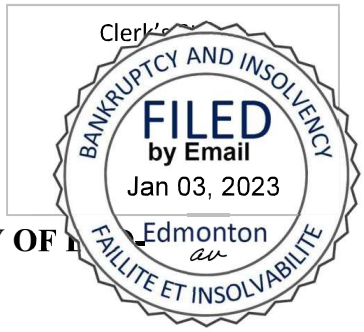

COURT FILE NUMBER	24-2806171
COURT	COURT OF KING'S BENCH OF ALBERTA
	IN THE MATTER OF THE BANKRUPTCY OF [illegible] INDUSTRIAL BUSINESS PARK INC.
JUDICIAL CENTRE	EDMONTON
APPLICANT	MNP LTD., in its capacity as the TRUSTEE IN BANKRUPTCY OF ECO-INDUSTRIAL BUSINESS PARK INC., and not in its personal capacity.
RESPONDENT	SYMMETRY ASSET MANAGEMENT INC.
DOCUMENT	**BENCH BRIEF OF THE TRUSTEE IN BANKRUPTCY** **Re: Inadmissibility of the Edwards Affidavit**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**OSLER, HOSKIN & HARCOURT LLP** Suite 2700, Brookfield Place 225 – 6th Avenue SW Calgary, AB T2P 1N2 Attention: Randal Van de Mosselaer / Emily Paplawski Telephone: 403.260.7060 / 403.260.7071 Facsimile: 403.260.7024 Email: rvandemosselaer@osler.com / epaplawski@osler.com File Number: 1231987

PART I – INTRODUCTION

1. This Bench Brief is submitted on behalf of MNP[1] in its capacity as the Trustee of Eco in response to Symmetry's recent filing of the Affidavit of Haven Eboni Edwards, affirmed December 2, 2022 (the "**Edwards Affidavit**"). The Edwards Affidavit includes significant double or in some cases, triple, hearsay. It was also filed contrary to the Law Society of Alberta Code of Conduct and in breach of an agreement between counsel regarding the timing for completion of all pre-hearing steps leading to the hearing of the Trustee's Application.

2. The Trustee submits that the Edwards Affidavit (other than Exhibit 3 thereto) or, at a minimum, paragraphs 6 and 8 of thereof, should be disregarded by this Honourable Court and given no weight. The Trustee also seeks full indemnity costs against Symmetry for all steps the Trustee has necessarily had, or will have, to undertake to address the improper filing of the Edwards Affidavit.

PART II – LAW AND ARGUMENT

A. The Edwards Affidavit is an Inadmissible Secretarial Affidavit

(a) Inadmissible Double/Triple Hearsay Evidence

3. Paragraphs 6 and 8 of the Edwards Affidavit are inadmissible double hearsay and contrary to the widely established principle in Alberta jurisprudence that "[t]he swearing of an affidavit by a legal assistant is unacceptable other than for noncontroversial matters."[2] As the Alberta Court has repeatedly noted: "an affiant should not simply relay information received from a lawyer, thereby insulating the lawyer from examination on the affidavit."[3] Such a practice constitutes

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[1] Capitalized terms used but not defined herein have the meanings given to such terms in the Bench Brief of the Trustee, filed in this matter on November 18, 2022.

[2] *Paquin v Lucki*, 2017 ABCA 79 at para 9 **("*Paquin*") [TAB 1].**

[3] *Al-Naami v College of Physicians and Surgeons of Alberta*, 2021 ABQB 549 at para 17 **[TAB 2]**. See also*: Calf Robe v Canada*, 2006 ABQB 652 at para 11 **("*Calf Robe*") [TAB 3]**; *Paquin* at para 9 **[TAB 1]**; *Canada (Attorney*

"double hearsay" and is "unacceptable".[4] As Justice McMahon warned in the strongest terms in *Calf Robe v. Canada*:

> [10] The only affidavit filed by Merchant in support of its motion was an affidavit of a legal secretary in the Merchant Calgary office.
>
> …..
>
> [11] Had a Merchant lawyer taken the affidavit rather than obliging an employee to do it, he or she would have been subject to cross-examination and could not have properly argued the motion on his or her own behalf. In fact, the secretary was cross-examined on her affidavit. The device of using a legal secretary to depose to contentious facts or to relay information received from a lawyer is to be discouraged. In fact it is seldom done by competent and experienced lawyers in Alberta. The usefulness of this affidavit is thus compromised.[5]

4. Paragraphs 6 and 8 of the Edwards Affidavit fall squarely within the "unacceptable" use of a secretarial affidavit repeatedly denounced by this Court. Ms. Edwards deposes to various contentious matters of which (by her own admission) she has no knowledge, including the value of the Dentons Claim as garnered from alleged settlement discussions which occurred prior to the involvement of Symmetry's current counsel and a request for invoices related to legal fees allegedly paid by Symmetry on behalf of Eco with respect to the ADT Action. Both of these evidentiary points go to the heart of the issue in the Trustee's application – whether the Assignment Agreements constitute a transfer at undervalue. Yet with respect to both these issues, Ms. Edwards confirmed on cross examination that she has no personal knowledge of either issue "other than what Ms. Roberts [Symmetry's counsel] told [her]."[6]

5. The entirety of paragraphs 6 and 8 of the Edwards Affidavit is nothing more than indirect evidence from Symmetry's counsel, communicated through a legal assistant so as to avoid subjecting counsel to cross examination and, in turn, the application of section 5.2-1 of the Law

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General) v Andronyk, 2017 ABCA 139 at paras 20-21 **[TAB 4]**; *Jervis v. Nendze*, 2002 ABQB 673 at paras 21-26 **[TAB 5]**.

[4] *Desoto Resources Limited v. Encana Corporation*, 2009 ABQB 512 at para 12 **[TAB 6]**.

[5] *Calf Robe* at paras 10-11 **[TAB 3]**. [Emphasis added]

[6] Transcript from the Questioning held December 19, 2022 of Haven Eboni Edwards on Affidavit sworn December 2, 2022, via remote video conference **(the "Edwards Transcript")** at p. 8:12-16 and 20:15-26.

Society of Alberta Code of Conduct: "A lawyer who appears as advocate must not testify or submit his or her own affidavit evidence before the tribunal unless permitted to do so by law, the tribunal, the Rules of Court or the rules of procedure of the tribunal, or unless the matter is purely formal or uncontroverted."[7] Notwithstanding the Court's repeated rejection of such practice as "unacceptable", Ms. Edwards confirmed the following on cross examination:

(a) with respect to paragraph 6(b) of the Edwards Affidavit:

> Q Am I correct, Ms. Edwards, that your only information about this statement in subparagraph (b) is what Ms. Roberts told you?
>
> A Correct.
>
> Q Ms. Roberts wasn't counsel for Symmetry in 2018; correct?
>
> A Correct.
>
> Q And Ms. Roberts wasn't counsel for Eco in 2018?
>
> A Correct.
>
> Q Ms. Roberts wasn't involved in this contested application?
>
> A Correct, she was not involved.
>
> Q And she wasn't involved in the amendments that were made to the statement of claim; correct?
>
> A Correct.
>
> Q So who, then, advised Ms. Roberts of the reasons for the amendments to the statement of claim as noted in subparagraph (b) here?
>
> A It was a call between Ms. Roberts and Mr. Payne.
>
> Q Okay.
>
> A But I am not aware of the details of that conversation.
>
> Q Okay.· So Mr. Payne, I understand, was counsel for Eco at the time; correct?
>
> A Yes.
>
> ….
>
> Q And so Mr. Payne advised Ms. Roberts of the reasons for the amendment, and Ms. Roberts then advised you of such reasons?
>
> A That's my belief.
>
> Q Okay. You weren't privy to that conversation?
>
> A Correct. Yeah, I wasn't.[8]

(b) with respect to paragraph 6(d) of the Edwards Affidavit:

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[7] Law Society of Alberta Code of Conduct, dated December 1, 2022 at s. 5.2-1. The Commentary to section 5.2-1 notes, "A lawyer should not express personal opinions or beliefs or assert as a fact anything that is properly subject to legal proof, cross-examination or challenge. The lawyer should not, in effect, appear as an unsworn witness or put the lawyer's own credibility in issue."

[8] Edwards Transcript at p. 6:17 – 7:23.

Q And similar to the above paragraph we just discussed, is it accurate that your only information about the statement in this subparagraph (d) is what Ms. Roberts told you?

A Yes.[9]

(c) with respect to paragraph 6(f) of the Edwards Affidavit:

Q And Ms. Roberts also advised you of the information stated in subparagraph (f)?

A Yes.

Q And did Mr. Payne advise Ms. Roberts of the information stated in subparagraph (f)?

A I'm not privy to the call that they had.

Q So the information in subparagraph (f), to the best of your knowledge, was communicated by Mr. Payne to Ms. Roberts in a telephone call?

A The information in subparagraph (f), to my knowledge, was just communicated to me by Ms. Roberts.· So anything that occurred before that, I'm not privy to.

Q So you have no information how Ms. Roberts became privy to the information noted in paragraph --·subparagraph (f)?

A Yes.

Q Yes, you have no information?

A Yes, I have no information to offer.[10]

(d) with respect to paragraph 6(g) of the Edwards Affidavit:

Q. Can you point me in Mr. Van de Mosselaer's response where the request was refused?

A Sorry.· Just a moment.· So for everything in paragraph 6 I was informed by Ms. Roberts, and it doesn't include any information that I did not receive in my affidavit. So beyond this, I'm not sure.[11]

(e) with respect to paragraph 8 of the Edwards Affidavit:

Q So am I accurate, Ms. Edwards, that your information regarding the subparagraphs (a) and (b) was conveyed to you by Ms. Roberts?

A Yes.

Q And Ms. Roberts' information about subparagraph (a) and (b) was conveyed to her by Mr. Payne?

A I can assume so, but I cannot a hundred percent say yes.

…

Q. So other than what Ms. Roberts told you, you have no independent knowledge about the discussions between Mr. Payne -- or between Ms. Roberts and Mr. Payne?

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[9] Edwards Transcript at p. 8:12-16.

[10] Edwards Transcript at p. 10:11 – 11:1.

[11] Edwards Transcript at p. 20:15-22.

A Correct.[12]

6. The purported introduction of the evidence at paragraphs 6 and 8 of the Edwards Affidavit by means of a secretarial affidavit is particularly egregious in the current instance as the information provided therein is twice removed from the affiant. Ms. Edwards was advised of the information by Ms. Roberts who, in turn, was allegedly advised of the information by Mr. Payne (Eco's former counsel). It is double hearsay. Double hearsay is "weaker and less reliable" and of "so little probative value as to be of no use to the Court".[13] The comments of Slatter J. (as he then was) in *TL v Alberta (Director of Child Welfare)* are on point and apply equally to the Edwards Affidavit:

> Furthermore, Ms. Stewart's affidavit was full of hearsay. It recounted things that third parties had disclosed to Mr. Lee, and that Mr. Lee had then passed on to Ms. Stewart, who then swore that she verily believed them to be true. This sort of double hearsay is of so little probative value as to be of no use to the Court (citations omitted). If there are third parties with factual information of assistance in the certification hearing, those third parties should themselves swear the affidavits.[14]

7. The risks of double hearsay are amply illustrated by the Edwards Affidavit. At paragraph 6(f) of the Edwards Affidavit, Ms. Edwards deposes that, "Mr. Payne informed the Receiver-Manager, MNP Ltd., through its counsel, of the fact that settlement discussions had occurred when he delivered his file to counsel for MNP Ltd." However, when taken to correspondence from counsel to the Trustee contradicting such statement[15], Ms. Edwards simply stated that she has "no information whether or not the information in 6(f) is accurate other than what…Ms. Roberts told [her]."[16]

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[12] Edwards Transcript at p. 21:18 – 22:12.

[13] *Warkentin Building Movers Virden Inc. v La Trace*, 2022 ABQB 346 at para 52 **[TAB 7]**.

[14] *TL v Alberta (Director of Child Welfare)*, 2006 ABQB 104 at para 24 **[TAB 8]**.

[15] In an email dated November 25, 2022, Mr. Van de Mosselaer (counsel for the Trustee) assured Ms. Roberts that, "The Receiver/Trustee certainly has no information related to any 'communications around settlement and qualifications for settlement', as you have suggested, and we take significant exception to the thinly veiled suggestion that the Receiver/Trustee failed to disclose information which it ought to have disclosed." See Exhibit 8 to the Edwards Affidavit.

[16] Edwards Transcript at p. 17:14-22.

8. Similarly, in paragraph 6(g) of the Edwards Affidavit, Ms. Edwards deposes that Trustee's counsel refused to deliver "copies of invoices on the ADT litigation". In cross-examination, Ms. Edwards was taken to correspondence from the Trustee's counsel advising Ms. Roberts that "we are unclear what you are asking for when you request 'invoices for services rendered'. Obviously, on its face such a request raises concerns about privilege, but we are unable to respond to your request because we don't know what you are asking for."[17] Ms. Edwards was not able to confirm whether Ms. Roberts ever responded to the email clarifying the request, nor was she able to identify any refusal by Trustee's counsel in the correspondence.[18] Ms. Edwards could only state that, "everything in paragraph 6 I was informed by Ms. Roberts."[19]

9. Finally, at paragraph 8 of the Edwards Affidavit, Ms. Edwards deposes that counsel at Dentons Canada LLP advised Mr. Payne who, in turn, advised Ms. Roberts who, in turn, advised Ms. Edwards (i.e. triple hearsay) that Dentons had not negotiated a "carve out" of the ADT Action from the Receivership Order "as was done with other litigation claims in favour of Mr. White or the Dan White Family Trust". However, in cross examination, Ms. Edwards confirmed that she had not reviewed the Receivership Order, nor was she aware whether any "carve outs" in fact existed in the Receivership Order.[20] A review of the Receivership Order confirms there is not anything which might be described as a "carve out". While paragraph 4 of the Receivership Order limits the Receiver's ability to settle or compromise certain claims, no litigation claims are excluded or "carved out" from the scope of the order.

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[17] Exhibit 8 to the Edwards Affidavit, Email from Mr. Van de Mosselaer to Ms. Roberts, dated November 25, 2022.
[18] Edwards Transcript at pp. 19:3 – 15 and 20:15 – 22.
[19] Edwards Transcript at p. 20:15-22.
[20] Edwards Transcript at p. 25:22 – 26:1.

10. Ms. Edwards was also not able to explain why, if the ADT Action and the Dentons Claim had been assigned to Symmetry prior to the Receivership Order, a "carve out" from the Receivership Order was necessary, nor was she able to confirm, with respect to paragraph 6(d) of the Edwards Affidavit, why counsel for Eco was negotiating settlement of the Dentons Claim if the Dentons Claim had been assigned to Symmetry years prior.[21]

11. All of the foregoing highlights the difficulty with double and triple hearsay – because the affiant has no knowledge of the matters deposed to, it is not possible to challenge the evidence through cross-examination. Paragraphs 6 and 8 of the Edwards Affidavit therefore have no probative value, constitute double (or with respect to paragraph 8, triple) hearsay and offend evidentiary principles regarding the proper scope of secretarial affidavits. Such paragraphs should be disregarded by this Honourable Court.

(b) Symmetry's Ongoing Disregard of a Counsel Agreement

12. In addition to the evidentiary issues posed by paragraphs 6 and 8 of the Edwards Affidavit, the Trustee submits that the entire Edwards Affidavit (other than Exhibit 3) is improper as it breaches – for the third time – an agreement between counsel establishing the schedule for the completion of all steps leading to the hearing of the Trustee's Application (the "**Counsel Agreement**"). (The Counsel Agreement is set out in the email exchange between counsel which was marked as Exhibit 1 to the cross-examination of Ms. Edwards.)[22] Pursuant to the Counsel Agreement, (a) Symmetry was required to file its evidence by no later than November 10, 2022, (b) the Trustee was required to file and serve its brief of argument by November 18, 2022, and (c)

[21] Edwards Transcript at pp. 9:15 – 23 and 28:2 – 7.

[22] Exhibit 1 to the Edwards Transcript, Email correspondence between Mr. Van de Mosselaer and Ms. Roberts, dated between September 21 and October 6, 2022.

Symmetry was required to file and serve its responding brief of argument by November 24, 2022. While Trustee's counsel consented to Symmetry filing a supplemental affidavit attaching Exhibit 3, Symmetry instead filed the Edwards Affidavit purporting to improperly introduce new substantive evidence, all in breach of the Counsel Agreement.

13. Apart from Exhibit 3, there is nothing which was not known, or could not have been known with reasonable diligence, by Symmetry prior to the date it filed its evidence in accordance with the Counsel Agreement. In fact, the line of inquiry from Symmetry's counsel which eventually led to the filing of the Edwards Affidavit began with a request by Symmetry's counsel on November 23, 2022 for "[a] copy of the memo sent by Mr. Payne as referenced in [Exhibit T to Mr. Kroeger's Affidavit]" and "[a] copy of any quantification memo or information provided by litigation counsel for Eco-Industrial Business Park Inc. (Mr. Payne)."[23] As Symmetry had cross-examined the Trustee's representative, Mr. Victor Kroeger, on November 4, 2022, yet raised neither of the above noted information requests, counsel for the Trustee advised, "You had the opportunity to ask Mr. Kroeger these questions during his cross-examination, and you chose not to. I am not inclined to allow a continuation of Mr. Kroeger's cross-examination via email."[24] In response, Symmetry filed the Edwards Affidavit.

14. Symmetry's attempt to circumvent the Counsel Agreement and any self-created limitations in its own evidentiary record by the filing of the Edwards Affidavit should not be permitted.

15. Importantly, the filing of the Edwards Affidavit is not the first time Symmetry has breached an agreement between counsel. Originally, the Trustee's application was scheduled to be heard on October 27, 2022. A schedule was agreed between counsel for Symmetry and the Trustee leading

[23] Exhibit 8 to the Edwards Affidavit, Email from Ms. Roberts to Mr. Van de Mosselaer, dated November 23, 2022.
[24] Exhibit 8 to the Edwards Affidavit, Email from Mr. Van de Mosselaer to Ms. Roberts, dated November 23, 2022.

to the hearing, which Symmetry subsequently refused to observe. Following an application by the Trustee to enforce the agreed schedule, Nielsen ACJ allowed the Trustee's application and awarded double column 5 costs against Symmetry in the amount of $4,050.[25] Such costs remain outstanding and have not been paid by Symmetry in breach of ACJ Nielsen's Order.

16. In addition, the Counsel Agreement required Symmetry to file and serve its rebuttal affidavit by "Thursday, November 10, 2022".[26] Symmetry's rebuttal affidavit was filed and served a day late – on Friday, November 11, 2022.[27] The Trustee did not raise an issue with the late filing.

17. Symmetry's continuing disregard for the Counsel Agreement including, most recently, by the filing of the Edwards Affidavit, is inappropriate. Symmetry continues to display a blatant disregard for agreements made between counsel, notwithstanding that it is already subject to a costs award relating to such conduct. As this Court has noted, failure of a litigant to comply with agreements made between counsel "undermine[s] the cooperative conduct of litigation and the efficient operation of the courts."[28] Such conduct has been found by this Court as deserving of full indemnity costs.[29]

18. The Trustee submits that apart from Exhibit 3, the Edwards Affidavit should be disregarded by this Honourable Court. The Trustee further submits that regardless of the outcome of its Application, full indemnity costs should be awarded against Symmetry for all steps the Trustee necessarily has had, or will have, to undertake to address the Edwards Affidavit, including its cross examination of Ms. Edwards on December 19, 2022, the preparation of this bench brief, and the

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[25] Order of the Honourable ACJ Nielsen, granted September 2, 2022.

[26] Exhibit 1 to the Edwards Transcript, Email correspondence between Mr. Van de Mosselaer and Ms. Roberts, dated between September 21 and October 6, 2022.

[27] Affidavit of David Gamage, sworn November 11, 2022.

[28] *RFG Private Equity Limited Partnership No 1B v Value Creation Inc*, 2015 ABQB 42 **("VCI")** at para 17 **[TAB 9]**.

[29] VCI at para 19 **[TAB 9]**.

portion of the application to be argued on February 2, 2023 addressing the admissibility of the Edwards Affidavit.

19. In the Trustee's submission, full indemnity costs are appropriate as a punitive costs award has already been made against Symmetry for its disregard of a counsel agreement (which costs award remains unpaid), yet Symmetry remains undeterred, continuing to approach these Court proceedings with little regard for the Counsel Agreement. The bankruptcy estate of Eco should not be required to bear the costs of Symmetry's ongoing bad behaviour.

B. Evidentiary Issues in Symmetry's Bench Brief

20. The evidentiary issues present in the Edwards Affidavit also impact the Bench Brief filed by Symmetry on December 2, 2022 (the "**Symmetry Brief**"). The Symmetry Brief references the Edwards Affidavit at paragraphs 13 to 19, 37 and 40. The Trustee submits that these paragraphs (or, with respect to paragraphs 37 and 40, the portions of the paragraphs citing to the Edwards Affidavit) should be struck from the Court record and not referenced by this Court in its consideration of the Trustee's Application.

21. In addition, even if the Edwards Affidavit was accepted (which it should not be), numerous statements made in the Symmetry Brief lack any evidentiary support in the Edwards Affidavit. For example, there is no evidence in the Edwards Affidavit that "counsel for various parties including Romspen, Dan White and DWFT, negotiated the preservation of other claims on a without prejudice basis, exempt from enforcement and receivership proceedings". There is also no support for the statement made at paragraph 37 of the Symmetry Brief that the Trustee failed to disclose "the procedural history or recent unsuccessful attempt to settle for a much lower amount." First,

the Edwards Affidavit only discusses settlement of the Dentons Claim, not the ADT Action.[30] There is no evidence before this Court regarding any efforts to settle the ADT Action. Second, contrary to the statement at paragraph 37, the Trustee's counsel unequivocally advised Symmetry's counsel that, "The Receiver/Trustee certainly has no information related to any 'communications around settlement and qualification of settlement', as you have suggested".[31] Accordingly, not only is there no evidence supporting the statement made at paragraph 37 of the Symmetry Brief, the evidence before this Court contradicts it.

22. While there are numerous other evidentiary and legal issues in the Symmetry Brief (including Symmetry's request for relief at paragraphs 57 and 58 thereof without the filing of an application), the Trustee will address such issues in oral argument at the hearing of the Application as the subject matter of this Bench Brief is limited only to the admissibility of the Edwards Affidavit.

PART V – CONCLUSION

23. The Trustee requests that this Honourable Court:

(a) disregard and give no weight to the Edwards Affidavit (excluding Exhibit 3 thereof) or, in the alternative, paragraphs 6 and 8 of the Edwards Affidavit; and

(b) award full indemnity costs against Symmetry for all steps the Trustee necessarily has had, or will have, to undertake to address the Edwards Affidavit.

[30] Edwards Affidavit at para 6(d).

[31] Exhibit 8 to the Edwards Affidavit, Email from Mr. Van de Mosselaer to Ms. Roberts, dated November 25, 2022.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 3rd DAY OF JANUARY, 2023

Emily PAplawski

Randal Van de Mosselaer / Emily Paplawski
Osler Hoskin & Harcourt LLP
Counsel for the Applicant

TABLE OF AUTHORITIES

TAB 1

In the Court of Appeal of Alberta

Citation: Paquin v Lucki, 2017 ABCA 79

Date: 20170307
Docket: 1601-0330-AC
Registry: Calgary

Between:

Al Tole

Not a Party to the Application

- and -

Neil Lucki, a minor by his *guardian ad litem*,
Jerzy Lucki and Bernadette Lucki, and
Jerzy Lucki and Bernadette Lucki

Respondents

- and -

Benjamin Paquin, Richard Paquin, and Angelika Paquin

Applicants

Reasons for Decision of
The Honourable Madam Justice Jo'Anne Strekaf

Application to Extend Time to File Appeal

Reasons for Decision of
The Honourable Madam Justice Jo'Anne Strekaf

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[1] This is an application for an extension to file a notice of appeal. The order the applicants want to appeal was pronounced October 14, 2016. The deadline for filing a notice of appeal is "within one month after the date of decision": *Alberta Rules of Court*, Alta Reg 124/2010, r 14.8(2)(a)(iii). The applicants attempted to file the notice of appeal on December 9, 2016, about 25 days too late.

[2] To be granted an extension, the applicant must show that there was a *bona fide* intention to appeal while the right to appeal existed and there were special circumstances that would excuse or justify the delay; the other side was not so seriously prejudiced by the delay that it would be unjust to disturb the judgment; the applicant has not taken the benefits of the judgment from which appeal is sought; and the appeal would have a reasonable chance of success if allowed to proceed: *Cairns v Cairns*, [1931] 4 DLR 819 at 826-827 (Alta SC (AD)); *Sohal v Brar*, 1998 ABCA 375, 223 AR 141 at para 1. The third factor is not relevant in this application.

[3] It is convenient to discuss the relevant facts under each of the considerations for determining whether an extension should be granted.

Was There an Intention to Appeal?

[4] A short delay or other misstep in filing will not dictate the outcome of the *Cairns* analysis, especially when all other criteria have been satisfied: see generally *Murphy v Haworth*, 2016 ABCA 219. An inadvertent failure to file the application in time will not necessarily be an obstacle to extending time to appeal: *Jackson v Canadian National Railway Co*, 2015 ABCA 89 at para 7, *Attila Dogan Construction and Installation Co v AMEC Americas Ltd*, 2015 ABCA 206 at para 7. The Court may relieve careless errors when the delay is short and no harm results: *FIC Real Estate Fund Ltd v Phoenix Land Ventures Ltd*, 2015 ABCA 245 at paras 13-14.

[5] The applicant's lawyer's affidavit states that when the order was pronounced (some seven months after the hearing) he was concluding a two-week trial and incorrectly diarized the appeal "due to inadvertence and a misapprehension regarding the commencement of the one-month appeal period". He deposed that his clients had a *bona fide* intention to appeal the Order on October 31, 2016.

[6] While it was helpful to have the lawyer's explanation for the delay, there should also have been affidavit evidence directly from the party who is alleged to have had the *bona fide* intention to appeal within the appeal period: *Banadyga v Machuk*, 2008 ABCA 146 at para 3.

[7] The respondent has referred to cases when this was not a sufficient justification. Other cases, as outlined above, have concluded that a mistake by counsel can constitute a reasonable explanation that justifies the delay. In any event, I am persuaded that the intention to appeal existed within time and that there was confusion in the lawyer's office that caused the short delay.

Was There Prejudice to the Respondents?

[8] The respondent's lawyer's legal assistant swore an affidavit to the effect that she was advised by the lawyer and verily believed that related actions "have stalled partially as a result of the delay".

[9] The swearing of an affidavit by a legal assistant is unacceptable other than for noncontroversial matters. While this practice has been criticized by the court on numerous occasions, it still occurs too often: *Chernetz v Eagle Copters Ltd*, 2002 ABQB 986 at para 12; *Calf Robe v Canada*, 2006 ABQB 652 at paras 10-11; *Desoto Resources Limited v Encana Corporation*, 2009 ABQB 512 at para 12. In this case, the legal assistant is at least two steps away from the party who is said to have been prejudiced by the delay. The party asserting prejudice (rather than its counsel and much less its counsel's assistant) should file an affidavit outlining the nature and extent of the prejudice claimed and be available to be cross-examined on the affidavit.

[10] There is no proper evidence of any prejudice. Moreover, the delay must be examined in the context of the action as a whole. The statement of claim was issued August 12, 2008 and the defence was filed July 10, 2010. The issue on appeal, if permission is granted, is a third party notice. It was circulated in draft form as a consent order in 2013 and the matter of amending the claim was heard by the Master in early 2016; the appeal from his order was heard in April 2016 and the order upholding the Master issued in October 2016. It seems unlikely (in the absence of any evidence to the contrary) that a 25-day delay in filing a notice of appeal in an action that has been extant for nearly seven years would be so prejudicial that it would be unjust to disturb the order.

Does the Appeal Have a Reasonable Chance of Success?

[11] The applicants wish to appeal an order granting them permission to file a third party claim against the respondents. The respondents say the *Limitations Act*, RSA 2000, c L-12 precludes that. Very briefly, the timeline is as follows:

Date	**Event**
August 17, 2008	A fire destroyed five residences; there are five actions, one for each house.
July 30, 2010	Statement of Claim filed in Action 1001-11365.
July 14, 2011	Statement of Defence filed by the applicants.
January 14, 2012	Rule 3.45 requires that a third party claim be filed and served within 6 months of the filing of the Statement of Defence.
2012	Fire and police reports received

2013	A consent order is circulated that would have allowed the late filing of the third party claim but consent is refused.
January 15, 2015	The applicants apply to extend time to file and serve the third party or add them as third party defendants
February 12, 2015	Master Robertson QC orders that the third party claim may be filed: *Tole v Lucki*, 2015 ABQB 231
April 7, 2016	Appeal from Master Robertson QC's order heard by Anderson J.
October 14, 2016	Appeal dismissed by Anderson J

[12] The applicants submit that the Queen's Bench appeal judge erred when she determined that section 6 of the *Limitations Act* extends the time period in section 3(1.1)(a), with the result that the third party claim was not statute-barred. This issue raises a question of law involving the previous jurisprudence of this Court regarding the relationship between section 3(1)(c) of the *Tort-feasors Act*, RSA 200, c T-5 and section 3(1)(a) of the *Limitations Act*, and the impact of the amendment to the *Limitations Act* which added section 3(1.1)(a).

[13] This Court considered the interplay between section 3(1.1)(a) of the *Limitations Act* and section 3(1)(c) of the *Tort-feasors Act* in *Whitecourt Power Limited Partnership v Elliott Turbomachinery Canada Inc*, 2015 ABCA 252, 606 AR 248 but the issue of section 6 was not fully canvassed. To meet the fourth criterion, the appeal must be *prima facie* meritorious, or not frivolous: *Alberta Treasury Branches v Conserve Oil 1st Corp*, 2016 ABCA 87 at para 6. An applicant need not demonstrate certainty or even likely victory: *Kerr v Robert Mathew Investments Inc*, 2008 ABCA 193 at para 5, 433 AR 251.

[14] Without commenting further on the merits, I am satisfied that the appeal at least raises an arguable issue, and this criterion is satisfied.

[15] The application for an extension of time to appeal is granted.

Application heard on January 26, 2017

Reasons filed at Calgary, Alberta
this 7th day of March, 2017

Strekaf J.A.

TAB 2

Court of Queen's Bench of Alberta

Citation: Al-Naami v College of Physicians and Surgeons of Alberta, 2021 ABQB 549

Date: 20210716
Docket: 2003 09129
Registry: Edmonton

Between:

Dr. Ghassan Al-Naami

Applicant

- and -

College of Physicians and Surgeons of Alberta

Respondent

Memorandum of Decision
of the
Honourable Mr. Justice W.N. Renke

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[1] Dr. Ghassan Al-Naami has applied for judicial review of decisions of the Complaints Director (the Director) of the College of Physicians and Surgeons of Alberta (the College).

[2] In August 2019, Dr. Al-Naami was charged with two child pornography offences. A complaint under the *Health Professions Act* was opened against Dr. Al-Naami (the First Complaint). Following discussions with the Director, Dr. Al-Naami provided an undertaking to withdraw from practice and the College stayed its investigation pending resolution of the criminal charges. Dr. Al-Naami subsequently sought to return to practice under conditions. The Director required Dr. Al-Naami's consent to communicate with the Crown prosecutor respecting

Crown disclosure for the charges. Dr. Al-Naami has not provided that consent. The Director has not authorized Dr. Al-Naami to return to practice on conditions.

[3] In September 2019, another complaint against Dr. Al-Naami was opened based on concerns raised by a parent concerning the mode of examination of her two children (the Second Complaint). Information was gathered from the complainant and Dr. Al-Naami respecting this complaint but the investigation has gone no farther. No decisions made in relation to the Second Complaint are challenged.

[4] The decisions challenged are the Director's refusal to accept Dr. Al-Naami's revocation of his undertaking, the Director's requirement that Dr. Al-Naami provide his consent for the College to receive information about Crown disclosure from the Crown prosecutor, and the Director's refusal to allow Dr. Al-Naami to return to practice on conditions.

[5] Before turning to the review of the Director's decisions, I will address the anonymization of this decision, the admissibility of an affidavit proffered by Dr. Al-Naami, whether this application should be dismissed without consideration of its merits, the standard of review, and the facts. I note that I decided the admissibility, prematurity, and standard of review issues in the hearing.

[6] I clarified at the outset of the hearing that the application was for judicial review not for a stay under s. 65(2) of the *Health Professions Act*. The application was framed as an application for judicial review, with only some intimations to the contrary. The College responded to an application for judicial review and the argument proceeded on the basis that the application was for judicial review.

[7] As I mentioned in the hearing, this application proceeded with an acknowledgement of the seriousness of child pornography offences, as recently confirmed in ***R v Friesen***, 2020 SCC 9 at paras 44 fn 2 and 51.

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I. Anonymization

[8] Dr. Al-Naami's trial is set for January 2022 in Provincial Court. At the hearing, I inquired whether I should anonymize this decision because Dr. Al-Naami has not yet gone to trial. Counsel for the College submitted that were anonymization contemplated an application should have been made on notice to the media. No such application has been made.

[9] There was no suggestion that the criminal trial will be proceeding by jury.

[10] This decision will not identify any children. The Alberta Law Enforcement Response Team has already publicized Dr. Al-Naami's charges. There was no argument that identifying the parties to this judicial review would imperil Dr. Al-Naami's rights in his criminal trial to be presumed innocent or to a fair trial. In the circumstances, I do not have grounds to restrict the open courts principle and to anonymize this decision and I decline to do so: ***AB v Bragg Communications Inc***, 2012 SCC 46, Abella J at paras 11, 13; ***AG (Nova Scotia) v MacIntyre***, [1982] 1 SCR 175, Dickson J, as he then was, at 185-187.

II. The Record

[11] An unusual feature of this judicial review application is that the decisions under review are not set out in the formal reasons for decision of an administrative tribunal. Rather, the decisions were made by the Director, a front-line statutorily-recognized administrator of a statutorily-recognized governing body of a profession: see *Health Professions Act*, ss. 1(1)(e), (i), (l), 2, 5, and 14. The decisions were made in the course of informal, pre-investigation and pre-hearing processes. The Certified Record of Proceedings (CRP), then, largely comprised correspondence between the Director and counsel for Dr. Al-Naami (Applicant's Counsel) and ancillary documents.

[12] Dr. Al-Naami sought to introduce an affidavit to supplement the record, sworn by Dr. Al-Naami on May 26, 2020. The affidavit, for the most part, duplicated material already on the record.

[13] I declined to admit the affidavit for two reasons.

[14] First, the general rule in judicial review applications is that the evidence is confined to the record. This makes sense, since usually what is at issue is the propriety of the decision-maker's determination on the evidence and argument before that decision-maker. Rule 3.22 provides as follows:

> 3.22 When making a decision about an originating application for judicial review, the Court may consider the following evidence only:
>
> > (a) the certified copy of the record of proceedings of the person or body that is the subject of the application, if any;
> >
> > (b) if questioning was permitted under rule 3.21, a transcript of that questioning;
> >
> > (c) anything permitted by any other rule or by an enactment;
> >
> > (d) any other evidence permitted by the Court.

[15] In ***Alberta Liquor Store Association v Alberta (Gaming and Liquor Commission)***, 2006 ABQB 904, Justice Slatter, as he then was, confirmed at paras 40 and 42 that the general rule is that judicial review is based on the record before the tribunal and affidavits are admitted only in exceptional circumstances. None of the exceptional circumstances identified by Justice Slatter in para 41 are engaged in this case. See also ***Alberta College of Pharmacists v Sobeys West Inc***,

2017 ABCA 306 at para 67, leave to appeal to SCC refused 37864 (August 9, 2018); ***JK v Gowrishankar***, 2019 ABCA 316 at para 60; ***British Columbia (Attorney General) v Provincial Court Judges' Association of British Columbia***, 2020 SCC 20 at para 52.

[16] Second, except when commenting about the direct personal adverse impacts of his practice suspension, Dr. Al-Naami swore to matters on information and belief not to matters within his personal knowledge. The affidavit was mostly hearsay. In my opinion, a judicial review application is a type of "final" proceeding, since if successful the challenged decision will be nullified. Under rule 13.18(3),

> (3) If an affidavit is used in support of an application that may dispose of all or part of a claim, the affidavit must be sworn on the basis of the personal knowledge of the person swearing the affidavit.

An applicant's affidavit based on information and belief is not an appropriate evidential foundation for final relief. See ***Murphy v Cahill***, 2012 ABQB 793, Veit J at para 25.

[17] I also observe that the affidavit mostly concerned communications between Applicant's Counsel and the Director. Hence the mostly hearsay nature of the affidavit. There may be circumstances in which this type of affidavit is practically unavoidable, harmless, or otherwise countenanced. Typically, though, an affiant should not simply relay information received from a lawyer, thereby insulating the lawyer from examination on the affidavit. See ***Calf Robe v Canada***, 2006 ABQB 652, McMahon J at para 11; ***Paquin v Lucki***, 2017 ABCA 79 at para 9; ***Canada (Attorney General) v Andronyk***, 2017 ABCA 139 at paras 20-21.

III. Preliminary Objections

A. Prematurity

[18] Counsel for the College argued that I should dismiss Dr. Al-Naami's application on the grounds of prematurity (or, put in other ways, on the grounds that the application violated the principle of exhaustion or the principle against fragmentation of proceedings).

[19] The general rule is that statutory review processes and procedures for the decision-maker should be completed before turning to the courts for judicial review. In ***Canada (Border Services Agency) v CB Powell Ltd***, 2010 FCA 61, Justice Stratas described the "principle of judicial non-interference with ongoing administrative processes" in this way at paras 30 - 33:

> [30] The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. The importance of this rule in Canadian administrative law is well-demonstrated by the large number of decisions of the Supreme Court of Canada on point ....
>
> [31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative

> process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.
>
> [32] This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway .... Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience .... Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision-makers who, like judges, have decision-making responsibilities to discharge ....
>
> [33] Courts across Canada have enforced the general principle of non-interference with ongoing administrative processes vigorously. This is shown by the narrowness of the "exceptional circumstances" exception .... Suffice to say, the authorities show that very few circumstances qualify as "exceptional" and the threshold for exceptionality is high .... [emphasis added]

See also ***Litchfield v College of Physicians and Surgeons of Alberta***, 2005 ABQB 962, Hillier J, at paras 31-35.

[20] In this case, the investigation of the First Complaint has not been completed. Indeed, the investigation was suspended not long after the complaint was opened. The investigation of the Second Complaint is not complete. There has been no hearing, no internal appeal, and no appeal to the Court of Appeal respecting either complaint.

[21] Nonetheless, I decided that the application was not premature and I declined to dismiss it.

[22] The preliminary nature of the process left Dr. Al-Naami without other remedy, and he would be left without remedy for months to come. The decision was by the Director, not a higher-level tribunal attracting a statutory right of appeal, and not by the higher-level tribunal that will ultimately decide Dr. Al-Naami's professional fate. Dr. Al-Naami's practice suspension was by way of undertaking. The Director did not suspend Dr. Al-Naami's practice permit. Hence, Dr. Al-Naami could not apply for a stay under s. 65(2) of the

> 65(1) On the recommendation of the complaints director or the hearing tribunal, a person or committee designated by the council may at any time after a complaint is made until a hearing tribunal makes an order under section 82
>
> > (a) impose conditions on an investigated person's practice permit generally or with respect to any area of the practice of that

> regulated profession, including the condition that the investigated person
>
> (i) practise under supervision, or
>
> (ii) practise with one or more other regulated members,
>
> or
>
> (b) suspend the practice permit of an investigated person,
>
> until the completion of proceedings under this Part.
>
> (2) An investigated person may apply to the Court of Queen's Bench for an order staying a decision by a person or committee under subsection (1) …. [emphasis added]

Counsel for the College did not argue that s. 65 applied and that a stay application was available.

[23] Dr. Al-Naami's inability to practice medicine is operating now and has real-time effects. Dr. Al-Naami removed himself from practice in August 2019. I did not need his affidavit to infer that he and his family have been suffering a serious adverse financial impact and his practice too would have been adversely affected. Hardship was established.

[24] This application would not cause delay since the College's investigation of the First Complaint has been suspended pending completion of the criminal trial, which is months away. The results of this application will not affect the time-line of the administrative process.

[25] Further, in the following cases judicial reviews of interim dispositions by physicians' professional regulatory bodies were permitted: ***Fingerote v The College of Physicians and Surgeons of Ontario***, 2018 ONSC 5131 (Div Ct), Myers J; ***Morzaria v College of Physicians and Surgeons of Ontario***, 2017 ONSC 1940, Gilmore J; ***Rohringer v Royal College of Dental Surgeons of Ontario***, 2017 ONSC 6656, Spies J; ***Huerto v College of Physicians and Surgeons of Saskatchewan***, 2004 SKQB 423, Foley J.

[26] The existence of statutory review provisions such as s. 65(2) of the *Health Professions Act* speaks to the need for review of interim decisions with potentially severe impacts on professionals. It would be inconsistent and unfair to Dr. Al-Naami to deny review on the technical ground that the decision to make the undertaking was his and not the Director's. Dr. Al-Naami is suffering the same adverse effects as if the Director had suspended him. In effect, the College is blocking Dr. Al-Naami's return to practice as if Dr. Al-Naami had been suspended.

