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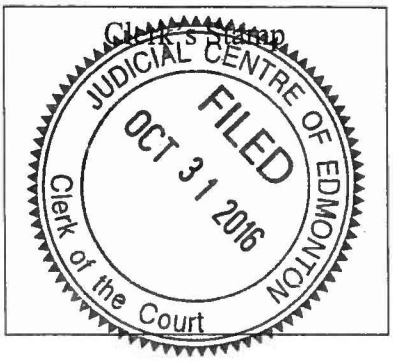

IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, C. T-8, AS AMENDED

IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985

APPLICANTS	**ROLAND TWINN, WALTER FELIX TWINN, BERTHA L'HIRONDELLE, CLARA MIDBO AND CATHERINE TWINN, as trustees for the 1985 Sawridge Trust**
DOCUMENT	**REPLY BRIEF OF CATHERINE TWINN FOR SPECIAL CHAMBERS CASE MANAGEMENT MEETING ~~ON OCTOBER 31, 2016~~**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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PART 1 INTRODUCTION

1. McLennan Ross LLP acts on behalf of Catherine Twinn in her capacity as a Trustee of the Sawridge Band Inter Vivos Settlement, April 15, 1985 (the "1985 Trust").

2. Under the *Trustee Act* (Alberta) all of the capacitated beneficiaries of the 1985 Trust must consent to any variation of trust.

Trustee Act, RSA 2000, c T-8 sections 42-43
[Authorities TAB 1]

PART 2 ADDING APPLICANT BENEFICIARIES

3. Catherine supports the submissions of Shelby Twinn, Deborah Serafinchon and Patrick Twinn (the "Applicant Beneficiaries") and agrees that they should be granted party status in this Action.

4. Given the significance of the relief sought in this Action and that it is the beneficiaries of the 1985 Trust who will be impacted by such a change, the principles of natural justice require that these Applicant Beneficiaries be given standing to have their interests represented.

1. In *Québec (Commission des relations ouvrières) v. Alliance des professeurs catholiques de Montreal* ([1953] 2 S.C.R. 140 at para 56), as translated in *T.W.U. v. Canadian Radio-Television & Telecommunications Commission*, this concept of how standing should be granted in the interest of natural justice was espoused by Rinfret C.J. He said:

> The principle that no one should be condemned or deprived of his rights without being heard, and above all without having received notice that his rights would be put at stake, is of a universal equity and it is not the silence of the law that should be invoked in order to deprive anyone of it. In my opinion, nothing less would be necessary than an express declaration of the Legislature in order to put aside this requirement which applies to all Courts and to all the

> bodies called upon to render a decision that might have the effect of annulling a right possessed by an individual.
>
> *T.W.U. v. Canadian Radio-Television & Telecommunications Commission*, [1995] 2 S.C.R. 781 at para 22 [Authorities TAB 2]

2. Further, and in addition to it being a fundamental right for these Applicant Beneficiaries to be able to speak to an application affecting their interests, the Applicant Beneficiaries can also provide the Court with assistance in adjudicating this matter. The Applicant Beneficiaries are able to provide information to the Court on the impact of the proposed variation to the beneficiary definition from the perspective of a beneficiary. The beneficiaries are what is critically important to this Action and hearing from the Applicant Beneficiaries will assist in focusing the Action. Catherine agrees with the submissions of the Applicant Beneficiaries that the most appropriate time for them to be added as parties is now. At present, the procedural history of the Action has primarily dealt with interlocutory applications that were of a procedural nature. The Action is now near a point where the substantive relief can be addressed. Adding the Applicant Beneficiaries as parties at this point is both practical and efficient.

3. In addition to the foregoing, case law supports that it should be the beneficiaries of a trust and not the trustees who bring an application for variation before the Court.

4. In *Re Druce's Settlement Trusts*, Russell, J. of the Chancery Division found that beneficiaries, and not the trustees, should be applying to vary the trusts. He said:

> The application was made not by a beneficiary but by the trustees. This is a disadvantage, particularly in a case such as the present, where the interests of the persons for whom the Court is concerned are not exactly the same as those of some respondent. It means that there is no counsel whose sole task is to protect and support those interests.
>
> [1962] 1 WLR 363 at page 370 [Authorities TAB 3]

5. Donovan Waters reiterates this sentiment in saying:

> Consequently, though the legislation enables anyone to put forward a proposed "arrangement", it should be the beneficiaries, not the trustees, who make the proposal.
>
> *Waters' Law of Trusts in Canada* chapter 27.IV at 3 [Authorities TAB 4]

6. The factual circumstances found in Re Druce's Settlment Trusts are similar to those in the present Action. While *Re Druce's Settlement Trusts* goes on to say that a trustee may make an application where there was no beneficiary willing to make the application, that is not the case here. The Trustees made the application in the first instance without first determining if a beneficiary would be willing to bring the application.

7. The Applicant Beneficiaries, aside from Patrick Twinn, will not necessarily be beneficiaries of the 1985 Trust if the definition is changed to band membership, as proposed by the majority of the trustees of the 1985 Trust. Given the serious ramifications of the variation sought by the trustees of the 1985 Trust, it is critical that the affected individuals be given the opportunity to advocate for and protect their interests.

8. As a result, it is critical that these beneficiaries have a voice, not only for themselves, but for other beneficiaries of the 1985 Trust who are in a like position to theirs. They alone can advise the Court as to:

   - how the change in beneficiary definition will impact them;
   - whether they have children who would be affected by the change; and
   - the definition of beneficiary which they believe will be beneficial to all beneficiaries.

9. As beneficiaries, the Applicant Beneficiaries can bring forward their respective positions while the Trustees must maintain a neutral stance in order to preserve their objectivity.

Waters' Law of Trusts in Canada chapter 27.IV at 3 [Authorities TAB 4]

PART 3 ADVANCE COSTS AND FULL INDEMNIFICATION

10. It follows that, if the Applicant Beneficiaries are appropriate Parties, their costs should be paid form the 1985 Trust.

11. If the Applicant Beneficiaries cannot proceed to protect the interests of the beneficiaries because they cannot afford to do so, the interests of some or all beneficiaries of the 1985 Trust may fall by the wayside. This cannot be a just effect.

12. The test for advance interim costs from *British Columbia (Minister of Forests) v. Okanagan Indian Band* should be applied to the Applicant Beneficiaries so they may participate in this litigation. The Applicant Beneficiaries are impecunious, have a case with merit and have special circumstances. As such, the Applicant Beneficiaries deserve to be awarded advance interim costs so they might be able to afford to litigate this issue of public interest.

British Columbia (Minister of Forests) v. Okanagan Indian Band (2003 SCC 71) at para 36 [Authorities TAB 5]

C. (L.) v. Alberta, 2016 ABQB 512 at paras 14-17 [Authorities TAB 6]

PART 4 CONCLUSION

13. Catherine concurs with the submission of the Applicant Beneficiaries and submits that the Applicant Beneficiaries are necessary parties to this Action.

14. It is appropriate and necessary to provide for indemnification of the Applicant Beneficiaries.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at the City of Edmonton, in the Province of Alberta, this 31st day of October, 2016.

McLennan Ross LLP

Per: _____

Karen Platten, Q.C.
Solicitor for Catherine Twinn, trustee of the 1985 Trust

Trustee Act, RSA 2000, c T-8

TRUSTEE ACT

Chapter T-8

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Definition

1 In this Act, "trustee" includes

(a) an executor, an administrator or a trustee of the estate of a person,

(b) a trustee whose trust arises by construction or implication of law as well as an express trustee, and

(c) several joint trustees.

RSA 2000 cT-8 s1;2004 cM-18.1 s22

Investments

Application

2(1) Sections 3 to 8 are subject to a contrary intention expressed in the instrument creating a trust.

court may order payment or delivery of the money or securities to the majority of the trustees for the purpose of payment into court.

(4) Every transfer, payment and delivery made pursuant to an order under subsection (3) is valid and takes effect as if it had been made on the authority or by the act of all the persons entitled to the money and securities so transferred, paid or delivered.

RSA 1980 cT-10 s40

Personal liability

41 If in any proceeding affecting trustees or trust property it appears to the court

(a) that a trustee, whether appointed by the court or by an instrument in writing or otherwise, or that any person who in law may be held to be fiduciarily responsible as a trustee, is or might be personally liable for any breach, whether the transaction alleged or found to be a breach of trust occurred before or after the passing of this Act, but

(b) that the trustee has acted honestly and reasonably and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which the trustee committed that breach,

then the court may relieve the trustee either wholly or partly from personal liability for the breach of trust.

RSA 1980 cT-10 s41

Variation of Trusts

Variation of trusts

42(1) In this section, "beneficiary", "beneficiaries", "person" or "persons" includes charitable purposes and charitable institutions.

(2) Subject to any trust terms reserving a power to any person or persons to revoke or in any way vary the trust or trusts, a trust arising before or after the commencement of this section, whatever the nature of the property involved and whether arising by will, deed or other disposition, shall not be varied or terminated before the expiration of the period of its natural duration as determined by the terms of the trust, except with the approval of the Court of Queen's Bench.

(3) Without limiting the generality of subsection (2), the prohibition contained in subsection (2) applies to

(a) any interest under a trust where the transfer or payment of the capital or of the income, including rents and profits

(i) is postponed to the attainment by the beneficiary or beneficiaries of a stated age or stated ages,

(ii) is postponed to the occurrence of a stated date or time or the passage of a stated period of time,

(iii) is to be made by instalments, or

(iv) is subject to a discretion to be exercised during any period by executors and trustees, or by trustees, as to the person or persons who may be paid or may receive the capital or income, including rents and profits, or as to

the time or times at which or the manner in which payments or transfers of capital or income may be made,

and

(b) any variation or termination of the trust or trusts

(i) by merger, however occurring;

(ii) by consent of all the beneficiaries;

(iii) by any beneficiary's renunciation of the beneficiary's interest so as to cause an acceleration of remainder or reversionary interests.

(4) The approval of the Court under subsection (2) of a proposed arrangement shall be by means of an order approving

(a) the variation or revocation of the whole or any part of the trust or trusts,

(b) the resettling of any interest under a trust, or

(c) the enlargement of the powers of the trustees to manage or administer any of the property subject to the trusts.

