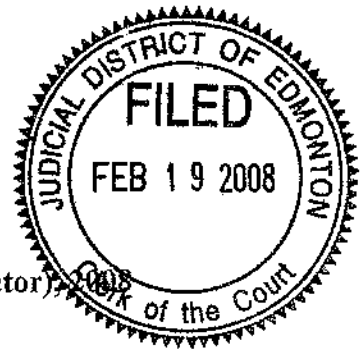

Court of Queen's Bench of Alberta

Citation: T.L. v. Alberta (Child, Youth and Family Enhancement Act, Director), 2008 ABQB 114

Date:
Docket: 0403 12898
Registry: Edmonton

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 a Minister's or a director's attention under the *Child, Youth and Family Enhancement Act*. See the *Child, Youth and Family Enhancement Act*, s. 126.2.

Reasons for Judgment
of the
Honourable Mr. Justice D.R. Thomas

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I. Introduction

[1] This is the Plaintiff's second attempt to have these proceedings certified as a class action. The original application was heard by Slatter J. (as he then was) on October 26, 2005: see ***T.L. v. Alberta (Director of Child Welfare)***, 2006 ABQB 104, 58 Alta. L.R. (4th) 23 [*"**T.L. #1***"]. He described this Action as a "lawsuit about lawsuits." The class is comprised of individuals who were physically and sexually abused by third party tortfeasors while minors (the "primary tort"). The class members, who were under the care of the Defendant Director of Child Welfare (sometimes referred to as the "Defendant Child Welfare"), allege that the Defendant had a duty to sue the third party tortfeasors and to make claims under crimes compensation legislation on their behalf. It is alleged that in failing to do so, the class members lost certain rights, the principal one being the ability to receive any compensation arising out of the primary tort. As such, the class members now seek to recover from the Defendant the damages that they would have received if the Defendant had advanced the claims relating to the primary tort on behalf of the class members.

II. Procedural History

[2] The alleged facts and claims made in these proceedings have been comprehensively canvassed by Slatter J. in his well-considered reasons and I will not repeat them here. However, I do repeat the following findings and directions at para. 151 of ***T.L. #1***:

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 issues, 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.

[3] Slatter J. was not willing to certify the proceedings based on the structure of the Action at that time and the application was adjourned with the Plaintiff being granted leave to reset the motion for certification. Section 6(1) of the ***Class Proceedings Act***, R.S.A. 2000, c. C-16.5 [the "C.P.A."] allows the court to adjourn an application for certification to permit the parties to amend their materials or pleadings or to permit further evidence. It is evident from his reasons that Slatter J. expected the Plaintiff to make certain modifications to the certification application and that the certification would only be granted if the modifications properly addressed the concerns identified above. The Plaintiff has proposed a Second Amended Statement of Claim which she submits now satisfies the requirements for certification.

[4] In determining the Plaintiff's present application, I have attempted to give full effect to Slatter J.'s previous reasons. The Plaintiff has been given a road-map and a second chance to obtain the certification she seeks. However, I caution any claimants seeking to certify an action as a class proceeding from believing that they will be given unlimited opportunities to correct deficiencies in their applications. The class proceedings regime is intended to be a practical, working device: ***T.L. #1,*** at para. 129. Allowing plaintiffs to repeatedly appear before the Court to modify their certification applications, particularly if they have chosen to disregard previously given directions, could render the class certification process unworkable.

III. The Present Application

[5] In his reasons, Slatter J. directed the Plaintiff to make the following amendments before the Action could be certified:

(a) Create a non-resident subclass for those class members who are not resident in Alberta at the time of the certification;

(b) Add approximately two or three additional proposed representative plaintiffs; and

(c) Add any other necessary parties to the Action.

[6] In the application before me, the Plaintiff is seeking approval for the following amendments:

(a) Modify the class definition proposed by Slatter J.;

(b) Create a non-resident subclass;

(c) Add F.M., J.S. and R.D. as additional representative plaintiffs; and

(d) Add the Public Trustee as a Defendant to the Action.

[7] I will deal with each of these required amendments in turn.

A. Revisions to the Class Definition

[8] In para. 151 of ***T.L. #1,*** Slatter J. defined the class as follows:

> 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.

[9] Slatter J. noted that the above definition would be subject to the submissions of counsel on specific wording. The Plaintiff seeks to modify the definition as follows (the proposed modifications are bolded and underlined):

> All persons who, **while resident in Alberta,** suffered personal injury while a minor as a result of a tort, and **on or after July 1, 1966** were in the actual custody of **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 take all appropriate steps to make a claim under the *Criminal Injuries Compensation Act*, or the *Victims of Crime Act*, or commence a civil action to obtain compensation on their behalf.

[10] The Defendant does not take issue with adding the phrase "while resident in Alberta" or changing the word "Defendant" to "Child Welfare". However, the Defendant argues that including the words "take all appropriate steps" would add a subjective element to the class definition. The Plaintiff has conceded this point and those words will be excised from the proposed class definition.

[11] There are only two contentious points remaining in respect to the proposed class definition: firstly, the removal of the phrase "by a third party", and secondly, the removal of June 29, 2004 (the date the original Statement of Claim was filed) as the end date for the class period.

[12] The Plaintiff characterizes these proposed modifications as minor. The Defendant argues that the proposed modifications significantly magnify the complexity of the main Action. In particular, the Defendant submits that by dropping the requirement that the tort be committed "by a third party", the Plaintiff is seeking to keep within the class those situations where the primary tort was committed by Child Welfare itself. There have been numerous actions filed against Child Welfare in relation to underlying torts which it has allegedly committed, such as improper placement, failure to investigate, etc., as well as claims based on vicarious liability for the wrongful acts of its employees and agents. The Defendant submits that if the Plaintiff's proposed definition is accepted, these tort allegations against Child Welfare would have to be determined under two different sets of procedures: the separate and individual claims, and the class proceedings. As such, there is a risk of inconsistent verdicts. Moreover, allowing the Plaintiff to remove "by a third party" from the class definition may render the proceedings unmanageable based on the increased complexity in pursuing both the primary tort actions against Child Welfare as well as the "duty to sue" allegations in relation to that primary tort.

[13] In response, the Plaintiff argues that the reason for removing the words "by a third party" is to make the class appropriately inclusive to ensure that a person who has suffered personal injury as a result of a tort committed by an employee of Child Welfare can participate in the class proceedings if he or she meets the other requirements to qualify as a member of the class. Such claims against Child Welfare would be founded on the legal concept of vicarious liability. The Plaintiff submits that the revised definition does not change the nature of the proposed class action as expressed by Slatter J. and does not increase the complexity of the Action and has no impact on the determination of the common issues. The Plaintiff takes the position that it is unclear as to whether Slatter J. specifically turned his mind to the issue of whether the class definition ought to exclude situations where the primary tort was committed by Child Welfare. Moreover, the Plaintiff submits that this modification does not create the potential of inconsistent verdicts between the individual actions and the class proceedings.

[14] In his reasons, Slatter J. noted the following at paras. 1-2:

> 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.
>
> 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. [Emphasis added]

[15] At para. 75:

> 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. [Emphasis added]

[16] Throughout his reasons, Slatter J. refers to the "primary tortfeasor", which he defines in para. 1 of ***T.L. #1*** as a "third party tortfeasor". The primary tort is the personal injury suffered by a member of the class at the hands of a third party tortfeasor. The class is therefore restricted to those individuals who were injured as a result of a third party tort. Although some of the class members may also have direct tort claims against Child Welfare in addition to a personal injury claim against a third party tortfeasor, this is outside the scope of these class proceedings. I assume that in drafting the class definition, Slatter J. intended to specifically include the phrase "by a third party" in order to reflect the nature of the underlying claims giving rise to the class proceedings. I agree with the Defendant that removing the words "by a third party" would change the nature of the lawsuit and would add an increased layer of complexity to the determination of the individual issues, which could go so far as to call into question whether a class proceeding is the preferable procedure for dealing with the class members' claims.

