

# Alberta's Class Action Cost Regime

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## INTRODUCTION

This paper provides an overview of the Alberta experience with respect to the issue of costs in class actions. Other panel members will be speaking to the experiences of other provinces.

Alberta's legislation is the *Class Proceedings Act*, R.S.A., 2003, c. 16.5 (the "CPA"). Section 37 of the CPA states:

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

Some might have hoped for more guidance from the legislature.

Nonetheless, Alberta's courts have done much to fill the void. Before we get there, however, in Part I we overview the underlying policy and the legislative development of Alberta's class action costs regime. In Part II we overview the specific cost regime of the CPA. In Part III we provide a summary of the seminal decision of the Alberta Court of Appeal in *Pauli v. Ace INA Insurance Co.*, [2004] A.J. No. 883. In Part IV we analyze how Alberta's courts have applied the *Pauli* decision. And, finally, if you are still with us, in Part V we summarize the present state of law in Alberta pertaining to class action costs.

In case you are unable to read a story without first checking the end, here it is: While the Alberta CPA indicates that class action costs might ordinarily be assessed in the same manner as other civil proceedings (the general rule being that loser pays), the Alberta courts have begun to establish a rule that looks much like that of Ontario, although with less legislative certainty.

## **PART I: THE DEVELOPMENT OF ALBERTA'S COST REGIME**

In 2003, Alberta joined Quebec (1978), Ontario (1993), British Columbia (1995), Saskatchewan (2002), Newfoundland (2002), Manitoba (2002) and the Federal Court (2002) in introducing class action legislation. Before Alberta crafted its class proceedings legislation, the Alberta Law Reform Institute (the "Institute") completed a comprehensive overview and analysis of the main issues concerning different aspects of class action regimes. The end product was the Alberta Law Reform Institute's (the "Institute"), *Class Actions: Final Report No. 85* (December, 2000) (the "Report").

The Institute outlined what it saw as two alternate approaches. The first would see a legislative grant of discretion to the courts to award costs, with the legislature providing some factors as guidance: such as whether the action concerned a test case, raised a novel point of law or involved a matter of public interest. The second would be a "no costs" regime in which the courts were prohibited from awarding costs except in special circumstances.

The Institute saw the choice as "difficult," noting, from 100,000 feet, the relative merits of both approaches:

It is difficult to choose between a costs regime and a "no costs" regime. Both approaches are working in the jurisdictions in which they have been introduced -- class actions are being litigated in Quebec, Ontario and British Columbia. In both costs and "no costs" regimes, class counsel are financing some representative plaintiffs on the basis of contingency agreements that would see counsel reimburse for out-of-pocket expenses and paid for their services from a share of the award in a successful action. Access to justice is taking place.<sup>1</sup>

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<sup>1</sup> Alberta Law Reform Institute, *Class Actions: Final Report No. 85* (December, 2000) at para. 394.

The Institute considered and wrestled with more detailed arguments both for and against the competing approaches, and ultimately recommended a "no costs" approach, subject to the "abusive conduct, delay and unjust deprivation" exemptions present in the British Columbia legislation.<sup>2</sup>

So much for the academics; for, as you know already, that is not how things turned out.

## **PART II: AN OVERVIEW OF THE ALBERTA COST REGIME**

The Alberta legislature, in drafting its class action legislation, ignored the recommendations of the Institute. Instead, the government wanted cost awards in class action proceedings made in the same manner as other judicial proceedings. Again, s. 37 of the CPA provides:

With respect to any proceeding or other matter under this Act, the Court may award costs as provided for under the Rules of Court.<sup>3</sup>

This rather spartan provision contrasts with the costs provisions in Ontario's *Class Proceedings Act, 1992*, S.O. 1992, c. 6. The Ontario legislation provides:

31. (1) In exercising its discretion with respect to costs under subsection 131 (1) of the Courts of Justice Act, the court may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest. 1992, c. 6, s. 31 (1).<sup>4</sup>

We will leave the analysis of Ontario's current regime, as applied by the Ontario courts, to bitter plaintiffs' counsel.

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<sup>2</sup> It worth noting, however, that this recommendation was influenced by the fact that the Institute determined that "the viability of the costs approach may, in fact, be dependent upon the existence of a [endowment] fund." The Institute expressed concern that the "Alberta government has been reluctant to come up with the funds in related, contexts, including civil enforcement."

<sup>3</sup> *Class Proceedings Act*, R.S.A., 2003, c. 16.5 at s. 37.

<sup>4</sup> *Class Proceedings Act, 1992*, S.O. 1992, c. 6 at s. 31(1).

