

## Has the Alberta Court of Appeal Opened the Door for Class Actions in Alberta? A Case Comment on *Pauli v. Ace Ina Insurance Co.*

By Bill McNally and Barb Cotton

The Alberta Court of Appeal has recently reversed a “chilling” cost award of Rooke J. in the auto insurance deductible class action<sup>1</sup> and in doing so has opened the door for class actions in Alberta. In *Pauli v. Ace Ina Insurance Co.*,<sup>2</sup> the Alberta Court of Appeal *per curiam*, with Fruman and Wittmann J.A. and Rawlins J. (*ad hoc*) on the panel, allowed a no costs order to issue, for the most part, with respect to the class action litigation.

As summarized by the appellate court, the class action represented individuals whose motor vehicles were damaged beyond economic repair. They made insurance claims and were paid the actual cash value of the vehicle less the policy deductible. In each case the insurer took title to the salvage. The appellants commenced a representative action against Alberta insurers, challenging the practice of subtracting the policy deductible from the cash value.

The Chambers judge and judicial case manager, Rooke J., ordered that there be a trial of a preliminary issue as to whether the relevant provision in the *Insurance Act* of Alberta permitted the insurance company to charge a deductible against the actual cash value in a total loss situation and keep the salvage (“the merits motion”). Counsel for the representative plaintiffs also decided to set in play parallel certification and privity proceedings.

The representative plaintiffs were ultimately unsuccessful in the merit application before Rooke J., and this decision was affirmed on appeal.<sup>3</sup> In the course of deciding the merits motion there had been six case management conferences, two contested special applications and seven examinations pursuant to Alberta Rules of Court 266, as well as the merits motion itself. It was argued before Rooke J. that a no cost award should be ordered as the class action involved a matter of public interest, a novel point of law, a test case, and it was important to ensure access to justice for class action litigants. Rooke J.

dismissed all of these arguments, and awarded a cost award against the representative plaintiffs of approximately \$125,000, thereby effectively slamming the door shut on class action litigation in Alberta.

While acknowledging that Rooke J.'s decision was a matter of discretion, the Alberta Court of Appeal overturned Rooke J. on each of these points. They commenced their judgments by reviewing the standard of review and stated that where a judge is given broad discretionary powers when awarding costs this exercise of discretion should not be interfered with unless there is a clear palpable and overriding error.<sup>4</sup> The appellate court noted that the judicial exercise of discretion in this case involved adherence to criteria indicative of when a no costs order should be made<sup>5</sup> and stated that where criteria are set out and conclusions are drawn to decide whether facts meet the criteria, an issue of mixed fact and law arises. A determination of whether the criteria have been met is subject to appellate review for palpable and overriding error, absent an extricable error in legal principle, which is reviewed for correctness.<sup>6</sup>

It was further stated that an appeal court should affirm an award of party and party costs unless an error in principle was made or unless the decision was plainly wrong.<sup>7</sup>

The appellate court then went on to consider whether Rooke J. had erred in his exercise of discretion regarding the four arguments made.

### **Public Interest**

Rooke J. had found that the action was not a matter of public interest because it was not pursued by the appellants as part of a group that has been historically disadvantaged in our society, nor did it raise issues of interest that went beyond the specific interests of the members of the proposed class, such as environmental and human rights issues. The action, he held, was pursued by consumers of automobile insurance in Alberta suffering a total loss of the vehicle which did not primarily seek to effect behaviour modification of the insurers but whose motivation was primarily, if not solely, monetary.

The Alberta Court of Appeal disagreed with Rooke J. on this point and commenced by reviewing the authorities governing public interest.

They quoted from *Vriend v. Alberta*<sup>8</sup>, which had quoted with approval from Orcan, *The Law of Costs*<sup>9</sup> as follows:

“An action or motion may be disposed of without costs when the question involved is a new one, not previously decided by the courts on the theory that there is a public benefit in having the court give a decision; or where it involves the interpretation of a new or ambiguous statute; or a new or uncertain or an unsettled point of practice; or where there were no previous authoritative rulings by courts; or decided cases on point; or where the application concerned a matter of public interest and both parties acted in complete good faith . . . or where the action was a test case; or where it was desirable to resolve a conflict in the case law.”

They noted that the Supreme Court of Canada has recently held<sup>10</sup> that there are two types of public interest litigants:

- “(1) litigants who have no direct pecuniary or other material interest in the proceedings (eg. a non-profit organization); and
- (2) litigants who do have a pecuniary interest, but whose interest is modest in comparison to the cost of the proceedings.

They then referred to the Ontario Law Reform Commission’s views on the appropriate criteria to consider in the context of costs in public interest litigation, as follows:

- (a) The proceeding involves issues the importance of which extends beyond the immediate interests of the parties involved.
- (b) The person has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or, if he or she has an interest, it clearly does not justify the proceeding economically.
- (c) The issues have not been previously determined by a court in a proceeding against the same defendant.