[17] The second aspect of the Plaintiff's change to the proposed class definition is to remove the end date of June 29, 2004 (the date the Action was first filed). The Plaintiff submits that the removal of this end date would bring the class period up to the opt in/opt out date, which would eliminate the need to commence an additional proceeding for claims arising after June 29, 2004 and thus achieve greater judicial economy. The Defendant argues that the removing the end date of June 29 ,2004 would have the opposite effect, because expanding the class further out in time

would magnify the complexities of the matter and make the case less amenable to proceeding as a class action.

[18] In the first certification application, the Plaintiff sought to have the class defined to include all persons who "were under the care and control of, or guardianship of Child Welfare at the time of or subsequent to the assault or injury". Slatter J. agreed with the Defendant that the proposed class definition was too wide and varied, with several different subgroups of class members under several different statutory regimes. In narrowing the proposed class, Slatter J. held at paras. 73 to 74:

> 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".
>
> 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.

[19] Further, in para. 88:

> 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. [Emphasis added]

[20] The 1966 Act is the ***Child Welfare Act, 1966***, S.A. 1966, c. 13, and the 1984 Act is the ***Child Welfare Act***, S.A. 1984, c. C-8.1. At para. 37, Slatter J. noted that:

> 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.

[21] Slatter J. further noted that the provisions in the 1984 Act relating to changes in guardianship resulting from the issuance of Temporary Guardianship Orders and Permanent Guardianship Orders were included unchanged in ss. 31(2) and 34(4), respectively, of the C.Y.F.E. Act: ***T.L. #1***, at para. 44. I note that the provisions in the C.Y.F.E. Act relating to permanent guardianship agreements (s. 11) are also unchanged from the 1984 Act.

[22] The original Statement of Claim was filed on June 29, 2004, prior to the coming in force of the C.Y.F.E. Act. The application before Slatter J. was heard on October 26, 2005, after the C.Y.F.E. Act came into effect. It is evident from the materials filed at the first certification application that the C.Y.F.E. Act was put before him, along with the other five statutory regimes relating to child protection in Alberta since 1905.

[23] I also note that Slatter J. used an end date of 2004 in setting out the common issues. He does not state any rationale for choosing this date and I am left to assume it was selected simply to accord with the date that the original Statement of Claim was filed. I have no reason to believe that this date was selected to reflect the fact that the C.Y.F.E. Act came into force on November 1, 2004.

[24] Although Slatter J. defined the class using an end date of June 29, 2004, I am not convinced that this date was not adopted simply because it was the date that the original Statement of Claim was filed. I have carefully considered his reasons and do not find it to be inconsistent with his overall approach to allow the Plaintiff to extend the class end date to the date of certification. The C.Y.F.E. Act may be considered the sixth statutory regime in Alberta dealing with child protection, however it has continued to use the same subcategories identified by Slatter J. in his class definition: persons under the actual custody of Child Welfare under a Temporary or Permanent Guardianship Order, or under a Permanent Guardianship Agreement. The relevant provisions relating to the changing of guardianship under the C.Y.F.E. Act are the same as those under the 1984 Act. I do not find that extending the class in this way would change the fundamental nature of the proceedings nor increase the number of subcategories in the defined class. It does not affect the common issues in any way, save to extend the end date to the date of certification. Any additional claims will not render the class proceedings so unwieldy or unmanageable as to outweigh the benefits of determining all of the claims brought under the defined subcategories in one proceeding.

B. The Requirement for Additional Representative Plaintiffs

[25] Although Slatter J. was prepared to accept that Ms. T.L. was a suitable representative plaintiff, he was hesitant to allow the certification application to proceed unless additional representative plaintiffs were added:

> 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. (***T.L. #1,*** at para. 126).

[26] The Plaintiff proposes to add three additional representative plaintiffs to the Action: Ms. F.M., Ms. R.D. (now Ms. R.M.) and Mr. J.S.

[27] Ms. F.M. was born on March 12, 1970. At all material times, she was resident in Alberta but now lives in British Columbia. From the time she was quite young until she was a teenager, she was physically and sexually assaulted by her mother and uncle, both of whom were eventually convicted for their crimes on March 30, 1984. She was apprehended by Child Welfare on September 21, 1983 due to reported concerns of sexual abuse by her mother and uncle. Ms. F.M. was the subject of a Temporary Wardship Order from March 1, 1984 until March 1, 1985. She was then the subject of a Permanent Guardianship Order from April 10, 1985 until March 12, 1988, when Ms. F.M. turned 18.

[28] Ms. R.D. was born on December 12, 1979 (as R.A.S.) and currently resides in Alberta. When she was 7 weeks old, she was severely physically assaulted by her mother and stepfather, resulting in hospitalization from February 7 until March 14, 1980. She was the subject of a Temporary Guardianship Order from February 26, 1980 to December 1, 1980, and of a Permanent Guardianship Order from October 8, 1980 until August 31, 1982. She was legally adopted on August 31, 1982. Ms. R.D.'s mother and stepfather were convicted for the assault and were incarcerated in November 1980; her mother received a six month sentence, and her stepfather received 3 years.

[29] Mr. J.S. was born on May 28, 1988 and is also an Alberta resident. While living in a foster home from October 1993 to February 1994, he was repeatedly sexually assaulted by the son of his foster parents. The son plead guilty to these assaults and was sentenced to two years probation. From January 24 to October 14, 1994, Mr. J.S. was the subject of Temporary Guardianship Orders. On October 4, 1995, he was the subject of a Permanent Guardianship Order that lasted over 6 years before it was terminated on April 23, 2002, when he was thirteen years old.

[30] The Plaintiff submits that all three proposed representative plaintiffs are members of the defined class and have consented to act as representative plaintiffs. None of the proposed representative plaintiffs received any compensation for the personal injuries that were inflicted

on them. They allege that no steps were taken by Child Welfare or the Public Trustee to obtain compensation on their behalf.

[31] Section 5(1)(e) of the C.P.A. sets out the requirements of an appropriate representative plaintiff:

> 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.

[32] The Plaintiff submits that the proposed representative plaintiffs meet all of these requirements. It is asserted that they understand the duties of a representative plaintiff and have expressed a willingness to act as a representative plaintiff.

[33] The Defendant submits that the proposed representative plaintiffs are not suitable for the following reasons:

(a) Ms. F.M. has a conflict of interest as she is alleged to have abused another class member (her daughter) and as her daughter's guardian for a period following the abuse, did not take any steps to commence a claim against other alleged tortfeasors on behalf of her daughter;

(b) Ms. R.D. does not appreciate that an earlier lawsuit had been commenced on her behalf by her mother through the offices of proposed class counsel. Ms. R.D. might also be in a potential conflict of interest as she does not know whether she will be suing her mother, who is also represented by proposed class counsel; and

(c) Mr. J.S. does not understand the nature of the litigation, believing that this Action is about improper placement rather than a failure to sue, that he is pursuing the Action of behalf of those who were injured as a result of a crime. In addition, there is no evidence that he is out of time in relation to any possible claim.