B. Section 41 Review

[27] Counsel for the College raised, for the first time at the hearing, the prospect of Dr. Al-Naami applying for a practice permit under s. 40 of the *Health Professions Act*. If a practice permit were issued subject to conditions, suspended or refused, a review is available under s. 41. That is, a statutory process was available to Dr. Al-Naami that would have permitted a statutory review. The implication is that Dr. Al-Naami has not exhausted his statutory options so judicial review should not be available to him.

[28] I found that ss. 40 and 41 did not enhance the College's prematurity argument. Dr. Al-Naami could not apply under s. 40 without encountering the issue of whether he could unilaterally rescind his undertaking to withdraw from practice. The College's position is that Dr. Al-Naami is bound by his undertaking not to practice. For him to apply for a practice permit would be to violate his undertaking. The same issues to be decided in the present application would require determination before the s. 40 process could be engaged.

[29] In any event, and I need not decide this matter, it is not clear that the s. 40 process applies in disciplinary or complaints circumstances. That is, it is not clear that interim conditions or a suspension to be imposed on an investigated member (assuming those to be the result of a s. 40 application by Dr. Al-Naami) should be imposed through s. 40 or by the Director. Section 40 falls within Part 2 of the Act concerning Registration, not Part 4 of the Act concerning Professional Conduct and complaints. That suggests that the s. 40 process would not have been an appropriate vehicle for Dr. Al-Naami's pursuit of relief.

C. Purely Administrative Decision

[30] An issue complementing the "prematurity" issue was *not* raised in argument, and properly so. For the sake of completeness, I will confirm that the Director's decisions were not immune from judicial review as being "purely administrative in nature:" see, e.g., ***A Lawyer v The Law Society of British Columbia***, 2021 BCSC 914 at paras 95-96. The Director's decisions affected Dr. Al-Naami's rights, interests, property, privileges, or liberties (of a professional nature) and so are subject to judicial review, notwithstanding the front-line status of the Director or the informal, pre-investigation and pre-hearing context of the decisions: ***Martineau v Matsqui Institution***, [1980] 1 SCR 602, Dickson J, as he then was, at 622-623; ***Mission Institution v Khela***, 2014 SCC 24, LeBel J at para 31.

IV. Standard of Review

A. Presumption of Reasonableness

[31] ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65 established that the presumptive standard of review when a court reviews administrative decisions - other than for a breach of natural justice or the duty of procedural fairness - is reasonableness: at paras 16, 23.

[32] At paras 88-89, ***Vavilov*** confirmed that this standard of review applies across the spectrum of administrative decision-makers:

> [88] .... The administrative decision makers whose decisions may be subject to judicial review include specialized tribunals exercising adjudicative functions, independent regulatory bodies, ministers, front-line decision makers, and more. Their decisions vary in complexity and importance, ranging from the routine to the life-altering ....
>
> [89] Despite this diversity, reasonableness remains a single standard, and elements of a decision's context do not modulate the standard or the degree of scrutiny by the reviewing court. Instead, the particular context of a decision constrains what will be reasonable for an administrative decision maker to decide

> in a given case. This is what it means to say that "[r]easonableness is a single standard that takes its colour from the context": *Khosa*, at para. 59 ....

B. Exception to Reasonableness Review – General Question of Law

[33] The presumption of reasonableness review does not apply if the standard of review is legislated or if the review is by statutory appeal: ***Vavilov*** at para 69.

[34] The presumption of reasonableness review is rebutted when the "rule of law" demands a correctness standard of review. The correctness standard of review applies respecting issues such as constitutional questions, general questions of law of central importance to the legal system as a whole, and questions regarding jurisdictional boundaries between administrative bodies: ***Vavilov*** at paras 53, 69. These are all questions that "[respect] the unique role of the judiciary in interpreting the Constitution and ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary: *Dunsmuir*, at para. 58:" ***Vavilov*** at para 53; see paras 62 and 59 (the need for "uniform and consistent answers").

[35] Dr. Al-Naami argued that correctness review was required respecting whether "it is defensible to require that Dr. Al-Naami provide his consent to the Crown Prosecutor to give the Crown Disclosure to the CPSA so that the CPSA may assess Dr. Al-Naami's safety to practice," because the Director's decision raised a "general question of law of central importance to the legal system as a whole:" Applicant's Brief at para 36; see also para 39.

[36] I disagreed and ruled that reasonableness review applied.

[37] This application did not raise an issue like solicitor-client privilege, a doctrine integral to the proper functioning of the rule of law. In ***Vavilov*** the Supreme Court reminded us of the limited scope of the "general questions of law" exception to reasonableness review. This exception has only been successfully invoked respecting *res judicata* and abuse of process, the State's duty of religious neutrality, limits on solicitor-client privilege, and the scope of parliamentary privilege: ***Vavilov*** at para 60.

[38] The outcome of the application was, I acknowledged, important to Dr. Al-Naami. There was a possibility that the central problem raised by the application – potential access by a regulatory body to Crown disclosure or information derived from Crown disclosure at the pre-investigation, pre-hearing stage – could affect many professionals in many professions. But the mere fact that a dispute is of "wide public concern" or "touches on an important issue" is not sufficient to attract the correctness standard: ***Vavilov*** at para 61. In any event, this application, like many others, turned on its own particular facts.

[39] In particular, this application did not involve a review or recasting of ***P(D) v Wagg***, 2004 CanLII 39048, 71 OR (3d) 229 (CA), although some reference will be made to ***Wagg***. The issues are not (e.g.)

- the proper parties to a regulator's application for production of Crown disclosure
- whether the regulator has a "right" to access Crown disclosure in the course of a professional misconduct investigation

- whether the Crown has a "right" to refuse access to Crown disclosure to a regulator
- the redaction authority of the Crown if disclosure is provided to a regulator
- the nature of terms on access that may be imposed if disclosure is provided to a regulator
- the impact of an accused's fair trial interests on whether, when, how, and on what terms Crown disclosure may be provided to a regulator
- the scope of public interest immunity in limiting regulator access to Crown disclosure
- the protection of privacy of third parties (particularly individual complainants, witnesses, or co-accuseds) and rights of participation of third parties in determinations of whether Crown disclosure should be provided to a regulator.

The Director has not applied for production of Crown disclosure. A sticking point has been – and this will be addressed below – that the Director has sought Dr. Al-Naami's consent to *communicate with* the Crown prosecutor about the case against Dr. Al-Naami. The Director does not propose any further investigation at this point. Dr. Al-Naami is not being asked to hand over Crown disclosure to the College.

[40] The reasonableness standard of review was not dislodged.

C. Features of Reasonableness Review

[41] I will identify some general features of reasonableness review, leaving more detailed discussion to my assessment of the Director's decisions.

[42] Reasonableness review focuses on both the decision-maker's reasoning process, the decision-maker's rationale, and the outcome, decision, or conclusion. The focus is *not* on the conclusion alone: ***Vavilov*** at paras 83, 86. A principled approach to reasonableness review "puts reasons first:" at para 84. The reviewing court is to pay "respectful attention" to the reasons and to seek to understand the reasoning process that led to the conclusion: at para 84. The reasons must justify the decision: at para 86. At para 87 we read that

> [87] This Court's jurisprudence since *Dunsmuir* should not be understood as having shifted the focus of reasonableness review away from a concern with the reasoning process and toward a nearly exclusive focus on the *outcome* of the administrative decision under review. Indeed, that a court conducting a reasonableness review properly considers both the outcome of the decision and the reasoning process that led to that outcome was recently reaffirmed in *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6, at para. 12. In that case, although the outcome of the decision at issue may not have been unreasonable in the circumstances, the decision was set aside because the outcome had been arrived at on the basis of an unreasonable chain of analysis. This approach is consistent with the direction in *Dunsmuir* that judicial review is concerned with *both* outcome *and* process. To accept otherwise would undermine, rather than

> demonstrate respect toward, the institutional role of the administrative decision maker.

[43] Reasonableness requires justification, transparency, and intelligibility in the reasoning process: ***Vavilov*** at paras 86, 99, 100.

[44] A reviewing court should not supply its own reasons to support a conclusion that was not supported by reasons discernable on the record. Paragraph 96 of ***Vavilov*** reads as follows:

> [96] Where, even if the reasons given by an administrative decision maker for a decision are read with sensitivity to the institutional setting and in light of the record, they contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision. Even if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome: *Delta Air Lines*, at paras. 26-28. To allow a reviewing court to do so would be to allow an administrative decision maker to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion. This would also amount to adopting an approach to reasonableness review focused solely on the outcome of a decision, to the exclusion of the rationale for that decision ….

[45] What is reasonable in a given situation will depend on the "constraints" imposed by the "legal and factual context of the particular decision under review:" ***Vavilov*** at para 90. "These contextual constraints dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt:" at para 90.

[46] ***Vavilov*** identified two types of "fundamental flaws," grounds for a finding of unreasonableness. "The first is a failure of rationality internal to the reasoning process. The second arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it:" at para 100.

[47] With respect to internal rationality, a reasonable decision is based on coherent reasoning. It cannot be the product of logical fallacies. The conclusion must follow from the reasons. The reasoning must be intelligible and rational. Reasons must lead from the evidence and law to the conclusions: ***Vavilov*** at paras 102-104.

[48] With respect to contextual consistency (one might say "external" rationality), a reasonable decision is justified in light of its legal and factual constraints. ***Vavilov*** identified some of these constraints, without providing a full catalogue, at para 106:

- the governing statutory scheme
- other relevant statutory or common law
- principles of statutory interpretation
- the evidence before the decision-maker

- the submissions of the parties
- past practices and decisions of the decision maker
- the potential impact of the decision on the individual to whom it applies.

I will return below to constraints of particular salience to this application.

D. Not the Legal Test for a Stay

[49] Applicant's Counsel suggested that since Dr. Al-Naami was denied an application for a stay under s. 65 because the Director did not suspend his privileges (relying instead on Dr. Al-Naami's undertaking), the legal test for a stay rather than the reasonableness standard of review should apply to the assessment of the Director's decisions: Applicant's Brief at para 81. See, by way of illustration, ***Kumar v College of Physicians and Surgeons of Alberta***, 2019 ABQB 514, Eidsvik J at paras 25-27. However, as indicated, this application was not for a stay but for judicial review. Judicial review is available, in part, because an application for a stay was not available. I am bound to apply the standard of review directed by ***Vavilov***. Moreover, Applicant's Counsel's argument presupposes that the Director somehow improperly kept Dr. Al-Naami from reaching s. 65. But whether the Director made legally significant missteps is what is at issue. Applying the standard that would have applied if the Director had not "erred" would beg the question.

[50] Having addressed the foregoing issues, I may now turn to the merits of the application.

V. Facts

[51] Dr. Al-Naami is a pediatrician who has been licensed to practice medicine in Alberta. He managed a clinic in Edmonton.

[52] Dr. Al-Naami was arrested on August 11, 2019 and charged with the possession and transmission of child pornography under ss. 163.1(4) and (3) of the *Criminal Code*, respecting events alleged to have occurred on April 7, 2019: CRP 2, 40, 69.

[53] Dr. Al-Naami was released on a Recognizance. Two conditions of the Recognizance are material. First, condition 4 of the Recognizance prohibited him from communicating with any person known to be under age 16 unless in the immediate presence of a parent, guardian, or responsible adult "of the child." Second, condition 5 prohibited Dr. Al-Naami from seeking, obtaining, or continuing any employment, whether or not remunerated, or becoming a volunteer in a capacity that involves being in a position of trust or authority toward any person under age 16: CRP 11-12, 21, 30, 40. Dr. Al-Naami's trial in Provincial Court was originally scheduled for September 2020 but was adjourned to January 2022.

[54] On August 12, 2019, Cpl. Knight, a member of the RCMP, informed the College of Dr. Al-Naami's charges: CRP 40, 69.

[55] On August 13, 2019, the College opened the First Complaint, concerning the conduct of Dr. Al-Naami reflected in the charges: CRP 22, 25-28. The Director wrote to Dr. Al-Naami as follows:

> … this complaint brings forward serious allegations about your conduct – the concern is only accentuated by the fact that you are a pediatrician …. I am sure you recognize it is the duty of the CPSA to be seen to protect the public as well as recognize the need to maintain confidence in medical practice and the regulation of the profession. In circumstances such as this, I believe it is essential that until the complaint investigation is completed and this matter adjudicated, you withdraw from the active practice of medicine. I will stress that this may also require completion of the criminal matters that we have become aware of: CRP 22.

[56] The Director requested Dr. Al-Naami to "provide an undertaking to withdraw from practice:" CRP 22, 23, 27, 40. (For a similar approach, see ***Kumar*** at para 5.)

[57] On August 14, 2019, the Alberta Law Enforcement Response Team issued a news release respecting Dr. Al-Naami. The news release included the following (CRP 31):

> Alnaami (*sic*) is a pediatrician in Edmonton, but currently [the Internet Child Exploitation team] has no information to suggest any offences were committed against children under his care. The Alberta College of Physicians and Surgeons has been advised.
>
> The allegations against Alnaami stem from an incident in April 2019 when child pornography was allegedly uploaded to the Internet. RCMP's National Child Exploitation Coordination Centre notified ICE of the offence in July 2019 and a complete investigation was launched.

[58] On August 15 and 16, 2019, there were discussions between the Director and Applicant's Counsel respecting the language of the undertaking and a stay of the College's investigation of Dr. Al-Naami pending conclusion of criminal proceedings: CRP 37, 36, 35, 40.

[59] On August 16, 2019 Dr. Al-Naami provided an undertaking to withdraw from practice (the Undertaking): CRP 33, 41. The Director agreed to stay the investigation.

[60] The Undertaking provides as follows (CRP 33-34):

> I understand that the CPSA has directed an investigation into the Complaint.
>
> I recognize that the CPSA has a duty to protect the public and must investigate the circumstances surrounding the allegations against me, and I am willing to give this Undertaking to the CPSA.
>
> Effective the signed date of this Undertaking, I undertake to the following:
>
> 1. I will withdraw from medical practice in Alberta while it remains a condition of my recognizance that I am "prohibited from seeking, obtaining or continuing any employment, whether or not the employment is remunerated or becoming a volunteer in a capacity that involves being in a position of trust or authority toward any person under the age of 16 years." I will provide a minimum of 72 hours' notice to the CPSA's Complaints Director of my intention to return to practice should I decide to do so upon the foregoing condition of my recognizance being amended so as to permit me to return to work as a pediatrician ….

> 3. If I fail to fulfill the terms of Section 1 of this Undertaking, that failure to do so may constitute unprofessional conduct under the *Health Professions Act* (Alberta) ….
>
> 6. Any return to practice as per (1) above by Dr. Al-Naami shall require a separate agreement confirming a practice permit condition of chaperone attendance with patients.
>
> These conditions shall remain in place until complaint file number 190468.1.1 is fully adjudicated or until after the notice period provided by Dr. Al-Naami pursuant to (1) above has terminated.

The Undertaking was signed by Dr. Al-Naami and the Director.

[61] On September 5, 2019, the College received a complaint about Dr. Al-Naami from the mother of two children, alleging that he had inappropriately conducted genital examinations of the children (age 6 and 2) in appointments in May and June 2018: CRP 79-80. The College opened the Second Complaint investigation on October 23, 2019: CRP 41, 83-85. An investigator was appointed. Dr. Al-Naami responded to the investigator by correspondence of November 18, 2019, asserting that he has never examined a child's genitals except for medical reasons and when medically indicated: CRP 86-87. The investigator interviewed the complainant and Dr. Al-Naami: CRP 110-116. The investigation report was completed on November 18, 2020: CRP 117-148. The report concluded that there was a conflict of evidence between the complainant and Dr. Al-Naami and no independent witness: CRP 148. The next stage of the investigation would be to obtain an expert opinion as to whether the conduct of Dr. Al-Naami was medically appropriate. The record disclosed no follow up. Dr. Al-Naami did not request that the Second Complaint investigation be stayed pending completion of the criminal matter or the First Complaint: CRP 41.

[62] On September 13, 2019, Cpl. Knight "called [the Director] to identify other concerns that have arisen with Dr. Al-Naami since he was charged:" CRP 69. Cpl. Knight advised that "electronic devices were seized as part of the investigation and laying of charges. On one device, a number of pictures were found of Dr. Al-Naami … in the nude in an office setting at a desk …. The setting is not of his home office in Edmonton … but there is no clarity as to whether it represents photos taken at his practice location in Edmonton or possibly his earlier practice location in Fort McMurray:" CRP 70-71. Cpl. Knight advised that "several parents have identified concerns to law enforcement following the release of information regarding criminal charges against Dr. Al-Naami." Cpl. Knight reported that "an image of female prepubescent genitalia was pulled from a hard drive device controlled by Dr. Al-Naami – there is a gloved finger in the photo … where the labia are apparently being spread open. The image had been deleted previously. Photographic data indicates that it was taken on a cell phone or similar device, and in the area of or within a medical office:" CRP 72. Cpl. Knight also advised the Director that several parents had identified concerns to law enforcement regarding Dr. Al-Naami. However, on the record to date, no further reports have been provided by the RCMP or other policing agencies and no further charges have been laid against Dr. Al-Naami: CRP 75.

[63] In October 2019, Applicant's Counsel contacted the Director requesting that Dr. Al-Naami be permitted to return to work with restrictions: CRP 39. Applicant's Counsel proposed that Dr. Al-Naami be restricted to seeing only 16 and 17-year old patients: CRP 41.

[64] On December 9, 2019, the Director wrote to Counsel: CRP 40-42. The Director commented that in providing the Undertaking, "Dr. Al-Naami is seen as adherent to his responsibilities under the *Standard of Practice* Self Reporting to the CPSA and the Code of Ethics and Professionalism." The Director continued that "I see any attempt at a return to practice as incongruent with the CPSA mandate to protect the public."

[65] The Director stated that "[a]t this time, the CPSA has no information (by virtue of our agreement to stay investigation with Dr. Al-Naami's withdrawal from practice) that can otherwise satisfy the CPSA/Complaints Director that Dr. Al-Naami is safe to practice and interact with patients." The Director then stated the following:

> To ensure "due diligence" on the part of the CPSA, a judgment as to Dr. Al-Naami's safety to practice would require the gathering of additional information in advance of any return to practice. I would propose that Dr. Al-Naami should provide his explicit and written consent allowing the CPSA to request any required evidence from the office of the Crown to allow for an informed assessment, on an evidentiary basis, of Dr. Al-Naami's potential risk to the public. The CPSA would not attempt to interview witnesses or other individuals with knowledge of this matter – it is anticipated that the CPSA would seek the provision of a summary of evidence (at a minimum) from the Crown. I acknowledge that this may be seen as requiring the CPSA to rescind its stay of investigation – however at this time my proposal would include the limitation of our work at this time to receiving information from the Crown for the purposes of determining whether Dr. Al-Naami may return to practice prior to the completion of both criminal and CPSA processes.

The Director asked counsel to review this proposal with Dr. Al-Naami.

[66] Dr. Al-Naami did not provide the written consent requested by the Director.

[67] On December 10, 2019, by way of a Consent Bail Variation Order, Justice Clackson varied the terms of condition 4 of Dr. Al-Naami's Recognizance to permit contact with a person under age 16 additionally as follows: "or in the direct presence of a chaperone authorized by the College of Physicians and Surgeons of Alberta:" CRP 14, 15-17, 43-44, 53-54. Condition 5, the prohibition on employment or volunteering in any capacity that involves being in a position of trust or authority towards a person under age 16, was not varied. The College was not consulted respecting the variation of the Recognizance: CRP 59. The College has had no contact with Crown Counsel.

[68] On February 13, 2020, Applicant's Counsel met with the Director respecting the request to speak to Crown Counsel: CRP 73. Applicant's Counsel stated "I relayed to you what the Crown Prosecutor is likely to advise you about the information in the disclosure … I intended to relay to you that the Crown Prosecutor would likely advise you that they have found one child pornographic video … on a laptop owned by Dr. Al-Naami to which his entire family (i.e. wife, two teenagers, and two children under twelve) has access:" CRP 55, 73-74.

[69] Also on February 13, 2020, Dr. Al-Naami proposed through counsel that he could limit his practice to older children or he could practice at AHS's Learning and Development Centre

where he would not do physical examinations: CRP 45. On February 20, 2020, Applicant's Counsel brought to the Director's attention that Dr. Al-Naami is licenced to perform echocardiographs, as a potential area for a return to practice: CRP 46.

[70] Dr. Al-Naami conveyed that he and his family were in financial distress: CRP 74.

[71] On February 20, 2020, the Director acknowledged that Dr. Al-Naami's "point [has] been made" but the "hurdle remains that of being able to have any contact with patients – full stop:" CRP 46.

[72] On February 26, 2020, the Director advised Applicant's Counsel that he had met with the College Registrar and reviewed Dr. Al-Naami's request for return to practice. The Director stated that the Registrar "remains of the opinion that Dr. Al-Naami should remain withdrawn, as the disclosure from the Crown (if as you have described) would not otherwise suggest to him that Dr. Al-Naami is appropriately safe to reenter practice:" CRP 47, 75-76. The Director concluded this letter by stating that "the outcome of the criminal matter will be required to reevaluate Dr. Al-Naami's practice condition."

[73] On February 26, 2020, the Director recorded that "[i]t was not the intent that the CPSA would … have a conversation with the Crown, but rather Dr. Al-Naami would make the request of the Crown. The Crown will agree or disagree as it sees fit, and the CPSA would only enter into a discussion with the Crown if [the] prosecution approached us for clarification:" CRP 77 (the date typed for this entry is March 24, 2020 which may be the date the entry was made, referring to an earlier matter. Nothing turns on the precise date of this comment).

[74] On March 9, 2020 Dr. Al-Naami wrote to the Director, under cover of correspondence from Applicant's Counsel, stating as follows: "Please accept this letter as commencing 72 hours' notice of my intention to return to practice and to revoke the Undertaking I gave the CPSA on August 16, 2019:" CRP 48-50. Dr. Al-Naami referred to his financial and emotional struggles. He stated that the Undertaking has injured his reputation, "as, although the allegations against me are unproven, my continued withdrawal from practice lends credence to the claims against me to which I have pleaded not guilty and will be vehemently defending against at trial:" CRP 49.

[75] The letter acknowledged that the Recognizance condition linked to the 72-hours notice was not varied although condition 4 was varied. Dr. Al-Naami stated that it was his understanding that the negotiated variation was "to enable me to return to pediatric practice." In his view, the Recognizance "clearly allows me to attend with patients who are 16 years of age and older."

[76] Dr. Al-Naami enclosed a draft alternative undertaking that imposed restrictions on his practice, protecting the public and promoting the College mandate while allowing him to practice medicine (Alternative Undertaking 1). Alternative Undertaking 1 is found at CRP 51-52, 57-58. The crucial conditions are as follows:

> 1. Dr. Al-Naami undertakes to have a chaperone, approved in writing by the CPSA, present for all attendances with patients under the age of eighteen in all locations where he provides clinical services. Dr. Al-Naami will maintain a daily

> list of all patients on which attendances occurred and will report to the CPSA upon request.
>
> 2. Dr. Al-Naami undertakes to post a notice about the chaperone requirement, set out in #1 above, in any clinic in which he provides medical services. Such notices will be posted in the clinic waiting area and in each exam room.

[77] On March 10, 2020 the Director responded to Dr. Al-Naami's March 9 correspondence: CRP 59-60. He referred to the request for Dr. Al-Naami's written consent to Crown Counsel "to permit the disclosure of records to the CPSA from the criminal disclosure package given to Dr. Al-Naami." The Director stated that "[t]his would allow the CPSA to have a more complete understanding of the evidence behind the charges against Dr. Al-Naami." That consent had not been provided.

[78] The Director considered the proposed chaperone requirement to be "grossly insufficient" as all of Dr. Al-Naami's patients are minors. Further, the Director stated that "[i]t is unacceptable that Dr. Al-Naami seeks to withdraw from his Undertaking to the CPSA and impede the CPSA receiving and considering relevant evidence:" CRP 59.

[79] The Director stated that Dr. Al-Naami has not provided "any information that is required to assist in setting the terms of any agreement for the reissuance of a practice permit:" CRP 60. And "[p]aragraph 6 of the Undertaking expressly recognizes that Dr. Al-Naami cannot unilaterally demand the issuance of a practice permit."

[80] The Director continued that Alternative Undertaking 1 failed to address "several significant issues," including

- the notification to be given to patients in advance of booking
- what information is to be provided to patients/guardians to provide informed consent as to whether they wish to be seen by Dr. Al-Naami.

The Director added that "[t]here are additional provisions in your form of undertaking that are unacceptable."

[81] The Director confirmed that Dr. Al-Naami "remains withdrawn from practice until such time that the previously requested information is available to the CPSA for an appropriate assessment of his risk." The Director stated that "[t]he CPSA cannot fulfill its duty to protect the public interest by negotiating terms for return to practice without the evidence from the Crown disclosure package being available for consideration."

[82] The Director warned that if Dr. Al-Naami were to return to seeing patients, he would not have a current practice permit. He would be exposed to further proceedings under the *Health Professions Act*.

[83] On March 12, 2020 Applicant's Counsel advised the Director by correspondence that her "understanding of the disclosure has evolved," and she was advised that the Crown "would also likely advise the CPSA that the disclosure contains a thumbnail to the aforementioned video, and 2 unique images which the Crown argues meet the test for child pornography:" CRP 55.

Applicant's Counsel referred to the Director's correspondence of February 26, 2020 and stated the following:

> As it appears that the CPSA has already concluded that the outcome of the criminal matter is necessary to trigger the reevaluation of Dr. Al-Naami's suspension from practice, Dr. Al-Naami was unable to see any purpose in permitting the CPSA to review the disclosure for his criminal matter with the Crown Prosecutor: CRP 56.

Counsel stated that allowing the CPSA to speak to the Crown Prosecutor compromises his "right to a fair trial given the risk of prejudice to Dr. Al-Naami's criminal proceedings that this action brings."

[84] Counsel stated that Dr. Al-Naami's "complete removal from the practice of medicine" is not the "least restrictive means to ensure public safety:" CRP 56. Counsel wrote that

> there are cases in which physicians with criminal charges, or even more, criminal convictions, have safely returned to practice with conditions on their practices. For example, Dr. Ramneek Kumar, who was charged with two counts of sexual interference and one count of sexual assault of a minor on March 27, 2019 continued to practice medicine safely in Alberta with a chaperone requirement on his licence.

[85] Counsel confirmed that Dr. Al-Naami will no longer voluntarily withdraw from practice and invited the CPSA to take proceedings under Part 4 of the *Health Professions Act*: CRP 56.

[86] Attached to Counsel's correspondence was a Revised Alternative Undertaking, that added the following as a new clause 3 (CRP 57):

> Dr. Al-Naami shall ensure that all staff advise patients or their guardians at the time of booking (for booked appointments) or at the time of registration (for walk-in appointments) about the chaperone requirement.

[87] On March 13, 2020 the Director reiterated that the CPSA position is that Dr. Al-Naami has been asked to provide his consent for the release of the criminal disclosure package from the Crown: CRP 64. The information "would help inform whatever practice permit conditions may be seen as appropriate if he were deemed suitable to practice." Without that information, the College "cannot ascertain the risk to any patient or member of the public who may attend him." Further, the College "would not know the nature of notifications to provide to other parties under s. 119 of the Act." Section 119 provides as follows:

> 119(1) If under Part 2 or Part 4 a regulated member's practice permit is suspended or cancelled ..., the registrar
>
> > (a) must enter the conditions imposed, if any, on the regulated member's practice permit,
> >
> > (b) must provide the information
> >
> > > (i) to a person who employs the regulated member to provide professional services on a full- time or

> part- time basis as a paid or unpaid employee, consultant, contractor or volunteer, and
>
> (ii) to a hospital if the regulated member is a member of the hospital's medical staff or professional staff, as defined in the Hospitals Act,
>
> (c) must provide the information to any Minister who, or an organization specified in the regulations that, administers the payment of fees for the professional services that the regulated member provides, ...
>
> (f) subject to the bylaws, may publish or distribute the information referred to in this subsection and information respecting any order made by a hearing tribunal or council under Part 4 ....
>
> (4) If a member of the public, during regular business hours, requests from a college information referred to in this section, section 33(3) or 85(3) or any information published on the college's website, or information as to whether a hearing is scheduled to be held or has been held under Part 4 with respect to a named regulated member, the college must provide the information with respect to that regulated member subject to the payment of costs referred to in section 85(3) and the period of time provided for in the regulations ....

In my opinion, the reference to s. 119 adds nothing of substance to position of the Director relating to practice permit conditions and I will not refer to it further in this decision.

[88] The Director commented that Applicant's Counsel's most recent communication "may be interpreted as suggesting that there may be more yet contained within the criminal disclosure file." Again, this information would be relevant to Dr. Al-Naami's "return to practice and the CPSA's requirement to ensure patient/public safety."

[89] On March 16, 2020, Applicant's Counsel maintained that Dr. Al-Naami is able to unilaterally withdraw from his Undertaking and therefore considers himself withdrawn from his Undertaking. However, because of COVID-19 considerations, he would not immediately return to work. Forty-eight hours notice of intention to return to practice would be provided: CRP 65.

[90] On March 18, 2020, the Director responded with correspondence to Applicant's Counsel: CRP 66-67. The Director confirmed that Dr. Al-Naami does not hold an active practice permit and seeing patients would create a new issue for investigation: CRP 68, 78. The Director stated that Dr. Al-Naami has a duty to cooperate with the investigation. The Director confirmed that the College would not require Dr. Al-Naami to provide a written response or to be interviewed. He is being asked to provide consent to the College to allow access to evidence already in the possession of the Crown. His right to a fair trial is not jeopardized. The College has no plan to pursue disciplinary proceedings against Dr. Al-Naami before the criminal proceedings are concluded. According to the Director, Dr. Al-Naami is "effectively preventing" the College from considering relevant evidence dealing with the degree of risk his return to practice may pose. The Director stated that "[i]t is not for Dr. Al-Naami to restrict the CPSA's access to relevant evidence and to dictate the conditions for his return to practice. If I may, that has the appearance of 'the tail wagging the dog.'" The Director stated that "[i]t is unfortunate that Dr. Al-Naami

continues to refuse to cooperate by providing the consent to the Crown to allow the CPSA access to the Crown disclosure records." The College requires access to the evidence to assess whether the Alternative Undertaking "might be adequate:" CRP 67.

[91] The Director denied that the College has already concluded that Dr. Al-Naami is guilty.

[92] Dr. Al-Naami has not provided the written consent requested by the Director. As of the hearing date, he has not attempted to return to practice.

VI. Issues

[93] Three main questions must be addressed:

- was Dr. Al-Naami entitled to rescind his Undertaking unilaterally?
- was Dr. Al-Naami entitled to request the College to reconsider its position?
- was the Director's reconsideration of Dr. Al-Naami's Undertaking reasonable?

[94] The responses to these questions require some delineation of the "limits and contours" of the College's decision space. Some more specific aspects of these "limits and contours" will be addressed when responding to particular issues.

VII. The College's Decision Space

[95] The general aspects of these "limits and contours" of the College's decision space are as follows.

A. Statutory Scheme

[96] The Supreme Court commented in ***Vavilov*** at para 108 that

> [108] Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision ….

1. The Public Interest

[97] The foundation of the College's decision space regarding the merits of disciplinary matters is its statutory obligation to promote and serve the public interest. Under s. 3(1)(a) of the *Health Professions Act*, "[a] college … must carry out its activities and govern its regulated members in a manner that protects and serves the public interest." In the present context, the focus of the "public interest" is on protecting patients from risks of criminal conduct. More precisely, since Dr. Al-Naami is a pediatrician and he is charged with child pornography offences, the focus of the public interest is on protecting young patients from the risks of sexual offending represented by Dr. Al-Naami. See ***Moll v College of Alberta Psychologists***, 2011 ABCA 110 at para 24; ***Pharmascience Inc v Binet***, 2006 SCC 48, Lebel J at para 36.

2. Procedural Context

[98] Procedurally, the Director's decisions are situated in a pre-hearing context. This pre-hearing landscape is not comprehensively regulated. Section 65 was quoted above.

[99] As regards the First Complaint, the investigation has been stayed or suspended by the College. As discussed above, the "suspension" of Dr. Al-Naami's practice is by way of his Undertaking not by the Director's suspension of his practice. As regards the Second Complaint, essentially the investigation reached only the point of gathering evidence from the complainant and Dr. Al-Naami.

[100] Since the decisions respecting Dr. Al-Naami are pre-hearing, interim decisions, the decisions are necessarily based on incomplete information.

B. The College and its Members

[101] The canopy that defines the College's decision space is formed not only by the public interest but by the College's relationship with its members.

1. Duty to Cooperate

[102] One aspect of this relationship is that members have a duty to cooperate with the College in investigations. See (with due regard for the distinct legislative context) ***Sazant v College of Physicians and Surgeons of Ontario***, 2012 ONCA 727 at para 180; ***Ontario (College of Physicians and Surgeons of Ontario) v Botros***, 2015 ONCPSD 42; ***Artinian v College of Physicians and Surgeons of Ontario***, 1990 CanLII 6860, 73 OR (2d) 704 (SC Div Ct) at 6 (CanLII pdf: "Fundamentally, every professional has an obligation to co-operate with his self-governing body"). This duty is statutorily-recognized at the stage of investigation in s. 1(1)(pp)(vii)(B) of the *Health Professions Act*:

> 1(1) (pp) "unprofessional conduct" means one or more of the following, whether or not it is disgraceful or dishonourable: …
>
> (vii) failure or refusal …
>
> (B) to comply with a request of or co- operate with an investigator ….

Under s. 1(1)(u), "investigator" means "the complaints director or other person who conducts an investigation under Part 4."

2. Impact of the Decision on the Affected Individual

[103] Further aspects of the relationship between the College and members that contribute to the College's decision space are the College's obligations towards its members in disciplinary matters.

[104] While the primary responsibility of the College is to protect the public, it must also treat its members fairly when establishing public protection measures: ***Moll*** at para 24.

[105] The requirement that the College take proper account of the interests of its members in disciplinary processes affects the application of the standard of review. We read the following at para 133 of ***Vavilov***:

> [133] It is well established that individuals are entitled to greater procedural protection when the decision in question involves the potential for significant

> personal impact or harm: *Baker*, at para. 25. However, this principle also has implications for how a court conducts reasonableness review. Central to the necessity of adequate justification is the perspective of the individual or party over whom authority is being exercised. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention. This includes decisions with consequences that threaten an individual's life, liberty, dignity or livelihood. [emphasis added]

C. Respect for *Charter* Values

[106] The College's decision space may also be shaped by *Charter* values. If a decision affects interests protected by the *Charter*, the College must ensure that the decision limits *Charter* protections reasonably or proportionately, so the limitations are no more than necessary given the statutory objective pursued: see ***Loyola High School v Quebec (Attorney General)***, 2015 SCC 12, paras 3-4, 37; ***Doré v Barreau du Québec***, 2012 SCC 12.

VIII. Assessment

A. Was Dr. Al-Naami entitled to rescind his Undertaking unilaterally?

[107] Dr. Al-Naami contended that he was entitled to rescind his Undertaking unilaterally. He could, on his own, declare it to be terminated. Were this expedient available to Dr. Al-Naami, matters would be simplified. He could declare his Undertaking at an end. At that moment, nothing would prevent Dr. Al-Naami from practicing. The College, then, should it oppose his re-entering practice, would suspend him. Dr. Al-Naami could thereafter make an application for a stay under s. 65.

[108] Dr. Al-Naami could act in a manner contrary to the commitments in the Undertaking. That, however, would not rescind or terminate the Undertaking. By way of analogy, a breach of contract does not (or need not) end a contract. Further, conduct contrary to the Undertaking would be regarded by the College as unprofessional conduct. Section 3 of the Undertaking provided that if Dr. Al-Naami failed to fulfill the withdrawal from practice terms of section 1, "that failure … may constitute unprofessional conduct." The Director warned Dr. Al-Naami that if he took steps to return to practice, he would be subject to disciplinary proceedings: CRP 60. See the definition of "unprofessional conduct" in s. 1(1)(pp) of the *Health Professions Act*. Dr. Al-Naami has chosen not to take steps to return to practice. If Dr. Al-Naami disregarded his Undertaking and if the Director took the view that his Undertaking was thereupon terminated, Dr. Al-Naami would face the challenge of being permitted to return to practice not only given his criminal charges and other information gathered to date, but given a further disciplinary violation.

[109] But did the Undertaking actually impose obligations on Dr. Al-Naami to follow its terms? If it did not establish obligations, not only would my contractual obligation analogy be misplaced but conduct contrary to the Undertaking might not be regarded as the proper subject of discipline since Dr. Al-Naami would not have done what he was obliged not to do. He would have done what he was free to do.

[110] Applicant's Counsel argued that the Undertaking did not impose a contractual obligation on Dr. Al-Naami. The Undertaking amounted to a bare or gratuitous promise. One might respond that the consideration for his withdrawal from practice was the College's forbearance from continuing the investigation. There was a *quid pro quo*. But since the College might have been legally required to stay its investigation because of potential prejudice to the criminal matter, the forbearance might not have been good consideration: see J.D. McCamus, *The Law of Contracts, 2nd ed* (Toronto: Irwin Law, 2012) 243 *et seq*. I will not explore these complexities. In my view, nothing turns on whether the Undertaking may be characterized as a contractual obligation in a private law sense. The issue is one of public law, concerning the relationship of a regulated member to his regulatory body, rather than an issue of private law.

[111] I accept Applicant's Counsel's observations that the Undertaking was not a lawyer's undertaking, made (e.g.) to the Court in the course of litigation. Neither was the Undertaking a statutorily-regulated undertaking, such as an undertaking respecting pre-trial release under the *Criminal Code*. The *Health Professions Act* does not address undertakings.

[112] The Undertaking took its meaning, significance, and force from its role in the disciplinary process for a regulated profession. Although undertakings are not legislatively regulated, I can infer on the materials before me that undertakings are commonly used for negotiated interim resolutions in disciplinary processes in Alberta and other provinces. See ***Kumar*** at para 6; ***Morzaria*** at paras 8-11, 14; ***Sazant*** at paras 19, 34; ***Huerto*** at para 29 (although judicially directed). The use of undertakings is part of the "common law" of dispute resolution developed in the disciplinary process for physicians.

[113] To assist in interim resolutions of disputes, undertakings must have stability. The usefulness of this tool would be subverted if a physician could simply declare that he or she were no longer bound by an undertaking freely made. If unilateral rescission were permitted, undertakings would serve no purpose.

[114] Moreover, a physician is a member of a learned profession, granted the privilege of carrying on that profession and having the status that follows. That privilege is endorsed and supported by the physician's regulatory body. The privilege of practice does not belong to the physician alone and is not achieved by the physician alone, but only subsists so long as the privilege is extended by the College. While further analysis is necessary to draw out the implications of this relationship, it would appear that one implication is that in dealings with the College, a physician's word must be his or her bond. One might observe that this should be so regardless of membership in a profession. Promises are to be kept. That is why they are "promises."

[115] And further, the Undertaking itself contained language precluding unilateral revocation. Section 3 provided that if Dr. Al-Naami failed to fulfill the terms of Section 1 of the Undertaking, including withdrawal from practice, "that failure may constitute unprofessional conduct under the *Health Professions Act*." Section 6 of the Undertaking stated that "Any return to practice as per (1) above by Dr. Al-Naami shall require a separate agreement confirming a practice permit condition of chaperone attendance with patients." Section 1 of the Undertaking set out a specific set of circumstances that would have permitted Dr. Al-Naami to provide notice of an intention to return to practice. Those circumstances have not occurred.

[116] In my opinion, Dr. Al-Naami was not entitled to rescind his Undertaking unilaterally.

B. Was Dr. Al-Naami entitled to request the College to reconsider its position?

[117] Is the result that undertakings are permanent, unchangeable? Does an undertaking trap a physician? Were this so, physicians might well be reluctant to enter into undertakings.

[118] After entering an undertaking, circumstances may change significantly, whether what has changed are the circumstances of the physician or the state of the evidence. Even if circumstances have not changed significantly, a physician who entered into an undertaking may have re-evaluated the appropriateness of its terms. An undertaking may have been made without the physician having thought things through, or perhaps only the passage of time has allowed the physician to think things through.

[119] In my opinion, a physician should be entitled to request reconsideration of the terms of an undertaking and the College should be obligated to reassess whether the terms of the undertaking remain appropriate. None of this is a guarantee that reconsideration will result in change.

[120] I take into account the following.

[121] An undertaking is a type of promise. But while promises should be kept, a person who has promised may ask to be relieved of his or her obligations ("I know I said I'd do it, but ….). An undertaking is made in more formal circumstances than a promise, though.

[122] Reconsideration of administrative decisions may be provided for by statute. Neither undertakings nor the reconsideration of undertakings are regulated by the *Health Professions Act*. Just as the use of undertakings is not precluded by the lack of explicit regulation, so reconsideration is not precluded by the lack of regulation. Nothing statutorily prevents reconsideration.

