In the Court of Appeal of Alberta

Citation: Elder Advocates of Alberta Society v Alberta Health Services, 2021 ABCA 67

Date: 20210222
Docket: 2003-0036-AC
2003-0038-AC
Registry: Edmonton

Docket: 2003-0036-AC

Between:

Elder Advocates of Alberta Society and Mark Darwish, Litigation Representative of James O. Darwish, Personal Representative of the Estate of Johanna H. Darwish, Deceased

Respondents
(Plaintiffs)

- and -

Alberta Health Services

Appellant
(Defendant)

- and -

Parlee McLaws LLP

Respondent

- and -

Her Majesty the Queen in Right of Alberta

Not a Party to the Appeal
(Defendant)

Docket: 2003-0038-AC

And Between:

Elder Advocates of Alberta Society and Mark Darwish, Litigation Representative of

James O. Darwish, Personal Representative of the Estate of Johanna H. Darwish, Deceased

Respondents
(Plaintiffs)

- and -

Her Majesty the Queen in Right of Alberta

Appellant
(Defendant)

- and –

Parlee McLaws LLP

Respondent

- and -

Alberta Health Services

Not a Party to the Appeal
(Defendant)

The Court:

The Honourable Mr. Justice Brian O'Ferrall
The Honourable Madam Justice Frederica Schutz
The Honourable Madam Justice Jo'Anne Strekaf

Memorandum of Judgment

Appeal from the Order by
The Honourable Madam Justice J.M. Ross
Dated the 20th day of January, 2020
(2020 ABQB 54, Docket: 0503 13196)

Memorandum of Judgment

The Court:

Overview

[1] The respondents' class action lawsuit against the appellants, Alberta and Alberta Health Services, was dismissed following a lengthy trial. The appellants say the trial judge erred in awarding no costs against the unsuccessful representative plaintiffs.

Background

[2] The respondents, Elder Advocates of Alberta Society and Mark Darwish as litigation representative of James Darwish and the estate of Johanna Darwish, were representative plaintiffs in a class action lawsuit against the appellants Alberta and Alberta Health Services (AHS). The respondent law firm is counsel for the representative plaintiffs, and agreed to assume liability for any adverse award of costs. For clarity, this judgment will refer to the respondent representative plaintiffs as the "plaintiffs" and the respondent law firm as "plaintiffs' counsel". Alberta and AHS will be referred to collectively as "the appellants".

[3] The class action was launched in 2005 on behalf of long-term care facility residents, primarily elderly and disabled Albertans, who paid accommodation charges to those facilities following an increase in the accommodation charges in 2003. The action alleged that the 2003 increase was not authorized by the applicable Alberta legislation and was unlawful, and that the residents had been subject to discriminatory treatment contrary to s 15 of the *Charter of Rights and Freedoms*.

[4] Following a six-week trial, the trial judge dismissed all the claims made by the plaintiffs: *Elder Advocates of Alberta Society v Alberta*: 2018 ABQB 37. An appeal was dismissed by this court (2019 ABCA 342), and an application for leave to appeal to the Supreme Court of Canada was denied (2020 CanLII 25158 (SCC)).

[5] The litigation was costly for all concerned. In addition to the lengthy trial and subsequent appeal, there was an involved certification process that resulted in a limiting of the claims being advanced: see *Elder Advocates of Alberta Society v Alberta*, 2008 ABQB 490, [2008] 11 WWR 70 ; *Elder Advocates of Alberta Society v Alberta*, 2009 ABCA 403, 315 DLR (4th) 59; *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 SCR 261; *Elder Advocates Society v Alberta*, 2011 ABQB 801, 528 AR 172; *Elder Advocates Society v Alberta*, 2012 ABCA 355, 539 AR 251.

[6] Unlike some other provinces, there is no class action fund in Alberta to assist representative plaintiffs with the cost of bringing class action proceedings. The plaintiffs' counsel took the action on a contingency basis, and agreed to indemnify the plaintiffs for any adverse costs award that might arise out of the litigation. The plaintiffs' counsel incurred disbursements (including the cost of experts) of almost $850,000, and recorded unbilled time on the file of over $5 million.