(5) In approving any proposed arrangement, the Court may consent to the arrangement on behalf of

(a) any person who has, directly or indirectly, an interest, whether vested or contingent, under the trust and who by reason of minority or other incapacity is incapable of consenting,

(b) any person, whether ascertained or not, who may become entitled directly or indirectly to an interest under the trusts as being, at a future date or on the happening of a future event, a person of any specified description or a member of any specified class of persons,

(c) any person who after reasonable inquiry cannot be located, or

(d) any person in respect of any interest of the person's that may arise by reason of any discretionary power given to anyone on the failure or determination of any existing interest that has not failed or determined.

(6) Before a proposed arrangement is submitted to the Court for approval it must have the consent in writing of all other persons who are beneficially interested under the trust and who are capable of consenting to it.

(7) The Court shall not approve an arrangement unless it is satisfied that the carrying out of it appears to be for the benefit of each person on behalf of whom the Court may consent under subsection (5), and that in all the circumstances at the time of the application to the Court the arrangement appears otherwise to be of a justifiable character.

(8) When an instrument creates a general power of appointment exercisable by deed, the donee of the power may not appoint to himself or herself unless the instrument shows an intention that he or she may so appoint.

(9) When a will or other testamentary instrument contains no trust, but the Court is satisfied that, having regard to the circumstances and the terms of the gift or devise, it would be for the benefit of a minor or other incapacitated beneficiary that the Court approve an arrangement whereby the property or interest taken by that beneficiary under the will or testamentary instrument is held on trusts during the period of incapacity, the Court has jurisdiction under this section to approve that arrangement.

RSA 2000 cT-8 s42;2004 cP-44.1 s52

Application to court for advice

43(1) Any trustee may apply in court or in chambers in the manner prescribed by the rules of court for the opinion, advice or direction of the Court of Queen's Bench on any question respecting the management or administration of the trust property.

(2) The trustee acting on the opinion, advice or direction given by the Court is deemed, so far as regards the trustee's own responsibility, to have discharged the trustee's duty as trustee in respect of the subject-matter of the opinion, advice or direction.

(3) Subsection (2) does not extend to indemnify a trustee in respect of any act done in accordance with the opinion, advice or direction of the Court if the trustee has been guilty of any fraud or wilful concealment or misrepresentation in obtaining that opinion, advice or direction.

RSA 1980 cT-10 s43

Allowances to Trustees, etc.

Allowances

44(1) A trustee under a trust, however created, is entitled to any fair and reasonable allowance for the trustee's care, pains and trouble and the trustee's time expended in and about the trust estate that may be allowed by the Court of Queen's Bench or by any clerk of those courts to whom the matter is referred.

(2) A judge of the Court of Queen's Bench may on application to the judge for the purpose settle the amount of the compensation although the trust estate is not before the Court in any action.

(3) Compensation may be allowed in the case of any trust created before as well as after the commencement of this Act.

(4) Nothing in this section applies to any case in which the allowance is fixed by the instrument creating the trust.

RSA 2000 cT-8 s44;RSA 2000 c10(Supp) s59

Professional fees

45 In addition to any allowance, a trustee who is a barrister and solicitor is also entitled to profit costs for any professional work done in connection with the trust.

RSA 1980 cT-10 s45

Judicial Trustees

Judicial trust

46(1) Application may be made to the Court of Queen's Bench

(a) by or on behalf of the person creating or intending to create a trust,

(b) by or on behalf of a trustee or beneficiary, or

1995 CarswellNat 969
Supreme Court of Canada

T.W.U. v. Canadian Radio-Television & Telecommunications Commission

1995 CarswellNat 706, 1995 CarswellNat 969, [1995] 2 S.C.R. 781, [1995] S.C.J. No. 55, 125 D.L.R. (4th) 471, 183 N.R. 161, 31 Admin. L.R. (2d) 230, 55 A.C.W.S. (3d) 890, J.E. 95-1353

TELECOMMUNICATIONS WORKERS UNION v. CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION, SHAW CABLE SYSTEMS (B.C.) LTD. and BRITISH COLUMBIA TELEPHONE COMPANY

Lamer C.J.C., La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Heard: January 23, 1995
Judgment: June 22, 1995
Docket: Doc. 23778

Counsel: *Morley D. Shortt, Q.C.*, and *Donald Bobert*, for appellant
Thomas G. Heintzman, Q.C. and *Susan L. Gratton*, for respondent Shaw Cable Systems (B.C.) Ltd.
Avrum Cohen, Allan Rosenzveig and *Carolyn Pinsky*, for respondent CRTC
Jack Giles, Q.C., Judy Jansen and *Alison Narod*, for respondent British Columbia Telephone Co.

Subject: Public

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Administrative law

III Requirements of natural justice
III.1 Right to hearing
III.1.c Procedural rights at hearing
III.1.c.i Opportunity to respond and make submissions

Headnote

Administrative Law --- Requirements of natural justice — Right to hearing — Procedural rights at hearing — Opportunity to respond and make submissions

Requirements of natural justice — Right to hearing — Procedural rights at hearing — Opportunity to respond and make submission — Application concerning installation of telecommunications structures — Union not given notice of hearing — Collective agreement containing work assignment clause — Union's interest in proceedings being indirect — Board not required to notify union of proceedings.

BC Tel provided telephone service in British Columbia. Its support structure consisted of poles and aerial cables as well as buried conduit. Shaw provided cable television service through cables.

Certain BC Tel employees were represented by the TWU. The collective agreements at the material times contained a clause addressing work assignments with respect to maintenance, repair, alteration or construction of the telephone plant.

The CRTC regulated certain aspects of BC Tel's and cable companies' operations. The CRTC decided in 1978 that BC Tel's proposal that its employees perform the installation of all cable company facilities on BC Tel's support structure, with the cable companies paying BC Tel for the work according to a tariff, was not justified. This decision was intended to provide guidance for negotiations over the content of the support structure agreements between BC Tel and the cable companies.

Following negotiations between BC Tel and the cable companies, and another CRTC decision, a support structure agreement submitted by the parties was approved by the CRTC. The agreement provided that cable companies could install their own cable facilities on BC Tel's support structure provided that the installation procedures did not include the "intentional dislocation" of BC Tel property. TWU initiated labour arbitration proceedings after a cable company did installation work. The labour arbitration board held that the cable company had installed its coaxial cable in such a manner that it had to do with the maintenance, repair and construction of the BC Tel plant. It held further that the installation, executed with the approval of BC Tel, did have the effect of altering the plant and to that extent contravened the collective agreement. The labour arbitration board stated that the cable companies could use their own contractors to perform installation work if BC Tel specified reasonable terms based on its collective agreement obligations.

BC Tel subsequently refused to allow cable companies to perform installation work. The Canadian Cable Television Association ("CCTA") complained to the CRTC and the TWU intervened in the dispute. In 1987, the CRTC ordered BC Tel to permit cable licensees to do the spinning work required to install their coaxial cable on BC Tel support structures in accordance with the terms of the agreement. BC Tel proceeded to allow cable companies to install their own cables on its support structure. TWU filed another grievance. This time, a labour arbitration board considered two installation activities, one of which was the spinning of aerial cables. In 1991, it found that BC Tel was in violation of the collective agreement when it permitted cable companies to perform these installation activities.

BC Tel submitted a revised agreement to the CRTC for approval. Shaw applied to the CRTC for a decision requiring BC Tel to permit Shaw or its contractors to install cable as provided for in the existing agreement. The CRTC directed BC Tel to comply with its obligations to permit Shaw and other cable companies to install their own cable on BC Tel's support structure. The CRTC requested written submissions from CCTA and invited them from BC Tel on the proposed agreement.

TWU applied for judicial review arguing that it had an interest in the decision and that it was entitled to notice of the proceedings leading to the decision. The Federal Court of Appeal dismissed the application for judicial review. TWU appealed.

Held:

The appeal was dismissed.

Per L'Heureux-Dubé J. (La Forest, Gonthier, McLachlin, Iacobucci and Major JJ. concurring)

The audi alteram partem rule did not require that TWU be provided with notice of the CRTC hearing. TWU was not a party, and it did not have a direct interest in the proceedings before the tribunal. Its interest was purely indirect and the effect of the CRTC decision on it was purely indirect.

The CRTC decision had to do with questions of telecommunications policy. The purpose behind the decision was not related to the work jurisdiction of TWU. TWU had no relevant interest to represent before the CRTC.

Even if the audi alteram partem rule would normally have required the CRTC to notify TWU of the proceedings, a statutory provision in force at the relevant time effectively relieved the CRTC of this obligation. Although that provision placed the responsibility on BC Tel to notify certain persons, it should also be read as shielding CRTC decisions from challenge on the grounds that a regulatee failed to notify its employees of the proceedings. The employees could instead have pursued in such circumstances, the remedy of applying for a re-hearing under the statutory provisions then applicable.

It was not established that there was a CRTC policy of deference to arbitration board decisions. It was improper for the CRTC to adopt such a general policy because this was an improper delegation or fettering of its discretionary powers.

Per Sopinka J. (dissenting) (Lamer C.J.C., and Cory J. concurring)

The CRTC decision would have a substantial impact on the work jurisdiction of TWU, directly affecting the rights of the union and its members. The question before it concerned who had the right to perform the work attaching equipment to the support structures belonging to BC Tel. In the unique circumstances of this case, it was unfair not to provide notice of the proceedings to TWU.

The interest at stake was not simply a contingent one, flowing solely from the effect of the decision on BC Tel. The central focus of the CRTC's ruling concerned the subject matter of the collective agreement, and the decision would have a direct bearing on the viability of a specific provision of the collective agreement. No practical hardship would have been created if the notice requirement had been imposed on the CRTC. The rules of natural justice required TWU to be notified and provided with an opportunity to be heard.

With respect to the statutory provisions then in force, the obligations imposed on parties by the *National Telecommunications Powers and Procedures Act* did not abrogate the CRTC's duty to fulfil the requirements of natural justice. There must be clear statutory language in order to detract from ordinary principles of procedural fairness. Here, the statutory language did not relieve the CRTC of its duty to provide notice to TWU in accordance with the principle of audi alteram partem.