[34] The Plaintiff argues that much of the Defendant's criticism of the proposed representative plaintiffs relate to individual issues that have no bearing on their ability to fairly and adequately

represent the interests of the class and submits that even if the representative plaintiff and the class have different interests, these differences do not negatively affect their positions on the common issues and as such, no conflict of interest arises. If a conflict does arise at some stage of the proceeding, the Plaintiff submits that it can be addressed at that time.

[35] The adequacy of a proposed class representative was briefly discussed by the Supreme Court of Canada in ***Western Canadian Shopping Centres Inc. v. Dutton***, 2001 SCC 46, [2001] 2 S.C.R. 543 ["***Western Canadian Shopping Centres***"], at para. 41:

> In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative plaintiff need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class: see Branch, *supra*, at para. 4.210-4.490; Friedenthal, Kane and Miller, *supra*, at pp. 729-32.

[36] In determining that Ms. T.L. was a suitable representative plaintiff, Slatter J. noted the following at paras. 117 to 125 of his judgment:

(a) The requirement that the representative plaintiff be a member of a class is not the same thing as requiring the representative plaintiff prove, at the certification stage, that she has a valid cause of action. Although Ms. T.L.'s claim may be statute-barred, she will respond 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.

(b) Ms. T.L. is not employed, has no financial resources, and it is unlikely that she had any skills, training or education that will assist her in discharging the responsibilities of a representative plaintiff. However, many other abused children face the same impediments and those who wish to pursue their claims are more likely to be in the same position as Ms. T.L.

(c) Despite her admitted impecuniosity, 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 C.P.A. to deny certification based on impecuniosity.

(d) Although the C.P.A. allows for 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, it is desireable in this case to have a manageable group of class members running the litigation to ensure that the class itself, and not the lawyer, has control of the litigation.

(e) As there is significant diversity between the members of the class, it is appropriate to permit a wider examination than a single representative would allow. Further, it is helpful if the trial judge has a wider range of factual circumstances to give context to the common issues.

(e) 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.

[37] I consider first the Defendant's concerns with respect to the appropriateness of adding Ms. R.D. and Mr. J.S., particularly regarding their respective understanding of the class action itself. In reviewing the transcripts from the cross-examinations of the proposed representative plaintiffs, I note the following:

(a) Ms. R.D. graduated from high school in 1998 and completed some upgrading courses at college in 2003 and 2004. She works part time at a call centre for a cable company and her husband collects AISH. She does not own any property or other assets.

(b) Mr. J.S. recently graduated from high school and is currently employed full time as a welding apprentice. He lives at home with his parents.

(c) Ms. F.M. completed Grade 7 in school. She is unemployed and currently collecting disability benefits from the British Columbia government. She does not own any property or other assets.

[38] Given Slatter J.'s reasoning in ***T.L. #1***, I agree that the rather modest financial means of the proposed representative plaintiffs is not a sufficient reason to prevent the Action from being certified. It is not necessary to canvass the entire class in order to find a representative plaintiff of substantial means who is best situated to answer any potential costs awards, particularly in this case where it can be said that the class, as a whole, is disadvantaged.

[39] Similarly, although a representative plaintiff should demonstrate a certain degree of general knowledge and understanding with respect to the nature and form of class action proceedings, the level of sophistication of the representative plaintiff , especially in respect to complex legal concepts and procedures, may vary depending on the circumstances of the class itself. I am satisfied that Ms. R.D. would be an appropriate representative plaintiff in this Action. Her evidence demonstrates that she has a sufficient understanding of the purpose of the class action and her role as a representative plaintiff:

Q What do you understand that this lawsuit is about?
A It's about compensation for people that were hurt and that should have got it a long time ago.
Q And when you talk about compensation, what do you understand that to mean?
A Compensation? When I was hurt, I guess I was entitled to compensation, and no one filed it for me, so we're doing it now.
Q Who do you understand, then, should have paid for this compensation?
A The people that were -- that should pay for the compensation? At the time when I was hurt, my biological parents may have been sued, but at the same time, the government was also -- I was also under their care as far as I know. They should be reliable. They should be at fault as well because – for placing me in a situation like that.
Q So do you understand, then, that the compensation could come from your biological parents?
A It could.
Q As well as the government?
A Yes.
...
Q You have agreed to act as a representative plaintiff?
A I did.
Q And who do you understand, then, that you'll be representing?
A I'm representing myself and several other people that have been hurt as well or victimized by the system.
Q And do you understand who these other people are?
A They're just like me.
Q What does that mean?
A People that were victimized by the system or hurt by other people or in the Child Services and ended up getting hurt.
Q So people who hurt by family members?
A Family members. Could be anybody. People that were foster parents or adoptive parents or –
Q So you're suing on behalf of those people as well?
A Yes, I am.
Q Foster parents and adoptive parents?
A I'm suing on behalf of the people that were hurt.
Q And hurt in what way?
A They could have been hurt like I was, beaten, molested.
Q And it is all people who were hurt?
A No. Just people who were in the care of Social Services.
...
Q What do you understand will be your job as the representative plaintiff? What's your job going to be?
A To represent them, to stand up, be strong for them.
Q How are you to do that? How will you be doing that, representing them?

A I'm not sure at this time.
Q Why do you want to be a representative plaintiff?
A Because I think that we all deserve justice in what happened to us.

[40] Although Ms. R.D. acknowledges that her biological mother is a potential class member in this Action, this fact alone does not necessarily place Ms. R.D. in a conflict of interest with the other class members. As stated in para. 53 of ***MacLean et al. v. Telus Corporation and Telus Communications Inc.,*** 2006 BCSC 766, [2006] B.C.W.L.D. 4697:

> The inquiries about whether the representative plaintiff adequately and appropriately represents class members and whether the representative plaintiff has potential conflicts of interest are focused on the proposed common issues. If differences between the representative plaintiff and the proposed class do not impact on the common issues then they do not affect the representative plaintiff's ability to adequately and fairly represent the class, nor do they create a conflict of interest: ***Hoy v. Medtronic***, at 83-85; *Endean v.* ***Canadian Red Cross Society,*** (1997) 36 B.C.L.R. (3d) 350 (S.C.) at 66.

[41] Unlike the situation with Ms. F.M., there is no allegation that Ms. R.D. has abused any other member of the class or that she is a third party tortfeasor herself. Ms. R.D. has not decided whether she will be suing her biological mother directly for the abuse she suffered as a seven-week old baby. Even if she decides to do so, that would not necessarily affect her ability to fairly or adequately represent the interests of the class or place her in a conflict of interest with the other class members with respect to the common issues. However, should Ms. R.D. decide to bring a direct action against her biological mother, then that would go to the question of damages and can be dealt with at a later date if necessary.

[42] With respect to Mr. J.S., when his age and overall situation is taken into account, I am also satisfied after a review of all of his testimony that he possesses sufficient understanding of both the class action lawsuit and his proposed role as a representative plaintiff. A portion of his evidence upon which I rely is as follows:

Q And do you understand that there is another proceeding that you're trying to be a representative plaintiff in; is that right?
A That's right.
...
Q And what's your understanding of what that lawsuit is all about?
A Well, I am standing up for the other hundreds of kids that the same abuse has happened to them, and I'm standing up for all of them and for myself.
Q And do you understand what type of people you're going to stand up for?
A Yeah. Victims of crime.
...
Q Do you understand that the only people you're going to be representing who were hurt as a result of a crime, or do you know?