[123] As I suggested, reconsideration complements the use of undertakings. In my opinion, an entitlement to request reconsideration in light of changed circumstances is a reasonable adjunct to the undertaking procedure. The possibility of reconsideration based on changed circumstances or the changed appreciation of circumstances prevents an undertaking from becoming a "trap" and avoids deterring physicians from entering undertakings for fear of being trapped. Just as it makes practical sense from a disciplinary process perspective for physicians to accept interim resolutions by way of undertaking, so it makes sense for the College to reconsider interim resolutions. Without reconsideration, physicians would be better off to invite suspension or the imposition of conditions and to seek relief in the courts through a stay application.

[124] In my view, upon Dr. Al-Naami requesting return to practice under conditions, the parties in fact considered themselves to be in a reconsideration process. See, for example (emphasis added),

- CRP 36 - e-mail from Applicant's Counsel to the Director, August 16, 2019:

> "I would like to ensure that Dr. Al-Naami's suspension will terminate and <u>will need to be reconsidered should his recognizance conditions change so as to allow him to return to practice</u>. We

> know that this would only change if it were decided that preventing him from working as a pediatrician is not required for the protection of the public. Accordingly, at that time, I do not want his voluntary suspension preventing his return to work, as there should be less restrictive means that would protect the public interest while permitting him to work."

- CRP 39 - e-mail from Applicant's Counsel to the Director, November 5, 2019

> "I am wondering if you had the chance to give any consideration to allowing him to return to work with restrictions?"

- CRP 40 – correspondence from the Director to Applicant's Counsel – December 9, 2019

> Thank you for both yours and Dr. Al-Naami's patience as the CPSA considers Dr. Al-Naami's request for a return to practice in advance of his criminal trial.

- CRP 41 – correspondence from the Director to Applicant's Counsel - December 9, 2019

> I have considered again the Undertaking given by Dr. Al-Naami to the CPSA on August 16, 2019, providing his commitment to withdraw from practice until such time that the matters identified to the CPSA had been fully investigated and adjudicated.

[125] Again, the reconsideration process does not obligate the College to amend its original position or to accept an alternative undertaking. What is owed to a physician is not the desired disposition but a *reasonable* reconsideration.

C. Was the Director's reconsideration of Dr. Al-Naami's Undertaking reasonable?

[126] Answering the question of whether the Director's reconsideration of Dr. Al-Naami's Undertaking was reasonable requires responses to four sub-questions.

- what was the Director required to decide?
- what did the Director decide?
- was the decision to require Dr. Al-Naami's consent to access information about Crown disclosure reasonable?
- was the Director's response to Dr. Al-Naami's request for reconsideration reasonable?

1. What was the Director required to decide?

[127] The Director's task was hardly unique. That did not make his task less difficult or make the description of his task less difficult.

[128] Fundamentally, the Director was required to balance the obligation to promote the public interest, specifically the need to protect young patients, and fairness to Dr. Al-Naami.

[129] This task required execution in conditions of informational uncertainty or incomplete information. As regards the First Complaint, the main complaint, the procedural context was pre-hearing, pre-investigation. The Director had to work with untested allegations, some conflicting.

[130] In my opinion, the Director had to address three questions: First, is the complaint supported by credible evidence or by a *prima facie* case? Second, do the circumstances of the complaint show that the physician represents a risk to the public? Third, given the risk of harm, what interim restrictions or conditions would be required to abate, manage, or mitigate that risk?

[131] I add that in my opinion, the Director should address the same three questions in approaching resolution by way of undertaking, in a reconsideration decision, or in a decision to suspend or impose conditions on a physician. The overall issues are the same (whether, in light of the evidence of risk, the physician may continue to practice and, if so, on what terms) and nothing justifies differing approaches.

(a) *Prima Facie* Case Supporting the Complaint

[132] Respecting the first question, the Director's task is not to resolve the uncertainty, to decide the merits, or assess the strength of competing allegations. That will occur at a later procedural stage: ***Scott v College of Massage Therapists of British Columbia***, 2016 BCCA 180 at para 73. At this point there are only two matters to be decided. On the one hand, if the allegations against the physician were found to be true, would the complaint would be made out? On the other hand, are the allegations, the case against the physician, not frivolous, not manifestly incredible? See ***Fingerote*** at paras 27-28; ***Scott*** at paras 55, 56. Only a limited weighing can occur at this point. Chief Justice Bauman did caution in ***Scott*** at para 56 against rejecting or discounting information as incredible or implausible at an early pre-hearing procedural stage.

(b) Evidence of Risk

[133] Respecting the second question, the evidence must support an inference that the physician poses a risk to the public, specifically to present or future patients: ***Fingerote*** at paras 29-30. It does not necessarily follow from a finding that a complaint is supported by a *prima facie* case that the physician poses a risk to any other patients. At this point two matters must be decided: What is the nature of the harm that is risked to current or future patients? and Is there a reasonable likelihood of the harm being caused if no restrictions or conditions were imposed? (alternatively, is there a risk of probable harm?) Both the magnitude of risk and the degree of likelihood of actualization of the risk should be considered. See ***Fingerote*** at paras 6-7.

(c) Response to the Risk

[134] Respecting the third question, the College's response to the risk must be proportional. Automatically suspending every physician who is the subject of a complaint giving rise to a risk of harm to patients would doubtless be effective, but this response would be overbroad, disproportional, and unreasonable. The administrative measures taken must be proportional to the particular risk in the particular circumstances.

[135] Because the administrative measures are interim, the allegations are untested and unproven, and the College is obliged to treat its members fairly, the principle that must be

respected is that the restrictions or conditions should be "necessary" or the least restrictive that can reasonably protect the public: ***Fingerote*** at paras 7 and fn1, 24; ***Morzaria***, Nordheimer J, as he then was, dissenting but not on this point, at para 45; ***Rohringer*** at para 69; ***Kumar*** at para 24; ***Scott*** at para 55.

[136] The least restrictive measures principle may be regarded as a means of respecting *Charter* values in interim determinations. A physician who has been accused of committing criminal offences, like Dr. Al-Naami, is presumed innocent in criminal proceedings. That does not block the College from protecting the patients from the risks the physician represents, but measures taken to protect the public should nonetheless be proportional, minimizing restrictions on an individual who has not been found guilty of any offence. Interim measures should not be a pre-punishment.

(d) Standard of Review

[137] The standard of review applicable to the Director's decisions concerning all of these issues is reasonableness.

2. What did the Director decide?

[138] The Director's response to Dr. Al-Naami had two main elements.

[139] First, on the information the Director had received, the College had no information that satisfied the Director that Dr. Al-Naami was safe to practice and interact with patients: CRP 41 (correspondence of December 9, 2019); CRP 47 (correspondence of February 26, 2020); CRP 60 (correspondence of March 10, 2020).

[140] Second, the Director required additional information to assess whether Dr. Al-Naami could return to practice on conditions. The information was required so the College could perform its "due diligence." The means of acquiring additional information proposed by the Director was for Dr. Al-Naami to "provide his explicit and written consent allowing the CPSA to request any required evidence from the office of the Crown:" CRP 41. The Director sought Dr. Al-Naami's consent to have the Crown provide information about Crown disclosure to the College. The Director might or could be provided with a "summary" of Crown disclosure: CRP 41. The Crown would "agree or disagree [to provide information] as it sees fit:" CRP 77. Later the Director wrote that "The CPSA cannot fulfill its duty to protect the public interest by negotiating terms for return to practice without the evidence from the Crown disclosure package being available for consideration:" CRP 60.

[141] I'll consider the reasonableness of seeking the consent respecting disclosure, then turn to the reasonableness of the Director's finding that on the information received Dr. Al-Naami could not return to practice on conditions.

3. Was the decision to require Dr. Al-Naami's consent respecting Crown disclosure reasonable?

[142] I'll begin with some clarifications.

[143] First, the Director did not ask Dr. Al-Naami to provide a copy of the Crown disclosure in his possession.

[144] Second, the Director was not pursing an application for production of Crown disclosure. The application would rely on s. 63(3) of the *Health Professions Act*. The application would be made in the course of the investigation (which had been suspended), on notice to at least the Crown or Attorney General. Disclosure materials may contain information about third parties, information protected by public interest privilege, information subject to privilege that may be asserted by the Crown, or information that, in the public interest, should not be disclosed even to the College: see ***P(D) v Wagg***, 2002 CanLII 23611, 61 OR (3d) 746 (ON SCDC), Blair RSJ at para 23 (affirmed by the Court of Appeal's decision in ***Wagg***). The Crown, as proxy for affected interests, would be responsible for limiting production: ***College of Physicians and Surgeons of Ontario v Peel Regional Police***, 2009 CanLII 55315 (ON SCDC) at para 63. The Court, ultimately, would decide what is and is not producible. Alternatively, the Crown and the College might work out production by consent: ***Feuerhelm v Alberta (Justice and Attorney General)***, 2017 ABQB 709, Eamon J at para 109. I accept the College's counsel's submission that it would be likely that the College would be successful in receiving production of some of the Crown disclosure: ***College of Physicians and Surgeons of Ontario v Peel Regional Police***, 2009 CanLII 28202 (ON SCDC), Lederman J at para 20; College's Brief at para 96.

[145] Third, the Director recognized that Dr. Al-Naami's consent would not have guaranteed access to information about disclosure. Dr. Al-Naami would only be communicating to the Crown that he would not object to the College receiving information about disclosure. "The Crown will agree or disagree as it sees fit." CRP 77. I accept the College's counsel's point that Dr. Al-Naami's consent would remove an obstacle to production, so his consent would have at least that much value: College's Brief at para 94.

[146] The Director, in effect, refused to consider the variation of the practice conditions for Dr. Al-Naami unless Dr. Al-Naami provided consent to permit the College to access Crown disclosure. Was requiring that consent reasonable?

[147] In my opinion, the Director's insistence on Dr. Al-Naami providing his consent permitting the College to access Crown disclosure was not reasonable.

(a) Procedural Prematurity and Unfairness

[148] The procedural context was critical. Dr. Al-Naami provided his Undertaking. The investigation was stayed or suspended.

[149] The College, more specifically the complaints director, could apply for access to the disclosure information under s. 63(3) once the investigation had resumed.

[150] In my view, what the Director pursued, the consent he sought, would create some significant distortions of process, relating both to the nature of the additional information sought and to the introduction of this additional information.

(i) Effects of Receipt of Summary of Information

[151] The Director anticipated receiving not production of Crown disclosure but a "summary of information." Suppose that summary were received.

[152] I accept the College's point that the receipt of Crown disclosure information by the College would not, by itself, imperil Dr. Al-Naami's fair trial rights: CRP 66. The Crown already had the information. Providing the information to the College would not create new information that might work prejudice to Dr. Al-Naami in his criminal trial.

[153] However, the Director could not rely on the untested allegations in the summary without hearing from Dr. Al-Naami so that he could provide his comments about the summary. Even at a preliminary pre-investigation stage, the College should not act solely on representations by others without entertaining some response from Dr. Al-Naami. It could be, for example, that some of the information in the disclosure was wholly unreliable, the product of *Charter* violations, or its prejudicial effect would exceed its probative value. The Crown's notion of what constituted a "summary" could be problematic to Dr. Al-Naami in terms of what was included, what was excluded, and how information was characterized. It could not be assumed that there was a non-controversial overview of events, at least an overview that would provide more information than the College already had. Dr. Al-Naami might not wish his professional status to be jeopardized by the information conveyed by the Crown. He could be, in effect, forced to respond to the use of this information by the College, before the criminal trial had even begun.

[154] Since this was not addressed in argument, I will not pursue the issues of whether Dr. Al-Naami would have "use immunity" and "derivative use immunity" protections available to prevent his responses being used in the criminal trial or whether the practical necessity of responding to the additional investigation elements would jeopardize Dr. Al-Naami's right to remain silent: see ***Cockeram v College of Physicians and Surgeons (NB)***, 2013 NBQB 197, Walsh J at paras 61-72.

[155] Nonetheless, the introduction of the "summary" information bears the reasonable prospect of transforming the pre-hearing, pre-investigation *status quo* into an investigation before the actual investigation.

[156] This prospect is inconsistent with the reasonable position of the College to stay its investigation pending completion of the criminal trial.

[157] In my view, the Director did not address the complexities attending access to Crown disclosure information. The Director did not advert to the issue of seeking information before the College was entitled to obtain the information and before a procedural step was reached when that information could be properly processed. This shows the unreasonableness of the Director's request.

(ii) Introducing Additional Information

[158] Dr. Al-Naami was withdrawn from practice. Information had been provided to the Director. Dr. Al-Naami requested reconsideration. The Director then sought Dr. Al-Naami's consent to permit access to further information from the Crown.

[159] It was clear from the Director's comments that on the information he already had, he was opposed to Dr. Al-Naami returning to practice. Dr. Al-Naami sought a reconsideration of that position, not a position based on the Director's assessment of new information. The Director was, in effect, seeking to change the informational foundation for his position without having reconsidered his original position respecting Dr. Al-Naami's suitability for return to practice.

[160] This proposed shifting of the informational foundation for the Undertaking and the Director's position was not responsive to Dr. Al-Naami's request for reconsideration and was unreasonable on that basis.

(b) The Value of the Information

[161] In the hearing, the College took the position that without access to Crown disclosure information the College was at an informational disadvantage. For example, para 44 of the College's Brief stated that "an evidential vacuum exists around the nature and extent of Dr. Al-Naami's conduct that is relevant to his fitness and safety to practice as a pediatrician." This claim was consistent with the Director's claim that the College could not fulfil its duty to protect the public interest without access to Crown disclosure information: CRP 60. It was also consistent with the Director's claims that Dr. Al-Naami was "preventing" the College "from receiving and considering relevant evidence" and that Dr. Al-Naami was "restricting" the College's access to relevant evidence: CRP 67.

[162] This claim has two aspects. First, that the Director did not have sufficient evidence to make the appropriate decision and second, that the Crown disclosure contained the information that the College needed.

(i) Available Information

[163] As for the "insufficient evidence" claim, the College already had ample information about Dr. Al-Naami's offences. It had far more information than in ***Kumar*** for example (see paras 20-21).

[164] The College was aware of the charges. It was aware of the ALERT Bulletin. Corporal Knight spoke to the College. He had taken the initiative to contact the College, so presumably he would have conveyed what was appropriate to be conveyed to a professional governing body about one of its members. The College had commenced the Second Investigation, but not pursued it beyond gathering statements from the complainant and Dr. Al-Naami. The College also had the information about disclosure provided by Applicant's Counsel.

[165] I confess to some ambivalence about Applicant's Counsel serving as the medium of transmission of information about disclosure. I understand the College preferring to get information directly from the Crown as opposed to getting information through the filter of a physician's lawyer. However, counsel may make admissions on behalf of a client and what was conveyed to the College could be regarded as information of that nature. The information was not exonerating. Further, providing the information through counsel could and should be regarded as Dr. Al-Naami providing information voluntarily, by consent, as a means of cooperating with the Director and of providing the Director with the type of information that he

wanted. In any event, the College had received at least some information about Crown disclosure.

[166] What further information could be reasonably anticipated to be recovered from a Crown's "summary" of disclosure information?

(ii) Existence of Significant Additional Information

[167] The Director appeared to believe that the Crown disclosure would contain information additional to what had already been provided to the College. This belief was reflected in the College's Brief at para 101: "it would be unreasonable to order Dr. Al-Naami [to] be permitted to return to practice in light of the evidence currently before the Complaints Director, and the knowledge that more relevant and significant evidence is contained in Crown records." See also para 87.

[168] The belief, however, was speculation. The Crown disclosure may have contained just what had been passed on to the College, additional insignificant information, or additional significant information. There was no basis for drawing conclusions one way or another relating to the contents of the Crown disclosure.

[169] Added to this uncertainty was that there was no evidence on the record that the Crown would have disclosed any information to the College without court order even with Dr. Al-Naami's consent. And further, the Crown might have deferred any production to the College until after the criminal trial was concluded.

[170] The Director's insistence on access to the disclosure information was unreasonable for two reasons.

(iii) Distorting Effect

[171] First, the Director tethered reconsideration to information of uncertain worth, information that the College should not have accessed at the pre-investigation stage of procedure. The repeated request for access to this information distracted and distorted the reconsideration assessment that should have occurred. Reconsideration was pulled into a blind alley.

(iv) No Necessity

[172] Second, as Applicant's Counsel argued, the Director did not need the disclosure information to make his decision. It was not merely that the Director already had ample information, as indicated. I return to my earlier concern about the Director seeking to introduce new information when reconsideration was requested. The Director had in fact decided not to reconsider based on the information he had. In December 2019, the Director stated that the "CPSA has no information … that can otherwise satisfy the CPSA/Complaints Director that Dr. Al-Naami is safe to practice and interact with patients:" CRP 41. That is to say, on the information the College had, Dr. Al-Naami could not safely return to practice. The Director's February 26, 2020 communication stated that the Registrar remained of the opinion that Dr. Al-Naami should remain withdrawn, "as the disclosure from the Crown (if as you have described) would not otherwise suggest to him that Dr. Al-Naami is appropriately safe to reenter practice," and the outcome of the criminal matter would be required to reevaluate Dr. Al-Naami's practice

condition:" CRP 47. On March 10, 2020, the Director stated that Dr. Al-Naami "has not provided any information that is required to assist in setting the terms of any agreement for reissuance of a practice permit:" CRP 60.

[173] The Director, one might observe, had already come to conclusion in August 2019 that Dr. Al-Naami should not be permitted to practice, before receiving additional information. *That* was the position that Dr. Al-Naami wished to have reconsidered.

[174] The actual situation was this: The Director had arrived at the conclusion based on the information already received that Dr. Al-Naami could not safely return to practice. In the Director's view, to dislodge that conclusion, Dr. Al-Naami would have to provide additional information, particularly through permitting access to Crown disclosure. In effect, it was up to Dr. Al-Naami to provide additional information that would provide a foundation for the Director to re-think his conclusion. The additional information would be provided "for the purposes of determining whether Dr. Al-Naami may return to practice prior to the completion of both criminal and CPSA processes:" CRP 62. (In my view, the "burden" on Dr. Al-Naami was tactical only – the Director was saying that if Dr. Al-Naami sought a different conclusion additional information would have to be provided since the Director had drawn his conclusion on the information that he already had. There was no suggestion in argument that any burden of proof (should that notion have any grip in an informal pre-investigation stage of a disciplinary procedure) had been "shifted" to Dr. Al-Naami.)

[175] Again, the access to Crown disclosure matter was a distraction. The fundamental issues concerned the reasonableness of the Directors' determination in the first place that Dr. Al-Naami was not safe to return to practice, or more precisely, the reasonableness of the Director's determination that his conclusion need not be reconsidered without additional evidence.

4. Was the Director's response to Dr. Al-Naami's request for reconsideration reasonable?

[176] I'll consider the approach to the Director's decisions, the information received by the Director, whether the complaints were supported by a *prima facie* case, whether the information received supported an inference of risk to present or future patients, and whether the Director's reasons show that the measures relied on to deal with the risk took into account the relevant considerations.

(a) Aspects of the Decisions and Standard of Review

[177] The standard of review of the Director's reasons is reasonableness. Paragraph 133 of ***Vavilov*** bears repeating:

> [133] .... Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention. This includes decisions with consequences that threaten an individual's life, liberty, dignity or livelihood.

I must also confirm that the reasons must justify the decision: ***Vavilov*** at para 86. The reasons must stand on their own, in context and on the record. It is not for me to "fashion [my] own reasons to buttress the administrative decision:" ***Vavilov*** at para 96. The reasons must be responsive to the submissions of the parties: ***Vavilov*** at para 106. The requirement of responsiveness to submissions was elaborated at paras 127 and 128 of ***Vavilov***:

> [127] The principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties. The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard: *Baker*, at para. 28. The concept of responsive reasons is inherently bound up with this principle, because reasons are the primary mechanism by which decision makers demonstrate that they have actually listened to the parties.
>
> [128] Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.
>
> See also para 91.

[178] With respect to para 128 of ***Vavilov***, I acknowledge that the Director was a front-line administrator. He did not issue formal reasons and could not be expected to have written the equivalent of formal reasons. The Director was under no requirement to provide lengthy or detailed reasons. He did, however, provide more than oral and informal responses to Dr. Al-Naami and Applicant's Counsel. His responses included letters and e-mails. The Director's reasoning may be discerned from these sources. All that could be expected would be that the Director would lay out, in short compass, the relevant issues and steps supporting his conclusions, showing that Dr. Al-Naami's arguments had been considered and demonstrating that the Director's decision was made fairly and not arbitrarily: ***Vavilov*** at para 79.

(b) Information Received by the Director

[179] On August 12, 2019, the College was advised by Cpl. Knight of Dr. Al-Naami's child pornography charges. The ALERT press release was issued on August 14.

[180] On September 5, 2019, the College received the information that led to the Second Complaint about Dr. Al-Naami. That complaint has been contested by Dr. Al-Naami.

[181] On September 13, 2019, the RCMP advised the College that electronic devices had been seized from Dr. Al-Naami and a device contained images of a sexual nature (the office images and the deleted image), and that several parents had identified concerns about Dr. Al-Naami.

[182] In February 2020, Applicant's Counsel advised the Director that the Crown prosecutor would likely advise the College that one child pornography video was found on a laptop owned by Dr. Al-Naami (to which his family had access). On March 12, 2020, Applicant's Counsel advised that the Crown would also likely advise the College that the disclosure contained a thumbnail to the video and two unique images that the Crown could argue met the test for child pornography.

(c) The Complaints

[183] There was no suggestion that the First Complaint, relating to the criminal charges based on the police investigation, was not supported by a *prima facie* case. The Second Complaint was supported by the complainant mother's account. There was no argument that her complaint should have been dismissed on the basis of being frivolous or manifestly incredible.

(d) Risk to the Public

[184] The College must protect and serve the public interest. That includes protecting patients from risk of harm caused by physicians. Did the information conveyed to the Director support an inference that Dr. Al-Naami posed a risk to young patients? I found above that two matters must be addressed: What is the nature of the harm that is risked? and Is there a reasonable likelihood of the harm being caused if no restrictions or conditions were imposed? (alternatively, is there a risk of probable harm?)

[185] Dr. Al-Naami faces child pornography charges. He is a pediatrician. In that capacity, he would have access to children. The Director moved immediately to the conclusion of risk and to his conclusion that it was essential that Dr. Al-Naami withdraw from practice until the complaint investigation is completed and the "matter is adjudicated:" August 13, 2019 correspondence, CRP 22. In his December 9, 2019 correspondence, the Director stated that any attempt to return to practice is "incongruent with the CPSA mandate to protect the public," and stated that "this is especially sensitive given the allegation of criminal behaviour involving children and Dr. Al-Naami's position as a community-based pediatrician:" CRP 41. The Registrar was of the view that Dr. Al-Naami should remain withdrawn from practice "as the disclosure from the Crown (if as you have described) would not otherwise suggest to him that Dr. Al-Naami is appropriately safe to reenter practice:" CRP 47.

[186] The nature of the risk and the degree of risk were not explicitly discussed, perhaps on the grounds that these matters were obvious.

[187] Setting aside distinctions and gradations within the realm of the morally indefensible, the best approach to this aspect of the Director's analysis is to confirm that Dr. Al-Naami and Applicant's Counsel accepted that he posed a measure of risk to young patients arising from the information relating to the First Complaint. That acceptance was reflected by Dr. Al-Naami's Undertaking and by Dr. Al-Naami's efforts to return to practice only on conditions. Given Dr. Al-Naami's implicit concessions, the information can be taken as supporting a likely risk to

young patients of harm if Dr. Al-Naami were to have access to them without conditions or restrictions.

[188] What of the Second Complaint?

[189] The Director mentioned in the Second Complaint in his December 9, 2019 correspondence but did not draw any link between it and the First Complaint: CRP 41. The Second Complaint was not mentioned in the Director's report of the Registrar's views on February 26, 2020 or in the Director's March 10, 2020 correspondence.

[190] The College's Brief stated at para 100 that "[i]t was reasonable for the Complaints Director to conclude that the similarities between the two complaints elevates the concern of risk to the public" and referred to the Second Complaint as a factor distinguishing Dr. Al-Naami's circumstances from the circumstances in (e.g.) ***Kumar*** and ***Rohringer***. There are three responses to these points by counsel. First, the link was not made by the Director on the record. Second, besides both complaints relating to minors, the "similarities" (or differences, for that matter) between the circumstances of the First Complaint and the Second Complaint were not elaborated on the record. Third, the Second Complaint approaches a category of complaint identified in ***Fingerote*** at para 32:

> [32] …. However here, where the facts are contested, the conclusions are based on a person's perception of another's intention, and where there is a clinically appropriate explanation put forward with no evidence to the contrary in the record, the Committee needs to point to some evidence to support its inference or opinion that the doctor exposes or is likely to expose his patients to harm or injury.

In this instance, the opinion by an independent physician respecting the clinical appropriateness of Dr. Al-Naami's conduct has not yet been provided. If the Second Complaint stood on its own, as evidence of a single incident, there would be an absence of evidence of probable exposure of patients to harm: see ***Kumar*** at para 28; ***Fingerote*** at paras 5-7, 32. In my opinion, the Director did not make the unreasonable inference that the Second Complaint added any weight to the inference of risk supported by the information bearing on the First Complaint.

(e) Addressing the Risk

[191] The College was required to protect the public and young patients. Dr. Al-Naami represented risk. But did the Director consider or reconsider whether any interim restrictions or conditions were available that could abate, manage, or mitigate that risk, aside from withdrawal from practice?

[192] Again, I have found that the Director was not entitled to defer or refuse this assessment until the consent to access Crown disclosure was in hand. The question is whether, on the information the Director had, the Director reasonably considered or reconsidered whether alternatives to no practice at all were available. In ***Morzaria*** at para 62, Justice Nordheimer J (dissenting) confirmed that "the fact that the ICRC may be justified in making some form of interim order does not grant it *carte blanche* to make any order it wishes."

[193] The Director's response to Dr. Al-Naami's bid for reconsideration left Dr. Al-Naami effectively suspended. The courts have recognized that this measure is potentially devastating: ***Scott*** at para 50. The deployment of suspension as an interim measure should require extraordinary circumstances and be resorted to sparingly: ***Kumar*** at para 21 ("one of the most serious sanctions possible"); ***Scott*** at para 50; ***Huerto*** at para 22 ("Total suspension is a matter of last resort"). Dr. Al-Naami and Applicant's Counsel conveyed the financial and reputational damage the withdrawal was causing. The Director's response was that Dr. Al-Naami's "point [has] been made" but the "hurdle remains that of being able to have any contact with patients – full stop:" CRP 46.

[194] Reasonableness required that the Director's reasons show not only that he had considered the risk represented by Dr. Al-Naami but also the impact of his decision on Dr. Al-Naami's interests and on whether the decision not to permit practice on conditions was appropriate. The Divisional Court properly anticipated ***Vavilov*** in ***Aris v College of Teachers***, 2011 ONSC 1202 at para 27:

> 27 In our view, fairness requires that an individual who loses his qualification to practice his profession through a suspension by his professional college, even on an interim basis, is entitled to an explanation for that decision ….

The need for such an explanation extends to the decision opposing a return to practice in a reconsideration context.

[195] In my opinion, the Director's response to Dr. Al-Naami's return to practice request was deficient and unreasonable in two ways.

(i) No Meaningful Assessment of Proposed Practice Conditions

[196] First, the Director provided no meaningful evaluation of Dr. Al-Naami's proposed practice conditions.

[197] The Director stated that a proposed chaperone condition was "grossly insufficient as all of Dr. Al-Naami's patients are minors." The "as … minors" clause did not function as an explanation. Dr. Al-Naami is a pediatrician so it follows that his patients would be minors. This conclusory comment is disconcerting since the Undertaking itself provided in para 6 that "[a]ny return to practice … shall require a separate agreement confirming a practice permit condition of chaperone attendance with patients." On the effectiveness of the chaperone requirement, see ***Kumar*** at para 22.

[198] Respecting Alternative Undertaking 1, the Director stated that it failed to address "several significant issues," including

- the notification to be given to patients in advance of booking
- what information is to be provided to patients/guardians to provide informed consent as to whether they wish to be seen by Dr. Al-Naami.

The Director pointed to problems but did not identify the standards that needed to be met in Dr. Al-Naami's conditions.

[199] In my opinion, the College, through the Director, was responsible for identifying the types of conditions that might manage Dr. Al-Naami's risk or provide reasons why the type of conditions proposed or any reasonably feasible conditions could not manage his risk. On the assumption that Dr. Al-Naami's proposals were indeed inadequate or insufficient or lacking detail, Dr. Al-Naami required more guidance than that what was proposed was not good enough. Dr. Al-Naami was left to make proposals, followed by rejection without clear direction or explanation for why his proposals did not meet what was required to manage risk. Dr. Al-Naami was not given standards to aim at or was not told why, in his circumstances, a return to practice on conditions could not preserve patient safety. Dr. Al-Naami was left guessing. There is a rule of law, "fair notice," and limit to discretion aspect of this responsibility of the Director. The standards applied by the Director remained opaque, unarticulated.

(ii) Least Restrictive Measures

[200] ***Vavilov*** required the Director to respond to the central concerns raised by Applicant's Counsel. These included, in particular, the proposals for conditions for return to practice which I have just addressed, and the "least restrictive measures" principle.

[201] The "least restrictive measures" principle was a key element in Applicant's Counsel's submissions in favour of a return to practice on conditions. See, for example, CRP 56 (Applicant's Counsel's correspondence of March 12, 2020):

> … Dr. Al-Naami disagrees that the least restrictive means to ensure public safety is his complete removal from the practice of medicine, as suggested by the CPSA. Indeed, there are cases in which physicians with criminal charges, or even more, criminal convictions [,] have safely returned to practice with conditions on their practices. For example, Dr. Ramneek Kumar, who was charged with two counts of sexual interference and one count of sexual assault of a minor … continued to practice medicine safely in Alberta with a chaperone requirement on his licence.

[202] As indicated above, the "least restrictive measures" principle is supported by the cases: ***Kumar*** at para 24 ("what is made clear in these cases is that the regulatory body should be imposing the least restrictive means to protect the public interest in interim situations and unproven allegations"); ***Fingerote*** at para 24 and fn1; ***Scott*** at para 55; ***Rohringer*** at para 69; ***Morzaria***, Nordheimer J (dissenting) at para 46 ("an interim order, of the type made here, ought to be the least restrictive order possible to protect the public"). These cases, for the most part, concerned stays of conditions imposed during investigations, but the approach would apply, *a fortiori*, in pre-investigation circumstances as well. The complaints were founded on allegations that have not yet been established. Investigation had not even begun respecting the First Complaint. But Dr. Al-Naami was blocked outside s. 65 by his Undertaking, precluding resort to the stay application. The practical effect on his professional career of the Undertaking was the same as a suspension of a practice permit by "a person … designated by council … after a complaint is made." The purely formal distinction between a suspension imposed by an Undertaking and a suspension imposed by (e.g.) a "designated person" did not eliminate the issue of whether the Director should consider the appropriateness of practice on conditions. These cases and the principle, then, form part of the constraints on the Director's decision space that should have been respected.

[203] The circumstances of this case are not identical to any of the just-cited cases. Those cases, though, provide illustrations of circumstances in which return to practice on conditions was judicially countenanced: see ***Kumar*** (pediatrician charged with sexual assault and sexual interference (with a minor)); ***Morzaria*** (physician charged with sexual assault, sexual interference, two counts of invitation to sexual touching with a 13-year old patient); ***Rohringer*** (dentist charged with indecent exposure, two counts, involving teenaged girls).

[204] What the Director should have provided were reasons why Dr. Al-Naami's return to practice on conditions was not feasible, was not sufficiently safe for young patients. Instead, Dr. Al-Naami was met with a conclusion asserted without reasons that a return to practice was not possible and with the request for the consent to access Crown disclosure – information that I found the Director should not have insisted on at this stage of proceedings. The Director did not properly respond to Dr. Al-Naami's request for reconsideration of his Undertaking.

(f) Conclusion

[205] The Director's failures to assess the effectiveness of Dr. Al-Naami's proposed conditions, to describe the standards that conditions would have to meet, and to consider means of addressing the risk represented by Dr. Al-Naami falling short of full suspension made the Director's decisions about Dr. Al-Naami's request for reconsideration unreasonable. The Director's reasons were not responsive to the submissions of Applicant's Counsel, specifically the proposed practice conditions and the least restrictive measures principle. The Director's reasons did not reflect the case-law constraints on his decision space. The Director did not identify the facts that demonstrated the need for Dr. Al-Naami to remain withdrawn from practice, the most severe and damaging pre-hearing, pre-investigation disposition. The Director's reasons for his decisions did not satisfy the requirements for "justification, transparency, and intelligibility."

[206] I find that the Director failed to reconsider Dr. Al-Naami's Undertaking reasonably.

IX. Remedy

[207] ***Vavilov*** provided guidance respecting the usual remedial consequence on a finding that a decision-maker's decisions were unreasonable at paras 140-141:

> [140] Where the reasonableness standard is applied in conducting a judicial review, the choice of remedy must be guided by the rationale for applying that standard to begin with, including the recognition by the reviewing court that the legislature has entrusted the matter to the administrative decision maker, and not to the court, to decide: see *Delta Air Lines*, at para. 31. However, the question of remedy must also be guided by concerns related to the proper administration of the justice system, the need to ensure access to justice and "the goal of expedient and cost-efficient decision making, which often motivates the creation of specialized administrative tribunals in the first place": *Alberta Teachers*, at para. 55.
>
> [141] Giving effect to these principles in the remedial context means that where a decision reviewed by applying the reasonableness standard cannot be upheld, it

> will most often be appropriate to remit the matter to the decision maker to have it reconsider the decision, this time with the benefit of the court's reasons. In reconsidering its decision, the decision maker may arrive at the same, or a different, outcome: see *Delta Air Lines*, at paras. 30-31.

[208] Dr. Al-Naami sought an order permitting his to return to pediatric practice on specified conditions. I will not order that Dr. Al-Naami be permitted to return to practice. Determination of the appropriate practice conditions – or even of whether any there are any reasonably available practice conditions – goes beyond unaided judicial expertise. For example, in the course of submissions, there was discussion about who might qualify as a chaperone or "practice monitor," since a person without medical training might not know what types of examinations were medically appropriate. If a person with medical training were required to serve as a chaperone, the issue of compensation would arise. Because this was an application for judicial review, I did not have submissions or evidence that dealt comprehensively with practice conditions.

[209] I declare that Dr. Al-Naami does not have, at the present state of proceedings, any obligation to the College to provide his consent to the production of Crown disclosure information to the College. I declare that the College does not have, at the present state of proceedings, any entitlement to receive information about Crown disclosure relating to Dr. Al-Naami. By "present state of proceedings" I mean the state of proceedings now in place between Dr. Al-Naami and the College, with Dr. Al-Naami having provided an Undertaking and the College having stayed or suspended the investigation relating to the First Complaint – that is, a pre-investigation state of proceedings.

[210] The Director unreasonably insisted on provision of the consent to provide Crown disclosure information to the College. On the record, the Director failed to consider the possibility of Dr. Al-Naami's return to practice on conditions at all or properly, failed to respond to the issues raised by Applicant's Counsel, and failed to consider the "least restrictive measures" principle and relevant case law. These omissions rendered his reconsideration of the Undertaking unreasonable.

[211] The Director's reconsideration of Dr. Al-Naami's undertaking must therefore be quashed.

[212] I order the College to reconsider whether, on the information currently available to the College, Dr. Al-Naami could be permitted to return to practice on conditions that would appropriately protect young patients. I am *not* directing that Dr. Al-Naami *be* permitted to return to practice. Rather, I am directing that the College consider whether there *are* any conditions that could be imposed on Dr. Al-Naami's return to practice that would reasonably protect young patients from becoming victims of criminal offences. If the College considers that such conditions are available, I direct the College to consider whether Dr. Al-Naami's Undertaking may be suitably amended to permit his return to practice. I direct the College to provide an explanation to Dr. Al-Naami as to why his Undertaking may or may not be amended to permit his return to practice on conditions.

X. Costs

[213] Dr. Al-Naami was not successful on the issues of the admissibility of his affidavit, the standard of review, or aspects of the remedy sought. Dr. Al-Naami was successful on the main issues in the litigation.

[214] The parties, though, did not speak to costs before me. If an agreement on costs cannot be reached, the parties may provide written submissions on costs by August 31, 2021 and I will respond in writing.

Heard on the 23rd day of April, 2021 at the City of Edmonton, Alberta.
Dated at the City of Edmonton, Alberta this 16th day of July, 2021.

W.N. Renke
J.C.Q.B.A.

Appearances:

Rene Gagnon
Emily Hole
Bennett Jones LLP
for the Applicant

Craig Boyer
Shores Jardine LLP
for the Respondent

TAB 3

Court of Queen's Bench of Alberta

Citation: Calf Robe v. Canada, 2006 ABQB 652

Date: 20060906
Docket: 9901 03772
Registry: Calgary

06 255 150

Between:

Marie Calf Robe

Plaintiff

- and -

Attorney General of Canada, the Catholic Archdiocese of Calgary, and the Missionary Oblates - Grandin Province

Defendants

- and -

The Roman Catholic Bishop of the Diocese of Calgary, the Roman Catholic Bishop of the Diocese of Calgary on Behalf of the Roman Catholic Church, the Missionary Oblates - Grandin Province; the Missionary Oblates of Mary Immaculate; the Sisters of Charity of Providence of Western Canada; the Sisters of Charity (Grey Nuns) of Alberta; the Sisters of Charity (Grey Nuns) of Montreal; and the Sisters of Charity (Grey Nuns) of the Northwest Territories

Third Parties

Reasons for Decision
of the
Honourable Mr. Justice T.F. McMahon

Introduction

[1] This is an application by a law firm, The Merchant Law Group ("Merchant") for a Charging Order or alternatively a solicitor's lien to secure fees, disbursements and taxes against its former client, the Plaintiff Marie Calf Robe and against one of the Defendants, the Missionary Oblates - Grandin Province ("Oblates"). The Order is not

sought against the Defendant The Attorney General of Canada nor the Defendant the Catholic Archdiocese of Calgary. I conclude that the application must be dismissed.

Facts

[2] Merchant filed a Statement of Claim on February 26, 1999 on behalf of Calf Robe claiming damages arising from her attendance at an Indian Residential School from 1943 to 1950. On November 21, 2005 Calf Robe filed a Notice of Change of Solicitor, choosing to act on her own behalf. A second such notice was filed March 15, 2006. On November 20, 2005 Canada and various claimants' law firms, including Merchant, entered into an Agreement in Principle to settle all claims arising from attendance at Indian residential schools by thousands of claimants. A Settlement Agreement received federal cabinet approval May 10, 2006. Merchant agreed to execute the Settlement Agreement on April 24, 2006. The Settlement Agreement is binding on the parties. The performance of some of the obligations under it are contingent upon other events occurring.

[3] The Settlement Agreement provides that certain claimants who resided at an Indian residential school are entitled to receive a common experience payment ("CEP") based upon the number of years of residence at the school. The Settlement Agreement further provides for a process called an Independent Assessment Process ("IAP") by which additional compensation may be awarded to those claimants who suffered physical or sexual abuse. All other claims are encompassed within and released by acceptance of the CEP by a claimant.

[4] The Settlement Agreement provides for legal fees. Part XII of the Agreement in Principle, incorporated into the Settlement Agreement, provides:

> XII LEGAL FEES
>
> WHEREAS legal counsel have done very substantial work on behalf of Eligible CEP Recipients for many years, have contributed significantly to the achievement of the Agreement in Principle and have undertaken not to seek payment of legal fees in respect of the Common Experience Payment to be paid to Eligible CEP Recipients, Canada agrees to compensate legal counsel in respect of their legal fees as follows:
>
> ...
>
> 4. The National Consortium and the Merchant Law Group shall each be paid $40,000,000 plus reasonable disbursements, and GST and PST, if applicable, in recognition of the substantial number of Eligible CEP Recipients each of them represents and the class action work they have done on behalf of Eligible CEP Recipients ... .

...

6. No lawyer or law firm that has taken part in these settlement negotiations or who accepts a payment for legal fees from ... Canada shall charge an Eligible CEP Recipient any fees or disbursements in respect of the Common Experience Payment paid to that Eligible CEP Recipient.

[5] Section 13.05 of the Settlement Agreement reads:

13.05 No fees on CEP Payment

No lawyer or law firm that has signed this Settlement Agreement or who accepts a payment for legal fees from Canada, pursuant to Sections 13.06 or 13.08, will charge an Eligible CEP Recipient any fees or disbursements in respect of the Common Experience Payment.

[6] Merchant as counsel of record for Calf Robe at May 30, 2005 will therefore be paid for its work leading to the CEP, assuming the Settlement proceeds to fruition.

[7] Appended to the Settlement Agreement is a separate agreement between Canada and each church organization. Schedule 0-3 is the "Catholic Agreement" which encompasses the Oblates.

Procedural Matters

[8] There are two matters to be addressed.