[7] The appellants sought costs against the unsuccessful plaintiffs, payable by the plaintiffs' counsel pursuant to their assumption of liability for costs. Alberta's application was for costs (including disbursements) in the amount of $2,304,506.72; AHS sought costs (including disbursements) of $2,899,043. The plaintiffs and their counsel cross-applied for an order of no costs, on the basis that the claim had been brought in the public interest and involved a novel point of law.

[8] The trial judge made an order of no costs. In doing so, she considered the factors set out in r 10.32 of the Alberta *Rules of Court*, AR 124/2010, which provides guidance for "determining whether a costs award should be made against the unsuccessful representative party" in class proceedings. The factors to be considered under r 10.32 include: the public interest; whether the action involved a novel point of law; whether the proceeding was a test case; and, access to justice considerations. The trial judge found that the proceeding was not a test case, but that each of the other r 10.32 factors weighed strongly in favour of the plaintiffs' application that no costs award be made against them.

[9] The trial judge did not find it necessary to assess the factors set out in r 10.33, which include: the result in the action and the degree of success of each party; the amount claimed and the amount recovered; the importance of the issues; and, the complexity of the action. She concluded that r 10.32 addresses *whether* a costs award should be made against the unsuccessful representative party, while r 10.33 relates to the *amount* of the costs award, and then moved on to assess the plaintiffs' application for a no costs award.

[10] The trial judge identified a number of factors, both under r 10.32 and otherwise, which she found justified a no costs award in this case (para 125). She found the action was brought on behalf of disadvantaged members of society, being residents of nursing homes and similar long-term care facilities with extreme medical needs, in relation to a significant increase by the Province in the charges to reside in those facilities. While individual class members had a financial interest in the action, the extent of that individual interest could not economically justify the action. The action was brought and maintained at the initiative of an established Society, which is an advocate for seniors' rights, and by individuals who had a personal interest as well as a general interest in seniors' rights. The plaintiffs' lawyer, who agreed to indemnify the individual plaintiffs against an adverse costs award pursuant to the court-approved Contingency Agreement, was not the driving force behind the action. The action was meritorious, in the public interest, involved a *Charter* challenge, and raised a novel point of law, and access to justice required a trial. The appellants' conduct in the proceedings did not contribute to a quick and efficient resolution of the matter. The

costs claimed by the appellants were out of proportion and, if granted, would have a chilling effect on future class actions. The appellants were better able to bear the costs of the litigation than the plaintiffs. Even a much-reduced costs award would inappropriately penalize the plaintiffs and their counsel.

[11] The trial judge granted the plaintiffs' application for a no costs award, and found it unnecessary to deal with the applications for costs brought by Alberta and AHS.

[12] Alberta and AHS appeal the costs order, arguing that the trial judge made several errors in her assessment of the applications, including her analysis of the factors set out in r 10.32, relying on irrelevant considerations, and failing to consider the factors set out in r 10.33 and weigh them against the r 10.32 factors.

Standard of Review

[13] Costs awards are discretionary decisions reviewed on a deferential standard, as described in *Condominium Corp No 311443 v Goertz*, 2016 ABCA 362 at para 24:

> The standard of review to be applied to a costs award is one of deference. The Supreme Court of Canada confirmed in *Hamilton v Open Window Bakery Ltd*., 2004 SCC 9 at para 27, [2004] 1 SCR 303, that "a court should set aside a costs award on appeal only if the trial judge has made an error in principle or the costs award is plainly wrong": see also *Indutech Canada Ltd. v Gibbs Pipe Distributors Ltd.*, 2013 ABCA 111 at para 12, 362 DLR (4th) 303.

While each costs award turns on its own unique circumstances, a combination of the guidance provided in the rules and authoritative case law provides some fundamental unifying principles.

Analysis

[14] The presumption in the rules is that the successful party is entitled to costs: r 10.29(1). Exceptions can be made, for example, where there is a public interest component to the litigation and "access to justice" is in issue. "However, there is no blanket exemption from exposure to costs in *Charter* litigation, even though most *Charter* litigation is of public interest…The general rule that costs follow the cause, has not been displaced": *Canadian Centre for Bio-Ethical Reform v Grande Prairie (City)*, 2018 ABCA 254 at para 4; *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2 at para 34, [2007] 1 SCR 38.

