

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

B E T W E E N :

TANYA LABONTE, JESSE STECHYNSKY AND RHONDA MCPHEE

Plaintiffs

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA as represented by THE DIRECTOR
OF CHILD WELFARE and THE PUBLIC TRUSTEE

Defendants

Brought under the *Class Proceedings Act*

**LITIGATION PLAN
as of January 27, 2014**

Overview

1. This action was certified as a class proceeding by Order dated February 19, 2008. Notice was given to the class pursuant to Section 20 of the *Class Proceedings Act*, SA 2003, c C-16.5 and the Order of the case management judge dated February 26, 2009.
2. Subject to amendment, the pleadings are complete. The parties have exchanged Affidavits of Records. Cross-questions on those Affidavits of Records are complete and questions for discovery are substantially complete as detailed below.
3. Progress of the action toward trial has been delayed by issues concerning the relationship between the representative Plaintiffs and class counsel. Subject to Court approval, the representative Plaintiffs have engaged new counsel. The action should now proceed in an orderly manner to the common issues trial or resolution.

4. This up-dated Litigation Plan has been prepared by Plaintiffs' new counsel, McKenzie Lake Lawyers LLP, who do not yet have access to the file of either Mr. Klein or Mr. Docken. Some modification may be necessary upon receiving input from the Defendants and this Honourable Court or as additional information becomes available.

The Parties

5. The representative Plaintiffs are Tanya Labonte, Rhonda McPhee and Jesse Stechynsky.
6. The Plaintiff class is defined as:

All persons who, while resident in Alberta, suffered personal injury while a minor as a result of a tort by a third party, and between July 1, 1966 and the certification date, were in the actual custody of the Child Welfare:

- i. as a permanent ward,
- ii. under a Permanent or Temporary Guardianship Order, or
- iii. under a Permanent Guardianship Agreement

and for whom the Defendants did not make a claim under the *Criminal Injuries Compensation Act*, R.S.A. 1980, c. C-33 or the *Victims of Crime Act*, R.S.A. 2000, c. V-3, or commence a civil action to obtain compensation on their behalf.

7. The Defendants are Her Majesty the Queen in Right of Alberta as represented by the Director of Child Welfare and the Public Trustee. The Second Amended Statement of Claim alleges that either or both Defendants owed statutory, fiduciary and common law duties to the members of the Plaintiff class to, *inter alia*, make applications for compensation under the applicable Victims of Crime legislation in Alberta or commence civil actions for the benefit of class members who suffered personal injury while a minor as a result of a tort by a third party.

Pleadings

8. By Order dated February 26, 2009, the case management judge granted leave to the Plaintiffs to deliver a Second Amended Statement of Claim. Although served upon the

Defendants, the Second Amended Statement of Claim has not been filed with the Court.

The Defendants have served and filed their Statements of Defence to the Second Amended Statement of Claim. Plaintiffs will file the Second Amended Statement of Claim with the Court Office forthwith.

9. The Plaintiffs anticipate an application to amend the Second Amended Statement of Claim for the following purposes:

- a) To plead the relevant statutory provisions as required by Rule 13.6(3)(r) of the *Alberta Rules of Court*; and
- b) To amend the title of proceeding to add “Brought under the *Class Proceedings Act*” immediately below the listed parties as required by Rule 13.11(1).

The purpose of the proposed amendments is to comply with the rules of pleading under the *Alberta Rules of Court*.

Documentary Production

10. The parties have exchanged Affidavits of Records and documents in electronic format using the Summation program. The Defendants’ productions comprise approximately 25,000 documents.
11. Schedule 2 of the affidavit of records of the Defendant, Child Welfare, merely sets out a broad claim of solicitor/client privilege without listing the historical documents for which solicitor/client privilege is claimed. Through the examinations for discovery to date, it has become apparent that there are documents that were generated during the claim period that relate to the policies, practises and systems of the Defendant, Child Welfare, which have not been produced and for which the Defendant claims solicitor/client privilege. An application will be brought by the Plaintiffs seeking:

- a) An order requiring the Defendant, Child Welfare, to provide an amended affidavit of records which lists the historical documents from the claim period for which the Defendant claims solicitor/client privilege; and,
- b) An order directing that, once identified, specific documents for which solicitor/client privilege has been claimed be produced to the Plaintiffs in this action.