Appeal from judgment of Federal Court of Appeal dismissing application for judicial review of decision of Canadian Radio-television and Telecommunications Commission.

***Sopinka J.* (dissenting) (*Lamer C.J.C.* and *Cory J.* concurring):**

1 The issue raised on this appeal is whether the Canadian Radio-television and Telecommunications Commission ("CRTC") violated the principles of natural justice by failing to provide formal notice to the

Telecommunications Workers Union ("TWU") regarding the application which resulted in Telecom Letter Decision CRTC 92-4 ("Decision 92-4"). Those proceedings involved a dispute between Shaw Cable Systems (B.C.) Ltd. ("Shaw Cable") and the British Columbia Telephone Company ("BC Tel") concerning who was entitled to perform the installation work on the support structures belonging to BC Tel.

2 TWU represents the bargaining unit for approximately 12,000 employees of BC Tel. The collective agreement between TWU and BC Tel stipulates that any maintenance, repair or construction of the support structure must be performed exclusively by members of TWU. Therefore, it is apparent that Decision 92-4 would necessarily impact upon the work jurisdiction of the employees represented by TWU. In my view, in light of the unique circumstances of this case, the failure to provide TWU with notice of the proceedings before the CRTC breached the requirements of natural justice.

3 As L'Heureux-Dubé J. has noted, the factual context and the history of the proceedings which gave rise to the present appeal have been fully set out in her reasons in the companion case, *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.* (No. 23717) [reported at (1995), 31 Admin. L.R. (2d) 169, ante]. I do not find it necessary to repeat them here. However, in light of the fact that the principles of natural justice, including the audi alteram partem rule, are dependent on the particular circumstances of the case, it will be necessary to emphasize certain facts in the course of my reasons, in order to explain my conclusion that TWU was entitled to notice of the proceedings between Shaw Cable and BC Tel.

I. Relevant Statutory Provisions

4 For convenience, I set out the relevant statutory provisions below:

National Telecommunications Powers and Procedures Act, R.S.C. 1985, c. N-20

> 66. The Commission may review, rescind, change, alter or vary any order or decision made by it or may re-hear any application before deciding it.
>
> 72. Every company shall, as soon as possible after receiving or being served with any regulation, order, direction, decision, notice, report or other document of the Minister or the Commission, or the inspecting engineer, notify each of its officers and servants performing duties that are or may be affected thereby by delivering a copy to them or by posting a copy in some place where their work or duties, or some of them, are to be performed.
>
> 74. (1) Subject to this Act, when the Commission is authorized to hear an application, complaint or dispute, or make any order, on notice to the parties interested, it may, on the ground of urgency, or for other reason appearing to the Commission to be sufficient, notwithstanding any want of or insufficiency in the notice, make the like order or decision in the matter as if due notice had been given to all parties, and the order or decision is as valid and takes effect in all respects as if made on due notice.
>
> (2) Any company or person entitled to notice and not sufficiently notified may, at any time within ten days after becoming aware of an order or decision made under subsection (1), or within such further time as the Commission may allow, apply to the Commission to vary, amend or rescind the order or decision, and the Commission shall thereupon, on such notice to other parties interested as it may in its discretion think desirable, hear the application, and either amend, alter or rescind the order or decision, or dismiss the application, as may seem to it just and right.

II. Issue

5 Did the CRTC exceed its jurisdiction in failing to provide notice to TWU of the application and proceedings which resulted in Decision 92-4?

III. Analysis

A. The Requirements of Natural Justice

6 The jurisprudence of this court has made it clear that the requirements of natural justice depend on the circumstances of the case, the nature of the inquiry, the subject matter being dealt with and the statutory provisions under which the tribunal is acting: *Inuit Tapirisat of Canada v. Canada (Attorney General)*, [1980] 2 S.C.R. 735, and *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, at p. 1191-92. In each case it must be determined whether the party claiming the right to have been given notice and an opportunity to be heard had a sufficient interest in the proceedings such that notice was required by the audi alteram partem principle.

7 In her reasons, my colleague suggests that TWU's interest in the proceedings before the CRTC was merely indirect as Decision 92-4 was addressing telecommunications policy and not labour relations. With respect, the fact that the CRTC was specifically concerned with telecommunications policy in accordance with its mandate does not detract from the fact that its decision would have a substantial impact on the work jurisdiction of TWU, thereby directly affecting the rights of the union and its members. The very question before the CRTC concerned who had the right to perform the work on the support structures belonging to BC Tel. The CRTC was well aware of the impact that its decision would have on TWU. Although the purpose behind Decision 92-4 may not have been related to the "work jurisdiction" of TWU and the CRTC may have been seeking to avoid entering the realm of labour relations, this is no answer to a violation of natural justice where a decision could potentially override the union's rights.

8 The principal, if not the sole, reason for BC Tel's application to the CRTC was to determine who could do the work in light of the arbitration award of July 19, 1991 (the "Glass Award") involving TWU. This is what prompted BC Tel to submit a revised Support Structure Agreement to the CRTC for approval, in October 1991. Before the CRTC, BC Tel argued that the Glass Award made it impossible for the company to allow anyone other than its own employees to attach equipment on its support structures. Shaw Cable opposed this position. In my view, it was clearly unfair not to provide notice of the proceedings in these circumstances.

9 To support her conclusion, L'Heureux-Dubé J. relies on the decision in *Canadian Transit Co. v. Canada (Public Service Staff Relations Board)*, [1989] 3 F.C. 611 (C.A.), for the proposition that, in order to be entitled to notice, one's interest must not merely be affected by virtue of a contractual relationship with one of the regulated parties immediately involved in the proceedings. Generally, I am in agreement that it would potentially be unduly onerous on regulatory agencies if notice had to be provided to all individuals having contractual relations with a regulated party. As my colleague observes, there are a myriad of decisions of a regulatory agency which could have an indirect impact on individuals simply because they are privy to a contract with the regulated party. For example, any decision of the CRTC which impacts on the financial status of a party falling within its regulatory jurisdiction will likely also incidentally affect those with whom that party contracts. Surely, this alone is an insufficient contingent interest to warrant the existence of a duty to provide notice of the proceedings before the administrative tribunal.

10 However, in my view, there are special circumstances which arise in this case such that the audi alteram partem rule mandates that formal notice be given to TWU. The central focus of the ruling of the CRTC specifically concerns the very subject matter of the contract between the BC Tel and TWU. Thus, the interest at stake is not simply a contingent one flowing solely from the effect of the decision on BC Tel. As I have

stated, the question the CRTC had to address was whether Shaw Cable and other cable companies were entitled to do the work on BC Tel's support structures. This is precisely what the Glass Award precluded as a result of the interpretation of Article 3(1) of the collective agreement. In my view, the passage cited by L'Heureux-Dubé J. from the *Canadian Transit* case was not intended to apply to situations where the administrative tribunal must actually address a key aspect of the contract directly pertaining to the rights of a third party. The CRTC was well aware of BC Tel's position that the arbitration award prevented it from allowing anyone other than members of the TWU to attach equipment to its facilities. The decision of the CRTC would have a direct bearing on the viability of a specific provision in the collective agreement. In my view, in such a situation it cannot be contended that the interest was indirect merely because it is derived from the contract.

11 Furthermore, the practical problems that might be associated with any duty to notify individuals in a contractual relation with a regulated party are absent in this case. In fact, following the arbitration award of January 25, 1983 (the "Williams Award"), when the Canadian Cable Television Association ("CCTA") applied to the CRTC, in 1987, for an order requiring BC Tel to permit cable licensees, including Shaw Cable, to install their own coaxial cables on BC Tel's support structures, the CRTC permitted TWU to participate. The CRTC knew that TWU's contributions could be very helpful. In a letter decision dated July 28, 1987, the CRTC wrote the following:

> On 2 April 1987, the TWU wrote to the Commission advising of its interest in the CCTA's application. By letter dated 27 April 1987, *the Commission indicated that it could benefit from the views of the TWU and set out the procedure to be followed by the TWU, B.C. Tel and the CCTA in addressing the issues.* [Emphasis added].

12 Given the fact that TWU was a party to the proceedings in 1987, the CRTC would have been aware that the interests of the union were substantially and equally at stake in the application leading to Decision 92-4 since the question to be considered was essentially identical. The only difference was that, in the interim, TWU had succeeded in obtaining a second arbitration award in its favour, which effectively rendered it impossible for BC Tel to comply with the CRTC's previous order in 1987. As an aside, it should be noted that Shaw Cable was given notice of the Glass arbitration proceedings and was invited to participate, although they declined. This is also indicative of the interrelation between the issues and interests at stake in the proceedings before the labour arbitration panels and the CRTC.

13 It was readily apparent that any order the CRTC made which conflicted with the Glass Award would directly affect the union's rights. The whole basis for BC Tel's application (and therefore Shaw Cable's application in response) was the arbitration awards. Thus, in my opinion, there would have been no practical hardship created whatsoever in requiring the CRTC to give notice to TWU in the present circumstances.

14 The decision of the Federal Court of Appeal in *Canadian Transit*, supra, supports my conclusion that formal notice was appropriate and necessary in these circumstances. In that case, customs employees requested an enquiry by the Public Service Staff Relations Board in order to determine whether working conditions on a bridge between Windsor, Ontario, and Detroit, Michigan, were unsafe. The bridge was owned and operated by the Canadian Transit Co. Pursuant to the *Customs Act*, R.S.C. 1985 (2nd Supp.), c. 1, the owner of the bridge would be responsible for the cost of any repairs that had to be effected in order to ensure that safety requirements were met. The Board held that the conditions on the bridge were unsafe and ordered the government employer to make the necessary safety changes. As a result, Canadian Transit Co. would be responsible for these costs.

15 Canadian Transit Co. sought judicial review of the Board's decision on the ground that it did not receive notice of the proceedings and was not afforded an opportunity to participate. The Federal Court of Appeal unanimously allowed the application and remitted the matter back for a re-hearing at which

Canadian Transit Co. would be allowed standing. Marceau J.A., writing the majority reasons, observed that the Board had no authority over Canadian Transit Co. since it was not the employer in the context of those proceedings. Nonetheless, the implementation of the Board's decision would directly and necessarily affect the rights of the company. Similarly, in concurring reasons, MacGuigan J.A. stated that, although the Board's order was directed only to the employer, "the consequences for the applicant were immediate" (p. 618).

