director of clear duties under his

> home legislation; her claim arose after the Alberta Court of Appeal had issued a strong ruling on the point in issue; and the Crown (through the Public Trustee) is paying for children in similar situations to get legal advice if they are now permanent wards of the state.

[97] My comments in relation to the Alberta Court of Appeal's decision in ***TS*** require further explanation. ***Okanagan*** requires that the issues raised have not been resolved in previous cases. It is true that ***TS*** resolved the issue of whether a TGO is valid after 30 days – hence my comment that the Alberta Court of Appeal had issued a strong ruling on the point in issue.

[98] This litigation, however, raises numerous additional issues that have not been fully considered in other lawsuits. For instance, issues in this case explore the duties owed by the Director to some of society's most vulnerable members, whether these duties were breached, whether alleged breaches were due to abuse of public office, and appropriate remedies when these duties are breached.

[99] It also warrants note that a disproportionate number of child class members are of Aboriginal descent.

[100] I rejected EMP's attempt to use the Truth and Reconciliation Report from the Truth and Reconciliation Commission of Canada as an authority in this action. This action is not restricted to child class members of Aboriginal descent.

[101] However, numerous Supreme Court decisions recognize the "shadow of a long history of grievances and misunderstanding": ***Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)***, 2005 SCC 69, [2005] 3 SCR 38 at para 1 [***Mikisew***]; see also ***Beckman v Little Salmon/Carmacks First Nation***, 2010 SCC 53, [2010] 3 SCR 103 at para 10; ***Manitoba Metis Federation Inc v Canada (Attorney General)***, 2013 SCC 14, [2013] 1 SCR 623 at para 66.

[102] Supreme Court case law has emphasized the destructive legacy not only of residential schools, but also smaller grievances: "The multitude of smaller grievances created by the indifference of some government officials to Aboriginal people's concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies": ***Mikisew*** at para 1; see also ***R v Gladue***, [1999] 1 SCR 688, 1999 CanLII 679; ***R v Ipeelee***, 2012 SCC 13, [2012] 1 SCR 433.

[103] A factor I can take judicial notice of is the recent public interest expressed over children who have been harmed in government care. It is common knowledge that children of Aboriginal descent have been and continue to be disproportionately taken into government care.

[104] The Provincial Government has recently appointed a task force to inquire into the death of a child in care. It is somewhat ironic that this appointment followed an emergency debate in the Legislature only a short time after HMQ argued that there is no ongoing or genuine public interest in the Director of Child Welfare failing to follow his legislated obligations towards children kept in government care under a TGO.

[105] Given identified past wrongs towards Aboriginal children, families, and communities, as well as the continuing need for both greater understanding of past events and reconciliation, it seems of considerable public importance to determine if HMQ through the Director has abused their office and unlawfully confined children, including numerous Aboriginal children.

[106] On the whole, I therefore find that the public importance requirement of ***Okanagan*** is fulfilled because:

> 1) The issues raised transcend the interests of the litigants as society as a whole has a strong interest in understanding the Director's decisions in such situations and holding the Director accountable;
>
> 2) The issues raised by this case are issues of public importance because, as noted above, society as a whole has an interest in understanding the Director's decisions and holding the Director accountable; and,
>
> 3) Issues raised in this case have not been fully addressed in other cases.

Residual Consideration: Discretion

[107] While the required elements of impecuniosity, *prima facie* merit, and public importance are present in this case, ***Little Sisters*** and other case law clarify that the decision to award advanced costs is still discretionary and should only be exercised in sufficiently special cases where there is no other way to prevent the identified injustice (para 74).

[108] As noted in ***Townsend v Florentis***, [2004] OJ No 5770, 2004 CarswellOnt 1402 (Sup Ct J) at paras 56-57 [***Townsend***], and subsequently quoted by the Alberta Court of Appeal in ***Deans v Thachuk***, 2005 ABCA 368, 376 AR 326 at para 41: "recalling that the circumstances must be special, that the class is narrow, and that the exercise of the power is extraordinary, it is clear that there must exist some factor which decisively lifts EMP's case out of the generality of cases." The Court in ***Townsend*** observed that "the existence of issues going beyond the interests of the parties alone would seem to be one possible example of the minimum required" (para 56).

[109] For the reasons discussed above, I find that this case is sufficiently special to justify advanced costs. The vulnerability of children, the importance of ensuring that children are protected, the Director's fiduciary duties to children in care, society's interest in understanding the actions and inactions of the Director, and society's interest in holding the Director accountable where there has been a breach (if one is proven) all lift EMPs case 'out of the generality of cases'. The fact that many of these children were of Aboriginal descent combined with past historical abuses against Aboriginal communities raise this case still further 'out of the generality of cases'. The ability of HMQ to legislate its way out of any accountability that may ultimately be ordered adds to the unique nature of this action.

[110] I am satisfied that an advanced costs order is the only way of advancing this action. As this action is the only way to ensure that significant issues of public importance will be decided, I order advanced costs.

VI. Substance of the Advanced Costs Order

[111] The amount of advanced costs ordered will be determined upon receiving additional submissions. Mr. Lee sought an order recognizing his draft budget of $1,774,537.50. While he has provided details supporting that budget, I am not satisfied that this action should require that level of expense. Upfront, I am not prepared to approve a budget in that magnitude.

[112] There are several issues that will need careful attention. One is the litigation plan itself and a determination as to the manner in which some of the issues may be explored. Temporal limits on questioning and limits to production of records come to mind.

[113] Some expenses are outside the control of one party as the approach the other party takes to the litigation will influence what a party must do to respond to the other side's strategy and tactics. Appeals, which may be taken as of right, can dramatically affect the cost and timing of litigation.

[114] Further, Mr. Lee is representing not only the child class but also the adult class. No advanced costs have been applied for by the parent and guardian class, and some management tools will have to be put in place to ensure that the parent and guardian class are carrying their own load and not coasting on the backs of the child class.

[115] ***Little Sisters*** makes it clear that "an advanced cost award is meant to provide a basic level of assistance necessary for the case to proceed" (para 43). A priority at this stage is for the funding of the appeal currently underway.

[116] Similarly, advanced costs must be subject to "stringent conditions and... appropriate procedural controls": ***Little Sisters*** at paras 4, 42. With these considerations in mind. I invite further submissions on the amount of advanced costs that should be ordered. as well as the mechanism by which these costs should be paid and monitored.

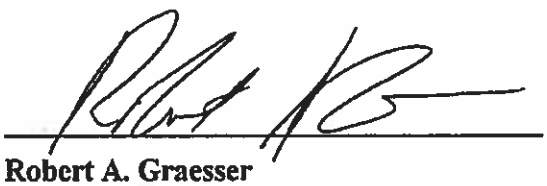
VII. Costs of the Certification Application

[117] Costs of the certification application have not been resolved. Having been successful, the plaintiffs are entitled to costs. It may be appropriate to postpone this until after the Court of Appeal has decided the appeal from the ***Certification Decision*** as costs will undoubtedly be dealt with by them.

VIII. Costs of this Application

[118] EMP has been successful in her application for advanced costs. She is therefore entitled to the costs of this application. If they cannot be agreed on, I retain jurisdiction to set them.

Heard on the 11th day of October and the 14th and 16th days of November, 2016.
Dated at Edmonton, Alberta this 10th day of February, 2017.



Robert A. Graesser
J.C.Q.B.A.

Appearances:

R.P. Lee
Robert P. Lee Professional Corporation
for the Applicant/Plaintiff

P. Barber and G.K Epp,
Alberta Justice;
W.K. Branch Q.C.,
Branch McMaster
for the Respondent/Defendant