

# **Court of Queen's Bench of Alberta**

**Citation: T.L. v. Alberta (Child, Youth and Family Enhancement Act, Director of the Court)**  
**ABQB 49**

**Date: 20100120**  
**Docket: 0403 12898**  
**Registry: Edmonton**

Between:

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

**Plaintiffs**

- and -

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

**Defendants**

**Restriction on Publication:** No one may publish any information serving to identify a child or guardian of a child who has come to a Minister's or a director's attention under the *Child, Youth and Family Enhancement Act*. See the *Child, Youth and Family Enhancement Act*, s. 126.2.

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

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## **I. Introduction**

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

[2] The Action is currently under case management. On December 2 and 3, 2009, I heard three applications brought by the Plaintiffs, Child Welfare and the Public Trustee, respectively. As the case management Judge, I am issuing my decisions regarding each application separately to allow the parties to continue moving this matter forward in a timely manner.

[3] This decision relates to the Plaintiffs' application for advice and directions in respect to describing solicitors files in their Affidavit of Records. The Plaintiffs' application is in response to the Defendants' application for a further and better Affidavit of Records. While I will consider the rest of the Defendants' application in a subsequent decision, I have carved out the issues relating to description of privileged records and deal with them as follows.

## **II. Factual Background to Application for Advice and Directions**

[4] On November 2, 2009, counsel the Plaintiffs provided the Defendants with a filed copy of the Amended Affidavit of Records of J.S (the "Amended Affidavit"). On November 30, 2009, the Plaintiff T.L. filed and served an Affidavit of Records (the "T.L. Affidavit"). Both the Amended Affidavit and the T.L. Affidavit included the following passage, which is commonly used in affidavits of records filed in Alberta:

1. I have in my possession or power the relevant and material records in this action set forth in the first and second parts of the first schedule hereto.
2. I object to produce the said records set forth in the second part of the first schedule hereto.
3. I object to produce the said records on the grounds that they were prepared for one or more of the following purposes:
  - (a) to communicate confidentially to my solicitor in an effort to obtain legal advice;

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- (b) to communicate confidentially from my solicitor in an effort to give legal advice;
- (c) to prepare for litigation then existing or contemplated; or
- (d) to conduct the defence of litigation then existing.

[5] The privileged documents are set out in the T.L. Affidavit as follows:

THE SECOND PART: Showing records in my possession which I object to produce.

1		Bundle - Solicitor File	
2		Bundle	A000001-A000336
3		Bundle	A000337
4		Bundle	A000338-A000388
5		Bundle	A000389

[6] The Amended Affidavit describes the privileged documents in the following manner:

THE SECOND PART: Showing records in my possession which I object to produce.

		Documents prepared in contemplation of litigation	
		Communication and copies of communication between solicitor and client	
		communication between co-counsel	
		Communication between solicitors	
		research	
		Work Product	
		Accounting Information	
		Solicitor notes, memos, records of telephone conversations	



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[7] The description of privileged documents contained in the Amended Affidavit was also used in a draft affidavit of records of the Plaintiff R.M., which was provided to the Defendants on October 26, 2009.

### III. Positions of the Parties

[8] The Defendants argue that the Amended Affidavit and the T.L. Affidavit are deficient because the privileged records are not marked or identified in any manner that indicates whether a record has been discovered or not. The Defendants seek a direction that all of the Plaintiffs' privileged records be labelled with a number or unique identifier to permit determination of whether any record has or has not been discovered.

[9] While the Plaintiffs agree that the privileged documents need to be identified, they do not agree that the requirement to identify privileged documents extends to numbering the privileged records contained in the solicitors' files. The Plaintiffs argue that it is very onerous on counsel and expensive for the client to have resources committed towards numbering pages within their own files and work product, including separating filed materials into particular bundles, and preserving those bundles in a form separate from the usual work materials. The Plaintiffs point out that there is not a consistent practice within Alberta, as the practice in Calgary is not to number or bundle the solicitor's own work product. The Plaintiffs further submit that solicitors' own work product has special status as being subject to solicitor-client privilege, which allows it to be treated differently from the usual litigation privilege attached to most other documents that may be privileged but still set out in an Affidavit of Records. The Plaintiffs are concerned that a requirement for bundling and page numbering might be an intrusion into solicitor-client privilege as it would not be possible to regulate without having an independent entity or the Court to protect the privilege.

[10] In its Reply Brief, Child Welfare also requests that the Plaintiffs discover from their solicitors' files any records related to or of the same nature as those records from the solicitors' files that the Plaintiffs have already determined should be produced in the Amended Affidavit of Records of J.S. In particular, Child Welfare refers to email correspondence between class counsel and the B.C. Office of the Public Trustee, which was included in the producible section of the Amended Affidavit. Child Welfare argues that the Plaintiffs voluntarily waived solicitor-client privilege over these communications and as such, the Plaintiffs must at least discover in the privileged section any other records that relate to or are of the same nature as the records produced.

[11] The parties had attempted to resolve this issue before appearing before me on December 2, 2009. Unfortunately, they were not able to do so and now seek advice and directions on this question.