A Yeah. They were hurt as a result of a crime.
Q Not as a result of accidents?
A No. These aren't accidents.
Q And do you have any understanding of what types of crime you might be representing people for?
A Sexual assault.
Q Any other kinds of crime?
A I'm not exactly sure.
...
Q Do you understand what a class action is?
A Yeah.
Q What do you think it is?
A It's a small group of people standing up for a large group of people.

[43] The Defendant argues that given Mr. J.S.'s young age (he is currently 19 years old), it is likely that the limitation periods related to the primary tort claims have not yet expired. However, as noted by Slatter J. in paras. 49-55 of ***T.L. #1***, there are two different limitation regimes with respect to minors under the old ***Limitations of Actions Act***, R.S.A. 1980, c. L-15 and the new ***Limitations Act***, R.S.A. 2000, c. L-12. While the new Act provides that the limitation period does not run against minors, under the old Act, the two-year limitation period would commence if the minor was in the actual custody of a parent or guardian. The assaults on Mr. J.S. took place between October, 1994 and February, 1994, prior to the coming in force of the new Act. As such, it is possible that the limitation period for the primary tort has expired, although this question will be left for determination at a later date. Nevertheless, I am not convinced that the objection raised by the Defendant in this regard is sufficient to prevent adding Mr. J.S. as a representative plaintiff in this Action.

[44] However, I do share the concerns of the Defendant about Ms. F.M. During cross-examination on her affidavit, Ms. F.M. stated that in January, 1994, she plead guilty to a charge of assault against her daughter C. and was given probation in relation to that charge. C. was subject to a Permanent Guardianship Order from November 9, 1994 until her adoption on August 11, 1997. As such, C. is also potential class member in this Action. There is a real question as to Ms. F.M.'s ability to reconcile her conflicting roles of representative plaintiff and primary tortfeasor. As stated in paras. 59-61 of ***Queackar-Komoyue Nation v. British Columbia***, 2006 BCSC 1517, 55 Admin. L.R. (4th) 236:

> In order to "adequately represent the class" a representative plaintiff must be free of conflicts of interest with members of the class that he or she seeks to represent. See: ***Horne v. Canada (Attorney General)*** (1995), 129 Nfld. & P.E.I.R. 109, 39 C.P.C. (3d) 38 (P.E.I.S.C.) at paragraph 24; ***Metera v. Financial Planning Group***, (2003), 12 Alta. L.R. (4th) 120, 2003 ABQB 326, [2003] 10 W.W.R. 367 [***Metera***] and ***Ryan v. Leighton***, [2006] 3 C.N.L.R. 350, 2006 BCSC 278 [***Ryan***]
>
> In ***Metera*** at paragraph 56, the Court stated:

> Conflicts of interest within the class tend to destroy the commonality of the interest. However, there is a more practical reason for this test. The representative class will be represented by one counsel, and that counsel is put in an impossible situation if he or she is required to represent competing interests.

In ***Ryan*** at paragraph 18, Satanove J. stated:

> Similarly, in ***Mack v. Mack***, [1994] B.C.J. No. 1000 (S.C.), Cowan J. disallowed the representative action of the plaintiffs on behalf of the Toquaht Nation Indian Band when he added the Band as a defendant to the proceedings. Unfortunately his reasons for judgment were not made available, but it is a matter of logic that the Band could not be both a plaintiff and defendant in the same proceeding.

[45] Similarly, I do not think that Ms. F.M. can adequately and fairly represent the interests of the class. Although it is arguable that she does not have an interest that is in conflict with the other class members with respect to the common issues *per se*, nevertheless I am satisfied that she would not be an appropriate representative plaintiff given that Ms. F.M. is an admitted primary tortfeasor of another potential class member. In reaching this conclusion, I do not mean to exclude her as a class member if she wishes to opt-in to the Action.

[46] The Defendant also argues that the proposed representative plaintiffs do not comprehensively represent all of the categories of claimants under the proposed class definition, namely that none of the proposed representative plaintiffs were:

(a) Permanent wards under the 1966 Act;
(b) Under Permanent Guardianship Agreements pursuant to the 1984 Act;
(c) Abused in a situation where a third-party tortfeasor was not criminally convicted;
(d) Abused after November 1, 1997, when the new ***Victims of Crime Act*** scheme came info force; or
(e) Under the care of a Designated First Nations Authority.

[47] The Plaintiff responds that the condition of naming additional representative plaintiffs does not require that these individuals be representative of every variation possible under the class definition and submits that not having representatives from the above categories has no impact whatsoever on the determination of the common issues. The Plaintiff further submits that the proposed representative plaintiffs do fall into four classes of claims: those based on the expiry of a limitation period, those based on delay, those based on accessing crime victim compensation legislation, and those based on commencing civil claims.

[48] At para. 119 of his reasons, Slatter J. notes that:

> 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 [of the C.P.A.], which makes the certification of subclasses discretionary, and ***Western Canadian Shopping Centres***, *supra*, at para. 41.

[49] As such, I am in agreement with the Plaintiff's position and find that it is not necessary for the Plaintiff to add a representative plaintiff to correspond with each possible subcategory under the class definition.

[50] In summary, I find that Ms. R.D. and Mr. J.S. are suitable representative plaintiffs and they will be added in that capacity to the Action (and with the Plaintiff, will sometimes be collectively referred to as the "Representative Plaintiffs"). Ms. F.M. is not a suitable representative plaintiff and will not be added as a party for the reasons outlined above.

C. Creation of a Non-resident Subclass

[51] Section 7(2) of the C.P.A. provides that:

> If a class is made up of persons who are residents of Alberta and persons who are not residents of Alberta, that class is to be divided into resident and non-resident subclasses.

[52] At para. 85 of his reasons, Slatter J. stated that:

> 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.

[53] Creating a non-resident subclass is necessary not only because the statute requires it, but it takes on practical importance as a non-resident can only become a member of the class if he or she chooses to opt into the class proceedings within the time provided for in the certification order: C.P.A., s.17(1)(b).

[54] However, I note that s. 17(1)(b) of the C.P.A. is subject to s. 17(1)(d):

> a person who is a prospective subclass member may not opt into a class proceeding under clause (b) unless a representative plaintiff who satisfies the requirements of section 7 has been or will have been appointed for the subclass in which the person is to become a subclass member at the time that the person becomes a class member.

[55] I have rejected the Plaintiff's application to add Ms. F.M., currently resident in British Columbia, as a representative plaintiff. Although I have discretion under s. 7(4) to certify a person who is not a member of a subclass as the representative plaintiff for the subclass, I can only do so if I am of the opinion that it would avoid a substantial injustice to the subclass. In the absence of evidence to that effect, I refrain from making such an order. If the Plaintiff wishes to include non-residents in the class action proceeding, she will be required to add a non-resident representative plaintiff for that subclass, unless she is able to demonstrate substantial injustice.

[56] The Plaintiff states that she has fulfilled Slatter J.'s direction by including non-resident members in the amended litigation plan and by requesting the Court to fix a deadline for class members to opt in or opt out of the class proceedings. In addition, the Plaintiff has re-worded the common issues to include reference to an opt-in date. The Defendant argues that the Notice of Motion does not technically seek certification of the non-resident subclass, although it is suggested in the Plaintiff's argument that this is her intention. In reply, the Plaintiff stated that the inclusion of a non-resident subclass will be set out in the certification order if the Action is certified.

[57] As the creation of a non-resident subclass is required by statute, I direct that such a subclass be included in any certification order that may issue from these reasons. I also direct that the Representative Plaintiffs further amend their litigation plan to make specific reference to the non-resident subclass and the notification process application to same. I note, however, that any non-resident person that otherwise meets the class definition will not be able to opt-in to the class proceedings in the absence of a non-resident representative plaintiff.