[9] 1. The Notice of Motion filed by Merchant seeks relief against the Plaintiff Calf Robe and "against each of the Defendants except the Attorney General of Canada". There are only two other named Defendants. The first is "The Catholic Archdiocese of Calgary". By an Order of March 18, 2002 made in all Indian Residential School actions under case management, including the Calf Robe action, the actions were struck as against that Defendant because it was a non-existent entity. Apart from Canada, that leaves only the Oblates as a Defendant in the Calf Robe action. Merchant also served the many Third Parties who had been brought into the action by Canada. Merchant seeks the same Charging Order or lien as against those Third Parties notwithstanding the wording of its motion. Most of those Third Parties appeared and opposed the motion. All except the Oblates argue that no relief can be given against them since none was sought against them in the motion. Merchant rather blithely argues that since they all came, it would be "expedient" to deal with the motion as though it had not been carelessly drafted. But a party who responds to a motion which seeks relief only against another party should not, merely by so appearing, become subject to the same relief. In any event, had I permitted expediency to prevail, the result would have been the same, as will be seen.

[10] 2. The only affidavit filed by Merchant in support of its motion was an affidavit of a legal secretary in the Merchant Calgary office. She deposes as a fact that "Marie Calf Robe duly executed a Retainer Agreement". She is not a witness to the Retainer Agreement nor is there any suggestion that she has any personal knowledge of its execution by Calf Robe. She also opines that her employer "is entitled according to the Retainer Agreement to compensation ...". She deposes that the file shows the first work occurred on February 4, 1999. Lastly, she passes on information received from one Matthew Merchant regarding the Settlement and Merchant's entitlement to a portion of money paid to Calf Robe.

[11] Had a Merchant lawyer taken the affidavit rather than obliging an employee to do it, he or she would have been subject to cross-examination and could not have properly argued the motion on his or her own behalf. In fact, the secretary was cross-examined on her affidavit. The device of using a legal secretary to depose to contentious facts or to relay information received from a lawyer is to be discouraged. In fact it is seldom done by competent and experienced lawyers in Alberta. The usefulness of this affidavit is thus compromised.

The Retainer Agreement

[12] Calf Robe deposes that:

> 3. I was approached by someone from the Merchant law firm in 1999 at Siksika. He was a large bald man and I have received information that he is now deceased. He told me to sign a document and that I would be getting money for my residential school abuse shortly. That document is the Assignment and Retainer Agreement dated March 13, 1999 attached as "Exhibit A". This document was never explained to me and I was not told by a Merchant representative to get any advice about it.
>
> 4. I received a letter dated February 25, 1999 from the Merchant law firm which enclosed the Retainer Agreement. In that letter, Anthony Merchant advised me that I would not have to pay that firm any fees or disbursements if I did not recover from that process. That letter is attached as "Exhibit B".

[13] The letter referred to was signed by E.F. Anthony Merchant, Q.C. and began:

> Enclosed please find an Assignment & Retainer Agreement which you should sign and send back to us quickly if you want us to act for you.

[14] The Retainer Agreement is dated March 13, 1999. The Agreement bears two signatures, apparently Calf Robe and Merchant but the place for a witness is blank. Calf Robe now argues that she did not understand that she would be obliged to pay out any

fees if she discharged Merchant. The Merchant letter urging her to sign the Retainer Agreement said:

> The papers which you should sign offer you the likelihood of recovery but you have no risk of paying anything to us if we do not recover on your behalf. Regardless of any possible misinterpretation to the contrary, you will pay nothing in fees and disbursements if you do not recover from this process.

[15] That unequivocal representation stands in contrast to the Retainer Agreement, which itself could be confusing to the client. Paragraph 10 provides that if the services of Merchant are terminated the client agrees to pay the solicitor's fees equal to that solicitor's then prevailing hourly rate, multiplied by the number of hours expended on the file. That paragraph is immediately followed by paragraph 11 which reads:

> Nothing in the Agreement is intended to require the client to pay any fees or disbursements if nothing is recovered. If nothing is recovered, the client will pay nothing to the Merchant Law Group.

Charging Orders

[16] Rule 625(1) of the Alberta Rules of Court provides:

> 625(1) The court may, on the application of a barrister and solicitor, declare the barrister and solicitor to be entitled to a charge upon the property recovered or preserved through his instrumentality in any proceedings prosecuted or defended by him for his proper fees and disbursements in reference to the proceeding, and may make such order or orders as may be just for the raising of payment of the fees and disbursements out of that property.

[17] The Rule has been considered by the Alberta Court of Appeal in *Royal Bank of Canada v. Laughlin*, 2001 ABCA 78, 277 A.R. 201. Four conditions must be met for a charging order to be granted:

> 1. The lawyer must have conducted litigation on behalf of the client.
> 2. The lawyer's efforts must have recovered or preserved for the client the net property sought to be charged.
> 3. The charge is limited to fees and disbursement incurred in the same litigation which recovered or preserved the property.
> 4. Even if the foregoing conditions are met, the court may not grant the charge if to do so would be unfair.

[18] The last requirement conveys some discretion to the court. In *Merchant Law Group v. McLeod & Co.*, 2005 ABQB 875, a delay of more than one year in applying for a charging order caused the court to find that it would be unfair to grant the order.

Where the advantage gained from a lawyer's work was merely illusory or where there was little net benefit to the client, a charging order has been denied. See *Henry v. Columbia Securities Ltd.* 1942 B.C.J. No. 25 (C.A.). The burden is on the lawyer to show that the property to be charged was recovered in the very proceedings which he commenced and through his "instrumentality". Fairness requires that there be a real connection between the property to be charged and the lawyer's labour. Failing a right to a charging order, a lawyer can always tax his account or sue for recovery of proper fees and disbursements, subject to Rule 626.

Solicitor's Lien

[19] At common law a lawyer may assert a lien for fees against property held by him or another party. The right to a lien is subject to equitable principles. The nature and extent of a solicitor's lien is well and lucidly described by Rawlins, J. in *Merchant Law Group v. McLeod & Co.* and also by Veit, J. in *Re Cochard (Bankrupt)*, 2005 ABQB 679. Like a charging order, a solicitor's lien attaches to property recovered or preserved by the lawyer's work, i.e. the fruits of successful litigation. Also like a charging order, the right to a lien is not absolute. It is merely a solicitor's right to seek the equitable intervention of the court to protect the lawyer for his fees. The court retains a discretion.

Analaysis

[20] There are several reasons why this application must fail.

[21] The Settlement Agreement precludes Merchant from seeking any additional fees for any services apart from Calf Robe's abuse claims. Merchant is not entitled to any charge against Calf Robe's CEP if and when received. If of course the Settlement does not proceed to fruition then all parties are back in litigation and the agreement itself would not longer bar a claim to a charging order or a lien.

[22] As to her abuse claims, there is no evidence that any recovery which she might receive has any connection to Merchant's "instrumentality" or Merchant's efforts on her behalf, to use the words of Rule 625 and the *Laughlin* case. Calf Robe deposes that:

> 6. I never went to trial or a discovery meeting about my case. I was never offered any money from the Merchant firm on my case. I thought the Merchant firm forgot about me. I have not moved since 1999 and the Merchant firm has always had my address. I check my mail regularly.
>
> ...
>
> 12. Shortly after firing the Merchant firm, I filled out an application to the government's Alternative Dispute Resolution ("ADR") program. I did not use a lawyer for this and I did not need a lawyer for this.

[23] Calf Robe entered into the dispute resolution programme to resolve her abuse claims after she had fired Merchant. She pursued that remedy without Merchant's services. If she enters the IAP she will do that as well without Merchant's services. Pre-existing litigation is not a prerequisite to either course of action. Any recovery she achieves in those proceedings will be through her own or new counsel's efforts. There is no evidence that Merchant did any work on her abuse claims before starting the action. Merchant's Statement of Claim for Calf Robe was filed February 26, 1999. Much of it is generic. Paragraphs 13, 14 and 15 purport to itemize physical and sexual abuse visited upon Calf Robe yet strangely Merchant's detailed fee account sent to Calf Robe lists only 1.09 hours of time on or before February 26, 1999. None of it relates to any meeting with or conversation with Calf Robe by Merchant or any person on Merchant's behalf.

[24] Merchant issued the Statement of Claim for Calf Robe along with thousands of others. No doubt those many proceedings played a role in reaching the Settlement and the payment of the CEPs to each claimant. For that the Settlement Agreement calls for Merchant to receive between $25 million and $40 million. To say that it would be unfair to permit Merchant to extract even more money from Calf Robe in these circumstances is a gross understatement. Egregious is a better description.

[25] The basis for a charging order or a lien is the lawyer's entitlement to a fee. Here, that entitlement arises from the Retainer Agreement and the Merchant letter. Both documents could lead a reasonable client to conclude that she had no obligation for fees if Merchant did not recover money for her. Without a clear entitlement to fees, Merchant cannot claim a charge or lien.

[26] Merchant argues that its charge or lien should attach to monies to be paid to Calf Robe from the named Catholic entities. So far as the Oblates and the other Catholic entities are concerned, the Catholic agreement referred to earlier does not provide for any cash payment directly to a former student. The Catholic entities commit to payments to a non-profit organization controlled by them to develop healing and reconciliation programmes and to provide services to former students and their families. Thus there is no money contemplated by the Settlement Agreement to be paid by any Catholic entity to Calf Robe to which a charging order or lien could attach, even if it could be said that such funds were due to Merchant's efforts or instrumentality. Merchant argues that a charging order or lien could attach to any money going to the former client but that is clearly wrong.

[27] Counsel for Calf Robe also argues *non est factum*. Given the conclusion I have reached on other grounds, I need not deal with this issue.

Conclusion

[28] There is no basis for either a charging order or a solicitor's lien. The application is dismissed.

Costs

[29] Costs follow the result. Merchant insisted upon seeking relief against the Third Parties notwithstanding the form of its Notice of Motion. The motion was served upon the Third Parties and they appeared and responded. Each one who did is entitled to costs. Merchant argues that if the Church organizations were certain they would never pay anything to Calf Robe, they ought to have submitted to a charging order on the basis that it was harmless. That argument is so devoid of merit it requires no response.

[30] The various Respondents seek costs on a solicitor/client scale. As to the Oblates, Merchant brought its motion notwithstanding the clear provisions of the Settlement Agreement. Merchant knew or ought to have known that it could not seek a charging order or lien against the CEP if and when paid to Calf Robe. It further knew or ought to have known that the Oblates, like all the Catholic entities, were by Schedule 0-3 to the Settlement Agreement not required to make any further payments to Calf Robe, whether in dispute resolution or IAP or any other process. The Oblates have been obliged to incur needless costs.

[31] Merchant also claimed its relief against the Third Parties The Sisters of Charity (Grey Nuns) of Alberta, The Sisters of Charity (Grey Nuns) of Montreal, and The Sisters of Charity (Grey Nuns) of the Northwest Territories. They are in the same position as the Oblates with one additional factor. None of the Grey Nuns entities operated a school which Calf Robe attended. Counsel for the Grey Nuns organizations says that fact was known to Merchant as a result of examinations for discovery. Merchant does not deny it. There was no basis for this application to be brought against those organizations. They are entitled to costs.

[32] Merchant also claimed against another Catholic entity - Sisters of Charity of Providence of Western Canada. They appeared by counsel and made representations. Their factual position is the same as the other Third Parties, and ought to have been known by Merchant. They too will have costs.

[33] As to the scale of costs, I do not find conduct, or misconduct, which would warrant solicitor/client costs. However, the relief sought against the Third Parties was so clearly baseless that increased costs are proper. The Oblates, the Grey Nuns (as one organization) and the Sisters of Charity of Providence will each have costs against Merchant on column 5 of Schedule C, per item 15.

[34] Calf Robe is equally entitled to her costs on the same scale. She has been wholly successful. The motion was brought against her notwithstanding the contradictions in the Retainer Agreement and the Merchant letter, and despite a lawyer's special obligation to inform a client of her liability for legal fees.

[35] Canada does not seek costs.

Heard on the 12th day of July, 2006.
Dated at the City of Calgary, Alberta this 6th day of September, 2006.

T.F. McMahon
J.C.Q.B.A.

Appearances:

L. Andrychuk, Q.C.
for the Plaintiff

C. Coughlan
J. Oltean
for the Defendant Canada

C. Onishenko
for the Missionary Oblates - Grandin Province

R. Baril, Q.C.
for the Sisters of Charity of Providence of Western Canada

R. Donlevy
for the Sisters of Charity (Grey Nuns) of Alberta

M. Merchant
for the Merchant Law Group

9p.

TAB 4

In the Court of Appeal of Alberta

Citation: Canada (Attorney General) v Andronyk, 2017 ABCA 139

Date: 20170504
Docket: 1603-0234-A
Registry: Edmonton

Between:

The Attorney General of Canada
on Behalf of United States of America

Applicant
(Respondent)

- and -

Robert Ermis Andronyk

Respondent
(Appellant)

Reasons for Decision of
The Honourable Mr. Justice Jack Watson

Application for Judicial Review
Motions by Attorney General to Rescind Release Order
Issue Warrant and Dismiss Application for Judicial Review

Reasons for Decision of
The Honourable Mr. Justice Jack Watson

I Introduction

[1] On April 25, 2017, I gave oral reasons granting applications in this matter with more detailed reasons to follow. The formal orders reflecting the rulings thus made have already been signed by me. These are the reasons to explain the granting of the applications and the signing of the Orders.

[2] The principal application before me was a multi-faceted application by the Attorney General of Canada, the respondent on the within application for judicial review. A cross-application was made by the counsel for the applicant for judicial review, Robert Ermis Andronyk (the "applicant"). Counsel for the applicant, Mr. Nathan J. Whitling, sought leave to withdraw from the record as counsel, largely grounded on his loss of contact with the applicant and in light of the evidence for the Attorney General in support of the Attorney General's motion. Mr. Whitling's application to withdraw was also granted. There was no reality to leaving Mr. Whitling in a limbo of legal duty in this matter.

II Context

[3] The application made by the Attorney General of Canada (on behalf of the Minister for Justice) had several aspects and was brought in relation to the within judicial review application from the Minister's decision dated September 12, 2016, to surrender the applicant to the United States of America pursuant to the *Extradition Act*, SC 1999, c 18. The Minister's decision to unconditionally surrender the applicant to the United States authorities pursuant to s 40 of the *Extradition Act* had been challenged by an originating application for judicial review filed on September 20, 2016, on behalf of the applicant.

[4] Earlier, the applicant had been committed for extradition to the United States by order of a judge of the Court of Queen's Bench dated March 2, 2016. That extradition committal order referenced an offence of "Luring a Child contrary to section 172.1(1)(b) of the *Criminal Code*". Presumably, applying the conduct based approach to extradition in this country set out in ***Canada v Fischbacher***, 2009 SCC 46 at paras 23-29, 40-41, [2009] 3 SCR 170 and section 58(b) of the *Extradition Act*, the Minister ordered surrender for a count as follows:

> Luring a minor for sexual exploitation, a class 3 felony, in violation of Arizona Revised Statutes, sections 13-3551, 13-3554, 13-3821, 13-610, 13-705, 13-701, 13-702, and 13-801 (Counts 1-7), as set out in indictment CR 2013-433491-001 filed on July 25, 2013, in the Superior Court of the State of Arizona, in and for the County of Maricopa.

[5] Pending his application for judicial review of the Minister's decision in this Court, the applicant sought and was granted judicial interim release by Berger JA on September 30, 2016, pursuant to s 20 of the *Act*. Two conditions of that order are particularly pertinent here although the others are not irrelevant. One is condition (1)(iii) which required the applicant to report once per week by telephone and twice a month in person to the bail supervisor he had been dealing with previously on release. Another is condition (1)(xiv) requiring the applicant to proceed with his application for judicial review with due diligence. That Order provided for a registrable encumbrance favouring the Crown on a residence located in NW, Edmonton, in the amount of $150,000 to enforce the conditions of the order. Importantly, those aspects of the release order were carried forward into the recognizance executed by the applicant.

[6] As noted above, the Attorney General's application had several aspects. The first element of the application sought a warrant for the arrest of the applicant pursuant to s 525(5) of the *Criminal Code*. The *Criminal Code* applies to these proceedings by virtue of ss 19 and 20 of the *Extradition Act.* Integral to that remedy sought by the Attorney General would also be an order cancelling the order of judicial interim release granted on September 30, 2016.

[7] By virtue of those *Code* provisions, I had jurisdiction as a single judge to revoke the order of Berger JA and to direct the issuance of a warrant if satisfied there were "reasonable grounds to believe" that the applicant had "contravened the .... recognizance": see ***R v Manasseri***, 2015 ONCA 3 at paras 30-32, 329 OAC 156; ***R v Parchment***, 2015 BCCA 196 at paras 15-19, [2015] BCJ No 876 (QL). For reasons set out below, that application to revoke the order and direct a warrant was granted.

[8] The second element of the application was related to the first. It sought an endorsement of default on the recognizance entered into by the applicant on October 1, 2016, pursuant to that release order. That application was also granted. My jurisdiction to so direct rested on s 770(1) of the *Criminal Code* although the practical involvement is that of the Registrar of this Court and then forwarded to the clerk of the Court of Queen's Bench for disposition in accordance with those provisions of the *Criminal Code*. In passing, I note that the decision on forfeiture itself would appear to not only be primarily with the Court of Queen's Bench, but perhaps, in this jurisdiction, exclusively so: see ***R v Aw***, 2008 ABCA 376, 440 AR 323.

[9] That said, it is an interesting question whether forfeiture of this sort, though built on a *Criminal Code* platform, might be considered to be a civil property process under s 92:14 and 92:15 of the *Constitution Act 1867*, and thus within the embrace of ss 3 and 10 of the *Judicature Act*, RSA 2000 c J-2: compare the discussion in ***Canadian Broadcasting Corporation v The Queen, (Re White),*** 2008 ABCA 294, at paras 19-30, 437 AR 130 as to s 11 of the *Judicature Act*, outcome affirmed on other grounds *sub nom* ***Toronto Star Newspapers Ltd v Canada***, 2010 SCC 21, [2010] 1 SCR 721 (see paras 62 to 63). If so, the decision of the Court of Queen's Bench might be reviewable in this Court notwithstanding ***Aw***, and thus, save the Supreme Court of Canada the need to backstop the process directly.

[10] The position in Ontario as to forfeiture of recognizances and as to rights of appeal from forfeiture orders appears to be different: compare ***Canada v Horvath***, 2009 ONCA 732, 248 CCC (3d) 1. Whatever the differences may be, I found ***Horvath*** to be an illuminating discussion of the "pull of bail" principle and the law in this topic region. See also ***R v Wilson***, 2017 ONCA 229 at paras 21-36, [2017] OJ No 1459 (QL) and ***R v Flanders***, 2015 BCCA 33 at paras 11-33, 319 CCC (3d) 240. The position in British Columbia also seems to differ from Alberta in terms of appellate courts assuming jurisdiction to consider the issue.

[11] Part XXV and its specific provisions of the *Criminal Code* dealing with forfeiture of recognizances is an orderly set-up of some antiquity. It is a legislative scheme which is carried out in the Court of Queen's Bench of this jurisdiction on a fair hearing basis with relief from forfeiture principles in mind. In other words, there is provision for notice being given to third party interested individuals and so forth. There may be such persons interested in relation to the real property referred to above encumbered as indicated. Consequently, it would appear to be a situation well suited to the adjudicative authority of the Court of Queen's Bench.

[12] The third element of the application of the Attorney General was for dismissal of the application for judicial review to this Court. The jurisdiction of a single judge to grant such an ultimate remedy can be found in Rule 14.37 of the *Alberta Rules of Court*, AR 124/2010 which includes the following:

> Single appeal judges
>
> 14.37(1) Unless an enactment or these rules otherwise require, a single appeal judge may hear and decide any application incidental to an appeal, including those that could have been decided by a case management officer.
>
> (2) For greater certainty, a single appeal judge may [.....]
>
> (b) declare an appeal to be struck, dismissed or abandoned for failure to comply with a mandatory rule, prior order or direction of the Court of Appeal, [.....]

[13] This Rule is nourished for federal law jurisdictional purposes by s 482(1) of the *Criminal Code* and linked thereto by s 57(10) of the *Extradition Act*. In my view, there is jurisdiction in a single judge to dismiss an application for judicial review of a Minister's surrender order under the *Extradition Act* for reasons as set out in Rule 14.37.

[14] Parliament has not, in my view, signaled by any language of the *Extradition Act* that the mere fact that substantive review of the Minister's decision lies with a quorum of the Court commands the further interpretation that a quorum is necessary to enforce the regularity processes of the Court under the *Act*. Rather, the *Extradition Act* itself provides that a single judge is empowered to screen grounds of judicial review: compare s 49 of the *Act* as to the leave requirement for appeals from orders of committal for extradition; ***United States of America v Sosa***

2012 ABCA 242 at paras 4-21, 536 AR 61, leave denied (2013) [2012] SCCA No 433 (QL) (SCC No 35047).

[15] In that light, it is hard to see why Parliament could have intended to hinder what is supposed to be an efficient and expeditious Court process. This aspect of the *Extradition Act* is related to the review of the essentially political decision of the Minister, to which deference is generally owed: see ***United States of America v Lake***, 2008 SCC 23 at para 34, [2008] 1 SCR 761 and ***Canada v Barnaby***, 2015 SCC 31 at para 2, [2015] 2 SCR 563 and ***M(M) v Canada,*** 2015 SCC 62 at para 126, [2015] 3 SCR 973.

[16] It is not obvious what benefit might exist in requiring a full quorum of the Court to decide whether the applicant -- who is in seeming default of the terms of his interim release order -- has thereby evinced a lack of interest in his own judicial review application under circumstances such as presented here. While there is a suggestion on the facts here, as discussed below, that the reason for the seeming default of the applicant may be quite sympathetic, even that fact could not re-cast the proper reading of the *Extradition Act* for all cases.

III Discussion

[17] From the material that has been provided to me, I was satisfied that in fact the test in s 525(5) of the *Criminal Code* as to breach of the recognizance which was entered into in this instance has been satisfied for two reasons. One was on the basis of the failure to report as required by the judicial interim release order. The other was non-compliance with the due diligence provisions of the order which was set by Berger JA, as well. In so saying, I have no criticism of Mr. Whitling who no doubt has represented the applicant as well as he could until he stopped receiving dispatches. Mr. Whitling was unable to shed light on the facts asserted by the Attorney General.

[18] These reasons should include a synopsis of the evidence. One affidavit was of Shantel Schmidek, who was the bail supervisor for the applicant starting in May, 2016, under an earlier order of judicial interim release which was, as it happens, signed by me. She confirmed the content of the recognizance and the applicant's failure to report and that the applicant had not been committed to custody somewhere in Alberta.

[19] The second affidavit was of Mark Stanicki, a legal assistant with Justice Canada, who reported to counsel for the Attorney General. His affidavit essentially annexed the relevant court records and the Minister's surrender order relating to the applicant. He also provided information that the applicant had not complied with the requirements as to filing and serving on that office of a factum on the application for judicial review.

[20] On this topic, I would observe that I do not part company with the concern expressed in the decision of Strekaf JA in ***Tole v Lucki***, 2017 ABCA 79 at para 9, [2017] AJ No 184 (QL) about potential misuses of affidavits of legal assistants that are essentially hearsay in content. To me,

however, this affidavit contains the sort of non-controversial information which is a recognized exception in ***Tole***.

[21] Moreover, it is helpful to assemble court records and other procedural fact evidence in an affidavit like this rather than commit a judge to ferret through court records to ascertain the same contextual circumstances. Court records are, *prima facie*, admissible in their own right as well as under the *Canada Evidence Act*, both for procedural fact purposes and for adjudicative fact purposes, such as proof of breach of recognizance, subject to adjudicative fairness considerations: see ***R v Tatomir***, 1989 ABCA 233, 99 AR 188, leave denied [1989] SCCA No 448 (SCC No 21713); ***R v West***, 2011 BCCA 109 at paras 3-19, [2011] BCJ No 583 (QL); ***R v Jerace***, 2016 ABCA 70 at paras 7-8, [2016] AJ No 239 (QL) leave denied (2016) [2016] SCCA No 342 (QL) (SCC No 37150); ***R v Caesar***, 2016 ONCA 599, 339 CCC (3d) 354; and compare ***Kon Construction Ltd v Terranova Developments Ltd,*** 2015 ABCA 249 at paras 13-15, 387 DLR (4th) 623 as to routinely (and electronically) recorded evidence.

[22] For the purposes of s 525(5) of the *Code* in this instance, the crucial affidavit provided is that of Cst. Jeffery Pettigrew of the RCMP who attested that on November 30, 2016, his Strathcona County Detachment received a call as to an abandoned vehicle located near Highway 830 and Highway 38 in the County, close to the Vinca Bridge which crosses the North Saskatchewan River. In the abandoned vehicle was located what purported to be a "suicide note" addressed to the applicant's daughter, expressing fears about extradition, facing lengthy prison time and not being able to afford a lawyer. His affidavit went on to set out the following:

> 5 Constable Steve Burgess (Cst Burgess) and I walked down to the North Saskatchewan River and saw that both shores of the river had frozen over extending out approximately 20 feet towards the centre of the river. There were a large amount of sizeable ice pieces floating down the river.
>
> 6 Based on my observations at the location, I believed Robert Andronyk may have jumped off the Vinca Bridge. No evidence of foul play was noted.
>
> 7 I learned that RCMP Air Services was not able to attend due to inclement weather. I also learned that Fire Services were not able to assist with a water search due to the cold weather, ice pieces in the water, darkness and the speed of the current.
>
> 8 An RCMP Police Dog Service member attended the location and I was advised they were unable to obtain a track leading away from the vehicle. I noticed a spot in the middle of the north side of the bridge where some dirt appeared to have been disturbed and there appeared to be smudge marks on the railing.
>
> 9 During my investigation, I spoke to Romayne Andronyk, the daughter of Robert Andronyk, and she said she found Robert Andronyk's medications and

> wallet in his home, and there was a note on the counter with a list of funeral songs. Robert Andronyk's driver's license, Alberta health care card and credit card were in the wallet.

[23] The affidavit of Cst. Pettigew went on to add the applicant's daughter told him of having received a substantial quantity of money from the applicant out of two estates. She advised that she had not noticed "any activity in his bank account" other than her use of it as holder of a power of attorney. The affidavit continued:

> 11 I was advised by Michael Yemen (Mr. Yemen) of Canada Passport investigation that they are conducting an investigation into a fraudulent passport application. Mr. Yemen advised that an application was received on October 31st, 2016, using all the information and supporting documents of Kenneth Ernest Andronyk, born April 22nd, 1943, but using Robert Andronyk's photograph. I was advised that a passport was not issued.
>
> 12 As part of the investigation I spoke with Kenneth Andronyk regarding his involvement in the passport application. I was advised by Mr. Yemen that he had spoken with another individual who was the guarantor on the passport. I believe based on my investigation that Robert Andronyk submitted the false passport application by deceiving Kenneth Andronyk and the guarantor.

[24] Cst. Pettigrew added that RCMP Air Services did an aerial search of the river on December 3, 2016, from the Vinca Bridge and approximately 2.5 miles downriver but did not locate the applicant's body.

[25] The effect of this information might be said to cast a shadow over the case in the sense that there is a suggestion that the applicant may have committed suicide. The Crown is skeptical of this, I notice from their materials. There is precedent for such skepticism.

[26] Almost 40 years ago, the Supreme Court of Canada had an unusual experience in ***R v Anderson***, [1979] 1 SCR 630. There, as Crown counsel, I appeared on an appeal from a decision of this Court which had reversed the appellant's acquittal for robbery. To the consternation of the Court, Anderson's then counsel surprised them with the assertion that he was not confident his client was still alive. The Court adjourned the appeal *sine die*. Several years later, I received a phone call from my highly regarded defence counsel colleague, Alexander Pringle, proposing a guilty plea by Mr. Anderson, which later occurred. As with the observation by Samuel L. Clemens (Mark Twain) that the report of his death was an exaggeration, Anderson's disappearance was likewise over-interpreted.

[27] There is also almost a 'B movie' quality to the way in which this alleged suicide is said to have occurred. The 'jump off a bridge' scenario has no extrinsic support in physical evidence. The 'suicide note' about his finances is difficult to reconcile with his possession of a large amount of

cash which, if he retained some, could fund a vanishing act without recourse to bank accounts or credit cards. Around the same time, the applicant is also said to have made an effort to develop another identity, albeit unsuccessfully. All this information offers support for the Attorney General's skepticism. While this information is not necessary to my decision in favour of the various applications of the Attorney General, it is noteworthy as to whether there is before me any reason to refrain from dismissing the judicial review application. There is not.

IV Conclusion

[28] In the end, I granted the orders sought by the Attorney General, namely the rescinding of the release order, the issuance of a warrant for the applicant's arrest, the direction of a certificate referral to the bail forfeiture court and the dismissal of the application for judicial review.

[29] By way of post-script, Crown counsel advised just as these reasons were about to be released that the applicant was arrested, subsequent to the oral disposition in this case, in another province. Crown counsel advised that he was apparently stopped in relation to a highway traffic matter.

Application heard on April 25, 2017

Reasons filed at Edmonton, Alberta
this 4th day of May, 2017

Watson J.A.

TAB 5

Jervis v. Nendze, 2002 ABQB 673

Date: 20020711
Action No. 9003 23782

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

02 203 032

BETWEEN:

DORIS ROSE JERVIS, JAMES WARREN GERAD DUCETTE, AN INFANT BY HIS NEXT FRIEND, DORIS ROSE JERVIS, JACQUELYN KANDACE NIKOLE DOUCETTE, AN INFANT BY HER NEXT FRIEND, DORIS ROSE JERVIS, JESSICA MOLLY ISABEL DOUCETTE, AN INFANT BY HER NEXT FRIEND, DORIS ROSE JERVIS, CHRISTOPHER JUSTIN GERARD JERVIS, AN INFANCT BY HIS NEXT FRIEND, DORIS ROSE JERVIS

Plaintiffs

- and -

WILLIAM NENDZE, GORDON ZILINSKI, ED ZILINSKI, HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA, AS REPRSENTED BY THE MNISTER OF TRANSPORTATION AND UTILITIES, JOHN DOE, AGENT OF HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA, JOHN DOE AGENT OF GORDON ZILINSKI, JOHN DOE AGENT OF ED ZILINSKI, HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA AS REPRSENTED BY THE ROYAL CANADIAN MOUNTED POLICE, AND JOHN DOE AGENT OF HER MAJEST THE QUEEN IN THE RIGHT OF CANADA

Defendants

- and -

ORLICK TRANSPORT LTD., GORDON ZILINSKI, ED ZILINSKI, HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA, HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA, JOHN DOE AGENT OF HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA, JOHN DOE AGENT OF GORDON ZILINSKI, JOHN DOE AGENT OF ED ZILINSKI, AND JOHN DOE AGENT OF HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA

Third Party

MEMORANDUM OF DECISION
of the
HONOURABLE MADAM JUSTICE J.B. VEIT

APPEARANCES:

Sandra L. Corbett
for the Applicants Gordon and Ed Zilinski

C.H. Ewasiuk
for the Plaintiffs

Edwin A. Bridges
for William Nendze

Shannon L. May
for the Queen in right of Canada and the R.C.M.P.

Dale E. Tumbach
for Orlick Transport Ltd.

Summary

[1] Despite having been given several years to provide required disclosure, Ms. Jervis has failed to do so. It is probable that, because of the time lapse, some of the information that Ms. Jervis was originally required to provide is no longer available. The defendants ask the court to cite Ms. Jervis in civil contempt and to sanction her contempt by dismissing her action or striking out her Statement of Claim, or dismissing her claim for want of prosecution, or by stopping the accumulation of pre-judgment interest.

[2] The outstanding disclosure is relevant only to the issue of damages. The issue of liability is hotly contested, one of the defendants going so far as to refuse a discontinuance of the action against them, presumably on the basis of their assessment that they will be successful at trial and will become entitled to substantial costs. All defendants oppose the severance of liability from damages.

[3] This is not a situation where additional time should be given to Ms. Jervis to complete her disclosure. She has had years to do so.

[4] The outstanding disclosure is relevant, but not crucial, to the ability of the defendants to defend the plaintiff's claim should the plaintiff be even partially successful on the issue of liability. Therefore, this is not a situation in which it is appropriate to strike out Ms. Jervis's claim. It is, however, a situation in which it is appropriate, as an overall sanction, to stop the accumulation of pre-judgment interest. That sanction is not, however, sufficient to address the prejudice which the lack of disclosure imposes on the defendants; in every area where Ms. Jervis has failed to make the required disclosure, she will be prohibited from leading any evidence establishing a unique dependency. For example, Ms. Jervis has failed to provide the medical records for two of the children who make a dependency claim arising out of their relationship with Mr. Jervis. From Ms. Jervis's perspective, the scenario producing the largest award is one in which those children suffered from injuries or diseases or conditions which made them heavily and permanently dependent on the deceased. From the defendants' perspective, the best scenario producing the smallest award is one in which the children were healthy and had no specific dependency other than the dependency resulting from minority. Therefore, in relation to the children's dependency claim, if Ms. Jervis proves a dependency claim on behalf of the children Jessica Jervis and Christopher

Jervis, she will be prevented from leading evidence in relation to their dependency claim other than evidence which establishes that the children were and are healthy. Similarly, in relation to Ms. Jervis's own dependency claim, Ms. Jervis is prohibited from leading any evidence other than evidence which establishes that, during her marriage to Mr. Jervis, Ms. Jervis was fully employed and earning what StatsCan identifies as average wages in Alberta for persons in her line of employment.

[5] This case management restriction on the type of evidence which may be led by the plaintiffs is, naturally, subject to review by the trial judge.

Cases and authority cited

By the court: ***Patel v Friesen***, 2002 ABQB 112 (M.)

Appendix A: List of outstanding undertakings

1. Background

[6] This action arises out of a motor vehicle accident which occurred on December 13, 1988. The plaintiff's husband, Duane Jervis, was driving a Freightliner owned by Orlick Transport Ltd. north on Highway 63, a short distance north of the town of Boyle. The Zilinski brothers are farmers whose property adjoins Highway 63. The Zilinskis had obtained a permit from the Alberta Government to burn stubble on their fields. The RCMP had posted a sign on Highway 63 warning drivers that they would be encountering smoke on the highway. William Nendze was also driving north on Highway 63 in his 1980 Ford; he was ahead of Duane Jervis. Duane Jervis encountered the smoke, or a mixture of fog and smoke, and rear ended the Nendze vehicle. The evidence to date suggests that Mr. Jervis did not slow down or in any way alter his driving pattern when he encountered the smoke. Both the Nendze and the Jervis vehicles went into the ditch. The load on Duane Jervis's truck shifted as a result of the collision and fatally crushed him.

[7] Mr. and Ms. Jervis were married in May, 1987. At the time of the fatal accident, Ms. Jervis had three children from a former relationship, and one child with Mr. Jervis. She alleges that Mr. Jervis was *in loco parentis* to the three Doucette children. At the time of the accident, Ms. Jervis was separated from Mr. Jervis. Mr. Jervis was 27 years old when he died.

[8] Ms. Jervis sued on behalf of herself and of her children. She alleges that Mr. Nendze was negligent in failing to maintain proper lighting on his vehicle and failing to avoid a collision. She sued the Zilinskis for allowing a fire to take place too close to the highway. She sued Alberta Transportation and Utilities for allowing the highway to be unsafe. She sued the RCMP for failing to take adequate measures to warn motorists of the danger on the highway.

[9] Ms. Jervis's statement of claim was issued on December 11, 1990. An order granting renewal of the statement of claim was issued on November 29, 1991. The statements of defence were all filed around February 24, 1992. Various Third Party notices were filed in 1993. In 1994, Ms. Jervis filed a partial discontinuance against Alberta.

[10] Ms. Jervis was examined for discovery on May 15 and 16, 1995. On March 26, 1996, a consent order issued by the Master required her to comply with her undertakings by April 15, 1996.

[11] Because she failed to comply with that order, an order of this court was issued on May 2, 1996 to require her to comply with her undertakings within 30 days. The court order also required Revenue Canada to comply with certain undertakings within 30 days of the order of the court; the undertakings that were required related to Ms. Jervis's income tax returns for the last ten years and to various aspects of Duane Jervis's income tax. The Workers' Compensation Board was also required to comply with an undertaking within 30 days; this undertaking related to the issue of whether the WCB had a subrogated claim.

[12] Ms. Jervis again failed to provide undertakings as required. On December 14, 1998, the then case management judge ordered her to provide:

- the 1995, 1996, and 1997 filed income tax returns and Notices of Assessments relative to Doris Jervis were to be requested of Revenue Canada and provided to the defendants no later than one week of receipt thereof;
- information to be provided to defendants by December 4, 1998 about whether Duane Jervis had passed his Class 1 licence;
- all medical charts of Doris Rose Jervis' treating physicians to current date and the Alberta Health Care benefits she received from October 31, 1995 to current date, and that information was to be provided by December 31, 1998;
- the medical chart of Jacquelyn Candace Doucette from Dr. Maghadam, or, the reason why the chart is not producible was to be provided by no later than December 31, 1998;
- an update of Dr. Woods's chart to current date was to be provided by no later than December 31, 1998;
- all particulars of all monthly expenses of Doris Jervis were to be provided by December 31, 1998;
- Mr. Godfrey was to provide defendants with information he had received to date concerning Ms. Jervis's expenses by December 31, 1998;
- confirmation of the educational status of Duane Jervis by December 31, 1998;
- a statement of benefits received by Duane Jervis from Alberta Health Care for the 7 years prior to the accident, that is from 1981 to 1988 was to be provided by December 31, 1998;
- all relevant filed court documents regarding Ms. Jervis's application to Provincial Court for maintenance from Mr. Jervis.

[13] In addition, the case management judge ordered a further examination of Ms. Jervis by no later than January 31, 1999. In addition, the judge ordered Ms. Jervis to retain an actuary by no later than December 8, 1998 and to ensure that the actuary's report was completed by January 15, 1999.

[14] The defendants assert that the undertakings set out in Appendix A remain outstanding.

[15] In a supplementary affidavit, filed January 21, 2002, the defendants assert that:

- in relation to undertaking #4, income tax returns for 1985, 1989, 1990 and 1991 have been provided. However, for the years 1987, 1988, 1993, 1995, 1996 and 1997, only computer printouts relating to income and deductions have been provided. No return for 1986 has been provided; only a T4 slip has been provided for that year.
- in relation to undertaking #5, Ms. Jervis undertook to provide employment records in relation to employment at CFB Currie Base, Pronto in Londonderry Mall, and Mama Brava in Northwood Mall. In answer to this undertaking, Ms. Jervis provided a letter from herself stating that she was paid in cash, and that she was paid a total of $2,000 over 36 months; there is no indication from her about who paid her the $2,000 cash. No records of employment were provided.

- Ms. Jervis undertook to provide transcripts or report cards from her junior high school. However, to date she has not provided any such records.
- Ms. Jervis undertook to provide details of all benefits she received from the accident, as well as all benefits received from Family Allowance and similar sources. Ms. Jervis has not provided information about any Family Allowance benefits she has received, nor any information about any WCB pension she has received.
- Ms. Jervis had undertaken to provide copies of her charts with Doctors Theissen and Law going back to 1979. She has not provided these.
- Ms. Jervis had undertaken to provide Jessica Jervis's charts with Drs. Yap, Thiessen and Talbot-Jones. Dr. Talbot-Jones's chart notes are incomplete as there are no notes for 1988. Dr. Thiessen's chart notes are incomplete as no notes have been provided with respect to treatment between 1989 and 1993.
- Ms. Jervis undertook to produce Christopher Jervis's charts from Drs. Yap, Thiessen and Talbot-Jones. This undertaking is incomplete as notes have not been provided from 1989 to 1991.
- Ms. Jervis undertook to provide an Alberta Health Statement of Benefits for Mr. Simmonds, to whom Ms. Jervis was married at the time of the discovery, but with whom she no longer has a relationship. No such statement has been provided.

[16] In answer to the motion to strike out her pleadings, the only affidavit filed by Ms. Jervis is an affidavit from a legal assistant in her lawyer's office. That affidavit notes that:

- certain of the income tax information required from Ms. Jervis was provided and that certain returns are not available;
- certain of the undertakings were qualified by availability of the requested documents;
- the people who hired Ms. Jervis were gone and she now believes that it is impossible to comply with this undertaking;
- Ms. Jervis believes that the junior high transcripts are not available, and that no junior high records of any kind are available;
- Ms. Jervis states that Dr. Law's name is not mentioned anywhere except in the discovery;
- Ms. Jervis states that she forwarded on the material she received from Dr. Thiessen and Dr. Talbot-Jones.
- Ms. Jervis states that she does not know the whereabouts of Mr. Simmonds and that she doubts that even if she knew where he was that she would be able to obtain his consent
- that it would be a "gross detriment" to the client if the statement of claim were struck, and the undertakings which have not been provided "largely involve inapplicable and irrelevant documentation".

2. Is Ms. Jervis in breach of her undertakings?

[17] Ms. Jervis is in breach of her undertakings.

[18] I accept the evidence of Ed Zilinski to the effect that the undertakings set out in Appendix A remain unsatisfied. In preferring his evidence to the submission on behalf of Ms. Jervis that some of the required disclosure has in fact been made, I rely on the fact that Ms. Jervis' prior solicitor, who is the not the solicitor appearing on this motion, appears to have left the file in a state which makes it difficult for Ms. Jervis's current solicitor to be certain which undertakings have been provided and which have not. On the other hand however, the evidence from the defendants is reliable; they have been able to make a thorough search of their files, and have in some cases even been able to rely on contemporary letters

telling Ms. Jervis's then solicitor that undertakings that were said to be included in correspondence were not in fact so included.