<u>Costs in class proceedings</u>

[15] Costs awards for class action lawsuits are treated differently in different provinces. Some provinces (eg. British Columbia, Newfoundland and Manitoba) and the Federal Court have adopted a "no costs regime" for class action lawsuits, in which no costs are awarded to either party

absent a special order of the court. The Alberta Law Reform Institute recommended a similar approach in its report, *Class Actions*, Final Report No 85 (December 2000), but Alberta did not adopt a "no costs regime" in the *Class Proceedings Act*, SA 2003, c C-16.5. Instead, section 37 of the *Class Proceedings Act* provides:

> 37. With respect to any proceeding or other matter under this Act, the court may award costs as provided for under the Rules of Court.

[16] Alberta's approach also differs from that in other "costs regime" provinces (for example, Quebec and Ontario), where a class action fund exists to assist representative plaintiffs with the costs of commencing an action and with paying any costs that may be awarded against them. Such a fund is the norm in a "costs regime": ALRI *Class Actions* at 145, 152. Alberta's *Class Proceedings Act* does not establish a class action fund.

[17] This court considered the basis for an award of no costs in a class proceeding in Alberta in *Pauli v ACE INA Insurance Co*, 2004 ABCA 253, and endorsed four factors to be considered in making that assessment: whether the issue involves a matter of broad public interest; whether it raises a novel point of law; whether it was a test case; and, whether a costs order would impede access to justice in the context of class actions. In *Pauli* itself, the class action was summarily dismissed, but the Court of Appeal nonetheless found that all four individual criteria were met and awarded no costs against the representative plaintiff (overturning the chambers judge, who had made a costs award). Subsequent cases have referred to or applied the *Pauli* factors: see, eg. *Papaschase Indian Band (Descendants of) v Canada (Attorney General)*, 2004 ABQB 913; *Ayrton v PRL Financial (Alta) Ltd.*, 2006 ABCA 88.

[18] In *Ayrton*, the court explained the difference in the approach to class action costs in Alberta and in jurisdictions where there exists a fund to assist prospective class action litigants (at paras 30 – 31):

> Section 37 must be seen as a policy choice by the Alberta Legislature. In Ontario, a normal costs regime applies, but where the matter is a test case, raises a novel point of law or involves matters of public interest, then, the general rule that costs follow the event may not apply. However, in Ontario, there is also a fund to assist prospective class action litigants. There is no such fund in Alberta.
>
> As a result, in Alberta, class action litigants can only avoid the risk of costs to be paid by a representative plaintiff by applying for an order for no costs in the proceedings and relying upon common law principles for public interest litigation. There is nothing in the *Class Proceedings Act* that expressly prohibits such an order.

[19] The court went on to state, at paras 35 and 36:

> The reasons in *Pauli* set out the basis for a court to order no costs in any event for a class action. In *Vriend v. Alberta* (1996), 1996 ABCA 274, 184 A.R. 351, cited in *Pauli*, this Court also observed that the discretion to depart from the normal rule that costs follow the event may be exercised when the case is one of public interest. Similarly, in *Friends of the Calgary General Hospital Society v. Canada* et al (2001), 2001 ABCA 162, 286 A.R. 128, where the plaintiff had unsuccessfully challenged the demolition of the Calgary General Hospital, this Court set aside a costs award on the basis of public interest.
>
> A purposive treatment of s. 37 of the *Class Proceedings Act* is in keeping with the Supreme Court of Canada's pronouncements on class proceedings. In *Western Canadian Shopping Centres, Rumley v. British Columbia*, 2001 SCC 69, and *Hollick,* the Court stated that class proceedings statutes shall be construed generously to give full effect to the objectives of judicial economy, access to justice and behaviour modification.