D. Adding Necessary Parties as Defendants to the Action

1. Preliminary Observations

[58] At the original application on ***T.L. #1***, the Defendant argued that a class proceeding was not the preferable way to determine the common issues because of the existence of numerous third parties that were necessary parties to the Action. These potential parties include:

(a) the primary tortfeasors who committed the torts or crimes;

(b) Designated First Nations Authorities ("DFNAs") to which child welfare responsibilities were delegated (there are about 18 potential third parties in this category);
(c) Regional Authorities created or continued under the *Child and Family Services Authorities Act,* R.S.A. 2000, c. C-11, to administer child protection services (there were 18, and are now 10 such authorities);
(d) Charitable and for-profit service providers which have been given responsibility over child protection from time to time; and
(e) the Public Trustee, which is the trustee designated by statute for many class members.

[59] In making the distinction between true third parties and necessary parties, Slatter J. stated the following at para. 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. [Emphasis added]

[60] And further, in para. 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. [Emphasis added]

[61] As such, Slatter J. directed the Plaintiff at para. 149 to join any other necessary parties to the Action before it could be certified as a class proceeding, noting that the failure to do so could result in a finding that a class proceeding is not the preferable procedure for resolving the claims:

> 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. [Emphasis added]

[62] In the application before me, the Plaintiff seeks to add only the Public Trustee to the Action and does not believe that any other potential parties identified by Slatter J. are necessary parties to the litigation, at least at this stage of the proceeding. On the other hand, the Defendant takes issue with the Plaintiff's failure to name the DFNAs or other third party guardians as necessary parties to the Action.

[63] In para. 145 of ***T.L. #1***, Slatter J. stated the following regarding the potential third parties:

> 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. [Emphasis added]

[64] Slatter J. also noted at para. 150 that the determination of whether the potential third parties are truly necessary to the proceeding will ultimately depend on the final definition of the class. For example, it may be possible to eliminate some of the third parties by narrowing the class. However, the only change to the class definition in this application is to extend the time period beyond the June 29, 2004 date initially proposed by Slatter J., which will in turn expand the class membership. There are no other changes to the class definition that would convince me to significantly depart from Slatter J.'s approach in this regard.

2. Adding the Public Trustee as a Defendant

[65] I turn now to the issue of whether the Public Trustee should be added as a necessary party to this Action. In para. 144 of ***T.L. #1,*** Slatter J. noted that:

> 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. [Emphasis added]

[66] At the hearing of this application, counsel for the Public Trustee made submissions regarding the appropriateness of being add as a defendant to the Action.

[67] The Public Trustee is explicitly mentioned in s. 34(4) of the C.Y.F.E. Act, in respect to a child subject to a Permanent Guardianship Order:

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

[68] The Public Trustee did not become the sole guardian or trustee of the estate of any minor person under a Permanent Guardianship Order until the 1984 Act was proclaimed in force on July 1, 1985. Furthermore, the Public Trustee has no relation to the estate of any person under a Temporary Guardianship Order.

[69] Counsel for the Public Trustee argues that the Public Trustee is a "corporation sole" and is not an officer, agent or servant of the Crown. On this issue, s. 3 of the ***Public Trustee Act,*** R.S.A. 2000, c. P-44.1 ("*Public Trustee Act*") confirms that the "Public Trustee is a corporation sole under the name Public Trustee." The Plaintiff has acknowledged that this is correct and is prepared to describe the Public Trustee as a corporation sole in the Second Amended Statement of Claim.

[70] Further, the Public Trustee appears to argue that the Crown is immune from liability arising out of the Public Trustee's actions or omissions. In that regard, the relevant section of the ***Public Trustee Act*** is s. 42(1):

> **42(1)** No action lies against the Crown for any claim arising out of an act or omission of the Public Trustee, but if a judgment is obtained against the Public Trustee in respect of any act or omission of the Public Trustee, the judgment, to the extent that it is not paid by a transfer from the common

> fund under section 35(1), is deemed to be a judgment against the Crown in right of Alberta and the amount of the judgment shall be paid out of the General Revenue Fund. [Emphasis added]

[71] In my view s.42(1) establishes that although the Crown may not be liable for the actions of the Public Trustee, nevertheless a judgment against the Public Trustee is deemed to be a judgment against the Crown.

[72] The Public Trustee's opposition to being added to this application is primarily grounded in the argument that the claims of the representative Plaintiffs would have been struck out as against the Public Trustee based on the expiry of the limitation periods, even if the Public Trustee had been a party to the Action from the outset. This argument can be summarized as follows (given my findings above, Ms. F.M. is not included in this analysis):

(a) Ms. T.L. was never under the *actual* custody of the Public Trustee. According to s. 59 of the ***Limitation of Actions Act***, the latest that the two-year limitation period against the primary tortfeasor could begin to run was when Ms. T.L. reached the age of majority on July 19, 1990. By the time Ms. T.L. brought the original Action on June 29, 2004, she was over the age of 28 and therefore outside the ten-year ultimate limitation period set out in the new ***Limitations Act***. Further, Ms. T.L. has not plead that she was under a disability after having reached the age of majority so as to suspend the operation of the limitation period under either the old ***Limitation of Actions Act*** or the new ***Limitations Act***, or that there was fraud or fraudulent concealment under the new ***Limitations Act*** .

(b) Ms. R.D. suffered harm when she was less than a year old. She was the subject of a Permanent Guardianship Order from 1980 to 1982; she was never under the actual custody, care or guardianship of the Public Trustee as the Permanent Order expired three years before the change in legislation that may have involved the Public Trustee. There is no evidence or allegation that the Public Trustee even knew of Ms. R.D.'s existence, let alone have any responsibility for her; indeed, it is pleaded in the proposed Statement of Claim that the Public Trustee was unaware of any potential claim she may have had.

(c) Mr. J.S. reached the age of majority in May of 2006. Section 5.1(2) of the *Limitations Act* provides that the operation of the limitation period is suspended while the claimant is a minor. The limitation period for bringing an action against the primary tortfeasor has not expired and as such, Mr. J.S. has not suffered any harm or loss.

[73] Lastly, respecting the limitation periods relating to applications under the ***Criminal Injuries Compensation Act***, the Public Trustee argues that: the limitation periods relating to such claims have expired for all of the Representative Plaintiffs; none of the Representative Plaintiffs were subject to Permanent Guardianship Orders at the time of expiry; and the Public Trustee had no knowledge of the potential claims.

[74] In response to these submissions, the Plaintiff argues that both the legislation and the case law confirm that the Public Trustee has an important function in the life of a child who is subject to a Permanent Guardianship Order, and many of the putative class members are or have been the subject of such orders. Respecting the limitation issues, the Plaintiff submits that much of the Public Trustee's argument relates to issues regarding individual limitation periods instead of referring to the common issues. The Plaintiff argues that where there is a fiduciary relationship between the plaintiff and the defendant, a finding of fraudulent concealment which includes a "passive failure to inform" and a "failure to disclose" can extend the limitation period. Furthermore, limitations issues were raised before Slatter J., who did not find that limitation periods were an impediment to certification. The Plaintiff posits that until the Public Trustee files a Defence in this Action, she is not in a position to plead that the limitation period has been postponed through disability, fraud or fraudulent concealment.

[75] It is evident from ***T.L. #1*** that Slatter J. was well aware of the limitations issues raised in this Action. I refer specifically to paras. 49, 53-55:

> 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.
> ...
> 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.
>
> 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.