[19] Even if the undertakings requested were "inapplicable and irrelevant" as she suggests, Ms. Jervis has undertaken to provide certain information, and was subsequently ordered by the court to provide certain information. If she was of the view that the undertakings were inapplicable and irrelevant, she should have appealed the court orders in a timely way. She failed to do so. Her obligation was then to provide the required disclosure within the time limits established.

[20] However, the information requested was not "inapplicable and irrelevant". On the contrary, the information is most pertinent to the dependency issues. Medical information about children who have a valid dependency claim is relevant to the quality of the dependency. Employment information about spouses who have a valid dependency claim is relevant to the quantification of the dependency.

3. Is the absence of an affidavit from the plaintiff fatal to her position on this application?

[21] Although the filing of this affidavit by a legal assistant is, in some respects inappropriate, in the circumstances here the court will consider the inappropriate contents of the affidavit as argument on behalf of Ms. Jervis.

[22] Ms. Jervis did not file her own affidavit in response to the application to strike out her statement of claim. Rather, an affidavit was filed by a legal assistant in the employ of Ms. Jervis's lawyer. This leads to two concerns: first, if Ms. Jervis could not be found to file her own affidavit, despite the court's one month adjournment to provide a response, perhaps Ms. Jervis has inadequate interest in this litigation and her claim should be struck out for failure to prosecute her claim. Second, while a legal assistant is the appropriate source of certain information, for example concerning the physical contents of a file, such a person is an inappropriate source of certain of the statements made in the affidavit.

[23] As to the first issue, there was a legitimate concern by the defendants about Ms. Jervis's commitment to this lawsuit because the court and the applicants eventually learned that Ms. Jervis had recently failed to maintain contact with her lawyer. In the result, her lawyer had difficulty in reaching her despite the one month adjournment granted by the court to her lawyer to prepare an answer to the defendants' application. However, it appears that the communication problem has now been resolved; I accept Ms. Jervis's lawyer's assertion that he is now in communication with his client and that Ms. Jervis intends to actively advance these proceedings.

[24] This leaves the problem concerning the contents of Ms. Jervis's lawyer's legal assistant. The following are extracts from the affidavit filed by that individual:

> We have no documentation on file from either of the 3 employers and I verily believe that it would impossible to obtain same at this late date, due to the fact that establishments such as these tend to go through staff members at a very high rate and it is unlikely that our client can remember the names of the persons she was employed by or with.
>
> . . .
>
> That it would be a gross detriment to our client and her four children for the Statement of Claim with respect to this matter to be struck at this time due to the Defendants' attempt to thwart this

matter by claiming Undertakings were not answered when in fact they were. In any event, the 8 Undertakings that the Defendants' claim have not been answered largely involve inapplicable and irrelevant documentation.

(Reproduced as found in the Affidavit)

[25] It is improper for a legal assistant to file this type of affidavit: see ***Patel***. As only three examples of the problems which arise here, the legal assistant could not be cross-examined concerning the names of employers, the choice of value-laden words such as "thwart" are argumentative rather than evidentiary, and the legal assistant does not have the expertise required to characterize certain contents of judicial orders as "inapplicable and irrelevant".

[26] In the result, the inappropriate comments in the affidavit filed on behalf of Ms. Jervis on this application will be considered as argument on her behalf.

4. What sanction should be imposed on Ms. Jervis for having failed to make the required disclosure?

[27] Sanctions for civil contempt are set out in R. 704. In particular, a litigant who disobeys an order of the court may have their pleadings, or part of them, struck out, or have their action stayed, or have their action dismissed or judgment entered against them, or be prohibited from introducing in evidence certain kinds of testimony.

a) Should the plaintiffs' statement of claim be struck out?

[28] It goes without saying that the sanction imposed for disobeying a court order should be proportional to the harm caused: the punishment should fit the crime. Striking out a statement of claim is the equivalent of terminating a plaintiff's claim in a situation such as this one where the statute of limitations would prevent Ms. Jervis from initiating a new claim for relief if the current claim were struck out. Such a serious remedy should perhaps only be awarded where the breach prevents the defendants from defending the claim against them or when the plaintiff's breach constitutes a flouting of the flaunting of a judicial order. In any event, in the circumstances here, despite Ms. Jervis's longstanding failure to provide the undertakings, the striking out of her statement of claim would constitute an excessive punishment.

[29] The fact that striking out the statement of claim would cause Ms. Jervis and her children serious hardship is no shield against an order striking out a claim; on the contrary, the fact that a claim could be struck out entirely is an entirely legitimate sanction in some circumstances against a litigant who wilfully disobeys an order of the court.

[30] Ms. Jervis asserts that she has completed much of the required disclosure and should not be penalized for having failed to produce some undertakings. The fact that Ms. Jervis has provided some disclosure does not relieve her from providing all required disclosure. However, as Ms. Jervis asserts, in the circumstances here, all of the missing undertakings relate only to the dependency claims rather than to the liability issue. The failure to provide the required undertakings does not prevent the defendants and third parties from defending Ms. Jervis's liability claim. The statement of claim should not be struck out in its entirety.

b) Should the plaintiffs' claim to pre-judgment interest be limited?

[31] Ms. Jervis's claim to pre-judgment interest on the bereavement claim should be limited to the claim which can be proven up to the date on which the Defendants and Third Parties first obtained an order against the plaintiffs requiring the answering of undertakings.

[32] By itself however, this is not a sufficient remedy for the failure to provide disclosure. We must then turn to other possibilities.

[33] It may be that the applicants are correct in their argument that the court has no jurisdiction to order the severance of a claim into its liability and damages component as a sanction for failure to provide undertakings relevant to damages because that is a remedy which is not mentioned in R. 704; on the other hand, it may be that very specific language in a rule would be required to restrict a judge's inherent jurisdiction to control legal proceedings. However, it is not necessary to deal with that issue on this application. It is sufficient to note that all of the defendants have indicated that they do not wish to sever the liability issue from the damages issue; such a severance will therefore not be imposed upon them.

[34] The applicants suggest that it would be appropriate to strike the plaintiffs' dependency claims leaving them with a bereavement claim and whatever special damages are permissible under the *Fatal Accidents Act.*

c) Should all dependency claims involving missing disclosure be struck out?

[35] The dependency claims should be limited, but they should not be struck out.

[36] First, some of the dependency claims, in particular the claims for two of the children, do not involve any of the missing disclosure. It would be unfair to strike out those claims.

[37] Second, with respect to the dependency claims of Ms. Jervis herself and of the remaining two children, if dependency is established, there may be a nominal or other quantification of such a claim that does not depend on evidence of any specific factors of dependency but rests solely on the dependency itself. Without determining that any such claim exists, if any such claim does in fact exist, that claim should not be forfeited because of the failure to provide evidence relating to an enhanced claim.

[38] However, Ms. Jervis's failure to provide required disclosure relating to her own dependency claim and that of two of the children does prevent the defendants and third parties from fully defending those claims. Therefore, in order to provide fairness to the defendants and the third parties, the court must try to remedy the unfairness to which they have been subjected.

[39] The specific prejudice which Ms. Jervis has created can be remedied by ordering that, in every area where Ms. Jervis has failed to make the required disclosure, she will be prohibited from leading any evidence establishing a unique dependency. For example, Ms. Jervis has failed to provide complete medical records for two of the children who make a dependency claim arising out of their relationship with Mr. Jervis. From Ms. Jervis's perspective, the scenario producing the largest award is one in which those children suffered from injuries or diseases or conditions which made them heavily and permanently dependent on the deceased. From the defendants' perspective, the best scenario, that is the one producing the smallest award, is one in which the children were healthy and had no specific dependency other than the dependency resulting from minority. Therefore, in relation to the children's dependency claims, if Ms. Jervis proves a dependency claim on behalf of the children Jessica Jervis and Christopher Jervis, she will be

prevented from leading evidence in relation to their dependency claim other than evidence which establishes that the children were and are healthy. Similarly, in relation to Ms. Jervis's own dependency claim, Ms. Jervis is prohibited from leading any evidence other than evidence which establishes that, during her marriage to Mr. Jervis, Ms. Jervis was fully employed and earning what StatsCan identifies as average wages in Alberta for persons in her line of employment.

d) This decision can be reviewed by the trial judge

[40] A case management judge should typically not rule on those matters that normally come within the ambit of the trial judge, including the issue of permissible evidence: see Q.B. Practice Note #1, s. 39. In support of the principle set out in the practice note, the court explicitly recognizes the jurisdiction of the trial judge to review the within order.

5. Costs

[41] If the parties are not agreed on costs, I may be spoken to within 30 days of the release of this decision.

HEARD on the 20th day of December, 2001, the 31st day of January,
the 25th day of February and the 27th day of February, 2002.
DATED at Edmonton, Alberta this 11th day of July, 2002.

J.C.Q.B.A.

Appendix "A"
Outstanding Undertakings

Undertaking #4

To provide Mrs. Jervis-Simmonds' income tax returns for the last ten years.

Undertaking #5

To provide employment records relating to employment of CFB Currie Base, Pronto, in Londonderry Mall and Mama Brava in Northwood Mall.

Undertaking #6

To obtain transcripts or report cards with respect to Mrs. Jervis-Simmonds' junior high school and high school education.

Undertaking #8

To provide details of any and all benefits received by Mrs. Jervis-Simmonds, be it governmental, group insurance, private insurance, benefits of any nature arising out of the accident of December 13, 1988; and also provide benefits of Family Allowance and similar items.

Undertaking #22

To obtain copies of the charts of Doctors Yap, Thiessen, and Dr. Law going back to 1979 with respect to Mrs. Jervis-Simmonds.

Undertaking #29

To produce the charts of Dr. Yap, Dr. Thiessen, and Dr. Talbot-Jones with respect to Jessica Jervis.

Undertaking #31

To produce the charts of Dr. yap, Dr. Thiessen, Dr. Talbot-Jones with respect to Christopher Jervis.

Undertaking #42

To provide a Statement of Benefits Paid for Mr. Simmonds.

TAB 6

Court of Queen's Bench of Alberta

Citation: Desoto Resources Limited v. Encana Corporation, 2009 ABQB 512

Date: 20090909
Docket: 0401 09040
Registry: Calgary

Between:

Desoto Resources Limited

Plaintiff

- and -

Encana Corporation and Pan Canadian Petroleum Limited

Defendants

Reasons for Decision
of the
Honourable Madam Justice B.E. Romaine

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[1] This is an application brought in morning chambers relating to an appeal of an Order of Summary Judgment granted by Master Mason on June 2, 2009. The Plaintiff/Appellant issued a Notice of Appeal dated June 5, 2009.

[2] Originally, the appeal was scheduled to be heard on August 12, 2009. Counsel for the Appellant, Mr. Silver, advised counsel for the Respondents, Mr. Babiuk, by e-mail of July 1, 2009 that he was taking two weeks of holiday and that on his return he wished to examine certain present and former employees of Encana prior to the appeal. In the e-mail, Mr. Silver asked if two current employees of Encana would be produced for examination and notes that, if not, he would have to make an application. Mr. Silver also advised that he would have to make a Rule 209 application to obtain documents from third parties for the appeal. He commented that

he was concerned that these examinations and applications would result in a need to postpone the appeal.

[3] Mr. Popowich on behalf of the Defendants/Respondents replied by letter dated July 13, 2009 refusing, in effect, to produce the witnesses, at least until the Appellant filed material for the appeal. He also advised that he would not agree to adjourn the August 12 appeal, and asked that future communications be directed to him. Mr. Silver apparently received the letter on July 29, 2009 and advised Mr. Popowich by e-mail on that date that the August 12 appeal had already been adjourned with the consent of his office. He set out the reasons he disagreed with Mr. Popowich's letter and advised of his intention to bring an application under Rule 266 if Mr. Smith, one of the current employees of Encana, was not produced. He listed further people that he wished to examine, and noted that he expected that the appeal then scheduled for September 22, 2009 would have to be adjourned.

[4] Mr. Silver filed the application that was before me in chambers on August 20, 2009, returnable on August 25, 2009. He applies for an adjournment of the appeal and an order directing the production of Mr. Smith and a former employee of Encana for examination pursuant to either Rule 266 or Rule 200. The application is opposed by the Respondents, with Mr. Babiuk appearing on their behalf.

[5] I was advised that arrangements had been made to allow the Appellant to cross-examine the deponent for the Respondents on the application for summary judgment, Ms. Luther, prior to September 22, 2009.

[6] My initial reaction to the application in chambers was erroneous, and I was concerned, incorrectly on review, that the application may need to be referred to the judge who would be assigned the appeal. I reserved to read the filed materials and the authorities that were provided to me by counsel and to review the court file, which was not available in morning chambers and had apparently been temporarily misplaced in the clerk's office.

[7] Having now reviewed the file and the authorities provided, it is clear that Mr. Silver is correct that the Appellant has a prima facie right to adduce new evidence on the appeal, subject to the limitations and requirements of Rule 200 or Rule 266: *Armstrong v. Esso Resources Canada Ltd.* [1992] A.J. No. 822; *Richardson v. Honeywell Ltd.* (1996), 181 AR. 247.

[8] As indicated by the Court of Appeal in *Armstrong*, an appeal from a Master is *de novo* and new evidence may be adduced by both sides. While undue delay may result in the loss of a right to adduce new evidence, the Court in *Armstrong* makes it clear that the time to lead such evidence commences when the appeal from the Master is filed. While this may be frustrating to the Respondents, given the Appellant's failure to cross-examine Ms. Luther on her affidavit or adduce the evidence it now suggests it needs prior to the application before the Master, this is the result of the *de novo* nature of an appeal from the Master. Although it appears that in *Armstrong*, the request to cross-examine would not have delayed the appeal if the Respondent had agreed to it, and the intention to adduce new evidence in this appeal will necessarily have that result, the delay in prosecuting this appeal has certainly not been lengthy at this point.

[9] The Appellant has not breached the requirement of Rule 500 (2) as its appeal was filed and initially made returnable within a reasonable time. Rule 500 (2) does not preclude adjournment of a return date for appeal if good reason exists to grant the adjournment. It is noteworthy that, even without the examination of witnesses under Rules 200 or 266, the appeal would likely have to be delayed to allow the Appellant to cross-examine Ms. Luther.

[10] However, the Appellant's application for an order directing the Respondents to produce Mr. Smith and a former employee for examination "pursuant to Rule 266 or Rule 200" suffers from at least two deficiencies and is premature.

[11] First, these are two very different rules, with different implications for the evidence derived from their use: *Richardson*, supra at para. 4. There may be issues as to whether the Appellant is entitled to use either or both rules for the purpose of adducing evidence to oppose a summary judgment application, and the information before me on this application is insufficient to determine those issues. Both rules contemplate that an appointment to examine be served as a first step. Although the failure to serve such an appointment may not be fatal to the application in certain circumstances (*K. v. K.* (E) 2003 Carswell Alta 806 at para. 14), in this case, the Appellant's choice of the rule it intends to rely on has implications relating to who should receive the appointment and whether the use of the rule in the circumstances is permissible. The Respondent or the proposed witness, depending on what Rule is chosen and the identity of the witness, may challenge the use of the Rule, either on grounds of relevance or abuse of process.

[12] Secondly, the affidavit filed by the Appellant in support of the application is an affidavit from a legal assistant, which, as the Respondents rightly note, should be discouraged: *Calf Robe v. Canada* [2006] A.J. No. 1109 at para. 11. The question of whether these witnesses have relevant information for the purpose of the appeal of the summary judgment order was addressed by way of double hearsay in the legal assistant's affidavit. This is unacceptable.

[13] The issue, therefore, is whether the Appellant should be afforded a reasonable opportunity to take the procedural steps necessary under either Rule for the production of the witnesses it wishes to examine. Given the procedural history of this matter, and in particular the fact that the Appellant was required to move quickly to apply for a timely adjournment of the appeal in the face of the refusal of the Respondents to produce the witnesses, I am prepared to allow the Appellant leave to take these steps so that the issues can be properly framed on any subsequent application before this Court, subject to such steps being taken without undue delay.

[14] I therefore allow the Appellant's motion for an adjournment of the appeal scheduled for September 22, 2009. I dismiss the application to direct the Respondents to produce witnesses at this time, but direct that the Appellant have until September 22, 2009 to take the proper procedural steps to compel attendance of the witnesses it wishes to examine. Either party or a designated witness may bring a further application relating to whether the Rule thus designated by the Appellant is appropriate in the circumstances of this appeal.

[15] The issue of costs of this application is reserved to be dealt with when the appeal is heard on the merits. To prevent further delay, I confirm that I am not seized with any continuation of the application.

Heard on the 25th day of August, 2009.
Dated at the City of Calgary, Alberta this 9th day of September, 2009.

B.E. Romaine
J.C.Q.B.A.

Appearances:

Brian E. Silver
Mason Silver LLP
for the Plaintiff/Appellant

Chad Babiuk
Code Hunter LLP
for the Defendants/Respondents

TAB 7

Court of Queen's Bench of Alberta

Citation: Warkentin Building Movers Virden Inc. v La Trace, 2022 ABQB 346

Date: 20220513
Docket: 170309064 and 170301023
Registry: Edmonton

Between:

Dean LaTrace and Darlene LaTrace

Plaintiffs (Applicants)

- and -

Warkentin Building Movers Virden Inc. operating as Warkentin Building Movers

Defendant (Respondent)

Decision
of the
Honourable Mr. Justice S.N. Mandziuk

Introduction

[1] This subject of this litigation is a damaged house (the House).

[2] Broadly speaking, the Plaintiffs, Dean and Darlene LaTrace, claim that the Defendants caused the damage when they moved and placed the House. The Defendants claim for services.

[3] The trial of this matter began in November, 2021, continued for about ten days and is scheduled to resume in September, 2022 for a further ten days.

[4] The Plaintiffs apply to admit the affidavit of Helmut Nickel (the Affidavit) as an expert report about the construction of the House and the value of the House before it was moved.

[5] Mr. Nickel died on December 21, 2020.

[6] The Defendant, Warkentin Building Movers Virden Inc., opposes the application, arguing that the Affidavit should not be admitted as an expert report or as fact evidence.

Facts

[7] The Affidavit deals with three subject areas:

- The value of the House;
- Denial of comments made by the Defendant and defence of construction methods; and
- Critique of the Defendant's moving methods.

[8] The Affidavit also attaches:

- Summary notes detailing a meeting between the Plaintiffs, Mr. Nickel and Ms. Diane Nickel in 2016. This document was signed by both Helmut and Diane Nickel;
- Photos; and
- Record of a property sale.

[9] The Affidavit was signed and notarized on October 29, 2020, filed on November 17, 2020, and served on opposing counsel on December 1, 2020.

[10] The Plaintiffs also prepared a Form 25 (Expert's Report), attached the Affidavit to the Form 25, and the Form 25 was signed by Mr. Nickel, also on October 29, 2020. The Form 25 was served on opposing counsel on December 1, 2020.

[11] The Defendant's submissions report that their counsel emailed the Plaintiffs on December 3, 2020 saying they would like to question Mr. Nickel on his Affidavit; the Plaintiffs responded that the Defendant should "follow the rules of court" and bring an application. This email correspondence is attached to counsel's submissions, without an affidavit.

[12] Technically this email is not evidence before me since it is not contained in an affidavit, but I accept counsel's submission that the Defendant sought to cross-examine Mr. Nickel on the Affidavit soon after it was served.

The Affidavit

[13] The attachments to the Affidavit are not formally itemized as exhibits in the Affidavit. In particular, the summary notes, while signed by Mr. and Ms. Nickel, cannot be considered evidence before the Court. The Affidavit does not reference or swear to the accuracy of those notes, and there is no indication that the signatures were affixed to attest to the accuracy of the notes. I will give those notes no weight. Only the body of the Affidavit constitutes evidence.

[14] The Affidavit was sworn on information and belief. The Affidavit is reproduced below, slightly re-arranged to include sub-paragraphs for ease of reference. Some typographical errors have been fixed for better comprehension.

1. I have knowledge of the matters deposed herein this Affidavit except where stated to be on information or belief, in which case I verily believe the same to be true.

2. For the purpose of this Affidavit if I refer to "my son" I am referring to Rick Nickel, and to Dean and Darlene LaTrace as "LaTraces" . I was interviewed by LaTraces and approved Darlene LaTrace's assistance in typing my testimony for this affidavit,
3. I am a master masonry contractor with more than 50 years [of] experience in the construction industry.
4. In 1994/95 [I] built for my son a high-end brick bungalow on my rural property near Beaumont, AB.
    a) The dream home was of custom design incorporating a massive central fireplace/waterfall feature with soaring ceilings. The rundle stone structural feature took me some 4 months to construct.
    b) There are few, if any, masonry contractors who could build the fireplace/waterfall.
    c) It was a very difficult and labor-intensive work of love that I told LaTraces I valued at $80,000 when I built it, and some $100,000 in 2016.
    d) I do not know of many masons who are capable of replicating it. I considered it an example of my best work.
5. Because the home was for my son, I used superior construction materials including upgraded insulation under the complete brickwrap exterior, and costly copper flashing, which is rarely used anymore because it is so expensive. I used granite, rundle stone, and slate extensively throughout the interior, and in-floor heating on both levels. Level 4 Emerald Pearl granite, (the most expensive level of granite) was used throughout the open concept kitchen/livingroom on the waterfall, thresholds, trim, railing, kitchen countertops and even the entire backsplash. Even the master shower walls were solid sheets of granite, not granite tile. The main bathroom floor was also granite matching the vanity granite top.
6. My son's brick house was less than 20 years old when a developer offered to buy my land and buildings, which would also have to include the brick bungalow I built for my son. It was simply an offer to good to refuse.
    a) Realtor Linda Lyons Boucher of Royal LePage had appraised my son's brick house without land at $850,000.
    b) When I decided to accept Qualico's offer to purchase my property, my son received $850,000 of the sale proceeds to compensate him for the house based on Ms. Lyons Boucher's appraisal.
7. I, along with my wife Diane, personally viewed the house and gazebo that I had built, along with LaTraces on August 11, 2016. It was devastating to us both to see what the building mover had done to the buildings and my hard work.

a) The house and gazebo were left in pristine condition when vacated in 2014. We have provided LaTraces with photos from 2014. See Number I attached as a couple of examples.

b) I am aware that late in 2015 vandals had broke[n] some windows in the house and other buildings on the property.

c) But what I saw August 11, 2016 was

   i. severe structural damage

   ii. caused by inadequate support of the brick house, and

   iii. an apparent accident wiping out a side of the house.

   iv. The gazebo was also severely damaged. To see my workmanship destroyed was painful for me.

8. LaTraces have since shared that the building mover claims the brick on the gazebo and house was not well attached. The building mover's claim is false.

   a) I used more brick ties than are required by the Alberta Building Code,

   b) After a lifetime in the industry [I] know how to install brick. Any of my peers will surely testify to the superior brick and stone workmanship of the house and gazebo.

   c) LaTraces have provided pictures of the gazebo after the bricks were torn off. (See attachment 2.)

      i. While the building mover tore off many brick ties,

      ii. the pattern of brick ties approximately every foot is still evident,

      iii. which far exceeds the requirements of the Alberta Building Code. (See attachment 3.)

   d) The brick on the gazebo was well attached and could have easily been supported by angle iron for a move because the octagon was constructed with steel posts on each corner. The angle iron could have been affixed to each steel corner post.

   e) There was no damage to the brick, it was properly attached, and I see no reason why it could not have been moved successfully,

   f) The LaTraces attached photo number 4 also shows that the gazebo was still secured to the foundation with bolts when

lifted as the sill plates have been ripped from the gazebo at points where my bolts secured it to the foundation.

g) That bricks were implanted in the cavity walls with the insulation is evidence that quite the force was required to tear off the brick. (See attachment 5.)

9. LaTraces have also shared that the building mover claims parts of the house were of unusual construction or inferior methods.

   a) His claims are false.

   b) The houses [were] built of superior construction materials and modern methods.

   c) Both the house and gazebo passed all required inspections.

   d) Wrapping the house with rigid insulation was an upgrade for the standard 2x6 insulated walls. (See attachment 6.)

   e) The manner in which brick ties were attached to affix the brickwrap over the insulation is an accepted standard practice as depicted in the attached illustration number 7. The number of brick ties on the house also exceeded what is required by the Alberta Building Code.

   f) Because the house sat on a solid block foundation, there was no settling cracks to the brick and I never saw any hairline cracks to drywall either.

10. LaTraces asked me to comment on the condition of shingles on the house. The shingles on the house and garage were in good condition when my son vacated the house in 2014, but the shingles on the solarium had begun to curl as seen in the attached picture number 8. Picture number 9 shows that the solarium shingles with some curling in 2015, only on the solarium. I believe that this occurred because of heat building up in the solarium through the many skylights with a lack air circulation especially after the house was vacated- I understand that LaTraces were not moving the solarium so those shingles were not an issue.

11. As a masonry expert, I know that

    a) [A]ngle iron is necessary to support brick when removing the house from the concrete support of the foundation.

    b) To use wood that can flex would not support the weight.

    c) It is evident from the attached pictures and my inspection of the damage that the brickwrap was not properly supported for moving.

    d) I saw no evidence that the mover even back braced the wood.

e) The brick has fallen out in many locations due to a lack of support or direct damage caused by striking it.

f) The brick has rotated downwards on the whole perimeter of the house due to lack of support.

g) And, certainly the spray foam that was sprayed in cracks and under the brick is not an acceptable or useful practice that would in any way support the brick.

h) Furthermore, the brick I used is no longer available.

i) I saw no practical way of saving the brickwrap when I viewed the house in 2016.

12. My inspection of 2016 made it clear to me that the house was not properly braced, shored, or secured for transport, or even transported with any decency of care.

    a) I believe the accident would have compounded the damage significantly.

    b) The damage caused by the mover to the house and gazebo is extensive, I believe the mover is clearly culpable.

13. Given my advancing age, health issues and heart condition, I do not know if I will be in a position to act as an expert witness on behalf of LaTraces in court, so if I am unable to, I have provided this affidavit as my expert and factual testimony.

The Issues

[15] The Affiant, Mr. Nickel, is deceased and was not cross-examined on the Affidavit.

[16] In determining the admissibility and use of the Affidavit at trial, two issues must be addressed:

a) Will the Court admit the Affidavit as evidence for the truth of its contents in the trial?

b) Will the Court qualify Mr. Nickel as an expert and permit the Affidavit as expert opinion evidence?

The Parties' positions

The Plaintiffs' position

[17] The Plaintiffs argue that the Affidavit should be admitted under the principled approach to hearsay evidence set out by the Supreme Court of Canada in ***R v Khan***, [1990] 2 SCR 531***; R v Starr***, [2000] 2 SCR 144 and ***R v Khelawon***, [2006] 2 SCR 787. Those principles were summarized in ***Heritage Freehold Specialists & Co v Montreal Trust Co***, 1997 CanLII 14818, 208 AR 241 (QB), at para 9 (CanLii):

> ... where it is reasonably necessary that the hearsay statement be received and there is a basis for concluding that the evidence is reliable, a trial Judge may receive such evidence.

[18] The Plaintiffs argue that the evidence is necessary because

a) it is relevant to a determination of the true facts, and

b) there is no other way to proffer the same evidence because Mr. Nickel has since died.

[19] Further, they suggest that the evidence is reliable, citing the comments of Charron J in ***Khelawon*** at para 49:

> The criterion of reliability is about ensuring the integrity of the trial process. The evidence, although needed, is not admissible unless it is sufficiently reliable to overcome the dangers arising from the difficulty of testing it.

[20] At this stage, the Plaintiffs argue, the Court is considering threshold reliability, not ultimate reliability. The Court will still have to determine the weight and ultimate trustworthiness of the evidence when considering it with all the other evidence: ***R v Hawkins***, [1996] 3 SCR 1043 at para 75.

[21] Mr. Nickel swore the Affidavit under oath almost two months before he died.

[22] In ***Brennenstuhl Estate v. Trynchy***, 2007 ABQB 647 Graesser J admitted the affidavit evidence of Mr. Brennenstuhl, after he died, for the truth of its contents. He noted (at para 38):

> The fact that an affidavit is under oath at the time that it was made is a factor to be considered as to threshold reliability. The fact that when the affidavit was sworn, filed and served, Mr. Brennenstuhl subjected himself to potential cross-examination on it is another factor. This was not a statement made without some thought as to potential consequences. These factors have heretofore been sufficient for courts in other jurisdictions to admit affidavit evidence for trial purposes, even though the deponent is not then available for cross-examination.

[23] In ***Brennestuhl***, the defendants had an opportunity to cross-examine the deceased affiant but chose not to. Graesser J held that any prejudice suffered by the defendants because they could no longer cross-examine him could be offset or balanced by adjusting the weight of the evidence to take into account there had been no cross-examination (at para 29):

> In balancing the prejudices, I cannot help but conclude that the Plaintiff will be more prejudiced if this evidence is not admitted than the Defendants will be if it is admitted. In other words, the probative value of the deceased Plaintiff's own sworn evidence with respect to the merits of the case and the importance of that evidence to the case outweigh the prejudice to the Defendants... Absent evidence of some greater prejudice, the inability to cross-examine may be offset or balanced by the weight the trier of fact may attribute to evidence untested by cross-examination.

[24] The Plaintiffs acknowledge that the trial judge retains the discretion to exclude the evidence, even if it is necessary and reliable, if the probative value is outweighed by the prejudicial effect.

[25] The Plaintiffs argue that the facts render this evidence necessary because:

a) Mr. Nickel has died;

b) The realtor who provided the $850,000 appraisal no longer has materials available to support her appraisal;

c) The fact that Mr. Nickel paid his son $850,000 out of the sales proceed is important information;

d) The Defendant submitted a late market analysis prepared by their expert, and the Affidavit permits the Plaintiff to respond to that evidence; and

e) Mr. Nickel had important information about the structural condition of the House before and after the move.

[26] The Plaintiffs further assert that the reliability of the Affidavit is established by the circumstances surrounding the swearing of the Affidavit, including: the Affidavit was sworn under oath; Mr. Nickel had no motive to lie as he was a disinterested party; Mr. Nickel knew that he could be cross-examined on the Affidavit; and while one of the Plaintiffs typed and prepared the Affidavit, they were not present when the lawyer attended Mr. Nickel to have him swear the Affidavit.

[27] The Plaintiffs further argue that Mr. Nickel would have been qualified as an expert for the trial had he lived based on his more than 50 years of experience in the construction industry.

The Defendant's Position

[28] The Defendant argues that the Affidavit should not be admitted as expert evidence, citing the factors delineated in ***R v Mohan***, [1994] 2 SCR 9: relevance, necessity, absence of an exclusionary rule, and properly qualified expert.

[29] The Defendant acknowledges that some portions of the Affidavit are relevant as they relate to the construction of the House and the nature of the brickwork. On the other hand, the Defendant argues that the trial has already included voluminous evidence regarding the condition of the House before and after it was moved, along with evidence of the methods of construction, damage done, and whether it can be repaired. Evidence has been heard from a home inspector, a structural engineer, and a contractor. Further, the Defendant notes that as hearsay evidence, the Affidavit falls within an exclusionary rule. Finally, the Defendants aver that Mr. Nickel's only apparent expertise relates to masonry, without any expertise in general construction, property valuation, or house moving methods.

[30] The Defendant also challenges Mr. Nickel's neutrality and impartiality, which are hallmarks of an expert's role. The Affidavit on its face shows Mr. Nickel's strong feelings about the House. He expresses opinions about his own work, takes offence at perceived criticisms made by the Defendant, and demonstrates deep emotional ties to the House.

[31] The Defendant also opposes admission of the Affidavit as fact evidence, citing ***Jans v Jans***, 2015 SKQB 226.

[32] The Defendants concede that Mr. Nickel's death means there is no other way to have his testimony entered, thus meeting the test of necessity set out in the Supreme Court of Canada jurisprudence regarding the principled approach to admission of hearsay evidence: ***Khelawon,*** at para 1.

[33] However, the Defendants argue that there are insufficient indicia of reliability because:

- The Plaintiffs drafted the Affidavit;
- There was no earlier testimony to test it against;
- The Defendant was unable to cross-examine Mr. Nickel;
- The Plaintiffs made bare assertions in their submissions regarding the circumstances surrounding the swearing of the Affidavit that are not in affidavit form and therefore not evidence before the Court; and
- The Affidavit's reference to Mr. Nickel's "advancing age, health issues and heart condition" raise questions about his ability to appreciate and swear to the contents of the Affidavit.

Analysis

Tests for admitting the affidavit of a deceased deponent

[34] Historically, the question of whether the Court should receive an affidavit of a deceased witness focussed on admitting the evidence and considering the weight to be given to it since cross-examination had not been undertaken. In ***Elias v. Griffith*** (1877), 46 LJNSCh 806,[1] the Vice-Chancellor noted:

> Of course, in estimating the value of such evidence, the Court must consider that the deponent might, but for his death, have been cross-examined; and in the case of a deposition made for the purpose of a motion, whether the non-cross-examination may or may not be wholly or to some extent attributed to the object and materiality of the motion, and to the opportunity which it might be considered would be afterwards afforded for cross-examination.

[35] Rose J in ***Randall v. Atkinson***, [1899] OJ No 140 (Ont HCJ) (aff'd [1899] OJ No 186 (Ont HCJ, Div Ct)) considered a situation in which a party was questioned, the matter adjourned, and then the party died before he could be cross-examined on his deposition. Rose J extensively canvassed the cases in which depositions, oral evidence, and affidavits sworn before trial and without cross-examination were admitted at trial, and those where the evidence was excluded. Most of these cases factored in whether the adverse party had an opportunity to cross-examine (***Cazenove v Vaughan*** (1813) 1 M. & S. 4, citing Lord Ellenborough CJ, cited at para 15 of ***Randall***.)

[36] The principles in some of the cases cited by Rose J in ***Randall*** include:

- Depositions given before a public officer will be deemed to be fairly and impartially taken and admitted: (***Buller's Nisi Prius*** (1817), 242, cited in ***Randall*** at para 22;
- An affidavit in favour of the Plaintiff but filed after a lengthy delay and after the affiant's death, was admitted, subject to weight (***Abadom v. Abadom*** (1857), 24 Beav. 243, cited in ***Randall*** at para 23;

[1] Cited in ***Randall v. Atkinson***, [1899] OJ No 140 (Ont HCJ) at para 28.

- An affidavit by an elderly person who could not attend cross-examination because of ill health and paralysis was admitted, subject to very little weight (***Braithwaite v. Kearns*** (1865), 34 Beav. 202, cited in ***Randall*** at para 24.)
- The Master of the Rolls admitted two affidavits in which one deponent died and the other became insane before cross-examination, (***Ridley v. Ridley*** (1865), 34 Beav. 329, cited in ***Randall*** at para 25).

[37] Factors considered in admitting the affidavits in other cases cited in ***Randall*** include:

- The procedural rules (***Ridley***);
- There were no improprieties and there was no attempt to prevent cross-examination***:*** ***Davies v. Otty*** (1865), 35 Beav. 208 (cited in ***Randall*** at para 26);
- Evidence was of great importance to the issue, and was admitted subject to weight: ***Tanswell v. Scurrah*** (1865), 11 LTNS 761, cited in ***Randall*** at para 27;
- Where a witness dies or falls ill before cross-examination, the evidence will be admitted but its weight may be slight: ***People v. Cole*** (1871), 43 NY 508, cited in ***Russell*** at para 30.

[38] Rose J (at para 34) followed the majority opinion of the Court in ***Rex v. Doolin*** (1832), Jebb C. C. 123, and concluded that the evidence should be admitted.

[39] More modern cases have considered the intersection of the Rules of Court and the common law dealing with the admission of hearsay.

[40] In ***Heritage Freehold Specialists & Co*** an application was made under R 261(2) of the *Rules of Court*, Alta Reg 390/1968 (now r 8.17 of *Alberta Rules of Court*, Alta Reg 124/2010) (see Appendix A) to read-in at trial the affidavit evidence of a deceased witness. That rule provided that the court could order that facts may be proven by affidavit, but where the opposite party has a bona fide desire to cross-examine, "and a witness can be produced", the court shall not authorize that the evidence be given by affidavit. Hawco J concluded that if the evidence was to be admitted by affidavit, it must be "by way of exception to the hearsay rule" (at para 6).

[41] Relying on the decisions in ***Khan***, ***R. v. Smith*** (1992), 1992 CanLII 79 (SCC), and ***Clark v. Horizon Holidays Ltd***. (1993), 45 CCEL 244 (Ont Gen Div), he applied the tests of necessity and reliability.

[42] Similarly, Graesser J in ***Brennenstuhl Estate*** dealt with an application under R 261. The plaintiff in that case had died and the estate was continuing the action. The affidavit in question was used in an earlier application, and the deceased plaintiff was not cross-examined on it at the time. Graesser J notes that Hawco J did not address the question of whether there was an opportunity to cross-examine the affiant in ***Heritage Freehold Specialists & Co***. He went on to note (at paras 22-23):

> The Rules in both provinces [British Columbia and Alberta] recognize that there are circumstances where the court may permit affidavit evidence to be admitted at trial, subject to the court's discretion, judicially exercised.

> As noted in the ***Canned Heat*** case, affidavit evidence has been admitted at trial since at least ***Elias v. Griffith*** (1877), 46 Ch. D. (N.S.) 806 where an affidavit was admitted despite the deponent having died before trial. The court noted that it still had to estimate the value of such evidence, once admitted.

[43] In ***Canned Heat Marketing Inc. v. CFM International Inc.,*** [1998] BCJ No 1722 (SC) (Master), the Master held that once the applicant shows special circumstances (like the death of the affiant), the opposite party must demonstrate prejudice; in this example, it could not now cross-examine the witness. Recognizing that if the affidavit is not admitted there is also prejudice to the applicant, Graesser J concluded that it was a question of weighing the prejudice to each side. He concluded that the prejudice to the plaintiff would be greater than that accruing to the defendant and admitted the affidavit.

[44] Graesser J went on to consider the principled approach to hearsay, saying (at para 36):

> Even if Rule 261 does not expressly require this Court to consider the principled approach to hearsay, I must apply the rules of evidence which include the presumptive inadmissibility of hearsay save where the evidence meets the necessity and reliability criteria... Where the witness has died without being examined *de bene esse*, for example, resort to prior statements or testimony is clearly necessary, as that witness's evidence cannot be obtained in any other way. The fact that there is some other witness who may give similar evidence is not an answer to necessity.

[45] Most recently, Rothwell J in ***United Inc v Canadian National Railway Company***, 2021 ABQB 356 applied r 8.17 and the principled exception to hearsay to admit the affidavit of a deceased witness, finding that the affidavit met the threshold of necessity and reliability, and that when weighing the competing prejudice to the parties, the balance favoured admission. He went on to note that even if admitted under the hearsay rules and r 8.17, the affidavit must still conform to other rules of evidence, stating (at para 48): "[e]vidence that would not be permitted in *viva voce* testimony should not be permitted by way of affidavit."

Necessity

[46] The Defendant acknowledged that Mr. Nickel's death established the necessity element of the hearsay test.

Reliability

[47] The Plaintiffs assert that reliability is established by the following:

a) Mr. Nickel knew when he swore the Affidavit that he could be subject to cross-examination;

b) The notes attached to the Affidavit were signed by both Diane and Helmut Nickel, as they were both present for the site visits and interview with the Plaintiffs. Ms. Nickel was not married to Helmut at the time of the sale of the property in question;

c) The Plaintiffs were not present when the lawyer attended upon Mr. Nickel to commission the Affidavit and endorse the meeting notes;

d) There is nothing in the circumstances to suggest a reason for the deceased to be untruthful, and no suggestion that anyone prompted Mr. Helmet Nickel or Ms. Diane Nickel to state anything untrue.

[48] I accept that each of these factors, to a greater or lesser extent, support the reliability of the evidence.

[49] The Plaintiffs list several other factors that I do not accept as supporting reliability:

a) Although one of the Plaintiffs drafted the Affidavit and the notes from their meeting, the Plaintiffs argue that this is similar to counsel drafting documents on behalf of their client;

b) Ms. LaTrace, who took notes during the visit, believed what Mr. Nickel was saying to be true.

c) There was no evidence that Mr. Nickel had any motive to lie, since he was not selling, trading or bartering anything. Further Mr. Nickel was objective in the sense that he had no interests at stake in the House and the litigation.

d) Mr. Nickel did not know Mr. Warkentin. He had no axe to grind.

[50] There is a distinct difference between a lawyer drafting her client's affidavit on behalf of her client, and a party drafting the affidavit of a witness on behalf of that party. In the same vein, the fact that Ms. LaTrace believed what Mr. Nickel deposed is clearly no indication of its reliability, since it was to her advantage.

[51] I agree with the assertion that Mr. Nickel had no apparent motive to lie for financial gain, but he certainly had a strong attachment to the House. His own evidence indicates that it was a was a source of pride for him. Mr. Nickel called it a "dream home," an "example of his best work," and said that he was "devastated" when he saw the damage. At the very least, he had an emotional tie to the House. This has some effect on the reliability of the evidence. It does not mean that Mr. Nickel lied, but his perception was undoubtedly coloured by how he felt about the House and what it meant to his family and his legacy.