The British Columbia *Class Proceedings Act*, RSBC 1996, c. 50, of course, adopts a "no costs" approach. The British Columbia *Act* does, however, grant the Supreme Court and Court of Appeal the judicial discretion to award costs in limited circumstances, including:

37 (2) (a) at any time that the court considers that there has been vexatious, frivolous or abusive conduct on the part of any party,

(b) at any time that the court considers that an improper or unnecessary application or other step has been made or taken for the purpose of delay or increasing costs or for any other improper purpose, or

(c) at any time that the court considers that there are exceptional circumstances that make it unjust to deprive the successful party of costs.<sup>5</sup>

At first blush, when compared to the Ontario and British Columbia legislation, and, for that matter, all other provincial class action cost legislation, the CPA might be seen to be the most plaintiff "unfriendly."

But that is at first blush.

Also, one cannot ignore that, unlike Ontario and Quebec, the CPA does not provide for the establishment a class action fund.<sup>6</sup> We will leave the analysis of the Ontario and Quebec funds to others. Suffice it to say that in Alberta, there is no social support for representative plaintiffs.

In any event, Alberta's legislature chose not to adopt the Law Reform Institute's "no costs" recommendation. The member who sponsored the Bill provided this pitch in support of the government's view:

As I indicated in committee, the reason that Bill 25 does not have a fund provided for plaintiffs is that the general practice in Alberta is that costs follow the cause. Successful plaintiffs are able to recover their court costs from the unsuccessful party. Similarly, successful defendants who fend off a lawsuit, be it a class action or otherwise, are able to recover their court costs from the unsuccessful plaintiff. This is the normalcy in Alberta, and Bill 25 does nothing to change the normal provisions for costs. Also existing in Alberta is the discretion of a judge to not award

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<sup>5</sup> *Class Proceedings Act*, RSBC 1996, c. 50 at s. 37(2).

<sup>6</sup> *Papaschase Indian Band v. Canada (Attorney General)*, [2004] A.J. No. 1439 at para. 11 (Alta. Q.B.).

costs if it would be unduly hard on the plaintiff, so there is that discretion.

I think that this is good legislation. The reason we chose this model is that the last thing we want is a cottage industry for frivolous or unmeritorious lawsuits. So this is the model that we chose. Costs follow the cause, and I ask all members to vote in favour of Bill 25.<sup>7</sup>

### **PART III: THE ALBERTA COURT OF APPEAL DECISION IN *PAULI***

*Pauli v. Ace INA Insurance Co.*, [2004] A.J. No. 883 (Alta. C.A.) concerned the Alberta version of the "automobile deductible" class actions that were filed in various Canadian provinces. The writer was privileged to have acted as defence counsel and in that regard to have sat on the Defence Committee struck by the Honourable Mr. Justice Rooke, who "case managed" the matter.

Rooke J. had ordered that there be a summary determination of the issue as to whether the relevant provisions of the *Insurance Act* permitted the insurers to charge a deductible against the cash value in a total loss situation and keep the salvage ("the merits motion"). Rooke J. answered affirmatively, thus effectively ending the putative class action.

Quite reasonably, I would think, the defendants sought substantial costs. The bills piled up, as there were approximately 130 defendants and a busload of counsel.

The plaintiffs argued that there should be a "no costs" award, as the class action involved a matter of public interest, a novel point of law, a test case, and was important to ensure access to justice for class action litigants. Rooke J. rejected the arguments and awarded costs against the representative plaintiff in the range of \$125,000. However, Rooke, J. did accept the argument that, in principle, "similar conditions [to s. 31(1) of the *Class Proceedings Act, 1992*, S.O. 1992,

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<sup>7</sup> Alberta Hansard, April 29, 2003, pg. 1318, cited in *Papaschase Indian Band v. Canada (Attorney General)*, [2004] A.J. No. 1439 at para. 14 (Alta. Q.B.).

c. 6], albeit not legislated, are relevant to the Court's broad discretionary power to award costs."<sup>8</sup> They did not support the plaintiffs on the facts of the case.