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.

[76] At paras. 114-115 of ***T.L. #1***, Slatter J. noted further that the questions of which limitation period applies, when it commenced running, and whether the class member was under disability, will vary widely depending on the circumstances of each individual class member. Similarly, the issue of fraudulent concealment would be based on individual determinations for each class member, unless there was systemic fraudulent concealment (which has been defined as a common issue).

[77] The Defendant raised a limitations argument in ***T.L. #1***, in respect of Ms. T.L.. Slatter J. considered this argument and held at paras. 117-118:

> 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.
>
> 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. [Emphasis added]

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

[79] Accordingly, I direct that the Public Trustee be added as a Defendant to the Action.

3. Adding the DFNAs and Third-Party Guardians as Parties to the Action

[80] I now turn to the issue of whether the DFNAs and the third party guardians ought to be added as necessary parties to the Action.

[81] At paras. 146-148 of ***T.L. #1***, Slatter J. stated that:

> 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.
>
> 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.
>
> 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. [Emphasis added]

[82] The Plaintiff has declined to add the DFNAs and the third party guardians as defendants to the Action. In respect of the DFNAs, the Defendant submits that there was an effective delegation of any relevant child welfare responsibilities to the DFNAs prior to November 1, 2004, and that the class members will be left without a remedy should it be accepted that authority was indeed delegated to these outside organizations. In response, the Plaintiff argues that there is no evidence of a statutory delegation made to the DFNAs prior to November 1, 2004, excepting the agreement with the Bigstone Cree Nation, which was tendered into evidence as an exhibit to the affidavit of Kelly Besler, sworn on November 8, 2004.

[83] On the issue of the third party guardians, the Defendant argues that in some cases, the "duty to sue" rests with other guardians, and points out that these guardianship issues are raised even in respect to the proposed representative plaintiffs. The other guardians will not be able to argue relative fault unless they are present to make submissions. However, the Plaintiff argues that it is not practically possible to join all persons who were guardians of individual class

members at this time as their identities, and the identities of all class members, are not yet know. The Defendant states that this argument only highlights the unworkability of the class action generally and that at a minimum, the other guardians for the proposed representative plaintiffs can be identified and should be added in order to allow a more complete representation of the factual and legal issues faced by the class as a whole. In contrast, the Plaintiff argues that joining the guardians at this point will not assist in the assessment of the common issues and that the fact that a class member may have had another guardian in addition to Child Welfare does not relieve Child Welfare and the Public Trustee of their duties to that class member.

[84] I deal first with the issue of adding the DFNAs. Section 121 of the C.Y.F.E. Act grants the Defendant the ability to delegate its responsibilities under the Act to third parties:

> 121(1) The Minister may delegate any of the duties or powers conferred or imposed on the Minister under this Act, except the power to delegate under subsection (2) and the power to make regulations under section 131, to a Child and Family Services Authority or to any person or government for any purpose in connection with the administration of this Act.
>
> (2) The Minister may delegate any of the duties or powers conferred or imposed on a director by a court or under any Act, including the power under this Act to form an opinion, to receive a report under section 4 or 5 or to delegate or subdelegate, to a Child and Family Services Authority or to any person or government for any purpose in connection with the administration of this Act.
>
> (3) A director may delegate any of the duties or powers conferred or imposed on the director by a court or under any Act, including the power under this Act, the Drug endangered Children Act or the Protection of Sexually Exploited Children Act to form an opinion, to receive a report under section 4 or 5 or to delegate or subdelegate to
>
> (a) a person employed or engaged in the administration of this Act,
> (b) a foster parent in respect of a particular child,
> (c) any other person who is providing care to a child in respect of that child, or
> (d) any other person or any government.
>
> (4) The Minister or a director is authorized to receive any authority delegated to the Minister or director by a government or child welfare authority relating to a child who is in the custody or under the guardianship of that government or authority.

[85] In her affidavit made November 8, 2004, Ms. Besler, the Acting Manager of Litigation Support and Post Guardianship Services with Children's Services, stated that beginning in the

1980s, the provision of Child Welfare services to children on a Reserve was delegated to various First Nations Child Welfare Societies:

> Each delegation was accomplished by a [written] contract between the Minister and the respective First Nations Child Welfare Society and a delegation by the Minister. The following is a list of the Societies, accompanied by the date that they first received delegated powers and duties:

1.	June 1983	Lesser Slave Lake Indian Regional Council
2.	Sept. 1986	Siksika Family Services Corporation
3.	March 1987	Yellowhead Tribal Services Agency
4.	Feb. 1993	Stoney Child & Family Services
5.	Aug. 1993	Bigstone Cree Child & Family Services
6.	Sept. 1993	Tsuu T'ina Child & Family Services
7.	Oct. 1996	Tribal Chiefs Child & Family Services, East
8.	Oct. 1996	Tribal Chiefs Child & Family Services, West
9.	April 1997	Akamkisipatinaw Ohpikihawasowin Child & Family Services
10.	June 1997	Kasohkowew Child Wellness Society
11.	March 1998	Little Red River Cree Nation Child & Family Services Society
12.	Sept. 1998	Kee Tas Kee Now Child & Family Services
13.	April 1999	Northpeace Tribal Council
14.	Feb. 2001	Western Cree Tribal Council
15.	Oct. 2001	Athabasca Tribal Council
16.	Mar. 2002	Piikani Child & Family Services
17.	Dec. 2002	Saddle Lake Wah-Koh-To-Win Child Care Society
18.	July 2003	Blood Tribe Child Protection Services Corporation

[86] Clearly, the provisions of the C.Y.F.E. Act and its predecessor legislation allow the Defendant Child Welfare to delegate some of its powers to other third parties. On the basis of Ms. Besler's affidavit, it seems likely that some type of delegation was made to the DFNAs mentioned above, although I refrain from making any findings with respect to the validity or terms of these purported delegations at this stage of the certification proceedings.

[87] Regarding the third party guardians, there is considerable merit in the Plaintiff's argument that the third party guardians cannot be joined to the Action as their identities cannot be ascertained until the class members themselves have been identified. In my view the question of adding the third party guardians to the Action would be better considered once the class itself has been closed and the members fully identified.

[88] The underlying question which must be considered in determining whether to add the DFNAs or the third party guardians as defendants to this Action is whether the inclusion of such third parties would assist in the determination of the common issues. I am not convinced that it

would. It may be that there were overlapping duties between the Defendant Child Welfare and a third party, or that the Defendant Child Welfare had a duty during one particular period of time but not during another. However, it is my view that the determination of such issues is highly individualistic in nature, as the type of third party entity involved may be specific to each class member, and would therefore be better dealt with in the second stage of the class action proceedings after the common issues have been decided.

[89] I am reluctant to make a ruling in respect to the appropriateness of adding the DFNAs and the third party guardians as necessary parties to the Action based only on the submissions of the Plaintiff and the Defendant Child Welfare. I am also concerned that ordering the Plaintiffs to add the DFNAs and the third party guardians as a condition to certification may have the effect of creating an unreasonable burden on the claimant to ensure that all defendants to an action are included before certification is granted. In my view, this result would be contrary to existing procedural rules and practice, which allow a plaintiff to sue any potential defendant he or she chooses, and to bear the risks that may arise if the wrong choice is made. Although the C.P.A. grants the certification judge discretion in determining the appropriate procedure by which the class action is to proceed, I do not accept that the C.P.A. requires a complete re-making of current procedures and practices. If the Defendant Child Welfare wishes to include the DFNAs and the third party guardians as parties to this Action, then it can add them using the third party provisions under the *Rules of Court*. At this stage of the Action, I do not believe that it is necessary to add the DFNAs and third party guardians as defendants to the Action, although I leave it open to the parties to re-apply to have either the DFNAs or other proposed third parties added, should that become necessary as the class action progresses.