[20] The 2010 amendments to the Alberta *Rules of Court* added r 10.32, which adopts the *Pauli* criteria. It provides:

> **10.32** In a proceeding under the *Class Proceedings Act* or in a representative action, the Court, in determining whether a costs award should be made against the unsuccessful representative party, may take into account one or more of the following factors, in addition to any other factors the Court considers appropriate:
>
> (a) the public interest;
>
> (b) whether the action involved a novel point of law;
>
> (c) whether the proceeding or action was a test case;
>
> (d) access to justice considerations.

[21] Rule 10.32 applies in addition to, rather than in substitution for, the other, more general, rules that deal with costs awards, including rules 10.28 to 10.31, 10.33 and 14.88.

[22] Rule 10.33 is of particular relevance to this appeal. It provides:

> **10.33**(1) In making a costs award, the Court may consider all or any of the following:
>
> (a) the result of the action and the degree of success of each party;
>
> (b) the amount claimed and the amount recovered;
>
> (c) the importance of the issues;
>
> (d) the complexity of the action;

(e) the apportionment of liability;

(f) the conduct of a party that tended to shorten the action;

(g) any other matter related to the question of reasonable and proper costs that the Court considers appropriate.

(2) In deciding whether to impose, deny or vary an amount in a costs award, the Court may consider all or any of the following:

(a) the conduct of a party that was unnecessary or that unnecessarily lengthened or delayed the action or any stage or step of the action;

(b) a party's denial of or refusal to admit anything that should have been admitted;

(c) whether a party started separate actions for claims that should have been filed in one action or whether a party unnecessarily separated that party's defence from that of another party;

(d) whether any application, proceeding or step in an action was unnecessary, improper or a mistake;

(e) an irregularity in a commencement document, pleading, affidavit, notice, prescribed form or document;

(f) a contravention of or non-compliance with these rules or an order;

(g) whether a party has engaged in misconduct;

(h) any offer of settlement made, regardless of whether or not the offer of settlement complies with Part 4, Division 5.

[23] The appellants argue that, in assessing whether to grant the plaintiffs' application for a no costs award, the trial judge focused exclusively on the factors set out in r 10.32, and gave no consideration to the factors relevant to costs awards contained in r 10.33. They say she erred in failing to balance all of the factors in reaching her conclusion on costs.

[24] We recognize that the factors set out in rules 10.32 and 10.33 are not mutually exclusive. While the focus of rule 10.32 is on the question of "whether a costs award should be made against the unsuccessful representative party" and the four identified factors, the rule also expressly provides that a judge faced with whether to award costs in a class action has the discretion to take into account "any other factors the Court considers appropriate". In appropriate circumstances, the "other factors" may include those identified in rule 10.33. Similarly, the factors identified in rule 10.32 may be taken into account under rule 10.33, when a judge determines the quantum of costs to be awarded against an unsuccessful representative party and whether a reduction from a full costs award might be appropriate. Such considerations would fall within the scope of "any other

matter related to the question of reasonable and proper costs that the Court considers appropriate": r 10.33(1)(g).

[25] All of these factors are available for consideration by the trial judge, but the determination of which factors to take into account in a particular case is ultimately left to the trial judge's discretion. A trial judge is not mandated to consider the rule 10.33 factors when considering whether costs should be awarded against a representative plaintiff, and neither *Jackson v Canadian National Railway Company*, 2015 ABCA 89 nor *Turner v Bell Mobility Inc*, 2016 ABCA 188, imposes such a mandate. The trial judge here was permitted, but not required, to weigh the rule 10.33 factors in the balance when assessing whether it was appropriate to issue a no costs order. Her failure to do so does not constitute reviewable error.

[26] The appellants also argue that the trial judge erred in her assessment of the specific considerations under r 10.32. They submit that the trial judge properly concluded that this case did not qualify as a test case within the meaning of rule 10.32(c), but erred in failing to find that the other three factors (public interest, novel question of law and access to justice considerations) strongly favoured a no costs award. We will consider each in turn.