The Alberta Court of Appeal affirmed the decision of Rooke J. on the merits but allowed the appeal on the issue of costs. The Court of Appeal said this:

A judge exercising discretion must give some weight to all legally relevant factors: [citation omitted]. It is not disputed that the four criteria [public interest, a novel point of law, test case, access to justice] considered by the chambers judge are legally relevant factors in the exercise of discretion. The issue in this case is whether the case management judge erred in the exercise of his discretion by concluding the criteria had not been met on the basis of the facts.<sup>9</sup>

In applying the above four-pronged standard enunciated by the Ontario legislature and endorsed by the Alberta Court of Queen's Bench, the Court of Appeal held that, with respect to the merits motion, the representative plaintiff had successfully established all four facets of the test. With respect to public interest, the Court of Appeal held:

... 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.<sup>10</sup>

With respect to the novel point of law, the Court of appeal reversed Rooke, J.'s finding, holding that:

... 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.<sup>11</sup>

Similarly, the Court of Appeal agreed that the action amounted to a test case:

... The decision on the merits issue appears to be the only judgment that analyzes the expression "subject to" in the context of the relevant

<sup>8</sup> *Pauli v. Ace INA Insurance Co*, [2003] A.J. No. 893 (Alta. Q.B.).

<sup>9</sup> *Pauli* para. 19 (Alta. C.A.).

<sup>10</sup> *Pauli* para. 26 (Alta. C.A.).

<sup>11</sup> *Pauli* para. 28 (Alta. C.A.).

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.<sup>12</sup>

Finally, the Court of Appeal acknowledged the role that class actions play in increasing access to the judicial system:

Class actions are relatively new in Canada, and it is arguable that such actions increase access to justice by allowing many claimants to pool their resources to pursue claims together that they could not pursue individually because of small monetary amounts at stake. But the reality is that large cost awards against unsuccessful plaintiffs will have a chilling effect and likely discourage meritorious class actions [...].<sup>13</sup>

It is important to note that the *Pauli* decision pre-dated the CPA coming into force in Alberta. The Court of Appeal did, however, expressly state that "general principles of costs under the [Alberta *Rules of Court*] apply to class actions both before and after the proclamation of the *Class Proceedings Act*."<sup>14</sup>

#### **PART IV. POST PAULI JURISPRUDENCE**

A number of courts in a host of jurisdictions have had the opportunity to consider the reasoning of the Alberta Court of Appeal in *Pauli*. In Alberta, two decisions are particularly insightful: *Papaschase Indian Band v. Canada (Attorney General)* [2004] A.J. No. 1439 (Alta. Q.B.) and *Ayrton v. PRL Financial (Alta.) Ltd.*, [2006] A.J. No. 296 (Alta. C.A.).

The first Alberta decision to consider *Pauli* was *Papaschase Indian Band v. Canada (Attorney General)*. The *Papaschase* decision involved the issue of the appropriate award of costs following a summary dismissal of an aboriginal rights claim. Slatter, J. engaged in a detailed

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<sup>12</sup> *Pauli* at para. 30 (Alta. C.A.).

<sup>13</sup> *Pauli* at para. 31 (Alta. C.A.).

<sup>14</sup> *Pauli* at para. 17 (Alta. C.A.).

analysis of the Alberta class actions costs regime, and, in particular, the *Pauli* decision. While noting that the *Papaschase* action was commenced before the CPA came into force, Slatter, J. reasoned that the CPA was applicable in that it reflected considerations of public policy.

Slatter, J. provided a detailed history of Alberta's legislation, including reference to the legislative debate, the recommendations of the Institute, and an articulation of the reasoning pertaining to costs in class proceedings adopted in the *Pauli* decision. After summarizing the legislative history of the costs provision of the CPA, Slatter, J. stated that the "[legislative] intent was apparently to adopt the normal presumptions regarding costs, while relying on the Court's discretion in difficult cases."<sup>15</sup> Slatter, J. noted, however, that the Court of Appeal panel in *Pauli* arrived at an "end result ... very similar to Recommendation 22 of the Institute [which recommended legislative wording similar to the BC legislation; ie. a "no costs" approach]."<sup>16</sup>

After conceding that the Court of Appeal decision in *Pauli* was binding on trial courts in Alberta, Slatter, J. highlighted a number of questions that the *Pauli* decision left "unanswered". Slatter, J.'s reservations with respect to the *Pauli* decision are evident from the following:

The [*Pauli*] decision does not note that the Legislature specifically rejected the "no costs" regime for class actions. It seems to put a representative plaintiff in a better situation than a plaintiff who sues on his or her own. It also creates a serious imbalance between plaintiffs and defendants. If the defendants in *Pauli* had been unsuccessful, they would undoubtedly have been called on to pay significant costs, but having succeeded they were denied most of their costs. While access to justice may be one of the objectives of class proceedings, justice is a two-way street. Successful defendants are entitled to some consideration as well. The Institute's recommendation would have created a level playing field for plaintiffs and defendants; the *Pauli* decision does not discuss whether defendants in class proceedings should also be relieved from paying costs when novel points or points of public interest are involved. While the Court noted in paragraph 31 that "there needs to be a balance between encouraging class actions that have potential merit and discouraging those that may be frivolous or vexatious", the Court did not specifically discuss the impact that success should have on the award of costs. While the claim in *Pauli* may have had "potential merit", it was in the end singularly unsuccessful.<sup>17</sup>

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<sup>15</sup> *Papaschase Indian Band v. Canada (Attorney General)*, [2004] A.J. No. 1439 at para. 14 (Alta. Q.B.).