[90] If an application is to be brought by the Defendant Child Welfare to add the DFNAs and the third party guardians, or any other third parties for that matter, I order that such future applications must be brought on notice to the proposed third party in order to allow them to make representations on their own behalf.

[91] In summary, I decline to add the DFNAs and the third party guardians as parties to the Action at this time.

E. Preferable Procedure

[92] The Defendant submits that although Slatter J. stated in at para. 133 of his reasons that "while the overall benefits will be slight, there is still some practical utility in deciding the common issues once", the Plaintiff has advanced new positions, law and evidence that now make the proposed class proceedings no longer the preferred procedure:

(a) New positions: the Plaintiff is not prepared to adopt the class definition proposed by Slatter J.; the Plaintiff is not prepared to add class representatives which reflect across the entire class; the Plaintiff is not prepared to add all the necessary parties (such as the DFNAs and third party guardians); the Plaintiff's new case management plan does not

specify how the preliminary issue of whether there was in fact a claim to be made is to be tried before consideration of any further issues, nor does it address a second preliminary issue of whether the limitation period for advancing any individual's claim has actually expired.

(b) New law: In ***Glover v. British Columbia (Workers' Compensation Board)***, 2006 BCSC 1071, 150 A.C.W.S. (3d) 991 ["***Glover***"], the class certification application was dismissed as the proposed class and subclass definitions did not meet the requirement that they be objectively determinable independent of the outcome of the litigation.

(c) New evidence increase the factual complexity of the matter: F.M. has made a Victims of Crime application already, which she says was turned down; she was also convicted of the abuse underlying the potential claim of another potential class member (her daughter) and although she started an action on behalf of her daughter, the effectiveness of that step is unclear. R.D.'s mother started an action on her behalf after she had reached the age of majority, but this was done without R.D.'s knowledge or consent. R.D. has also made an application for Victims of Crime benefits and has not yet received a response; however, if this application is accepted, she may no longer have a claim to advance. J.S.'s mother also purported to commence litigation on his behalf; he had refused to confirm whether or not he has made a Victims of Crime application.

[93] The Defendant argues that these factors, which are drawn only from the proposed representative plaintiffs, demonstrates that a "one size fits all" class action approach is unworkable and that certification should once again be denied.

[94] In reply, the Plaintiff argues that the proposed amendments to the Statement of Claim address the conditions required for certification as set out in Slatter J.'s reasons and that the practical benefits of deciding the common issues in the context of a class proceeding have not been affected by the various amendments. The Plaintiff distinguishes the decision in ***Glover***, *supra* on the grounds that: the proposed representative plaintiffs had already been awarded statutory benefits but asserted that their claims were not properly adjudicated in accordance with established policies; the claim was much narrower in scope than the present Action; there was no evidence provided of the existence of any other members of the proposed class apart from the proposed representative plaintiffs; and the British Columbia ***Judicial Review Procedure Act*** provided for summary disposition of the claims. As such, the Plaintiff maintains that class proceedings remain the most efficient means for adjudicating all of the potential claims.

[95] Section 5(1)(d) of the C.P.A. requires that in order for a proceeding to be certified as a class proceeding, the court must be satisfied that a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues. Furthermore, s. 5(2) sets out five mandatory factors that the court must consider in determining whether a class proceeding is

the preferable procedure, although other factors may also be taken into account. The five mandatory factors are:

(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 other proceedings;
(d) whether other means of resolving the claims are practical or less efficient; and
(e) whether the administration of the class proceeding would create greater difficulties that those likely to be experienced if relief were sought by other means.

[96] Whether a class proceeding is the "preferable" procedure is a question of law to be determined by the certification judge based on his or her knowledge of the Court's processes: see ***T.L. #1***, at para. 30. The court is required to take a purposive approach to the interpretation and application of these factors, one in which they are read with, and tested against, the objectives of the legislation: ***Kristal Inc. v. Nicholl and Akers***, 2006 ABQB 168, 54 Alta. L.R. (4th) 275 ["***Kristal***"], at para. 107, rev'd on other grounds, 2007 ABCA 162, 81 Alta. L.R. (4th) 11; ***Condominium Plan No. 0020701 v. Investplan Properties Inc.***, 2006 ABQB 224, 57 Alta. L.R. (4th) 310 ["***Condominium Plan No. 0020701***"] at para. 86. The term "fair and efficient" provides additional and explicit textual support for a purposive approach: ***Kristal***, *supra* at para. 107. A purposive approach requires the Court to be mindful of the objectives of class litigation, which are:

(1) enhancing judicial economy by avoiding unnecessary duplication of fact-finding and legal analysis (thereby freeing up judicial resources and reducing the costs of litigation),
(2) improving access to justice by dividing litigation costs over a large number of plaintiffs,
(3) effecting behaviour modification by ensuring that actual and potential wrongdoers do not ignore their obligations to the public,
(4) avoiding inconsistent results, and
(5) with the assistance of case management and alternative dispute resolution, reducing adversity and increasing the likelihood of reaching a fair and equitable result.

Hollick v. Toronto (City), 2001 SCC 68, [2001] 3 S.C.R. 158 ["***Hollick***"], at para. 27; see also ***Western Canadian Shopping Centres***, *supra* at paras. 27-29; ***Paron v. Alberta (Environmental Protection)***, 2006 ABQB 375, 60 Alta. L.R. (4th) 95 ["***Paron***"], at paras. 36-37; ***Condominium***

Plan No. 0020701, *supra* at para. 30; ***Ayrton v. PRL Financial (Alta.) Ltd.***, 2005 ABQB 311, at para. 33, aff'd ***Ayrton v. PRL Financial (Alta.) Ltd.***, 2006 ABCA 88 [***"Ayrton (CA)"***].

[97] Class proceedings legislation must be construed generously to give full effect to the objectives of judicial economy, access to justice and behaviour modification: ***Ayrton***, *supra* at para. 36. Judicial economy in the context of class proceedings means a simple and efficient means of dealing with a large number of claims involving common issues of fact or law within a single proceeding with a view to preventing a drain on court resources: ***Paron***, *supra* at para. 113. Regarding access to justice, class actions provide a means to sue defendants who might otherwise, practically speaking, be immune from suit by allowing claimants to share the cost of litigation and financially justify the pursuit of smaller value claims that otherwise could be prohibitively expensive: *ibid,* at para. 102. The objective of behaviour modification is to ensure that actual and potential wrongdoers do not ignore their obligations to the public; as such, modification of behaviour does not only look at the particular defendant, but more broadly at similarly situated defendants: *ibid,* at paras. 99-100.

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

[99] In summary, preferability involves a balancing of all the interests of the parties and of the Court and may include an assessment of the economics of the litigation, the number of individual issues to be dealt with, the complexities if there are third party claims and the alternative means available for adjudicating the dispute: ***Condominium Plan No. 0020701***, *supra* at para. 89.

[100] Section 8 of the C.P.A. provides that the Court should not refuse certification if any, or all, of the following situations apply:

(a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
(b) the relief claimed relates to separate contracts involving different prospective class members;

(c) different remedies are sought for different prospective class members;
(d) the number of prospective class members or the identity of each prospective class member has not been ascertained or may not be ascertainable;
(e) the class includes a subclass where the prospective subclass members have claims that raise common issues not shared by all the prospective class members.