- (d) The defendant has a clearly superior capacity to bear the costs of the proceeding.
- (e) The plaintiff has not engaged in vexatious, frivolous or abusive conduct.”<sup>11</sup>

The appellate court then concluded on this point:

“Almost all litigation has some precedential value that “extends beyond the immediate interests of the parties involved.” The public interest test is not met merely because future parties might be affected by the ruling. However, the issues raised by the appellants in this litigation have a more profound effect. A ruling would affect every Albertan who has an automobile insurance policy with collision coverage in the extent of a total loss. The Insurance Act is, inter alia, a form of consumer protection legislation: *Smith v. Co-operators General Insurance Co.*, [2002] 2 S.C.R. 129 at para. 11. It affects a large community and, if successful in their interpretation of the relevant legislation and the standard automobile policy, the appellants would have effected behavioral modification of all Alberta insurers offering similar policies. Despite the fact that the appellants’ action was framed as a class action against many insurers and included a claim for damages, the chambers judge, acting as the case manager, determined that a declaratory judgment was more prudent to ensure judicial efficacy. In short, if the respondents were successful, there would be no need for the class action process. While we agree that such a route was to all parties’ benefit, such procedures transformed the appellants’ relief from monetary to primarily declaratory at that point in time.

A declaratory judgment that interprets provincial insurance legislation and the standard automobile insurance policy clearly has implications reaching beyond the interests of these appellants. In our view, the issue constitutes a matter of broad public interest.”

### **Novel Point of Law**

Rooke J. had held that to the extent a novel point of law was raised, parties who had done no wrong should not be forced to bear the costs of someone seeking to clarify the law. The Alberta Court of Appeal reversed Rooke J. on this point as well, stating:

“Most cases involving the interpretation of legislation or contracts necessarily involve favouring one side or the other. To deny costs where a novel point of law is determinative of the issue solely because one party is

innocent of any wrongdoing, as the chambers judge did in this case, may effectively deny a “no costs” order in most cases. That is not the point of determining whether a novel point of law exists. In this case, to determine the merits motion, it was necessary to clarify the outstanding law. We find the action as framed by the chambers judge involved a novel point of law.”

### **Test Case**

Rooke J. held that the action was not a test case because the representative plaintiffs were “intent on capturing in the “net” of this action all possible Alberta parties” and having all similar claims in Alberta settled by the action.

The appellate court disagreed with him on this point, stating:

“While it is true that the action framed by the appellants was in the form of a class action requesting large sums of money, such relief was premised upon an interpretation favourable to the appellants of the Insurance Act and the standard automobile insurance policy with collision coverage. This interpretation would establish a legal principle that would determine other actions in Alberta and be persuasive in other provinces where similar statutory language exists. The decision on the merits issue appears to be the only judgment that analyzes the expression “subject to” in the context of the relevant legislation, the Alberta standard automobile policy and previous case law. It may be that such analysis of this expression is persuasive in other cases. In short, given the conflicting cases in this regard, the issue meets the requirements for a test case. The fact that damages were sought does not change that.”

### **Access to Judgment**

It is the appellate court’s decision on this point that is perhaps of most assistance to plaintiff’s counsel. Rooke J. had held that there was some evidence that counsel for the representative plaintiffs had underwritten the cost risks and took into consideration this fact of indemnification.

The appellate court commenced their discussion on this point by expressly noting that large costs awards against unsuccessful plaintiffs in class actions would have a “chilling” effect and likely discourage meritorious class actions.<sup>12</sup> The appellate court stated that in exercising the court’s discretion to award costs there needed to be a balance between encouraging class actions that have potential merit and discouraging those that may be frivolous or vexatious.

The appellate court then expressly stated that Rooke J.’s acceptance of defense counsel’s characterization of the action as “driven and funded by lawyers” was inappropriate and that factors regarding indemnification and the financial circumstances of the representative plaintiffs or their counsel were given undue weight by the chambers judge.

The appellate court stated:

“Such an award [as that given by Rooke J.] curtails access to justice because it has a chilling affect on future potential litigants. Lawyers and other third parties, who might be willing to underwrite the costs of a potentially meritorious representative action, would be unwilling to do so if they knew they would face crippling costs merely because they offered this financial assistance. Individual litigants, whose stake in the litigation is relatively small, would then be unwilling to pursue the action.”

It is the authors’ view that with these comments the Alberta Court of Appeal has effectively opened the door to class actions in Alberta, which was previously slammed shut by the decision of Rooke J.. This is the import of this judgment and its most significant benefit for all plaintiffs’ counsel in Alberta.

In the result a no costs award was issued as it related to the “merits issue”, and the costs award of Rooke J. was allowed to stand regarding the certification and privity issues.

## ENDNOTES

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- <sup>1</sup> *Pauli v. Ace Ina Insurance Co.*, [2003] A.J. No. 893, 2003 ABQB 600
- <sup>2</sup> [2004] A.J. No. 883, 2004 ABCA 253
- Pauli v. Ace Ina Insurance Co.*, [2004] A.J. No. 185, 2004 ABCA 84, leave to appeal to the Supreme Court of Canada refused at [2004] S.C.C.A. No. 169
- <sup>4</sup> Applying *Westersund v. Westersund* (1993), 157 A.R. 276 at para. 11
- <sup>5</sup> As embodied in s. 31(1) of the *Class Proceedings Act*, 1992, S.O. 1992, c. 6
- <sup>6</sup> Applying *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at para. 36
- <sup>7</sup> Citing *Metz v. Weisgerber*, [2004] ABCA 151
- <sup>8</sup> (1996), 184 A.R. 351
- <sup>9</sup> (2<sup>nd</sup> ed., 1995) at pp. 2-37 – 2-38
- <sup>10</sup> *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69 at para. 76
- <sup>11</sup> *Report on the Law of Standing* (Toronto: Minister of the Attorney General, 1989), as applied in *Harris v. Canada*, [2002] 2 F.C. 484 at para. 222
- <sup>12</sup> Referring to *Final Report No. 85, Class Actions* (Alberta Law Reform Institute, December, 2000)