<sup>16</sup> *Papaschase* at para. 16 (Alta. Q.B.).

<sup>17</sup> *Papaschase* at para. 17 (Alta. Q.B.).

In breaking with the four criteria approach outlined in *Pauli*, Slatter, J. enlisted the legislative guidance of Rule 601 of the *Alberta Rules of Court* in articulating a robust, multi-factor approach to costs. The criteria addressed by Slatter, J. included: (1) the final result of the litigation; (2) the strength of the case; (3) reciprocity; (4) the public interest; (5) the type of action; (6) novel point of law; (7) test case; (7) access to justice; (8) whether a costs contribution is available from a fund; and (9) costs awards in analogous previous decisions.

In weighing the above factors, Slatter, J. held that it would be "inappropriate to totally deprive the Defendant of costs in this action."<sup>18</sup> However, factors such as "the chilling effect that an award of costs would have on representatives who propose to advance claims on behalf of their Aboriginal communities", the novel issues raised, and "the modest means of the representative Plaintiffs" mandated a "moderate and measured" costs award.<sup>19</sup> Slatter, J. granted the Defendant's request for Column 1, Schedule C costs, well below the Column 5, Schedule C costs that "actions of this sort might easily justify."<sup>20</sup> The substantive issue of the *Papaschase* summary dismissal decision was successfully appealed. On appeal, the Court of Appeal did not address Slatter, J.'s approach to costs.

In the more recent decision of *Ayrton v. PRL Financial (Alta.) Ltd.*, [2006] A.J. No. 296 (Alta. C.A.), the Alberta Court of Appeal appears to have affirmed the four costs criteria outlined in *Pauli*. The *Ayrton* decision involved a class action against the appellant payday loan companies and their directors. The relevant part of the judgement for our purposes was Ayrton's cross-appeal regarding the certification judge's determination to defer a decision on Ayrton's application for a no-costs order. In addressing the class action costs regime in Alberta, the Court of Appeal stated:

In Alberta, there is no general rule for a no costs regime. Section 37 of the Alberta *Class Proceedings Act* reads: [...]

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.

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<sup>18</sup> *Papaschase* at para. 46 (Alta. Q.B.).

<sup>19</sup> *Papaschase* at paras. 43, 46 (Alta. Q.B.).

<sup>20</sup> *Papaschase* at para. 46 (Alta. Q.B.).

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.<sup>21</sup>

On cross-appeal, Mr. Ayrton invited the court to apply the reasoning in *Pauli* and order no costs for the proceedings. The Court ultimately determined that the certification judge did not err in deferring a costs decision, and as such, there was no basis to order a no costs award. In arriving at this decision, however, the Court examined the reasoning in *Pauli* and, more generally, the law with respect to class action costs. The Court of Appeal stated that "the reasons in *Pauli* set out the basis for a court to order no costs in any event for a class action."<sup>22</sup> Further, the Court of Appeal reasoned:

This Court [in *Pauli*] discussed the four criteria to be considered when departing from the normal rule that costs follow the event: public interest, novel point of law, test case and access to justice. [...]

The four criteria are engaged in this appeal. This action involves the public interest in protecting the public against criminal rates of interest and breaches of consumer protection legislation. While the plaintiff has a pecuniary interest, the interest is modest in comparison with the costs of the proceedings. Whether brokerage fees constitute interest for the purposes of s. 347 of the Criminal Code has not been considered by a superior court in this Province. It would establish a legal principle that would determine other actions in Alberta. Class actions, by their very nature raise access to justice issues.<sup>23</sup>

Therefore, while the *Ayrton* court determined that it was not in a position to award a "no costs" award, it concluded by stating that: "should Mr. Ayrton seek a no costs order in the future, we urge serious consideration be given to the criteria for departing from the normal costs rule in light of the nature of this action and the objectives of the *Class Proceeding Act*."<sup>24</sup>

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<sup>21</sup> *Ayrton v. PRL Financial (Alta.) Ltd.*, [2006] A.J. No. 296 at paras. 29 - 31 (Alta. C.A.).