[52] Several of the statements in the Affidavit are double hearsay, Double hearsay has been described as "weaker and less reliable" (***R v McDonald***, 2017 ABQB 778, at para 30) and of "so little probative value as to be of no use to the Court" (***TL v Alberta (Director of Child Welfare)***, 2006 ABQB 104 at para 24). In ***TL,*** Slatter J, as he then was, noted, "[i]f there are third parties with factual information of assistance ... those third parties should themselves swear the affidavits."

[53] Based on this analysis, I give no weight to the evidence in the following paragraphs:

- 4(b): Mr. Nickel gives no basis for this statement, assuming it is made on either information and belief or based on his expertise. This paragraph is also excluded as being outside of his expertise (see *infra)*.
- 6(a): This statement is double hearsay. The realtor would be the best person to give this evidence. The Plaintiffs submit that Ms. Lyons-Boucher no longer has the materials to support the statement, but that fact

is not in evidence. In any event, the loss of the materials adds to the lack of reliability of the evidence.

- 7(b): This statement is double hearsay. Assuming that Mr. Nickel was told that the windows were broken by vandals, he gives no source for that information. The sentence would better have read: "In late 2015 some of the windows in the House and other buildings were broken". This preserves the factual evidence that some of the damage to the House occurred before the move.
- 7(c)(iii): This statement is double hearsay (someone told Mr. Nickel there was an accident that damaged the House), as Mr. Nickel does not personally know of an accident.
- 8 (first two sentences): This statement is double hearsay (the Plaintiffs told Mr. Nickel what the Defendants said) and is unreliable as such. Without the first sentence, the second sentence is unnecessary.
- 9 (first sentence) and 9(a): This statement is double hearsay (the Plaintiffs told Mr. Nickel what the Defendants said) and is unreliable as such. As noted above, it is also unnecessary as the Defendants can give evidence about whether parts of the House were "of unusual construction or inferior methods." Without that sentence 9(a) is unnecessary.
- 12(a): Mr. Nickel has no personal knowledge about an accident to the House.

Relevance

[54] It is trite law that all evidence must be relevant to an issue at trial. The portion of paragraph 10 dealing with the condition of the solarium shingles is irrelevant as it is not an issue at trial. That portion of the Affidavit will receive no weight.

Expert evidence

[55] The Plaintiffs' only evidence for qualifying Mr. Nickel as an expert is the fact that he had worked for more than 50 years as a mason.

[56] The Supreme Court of Canada in ***Mohan***, set out the criteria that governs when expert evidence can be admitted (at para 17):

- relevance;
- necessity in assisting the trier of fact;
- the absence of any exclusionary rule; and
- a properly qualified expert.

[57] As to qualifications the Court noted (at para 27):

> [T]he evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify.

[58] As the Defendants noted in their submissions there is no evidence in the Affidavit, or otherwise, that Mr. Nickel has any expertise in general construction, property valuation, or house moving methods. The Plaintiffs wished to rely on the Affidavit primarily to establish the market value of the House.

[59] An expert's area of expertise will be defined clearly, and his opinion evidence limited to that area of expertise. Usually, the expert will provide a resume or *curriculum vitae;* there is none here – only the assertion of 50 years of experience in masonry.

[60] I will not qualify Mr. Nickel's evidence as expert evidence.

[61] However, I will accept his evidence as factual evidence where he addresses such things as how he built the House and what materials he used, the structural elements of building with bricks, the strength and weight of bricks, and the standard practices related to affixing bricks. This evidence is relevant, necessary, and reliable as given by the person who built the House with familiarity with how it was constructed, the materials used, and the cost in time and materials to build the House.

[62] Based on this analysis, I give no weight to the evidence in the following paragraphs:

- 4(b): Mr. Nickel has not been qualified as an expert to give an opinion about whether anyone else could have built the fireplace/fountain. This is contrasted with paragraph 4(d), which will be weighed, in which Mr. Nickel makes the factual assertion that he does not know anyone else who could build the fireplace/fountain.
- The last phrase in paragraph 7: "to see what the building mover had done to the buildings and his hard work." This is not within either Mr. Nickel's knowledge or expertise.
- 7(c)(ii): This is an opinion about moving buildings that Mr. Nickel has not been qualified to provide to the Court.
- 8(d): The second portion of the sentence: "and could have easily been supported by angle iron for a move because the octagon was constructed with steel posts on each corner. The angle iron could have been affixed to each steel corner post." This is an opinion about moving buildings that Mr. Nickel is not qualified to provide to the Court.
- 8(e): The second portion of the sentence – "and I see no reason why it could not have been moved successfully". This is an opinion about moving buildings that Mr. Nickel is not qualified to provide to the Court.
- 8(f): The second portion of the sentence "and I see no reason why it could not have been moved successfully". This is an opinion that Mr. Nickel has not been qualified to provide to the Court.
- 8(g): The force required to tear off brick is a matter of expert opinion that Mr. Nickel is not qualified to provide to the Court.
- 11(a), (c)-(e): These are opinions about moving buildings that Mr. Nickel has not been qualified to provide to the Court.

- 12, 12(a)12(b): This is an opinion that Mr. Nickel has not been qualified to provide to the Court.

Prejudice

[63] As noted, the Plaintiffs acknowledged that the evidence should be excluded if its prejudicial effect outweighs its probative value. The Defendants were unable to cross-examine Mr. Nickel. Given the time between when the Affidavit was served and Mr. Nickel's death, and the fact that the Defendants indicated that they would seek to question him, there is clearly some prejudice.

[64] On the other hand, the Plaintiffs have no other opportunity to obtain similar evidence from anyone contemporaneous with the building of the House, and in particular the brickwork. Evidence from experts after-the-fact is no substitute for the evidence of the person who built the House and did the detailed and extensive brickwork.

[65] I conclude that the balance of prejudice weighs in favour of admission.

Summary of evidence to be admitted

[66] The following paragraphs of the Affidavit are admitted as factual evidence, to be assessed for their weight and their truth:

- Paragraphs 1-3 provide basic facts underlying the circumstances of swearing the Affidavit;
- Paragraphs 4(a), (c), and (d) describe Mr. Nickel's personal involvement in building the House;
- Paragraphs 5 and 6 describe the materials he used to build the House and the circumstances surrounding his decision to sell the property where the House was located;
- Paragraph 6(b) describes how much he paid to his son from the sale proceeds of the property;
- Paragraph 7 first sentence and first part of second sentence – "I, along with my wife Diane, personally viewed the house and gazebo that I had built, along with LaTraces on August 11, 2016. It was devastating to us both to see"; this is a narrative of what Mr. Nickel and his wife saw and how they reacted to seeing the House;
- Paragraph 7(a) reports Mr. Nickel's opinion about the condition of the House when they left it;
- Paragraph 7(b) to the extent that he knows that some windows were broken in 2015 in the House;
- Paragraph 7(c)(i) and (c)(iv) reports specifics of what Mr. Nickel saw at the House that does not require expertise;
- Paragraph 8(a)-(c) records specifics of the techniques and materials Mr. Nickel used to construct the House. As a builder, he would know the

requirements of the Alberta Building Code, and this does not require expertise;

- Portions of paragraph 8(d) and (e) that report that "the brick on the gazebo was well attached" and that "there was no damage to the brick", are both within his personal knowledge;
- Paragraph 8(f) is the simple reporting of a fact related to a photo;
- Paragraph 9(b)-(f) reports Mr. Nickel's experience with the House, his personal knowledge of what was required when he built the House, his experience as a mason, and what he saw in the drywall and bricks before the move.
- Paragraph 10: The first two sentences dealing with the condition of the shingles on the House in 2014, but not the solarium, is within Mr. Nickel's personal knowledge;
- Paragraph 11(b) and (f)-(i) report facts known and understood by Mr. Nickel personally, considering that while he was not qualified as an expert, his experience gives him significant insight into what he observed when he saw the House after the move;
- Paragraph 13 again provides some context for the circumstances surrounding the preparation of the Affidavit.

Conclusion

[67] The parties have had mixed success. The Affidavit is admitted, and some portions will be weighed for the truth of the contents. However, some portions will be given no weight because they were unreliable or outside of Mr. Nickel's personal knowledge.

[68] I have concluded that I will not qualify Mr. Nickel's evidence as expert opinion evidence as there is insufficient evidence of the scope or depth of his expertise.

Heard by written submissions received November 25, 2021, December 28, 2021and February 1, 2022.

Dated at the City of Edmonton, Alberta this 13th day of May, 2022.

S.N. Mandziuk
J.C.Q.B.A.

Appearances:

Dean LaTrace and Darlene LaTrace
Self-Represented Litigants
for the Plaintiffs (Applicants)

Ted Lawson & Megan Riddell
Parlee McLaws
for the Defendant (Respondent)

Appendix A

261(1) In the absence of an agreement between the parties and subject to these Rules and The Evidence Act and any other enactment relating to evidence, any fact required to be proved at the trial of an action by the evidence of witnesses shall be proved by the examination of the witnesses orally and in open court.

(2) The court may, at or before the trial, order

(a) that any fact or facts may be proven by affidavit, or

(b) that the affidavit of any witness may be read at the trial, or

(c) that any witnesses whose attendance, for some sufficient cause, ought to be dispensed with, be examined before an examiner to be appointed by the court,

but where the other party bona fide desires the production of a witness for cross- examination and the witness can be produced, an order shall not be made authorizing his evidence to be given by affidavit.

Alberta Rules of Court, Alta Reg 124/2010

8.17(1) A fact to be proved at trial by the evidence of a witness must be proved by questioning the witness in Court unless

(a) these rules or an enactment otherwise requires or permits,

(b) the parties agree to that fact, or

(c) the Court otherwise orders.

(2) The Court may not order that a fact be proved by affidavit evidence of a witness if

(a) a party, for good reason, wishes to cross-examine the witness, and

(b) the witness may be required to attend the trial.

TAB 8

Court of Queen's Bench of Alberta

Citation: T.L. v. Alberta (Director of Child Welfare), 2006 ABQB 104

Date: 20060208
Docket: 0403 12898
Registry: Edmonton

06 059 075

Between:

T.L.

Plaintiff

- and -

Her Majesty the Queen in Right of Alberta as Represented by the Director of Child Welfare

Defendant

Restriction on Publication: No one may publish any information serving to identify a child or guardian of a child who has come to the 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.

Note: On behalf of the Government of Alberta identifying information has been removed from this unofficial electronic version of the judgment.

Reasons for Judgment of the Honourable Mr. Justice Frans F. Slatter

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[1] This is an application to certify these proceedings as a class action. The premise of the action is that the class members, who were minors at the time and under the care of the Defendant, suffered a personal injury (the "primary tort") at the hands of a third party tortfeasor (the "primary tortfeasor"). It is alleged that the Defendant Director of Child Welfare had a duty to

sue the primary tortfeasor on behalf of the minor, but did not do so. As a result, it is alleged that the class members lost certain rights, and they now seek to recover damages from the Defendant Director.

[2] This is therefore not an action about any failure of the Defendant to react properly to the abuse itself. This is a lawsuit about lawsuits. The thrust of the Plaintiff's claim is that she and other members of the class suffered personal injuries that would have entitled them to damages, or would have entitled them to make claims under the Victims of Crime legislation. The allegation is that the Defendant should have pursued those claims on behalf of the plaintiff class, and did not do so.

Facts

[3] A certification application is not a determination of the merits, and none of the allegations in the pleadings have at present been proven. In this particular action, the circumstances of the various potential class members will vary widely, distinguishing this action from some others that have been certified. The circumstances of some of the individual potential class members are useful in providing some context for the application. The record discloses the circumstances of three potential class members.

The LaBonte Claim

[4] Ms. T.L., the proposed representative plaintiff, deposes that she was abused by her step-father between the ages of 7 and 14. The first involvement of the Defendant with the family actually occurred when Ms. T.L. was nine years old, and involved a report of mental abuse by her step-father. Both Ms. T.L. and her mother denied the abuse, and the file was closed.

[5] In about September of 1986, Ms. T.L. and her mother and sister went to a facility for battered women. At that time Ms. T.L. reported physical abuse by her step-father to the Defendant. Ms. T.L. was 14 years old. Ms. T.L. deposes that she was made the subject of a Permanent Guardianship Order at this time, but the Defendant's records do not confirm that. The Defendant and the Plaintiff's mother did enter into a "Support or Custody Agreement with Guardian" for a three-month period from September 11, 1986 to December 18, 1986. The Support Agreement is a standard form one-page document, which recites that it was made pursuant to the provisions of the *Child Welfare Act*. The agreement has a place to check off "Support Agreement", or "Custody Agreement", and the former was checked. The agreement states that "the guardian(s) and the Director agree:", and the only operative clause is clause 5 which reads as follows:

> 5. The guardian(s) delegate(s) to the director the authority to make the following decisions:
>
> ☐ Day to day child care
> ☐ Social activities
> ☐ School enrollment, vocational training, and employment
> ☐ Consent to emergency treatment or surgical procedures
> ☐ Not applicable
> ☐ Other

- ☐ Acquisition of recreational licenses and permits (excluding firearms and driver's license)
- ☐ Consent to ordinary medical/dental care

The only box checked off was the one marked "Not applicable". It therefore appears that a fairly low level of involvement by the Defendant was anticipated. The purpose of the Support Agreement was apparently to allow the Defendant to provide the Plaintiff with a youth worker and counselling services.

[6] In December of 1986, Ms. T.L.'s counsellor reported that she was doing well. There was a restraining order in place against her step-father, the Department workers concluded that the family was doing well, and the file was closed on January 26, 1987.

[7] In May of 1987, Ms. T.L. disclosed prior sexual abuse to her mother, who contacted the Department. A further Support Agreement was entered into between July 7, 1987 and January 6, 1988. It was similar in form to the previous Support Agreement. Further counselling was arranged, but Ms. T.L. apparently did not attend.

[8] The second Support Agreement was terminated early on September 2, 1987 when Ms. T.L.'s mother arranged for her to move and reside with an aunt. On September 29, 1987 the aunt reported some difficulties with Ms. T.L. In October of 1987, Ms. T.L. overdosed and was admitted to hospital. On October 29, 1987, Ms. T.L. was "apprehended into the custody of a director" under s. 17(9)(a) of the *Act*, on the basis that Ms. T.L. was lost or abandoned or had no guardian, as neither her mother nor her aunt were willing to take responsibility for her.

[9] On November 10, 1987, the Provincial Court issued a Temporary Guardianship Order with respect to Ms. T.L. The order was made permanent on October 20, 1988. That order stayed in effect until her 18th birthday on July 19, 1990. At that point, Ms. T.L. left the Child Welfare system, and *prima facie* the limitation periods on her claims would have started to run again (see *infra*, para. 77). During this time the Department arranged counselling for Ms. T.L. and her mother, and she resided in various foster homes (from which she sometimes ran away).

[10] In 1988, Ms. T.L.'s step-father was charged with criminal offences relating to the abuse, and in 1990 he was convicted and sentenced to a term in prison.

[11] A summarized chronology of the T.L. claim is as follows:

T.L. Chronology	
July 19, 1972	Date of Birth
1979	Abuse starts (age 7)

August, 1981	First Involvement of Children's Services (emotional abuse)
August, 1986	Abuse ends (age 14)
Sept. 11-Dec. 18, 1986	Physical abuse reported; Support Agreement and counselling
May, 1987	Sexual abuse reported to mother and Department
July 7-Sept. 2, 1987	Support Agreement; moves to aunt
October 29, 1987	Apprehended (age 15)
November 10, 1987	Temporary Guardianship Order
1988	Step-father charged
October 20, 1988	Permanent Guardianship Order (age 16)
July 19, 1990	Turns 18; leaves Child Welfare system; limitations start to run?
1990	Step-father convicted
July 19, 1992	Turns 20; two years from re-start of limitations
August, 1996	Ten years after abuse ends
May, 1997	Ten years after disclosure
March 1, 1999	New *Limitations Act* in effect
July 19, 2000	Turns 28; ten years after re-start of limitations
March 1, 2001	Two years after new *Limitations Act*; transitional period over
June 29, 2004	Action commenced

[12] It is unclear whether Ms. T.L.'s history represents a typical pattern of the proposed class. It can be seen that on two occasions she was under "Support Agreements" for short periods of time. She was the subject of a Temporary Guardianship and then a Permanent Guardianship Order for approximately 31 months. Since her step-father was convicted, it is clear that she was the victim of a tort. It also seems likely that she might have had a claim under the *Criminal Injuries Compensation Act*. She was not however under the care of the Defendant at the time of the tort, and she was not apprehended directly as a result of the tort. Her eventual apprehension was as a result of her aunt having problems with her, and because of her overdose. However, the Defendant was aware of the tort at the time of the apprehension in October of 1987.

S.J. Claim

[13] It was originally proposed that S.J. would be the representative plaintiff, but Ms. T.L. was substituted in her place. S.J. was born in 1961. She deposes that she was sexually and physically assaulted by a number of relatives and friends of the family. When she was 14 years old she became pregnant as a result of a sexual assault by a relative. That relative was subsequently convicted of the crime. S.J. lived a very unstable life, and in her later teens she was abused or exploited by other persons, and had three other children.

[14] S.J.'s involvement with the Defendant was somewhat limited. Between 1965 and 1968 the family was involved with the City of Calgary's Children's Aid Department, not the Defendant. The Defendant assumed supervision of the family in December of 1968, when S.J. was about seven years old. At one point, S.J.'s sister was the subject of a Temporary Guardianship Order. In addition to the Defendant's monitoring of the home, S.J. was the subject of a Temporary Custody Agreement under s. 35 of the *Act*, dated May 31, 1977. The agreement provided that "the Director agrees to take the child into care". It gave the Director authority to provide medical care for S.J., and allowed the Director to collect the Family Allowance payments. It was anticipated that the agreement would be in force for six months, but it was terminated after two months on August 1, 1977. On that date S.J. was moved from a foster home back to her parents.

[15] S.J. was apparently never the subject of a Temporary Guardianship Order or a Permanent Guardianship Order. Apart from the Temporary Custody Agreement that was in place for about two months, the involvement of the Defendant with S.J. amounted to "monitoring" of the family. The involvement of the Department with S.J. was therefore qualitatively different than its involvement with Ms. T.L. While S.J. was assaulted many times, the primary assault occurred in 1975, which would suggest that the presumptive limitation period would have expired in 1977. The record is somewhat unclear, but the limitation might have expired during the term of the Temporary Custody Agreement. This raises the issue of the responsibility of her guardians to commence the action either before, or during the currency of the Temporary Custody Agreement. If the Defendant had a duty to sue on her behalf, and did not do so, the limitation period on S.J.'s cause of action against the Defendant might well have expired in 1983. At the time that this action was commenced, S.J. was over 28 years of age, which suggests that the ultimate limitation period might have expired (see *infra*, paras. 55(a) and 77).

Claim of J. J. S.

[16] J. J. S. is put forward as another person who might be a member of the clasS.J. J. S. was born on May 28, 1988. He was accordingly 16 years old when this action was commenced, and he is 17 today. A Next Friend commenced an action on his behalf in 2004, but it is suggested that this claim would be absorbed into the class action.

[17] J. J. S. was apparently made the subject of a Temporary Guardianship Order in November of 1993, when he was five years old. J. J. S. was placed in a foster home, where he was assaulted by another foster child in late 1993 or early 1994. The other foster child was convicted as a result of these assaults.

[18] The claim of J. J. S. therefore differs significantly from the claim of S.J. and Ms. T.L. The primary tort against him occurred while he was under the joint guardianship of the Defendant. The limitation period against the primary tortfeasor would have arisen under the old *Limitation of Actions Act*. By the time the new *Limitations Act* came into place in 1999, it is likely that the limitation period had already run, subject to the question of whether he was under the "actual custody" of a parent or guardian (see *infra*, para. 50). If the tort had occurred after 1999, the limitation period would still be suspended in favour of J. J. S. under the new *Limitations Act*, because he is a minor (see *infra*, para. 52).

[19] This brief summary of the allegations of Ms. T.L., S.J., and J. J. S., shows the wide variety of circumstances in which the claims of class members might arise. This factual context must be kept in mind in determining whether this action should proceed as a class action.

The Statute

[20] This application is brought under the *Class Proceedings Act,* R.S.A. 2000, c. C-16.5. The most relevant provisions of the *Act* are 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.

Evidentiary Issues

[21] The Plaintiff and Defendant tendered evidence in this application. A good deal of that evidence was inadmissible.

Evidence on Legal Issues

[22] An affidavit was filed by S.J., who was originally put forward as the representative plaintiff. She deposed in part "I have reviewed the proposed litigation plan attached as Exhibit A and believe it would provide a proper framework for dealing with the claims." Whether the litigation plan is appropriate is a matter for argument by counsel, and a decision by the certifying judge. It is not an appropriate topic for expert evidence, much less evidence of a lay litigant.

[23] The Plaintiff also filed an affidavit of Deborah Stewart, a barrister with a large personal injury practice in Edmonton. Ms. Stewart deposed that she once represented a client known as MS.J. MS.J. had been sexually abused by her step-father, and was so traumatized by the experience that she was unable to participate in any litigation to protect her rights. She could not even participate in examinations for discovery or independent medical examinations. Ms. Stewart deposed that plaintiffs like MS.J. would benefit from a class proceeding, because they would not have to participate directly in the proceedings. To this extent Ms. Stewart's affidavit was unobjectionable, even if of slight materiality, as the circumstances of MS.J. were so extreme and unusual that they are unlikely to be representative of the majority of class members. The affidavit also did not explain how a plaintiff like MS.J. would handle the individual phase of this litigation: see *infra*, para. 58.

[24] Ms. Stewart's affidavit, however, went on to depose that "based on my experience and observations as Next Friend for MS.J., I believe that there are many advantages to prosecuting S.J.'s lawsuit as a representative action." Again, whether a class proceeding is "the preferable procedure for the fair and efficient resolution of the common issues" is a matter for argument and decision. It is not an appropriate topic for expert evidence: Furthermore, Ms. Stewart's affidavit was full of hearsay. It recounted things that third parties had disclosed to Mr. Lee, and that Mr. Lee had then passed on to Ms. Stewart, who then swore that she verily believed them to be true. This sort of double hearsay is of so little probative value as to be of no use to the Court: ***Dudziak v. Boots Drug Stores Canada Ltd.*** (1983), 40 C.P.C. 140 at para. 6; ***Edwards v. Law Society of Upper Canada*** (1995), 40 C.P.C. (3d) 316 (Ont. Gen. Div.) at para. 15. If there are third parties with factual information of assistance in the certification hearing, those third parties should themselves swear the affidavits.

Statements of Counsel

[25] The Plaintiff also attempted to rely on statements made in court by counsel retained by the Defendant in other similar litigation. These statements were made during argument in those cases, sometimes in response to questions from the presiding judge. What counsel says in court about issues of fact is not evidence: ***Cairns v. Cairns***, [1931] 3 W.W.R. 335, 26 Alta. L.R. 69 (C.A.); ***Ravoy v. Ravoy***, 2000 ABCA 114, 255 A.R. 293 at para. 18; ***Mitran v. Guarantee RV Centre Inc.*** (1999), 251 A.R. 77, at para. 17; ***Principal Savings and Trust Co. v. Amo Pecuniam Holdings***, [1984] A.J. No. 578 at para. 36. Counsel of course has implied authority to make binding admissions of fact in an action. But such admissions are regarded as mere waivers of the need to prove the fact in that case, and are not binding in subsequent actions: *Phipson on Evidence* (16th ed., 2005) at para. 4-19. Any purported "admissions" on matters of law are not binding on the court, even in the action in which they are made: ***Avco Delta Corp. Canada Ltd. v. MacKay*** (1977), 4 A.R. 565, [1977] 5 W.W.R. 4 (App. Div.); ***V. W. v. D. S.***, [1996] 2 S.C.R. 108, at para. 17.

[26] Statements made by counsel to the court during argument are rarely admissions at all. They often are no more than examples offered by counsel to show the consequences of the arguments of that counsel, or his or her opponent. Sometimes they are merely responses to probing questions or "kite flying" by the judge. Statements made by counsel in argument in other cases are not relevant. For example, in ***British Thomson-Houston Company, Limited v. British Insulated and Helsby Cables, Limited***, [1924] 1 Ch. 203, the plaintiff argued that it was impossible to draw a tungsten filament by following a particular patent. In a previous action it had argued the opposite. The case (i.e. the factum) filed by the plaintiff in the House of Lords in the earlier action was held not to be admissible in the present action. In ***Canadian Parks and Wilderness Society v. Canada (Minister of Canadian Heritage)***, 2002 FCA 106, the Court refused to include in the appeal books the arguments of counsel in a previous related action. Even the reasons for judgment in a previous action involving the same parties have no probative value: ***Marthaller v. Lansdowne Equity Venture Ltd.*** (1997), 52 Alta. L.R. (3d) 329, 200 A.R. 226 (C.A.) at para. 46; ***Edwards v. Law Society of Upper Canada***, *supra*, at para. 9.

[27] Related to the rule that the arguments of counsel are irrelevant in subsequent cases is the rule that the comments of the judge during argument are not official pronouncements. As Viscount Simon said in a *Practice Note*, [1942] W. N. 89:

> During the hearing of an appeal Viscount Simon L.C., referring to reports which might be made of the case, said that it was well understood that interlocutory observations of members of the Board or of a Court were not judicial pronouncements. They did not decide anything, even provisionally. They were made to elucidate the argument, to point the question, or to indicate what were the matters which the judicial spokesman thought needed to be investigated, and that was all. It would be a very great pity, and a profound error, if anybody, foreigner or fellow-subject, supposed that interlocutory observations were anything more.

See also ***R. v. Hodson***, 2001 ABCA 111, 281 A.R. 76, at para. 33; ***Alberta Union of Provincial Employees v. Continuing Care Employees' Bargaining Association***, 2002 ABCA 148, 4 Alta. L.R. (4^{th}) 206, 303 A.R. 137. Any rule that the client is forever bound by statements made by its counsel in argument could only impede the frank dialogues between counsel and the Court that are often used as a part of the adversarial process of problem solving. The transcripts of argument in other cases relied on by the Plaintiff are of no probative value, and are vexatious.

Evidence of Other Actions

[28] The Defendant also attempted to produce evidence on whether the class proceeding is the "preferable procedure for the fair and efficient resolution of the common issues". The evidence was an affidavit deposing that 33 individual actions had been commenced against the Defendant that overlapped with the claims that would be included in the class action. This, the Defendant argued, showed that these claims can be efficiently resolved in individual actions.

[29] Not surprisingly, the Plaintiff attempted to cross-examine on this affidavit. She wanted the Defendant to identify each of the 33 actions, and then to give the status of the actions. The Plaintiff proposed to show that some of the 33 actions had been abandoned, discontinued, struck out, or summarily dismissed. This it was said would show that a class proceeding was the preferable procedure.

[30] An application to compel the Defendants to provide further information about the 33 actions was dismissed, on the basis that the evidence was not relevant and material. The reasons can be summarized as follows:

(a) Whether a procedure is "preferable" is largely a question of law. It is determined by the certification judge based on his or her knowledge of how court procedures work. Evidence on questions or conclusions of law is not appropriate: ***Canada Post Corp. v. Smith*** (1994), 20 O.R. 173, 118 D.L.R. (4th) 454 (Div. Ct.); ***R. v. S. (G.)*** (1988), 67 O.R. (2d) 198, 31 O.A.C. 161, 46 C.C.C. (3d) 332 (C.A.), aff'd [1990] 2 S.C.R. 294; ***R. v. Oliver*** (1997), 48 Alta. L.R. (3d) 180, 193 A.R. 241 (C.A.); ***Ontario (Ministry of Natural Resources) v. Ontario Federation of Anglers and Hunters*** (2001), 143 O.A.C. 103, 32 Admin. L.R. (3d) 282 (Div. Ct.); ***Marquis of Camden v. Inland Revenue Commissioners***, [1914] 1 K.B. 641 at pg. 650. For example, evidence of this type was rejected in ***Bramalea Inc. (Trustee of) v. KPMG*** [2000] S.C.C.A. No. 278, 143 O.A.C. 399 (whether issue important enough to justify leave to appeal); ***Alberta Human Rights Commission v. Blue Cross***, [1983] 6 W.W.R. 758, 28 Alta. L.R. (2d) 1, 48 A.R. 192 at para. 8 (whether procedural steps unreasonable); ***Chevron Canada Resources v. Canada (Executive Director of Indian Oil and Gas Canada)***, 1998 ABQB 910, [1999] 7 W.W.R. 47, 239 A.R. 138 (whether proceeding an abuse of process);

Hovsepian v. Westfair Foods Ltd., 2003 ABQB 641, [2004] 5 W.W.R. 519, 22 Alta. L.R. (4th) 241, 341 A.R. 1 at para. 54 (whether matter *res judicata*).

(b) Some of the proposed evidence did not appear to be relevant. For example, if an action was dismissed or abandoned because of the expiry of a limitation period, that would have nothing to do with whether a class proceeding was preferable or not. Either way the action would be statute barred.

(c) The evidence is not material, because at the end of the day it is not probative. As I pointed out in ***Robertson v. Edmonton (City) Police Service (#9)***, 2004 ABQB 243, 39 Alta. L.R. (4th) 239, 355 A.R. 281 at paras. 12-20 attempting to draw generalized conclusions from individual examples is rarely helpful.

(d) This evidence is also not admissible because it would cause the Court to have to inquire into 33 separate collateral issues. One could only conclude that the 33 actions were or were not being successfully prosecuted individually by examining the circumstances of each one. Where the actions had been abandoned, discontinued, or struck out, one would have to examine them individually to see whether they would have been more successful as a class proceeding. The system simply cannot devote the resources needed for this kind of collateral inquiry: ***Robertson v. Edmonton***, *supra*, at para. 20. In any event, even if the inquiry was conducted it is unlikely that any probative evidence would result.

(e) Further, it should be noted that the issue in the *Act* is whether the common issues can be more efficiently decided in the class action. Because individual issues and individual actions have been resolved does not necessarily speak to the preferable way of resolving the common issues.

In determining whether a class proceeding is the preferable procedure to follow, I have accordingly disregarded any evidence of the results of particular individual actions.

Publication Ban

[31] The proposed representative Plaintiff brought an application to prosecute this action using a pseudonym, and for an order that information that would disclose her identity not be published. In accordance with Practice Note No. 11, notice was given to the media of this application. The Defendant took no position on the application.

[32] The Supreme Court has, on many occasions, made it clear that justice should be administered in public. As the Court recently held in ***Toronto Star Newspapers Ltd. v. Ontario***, [2005] 2 S.C.R. 188, 2005 SCC 41, 253 D.L.R. (4th) 577 at paras. 1-4:

> [1] In any constitutional climate, the administration of justice thrives on exposure to light -- and withers under a cloud of secrecy.
>
> [2] That lesson of history is enshrined in the *Canadian Charter of Rights and Freedoms*. Section 2 of the *Charter* guarantees, in more comprehensive terms, freedom of communication and freedom of expression. These fundamental and closely related freedoms both depend for their vitality on public access to information of public interest. What goes on in the courts ought therefore to be, and manifestly is, of central concern to Canadians.
>
> [3] The freedoms I have mentioned, though fundamental, are by no means absolute. Under certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice. A temporary shield will in some cases suffice; in others, permanent protection is warranted.
>
> [4] Competing claims related to court proceedings necessarily involve an exercise in judicial discretion. It is now well established that court proceedings are presumptively "open" in Canada. Public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would *subvert the ends of justice* or *unduly impair its proper administration*.

An open judicial system is one of the hallmarks of our democratic constitution. As such, publication bans should be exceptional.

[33] There are some cases where the victims of sexual assaults have been permitted to sue using pseudonyms: ***Nickason v. Alberta***, 2006 ABQB 115 at para. 10. Many of these cases were decided before the leading decisions on the constitutional importance of keeping the courts open. Most of them were not decided on notice to the media, and many do not discuss the *Charter* implications of a publication ban.

[34] When considering a publication ban, there are special considerations that apply to a class action. When a person comes forward and purports to be a representative plaintiff, there is much to be said for the argument that the other members of the class are entitled to know who it is that purports to represent them: see ***B. B. v. Quebec (Procurer General)***, [1998] R.J.Q. 317. Section 20 of the *Act* requires that notice of certification be given to the class. Section 20(6)(a) requires that the name and address of the representative plaintiff be disclosed. It would be somewhat artificial to provide for a publication ban, or the use of a pseudonym, when the name and address of the representative plaintiff must be publicized to the class. In all of the circumstances, it is inappropriate to allow the representative Plaintiff to sue by use of a pseudonym, and the application is accordingly dismissed.

The Merits

[35] Section 6(2) of the *Act* provides that a certification application is not a determination of the merits: see also ***Hollick v. Toronto (City)***, [2001] 3 S.C.R. 158, 2001 SCC 68 at para. 16. Section 5(1)(a) requires only that the pleadings disclose a cause of action. A certification application is therefore not in the nature of a summary judgment application, although sometimes the defendant will bring a cross-application for summary judgment at the time of certification: ***Pauli v. ACE INA Insurance Co.***, 2004 ABCA 253, 32 Alta. L.R. (4th) 205, at para. 7; ***Papaschase Indian Band v. Canada (A.G.)***, 2004 ABQB 655, 43 Alta. L.R. (4th) 41, at para. 1.

[36] Nevertheless, the merits of the action are relevant to determining whether a class proceeding is the preferable procedure for the fair and efficient resolution of the common issues. It is necessary to explore the merits to identify the common issues and to define the class: ***Cloud v. Canada (A.G.)*** (2004), 73 O.R. (3d) 401, 247 D.L.R. (4th) 667 (C.A.) at para. 48. Further, while the certification motion is not the appropriate place for deciding difficult questions of fact or law, if it appears on the face of the proceeding that the action is doomed to fail, there is little point in certifying the class proceeding. The following issues relating to the merits are relevant to the certification motion.

Social Welfare Legislation

[37] Since Alberta became a province in 1905, there have been five statutes relating to the protection of children:

> *The Children's Protection Act of Alberta*, S.A. 1909, Chapter 12; in force February 15, 1909 (the "*1909 Act*");
>
> *The Child Welfare Act*, S.A. 1925, Chapter 4; in force November 1, 1931 (the "*1925 Act*");
>
> *The Child Welfare Act*, S.A. 1944, Chapter 8; in force May 1, 1944 (the "*1944 Act*");
>
> *The Child Welfare Act*, 1966, S.A. 1966, Chapter 13; in force July 1, 1966 (the "*1966 Act*");
>
> *Child Welfare Act*, S.A. 1984, Chapter C-8.1; in force July 1, 1985 (the "*1984 Act*").

The *1984 Act* was substantially amended, and renamed the *Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12 ("*C.Y.F.E. Act*") as of November 1, 2004. The *1984 Act* having been in force for the last 20 years, as a practical matter most of the class members were probably involved with the Defendant pursuant to its provisions.

[38] Not surprisingly the legislation has changed over time. It is not necessary to explore all of the differences in the legislation over the last century, but a few comments about the concept of guardianship are appropriate.

[39] The *1909 Act* did not deal with guardianship. The *1925 Act* provided that the Director, or a private children's aid society would be the legal guardian of a child who became a permanent ward. Under the *1944 Act*, the Superintendent became the legal guardian "of the person of the child" when a child was made a permanent ward.

[40] By s. 10 of *An Act to Amend the Child Welfare Act*, S.A. 1961, c. 11, the Superintendent became the "sole legal guardian of the person *and estate* of the child" (emphasis added). The statute provided that the rights of the Public Trustee with respect to any property held by him for the child were not affected by the guardianship of the Superintendent.

[41] The *1984 Act* expanded the options available to the Department. Section 7 of the *1984 Act* authorized support agreements "with respect to the provisions of support services to the family or the child", if the welfare of the child would be adequately protected if he or she stayed with his or her guardian. Section 8 of the *1984 Act* allowed for custody agreements under which a Director would be given custody of a child for a period not exceeding six months. Custody agreements could be renewed, but the total duration of the custody could not be more than two years. Under s. 9, a custody agreement had to deal with a number of issues, including "the extent of the delegation of the authority of the guardian to the Director".

[42] The *1984 Act* also allowed for Supervision Orders, Temporary Guardianship Orders, and Permanent Guardianship Orders. A Supervision Order could be made for a period not exceeding six months where a child was in need of protective services, and the child's needs could adequately be dealt with by the child's guardian, subject to the supervision of the Director.

[43] If the needs of the child could not be met by the child's guardian, then the Director could apply for a Temporary Guardianship Order. A Temporary Guardianship Order could be in place for no more than one year, at which time the Temporary Guardianship Order could be renewed for one more year, or a Permanent Guardianship Order could be granted.

[44] The *1984 Act* did not appear to contemplate any change in guardianship as a result of a Supervision Order. When a Temporary Guardianship Order was made, s. 29(2) provided that the Children's Guardian would become a joint guardian with any other guardian of the child. When a Permanent Guardianship Order was granted, s. 32(3) provided:

> **32(3)** If the court makes a permanent guardianship order, the Children's Guardian is the sole guardian of the person of the child and the Public Trustee is the *sole trustee of the estate of the child.* (emphasis added)

In 1988 the Children's Guardian was replaced by the Director, but otherwise the provisions of the *1984 Act* were unchanged: see *C.Y.F.E. Act*, ss. 31(2) and 34(4). Thus, from 1961 to 1985 the Superintendent was the "guardian of the estate" of the child. From July 1, 1985, the Public Trustee has been the trustee of the estates of children subject to permanent guardianship orders. See ***Blood v. Alberta (Minister of Children's Services)***, 2004 ABQB 788, 365 A.R. 179, 7 C.P.C. (6th) 174.

Victims of Crime Legislation

[45] One branch of the claim asserts that the class members have lost claims to compensation under the statutes in place to assist victims of crime. There have been two such statutes in force in Alberta: *The Criminal Injuries Compensation Act*, R.S.A. 1980, c. C-33 ("*C.I.C.A.*") which was in force from October 1, 1969 to November 1, 1997, and the *Victims of Crime Act*, R.S.A. 2000, c. V-3 ("*V.C.A.*"), which has been in force from November 1, 1997 to the present. The benefits available under the statutes vary.

[46] The *C.I.C.A.* (s. 2(3)(a)) required that the claim be made within one year of the injury, although the Board had a discretion to extend the time. Claims under the *V.C.A.* must (since it was amended in 2001) be made within two years of discovery of the injuries (s. 12). The discretion to extend the time remains, but ignorance of the existence of the *V.C.A.* is apparently not considered a sufficient reason.

[47] The *C.I.C.A.* (s. 9(1)) allowed for out-of-pocket expenses and pecuniary damage including wage loss. The *V.C.A.* (under the *Victims of Crime Regulation*, AR 63/2004) contains a detailed list of injuries, and rates them by severity. Compensation is provided by a formula based on the assessed severity, to a maximum of $110,000.00 (Reg. 8(4)). In some cases the applicant might potentially receive more, and in other cases less, under the *V.C.A.* than the *C.I.C.A.*

Government Policy on Legal Rights of Children

[48] The Defendant has for some time had written policies in place to provide for legal representation (when appropriate) for children respecting a child's own involvement in the Child Welfare system, and for children in care who become involved in the youth criminal justice system. Written policies respecting the legal representation of children in care who might have civil claims are more recent. Recognizing that this is not a determination of the merits, they appear to be as follows:

The 1989 Policy

> N. LEGAL AID FOR CHILDREN IN CARE
> There may be a situation in which a child has the right to initiate civil legal action and will require legal counsel. The child welfare worker shall refer these to the Regional Manager of Children's Services to determine the appropriate action to take to protect the rights of the child.

The 1991 Policy

CRIMINAL OR CIVIL

If a child with status is a party to a criminal or civil action, even if proceedings continue past the 18th birthday:

1. Determine whether the child should have a lawyer.

2. If the child needs a lawyer, advise the regional manager, child welfare services.

3. Arrange for a lawyer.

If a child in care has the right to initiate civil action, refer the matter to the regional manager, child welfare services. The regional manager, child welfare services determines what action to take to protect the child's rights.

The 1992 Policy

CRIMINAL OR CIVIL

If a child *under guardianship* is a party to a criminal or civil action, even if proceedings continue past the 18th birthday:

1. Determine whether the child should have a lawyer.

2. If the child needs a lawyer, inform the *district manager.*

3. Arrange for a lawyer.

If a child *under guardianship* has the right to initiate civil action, refer the matter to the *district manager* who decides what action to take to protect the child's rights. (changes from 1991 Policy highlighted)

The 2005 Policy

Purpose	To inform Ministry staff of the interim process for protecting the legal interests of children under permanent guardianship.
Background	A recent ruling from the Court of Queen's Bench suggests that the Public Trustee (Alberta Justice) has the authority and the responsibility to pursue civil claims on behalf of

children under permanent guardianship. This does not mean that the Public Trustee must pursue all claims that come to his attention. Rather, the Public Trustee is entitled to assess potential claims to determine if they are of sufficient merit to justify the expense and risk of legal action, and to consider, in consultation with the Director of Child, Youth, and Family Enhancement, whether litigation is in the best interests of the child.

In order to carry out this responsibility, the Public Trustee will be relying on Children's Services to identify cases involving harm to children under permanent guardianship and refer those cases to the Public Trustee for assessment and appropriate action.