16 In the case at bar, just as in the *Canadian Transit* case, the administrative body was clearly aware of the applicant's interest. To borrow the words of MacGuigan J.A., "this real interest of the applicant was in a sufficiently direct relationship to the subject-matter before the Board that the applicant was entitled to notice of the hearing ...and an adequate opportunity to present its case" (p. 624).

17 In my view, all of the foregoing suggests that the rules of natural justice required TWU to be notified and provided with an opportunity to be heard. However, it remains to be examined whether there are any provisions within the statutory scheme governing the powers of the CRTC which would alter this conclusion.

B. The Effect of the Statutory Scheme

18 In my colleague's reasons, L'Heureux-Dubé J. argues that even if the rules of natural justice would normally have required the CRTC to furnish notice of the proceedings to TWU, s. 72 of the *National Telecommunications Powers and Procedures Act*, R.S.C. 1985, c. N-20 ("NTPPA"), relieves the CRTC of that obligation. That provision places a duty on every company subject to a proceeding before the CRTC to notify any of its officers and servants that may be affected by the outcome of the hearing. Therefore, in this case, BC Tel had a duty under s. 72 to notify TWU. With respect, I cannot agree that a provision which obliges a party to a proceeding to provide notice can absolve an administrative tribunal from its duty to comply with the dictates of natural justice. The effect of this would be that a failure on the part of a regulated party to give notice to another interested party in accordance with s. 72 could result in a denial of natural justice without recourse. This is an extraordinary proposition. Rules of procedure frequently leave it to the parties to give notice, but failure to do so is a defect in the proceedings which entitles an aggrieved party to relief irrespective of the origin of responsibility for the default.

19 . It is true that, generally, the employer is in the best situation to know whether the employees' interests are at stake. However, in circumstances where, to the knowledge of the CRTC, the officers or servants of a party will be directly affected by the proceedings, nothing in s. 72 abrogates the CRTC's duty to fulfil the requirements of natural justice. Therefore, in the special circumstances of this case, where TWU had been a participant in the 1987 proceedings and the principal reason for the application was to consider who was to perform the work on the support structures in light of Article 3(1) of the collective agreement, the rules of natural justice required the CRTC to ensure notice was given, regardless of the employer's obligations under the NTPPA. Procedural fairness is the right of the interested parties and the duty of the administrative tribunal. This does not change where an additional notice obligation is placed on one of the regulated parties.

20 My colleague also refers to s. 66 NTPPA as providing the appropriate remedy for employees who have not been given notice. That section grants the CRTC the power to vary any order or re-hear any application. However, it must be observed that the language used in s. 66 is permissive. In other words, the CRTC has the discretion to vary or re-hear the application. The provision does not provide a right of appeal nor a right to have the decision of the CRTC reviewed on the grounds of a denial of natural justice. Where natural justice requires that a party be given notice and a tribunal fails to provide such notice, the aggrieved party is entitled to judicial review of the decision. It is not an adequate alternative remedy to request that the tribunal, in its discretion, re-hear the application after it has already decided it.

21 Similarly, contrary to Shaw Cable's argument, I do not believe that s. 74 NTPPA is of any assistance in the present appeal. Clearly, that provision applies where, for reasons of urgency or other sufficient reason, the CRTC decides to proceed with a matter without notice. In that case, pursuant to s. 74(2), a party otherwise normally entitled to notice may apply to the CRTC to have the decision varied or amended. However, it is apparent that s. 74 contemplates a situation where natural justice entitles a party to notice and the CRTC, having addressed its mind to the issue, proceeds without notice, in any event, for reasons it deems sufficient. This did not occur in the present case. The CRTC simply neglected to provide any notice to TWU, apparently believing that it was not required. There is absolutely no indication that the CRTC actually decided to proceed with the application without notifying TWU based on any "ground of urgency, or for other reason." Thus, in my view, s. 74 is inapplicable in the instant case.

22 While it is true that the rules of natural justice are dependent on the statutory scheme governing the administrative tribunal, there must be clear statutory language in order to detract from the ordinary principles of procedural fairness. I find the words of Rinfret C.J. in *Québec (Commission des relations ouvrières) v. Alliance des professeurs catholiques de Montreal*, [1953] 2 S.C.R. 140, [1953] 4 D.L.R. 161, at p. 174 D.L.R., to be apposite in the present context:

> [TRANSLATION]
>
> The principle that no one should be condemned or deprived of his rights without being heard, and above all without having received notice that his rights would be put at stake, is of a universal equity and it is not the silence of the law that should be invoked in order to deprive anyone of it. *In my opinion, nothing less would be necessary than an express declaration of the Legislature in order to put aside this requirement which applies to all Courts and to all the bodies called upon to render a decision that might have the effect of annulling a right possessed by an individual.* [Emphasis added.]

This principle applies not only to the entitlement to natural justice but to the right to judicial review when natural justice is denied.

23 In this case, it cannot be said that any of the statutory language employed relieves the CRTC of its duty to provide notice to TWU in accordance with the principle of audi alteram partem. Nor does the NTPPA remove recourse to the courts when there is a failure to comply with the dictates of procedural fairness.

24 It is also worth pointing out that in the companion case, this court has concluded that, in the event of a conflict, the decision of the CRTC must take precedence over that of the arbitration board. For this reason, it becomes all the more important for TWU to be afforded an opportunity to be heard by the CRTC in order to attempt to preserve its rights.

25 As a result, I am of the view that the failure to notify TWU of the proceedings before the CRTC amounted to a denial of natural justice. While notice need not be given to every union which has a collective agreement with a company that is regulated by the CRTC, I believe that the unique circumstances of this case, which I have discussed above, required that notice be furnished to TWU.

IV. Disposition

26 For all of the foregoing reasons, I would allow the appeal and order the CRTC to re-consider its decision after affording TWU an opportunity to be heard.

***L'Heureux-Dubé J. (La Forest, Gonthier, McLachlin, Iacobucci* and *Major JJ.* concurring:**

27 This case was heard at the same time as the companion case of *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.* (No. 23717) [reported at (1995), 31 Admin. L.R. (2d) 169, ante], and arises out

of the same factual circumstances. *British Columbia Telephone* concerns a statutory appeal by the British Columbia Telephone Company ("BC Tel") of Telecom Letter Decision CRTC 92-4 ("Decision 92-4"). This appeal, on the other hand, concerns an application for judicial review by the Telecommunications Workers Union ("TWU") of the same letter decision. Decision 92-4 and the factual circumstances giving rise to this appeal are both described in detail in my reasons in *British Columbia Telephone*.

28 As regards the procedural history of the case at hand, the TWU's application for judicial review was first heard by the Federal Court of Appeal and was rejected: [1993] F.C.J. No. 444 (QL) [unreported]. In brief reasons, Mahoney J.A., writing on behalf of a unanimous Court of Appeal, noted that the issues raised by the TWU's application for judicial review were, with one exception, substantially identical to those raised by BC Tel in its statutory appeal from Decision 92-4 (which forms the subject matter of *British Columbia Telephone*). Mahoney J.A. then went on to state [at p. 2]:

> The ground for this application that is different from those raised on the [statutory] appeal is that TWU was denied natural justice by the CRTC [Canadian Radio-television and Telecommunications Commission] because it was not given notice of the applications which led to decision 92-4.
>
> In the [statutory] appeal, it has been decided that the CRTC had not the jurisdiction to order BCTel to violate the collective agreement by doing again that which had been conclusively determined to be a violation by an arbitration board constituted as required by the *Canada Labour Code*. It seems to me that the corollary is that TWU was not entitled to notice of the applications since the CRTC had not the jurisdiction to deprive TWU or its members of any rights they had under the collective agreement. I would, for that reason, and because allowing the [statutory] appeal has rendered it otherwise moot, dismiss this application for judicial review.

It is from this decision that the appellant appeals to this court.

29 While the appellant raised several grounds in its initial application for judicial review before the Federal Court of Appeal, only two of these grounds are pursued in the appeal to this court of the Federal Court of Appeal's decision. First, the TWU argues that the CRTC's failure to provide it with notice of the proceedings which resulted in Decision 92-4 deprived the CRTC of its jurisdiction and that as such Decision 92-4 is invalid. Second, the TWU claims that Decision 92-4 should be overturned on the ground that the CRTC erred in law and exceeded its jurisdiction by allegedly failing to follow its established policy of deferring to decisions of arbitration boards constituted by BC Tel and the TWU with respect to the work jurisdiction of BC Tel employees.

Failure to Provide Notice

30 The audi alteram partem rule, which is a component of the principles of natural justice and of procedural fairness, requires that a person who is a party to proceedings before a tribunal be informed of the proceedings and provided with an opportunity to be heard by the tribunal.

31 The appellant TWU argues that it has an interest in Decision 92-4 and that consequently it was entitled to the aforementioned procedural protections as regards that decision. Specifically, the TWU argues that Decision 92-4 will have an effect on the work jurisdiction given to members of the TWU. Consequently, the TWU argues that it was entitled to notice of the proceedings leading to the decision and that in the absence thereof the decision is invalid.

32 The respondent Shaw Cable Systems (B.C.) Ltd., on the other hand, contends that the TWU was not entitled to notice because its interest in the CRTC proceedings in question was purely indirect. In this respect, the respondent referred to the comments of Marceau J.A. in *Canadian Transit Co. v. Canada (Public Service Staff Relations Board)*, [1989] 3 F.C. 611 (C.A.), at p. 614:

> It is clear to me that mere interest in the eventual outcome of a proceeding before a tribunal, whether financial or otherwise, is not in itself sufficient to give an individual a right to participate therein. The demands of natural justice and procedural fairness certainly do not require so much and in any event it would be impossible in practice to go that far. In my judgment, to be among the interested parties that a tribunal ought to involve in a proceeding before it to satisfy the requirements of the *audi alteram partem* principle, an individual must be directly and necessarily affected by the decision to be made. *His interest must not be merely indirect or contingent, as it is when the decision may reach him only through an intermediate conduit alien to the preoccupation of the tribunal, such as a contractual relationship with one of the parties immediately involved.* [Emphasis added].