<sup>22</sup> *Ayrton* at para. 35 (Alta. C.A.).

<sup>23</sup> *Ayrton* at paras. 34, 37 (Alta. C.A.).

<sup>24</sup> *Ayrton* at para. 39 (Alta. C.A.).

## **PART V: THE PRESENT STATE OF LAW IN ALBERTA**

While the Alberta government rejected the creation of a special costs regime for class action proceedings, Alberta's courts have been inclined, in some circumstances, to apply such a regime.

The decision in *Pauli*, while not decided under the *Class Proceedings Act*, specifically referenced the CPA before stating "a judge exercising discretion must give some weight to all the legally relevant factors."<sup>25</sup> In identifying and exclusively focusing on the four criteria embodied in the Ontario legislation, the Court of Appeal endorsed the chambers judge's statement that "similar conditions [to s. 31(1) of the Ontario *Class Proceedings Act*], albeit not legislated, are relevant to the Court's broad discretionary power to award costs."<sup>26</sup>

In *Papachase*, decided shortly after *Pauli*, the Alberta Court of Queen's Bench expressed an uneasiness with the Court of Appeal's apparently finite four point criteria outlined in *Pauli*. After a detailed analysis of the legislative and policy history underlying Alberta's class action legislation, the *Papachase* court deferred to the legislative policy choice embodied in s. 37 of the *Class Proceedings Act*. The court ultimately refused to adopt the four criteria approach outlined in *Pauli*. Instead, the court grounded its analysis in the legislative mandated judicial discretion inherent in the *Rules of Court*. The court enunciated a robust 9 point list of "relevant considerations". It is noteworthy, however, that the four *Pauli* criteria -- public interest, a novel point of law, test case, and access to justice -- were all considered.

In *Ayrton*, the Court of Appeal offered additional guidance as to the scope and content of a court's discretionary power in relation to class action costs. The *Ayrton* court conceded that "[s]ection 37 must be seen as a policy choice by the Alberta Legislature."<sup>27</sup> As such, "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."<sup>28</sup>

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<sup>25</sup> *Pauli* at para. 19 (Alta. C.A.).

<sup>26</sup> *Pauli* at para. 9 (Alta. C.A.).

<sup>27</sup> *Ayrton* at para. 30 (Alta. C.A.).

<sup>28</sup> *Ayrton* at para. 31 (Alta. C.A.).

Notwithstanding the deference afforded to the legislature, the *Ayrton* court relied on *Pauli* as an articulation of the appropriate criteria to consider when exercising judicial discretion as to class action costs. The *Ayrton* court stated that a "purposive treatment of s. 37 of the *Class Proceedings Act*" is in keeping with Supreme Court of Canada class action jurisprudence.<sup>29</sup> Further, the Court of Appeal characterized the *Pauli* factors as "the basis for a court to order no costs in any event for a class action."<sup>30</sup>

The *Ayrton* court's recent endorsement of *Pauli* suggests that a new judicial standard, comprised of four criteria -- public interest, a novel point of law, test case, and access to justice -- now governs the judicial exercise of discretion to award costs in Alberta class action proceedings. That said, the long standing principle that "a judge exercising discretion must give some weight to *all legally relevant factors*" offers some support for the argument that the four criteria outlined in *Pauli* may not be an exhaustive list.<sup>31</sup> While this remains somewhat of an open question, at minimum, in determining whether to exercise discretion and make a "no costs" order, a court must consider whether a class action engages the public interest, raises a novel point of law, can be characterized as a test case, and / or raises access to justice concerns.

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<sup>29</sup> *Ayrton* at para. 36 (Alta. C.A.).

<sup>30</sup> *Ayrton* at para. 35 (Alta. C.A.).

<sup>31</sup> This principle was articulated in *Metz v. Weisgerber*, [2004] A.J. No. 510 (Alta. C.A.), a decision relied on in *Pauli v. Ace INA Insurance Co.*, [2004] A.J. No. 883 (Alta. C.A.).

## CONCLUSION

The class action costs regime in Alberta lacks a legislative grant of discretion as in the Ontario legislation but our courts appear to have found such jurisdiction nonetheless. Our courts have seized on the discretionary grant of power afforded by the *Rules of Court* and have created a judicially mandated standard for awarding costs in class action proceedings. This judicial standard, first enunciated in *Pauli* and recently endorsed in *Ayrton*, is similar to the legislated standard in Ontario. Therefore, while the Alberta legislature may not have intended that the *Class Proceedings Act* would "change the normal provisions for costs", the Alberta Court of Appeal certainly did.