Rule 10.32(a) - Public Interest

[27] In applying the approach to public interest set out in *Pauli* and *Ayrton*, the trial judge made the following statements:

> [45] All of the factors referred to in *Harris* are present. The issues raised in the class action are of public importance extending beyond the interests of the Plaintiffs. The individual Plaintiffs' pecuniary interest, perhaps $10,000 estimated by James Darwish, clearly did not justify the proceedings economically. The issues had not been previously determined, the Defendants had a superior capacity to bear the costs of the proceedings, and there is no suggestion that the Plaintiffs engaged in vexatious, frivolous or abusive conduct.
>
> [46] In addition to dealing with issues of broad public importance, the action involved disadvantaged members of society, disabled, often elderly persons, who as a result of extreme medical needs were required to reside in nursing homes. This lends support to the characterization of the issue as being in the public interest: *Vennell v Barando's* (2004), 73 OR (3d) 13 at paras 31-32 (Ont Sup Ct J).

She went on to state:

> [50] This present class action also had the potential to influence behaviour in the community, and to have an impact well beyond any members of the class who came forward to seek reimbursement for overpayment of accommodation charges.

> Had the action succeeded, there would have been a significant impact on the ongoing determination of charges by the Province and AHS, in relation to nursing homes and other residential facilities in which medical care is provided to residents. The Province, AHS and operators of such facilities would have been required to ensure that amounts paid by residents did not exceed the actual cost of accommodation and meals. This would have required systems to ensure an ongoing collection of data and allocation of costs very different from the systems in place when the accommodation charges were increased, and potentially different from changes to data collection that were put in place following the *Report of the Auditor General.*
>
> [51] The Province also argues that the action did not concern the quality of health care services or residential services provided to class members, and was purely monetary in nature. Class action frequently address monetary interests of the class members. The issues may, nonetheless, be in the public interest, as shown in both *Pauli* and *Ayrton*.

[28] Alberta argues that the trial judge failed to recognize that the beneficiaries of the class and people benefitting from a compliance order were one and the same. They also argue that she failed to consider whether there was a relationship between disadvantage and the issues raised in the action, and did not consider that people who were unable to pay the accommodation charge received subsidies and were excluded from the class. AHS submits that the trial judge's assessment of the public interest failed to consider that the long term care system would have lost a significant source of funding if the plaintiffs' action had succeeded.

[29] Matters of "public interest" may involve "issues of broad public importance or persons who are historically disadvantaged in society" (M. M. Orkin, *The Law of Costs* (2nd ed. (loose-leaf)), vol. 1, at §208.2.1 (footnote omitted)). The trial judge found, in effect, that the "issues raised transcend the individual interests of the particular litigant": *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 at para 40. We are satisfied that her conclusions that the beneficiaries of the action were disadvantaged and that the action was brought in the public interest were reasonable and disclose no palpable and overriding error.

Rule 10.32(b) - Novel Question of Law

[30] In their application for a no costs order, the plaintiffs argued that the validity of the accommodation charge under the applicable legislation and the *Charter* were novel points of law. The appellants, on the other hand, argued that the statutory interpretation argument was without merit.

[31] The trial judge referred to the characterization of a novel point of law in *Das v George Weston Limited*, 2018 ONCA 1053 at para 245:

> [I]f a legal issue is novel in that, on the current state of the law, either party could have reasonably expected to be successful on the point, the novelty of the claim should play a significant role in fixing costs. However, if the legal point is novel in the sense that it has not been decided in the specific factual context in which it is raised, but the applicable case law and principles pointed strongly towards the outcome eventually arrived at in the proceeding, a claim of novelty will have little or no impact on the costs awarded against the losing party. In cases where there is an element of novelty to the claim, it is for the motion or trial judge to determine where the case fits along the novelty continuum.

[32] The trial judge did not agree that the statutory interpretation argument put forward in the class action was without merit. As she noted, she accepted Alberta's interpretation of the legislation, "only following extensive consideration of the text, context and purpose of the *Nursing Homes Act* and regulations, as revealed in the legislation and in the evidence presented during the six-week trial. In the alternative, in the event that the second interpretation were correct, I also concluded that based on the expert evidence at trial, the Defendants had established a reasonable nexus between accommodation charges and the cost of providing accommodation and meals": para 64. She found that "the statutory interpretation issue was not only not "doomed to fail"; rather it was a difficult question of law. "The alternative finding, that there was a reasonable nexus between accommodation charges and the cost of accommodation and meals, involved a difficult question of fact": para 65.