33 In general, I agree with the submissions of the respondent. In my view, the TWU's interest in the proceedings before the CRTC was purely indirect. The CRTC decision concerned questions of telecommunication policy. The CRTC was required to decide on the best way to regulate a monopoly telephone company in order to preserve the public interest. The purpose behind the CRTC decision was totally unrelated to the "work jurisdiction" of the TWU. In fact, such a consideration would have been irrelevant to the CRTC decision. Consequently, the TWU had no relevant interest to represent before the CRTC. While the TWU may have been affected by the CRTC decision, the effect of this decision on the TWU was purely indirect. Accordingly, I conclude that audi alteram partem did not require that the TWU be provided with notice of the CRTC hearing. The TWU was not a party nor did it have a direct interest in the proceedings before the tribunal.

34 In this respect, it is important to note that a finding in the case at hand that the TWU was entitled to notice would have grave consequences that could paralyse regulatory agencies. Effectively, it would mean that all individuals with contractual relations with a regulatee would have to be given notice of regulatory proceedings concerning that regulatee if such proceedings were likely to effect, even indirectly, the person in question. Given the wide scope of many regulatory agencies, their decisions are likely to have an indirect effect on a large number of individuals in contractual relations with the regulatee. As a result, all such parties would have to be provided with notice of the regulatory proceedings. This is particularly problematic in light of the extreme difficulty of ascertaining exactly who these parties are in advance of the hearing and the possibility that, in the absence of notice, these parties would be able to challenge the legality of the regulatory decision. This could result in an endless series of challenges that would effectively paralyse regulatory agencies. Accordingly, the audi alteram partem rule should not be interpreted as requiring that notice be provided to parties indirectly affected by regulatory proceedings.

35 However, even if I am wrong and the audi alteram partem rule would normally have required the CRTC to notify the TWU of the proceedings in question, in my view, s. 72 of the *National Telecommunications Powers and Procedures Act*, R.S.C. 1985, c. N-20 ("NTPPA"), effectively relieves the CRTC of this obligation. Section 72 NTPPA read as follows at the time of the issuance of Decision 92-4:

> 72. Every company shall, as soon as possible after receiving or being served with any regulation, order, direction, decision, notice, report or other document of the Minister or the Commission, or the inspecting engineer, notify each of its officers and servants performing duties that are or may be affected thereby by delivering a copy to them or by posting a copy in some place where their work or duties, or some of them are to be performed.

The effect of this section is to relieve the CRTC of any responsibility to notify the TWU of the proceedings in question. Instead, s. 72 places this responsibility on BC Tel. However, this shift of responsibilitywould be meaningless if a CRTC decision could still be challenged on the grounds that the TWU was not notified of the proceedings. In my view, s. 72 should therefore be read as shielding CRTC decisions from challenge on the grounds that a regulatee (i.e., BC Tel) failed to notify its employees of the proceedings. Instead, in such

circumstances, the appropriate remedy would be for the employees to apply to the CRTC for a re-hearing as permitted by the then applicable s. 66 NTPPA:

> 66. The Commission may review, rescind, change, alter or vary any order or decision made by it or may re-hear any application before deciding it.

As a result, the remedy available to employees would be equivalent to that available to a party provided with inadequate notice by the CRTC under s. 74 NTPPA. At the time of the events giving rise to this proceeding, s. 74 NTPPA read as follows:

> 74. (1) Subject to this Act, when the Commission is authorized to hear an application, complaint or dispute, or make any order, on notice to the parties interested, it may, on the ground of urgency, or for other reason appearing to the Commission to be sufficient, notwithstanding any want of or insufficiency in the notice, make the like order or decision in the matter as if due notice had been given to all parties, and the order or decision is as valid and takes effect in all respect as if made on due notice.
>
> (2) Any company or person entitled to notice and not sufficiently notified may, at any time within ten days after becoming aware of an order or decision made under subsection (1), or within such further time as the Commission may allow, apply to the Commission to vary, amend or rescind the order or decision, and the Commission shall thereupon, on such notice to other parties interested as it may in its discretion think desirable, hear the application, and either amend, alter or rescind the order or decision, or dismiss the application, as may seem to it just and right.

36 For all of the above reasons, I reject this ground of appeal.

Failure to Follow CRTC Policy

37 The TWU's second ground of appeal is that the CRTC erred in law and exceeded its jurisdiction by failing to follow an alleged policy of deferring to the decisions of arbitration boards constituted by the parties in respect of this matter.

38 In my view, this ground of appeal is entirely without merit. First, the CRTC has never adopted a policy of deferring to such arbitration board decisions. The TWU refers to passages such as the following as supporting the existence of such a policy:

> B.C. Tel argued that Article XXI of its collective agreement with the Telecommunications Workers Union precluded it from contracting this work out, but the clause in question does not appear to prohibit the Company from permitting third parties from installing their own facilities at their own expense. [Telecom Decision CRTC 78-6, July 28, 1978, at p. 27.]
>
> In the absence of an arbitration board ruling that the collective agreement would not permit the work contemplated in those Decisions [Telecom Decisions CRTC 78-6 and 79-22], there seems to be no reason to alter the status quo. The Commission therefore orders B.C. Tel to permit cable licensees to do the spinning work required to install their coaxial cable on B.C. Tel support structures in accordance with the terms of the Agreement. [CRTC Letter Decision, July 28, 1987, at p. 5.]

These passages, however, do not actually establish a policy of deference to arbitration boards. I agree with the respondent Shaw Cable Systems (B.C.) Ltd. that such comments were merely obiter comments designed to respond to the submissions of BC Tel and the TWU. Second, it would be improper for the CRTC to adopt a general policy of deference to an arbitration board as this would be an improper delegation or fettering of the CRTC's discretionary powers.

Disposition

39 For the reasons outlined above, I would dismiss this appeal with costs throughout.

Appeal dismissed.

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*363 In re Druce's Settlement Trusts

Pothecary and Another v. Druce and Others
1961 D. No. 1567

Chancery Division
29 January 1962

[1962] 1 W.L.R. 363

Russell J.
1962 Jan. 23, 24, 29

Analysis

Trusts—Variation—Act of 1958—Applicants—Trustees as applicants—Variation of Trusts Act, 1958 (6 & 7 Eliz. 2, c. 53), s. 1.

Under a voluntary settlement dated October 9, 1930, the trust fund was directed to be held on trust for the settlor during her life, and thereafter for the spinster member of her family absolutely who should qualify by appointment or seniority. In order to minimise estate duty an arrangement was proposed whereby the trustees, after an accumulation for two years, at their discretion were to pay or apply the income of the fund (less the clear sum of £21,000 which *364 was to be paid to the settlor) during the trust period, which the trustees might determine at any time after the death of the settlor, to or for the benefit of any of the spinster members of the family; on the determination of the trust period the capital of the fund was payable to the spinster then qualified by appointment or seniority.

On an application by the trustees for an order under section 1 of the Variation of Trusts Act, 1958, approving the arrangement on behalf of the person who should be the senior spinster descendant living at the death of the settlor, other than the descendants who were respondents to the summons:—

Held, that although there was bound to be a period after the death of the settlor during which the trustees must have power to direct income and capital in a manner other than that provided for by the settlement, the proposed arrangement was directed to ensure as far as possible that this power would not be exercised so as to produce de facto benefits different from those conferred by the settlement and that, therefore, the arrangement was for the benefit of the unascertained beneficiary and the court would, accordingly, approve it.

Per Russell J. In general the trustees should not be the applicants in applications to vary beneficial trusts, unless they are satisfied that the proposals are beneficial to the persons interested and have a good prospect of being approved by the court, and further, that if they do not make the application no one will. In particular, it would not be right if it became the general practice for such application to be made by the trustees upon the supposition that should the application fail it will be more probable (though not, of course, certain) that the costs of all parties will be directed to be met out of the trust funds. I would deprecate any suggestion that trustees must content themselves in every case with leaving it to the beneficiaries (or, if infants, their parents or guardians) to initiate or put forward such schemes, although, on the other hand, failure to do so themselves would scarcely be a breach of trust. In general, such steps should be left to the beneficiaries (except in so far as inevitably joined in by the trustees) unless the trustees are satisfied that such steps are likely to produce beneficial results, and that no beneficiary is able or willing to take them (post, p. 371).

The following cases were cited in argument:

- In re Chapman's Settlement Trusts (No. 2) [1];
In re Cohen's Will Trusts. [2]

ADJOURNED SUMMONS.

The following statement of facts is taken substantially from the judgment of Russell J.

By a voluntary settlement, dated October 9, 1930, the settlor, Miss Millicent Druce, who was born on January 15, 1899, directed the trustees to hold the property thereby settled on trust to pay the income to her during her life and thereafter to transfer the property (a) to the senior spinster descendant of her brother Charles Claridge Druce living at her death; (b) if there were no such descendant, to such spinster descendant of her brother John Christopher Druce or Alexander George Druce as she should, with the trustees' consent, by deed appoint, provided that the appointment should take effect only in the event of the appointee surviving the settlor and being a spinster at the time of the settlor's death; (c) in default of appointment to the senior spinster descendant of John Christopher Druce living at the death of the settlor; (d) if there were no such descendant, to the senior spinster descendant ***365** of Alexander George Druce living at the death of the settlor; (e) if there were no such descendant, to such one of the spinster descendants of the settlor's great-grandfather, Charles Druce, as the settlor should, with the trustees' consent, by deed appoint, provided that the appointment should take effect only in the event of the appointee surviving the settlor and being a spinster at the time of the settlor's death; (f) and in default of appointment to the senior spinster descendant of Charles Druce living at the death of the settlor. The settlor further provided that every instrument effectuating a transfer of the trust property should contain the expression of the wish that the trust property should always devolve on a spinster descendant of Charles Druce bearing the surname of Druce.

At the date of the issue of the summons the settlor, who was the first defendant, was 62 years of age. Charles Claridge Druce was 72 years of age and he had one spinster descendant, a daughter, Isobel, the second defendant, who was 29 years of age. He also had a married daughter, aged 30. John Christopher Druce, who was aged 70, had no issue, while Alexander George Druce had a daughter, Penelope, the fourth defendant, aged 24, who had married after the date of the issue of the summons. There were in addition more than 30 spinster descendants of Charles Druce, of whom the senior, Elizabeth Druce, the third defendant, was aged 87.