Pending further clarification concerning the role of the Public Trustee, CFSAs and DFNAs are requested to implement the following process, effective immediately.

Process

Advise the Legal Services branch of Children's Services of *all* cases that meet *any one* of the following criteria:

- A child under permanent guardianship has been sexually assaulted.
- A child under permanent guardianship has sustained serious physical injury requiring significant medical attention, or resulting in residual medical problems.
- A lawyer or insurance company has contacted a child under permanent guardianship, or the child's worker, with respect to settlement of an injury or accident.
- A child under permanent guardianship has indicated that he or she wishes to commence a civil action.

Legal Services will subsequently refer these cases to the Public Trustee for assessment and appropriate action.

The "recent ruling" referred to in the 2005 Policy is my prior decision in ***Blood v. Alberta (Minister of Children's Services)***, *supra*, para. 44, which held that a natural parent has no standing to sue on behalf of a child who is the subject of a Permanent Guardianship order. The

decision held that the Public Trustee should commence such actions, and that the natural parent has a moral (and possibly legal) duty to report all possible actions to the Public Trustee or the Director.

Limitations

[49] The statutes of limitation will be a major issue in this litigation. They will operate at two levels:

(a) when and how the limitation period expired against the primary tortfeasors, which is said to trigger the liability of the Defendant, and

(b) when and how the limitation period expires on this claim by the class members against the Defendant.

The issue is further complicated by the fact that two different statutory regimes relating to limitations have been in place in Alberta during the relevant period.

[50] Up to March 1, 1999, limitations were governed by the *Limitation of Actions Act*, R.S.A. 1980, c. L-15. Section 51(b) of that *Act* provided a general two-year limitation (triggered by discoverability of the injury) in cases of personal injury. Of importance were the provisions relating to minors:

> **59**(1) When a person entitled to bring an action to which this Part applies is under disability at the time the cause of action arises, he may commence the action at any time within 2 years from the date he ceases to be under disability.
>
> (2) Subsection (1) does not apply
>
> (a) if the person under disability is a minor in the *actual custody of a parent or guardian*, . . .
>
> (emphasis added)

Thus, if the class member was under the "actual custody" of the Defendant in its capacity as guardian, time would run against the class member. But if the class member was not in the "actual custody" of his or her guardian, time would not start to run until the class member turned 18 years of age. Under s. 57 of the old *Limitation of Actions Act*, fraudulent concealment of the cause of action might also stop time from running.

[51] The old *Limitation of Actions Act* would apply to any tort that occurred before March 1, 1999. It would also apply to some of the claims by class members against the present Defendant,

where the alleged negligence of the Defendant was discoverable prior to March 1, 1999, although the length of the limitation period on those claims is a live issue.

[52] After March 1; 1999, limitations in Alberta have been governed by the new *Limitations Act*, R.S.A. 2000, c. L-12. That *Act* has a transitional provision that applied up to March 1, 2001, but which is unlikely to have effect on most of the class claims. The new *Limitations Act* provides for a general two-year limitation period on all claims, calculated from discoverability. Significantly, it also has a ten-year "ultimate" limitation on all claims, calculated from the date the conduct complained of occurred. Time under the new *Limitations Act* does not run against minors (s. 5.1(2)), persons under a disability (s. 5), and where there has been fraudulent concealment (s. 4). Persons are defined as being disabled if they are subject to an order under the *Dependent Adults Act*, R.S.A. 2000, c. D-11, or they meet the criteria of the *Dependent Adults Act* even if no order is in place: see Alberta Law Reform Institute, *Limitations*, Report No. 55, pg. 51.

[53] Since this action was commenced on June 29, 2004, it is governed by the new *Limitations Act*. It is likely that some of the primary torts are also governed by the new *Limitations Act*, for example if they occurred after March 1, 1999. The ultimate ten-year limitation period also applies to this action, *prima facie* barring any claims that arose prior to June 29, 1994.

[54] There are therefore several "layers" to the limitations issue:

(a) The limitation on the primary tort

i) where the tort was discoverable before March 1,1999 (old *Limitation of Actions Act*).

ii) where the tort was discoverable after March 1,1999 (new *Limitations Act*).

(b) The limitation against the present Defendant under the old *Limitation of Actions Act*, where the limitation arguably expired before March 1, 1999 (or the end of the transitional period under the new *Limitations Act*, March 1, 2001), and so the action was barred under the old limitations regime.

(c) The limitation against the present Defendant under the new *Limitations Act*, since this action is *prima facie* governed by the new *Limitations Act*.

(d) The ultimate limitation period of ten years.

These layers must all be kept in mind when defining the class and the common issues.

[55] I repeat again that a certification motion is not an adjudication on the merits. It does appear however that

(a) Any class member who was over the age of 28 on the date the Statement of Claim was issued will have to prove disability or fraudulent concealment to avoid the ultimate limitation period, because when he or she turned 18 the ten-year period started to run.

(b) Where the primary tort was discoverable more than two years before the class member came under the care of the Defendant, there will likely be an argument that the damage had already been done.

(c) Since time under the new *Limitations Act* is unconditionally suspended for minors, any class member who is still a minor (or possibly was a minor when the claim was issued on June 29, 2004) may still have a claim against the primary tortfeasor, at least where the tort occurred after March 1, 1999.

Again, these factors must be kept in mind in setting the common issues, and in defining the class.

Conditions for Certification

[56] Section 5(1) of the *Act* (*supra*, para. 20) sets out the five requirements for certification:

(a) a cause of action

(b) an identifiable class

(c) common issues

(d) a suitable representative plaintiff, and

(e) that the class proceeding is the preferable procedure for the fair and efficient resolution of the common issues.

Each of these requirements are discussed in the following sections of these reasons.

A Cause of Action

[57] The statute requires that the claim disclose a cause of action. The premise of the claim is that:

(a) Each class member was injured in a tort, which might also have been a crime.

(b) If the class member had sued the primary tortfeasor, the class member would have been awarded, and would have actually recovered damages, or the class member could have made a claim under the Victims of Crime statutes.

(c) At a relevant point in time the class member came under the care of the Director of Child Welfare in some way, sometimes as a result of the very tort in issue.

(d) The Director owed a duty to the class member to protect his or her legal rights.

(e) In all the circumstances, it was prudent and in the best interests of the child that an action be commenced, or a Victim of Crime claim be made.

(f) The Director negligently failed to take appropriate steps to advance the claim against the primary tortfeasor, or under the Victims of Crime statutes.

(g) As a result of the omission of the Director, the class member has lost his or her claim against the primary tortfeasor, usually because a limitation has run, but possibly just because pursuit of the claim has been made more difficult by the passage of time.

The Defendant concedes that this pleading does disclose a cause of action.

[58] It will be apparent that, apart from any common issues, each individual claim will involve a "trial within a trial", much like a lawyer's negligence action. As the Court noted in ***Kelly v. Lundgard***, 2001 ABCA 185, 202 D.L.R. (4th) 385, [2001] 9 W.W.R. 399, 95 Alta. L.R. (3d) 11, 286 A.R. 1, 7 C.C.L.T. (3d) 1 at para. 328:

> The prevailing practice in Alberta to ascertain damages in a [legal] professional malpractice action is to conduct a "trial within a trial" on the substantive action from which the negligence arose: *Alberta (Worker's Compensation Board) v. Riggins* (1992), 3 Alta. L.R. (3d) 66 (C.A.); *Fisher v. Knibbe* (1992), 3 Alta L.R. (3d) 97 (C.A.). A "trial within a trial" requires a trial judge to try the hypothetical action that a plaintiff would have against the original defendant had the cause of action not been missed. The issues to be dealt with include liability, causation and damages.

In order to determine damages for each class member, it will be necessary to try the potential action he or she would have had against the primary tortfeasor. This will include issues of liability, limitations against the primary tortfeasor, causation, quantum, and whether the primary tortfeasor had any assets to satisfy a judgment.

Identifiable Class

[59] The statute requires an identifiable class of two or more persons. The Plaintiff proposes to define the class as follows:

> All persons who claim that:
>
> a) they were assaulted, sexually assaulted or injured while under the age of majority, and
>
> b) they were under the care and control of, or guardianship of Child Welfare at the time of or subsequent to the assault or injury, and
>
> c) Child Welfare failed to take steps to obtain compensation on their behalf.

While the proposed definition of the class has evolved over time, the Defendant argues that this definition is still inappropriate for several reasons.

[60] The Defendant argues that the class is too wide and varied. The factual context suggests there might be several subgroups of class members. Different statutory regimes were in place from time to time, and different class members may have been in care under different regimes. Different limitations may apply depending on when the underlying tort occurred, when the class member was in care, which statute was in force, and whether the class member is still a minor. Without providing a definitive list, the Defendant also argues that different subclasses exist, depending on the following levels of involvement by the Defendant:

a) Screening
b) Investigation
c) Assessment
d) Support Agreement with Guardian
e) Support Agreement with Child
f) Custody Agreement with Guardian or Child
g) Apprehension Order
h) Supervision Order
i) Interim Custody Order
j) Temporary Guardianship Order
k) Permanent Guardianship Agreement
l) Permanent Guardianship Order
m) Extended Care and Maintenance

The Defendant argues that the circumstances of the various subgroups are so varied, and the legal implications of each different form of involvement are so different, that it is unlikely that there is one answer to the question "did the Defendant owe a duty of care to this class member?" The

Defendant raised several specific objections to the proposed class definition, which are discussed in the following sections.

[61] The Plaintiff acknowledges the breadth of the class, without conceding that all the possible categories identified by the Defendant would amount to "care and control", but argues that it is not necessary for all class members to be similarly situated. Differences between the class members are not a bar if there are common issues. The Plaintiff cites ***Western Canadian Shopping Centres Inc. v. Dutton***, 2001 S.C.C. 46, [2001] 2 S.C.R. 534, at para. 54.

> The defendants' contention that there are multiple classes of plaintiffs is unconvincing. No doubt, differences exist. Different investors invested at different times in different jurisdictions, on the basis of different offering memoranda, through different agents, in different series of debentures, and learned about the underlying events through different disclosure documents. Some investors may possess rescissionary rights that others do not. The fact remains, however, that the investors raise essentially the same claims requiring resolution of the same facts. While it may eventually emerge that different subgroups of investors have different rights against the defendants, this possibility does not necessarily defeat the investors' right to proceed as a class. If material differences emerge, the court can deal with them when the time comes.

See also ***Rumley v. British Columbia***, 2001 SCC 69, [2001] 3 S.C.R. 184 at paras. 32-3. The Plaintiff argues that the differences that exist do not negate the common features of the class. If a duty is found for those class members in the "care and control" of the Defendant, it will be a question of fact at the individual phase of the proceedings whether each class member was in "care and control".

"Claims to Be" Definition

[62] The preface of the proposed class definition is "All persons who claim that". The Defendant argues that a class should not be defined based on a subjective "claim" of a potential class member. The Defendant argues that a class definition must be objective and presently ascertainable, citing the following passage from the *Manual for Complex Litigation, Third* (1995, West Publishing) at p. 217, quoted with approval in ***Bywater v. Toronto Transit Commission*** (1998), 27 C.P.C. (4th) 172 at para. 10:

> Class definition is of critical importance because it identifies the persons (1) entitled to relief, (2) bound by a final judgment, and (3) entitled to notice in a class action. It is therefore necessary to arrive at a definition that is precise, objective, and presently ascertainable. . . . Definitions should avoid criteria that are subjective (eg. a plaintiff's state of mind) or that depend on the merits (eg., persons who were discriminated against). Such definitions frustrate efforts to identify class members, contravene the policy against considering the merits of a

> claim in deciding whether to certify a class, and create potential problems of manageability.

The importance of a clear class definition was also discussed in ***Western Canadian Shopping Centres Inc. v. Dutton***, *supra*, at para. 38:

> First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known.

The Defendant argues that defining the class as those who "claim" something incorporates a subjective state of mind into the definition.

[63] The Plaintiff points out that claims-based classes have been certified in other actions. ***Rumley v. British Columbia***, 1999 BCCA 689, 72 B.C.L.R. (3d) 1, aff'd 2001 SCC 69, [2001] 3 S.C.R. 184 was an action by former students of a residential school for the deaf, concerning allegations that the students had been abused for many years. The British Columbia Court of Appeal certified the action, and varied the class definition to cover all students who "claim to have suffered injury". The Supreme Court of Canada dismissed an appeal from this decision. While ***Rumley*** did approve this form of definition of the class, counsel for the Plaintiff fairly pointed out that neither court actually discussed this aspect of the definition: see ***Rumley*** at para. 26.

[64] ***Pardy (Wheadon) v. Bayer Inc.*** (2004), 237 Nfld. & P.E.I.R. 179 aff'd 2005 NLCA 20, 246 Nfld. & P.E.I.R. 157 was a pharmaceutical products liability class action. A class described as those "who claim personal injury" was found to be acceptable. While the defendant argued that the class definition was based on a subjective consideration, the Court concluded that "whether or not one makes a claim can be objectively determined." ***Walls v. Bayer Inc.***, 2005 MBQB 3, 189 Man. R. (2d) 262, leave to appeal denied 2005 MBCA 93, 15 C.P.C. (6th) 377 was a parallel pharmaceutical products liability class action. It also approved a class of those "who claim personal injury".

[65] In my view, claims-based class definitions are based on a subjective consideration, and are *prima facie* problematic. As the Court held in ***Western Canadian Shopping Centres***, it is important to know from the beginning who will be bound by the decision in the class action, win, lose or draw. It is not an acceptable situation for a class member to potentially argue in the future that they are not bound by the result of the class proceedings, or a settlement, because they never "claimed" anything, or that they never claimed anything at a relevant point in time.

[66] Furthermore, a claims-based definition is not necessary. In the ***Bayer*** cases it would have been just as easy and effective to define the class as all those who consumed the drug in question and suffered personal injury as a result. Likewise, in ***Rumley***, the definition would have been just the same if it had covered all students who were in fact assaulted at the school. If a situation arose where the class could not be defined except based on those who advanced a claim, a "claims-based" definition of the class might be appropriate, but that will not generally be the case.

[67] The source of the "claims based" class definitions appears to be an attempt to avoid a merits based class definition. A merits based definition defines the class as those who have a valid cause of action, and so results in a circular definition. Those class members who lose were never part of the class to start with. Thus a definition of all those "who have suffered loss or damage as a result of the defendants'" conduct was found to be merits based in ***Chadha v. Bayer Inc.*** (2001), 54 O.R. (3d) 520 (Div. Ct.) at paras. 47-50, aff'd (2003), 63 O.R. (3d) 22 (C.A.) at para. 69. This problem is supposedly avoided by defining the class as those who "claim" injury, but this introduces a subjective element to the definition. There is however a difference between "damage" and "damages". "Damage" is an injury to person or property. "Damages" is a legal remedy, consisting of a sum of money paid to someone who has suffered compensable damage". It is merit based to define the class as "all those who are entitled to damages" from the defendant, because the entitlement to damages depends on a finding of liability. It is not merit based to define the class as all those who suffered "damage" or "personal injury". Damage is an essential element of a tort: without damage there is no tort. The suffering of damage does not always result in compensation (i.e. damages), or does not always result in compensation from the named defendant. In my view the resort to "claims based" class definitions is an attempt to avoid an artificial problem, and there is nothing wrong with requiring that the members of the class be only those who have suffered injury. Those without injury have no cause of action against anyone: ***Chadha***, *supra*, at para. 19 (Div. Ct.).

[68] In this action the essential characteristic of the class is the suffering of personal injury as a result of a tort while under the care of the Defendant. There is no need to resort to a claims-based definition of the class.

"Care and Control"

[69] A second key part of the proposed definition of the class is that the class members were "under the care and control of, or guardianship" of the Defendant. The concept of "care and control" is taken from the decisions in ***Kocur v. Meunier***, 2003 ABQB 539, 15 Alta. L.R. (4^{th}) 370, 345 A.R. 383, and ***Thomas v. Radvak*** (1997), 51 Alta. L.R. (3d) 327 (C.A.) at paras. 19-21. Those decisions held that a child was under the "actual custody of a parent or guardian" within the meaning of s. 59(2)(a) of the *Limitation of Actions Act* (reproduced *supra*, para. 50) where the Director had "effective care and control" of the child. The issue in ***Kocur*** was whether the limitation period had run against the plaintiff during the time that he was the subject of a Permanent Guardianship Order. The proposed incorporation of "care and control" into the

definition of the class therefore relies on a judicial gloss on the exact words of the statute, which are "the actual custody of a parent or guardian".

[70] The incorporation of "guardianship" into the proposed definition of the class also finds its source partly in s. 59(2)(a) of the *Limitation of Actions Act*. However, it is more directly related to those provisions of the *Child Welfare Act* that relate to permanent guardianship, temporary guardianship, and the like. The concept of "guardianship" would cover only a limited number of the potential levels of involvement, listed *supra*, at para. 60. The concept of "care and control" is less precise, and might apply to many of the different categories of involvement.

[71] In my view, the concept of "care and control" is too imprecise a basis for a definition of the class. Whatever the merits of the ***Kocur*** and ***Thomas*** decisions, it is unlikely that the courts intended the expression "care and control" to be a universal substitute for the exact wording of the statute. It is inappropriate to build the entire definition of the class on that foundation. Further, since s. 59(2)(a) only relates to "parents or guardians", it will only be engaged in this action where the Defendant was a "guardian". Care and control through some other relationship will not be enough. The definition must therefore encompass care and control "and" guardianship, not "or" guardianship.

[72] The fundamental relationship between the class members and the Defendant arises from the *Child Welfare Act*. While the wording of the *Limitation of Actions Act* will be important in the claims of many class members, it is the *Child Welfare Act* that is the foundation of the relationship. The class definition should therefore be tied back to the *Child Welfare Act*.

[73] The argument of the Defendant that the present class definition on its face encompasses too many different levels of involvement in the care of children is valid. If the class definition was to encompass all of the different levels of involvement set out, *supra*, para. 60, the action would become unmanageable. In my view, the class should be limited to specific subgroups: "permanent wards" under the *1966 Act*, and those subject to Temporary Guardianship Orders, those subject to Permanent Guardianship Orders, and those subject to Permanent Guardianship Agreements under the *1984 Act*. Those are the situations where the Defendant had "guardianship" and the greatest involvement with the children and their estates, and they are the categories the Plaintiff indicated might amount to "care and control".

[74] It is true that this definition of the class might well exclude some persons who are similarly situated to the class, such as S.J. However, it is important that the class action remain manageable. If too many of the different subcategories of children in care are included, the action will become unwieldy. The decision in the class action will likely provide some guidance even for those persons who are excluded from the class. While the decision will not have the advantage of binding the Defendant and the non-class members, it may nevertheless prove to be of some practical utility. In order to maintain the manageability of this class action, it is appropriate to limit the class as specified.

Torts Only

[75] The Defendant notes that the proposed definition covers all persons who were "injured". On the face of it, this would include children who simply fell off their bicycles, or tripped at the playground, and would not have a civil claim against anybody. Since the premise of the claim is that the class members had legal rights against a tortfeasor that were not protected by the Defendant, it is obvious that the class is only intended to include persons who were injured as a result of a tort. The class should be defined accordingly.

Minors

[76] Under s. 5.1(2) of the new *Limitations Act*, time does not run against minors. The new *Act* does not make the suspension of the limitation period dependent on whether the minor is in the actual custody of a guardian. Since the premise of this action is that the class members have claims against primary tortfeasors that have been barred by statute, the Defendant argues that any class member who was still a minor when the Statement of Claim was issued would have no claim, and should be excluded from the class. Such persons could sue on their own once they turn 18, and would have a duty to mitigate. There is some merit to this argument, and it seems unlikely that many persons who were still minors on the date the Statement of Claim was issued would have a claim in this action. If the present *Limitations Act* had been in force throughout the relevant time period, the argument would have much merit. However, there is the possibility that there are some potential class members who were under 18 when the Statement of Claim was issued, but had claims against primary tortfeasors that became barred by time before 1999 when the new *Limitations Act* came into force. Inclusion of the minors in the class will not unduly complicate the litigation, and the proposed definition of the class is not objectionable because it includes them.

Persons Over 28

[77] The Defendant also argues that no person over the age of 28 can have a claim against the Defendant, because when that class member turned 18, the ultimate limitation period will have started to run. The Plaintiff essentially concedes that persons, like herself, who are over the age of 28 will either have to prove a disability under s. 5, or fraudulent concealment under s. 4 of the *Limitations Act* in order to succeed. Again, while the claims of this category of the class may be more difficult, including them in the class will not unduly complicate the litigation. Whatever the status of their individual claims, there is merit in having them bound by the decision on the common issues.

"Delay Claims"

[78] The proposed class action envisages three ways that a class member might have suffered loss. The first is that the limitation period against the primary tortfeasor has passed. The second is that a claim under the Victims of Crime statutes can no longer be advanced because of the passage of time. The third is that while a claim could still be advanced, the passage of time has

made the prosecution of the claim more difficult because of the fading of memories, the disappearance of witnesses and documents, and other matters of that sort. The Defendant argues that the third category of loss is qualitatively different from the first two.

[79] It is true that the third type of loss will involve different questions of proof than the first two. It will, if nothing else, be difficult to prove what a witness would have been able to remember if only he or she had not forgotten it. Nevertheless, considerations of that sort are more likely to arise during the individual phase of the class proceeding, and not during the determination of the common issues. As a result, the inclusion of all three types of loss within the class definition is not inappropriate.

Merits

[80] It is clear that a class definition should not be merits based, in the sense that inclusion in the class should not depend on success in the class action. That creates a circular definition. The Defendant argues that this class definition is merit based, because it depends on each class member showing that they had a valid claim against the primary tortfeasor. The circularity only arises, however, if the definition is based on the merits of this action, that is on the class action respecting the failure of the Defendant to sue on the original cause of action. The merits of the original cause of action on the primary tort raise an issue of quantum, but do not create circularity in the class definition.

Non-Residents

[81] Section 7(3) of the *Act* requires that a separate class be created for non-residents of the province. The Defendant noted that the Plaintiff has not proposed such a subclass, nor has the Plaintiff put forward a proposed representative plaintiff to represent the non-resident subclass.

[82] The *Act* was based on Report No. 85 of the Alberta Law Reform Institute entitled *Class Actions* (December 2000). The Report contemplated (at para. 227) that the non-resident subclass would have its own representative plaintiff. The *Act* appears to require a separate subclass for non-residents partly at least for constitutional reasons. Some class actions may encompass causes of action that arose in many different jurisdictions. Further, under the *Act* resident class members must opt out of the class action, while non-resident class members must opt in.

[83] The Defendant pointed to a British Columbia decision that appears to suggest that there must always be a separate representative plaintiff for each subclass, particularly the non-resident subclass: ***Endean v. Canadian Red Cross Society*** (1997), 36 B.C.L.R. (3d) 350, at para. 32. Compare ***Pearson v. Boliden*** (2001), 94 B.C.L.R. (3d) 133, at paras. 75-6.

[84] Section 7(1) of the *Act* merely provides that the Court "may" appoint a representative plaintiff for the subclass. While it is contemplated that the representative plaintiff will be a member of the subclass, s. 7(4) does provide for a non-member to be the representative plaintiff "to avoid a substantial injustice to the subclass". In my view, s. 7(1) is permissive, and it is not

always necessary to appoint a representative for a subclass, even where a subclass is created: ***Anderson v. Wilson*** (1999), 44 O.R. (3d) 673 (C.A.).

[85] In this case the creation of a separate subclass for non-residents is something of a formality. Because the operations of the Defendant have always been limited to the Province of Alberta, any cause of action against the Defendant will have arisen in the Province of Alberta. All of the class members must have been subject to the Alberta *Child Welfare Act* at one time or another. If there are non-resident subclass members, it is because they have since emigrated from Alberta. There is no conflict of interest between the representative Plaintiff and the non-resident subclass. Since the statute requires it, there will have to be a subclass for non-resident members. However, there is no need at this time to have a separate representative plaintiff for that subclass.

Temporal Limitations

[86] The Defendant pointed out that the subclass is defined broadly enough to encompass all persons who were under care since the *Children's Protection Act of Alberta* was passed in 1909. Not only have the provisions of the statute varied significantly over time, the very structure of the child protection system has changed. The Defendant argues that when these factors are combined with the many different levels of care that are possible (see *supra*, para. 60), the entire action becomes completely unmanageable.

[87] The Plaintiff notes that class actions have been certified even though they cover lengthy periods of time. For example, the ***Rumley*** case, *supra*, covered a period of 42 years. The ***Woodlands*** case (***W.J.R. v. British Columbia***, 2005 BCSC 372) covered a period of 118 years. These class actions arose, however, out of abuse at single institutions, and largely related to abuse by the same type of tortfeasor (i.e. employees of the institution). While there were undoubtedly differences in the way the institutions were operated over the years, there was still the unifying factor of the institution throughout. Further, all the class members had the same relationship to the institution (ie. they were residents), whereas the class members in this case had varied relationships to the Defendant.

[88] The Defendant raises a valid point on this issue. At the end of the day the class action must be manageable at a practical level. The class should not be unduly broad: ***Hollick***, *supra*, at para. 21; ***Bywater v. Toronto Transit Commission*** (1998), 27 C.P.C. (4th) 172, at para. 10. To attempt to cover every combination of care and statutory provision that has existed since 1909 is unworkable. It is also likely that any older claims will in practical terms be unsustainable at this point. In order to maintain the viability of the class action, the class should be limited to those class members who were in care under the *1966 Act* or the *1984 Act*, which covers the period after July 1, 1966. That will essentially cover the last 40 years, and should capture most of the viable claims.

[89] Subject to the submissions of counsel on the exact wording, the appropriate class is defined, *infra*, at para. 151(b).

Common Issues

[90] The statute requires that the action raise common issues, which can be common issues of fact, or common issues of law arising out of similar facts. An issue is "common" where its resolution is needed for the determination of the claim of each class member: ***Western Canadian Shopping Centres v. Dutton***, *supra* at para. 39. An issue is "common" if deciding it will avoid duplication of fact-finding or legal analysis, and if the issue is a "substantial ingredient" of each individual claim: ***Hollick***, *supra*, at para. 18. A class proceeding will always consist of some common issues that are decided once, followed by a number of individual issues that are decided by some suitable procedure: ***Metera v. Financial Planning Group***, 2003 ABQB 326, 12 Alta. L.R. (4^{th}) 120 at para. 69.

[91] For an issue to be "common", it is not necessary that it will dispose of the entire cause of action: ***Cloud v. Canada***, (2004), 73 O.R. (3d) 401 (C.A.), at para. 53. As I previously stated in ***Metera***, *supra*, at para. 71:

> Given that there are common issues, the proper question is "how best can the common issues be decided?" This question must be answered in the overall context of the litigation, recognizing that the individual issues must also be decided at some point, and searching for the procedure that is most efficient globally. Regard must also be had to the other primary objective of class actions: access to justice.

To this should be added the point made in s. 5(1)(d), ***Western Canadian Shopping Centres***, *supra*, at para. 51, and ***Chadha v. Bayer Inc.***, *supra*, at para. 18 that the structure of the common issues must be fair to all parties.

[92] It is also clear that the certification of a common issue is no guarantee that the trial judge will be able to answer it. If it is too general it may have to be amended, or it may not be capable of an answer: ***Cloud v. Canada***, *supra*, at para. 72.

[93] The Plaintiff proposes the following common issues:

(a) Did the Defendant owe a duty to class members to protect their legal rights by taking appropriate steps to obtain compensation on their behalf?

(b) If the answer to common issue no. 1 is yes, did the Defendant breach its duty or duties by failing to take reasonable measures in its operations or management to ensure that appropriate steps would be taken to obtain compensation on behalf of class members?

(c) If the answer to question 2 is yes, was the Defendant guilty of conduct that justifies an award of punitive damages?

(d) If the answer to question 3 is yes, what amount of punitive damages should be awarded?

The Defendant argues that these questions are not appropriate.

The Duty

[94] The proposed class would include children who were the victims of torts, and subsequently were under the care of the Defendant. In some cases the abuse will have been one, and perhaps the primary, reason for the apprehension of the child. The action therefore goes to the heart of the nature of a Child Welfare apprehension. Is the apprehension merely to ensure that the child receives "protective services", or does the apprehension go further and require the Defendant to protect the civil legal rights of the apprehended child? In other words, does the Defendant discharge its duty by simply ensuring that the child is placed in a safe environment, or must the Defendant also then pursue the legal rights of the child for the abuse that resulted in the apprehension? What is the effect of the statutory provisions making the Defendant the guardian of the children? Would the social workers employed by the Defendant be distracted from the protection of the children if they had to attend to their legal rights as well? These are issues that are central to this litigation, and common to the class.

[95] The Defendant argues that the "duty" issue is incapable of an answer because of the many levels of care involved (see *supra*, para. 60), the different statutory regimes in place, the long time period covered, and similar issues. The duty may also vary depending on whether the tort occurred before or while the class member was in care. The Plaintiff replies that she just wants a simple answer to a simple question about the duty owed to all those in the "care and control" of the Defendant. In my view the Plaintiff's position does not answer the objection. A common issue should not be framed so as to only accommodate the theory of the plaintiff, but rather must be open to responding to the theories of all parties. It is not open to either party to say they want a "yes or no" answer, and that they are not seeking a "nuanced response" if that seems to be the only response possible. On the other hand, the differences identified by the Defendant can be dealt with by limiting the class, or by giving different answers (if necessary) for the different categories of class members. There may obviously be different answers to the question, depending on the statutory regime in force from time to time, and depending on the degree of involvement by the Defendant. The fundamental question is however the same.

[96] I therefore conclude that the issue of the duty of the Defendant to the class is a common issue. Deciding this issue once will prevent duplication of fact-finding and legal analysis. The resolution of the duty issue is necessary for the resolution of the claim of each class member. The first common issue proposed by the Plaintiff is appropriate in this form:

> Did the Defendant owe, between 1966 and 2004, 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?

Systemic Negligence and Policies

[97] The second proposed common issue is whether the Defendant breached any duty that it might have owed to some or all of the class. The Plaintiff does not propose as a common issue whether the Defendant might have breached its duty with respect to any individual class member. Rather, the Plaintiff proposes as a common issue whether the Defendant's operations and management themselves were a breach of duty. In other words, the Plaintiff proposes to argue that there was a "systemic breach" of duty by the Defendant.

[98] The Defendant argues that any issue of systemic breach is inappropriate in this case. The Defendants notes that some of the features of the Child Welfare system may have arisen as a result of policy decisions, whereas decisions with respect to individual children were likely operational. The liability of the Defendant may vary depending on the nature of the decision: ***Just v. British Columbia,*** [1989] 2 S.C.R. 1128. The Defendant argues that this prevents any meaningful analysis of the alleged systemic breach of duty in a way that would apply to all class members. The Defendant argues that the Plaintiff has drafted the common issues with a high level of abstraction, giving an artificial appearance of commonality.

[99] The Defendant also argues that the situation of the various class members is too divergent to permit any systemic analysis of the breach of duty. In this case the class members were under various types of care, at different points in time, under different statutory regimes, and while differing policies of the Defendant were in place. Some were injured while in care, others before they were in care in events unrelated to their apprehension, and some before they were in care in events resulting in apprehension. The Defendant distinguishes cases like ***Rumley v. British Columbia***, 2001 SCC 69, [2001] 3 S.C.R. 184, where systemic breach was certified as a common issue, on this basis. The Defendant notes that in ***Rumley*** sexual abuse of the plaintiff class was admitted, the plaintiff class all attended one institution, all the abuse happened there, and there was a much higher level of commonality between them.

[100] The Plaintiff relies on decisions like ***Rumley***, and argues that systemic breach is an appropriate common issue. The Plaintiff acknowledges that the issue of systemic breach has been intentionally structured in a manner that makes the case more amenable to certification, and argues that she is entitled to do so. The Plaintiff cites ***Rumley***, at para. 30, as follows:

> As Mackenzie J.A. noted, the respondents' argument is based on an allegation of "systemic" negligence – "the failure to have in place management and operations procedures that would reasonably have prevented the abuse" (pp. 8-9). The respondents asserts, for example, that JHS did not have policies in place to deal with abuse, and that JHS acted negligently by placing all residential students in one dormitory in 1978. These are actions (or omissions) whose reasonability can be determined without reference to the circumstances of any individual class member. It is true that the respondents' election to limit their allegations to systemic negligence may make the individual component of the proceedings more difficult; clearly it would be easier for any given complainant to show causation if

> the established breach were that JHS had failed to address her own complaint of abuse (an individualized breach) than it would be if, for example, the established breach were that JHS had as a general matter failed to respond adequately to some complaints (a "systemic" breach). As Mackenzie J.A. wrote, however, the respondents "are entitled to restrict the grounds of negligence they wish to advance to make the case more amenable to class proceedings if they choose to do so" (p. 9). [Emphasis in original]

The Plaintiff argues that if a systemic breach of duty is found, it would still be open to the Defendant to prove in the case of each individual class member that the systemic breach was not operative in causing any damage with respect to that individual class member.

[101] ***Rumley*** was a class action proceeding arising out of sexual abuse of students at a school for the deaf. Over the years there had been numerous reports of abuse at the school that had not been responded to appropriately. The government directed that an inquiry be conducted, and the resulting report concluded that there had been abuse, and that the response had been inadequate. The government then set up a compensation scheme for the former students, but some of them elected to proceed by class action instead. The representative plaintiff proposed a common issue of systemic negligence, much like the one proposed in this case. The trial judge rejected this common issue, holding that it was too generalized to be of any practical utility. The British Columbia Court of Appeal and the Supreme Court of Canada disagreed, holding that such questions of "systemic negligence" were appropriate for certification. The Court held that, within reason, the plaintiffs were entitled to narrow their claim if they chose, and that if the issue was too generalized that would simply make it more difficult for individual class members to prove their claims. That was however a choice that the class members were entitled to make.

[102] The representative plaintiff may well be entitled to "restrict the grounds of negligence she wishes to advance to make the case more amenable to class proceedings". There are however limits on the ability of the representative plaintiff to define the issues: ***Rumley***, at para. 28. ***Rumley*** states that the plaintiffs are entitled to "limit the grounds of negligence" they rely on to make certification possible, not that they are entitled to define the common issues as they choose. Class proceeding statutes are largely procedural in nature. They are designed to deal more efficiently and effectively with mass litigation. Class proceedings are not intended to create new substantive rights, to vary the substantive law relating to the issues, or to reverse the burden of proof: ***Chadha v. Bayer Inc.***, *supra*, at paras. 18-19. The common issues must not only be capable of resolution at a practical level, they must also be fair, and that means they must be fair to both the class and the defendant: s. 5(1)(d); ***Caputo v. Imperial Tobacco Ltd.*** (2004), 236 D.L.R. (4th) 348, 44 C.P.C. (5th) 350 (Ont. S.C.) at para. 50; ***Chadha v. Bayer Inc.***, *supra*, at para. 18. I do not read ***Rumley*** as holding that the class is always entitled as a matter of right to have "systemic breach" as a common issue. Because the courts had the advantage of the public inquiry into conditions at the school, ***Rumley*** may be at the extreme edge of the type of case that can be certified.

[103] Systemic breach issues should not be stated so generally that the answer to the systemic breach issue is unlikely to be of much practical assistance in resolving the claims of individual class members. The Plaintiff presumably wishes to demonstrate that the policies that the Defendant had in place, and the way the Child Welfare system as whole was managed, was negligent. Even if this could be shown, the answer will be so abstract as to be of little practical utility. Take, for example, the situation of two large grocery stores. Both grocery stores realize that there is a risk that customers could slip on produce that finds it way onto the floors in the produce department. The one grocery store has in place a rigid policy requiring regular sweeping of the produce department, and the recording of the sweeping in a detailed log. The second grocery store has no such policy in place. If systemic breach of duty was set as a common issue in this case, one might well conclude that the second grocery store was in breach of its systemic duty. Suppose however that it was revealed that the first grocery store simply did not follow its policies and procedures, despite their supposed universal applicability. On the other hand, suppose it was shown that the second grocery store had particularly diligent management and staff, who meticulously cleaned the produce department despite the fact that there was no policy requiring them to do so. In evaluating the claim of any member of the class of customers who slipped on produce, the finding of systemic breach of duty would be practically meaningless. Even if the finding of systemic negligence was of some general validity, one would still have to examine the situation that prevailed on the particular day that any class member slipped on produce. Apart from perhaps reversing the burden of proof, the finding of systemic negligence would be of little assistance. The presence of, absence of, or content of policies will not equate to a systemic breach of duty, and neither will any assessment of the generic "operation" or "training" of the Child Welfare system. The "operation" of the system can only be tested at the individual level, by seeing how the rights of individual children were handled.

[104] In this case the class consists of thousands of persons who were under the care of hundreds of different social workers, in many different situations. At the end of the day, whether an action should have been commenced on behalf of any particular child is going to depend on individualistic issues such as the quality of the evidence available, the identity of the defendant, whether that defendant had any resources to satisfy the judgment, whether the primary tort was the reason for the apprehension, and matters of that sort: see para. 58, *supra*. Overriding the entire decision to commence proceedings would be the question of whether it was in the best interests of the child to commence those proceedings: s. 2 of the *C.Y.F.E. Act* makes the interests of the child the overriding factor in all child welfare decisions. In this climate the system of policies and operations that the defendant had in place will be relatively unimportant. The standard of care may be little more than "consider each case individually". This can be compared with a case like ***Rumley*** (see B.C.C.A. at para. 18) where the duty to prevent sexual abuse had no individualistic character to it. It is significant that in ***Rumley*** only the sexual abuse claim was considered to be sufficiently discrete to allow certification, and the other claims were not certified. The allegation of "systemic negligence" in this case is more analogous to the allegation of "educational malpractice" than the court refused to certify in ***Rumley***. ***Andersen v. Wilson*** (1999), 44 O.R. (3d) 673, and ***Endean v. Canadian Red Cross Society*** (1997), 36 B.C.L.R. (3d) 350, rev'd other grounds (1998), 48 B.C.L.R. (3d) 90 (C.A.), other cases relied on by the Plaintiff, can also be distinguished because the "systemic negligence" focussed respectively on

very discrete issues about the sterilization of medical instruments, and the screening of blood donors, not the general operation of the defendants' systems. The present action is the type of case where determining a breach of duty "would ultimately break down into individual proceedings": ***Nieberg (Litigation Guardian of) v. Simcoe County District School Board*** (2004), 48 C.P.C. (5th) 164 (Ont. S.C.), at paras. 40-42; ***Fehringer v. Sun Media Corp.*** (2002), 39 C.P.C. (5th) 151 (Ont. S.C.J.) at paras. 17, 19 and 24, aff'd 39 C.P.C. (5th) 151 (Div. Ct.); ***Sutherland v. Canadian Red Cross Society*** (1994), 17 O.R. (3d) 645. At the end of the day, this is not an appropriate case in which to attempt to decide if there has been a "systemic breach of duty".

[105] The Plaintiff did not outline how she proposes to prove systemic negligence. If the intention is to prove systemic negligence by proving individual acts of negligence, the class proceeding is unlikely to be the "preferred procedure". Given the individualistic nature of the inquiry (discussed *supra*, paras. 104-5) this type of proof is to be expected. Any issue to be proved in this way is presumptively an "individual issue", not a common issue. Proving a general proposition by proving individual examples involves a type of similar fact analysis, and is an inefficient and usually inappropriate method of proof: ***Robertson v. Edmonton (City) Police Service (#9)***, 2004 ABQB 243, 355 A.R. 281 at paras. 12-20. Notwithstanding the superficial attractiveness of a common issue, the Court must have regard to the practicalities of having a trial with respect to the common issue. General and theoretical questions, that would not be sufficiently particular to place in a pleading, are not appropriate.

[106] Here the Plaintiff argues that it would still be open to the Defendant to prove in any particular case that any systemic breach of duty did not cause any loss to any particular class member. This would effectively reverse the burden of proof, and if an accurate statement it would be one reason not to certify the systemic breach issue. However the burden of proof would not shift. It would still be up to each class member to prove causation: ***Rumley*** at para. 30.

[107] The Plaintiff pointed to other cases where systemic breach had been certified as a common issue: ***Cloud v. Canada (A.G.)***, *supra*; ***White v. Canada (Attorney General)***, 2004 BCSC 99, 24 B.C.L.R. (4th) 347; ***Griffiths v. Winter***, 2002 BCSC 1219, 23 C.P.C. (5th) 336, affirmed 2003 BCCA 367; 15 B.C.L.R. (4th) 390, 34 C.P.C. (5th) 216; ***Richard (W.J.R.) v. Canada***, 2005 BCSC 372; and ***Larcade v. Ontario (Ministry of Community and Social Services)*** (2005), 197 O.A.C. 287, 16 R.F.L. (6th) 156 (Div. Ct.). The decision in ***Larcade*** related to the provision of medical services to disabled children. ***Larcade*** certified specific questions of statutory interpretation, and did not certify systemic negligence as a common issue. In ***Griffiths v. Winter***, the "systemic negligence" related to the proper hiring and supervision of one specific foster parent, and did not raise truly "systemic" issues. The other cases related to sexual and physical abuse of children in institutional settings. The prevention of physical or sexual abuse is always imperative, and is not subject to the "best interests of the child". In these cases any systemic negligence arising from the way that the residential facilities were operated was found to be a common issue. However, the circumstance of the class members in these cases were more uniform than in this one. The requirements of a policy would have been more rigid than is likely to be the case here. In the end there is unlikely to be much saving of legal or factual analysis by

determining systemic breach as a common issue in this case, and a significant risk of unfairness to the Defendant. I note that in none of these cases was it expressly considered whether the allegation of systemic negligence was one that could be fairly responded to by the defendants, and the decisions proceeded on the assumption that there was no such unfairness. All of these cases assumed that the issue of systemic negligence could be decided without exploring in detail individual claims. If it is actually proposed to prove systemic negligence by proving acts of negligence in individual cases, the identification of systemic negligence as a "common" issue will be illusory.