[33] The trial judge went on to state:

> While guiding principles of statutory interpretation are not novel law, their application in the context of a complex legislative scheme that has not previously been considered by the courts certainly can be novel, and in my estimation, it was novel in this case. Statutory interpretation requires examination of the text, context and purpose of legislation, which may require a substantial evidentiary basis. It was the Defendants' position on the Plaintiffs' application for a preliminary hearing on statutory interpretation issues that a significant factual matrix was required to determine the issues in this case. Much of the evidence called during the six-week trial was called by the Defendants and addressed how accommodation charges were determined in Alberta, historically, and at the time of the challenged increase and afterwards, as well as the development and implementation of Alberta's policies concerning the provision of long-term care. While the principles of statutory interpretation are settled, their application in the legislative and factual matrix of this case was novel.

[34] As a result, she concluded that this factor weighed in the plaintiffs' favour.

[35] The appellants suggest that "complexity and difficulty" should not be considered when determining if a question is novel and that the test in *Das* holds that a case is novel only if the decided cases do not provide adequate guidance to resolve the issue, and either party could reasonably expect to succeed.

[36] In our view, complexity and difficulty are relevant considerations when determining whether a novel question of law has been raised. The Supreme Court of Canada in *Rogers Communications Inc. v. Voltage Pictures, LLC,* 2018 SCC 38, [2018] 2 SCR 643 at para 57, described the issues in that case as "difficult and novel questions of statutory interpretation". Similarly, the trial judge here characterized the statutory interpretation issue as a "difficult question of law", and found that the application of principles of statutory interpretation "in the legislative and factual matrix of this case was novel." In our view, this was a reasonable assessment of the issues at trial, and the trial judge was well-positioned to make that assessment. Her conclusions are afforded appellate deference and disclose no reviewable error.

Rule 10.32(c) - Access to Justice

[37] The trial judge viewed the members of the class as constituting a "disadvantaged group", as they were "disabled and elderly people of such medical frailty that they were essentially forced to reside in nursing homes": para 73. She acknowledged that some residents with very little income received grants, but considered it "likely that many of the residents who had to pay the increased accommodation charge had modest, and fixed, incomes." In our view, this was a reasonable assessment by the trial judge and does not disclose reviewable error. We see no reason to intervene in her assessment that access to justice concerns were raised in the circumstances of this case.

Balancing of the factors and additional considerations

[38] The trial judge concluded that "the factors listed in r 10.32 strongly favour the Plaintiffs in this case". She went on to identify (at para 125) those and other factors which justified a no costs award (numbers added for convenience):

> 1. The action was brought on behalf of class members, residents of nursing homes and similar long-term care facilities, who are disadvantaged members of society, and who were required to live in these facilities because of their extreme medical needs.
> 2. The action related to a significant increase by the Province in the charge to reside in the long-term care facilities. The information relied on by the Province in authorizing the increase had been criticized by the Auditor General.
> 3. While the class members had a financial interest in the action, the extent of that interest – some thousands of dollars – clearly would not justify the action economically.

4. The action was brought and maintained at the initiative of an established Society which was an advocate for seniors' rights, and by individuals who had personal interests as well as an interest in seniors' rights.
5. The Plaintiffs' law firm provided many hours of professional services and funded significant disbursements pursuant to the Contingency Agreement, which was approved by the Court.
6. The law firm agreed to indemnify the individual Plaintiffs, at their request, against an adverse costs award.
7. These arrangements between the law firm and the Plaintiffs were necessary for the action to proceed, but did not mean that the law firm was the driving force behind the action. The action was brought to the law firm by the Plaintiffs, not the other way around.
8. The action was in the public interest, both with respect to the interests of the class members and the potential to have a broader impact, by changing government practice relating to charges imposed on residents of long-term care facilities.
9. It was claimed that the increase in the charge was not valid under governing legislation and the *Charter*.
10. This claim raised a novel point of law. The validity of the charge had not been determined by the courts.
11. Although it was unsuccessful, the claim was meritorious. Access to justice required a trial to determine the issue.
12. The Defendants' conduct in the proceedings did not contribute to, and arguably made more difficult, a quick and efficient resolution of the matter.
13. The costs claimed by the Defendants are clearly out of proportion, given the public interest, the novel point of law raised, and access to justice issues. Orders for costs claimed by the Defendants would clearly have a chilling effect on future class actions.
14. The Plaintiffs do not claim costs, notwithstanding significant costs incurred by their counsel.
15. The Defendants are better able to bear the costs of the litigation than are the Plaintiffs. A much reduced costs award would not significantly change the Defendants' position; and would inappropriately penalize the Plaintiffs and their counsel.