By the summons the trustees applied to the court for an order under section 1 of the Variation of Trusts Act. 1958, approving the following arrangement on behalf of the person who should be the senior spinster descendant living at the death of the settlor (a) of her brother Charles Claridge Druce, or failing whom (b) of her brother John Christopher Druce, or failing whom (c) of her brother Alexander George Druce or failing whom (d) of her great-grandfather Charles Druce, other than the second, third and fourth defendants.

The arrangement provided that the settlor should receive the clear sum of £21,000 to be raised out of the trust fund and should effect a policy of assurance at a single premium assuring payment to the trustees of the sum of £12,000 in the event of her death within five years of the date of the policy (the "operative date"). (The settlor was insurable owing to her health on the basis of a male of the same age). The policy and the sum assured were to be held by the trustees as an accretion to the remainder of the trust fund (the "reversionary share"). During the period of two years from the operative date or until the earlier death of the settlor the trustees were to accumulate the income of the residuary share at compound interest and hold the accumulation on trust for any female descendant for the time being living (whether or not having been married) of the settlor's father, George Claridge Druce, (other than the settlor) as the trustees should after the expiration of two years appoint but so that an appointment should only be made (a) during the period ending ***366** 20 years after the death of the last survivor of the descendants of King George the Fifth living at the date of the settlement or on January 15, 1999, (when the settlor would, if living, be 100 years of age) whichever should be the earlier (the "trust

period") and (b) with the approval of the settlor during her lifetime, and in default of appointment on the trusts of the residuary estate. Subject thereto, during the trust period the trustees at their discretion were to pay or apply the income of the reversionary share to or for the benefit of any of the spinster descendants of the great-grandfather of the settlor (other than the settlor).

On the expiration of the trust period the trustees were to hold the reversionary share in trust absolutely (1) for the senior spinster descendant born before the death of the settlor of her brother Charles Claridge Druce then living, subject thereto (2) for such one of the spinster descendants born as aforesaid of John Christopher Druce and Alexander George Druce then living as the trustees should (with, in her lifetime, the settlor's consent) by deed appoint, in default of appointment, (3) for the senior spinster descendant born as aforesaid then living of John Christopher Druce, subject thereto (4) for the senior spinster descendant born as aforesaid then living of Alexander George Druce, subject thereto (5) for such one of the spinster descendants born as aforesaid then living of the settlor's great-grandfather as the trustees should (with, in her lifetime, the settlor's consent) by deed appoint, and in default of appointment (6) for the senior spinster descendant born as aforesaid then living of the settlor's great-grandfather and subject thereto (7) in trust for Isobel Claridge Druce absolutely. Any female who first married after the death of the settlor was to be treated as a spinster and no person born after the settlor's death could qualify.

The trustees were empowered to determine the trust period at any time after the death of the settlor. If after the death of the settlor and within the trust period any person died who could have taken under the settlement the trustees were empowered to appoint capital to her estate. The trustees were required, without the imposition of any restriction on their powers and discretion, to consider primarily the interests of the person who would have been entitled under the settlement. Special powers of removal and appointment of trustees were conferred on the person who would have been presumptively or actually entitled to capital under the settlement.

Representation

- J. A. Brightman Q.C. for the trustees.
- John Monckton for the first defendant.
- A. J. Balcombe for the second, third and fourth defendants.

Cur. adv. vult.

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RUSSELL J.

Jan. 29. read the following judgment: The settlement in question in this case is the latest in a long series of voluntary resettlements, unusual in character in that the beneficiaries are limited to spinster members of the Druce family. The framework of this particular settlement, which is dated October 9, 1930, is this. [His Lordship stated the trusts of the settlement and continued:] The present state of the family is this, Charles Claridge Druce is aged 72 and he has one spinster descendant, Isobel, aged 29, represented by Mr. Balcombe. The settlor is aged 63. Isobel will therefore probably take, unless she disqualifies herself by marriage in the settlor's lifetime. Potentially Charles Claridge Druce may have in the settlor's lifetime one or more further spinster descendants, either daughters or granddaughters; his married daughter is only 30 years old. John Christopher Druce has no issue. He is 70; he might have spinster descendants born in the settlor's lifetime. Alexander George Druce may yet have spinster daughters so born or spinster granddaughters so born through his daughter Penelope, who has since the issue of the summons disqualified herself by marriage. Apart from these, there is a large number of spinster descendants of the great-grandfather — at present over 30 — whose number is from time to time increased or decreased by birth, death or marriage. The senior of these, Elizabeth Druce, who is aged 87, is also represented by Mr. Balcombe. The rest of this last group are not parties to the summons but, having regard to

the language of section 1 (1) (b) of the Variation of Trusts Act, 1958, the court is empowered to approve the arrangement on their behalf even though they are not ascertained.

The financial proposals — the fund being some £65,000 — I need not rehearse in great detail. The settlor receives some £21,000 if death duties can be avoided on her death by sufficient survival of the operative date for the scheme. This abstraction will leave the reversion viewed as a whole better off by over £8,000 (subject to the question of costs) than it would be at her death under the settlement after estate duty. Moreover, as to the funds left in the settlement from which the settlor will be excluded, the reversion is accelerated (though the acceleration is to be postponed for two years) which is an additional benefit. The settlor is to effect a single premium policy of insurance over her own life against death within five years. The fruits of such policy will, broadly speaking, cover the reversion against relative loss, though not necessarily completely. Any arrangement is capable of being regarded us beneficial under the statute if it can, on balancing probabilities, be regarded as a good bargain, and the fact that in improbable circumstances no benefit or even some loss is possible does not necessarily deprive the arrangement of that quality. Viewing the financial proposals as affecting the reversion as a whole, I regard those proposals as beneficial to the reversion.

The duty of the court, however, extends beyond that. I must consider the proposals from the viewpoint of each of those persons ***368** on whose behalf I am required to approve the arrangement, that is, of all those who may become interested under the trusts of this settlement born or unborn, other than those who are parties. No party is an infant. These are the unborn descendants of the three brothers and the descendants of the great-grandfather to whom I have referred.

The purpose of the arrangement proposed is to achieve as nearly as possible the same beneficial results as would be achieved by the settlement without running the risk of liability for estate duty, having regard to the fact that the saving of estate duty is the root of the benefit to be gained. Here plainly there is difficulty having regard to the nature of the settlement.

I summarise what are proposed as the new trusts of the retained funds, the original scheme having undergone certain changes in the course of the hearing. [His Lordship summarised the proposed arrangement, observing that the trustees' power to determine the trust period at any time after the death of the settlor would not attract estate duty on the settlor's death, but that the intention was that such power would de facto be exercised immediately after the death, and continued:] It is to be observed that the de facto approximation of the various beneficial interests under the arrangement with the beneficial interests under the settlement depends upon the manner of exercise of the powers conferred on the trustees (a) to divide income in their discretion among the whole class of the great-grandfather's spinster descendants, and (b) to maintain or determine the trust period.

As to the discretionary power over income, it is said that there can be no objection to it in its present form in respect of income accruing during the settlor's life. No spinster descendant will get that if no arrangement is made, and therefore it must be beneficial to all to have a chance of getting some of it. Moreover, it would not be possible to produce strict acceleration because that would lead to estate duty: for example, if Isobel died in the trust period. For the same reasons it would be dangerous to have four tiers of discretionary trusts of this income, the spinster descendants of Charles Claridge Druce being the first tier. So far as the trusts of the income are concerned and, more important, the trusts of capital, the real difficulty lies in the period which may elapse between the death of the settlor and the determination of the trust period.

The present intention of the trustees, I am told, is to determine the trust period immediately after the death of the settlor. This may not happen either because the then trustees do not decide to

do it; or it may not happen for a time by the accidents of communications and so forth. The situation is, therefore, that there is bound to be a period, shorter or longer, after the death of the settlor during which the trustees must have power to direct income and capital in a manner other than that provided for by the settlement. Such powers are the necessary price of the *369 financial benefit to the reversion which is likely to result from the arrangement: without them there can be no arrangement.

As I have indicated, the arrangement, with its amendments, is directed to ensure so far as possible that these powers will not be exercised so as to produce de facto benefits different from those conferred by the settlement. Three additional points are to be inserted in the arrangement. If in the extended period after the death a person dies who would have taken under the settlement, the trustees are given power to appoint the capital to her estate: to give more than a power would have estate duty repercussions. This is not, of course, as satisfactory, for example, to Isobel or to any yet unborn spinster descendant of Charles Claridge Druce who may become the senior spinster surviving the settlor if Isobel dies or marries in the settlor's life, as would be the absolute right on such survival which is conferred by the settlement. But this does not mar the arrangement in Isobel's eyes, and the unborn spinster I have mentioned has under the arrangement an extra benefit which Isobel as the senior lacks, for the very fact that it is only a power gives that second spinster a chance of taking which she would never have had under the settlement. The point is that this aspect of a scheme which I have to approve on behalf of that unborn spinster is rather less favourable to Isobel, who nevertheless supports the scheme, than to that unborn spinster.

The second additional provision to be inserted in the scheme is that without imposing any restriction on the exercise of the powers and discretions conferred upon the trustees, it is declared that the trustees shall consider primarily the interests of the person who would have bean entitled under the settlement. The third additional provision is that special powers of removal and appointment of trustees are conferred on the person who at any given time under the settlement would have been beneficially entitled to capital.

I was at one time exercised in my mind as to the propriety of conferring discretionary powers which were in fact intended to be exercised in particular ways and with indications short of effective command that they should be so exercised. But it is not uncommon for such indications to be given by settlors who so intend. If the possible beneficiaries under this settlement had all been sui juris and ascertained, they could have done so in an arrangement without reference to the court. This jurisdiction in effect enables the court to contract on behalf of certain beneficiaries, or possible beneficiaries, and I do not see why it should not agree to that which in other circumstances they might have agreed for themselves. However, there may well be occasions for the exercise of the discretion in a manner which will not accord with the basic expectations of the scheme in circumstances to which no one could take exception. I instance the possibility of the person who would have taken under the settlement not *370 wanting through riches, insolvency or old age to take and preferring another spinster descendant to take.