[108] It is instructive to note that the experience in the ***Rumley*** action was not entirely happy. An application was subsequently brought to decertify the action: ***Rumley v. British Columbia (#2)***, 2003 BCSC 234, 12, B.C.L.R. (4th) 121. As the case progressed, it became apparent that the attempt to determine negligence at a systemic level was actually turning into a trial of many different individual instances of abuse: see paras. 64 to 69. As the Court stated at para. 60:

> The question then remains whether any general finding that can be made in such a class proceeding can be of any assistance to the members of the plaintiff class who must then prove on an individual basis that they suffered damage and that the systemic breach was an effective cause of their injury.

The chambers judge went on to conclude that "the difficulty is that all of this must have been known by the Court of Appeal when they decided it was possible to certify a common issue", but I would note that the *Act* specifically provides for decertification just because it is impossible for the court to predict exactly how a class action will unfold. ***Rumley*** shows that an attempt to prove systemic negligence by proving many individual examples of negligence is unworkable. A careful reading of ***Rumley (#2)*** is instructive, because it is clear that if the chambers judge was deciding the matter afresh, she would not have certified systemic negligence as a common issue. While the case management judge felt that the class action could continue through "aggressive case management", and some refinement of the common issues, she did conclude at para. 91 that the action had "reached a precarious balance between a potentially workable class proceeding and unmanageable confusion".

[109] As noted (*supra*, para. 61) a significant amount of divergence is possible within the class. In some cases it will be possible to certify systemic negligence as a common issue. But the more divergent the class, and the more varied the circumstances giving rise to the alleged breach of duty, the less likely it will be that a workable systemic breach common issue will be possible. In this case the class is very divergent. The individual breaches of duty alleged raise polycentric and individual considerations that go far beyond the generalized "policies and operations" of the Defendant. In this case "breach of the standard of care" is essentially an individual issue that must be decided in the second phase of the proceedings, and attempting to frame it as an issue of "systemic negligence" is really an attempt to bootleg individual issues as a common issue. The appearance of commonality is an artificial result of the generality of the question. The proposed systemic breach common issue is not fair or workable in this case.

[110] There is however one common issue of fact that would be usefully determined as a common issue. It can be stated as follows:

> What policies, practices and systems did the Defendant have in place between 1966 and 2004 relating to the prosecution of civil claims on behalf of children in care?

Deciding this issue of fact once will eliminate the need for repetitive factual inquiries, and it is accordingly an appropriate common issue. Whether, in all the circumstances, the Defendant breached any duty it might owe is not a suitable common issue.

Punitive Damages

[111] The third and fourth common issues proposed by the Plaintiff relate to the liability of the Defendant for punitive damages. The Plaintiff points to cases that have certified punitive damages as an appropriate common issue: ***Rumley***, *supra*, at para. 34.

[112] The Plaintiff has identified, in the very structure of the third proposed common issue, that it is not possible to decide if the systemic operation of the Child Welfare system justifies an award of punitive damages, without deciding if there has been some systemic breach of duty. Having concluded that the systemic breach issue is not an appropriate one for common determination, it follows that the determination of punitive damages is not appropriate as a common issue. Whether any class member has been dealt with in such a way that he or she is entitled to punitive damages will have to be dealt with as part of the assessment of individual claims.

[113] There is however one aspect of the Defendant's conduct that could possibly be examined globally to determine if it itself justifies punitive damages. As previously indicated, one appropriate common issue is the determination of the policies that the Defendant had in place from time to time. The following common issues may therefore also be appropriate:

(a) Was the existence of, absence of, or content of the policies of the Defendant relating to the protection of the civil rights of children in care at any time between 1966 and 2004 so egregious or highhanded as to justify an award of punitive damages?

(b) If so, what quantum of punitive damages should be paid, and to whom?

Assessing the policies in this way at one time will possibly avoid duplication of factual and legal analysis, and this is also an appropriate common issue. If it turns out that this issue cannot be efficiently addressed in isolation, the question can be amended or withdrawn.

Limitations

[114] The Plaintiff has not proposed any common issue with respect to limitations. As previously noted (*supra*, paras. 49-55) limitations will play a large part in this litigation. Since the limitations applicable to each class member, and when the applicable limitation started to run, will vary widely, it is impossible to state any common issue with respect to limitations generally.

[115] There is however one aspect of the limitations argument that is amenable to common determination. As previously noted (*supra*, para. 77), there is an argument that the claim of any class member over the age of 28 is barred. Such a class member will have to demonstrate either fraudulent concealment of the cause of action, or disability. Disability is an individual issue that is not amenable to common determination. The same would apply to any fraudulent concealment of the claim of an individual class member. However, the argument that there was systemic fraudulent concealment is amenable to common determination, and the following common issue is appropriate:

> Did the Defendant operate the Child Welfare system at any time between 1966 and 2004 in such a way as to fraudulently conceal any breach of duty by it to the class members?

The determination of this common issue will avoid repetitive factual finding and legal analysis. Again, if the question turns out to be unworkable, it can be withdrawn.

A Suitable Representative Plaintiff

[116] Section 5(1)(e) of the *Act* requires that there be a suitable representative plaintiff. S.J. was originally proposed as the representative plaintiff. The Defendant objected to her suitability, and Ms. T.L. was substituted as the proposed representative plaintiff. The Defendant argues that Ms. T.L. is also not a suitable representative Plaintiff.

[117] The Defendant argues that the proposed representative Plaintiff is not a suitable member of the class, because her claim is statute barred. Subsection 2(4) creates a presumption in favour of the representative plaintiff being a member of the class, and states that a non-member may only be the representative plaintiff if "to do so will avoid a substantial injustice to the class". The requirement that the representative plaintiff be a member of the class is not the same thing as requiring that the representative plaintiff prove, at the certification stage, that he or she has a valid cause of action. In other words, being a member of the class is not the same thing as being able to succeed on an immediate summary judgment application on the entire cause of action. The Defendant undoubtedly has an arguable defence against the specific claim of the named representative Plaintiff, but that does not mean that she is not a member of the class.

[118] Ms. T.L. asserts in the claim that she made disclosure to the Defendant's officials in 1987 or 1988. It is possible that if Ms. T.L. did have a cause of action against the Defendant, it may

have become barred on her 28th birthday on July 19, 2000, at which time the ten-year ultimate limitation period in the *Limitations Act* would have expired. If the expiry of the limitation was conceded, then Ms. T.L. might not be a suitable representative. However, her counsel indicated she will reply to any limitation defence with a plea of "fraudulent concealment" or possibly "disability". Her claim is therefore sufficiently viable to allow her to represent the class.

[119] As previously indicated (*supra*, para. 73), there are actually a number of subcategories of persons covered by the proposed class. Ms. T.L. is a representative of those who were subject to a Permanent Guardianship Order after the abuse in question had ceased. The fact that Ms. T.L. is not identically situated with all possible class members does not preclude her from being a proper representative plaintiff: see s. 7, which makes the certification of subclasses discretionary, and ***Western Canadian Shopping Centres***, *supra*, at para. 41. However, the Court must still examine whether, all things considered, she is a suitable representative Plaintiff.

[120] Ms. T.L. had undoubtedly had a very difficult life, and has not been afforded many of the advantages we hope children receive. She herself deposes that she has lived "a horrible life of poverty and sadness". She is not employed and has no financial resources. She has not deposed to her educational achievements, but it is unlikely that she has any skills, training, or education that will assist her in discharging the responsibilities of a representative plaintiff.

[121] One could argue that with all of her challenges, Ms. T.L. is not suitable to represent the class. However, the circumstances are that many children who were abused would face similar impediments. The more resilient members of the class who have gone on to pursue successful lives despite the challenges they faced may not be easily identified, or may not wish to pursue their claims. Those who do wish to pursue their claims are more likely to be in the same position as Ms. T.L. In the circumstances, Ms. T.L. is a suitable representative plaintiff despite the challenges she faces.

[122] The Defendant argues that Ms. T.L. would be unable to satisfy any costs award against her, because she is admittedly impecunious. The ability of the representative Plaintiff to answer a costs award is a relevant factor, but not an absolute bar: see ***Pearson v. Inco Ltd.***, [2005] O.J. No. 4918 (C.A.) at paras. 95-6. If it appeared that a representative plaintiff had been selected deliberately because he or she was judgment proof, or if it appeared that there were suitable representative plaintiffs of means who were being held back, the Court might be disinclined to approve the proposed representative plaintiff. However, one of the purposes of the *Class Proceedings Act* is to ensure access to justice. Where it appears that the class as a whole is disadvantaged, and it seems unlikely that a member of the class of substantial means could be identified to pursue the action, it would be contrary to the very purposes of the *Act* to deny certification based on impecuniosity. This factor is therefore not an impediment in this case.

[123] Section 2(1) of the *Act* provides that "one member" of a class may commence a proceeding. While the *Act* clearly authorizes a single representative plaintiff, that does not mean that a single representative plaintiff will always be appropriate. Since the representative plaintiff purports to represent the interests of a large group, there is much to be said for having a

manageable group of class members running the litigation. Counsel for the Plaintiff advised that a single representative plaintiff was being proposed, as it is easier to take instructions from a single plaintiff, and therefore the administration of the action is easier. That may be so, but the convenience of counsel is not a primary consideration. Class proceedings are often criticized as being "lawyer-driven", and that argument is only strengthened if it appears that the class itself does not have control of the litigation. There are good reasons for requiring the self-appointed representative plaintiff to consult with other members of the class.

[124] Further, s. 18(2) of the *Act* provides that the defendants can only examine the representative plaintiff as of right. Where there is significant diversity between the members of the class, it is appropriate to permit a wider examination than a single representative plaintiff can permit. Furthermore, when the matter goes to trial it is helpful if the trial judge has a wider range of factual circumstances to give context to the common issues. Ms. T.L.'s claim may turn out to be an extreme one, because her tortfeasor was criminally convicted, and the trial judge may find other cases of assistance.

[125] As previously indicated (*supra*, para. 77) Ms. T.L.'s claim will be met with a limitation defence of some arguable merit. Where the claim of the proposed representative plaintiff is possibly vulnerable, it is appropriate to have multiple plaintiffs to ensure the continuity of the action.

[126] Where the proposed representative plaintiff is a particularly strong representative, a single representative plaintiff might be appropriate. In this case however, Ms. T.L. has acknowledged her own limitations and challenges. In some cases there may be difficulty in identifying more than one representative plaintiff. I note however that the record discloses that over 200 persons have approached counsel for the Plaintiff, indicating that they are potential members of the class and wish to be included. In the circumstances, there is no reason to believe that there are not other appropriate representative plaintiffs available, and accordingly there is no reason to appoint a single representative. Therefore, while Ms. T.L. is a suitable representative plaintiff, the action should only proceed as a class action if two or three other suitable representative plaintiffs are also added.

The Litigation Plan

[127] Section 7(1)(b) of the *Act* requires that the representative plaintiff present a proposed litigation plan. Section 9 does not make the approval of the plan one of the mandatory provisions of a certification order. Section 13 of the *Act* contemplates continual case management of the action, and variations of the litigation plan as required. Neither party discussed the litigation plan in great detail during argument on the certification motion, and the exact contents of the litigation plan will have to be dealt with at a suitable time in the future if the other hurdles to certification can be overcome.

[128] This factor overlaps however with the absence of necessary parties (see *infra*, paras. 138 *ff.*). The Plaintiff has a plan to try the common issues, and the "trials within trials" needed to

resolve individual claims could be managed in some way (see *supra*, para. 58), but there is at present no viable plan presented to deal with the rights, duties and interests of third parties.

The Preferred Procedure

[129] The statute requires that a class action be the "preferable procedure" for the "fair and efficient" resolution of the common issues. The class proceeding regime is a tool of civil procedure. It is intended to be a practical, working device. As I summarized the situation in ***Metera***, *supra*, at para. 88:

> In *Western Canadian Shopping Centres* the Court at paras. 44-46 and 51 emphasized the need for a "liberal and flexible" approach to certification, and the need to balance "efficiency and fairness". In *Elms* the Court noted at paras. 46-52 that trial judges must be given the flexibility to "make the proceedings work" and to achieve the objectives of class proceeding statutes. Class proceedings were said to require a "cost/benefit analysis", not to provide "perfect justice" but to enable the "fair and efficient resolution" of common issues. *Hollick* at para. 28 and *Rumley* at para. 35 speak of the need for class proceedings to be "fair, efficient and manageable". These cases also make the point that a class action can be decertified if it turns out to be an unsuitable procedure: *W.C.S.C.* at paras. 55-6; *Elms* at para. 48.

This pragmatic approach must be used to determining if the class action is the "preferable procedure", or if the action will turn out to be a "monster of complexity and cost": ***Tiemstra v. Insurance Corp. of British Columbia*** (1997), 95 B.C.A.C. 144, 38 B.C.L.R. (3d) 377 (C.A.) at para. 13.

[130] The Court may consider any relevant matter in deciding if the class action is the "preferable procedure", but the *Act* sets out some mandatory factors:

> 5(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.

Each of these factors is considered below. Another relevant factor in this case is the rights of third parties.

Whether Common Issues Predominate

[131] A factor commonly considered in deciding whether or not to certify a proceeding is whether the common issues predominate over the individual issues. The statute requires that the class proceeding be the preferable, efficient and fair approach to deciding the "common issues". Section 5(1)(c) of the *Act* allows certification even if the common issues do not "predominate". Again, as I noted in ***Metera***, *supra*, at para. 69, it would be extremely rare for a class proceeding to contain only common issues, with no individual issues to be determined. The question is always whether a class proceeding is the preferable way to resolve what common issues there are. Of course, using the pragmatic approach to certification, the presence and scope of the individual issues must also be considered. The ultimate goal is to resolve all of the individual claims, and the Court must determine that a class proceeding will ultimately be of some practical utility in doing that: see ***Hollick***, *supra*, at para. 29; ***Chadha v. Bayer Inc.***, *supra*, at paras. 13-17 (Div. Ct.) and paras. 53-4 (C.A.).

[132] The Defendant argues that this litigation is "inverted". The Defendant argues that it cannot be known whether any class member should pursue this claim until it is known that they suffered an actionable wrong that would have resulted in a damage recovery which is now barred by the passage of time. Since virtually all class actions deal with common issues, followed up by an assessment of individual claims, this argument could be made with respect to any class action. It is really an argument that the individual issues predominate over the common issues. The statute however provides that the common issues need not dominate the individual issues, so long as the class proceeding is the preferable, efficient and fair method of deciding the common issues. Of course, while the Plaintiff is entitled to "limit the grounds of negligence she relies on" (see *supra*, para. 100), the more limited the common issues, the more the individual issues will predominate, and the less efficient will be the class proceeding.

[133] 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.

Separate Proceedings

[134] The second and third factors to be considered are whether the prospective class members might have an interest in individually controlling their own actions, and whether the class claims are already the subject of other proceedings. On the first factor, each class member will still retain a significant element of control over his or her own 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: see ***Rumley*** at para. 37.

[135] The record does disclose a number of other proceedings that might be overtaken by the class proceeding. There is however some evidence that at least some of the plaintiffs in those individual proceedings would prefer to have their claims absorbed by the class action. For those that do not, there is always the option of "opting out" of the class proceeding pursuant to the terms of s. 17. On balance, the presence or likelihood of parallel private claims is not an impediment to certification in this case.

Practicality of Other Procedures

[136] The fourth factor in s. 5(2) is whether other means of resolving the claims are less practical or less efficient. 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.

Difficulty in Administration

[137] The final mandatory consideration under s. 5(2) is whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means. In this case it is likely that the class members might well be among the more vulnerable and less advantaged members of society: see, *supra*, paras. 120-21. As the Court stated in ***Rumley*** at para. 39: "Allowing the suit to proceed as a class action may well go some way towards mitigating the difficulties that will be faced by the class members" if they attempted to pursue their claims individually. This is accordingly a factor that speaks in favour of certification.

Third Parties

[138] The Defendant argues that this action is not the preferable way to determine the common issues because there are numerous third parties who are necessary parties. The Defendant identifies the following categories of potential parties:

(a) the primacy tortfeasors who committed the torts or crimes.

(b) First Nations to whom child welfare responsibilities were delegated (there are about 18 possible third parties).

(c) Regional Authorities created under the *Child and Family Services Authorities Act* to administer child protection services (there were 18, and are now 10 authorities).

(d) Charitable and for-profit service providers who were given responsibility over child protection from time to time.

(e) The Public Trustee, who is the trustee by statute of many class members.

The Defendant argues that the common issues cannot, or should not, be decided in the absence of these parties.

[139] Section 21 of the *C.Y.F.E. Act* permits the delegation of the powers under the *Act* to a child and family services authority or to any other person. The Defendant placed on the record delegations of authority to First Nations child welfare agencies. These documents delegate to the agency all the powers of a director under the *Act*, and many of the Ministerial powers. The accompanying child welfare agreements appear to grant the authority wide-ranging powers relating to the provision of child welfare services. The delegation of authority created by these documents might well have a significant impact on the existence and scope of any duty of care the Defendant might owe to the plaintiff class.

[140] The representative plaintiff argues that she is entitled to pick her defendants, and there is no obligation on the class to sue all persons who might potentially be liable. The representative plaintiff has chosen to sue the Defendant government only, and has not engaged the liability of other defendants. The representative plaintiff undoubtedly has significant flexibility in choosing defendants, if only because of the common law rule that any joint tortfeasor is responsible for 100% of the damage caused to the plaintiff. However, if necessary parties are not joined in the litigation, that might be a factor which precludes certification of the class action. If the proper parties are not joined, the class action may no longer be the "preferable procedure".

[141] First of all, it is useful to draw a distinction between true "third parties" and "necessary parties". In some cases the defendant may claim a right to be indemnified by another person who is not a party to the litigation, and the defendant may propose to add that other person as a third

party. In those situations of a pure indemnity claim, it may be quite possible to proceed with the class action without adding the third parties: for example ***Attis v. Canada (Minister of Health)*** (2005), 75 O.R. (3d) 302. However, the more common situation is where the "third parties" are persons who are potentially jointly liable with the named defendant. For example, in ***Baxter v. Canada (Attorney General)***, [2005] O.T.C. 391 the representative plaintiffs sued over abuse at Indian residential schools. The plaintiff initially sued both the federal government and a number of different religious groups that actually operated the schools. The presence of this many parties was a hurdle to the certification of the class action, or at least prevented the certification of the class action without all of the third parties being given an opportunity to speak to the issue of certification. In response to this problem, the plaintiffs apparently proposed to limit their claim to the several liability of the federal government only, thereby supposedly enabling the exclusion of the defendant religious groups from the action. With respect, the suggestion that the interests of the other defendants could be severed in this way is illusory. How could the court fairly decide that the federal government was, say, severally liable for 25% of the damages without affording the third parties a reasonable opportunity to be heard? What if it was the third parties' position that the federal government was liable for 50% of the damages, or 75%? It would be fundamentally unfair to the other potential tortfeasors to purport to decide the several liability of one party without the others being part of the litigation. On this point I respectfully disagree with the premise of ***Baxter*** and with the similar conclusions in ***Endean v. Canadian Red Cross Society***, *supra*, at paras. 56-9. Deciding the proportional liability of one defendant in the absence of other necessary parties creates a real risk of inconsistent judicial decisions, and violates the principle of natural justice that the rights of persons should not be decided unless they are extended a right to be heard in the proceedings: ***Sutherland v. Canadian Red Cross Society*** (1994), 17 O.R. (3d) 645 at pg. 652. In my respectful view the other defendants in ***Baxter*** were "necessary parties", not "third parties", and they had to be a part of the action before the issues of duty and proportional liability could possibly be decided. Similar issues arise in this action.

[142] Further, while the Plaintiff relies on the ***Baxter*** decision as authority for the proposition that the presence of third parties is not a bar to certification, the ***Baxter*** decision only decided whether the certification motion should proceed before or after certain motions proposed by the third parties. It is not authority for the proposition that the presence of third parties is irrelevant to certification. ***Baxter*** also did not draw any distinction between true third parties and necessary parties.

[143] In ***Attis v. Canada (Minister of Health)***, *supra*, it was held at paragraph 14 that "until such time as the action is certified, the nature of the proceeding is not yet crystallized so as to require the third party's participation. In consequence, the third party would have no standing to participate in the certification motion in any event." I am unable to accept that there is any such general rule. If the only claim against the third party is a claim for indemnity, as was the case in ***Attis***, severance of the third party claim may be possible. However, in most cases it is essential that all necessary and proper defendants be a part of the action. The deliberate decision of the plaintiff not to name proper defendants in an attempt to make the proceeding more amenable to certification will in fact often backfire, and the absence of those necessary defendants will often mean that the action cannot be certified: ***Bittner v. Louisiana-Pacific Corp.*** (1997), 43 B.C.L.R.

(3d) 324; ***Charette v. Minerve Canada Compagnie de Transport Aériens Inc.***, unrep. Que. S.C., May 3rd, 1988, No. 500-06-000002-887; ***Dumoulin v. Société de transport de la Communauté Urbaine de Montreal***, [1999] J.Q. No. 4899. I repeat that the *Act* is a tool of civil procedure, and is not intended to override other substantive and procedural rules, such as Rule 38(3) which requires the presence of all necessary parties: ***Edwards v. Law Society of Upper Canada*** (1995), 40 C.P.C. (3d) 316 (Ont. Gen. Div.) at para. 22. While s. 41(2) provides that the *Act* prevails over inconsistent Rules, there is nothing in the *Act* dispensing with the need to join all necessary parties.

[144] One potential defendant is noticeably absent: the Public Trustee. In ***Blood v. H.M.Q.***, *supra*, para. 44, it was determined that the Public Trustee is the one who has the primary responsibility for enforcing the legal rights of children. Whatever the merits of that decision, it would appear that the Public Trustee is a necessary party to this litigation, if for no other reason than the Public Trustee is specifically mentioned in the *C.Y.F.E. Act*. It is at least theoretically possible that the trial judge in this proceeding might determine that the Defendant does not have any duty as alleged, because that duty falls on the Public Trustee. It would be inappropriate for the trial judge to make such a determination without hearing submissions from the Public Trustee, and without having the Public Trustee being bound to that conclusion. If such a determination was made, and the Public Trustee subsequently challenged it, there would be the risk of inconsistent decisions of the Court. Furthermore, if that was the conclusion of the trial judge, the resolution of the common issue would be of no practical utility. It is accordingly inappropriate to certify this class proceeding for any class member who was in care after 1985, unless the Public Trustee can be made a defendant.

[145] Similar concerns exist with respect to the other potential third parties identified by the Defendant. While the Defendant has not yet filed a defence, it seems likely that the Defendant might argue that whatever duty it had to pursue the civil remedies of the class fell in whole or in part on the third parties, and not on the Defendant. The Plaintiff might argue in response that the Defendant had a non-delegable duty to the class and remains liable notwithstanding the involvement of the third parties. The Defendant might argue that whatever duty it has was discharged by putting the class members in the care of responsible third parties. I express no opinions on the correct answers to these difficult issues. It is obvious however that whatever decisions are made should only be made after the potential third parties have been given a fair opportunity to make submissions. Further, any decisions made on these issues should be binding on all those third parties.

[146] Another group of potential necessary parties is absent: the other guardians of the class members. It appears that the involvement of the Defendant short of Temporary Guardianship did not result in a change of guardianship, and that Temporary Guardianship itself resulted in shared guardianship (see *supra*, para. 44). Even those class members who were subject to Permanent Guardianship Orders would have had other guardians before, and possibly after, the Permanent Guardianship Order. In some cases the primary tort, or the expiration of the limitation period may have occurred under that other guardianship. The interaction of any duty of the Defendant to pursue

the civil claims of the class members, and the corresponding duty of these other guardians, is not something that could easily be decided in the absence of those other guardians.

[147] On the other hand, I am not satisfied that it is necessary to join the original primary tortfeasors to this action. The premise of the litigation is that the limitation period has expired against the primary tortfeasors, and on that assumption it is unlikely that the rights of the primary tortfeasors will be affected by this litigation. They are not necessary parties. For the same reason, the various agencies that were under contract to provide child welfare services are not necessary parties simply because they might have been vicariously liable for the acts of the primary tortfeasor, because the claim of vicarious liability is presumably subject to the same limitation period.

[148] The Defendant argues that the other child welfare agencies are also necessary parties to this action because most of the documentation with respect to the class members is with those agencies. In my view this itself is not an impediment to certification. Rule 209 provides for the production of relevant documents by third parties. Furthermore, the production of documentation with respect to individual class members will only become critical when the individual claims are assessed in the second phase of the class proceedings.

[149] To summarize, while the representative plaintiff may have a right to pick the defendants that are to be sued, the representative plaintiff must ensure that all necessary parties are joined to the litigation. The *Class Proceedings Act* does not override the general principles of civil litigation and R. 38(3) requires the joining of all necessary parties. The representative plaintiff has to take the Child Welfare system as it existed, and it appears that the system was, to a considerable extent, operated through third party agencies. It is not the "preferable procedure" to try and determine these difficult issues in the absence of those key third parties. It is therefore inappropriate for this class proceeding to be certified unless the necessary and appropriate third parties are joined.

[150] As indicated, the Defendant has identified a number of possible third parties. Without hearing from each of them, and without hearing from the Plaintiff, it would be inappropriate to determine which of them are truly necessary to this proceeding. Some of them may become necessary, or may be excluded as being not necessary, depending on the final definition of the class. In other words, if the time period covered by the action is changed, the number of necessary third parties may be reduced. Furthermore, it might be possible to eliminate some third parties by narrowing the class. For example, if the class was defined to exclude class members under the care of particular categories of third parties, that might solve the problem. Alternatively, it might be possible to limit the class to only those children who were under the direct care of the Defendant, and were not thereafter placed under the care of third parties. No final decision on this issue should be made without giving the Plaintiff and the Defendant the opportunity to make further representations if they are so advised. However, as the action is presently structured, it would be inappropriate to certify it as a class action.

Summary

[151] In summary, and subject to the submissions of counsel on the specific wording:

(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.

(d) the following common issues can be identified:

(i) Did the Defendant, between 1966 and 2004, 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 Defendant have in place between 1966 and 2004 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 Defendant relating to the protection of the civil rights of children in care at any time between 1966 and 2004 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 operate the Child Welfare system at any time between 1966 and 2004 in such a way as to fraudulently conceal any breach of duty by it to the class members?

(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.

(g) the application to sue by pseudonym is dismissed.

[152] The parties may speak to costs, and may seek other advice and directions as they are advised.

Heard on the 26th day of October, 2005.
Dated at the City of Edmonton, Alberta this 8th day of February, 2006.

Frans F. Slatter
J.C.Q.B.A.

Appearances:

David Klein,
Robert P. Lee and
Clint G. Docken, Q.C.
for the Plaintiff

Ward Branch,
G. Alan Meikle, Q.C. and
Susan Bercov
for the Defendant

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TAB 9

Court of Queen's Bench of Alberta

Citation: RFG Private Equity Limited Partnership No 1B v Value Creation Inc, 2015 ABQB 42

Date: 20150115
Docket: 1001 04077
Registry: Calgary

Between:

RFG Private Equity Limited Partnership No. 1B, Richardson Capital Private Equity Limited Partners, RFG GP No. 1 Limited, Opus Capital Corp., Ronald Poelzer and Carpenter Capital Inc.

Plaintiffs

- and -

Value Creation Inc.

Defendant

Memorandum of Decision
of the
Honourable Mr. Justice K.D. Yamauchi

I. Introduction and Background

[1] This Court heard a "mini-trial" in this matter on September 30, 2014. It rendered its decision on October 3, 2014, which is reported as ***RFG Private Equity Limited Partnership No 1B v Value Creation Inc***, 2014 ABQB 611 ("Reasons for Decision"). The issue underlying the "mini-trial" involved the Defendant Value Creation Inc ("VCI") seeking an order allowing it to serve an additional expert's report (the "Additional Report") on the Plaintiffs. The "mini-trial" dealt with the preliminary issue of whether an agreement existed between counsel concerning the filing of the expert reports, and whether the Additional Report goes beyond that agreement.

[2] This Court found as follows:

> Counsel for VCI and counsel for the Respondents had an agreement with respect to the filing of expert reports. That agreement said that the expert reports would be exchanged simultaneously and that rebuttal expert reports would be exchanged simultaneously. The parties settled on the dates and the names of the experts. There would be no surrebuttal reports or no additional reports filed by either party, as they saw no need for them. That is the limit of the parties' agreement: Reasons for Decision at para 59.

[3] On October 10, 2014, VCI abandoned its application for leave to file the Additional Report. Strekaf J was supposed to hear that application. On October 22, 2014, counsel appeared before Justice Strekaf to address, among other things, costs in connection with VCI's application. The Plaintiffs sought costs for the application (other than costs for the "mini-trial") on a solicitor and client basis. Strekaf J reserved her decision, but has since rendered her decision, reported as ***RFG Private Equity Limited Partnership No 1B v Value Creation Inc***, 2014 ABQB 738 ("Strekaf J's Decision").

[4] The parties ask this Court to deal with the issue of costs arising from the "mini-trial."

II. Discussion

[5] The *Alberta Rules of Court*, Alta Reg 124/2010 [*Rules*] rr 10.29, 10.31 and 10.33 provide as follows:

> 10.29(1) A successful party to an application, a proceeding or an action is entitled to a costs award against the unsuccessful party, and the unsuccessful party must pay the costs forthwith, notwithstanding the final determination of the application, proceeding or action, subject to
>
> (a) the Court's general discretion under rule 10.31, …
>
> 10.31(1) After considering the matters described in rule 10.33, the Court may order one party to pay to another party, as a costs award, one or a combination of the following:
>
> (a) the reasonable and proper costs that a party incurred to file an application, to take proceedings or to carry on an action, or that a party incurred to participate in an application, proceeding or action, or
>
> (b) any amount that the Court considers to be appropriate in the circumstances, including, without limitation,
>
> (i) an indemnity to a party for that party's lawyer's charges, or
>
> (ii) a lump sum instead of or in addition to assessed costs.
>
> 10.33(1) In making a costs award, the Court may consider all or any of the following:

(a) the result of the action and the degree of success of each party;

(b) the amount claimed and the amount recovered;

(c) the importance of the issues;

(d) the complexity of the action;

(e) the apportionment of liability;

(f) the conduct of a party that tended to shorten the action;

(g) any other matter related to the question of reasonable and proper costs that the Court considers appropriate.

(2) In deciding whether to impose, deny or vary an amount in a costs award, the Court may consider all or any of the following:

(a) the conduct of a party that was unnecessary or that unnecessarily lengthened or delayed the action or any stage or step of the action;

(b) a party's denial of or refusal to admit anything that should have been admitted;

(c) whether a party started separate actions for claims that should have been filed in one action or whether a party unnecessarily separated that party's defence from that of another party;

(d) whether any application, proceeding or step in an action was unnecessary, improper or a mistake;

(e) an irregularity in a commencement document, pleading, affidavit, notice, prescribed form or document;

(f) a contravention of or non-compliance with these rules or an order;

(g) whether a party has engaged in misconduct.

[6] At first, the "mini-trial" was intended to determine whether an agreement existed between the parties, and, if so, the scope of that agreement. VCI argues that "there was never an issue as there being an agreement": VCI's Brief, December 16, 2014, para 1. This court disagrees. There was an issue concerning the existence of an agreement between the parties, but that issue evaporated following VCI's concession that there was an agreement. That concession was not made until the outset of the "mini-trial." Before that, the existence of an agreement was very much a live issue, as evidenced by the exchange between VCI's trial counsel ("OHH") and LoVecchio J that is transcribed in the Reasons for Decision at para 41. As well, the "non-

concession" is evidenced in LoVecchio J's order that started this whole process: Reasons for Decision at para 2; Strekaf J's Decision at para 12.

[7] As far as the scope of the agreement between the parties, this Court has already transcribed its decision in para 2, above. To use the wording from *Rules* r 10.29(1), the Plaintiffs, being the "successful party" to the issues raised as part of the "mini-trial" are entitled to a costs award against VCI, being the "unsuccessful party."

[8] The question becomes what will be the quantum of those costs? The Plaintiffs seek solicitor and client costs on a full indemnity basis, of the "mini-trial" counsel ("BDP"), as well as solicitor and client costs of the main trial counsel ("NRF"), who was required to appear as a witness before this Court during the "mini-trial." VCI asks this Court to award something less than solicitor and client costs and, in particular, it argues that NRF is not entitled to those enhanced costs.

[9] This Court has discretionary authority to award costs. This discretion is not absolute. A court must exercise its discretion judicially and in accordance with established principles: ***Pharand Ski Corp v Alberta*** (1991), 81 Alta LR (2d) 304 (QB); ***642718 Alberta Ltd v Alberta (Minister of Public Works, Supply & Services)***, 2005 ABQB 810, 56 Alta LR (4th) 192 at para 10; ***Jamieson v Denman***, 2004 ABQB 693, 34 Alta LR (4th) 162 at para 19.

[10] Alberta cases have repeatedly stated that awarding costs on a full indemnity basis requires the court to conclude that the case falls within the parameters of a "rare and exceptional or unusual case." See e.g. ***Jackson v. Trimac Industries Ltd.*** (1993), 8 Alta LR (3d) 403 [***Jackson***] at para 28 (QB). In ***Powermax Energy Inc v Argonauts Group Ltd***, 2003 ABQB 543 at para 29, 16 Alta LR (4^{th}) 90, Chrumka J said that, "This award of solicitor and its own client costs (full indemnity) is a rare and exceptional and in itself is of a punitive nature." In ***Jackson***, Hutchinson J provided 9 examples of these rare and exceptional or unusual cases, when he said the following:

> 1. circumstances constituting blameworthiness in the conduct of the litigation by that party;
>
> 2. cases in which justice can only be done by a complete indemnification for costs;
>
> 3. where there is evidence that the plaintiff did something to hinder, delay or confuse the litigation, where there was no serious issue of fact or law which required these lengthy, expensive proceedings, where the positively misconducting party was "contemptuous" of the aggrieved party in forcing that aggrieved party to exhaust legal proceedings to obtain that which was obviously his;
>
> 4. an attempt to deceive the court and defeat justice, an attempt to delay, deceive and defeat justice, a requirement imposed on the plaintiff to prove facts that should have been admitted, thus prolonging the trial, unnecessary adjournments, concealing material documents from the plaintiffs and failing to produce material documents in a timely fashion;

> 5. where the defendants were guilty of positive misconduct, where others should be deterred from like conduct and the defendants should be penalized beyond the ordinary order of costs;
>
> 6. defendants found to be acting fraudulently and in breach of trust;
>
> 7. the defendants' fraudulent conduct in inducing a breach of contract and in presenting a deceptive statement of accounts to the court at trial;
>
> 8. fraudulent conduct;
>
> 9. an attempt to delay or hinder proceedings, an attempt to deceive or defeat justice, fraud or untrue or scandalous charges.
>
> ***Jackson*** at para 28. [Citations excluded].

[11] In ***Huerto v Canniff***, 2014 ABQB 534 at para 68, Shelley J found that "the general principles and litigant obligations identified in *Rule* 1.2(3) are also a basis to order elevated costs, even though that misconduct may also fall into the factors identified in *Rule* 10.33."

[12] The situation with which this Court was dealing does not fall within many of the examples that Hutchinson J listed in ***Jackson***. It does, however, fall within some of the other examples. There was an agreement between counsel concerning the filing expert reports. VCI conceded as much at the outset of the "mini-trial." It is troubling that OHH refused to acknowledge that such an agreement existed, when LoVecchio J asked him that question directly; and bluntly. There was "no serious issue of fact or law which required" the "mini-trial." But for that refusal, this matter likely would not have found its way to this Court. As well, until VCI's "mini-trial" counsel ("BLG") conceded the fact that there was an agreement, both BDP and this Court had to proceed on the basis that there would not be such a concession. This took up counsel's time and this Court's time. Said differently, until VCI made that concession, there was "a requirement imposed on the [Plaintiffs] to prove facts that should have been admitted," thus requiring the "mini-trial."

[13] BLG argues that, given the concession that the agreement between counsel existed, the matter before this Court "was really no different than any other contract dispute": VCI's Brief, December 16, 2014, para 2. This Court agrees, but that concession was not made until the opening of the trial. In the face of the agreement between counsel, this Court doubts that the "scope of the agreement" issue would have even made it to this Court.

[14] *Rules* r 8.16 deals with expert reports. When it sought leave to file the Additional Report, the brief that VCI filed in support of its application did not even acknowledge the existence of this *Rule*. OHH argued that the Additional Report was not caught by *Rules* r 8.16(1) because it was a "bridge report." This Court said the following:

> Although the Additional Report might contain other things, it is, in the end, a valuation of the Shares. Attempting to call it something else so that it does not fall within the purview of the *Rules* or, more importantly, the agreement on which counsel settled, is highly inappropriate. This Court agrees completely with the words of LoVecchio J when he directed a trial of this issue, when he said, "I'm not

> aware of any principle which permits one partner of a firm to disavow what another partner of the firm may have agreed to in litigation": Reasons for Decision para 55. [Emphasis added].

[15] BLG argues that OHH correctly sought leave to file the Additional Report. This Court agrees with that argument. It does not agree, however, that seeking leave in the face of the agreement between counsel, then refusing to acknowledge that agreement following LoVecchio J's direct inquiry, is correct. As this Court said in the Reasons for Decision, this kind of behaviour was "highly inappropriate."

[16] Further this Court found that Forms 37 and 38 have meaning:

> VCI's counsel argues that the Form 37 and Form 38 have nothing to do with the issue that is before the Court, *viz* what is the scope of the agreement between counsel. This Court disagrees. Those forms are evidence of the scope of the agreement to which the parties' counsel agreed. The parties did not represent to the court, through the forms that there would be a surrebuttal report or any additional reports. There is a reason why the forms contain that information, and why the Trial Coordinator requires that information. If the parties are at liberty willy-nilly to change the content of the forms, why have that information in the forms at all? If the parties are free to continue filing additional reports, rebuttals to those reports, surrebuttals to the rebuttals, and further reports and so on, setting matters down for trial would be an impossible, repetitive and wasteful task. …: Reasons for Decision at para 56. [Emphasis added].

[17] The Plaintiffs argue that VCI should have acknowledged and honoured the agreement between counsel, should have addressed *Rules* r 8.16(1), and should never have sought to file the Additional Report. This, they argue, was a legally ill-conceived strategy improperly and inappropriately premised upon breaches of the agreement between counsel and certifications to the court, which, as stated by LoVecchio J, undermined the cooperative conduct of litigation and the efficient operation of the courts. That strategy, and that strategy alone, was the sole cause of the "mini-trial" and all the costs incurred for the mini-trial.

[18] This Court agrees with the Plaintiffs' argument. Thus, it falls within one of those "rare and exceptional cases" that attract full indemnity costs. This Court grants full indemnity costs in respect of BDP in favour of the Plaintiffs in the amount of $40,532.63.

[19] The Plaintiffs also claim the costs of NRF in the amount of $35,129. VCI argues that Mr Leitl of NRF took the stand as a witness, and not as trial counsel. The Plaintiffs should, at most, recover witness fees. This Court disagrees with that characterization. Mr Leitl could not simply argue the existence of the agreement and its scope. He tried that in front of LoVecchio J, and OHH challenged the very existence of the agreement, which LoVecchio J felt required the giving of *viva voce* testimony. Mr Leitl was not just "any witness" and he was not simply acting in his role as trial counsel. In some ways, he was acting in both capacities to help this Court understand what went on between counsel. Is this common? Of course not! Is this acceptable? Definitely not! To require the courts to resolve disputes between trial counsel, adds a further layer to an already over-burdened system. That is why we have *Rules* rr 1.2 (3) and 10.33. This Court grants full indemnity costs in favour of the Plaintiffs for NRF's role in the "mini-trial."

[20] VCI raises the concern that the NRF's costs include their appearances before LoVecchio J. The costs to which the Plaintiffs are entitled during this portion of the proceedings relate only to those involved in the preparation and appearance for the "mini-trial." The costs involved in the appearances before LoVecchio J were dealt with in Strekaf J's Decision. Thus, if there is any "double dipping" in the sense that if some of NRF's costs were for their appearances before LoVecchio J are included in the $35,129 they claim before this Court, those amounts will be removed from their claim.

[21] VCI will recover their costs, on a party-party basis, for the preparation of their brief for this costs application.

Heard by way of written submissions.
Dated at Calgary, Alberta on January 15, 2015.

K.D. Yamauchi
J.C.Q.B.A.

Appearances:

Daniel J. McDonald, Q.C.
Burnet, Duckworth & Palmer LLP
for the Plaintiffs

Lenard Sali, Q.C.
Borden Ladner Gervais LLP
for the Defendants