

January 24, 2020

## Costs Denied in Elder Advocates of Alberta Society Case

By: Jennifer Koshan and Jonnette Watson Hamilton

**Case Commented On:** *Elder Advocates of Alberta Society v Alberta*, [2020 ABQB 54 \(CanLII\)](#)

In [February 2018](#) and [October 2019](#), we posted comments on the class action litigation in *Elder Advocates of Alberta Society v Alberta*, where a class of long-term care residents unsuccessfully challenged the Alberta government's ability to charge accommodation fees in long-term care facilities. The case involved claims of unjust enrichment, negligence and contract – addressed by our colleague Lorian Hardcastle [here](#) – and discrimination based on age and mental / physical disability, which we dealt with in our posts. None of the claims were ultimately successful. The plaintiffs' most persuasive argument was that the imposition of accommodation fees was discriminatory, which was accepted by the Alberta Court of Appeal. However, the Court found the discrimination to be justified (see *Elder Advocates of Alberta Society v Alberta*, [2019 ABCA 342 \(Can LII\)](#) and our post on that decision [here](#)).

In spite of the lack of success of this class action, Justice June Ross, the trial judge in the case, recently denied the Province of Alberta and Alberta Health Services costs against the plaintiffs and their lawyers (see *Elder Advocates of Alberta Society v Alberta*, [2020 ABQB 54 \(CanLII\)](#)).

The question of costs in a class action is governed by r 10.32 of the *Alberta Rules of Court*, [Alta Reg 124/2010](#), which 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.

Justice Ross thoroughly reviewed the relevant legislation and relevant Court of Appeal decisions, and then applied the public interest, novel point of law, access to justice and balancing factors to the case before her.

Her comments on the access to justice factor are particularly interesting, in part because it appears that the Province pushed its arguments on this factor the hardest. The Province had argued that the class members were not socioeconomically disadvantaged individuals lacking access to courts and therefore the class action did not give rise to access to justice issues (at para 71). Justice Ross noted that the court's discretion to depart from normal costs rules was not limited to actions on behalf of socioeconomically disadvantaged individuals (at para 72) and the members of the class in this case were in fact members of a disadvantaged group, being disabled, elderly and on modest and fixed incomes (at para 73). The Province also argued that it was entitled to have its own access to justice concerns addressed because it had to defend a "meritless claim" (at para 76). The claim was, of course, not meritless, as Justice Ross addressed when discussing the public interest and the novel points of law it raised. The Province also argued the barrier to access to justice that arises from potential liability for costs could be dealt with in other ways. Alberta Health Services suggested the plaintiffs should have engaged in fundraising or sought third-party funding (at para 79) and that the plaintiffs' counsel's assumption of liability for costs was enough (at para 81). On the latter point, Justice Ross rejected the idea that plaintiffs' counsel's increased risk exposure also means an increased potential upside (at para 83) as there was no evidence to support that argument (at paras 82-87). This was not a "lawyer driven" case (at paras 70, 87, 101, 110), and any criticism of plaintiffs' counsel's conduct was unfounded (at paras 95 and 101). The analysis of the access to justice factor concludes with a helpful review of the difference in the legislated context of class actions in Alberta and in Ontario (at paras 101-112).

Justice Ross nicely summarizes her reasons for making a no costs award at para 125:

In my view the factors listed in r 10.32 strongly favour the Plaintiffs in this case. Those factors and other factors that justify a no costs award in this case are:

- 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.
- 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.
- 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.
- 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.
- 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.

- The law firm agreed to indemnify the individual Plaintiffs, at their request, against an adverse costs award.
- 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.
- 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.
- It was claimed that the increase in the charge was not valid under governing legislation and the Charter.
- This claim raised a novel point of law. The validity of the charge had not been determined by the courts.
- Although it was unsuccessful, the claim was meritorious. Access to justice required a trial to determine the issue.
- The Defendants' conduct in the proceedings did not contribute to, and arguably made more difficult, a quick and efficient resolution of the matter.
- 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.
- The Plaintiffs do not claim costs, notwithstanding significant costs incurred by their counsel.
- 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.

---

This post may be cited as: Jennifer Koshan and Jonnette Watson Hamilton, "Costs Denied in Elder Advocates of Alberta Society Case" (July 3, 2018/January 24, 2020), online: ABlawg, [http://ablawg.ca/wp-content/uploads/2018/07/Blog\\_JK\\_JWH\\_ElderAdvocatesCosts.pdf](http://ablawg.ca/wp-content/uploads/2018/07/Blog_JK_JWH_ElderAdvocatesCosts.pdf)

To subscribe to ABlawg by email or RSS feed, please go to <http://ablawg.ca>



Follow us on Twitter [@ABlawg](https://twitter.com/ABlawg)