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#### IV. Law

[12] The Rules of Court are silent on this issue. The seminal case in Alberta regarding how documents are to be described in an Affidavit of Records is the Court of Appeal's decision in *Dorchak v. Krupka* (1997), 196 A.R. 81 (C.A.) ("*Dorchak*"), which stands for the following principles:

- (a) an Affidavit of Records must show unambiguously what documents' existence it does or does not disclose; even when describing privileged documents, the central question is whether one can unequivocally say of a given record whether its existence has been disclosed in the Affidavit of Records or not: at para. 8, 34.
- (b) there is no rule that individual documents always be individually listed; in modern complex litigation with large numbers of producible documents, it is certainly permissible to group them into bundles with common characteristics and to describe the bundle without itemizing individual documents: at paras. 20, 22.
- (c) any system of listing or describing privileged documents which gives away privileged information or reveals their contents is unthinkable; the description of the privileged documents need not include dates, contents or parties to them: at paras. 36-37, 43.
- (d) ordinarily, it is sufficient for the affidavit's second part of the first schedule to list and describe privileged documents merely as numbered bundles, as details of individual documents are unnecessary; ordinarily one should be able to describe a bundle in some manner which will not reveal secrets: at paras. 44, 59, 62.
- (e) the description of the documents in the schedule need not corroborate privilege; however, the reasons for any claim of privilege must be fairly precise and must recite enough facts to trigger privilege. The individual types of privilege (e.g. solicitor's advice, litigation, and without prejudice) must be segregated and the affidavit must say which numbered documents come within each type of privilege: at para. 47, 67, 70.

[13] Whether a particular method of describing documents is appropriate will depend on the overall context of the litigation. The cardinal rule is whether the method of description in question clearly identifies the existence of a record that is relevant and material to the action, keeping in mind that special consideration must be taken in describing those records over which privilege is claimed. It must also be remembered that disclosing the existence of a record is not the same as producing it.



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## V. Decision

[14] The main point of contention between the parties is whether the requirement to identify privileged records extends to the numbering of the privileged records contained in the solicitors' files.

[15] The purpose of describing the records properly is to prevent the mischief that would result if a party produced a document at trial that had not been previously disclosed in the Affidavit of Records. Numbering the individual sheets contained in a bundle helps to avoid this mischief, as it is easy to see from the document's face and location if it is one of the documents disclosed: *Dorchak* at para. 9.

[16] While I recognize that the principles related to describing documents are somewhat modified when dealing with privileged records, the generic description of the privileged documents in the Amended Affidavit and the draft Affidavit of Records of R.M. is insufficient as there are no numbered bundles or other description to allow parties to identify whether a given record was one of the documents referred to in the Affidavit: see *Dorchak* at paras. 64-65. As such, I direct that the privileged records set out in Part 2 of Schedule 1 be identified using a system that numbers each individual record contained in each bundle. u s

[17] In contrast, it appears that the records listed in Part 2 of Schedule 1 to the T.L. Affidavit are individually numbered. However, there is no description at all of the different bundles that would indicate, in general terms, the basic nature or source of each bundle. Indeed, the failure to provide any description of the bundles raises the question of why the records contained in this part have even been divided into different groups in the first instance. Without knowing what distinguishes one bundle from the other, and why certain records fall into one group and not another, it is impossible to determine whether the existence of the records has been properly disclosed or whether an application to produce is required. Further, the current description of the bundles does not indicate the type of privilege being asserted over those numbered documents. Docken

[18] As such, I direct that the T.L. Affidavit include better descriptions of the bundles set out in Part 2 of Schedule 1, in accordance with the principles articulated in *Dorchak*, and that such descriptions indicate the nature of any privilege being claimed, i.e. solicitor-client privilege, litigation privilege, without-prejudice communications, etc. Docken

[19] The above remarks should not be construed as confirming that the records contained in Part 2 of Schedule 1 are in fact protected by privilege; that is an issue open to determination should any of the parties apply for production of these records. The question of whether privilege over any of the documents was waived as a result of the production of Plaintiffs' counsel's correspondence with the BC Public Trustee is outside of the scope of this application. I leave that question for another day.

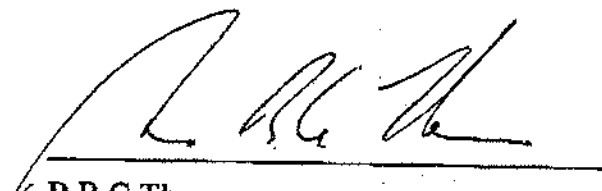
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[20] I have reviewed the Affidavit of Records submitted by the Public Trustee, in particular its description of privileged records. I note that these descriptions are in line with *Dorchak* and are a good example of appropriate descriptions that do not otherwise disclose the contents of the privileged records but give proper disclosure of the existence of such records to allow opposing parties to identify the source of such a record, if produced.

[21] The parties may speak to costs once all decisions on the overall application have issued. The parties may also seek further advice and directions as may be necessary.

Heard on the 2<sup>nd</sup> and 3<sup>rd</sup> day of December, 2009.

Dated at the City of Edmonton, Alberta this 20<sup>th</sup> day of January, 2010.

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

**Appearances:**

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

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

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

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

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