The relief sought in (b) above will likely be made contemporaneous with a broader application to compel answers to questions refused on the examinations for discovery.

Questions for Discovery

12. The questions for discovery have been commenced and are substantially complete. There are a couple of witnesses whose examinations were not completed. In addition, there are questions improperly refused, undertakings which are unfulfilled and questions arising therefrom. Upon completion of the application and those questions, the only remaining questioning of the Defendants is of the current Directors in order that answers provided by former employees may be adopted as binding upon the Defendants. No examination of any other new witnesses is currently contemplated.

Experts

13. Expert reports will be exchanged within 120 days of the final examinations for discovery. Rebuttal expert reports will be provided within 90 days of receipt of the other party's expert report(s). The Plaintiffs expect that they will be delivering expert reports and calling expert witnesses at the common issues trial.

Refinement of Common Issues

14. Following examinations for discovery and the exchange of expert reports and prior to the trial of the common issues, the Plaintiffs may ask the Court for an order to amend or further refine the common issues, if required.

Readiness for Trial

15. Within 60 days of receiving the rebuttal expert reports, the parties will prepare a certificate of readiness and hold a pre-trial conference with the Case Management Judge. The purpose of the pre-trial conference is to address any issues upon which the parties are unable to agree and for which the assistance of the Court may be beneficial to ensure the common issues trial proceeds on schedule and efficiently.

Common Issues Trial

16. The common issues trial will be held in Edmonton. The trial date, when determined, will be posted on the web page dedicated to this action so that members of the Plaintiff Class may attend if they so desire.
17. The Plaintiffs propose that well in advance of the common issues trial, counsel for the parties should meet for the purpose of:
 - a) Determining the documents to go into a joint documents brief;
 - b) Determining an agreed statement of facts, if possible;
 - c) Identifying any known evidentiary issues and determining whether any of those issues can be resolved prior to or at the outset of the commencement of the trial;
 - d) Identifying anticipated witnesses and exchanging a summary of the evidence which each is anticipated to provide (save for those for whom examinations have already been conducted);

- e) Estimating the time required for each witness; and,
- f) Identifying any other issues that will assist in the efficient and orderly conduct of the trial.

Dispute Resolution

18. The parties have undertaken mediation to resolve the action. To date, the mediation has been unsuccessful. The Plaintiffs remain willing to participate in mediation or non-binding alternative dispute resolution efforts if the Defendants are prepared to do so.

Determination of Common Issues at Trial

19. The class will be informed of the results of the common issues trial by publication of a notice pursuant to section 21 of the *Class Proceedings Act*.
20. If the Defendants are ultimately wholly successful on the common issues, the litigation will be at an end.
21. If the Plaintiffs are ultimately wholly or partially successful on the common issues, then further proceedings as described below will be needed to resolve any outstanding individual issues for class members.
22. If the Plaintiffs are successful with respect to common issues (c) and (d) such that punitive damages are payable by one or both Defendants, those monies shall be paid by the Defendants into Court and the Plaintiffs shall then seek directions from the Court regarding the distribution of such funds to class members.

Determination of Individual Issues

23. If any or all of the common issues are resolved in favour of the class, the Plaintiffs propose that a case management hearing be held as soon as possible following judgment. At that hearing, the parties will be at liberty to make submissions regarding the methodology for

resolving the remaining issues. Potential methods include references, mini trials, mediation, arbitration or other means approved by the Court pursuant to sections 28-34 of the *Class Proceedings Act*. A proposed method of resolving outstanding individual issues is set out below.

24. The Court will be asked to specify procedures and deadlines by which individual class members shall identify themselves as wishing to make a claim for individual compensation. It is proposed that class members claims be divided into two categories:
 - a) Claims related to a Defendants' failure to make a *Criminal Injuries Compensation Act* or *Victims of Crime Act* application on behalf of the class member (hereafter "the Victims of Crime Claimants");
 - b) Claims related to a Defendants' failure to commence a civil action on behalf of the class member (hereafter "the Tort Claimants").