[101] The need for individual damage calculations is generally not an impediment to certification: ***Paron***, *supra* at para. 123. The question of preferability must take into account the importance of the common issues in relation to the claims as a whole: ***Hollick***, *supra* at para. 30. It is clear that some individual issues must be determined after the common issues in many, if not most, class actions, and that fact alone is not alone a bar to certification; in determining preferability, all of the individual and common issues arising from the claims must be considered in the context of the factual matrix: ***Paron***, *supra* at para. 114. Slatter J. recognized that even where individual issues might predominate in the sense that much work will remain after resolution of the common issues, there might still be practical utility in deciding the common issues once, even if the overall benefits are slight ***T.L. #1***, at para. 133.

[102] It is important to note that a court retains discretion to determine how the individual issues should be addressed, once the common issues have been resolved: ***Western Canadian Shopping Centres Inc.***, *supra* at para. 50. Generally, individual issues will be resolved in individual proceedings, however a court may specify special procedures that it considers necessary or useful : *ibid.*, see also s. 28 of the C.P.A. The C.P.A. provides for extensive flexibility in terms of procedures available to certification judges to deal with class actions as they unfold: ***Ayrton (CA)***, *supra* at para. 14.

[103] In paras. 131-137 of ***T.L. #1***, Slatter J. considered each of the five mandatory factors set out in s. 5(2) of the C.P.A., and held that while the benefits were marginal, a class proceeding was the preferable procedure based on these five factors. However, Slatter J. introduced another factor in the preferability analysis, namely the issue of whether certain other parties must be joined to the Action as necessary parties, and refused to grant certification until such time as these necessary parties were added to the Action.

[104] Based on my determinations set out above, I do not think that there are any significant differences between the current application before me and the one before Slatter J. in ***T.L. #1*** in terms of the preferability analysis that would convince me to deviate from his finding that a class action is the preferable procedure based on the five factors set out in s. 5(2) of the C.P.A. The amended class definition, which extends the end date from the date the Statement of Claim was filed to that of certification, does not otherwise increase the complexity of the Action or affect the determination of the common issues. The Plaintiff has been successful in adding R.D. and J.S. as suitable representative plaintiffs, who will assist the Plaintiff in discharging her duty to

fairly and adequately represent the interests of the class members and will have a positive effect overall on the administration of the class proceeding.

[105] On the issue of whether all necessary parties have been joined to the Action before certification is granted, I find that at this stage of the proceedings, it is sufficient that only the Public Trustee be added as a defendant to the Action. I do not think that it is necessary to join other parties to the Action at this point, as I am not convinced that adding these other parties will assist the trial judge in determining the common issues.

[106] After carefully balancing the interests of the parties, and keeping in mind the objectives of class proceedings based on a purposive approach to the legislation, I am prepared to grant certification based on my finding that a class action would be the preferable procedure for adjudicating the class members' claims. However, I note again that it may become necessary, depending on how the Action progresses, to re-visit the issue of whether some of the other third parties should be added to the class action at a later date.

F. Adequacy of the Litigation Plan

[107] A question has been raised with respect to the adequacy of the proposed Litigation Plan. The Plaintiff has amended the litigation plan presented at the original certification hearing to set out provisions relating to notice to the class, pre-trial discovery on the common issues, trial on the common issues, and adjudication of the individual class members' claims. The Plaintiff argues that on of the strengths of the amended litigation plan is to divide the class members into two categories: those advancing claims related to the Defendant's failure to make an application on their behalf pursuant to the ***Criminal Injuries Compensation Act*** or a ***Victims of Crime Act*** (the "Victim of Crime Claimants"); and those advancing claims related to the Defendant's failure to commence a civil action on behalf of the class member (the "Tort Claimants"). The former set of claims would be governed by the relevant crime compensation legislation, while the latter would be guided by the *Rules of Court*. The Plaintiff argues that the amended litigation plan addresses Slatter J.'s concern that issues regarding third parties had not been taken into account, as it allows the Defendant to commence third party proceedings as may be applicable to the individual claims of the Tort Claimants. The Plaintiff submits that the amended litigation plan, with its two categories of claimants, provides a workable structure to address the procedural steps in the class proceedings. I agree with that view.

[108] The production of a workable litigation plan serves a twofold purpose: it assists the court in determining whether the class proceeding is indeed the preferable procedure; and it allows the court to determine whether the litigation itself is manageable in its constituted form. The manageability must be assessed in the context of the entirety of the litigation, not just a common issue trial: ***Carom***, *supra*.

[109] While it is normal for a litigation plan to be somewhat fluid, it nonetheless must have some substance to it, providing sufficient detail commensurate with the complexity of the

litigation: ***Paron***, *supra* at para. 128. The essential elements of a litigation plan were set out in ***Bellair v. Independent Order of Foresters***, [2004] O.J. No. 2243, 5 C.P.C. (6th) 84 (S.C.J.), as referred to by Topolniski J. in ***Paron***, *supra* at para. 130:

(i) the steps that are going to be taken to identify necessary witnesses and to locate them and gather their evidence;
(ii) the collection of relevant documents from members of the class as well as others;
(iii) the exchange and management of documents produced by all parties;
(iv) ongoing reporting to the class;
(v) mechanisms for responding to inquiries from class members;
(vi) whether the discovery of individuals class members is likely and, if so, the intended process for conducting those discoveries.

[110] Of particular importance are the provisions relating to notice, as discussed by the Supreme Court of Canada in ***Western Canadian Shopping Centres Inc.***, *supra* at para. 49:

> A judgment is binding on a class member only if the class member is notified of the suit and is given an opportunity to exclude himself or herself from the proceeding. This case does not raise the issue of what constitutes sufficient notice. However, prudence suggests that all potential class members be informed of the existence of the suit, of the common issues that the suit seeks to resolve, and of the right of each class member to opt out, and that this be done before any decision is made that purports to prejudice or otherwise affect the interests of class members.

[111] Some of these details are missing from the current version of the Plaintiff's litigation plan. The elements outlined above shall be addressed by the representative plaintiffs in an updated litigation plan within 90 days of the filing of the Formal Judgment.

IV. Summary of Directions

[112] The Action is certified as a class proceeding. In addition to the directions of Slatter J. in *T.L. #1*, I make the following confirmatory declarations and directives:

(a) The proceeding, as modified, discloses a cause of action;
(b) The 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;

(c) A subclass for non-resident members of the class who are not residents of Alberta on the date of certification shall be and is hereby created;

(d) The common issues in this proceeding are:

(i) Did the Defendants Child Welfare and the Public Trustee, between 1966 and the certification date, owe a duty to some or all of the various types of class members to protect their legal rights by taking steps to obtain compensation on their behalf, and if so, what was the nature of that duty?

(ii) What policies, practices and systems did the Defendants Child Welfare and the Public Trustee have in place between 1966 and the certification date relating to the prosecution of civil claims on behalf of children in care?

(iii) Was the existence of, absence of, or content of the policies of the Defendants Child Welfare and the Public Trustee relating to the protection of the civil rights of children in care at any time between 1966 and the certification date so egregious or highhanded as to justify an award of punitive damages?

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

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

(e) The Representative Plaintiffs are T.L., R.D., and J.S.;

(f) The Public Trustee is added as a Defendant; and

(g) A class proceeding is the preferable procedure for deciding the common issues.

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

Heard on the 12th and 13th day of September, 2007.
Dated at the City of Edmonton, Alberta this 19th day of February, 2008.

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

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