The position, therefore, may be thus summarised. It is not possible to obtain for the reversioners as a group the benefit of some £8,000 (subject to costs) without introducing trusts and powers under which beneficial rights in the reversion may be disturbed in a manner other than that which would have been effected by the settlement. The present proposals avoid that event as far as is legally possible. The various interests with which I am concerned have expectancies or chances under the settlement in respect of a capital sum of x pounds, and the question is whether it is a good bargain for them to exchange these for slightly different expectancies or chances in respect of a capital sum of x pounds plus £8,000. Of the possible beneficiaries, Isobel may be said to have the best prospect of succeeding to the capital

under the settlement — better than any person with whom I am concerned. In the ordinary course of life she will survive the settlor and if she marries it will be a voluntary act. In the negotiations prior to this hearing she has been and is now represented by separate solicitors and counsel: her considered view with their assistance is that this is for her a beneficial arrangement.

In my judgment, it is established that the carrying out of the arrangement as now proposed would be for the benefit of all spinster descendants of the great-grandfather of the settlor born or unborn, not parties to this application. That having been established, the question remains whether it is a proper case for the exercise of the discretion under the statute. On the whole, I think that it is, and, accordingly, I approve the arrangement on behalf of the persons I have mentioned.

One point arises to which I would refer. The application was made not by a beneficiary but by the trustees. This is a disadvantage, particularly in a case such as the present, where the interests of the persons for whom the court is concerned are not exactly the same as those of some respondent. It means that there is no counsel whose sole task is to protect and support those interests. Where the trustees make the application their counsel is there to argue for the acceptance of the scheme: but at the same time his duty and that of the trustees is to be the watchdog for (for example) unborn interests. Let me say at once that Mr. Brightman for the trustees, while recognising the disadvantage, overcame admirably the duality of his position. To change the metaphor, his performance as touch judge was not marred by the fact that he started in the line-out, and I was grateful for his assistance. Nevertheless, the disadvantages of this duality exist. Counsel for the applicant trustees must have an instinctive reaction against a criticism from the bench, designed to safeguard or benefit those unborn interests, which would be lacking in a respondent trustee, an instinctive tendency to be against alteration of the scheme for the approval of which he is applying. Moreover, if the criticism be in fact unsound, it is likely to take
*371 longer for the judge to be dissuaded from it because of that very duality. There are, of course, cases of applications to vary beneficial interests where it is necessary and proper that the trustees should make the application, notwithstanding the disadvantage I have mentioned. This case was one of them, the trustees being satisfied that the scheme was beneficial to their beneficiaries and no beneficiary being willing to make the application. But, in general, the trustees should not be the applicants in applications to vary beneficial trusts, unless they are satisfied that the proposals are beneficial to the persons interested and have a good prospect of being approved by the court, and further, that if they do not make the application no one will. In particular, it would not be right if it became the general practice for such applications to be made by the trustees upon the supposition that should the application fail it will be more probable (though not, of course, certain) that the costs of all parties will be directed to be met out of the trust funds.

Arising out of the discussion about trustees as applicants, a question was to some extent canvassed — to what extent should trustees be the initiators or movers of schemes to be put before the court for the variation of beneficial interests. I would deprecate any suggestion that trustees must content themselves in every case with leaving it to the beneficiaries (or, if infants, their parents or guardians) to initiate or put forward such schemes, although, on the other hand, failure to do so themselves would scarcely be a breach of trust. But the initiation of and other steps leading to a final scheme may be very costly and may prove abortive. In general, such steps should be left to the beneficiaries (except in so far as inevitably joined in by the trustees) unless the trustees are satisfied that such steps are likely to produce beneficial results, and that no beneficiary is able or willing to take them.

Representation

•Solicitors: Druces & Attlee; Montagu's and Cox & Cardale.

Order accordingly. Costs of trustees on the trustee basis, and of defendants on a common fund basis, to be paid out of the reversionary share.

Footnotes

1 [1959] 1 W.L.R. 372; [1959] 2 All E.R. 47n.
2 [1959] 1 W.L.R. 865; [1959] 3 All E.R. 523.

[1962] 1 W.L.R. 363

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The substantive requirements for approval are also different in these two provinces. Under the basic model, it is necessary (but perhaps not sufficient) that the variation appears to be for the benefit of those described in paragraphs (1)(a), (b), and (c).[14] In Alberta and Manitoba, not only must the arrangement be for the benefit of those on whose behalf the court is asked to consent,[15] it must also appear to the court "otherwise to be of a justifiable character."[16] Presumably this provides some guidance in a case in which the court is not called upon to consent for anyone, but merely to approve a termination. In other provinces, such a termination could take place extrajudicially under *Saunders v. Vautier*.

There are some further innovations in the Manitoba statute which do not appear in that of Alberta. First, there is some guidance as to the meaning of "benefit", which will be discussed below.[17] There is also a much longer list of persons on whose behalf the court can give consent. In addition to the four cases given in the basic scheme set out above, the Manitoba legislation adds a number of others, which will be mentioned below.[18]

The British Columbia Act also shows variations from the basic scheme. One difference is highlighted by the name of the act: the *Trust and Settlement Variation Act*.[19] By its s. 4, the Act applies to land "the ownership of which is the subject of a legal life interest"; the legal settlement is deemed to be a trust, and the life tenant and everyone else with an interest in the land are deemed to be incapable beneficiaries.[20] Although the legislative technique is somewhat drastic, since it allows variation against the wishes of fully capacitated persons, it is true that situations like this cry out for the possibility of judicial intervention.[21] The British Columbia Act also requires that written notice of the application be given to the Public Guardian and Trustee where consent is sought on behalf of unborn, minor, or incapacitated beneficiaries; and it gives standing to that official in the hearing of the application. In Saskatchewan, notice must be given to this official in all cases.[22] In this way, the sanction of primary legislation is given to what is, in any event, a rule of practice in every jurisdiction where there is such an official.

Because of these differences, and the considerable importance of the discretionary jurisdiction conferred upon the courts, it will remain important that the published reports carry as many of these decisions as possible. Often these decisions are entirely factual, constituting a discussion only of the particular circumstances in hand, but each nevertheless reveals that type of problem and the forms of variation which the courts are prepared to entertain.[23]

B. — Persons Who May Apply Under this Legislation

Applications to the court, whether under the trustee statutes or other legislation enabling the court to grant authority for specified activity, are normally made by the trustees. The object of such legislation is to support the administrative machinery of the trust, and it is therefore natural that the duty of application should be upon the trustee, unless there is no person appointed as trustee, or it is a beneficiary who is seeking the removal by the court of a trustee.

The variation of trusts legislation, however, is little more than an authority to the court to act on behalf of those beneficiaries who cannot consent for themselves in a *Saunders v. Vautier* type of operation.[24] Consequently, though the legislation enables anyone to put forward a proposed "arrangement", it should be the beneficiaries, not the trustees, who make the proposal.[25] The adult and capacitated beneficiaries have given their consent to the bargain which the arrangement represents,[26] and they are now asking the court to complete the required consents on behalf of the other beneficiaries.[27] The trustees for their part should remain objective, and concerned merely to ensure that during the pre-hearing bargaining stage the interests of the incapacitated and unborn are adequately put forward. In British Columbia and Saskatchewan, as previously noted, the Act requires that notice of an impending application be given to the Public Guardian and Trustee, who will enter an appearance on behalf of infants and the unborn.[28] Where there is no conflict between the adult and capacitated beneficiaries as to the form of the bargain — and that will be in the great majority of instances — it is usual to appoint the Public Guardian to act on behalf of the infants and unborn, and he will normally

be brought in at the bargaining stage so that preferably his consent is forthcoming before the application is brought to court.[29]

In England the absence of such an official has meant that the courts have put particular stress upon the desirability of the trustees being concerned with the interests of the infants and the unborn rather than making application themselves. The courts have made it clear several times that they wish to see the persons on behalf of whom the court has to consent separately represented by counsel.[30] It follows that wherever there is an official to perform this role of representing infants and the unborn, it would not be essential that the application be put forward by someone other than the trustees. Nevertheless, though they should be represented and their views presented on the fairness of the arrangement, it is not a proper role for trustees, we would suggest; only if an application should be made, and there is no beneficiary able or willing to apply, are the trustees properly entitled to assume the task.

In the case of an *inter vivos* trust, the settlor may choose to put forward the application himself. He may be a beneficiary, such as a life tenant, who wishes, for instance, to acquire a capital sum from the trust fund. If he is not a beneficiary, he may nevertheless desire to revoke the trust or enable the trustees to exercise a power which the trust instrument does not give them. Where the beneficiaries are all children and unborn, it would be logical for him to make the application if he is the one who desires the modification or revocation.[31] Because of the tax connotations, it is unlikely that the settlor will have reserved to himself in the instrument powers of revocation or even of modification.

C. — Persons on Whose Behalf the Court Can Approve an Arrangement

1. — Introduction

The idea of the legislation is that those who are adult and mentally competent have the right and the consequent obligation to look after their own interests,[32] subject to the court being satisfied that the proposed arrangement is, overall, one which it should support. The court's role is to consent where it is satisfied that the arrangement is to the benefit of those who cannot consent because, as is usually the case, they are infants, mentally incompetent, or unborn. The difficulty in drafting variation of trusts legislation is in deciding what to do with those persons who are adult and mentally competent, but are untraceable, or are members of a class which is to be determined in the future. For instance, Henry has a remainder interest in the capital of the trust fund after the death of his mother, who is the life tenant. The other remaindermen agree with the widow on a proposed division of the capital in the trust fund, but no one knows where Henry is. He went to South America years ago, and sends Christmas cards whose postmarks suggest he is travelling around. Henry is untraceable.[33] The members of a class, to take the second situation, may be those children of the testator who are living at the death of the presently surviving life tenant, the testator's widow. Another example is the next-of-kin of a living beneficiary on failure of that beneficiary to exercise a testamentary power of appointment. A less difficult question arises in connection with as yet unascertained persons, such as the possible spouse of a beneficiary who is at present unmarried.