When filing their claims, class members will be required to declare whether they wish to assert a claim as a Victim of Crime Claimant or a Tort Claimant or both.

25. Adjudications of the two categories of claims will be conducted by the Court or by such other person as the Court appoints pursuant to section 28 of the *Class Proceedings Act*.
26. Adjudications for the Victims of Crime Claimants shall be guided by the rules, procedures, available compensation levels and criteria that would have been available to the Victims of Crime Claimants if the Defendants had brought timely applications for compensation for these class members under the *Victims of Crime Act* or its predecessor legislation. The Plaintiffs' position is that the Adjudicator of these claims should also assess the claimant's damages that resulted from the delay in payment due to the Defendants' failure to bring timely applications on behalf of the claimant.

27. Adjudications for the Tort Claimants shall be guided by the Rules of Court. Before filing a claim, a Tort Claimant will required to stipulate the maximum quantum of damages being claimed as:
- a) \$25,000 or less, being the financial jurisdiction of Small Claims Court;
 - b) \$25,000 but less than \$75,000, being the financial jurisdiction of the Streamlined Procedure; or,
 - c) Greater than \$75,000 being the financial jurisdiction of ordinary civil actions.

The adjudication of claims within each of the three categories of tort claims shall be guided by the applicable rules and procedures for discovery and trial for each of these three categories of claim.

28. The Defendants shall have the right to institute such third party proceedings as may be applicable to the individual claims of Tort Claimants, and such third party proceedings will be determined as part of the Tort Claimant Adjudication.

Legal Counsel/Communication with Class

29. The representative Plaintiffs have entered into a Retainer Agreement with McKenzie Lake Lawyers LLP to act on their behalf and on behalf of the Plaintiff class, subject to approval of this Honourable Court. McKenzie Lake Lawyers LLP are experiences class action counsel. Particulars of their experience and resources are filed as part of the application to appoint McKenzie Lake Lawyers LLP as lawyers of record.
30. McKenzie Lake Lawyers LLP will be the sole law firm of record for the Plaintiffs. Although the firm may use other counsel familiar with this action or this type of claim as a resource, none of those counsel will be lawyers of record.

31. McKenzie Lake Lawyers LLP will have direct and regular communication with the representative Plaintiffs so that they are kept informed as the action progresses and so that meaningful instructions can be obtained.
32. In addition, McKenzie Lake Lawyers LLP will have a web page on its firm website dedicated to this action. The web page will provide links to the pleadings, Orders, decisions and any class notices. The web page will also provide particulars to contact the lawyers at McKenzie Lake Lawyers LLP who are responsible for the carriage of this action including a 1-800 telephone number and e-mail addresses.
33. McKenzie Lake Lawyers LLP will regularly up-date its web page as the action progresses so that class members remain informed of the status of the action.
34. McKenzie Lake Lawyers LLP has also undertaken to keep Messrs. Klein and Docken advised of the progress of this action given their ongoing representation of individual class members.
35. Ongoing reporting to the class regarding the status of the action will be made to class members by mail, email and through updated posts on the website. Michael Saelhof, an associate lawyer in the class action group at McKenzie Lake Lawyers LLP and Deborah Andrews, a senior litigation clerk with more than 30 years experience, will be designated as contact persons to respond to inquiries from class members. Both Mr. Saelhof and Ms. Andrews will be well-versed in the facts and status of the action. They will respond to all inquiries from members of the class in a timely fashion. If there are a significant number of inquiries from the class, class counsel will create a “frequently asked questions” section for the website and, if appropriate, meetings will be held in Alberta to which class

members will be invited where they can be informed and ask questions. McKenzie Lake Lawyers LLP will record the contact information for class members who make inquiries.

Notice of Certification

36. As indicated above, notice of certification was provided to the Plaintiff Class pursuant to section 20 of the *Class Proceedings Act* and the Order of the Case Management Judge dated February 26, 2009. The opt out period has expired.

Case Management

37. It is expected that this action will continue to be case managed. Regular case management meetings and interlocutory applications will be scheduled as required.