[39] We are satisfied that many of the listed factors were proper considerations in the decision to award no costs against the representative plaintiffs. They would also have been appropriate

considerations in determining whether to adjust the quantum of costs otherwise payable, had the trial judge decided to award costs against the plaintiffs. In particular, Items 1 to 4 and 8 to 11 relate generally to the factors identified in rule 10.32 and would be relevant to either assessment.

[40] Similarly, Items 5 to 7, which relate to the relationship between the plaintiffs and their counsel and how the litigation was funded, are all proper considerations in the assessment of access to justice concerns in the context of a class proceeding. In particular, the trial judge was entitled to ascertain and take into account whether the plaintiffs or their counsel were the "driving force" behind the litigation.

[41] Overall, therefore, we discern no reviewable error in the trial judge's assessment that a no costs award was justified in the circumstances of the case, as she found them. We do, however, question the relevance of three of the items identified by the trial judge (Items 12, 14 and 15) in the circumstances of this case. In light of the findings of the trial judge, her assessment of the case, and her reasons as a whole, we would not interfere in the trial judge's exercise of discretion on the basis of these factors. Nevertheless, we are of the view that they are worthy of further comment, as set out below.

The Defendants' Conduct – Item 12

[42] One of the factors identified by the trial judge as justifying a no costs award was that the appellants' conduct in the proceedings "did not contribute to, and arguably made more difficult, a quick and efficient resolution of the matter."

[43] There is no doubt that the litigation conduct of a party and its counsel are relevant to the making of a costs award: see rules 10.33(1)(f) and 10. 33(2)(a), (b) and (g). The judge who presided over the trial is in the best position to assess the litigation conduct of a party and their counsel, and such assessments are afforded deference on appeal. When a party is penalized in costs as a result of its litigation conduct or that of its counsel, there need not be a catalogue of every instance of inappropriate behavior, but there should be an adequate explanation of the nature of the conduct that was found to be problematic.

[44] The trial judge's comments about how the litigation was conducted by the appellants and their counsel was limited to the following (paras 60-62):

> [60] On May 10, 2013, the Plaintiffs brought an application before the Case Management Justice for an Order directing the hearing or trial of two questions of statutory interpretation regarding the Province's authority to include specific costs in the accommodation charge. The Defendants opposed the application.
>
> [61] The Case Management Justice summarized the arguments of the Plaintiffs and the Defendants (*Elder Advocates of Alberta Society v Alberta*, 2013 ABQB 649 at paras 18-30). The Plaintiffs submitted that statutory interpretation was a

severable question of law, that could be appropriately dealt with as a preliminary matter, and that the Court should attempt to achieve the expeditious and efficient resolution of the dispute between the parties. The Defendants submitted that the determination of the statutory interpretation issue required an evidentiary context, and that severance of the legal issue would not save time or money.

[62] In her decision denying the application, the Case Management Justice stated (at para 47):

> It is my view that if the parties were agreeable to the admission of a body of evidence concerning the historical treatment by Alberta and AHS of the "Accommodation Charge" for the purposes of answering the Proposed Preliminary Questions, those Questions could be answered in a summary process by the trial judge, which would in turn likely lead to some efficiencies in answering the ultimate questions in the lawsuit. However, neither Alberta nor AHS appear disposed to an approach that would shorten or expedite this lawsuit. They are entitled to the opportunity to fully canvass every intricate detail to establish the factual matrix for determination of the legal issues and ultimate questions as to liability.

[45] The foundational rules direct all parties to an action to "identify or make an application to identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense": r 1.2(3)(a). The trial judge identified no conduct by the appellants or their counsel that failed to contribute to a quick resolution of the matter, or that arguably made resolution more difficult in the course of the trial or pretrial proceedings, other than their successful opposition to the plaintiffs' application for the hearing of a preliminary issue. It is not apparent why a bifurcated hearing to address a preliminary issue on agreed facts (that had yet to be agreed upon) would have expedited the process in the circumstances of this case. The trial judge was herself only able to interpret the applicable statutory provisions "following extensive consideration of the text, context and purpose of the *Nursing Homes Act* and regulations, as revealed in the legislation and in the evidence presented during the six-week trial". She concluded, "based on the expert evidence at trial", that the appellants "had established a reasonable nexus between accommodation charges and the cost of providing accommodation and meals."

[46] While the litigation conduct of a party or of its counsel can be relevant considerations when assessing costs, there is no meaningful explanation in the trial judge's reasons of how the conduct of the appellants or their counsel in this case supported a no costs award.

The Plaintiffs' Decision not to Claim Costs – Item 14

[47] Another factor identified by the trial judge as justifying a no costs award was that "(t)he Plaintiffs do not claim costs, notwithstanding significant costs incurred by their counsel." The

plaintiffs were seeking costs "on a solicitor and client basis or alternatively enhanced party/party costs, with full indemnity for disbursements and GST", had they succeeded. It is difficult to understand why refraining from seeking costs when they were unsuccessful is a relevant factor in determining whether costs should be awarded against the plaintiffs in the circumstances of this case.

Who is better able to bear a costs award – Item 15

[48] A further factor which the trial judge found justified a no costs award was that "(t)he Defendants are better able to bear the costs of the litigation than are the Plaintiffs. A much reduced costs award would not significantly change the Defendants' position; and would inappropriately penalize the Plaintiffs and their counsel."

[49] Generally, a party's impecuniosity does not justify no costs being awarded against it: *Anderson v Canada Safeway Limited*, (2005) 361 AR 270 (CA) at para 3; *Bio-Ethical*, at para 5. The fact that the appellants in this case are "better able to bear the costs of litigation" than the plaintiffs is not a good reason to decline to award any costs whatsoever to the successful appellants. The defendants in most class action lawsuits would be in this position, yet the Alberta legislature elected not to adopt a no costs model for class proceedings, as was done in other provinces, and instead directed that "the court may award costs as provided for under the Rules of Court": *Class Proceedings Act*, s 37. While the representative plaintiffs' financial circumstances and the manner in which the litigation was funded may have access to justice implications properly considered under r 10.32, an assessment of who is "better able to bear the costs of litigation" is not consistent with the class action costs regime in Alberta as contemplated in the *Class Proceedings Act* and *Rules of Court*.

[50] Finally, we have difficulty with the proposition that even a much reduced costs award would "inappropriately penalize[e] the Plaintiffs and their counsel". Party and party costs are designed to partially indemnify the successful party and "are not designed for the purpose of punishing, penalizing or benefitting a party to an action": *Wenden v Trikha* (1992), 124 AR 1, 6 CPC (3d) 15 (ABQB) at para 22.

Conclusion

[51] Costs awards are afforded considerable deference on appeal; the trial judge is in the best position to assess what is appropriate in the circumstances, having regard to the factors identified in the *Rules* and applicable authorities. The trial judge correctly interpreted the relevant rules. She made numerous specific findings of fact and mixed fact and law, which disclose no palpable and overriding error. The majority of the fifteen specific items she identified as justifying a no costs award were properly considered by her. When her decision is read in its entirety, we do not find that her consideration of some factors that were not relevant in this case (items 12, 14 and 15)

would have materially affected her overall decision, or that her exercise of discretion was "clearly wrong".

[52] The appeal is dismissed.

Appeal heard on August 31, 2020

Memorandum filed at Edmonton, Alberta
this 22nd day of February, 2021

O'Ferrall J.A.

Schutz J.A.

Authorized to sign for: Strekaf J.A.

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