2. — Infants and Mentally Incompetent Persons

Paragraph (a) of the section in question includes infants and mentally incompetent persons. It could also include persons who, though not mentally incompetent, are unable to understand what is being put to them. The sections say, "incapable of assenting", and it is important that the court's consent be sought if there is any question as to the capacity of an adult beneficiary.

Consent under this paragraph must be given for any such beneficiary whose interest is vested or contingent, and direct or indirect. It has been suggested that an indirect interest is one which arises under a sub-trust.[34] This may be so, though one would have thought that a sub-trust was independent of the head trust and would be separately brought before the court for variation or revocation. It seems the better view that the section is merely seeking to make it clear that any kind of interest whatsoever, be it in the realms of remote possibility only, is included.

Most Negative Treatment: Check subsequent history and related treatments.

2003 SCC 71, 2003 CSC 71
Supreme Court of Canada

British Columbia (Minister of Forests) v. Okanagan Indian Band

2003 CarswellBC 3040, 2003 CarswellBC 3041, 2003 SCC 71, 2003 CSC 71, [2003] 3 S.C.R. 371, [2003] S.C.J. No. 76, [2004] 1 C.N.L.R. 7, [2004] 2 W.W.R. 252, 114 C.R.R. (2d) 108, 127 A.C.W.S. (3d) 214, 189 B.C.A.C. 161, 21 B.C.L.R. (4th) 209, 233 D.L.R. (4th) 577, 309 W.A.C. 161, 313 N.R. 84, 43 C.P.C. (5th) 1, J.E. 2004-59

Her Majesty The Queen in Right of the Province of British Columbia, as represented by the Minister of Forests, Appellant v. Chief Dan Wilson, in his personal capacity and as representative of the Okanagan Indian Band and all other persons engaged in the cutting, damaging or destroying of Crown Timber at Timber Sale Licence A57614, Respondents and Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of British Columbia, Attorney General of Alberta, the Songhees Indian Band, the T'Sou-ke First Nation, the Nanoose First Nation and the Beecher Bay Indian Band (collectively the "Te'mexw Nations"), and Chief Roger William, on his own behalf and on behalf of all other members of the Xeni Gwet'in First Nations government and on behalf of all other members of the Tsilhqot'in Nation, Interveners

Her Majesty The Queen in Right of the Province of British Columbia, as represented by the Minister of Forests, Appellant v. Chief Ronnie Jules, in his personal capacity and as representative of the Adams Lake Indian Band, Chief Stuart Lee, in his personal capacity and as representative of the Spallumcheen Indian Band, Chief Arthur Manuel, in his personal capacity and as representative of the Neskonlith Indian Band and David Anthony Nordquist, in his personal capacity and as representative of the Adams Lake Indian Band, the Spallumcheen Indian Band and the Neskonlith Indian Band and all other persons engaged in the cutting, damaging or destroying of Crown Timber at Timber Sale Licence A38029, Block 2, Respondents and Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of British Columbia, Attorney General of Alberta, the Songhees Indian Band, the T'Sou-ke First Nation, the Nanoose First Nation and the Beecher Bay Indian Band (collectively the "Te'mexw Nations"), and Chief Roger William, on his own behalf and on behalf of all other members of the Xeni Gwet'in First Nations government and on behalf of all other members of the Tsilhqot'in Nation, Interveners

McLachlin C.J.C., Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps JJ.

Heard: June 9, 2003
Judgment: December 12, 2003
Docket: 28988, 28981

Proceedings: affirming (2001), [2001] B.C.J. No. 2279, [2002] B.C.W.L.D. 21, 95 B.C.L.R. (3d) 273, [2002] 1 C.N.L.R. 57, 208 D.L.R. (4th) 301, 161 B.C.A.C. 13, 263 W.A.C. 13, (sub nom. British Columbia (Ministry of Forests) v. Jules) 92 C.R.R. (2d) 319 (B.C. C.A.); reversing in part (2000), 2000 BCSC 1135, 2000 CarswellBC 1559, [2000] B.C.J. No. 1536 (B.C. S.C.)

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Subject: Public; Civil Practice and Procedure; Constitutional; Family

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Aboriginal law

I Constitutional issues
I.8 Canadian Charter of Rights and Freedoms

Aboriginal law

X Practice and procedure
X.7 Miscellaneous

Civil practice and procedure

XXIV Costs
XXIV.7 Particular orders as to costs
XXIV.7.i "Costs in any event"

Civil practice and procedure

XXIV Costs
XXIV.24 Appeals as to costs
XXIV.24.b Interference with discretion of lower court

Constitutional law

XI Charter of Rights and Freedoms
XI.3 Nature of rights and freedoms
XI.3.h Equality rights
XI.3.h.i General principles

Public law

I Crown
I.6 Practice and procedure involving Crown in right of province
I.6.h Costs
I.6.h.i Costs against Crown

Headnote
Aboriginal law --- Practice and procedure — Miscellaneous issues

Courts have inherent jurisdiction to grant costs to litigant, in rare and exceptional circumstances, prior to final disposition of case and in any event of cause, where party seeking interim costs genuinely cannot afford to pay for litigation, claim to be adjudicated is prima facie meritorious, and issues raised are of public importance and have not been resolved in previous cases — Granting of interim costs to respondent Indian Bands claiming logging rights on Crown land by Court of Appeal upheld — Circumstances of this case were exceptional.

Crown --- Practice and procedure involving Crown in right of province — Costs — Costs against Crown

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Civil practice and procedure --- Costs — Particular orders as to costs — "Costs in any event"

Courts have inherent jurisdiction to grant costs to litigant, in rare and exceptional circumstances, prior to final disposition of case and in any event of cause, where party seeking interim costs genuinely cannot afford to pay for litigation, claim to be adjudicated is prima facie meritorious, and issues raised are of public importance and have not been resolved in previous cases — Granting of interim costs to respondent Indian Bands claiming logging rights on Crown land by Court of Appeal upheld — Circumstances of this case were exceptional.

Civil practice and procedure --- Costs — Appeals as to costs — Interference with discretion of lower court

Court of Appeal had sufficient grounds to review exercise of discretion by trial court and to grant interim costs to respondent Indian Bands claiming logging rights on Crown land — Appellate court may and should intervene with trial judge's exercise of discretion where trial judge has misdirected himself as to applicable law or made palpable error in his assessment of facts — Trial judge erred in overemphasizing importance of avoiding any order that involved prejudging issues.

Droit autochtone --- Procédure — Questions diverses

Tribunaux ont le pouvoir inhérent d'accorder des dépens à une partie au litige, dans des circonstances rares et exceptionnelles, avant le règlement définitif de l'affaire et quelle qu'en soit l'issue, lorsque: la partie qui réclame une provision pour frais n'est réellement pas en mesure d'assumer les coûts du litige; la question à trancher est à première vue méritoire; et les questions soulevées sont d'importance pour le public et n'ont pas été tranchées dans le cadre d'affaires précédentes — Maintien de la décision de la Cour d'appel d'octroyer une provision pour frais aux bandes indiennes intimées, qui alléguaient détenir des droits de couper du bois sur les terres de la Couronne — Circonstances de l'espèce étaient exceptionnelles.

Couronne --- Procédure mettant en cause la Couronne du chef de la province — Frais — Condamnation de la Couronne aux dépens

Tribunaux ont le pouvoir inhérent d'accorder des dépens à une partie au litige, dans des circonstances rares et exceptionnelles, avant le règlement définitif de l'affaire et quelle qu'en soit l'issue, lorsque: la partie qui réclame une provision pour frais n'est réellement pas en mesure d'assumer les coûts du litige; la question à trancher est à première vue méritoire; et les questions soulevées sont d'importance pour le public et n'ont pas été tranchées dans le cadre d'affaires précédentes — Maintien de la décision de la Cour d'appel d'octroyer une provision pour frais aux bandes indiennes intimées, qui alléguaient

détenir des droits de couper du bois sur les terres de la Couronne — Circonstances de l'espèce étaient exceptionnelles.

Procédure civile --- Frais — Ordonnances particulières en matière de frais — Frais accordés quelle que soit l'issue de la cause

Tribunaux ont le pouvoir inhérent d'accorder des dépens à une partie au litige, dans des circonstances rares et exceptionnelles, avant le règlement définitif de l'affaire et quelle qu'en soit l'issue, lorsque: la partie qui réclame une provision pour frais n'est réellement pas en mesure d'assumer les coûts du litige; la question à trancher est à première vue méritoire; et les questions soulevées sont d'importance pour le public et n'ont pas été tranchées dans le cadre d'affaires précédentes — Maintien de la décision de la Cour d'appel d'octroyer une provision pour frais aux bandes indiennes intimées, qui alléguaient détenir des droits de couper du bois sur les terres de la Couronne — Circonstances de l'espèce étaient exceptionnelles.

Procédure civile --- Frais — Appels relativement aux frais — Intervention dans l'exercice du pouvoir discrétionnaire du tribunal inférieur

Cour d'appel avait des motifs suffisants pour réviser l'exercice du pouvoir discrétionnaire du tribunal de première instance et pour accorder une provision pour frais aux bandes indiennes intimées qui alléguaient détenir un droit de couper du bois sur les terres de la Couronne — Tribunal d'appel peut et doit intervenir dans l'exercice du pouvoir discrétionnnaire d'un juge de première instance lorsque ce dernier a mal compris le droit applicable ou a commis une erreur manifeste dans son appréciation des faits — Juge de première instance a commis une erreur en insistant trop sur l'importance d'éviter toute ordonnance nécessitant de préjuger les questions en cause.

Members of respondent Indian Bands began logging on Crown land in British Columbia without authorization under the Forest Practices Code of British Columbia Act, but with authorization from their respective tribal councils. The Minister of Forests served the Bands with stop-work orders and commenced proceedings to enforce them. The Bands, claiming they had aboriginal title to the lands in question and were entitled to log them, filed a notice of constitutional question. The Minister applied to have the proceedings remitted to the trial list, while the Bands urged that the matter be dealt with summarily because they lacked the financial resources for a protracted and expensive trial. Alternatively, they submitted that the matter should go to trial only if the Crown were ordered to pay their legal fees and disbursements in advance and in any event of the cause.

The chambers judge held that the case could not be decided based on the documentary and affidavit evidence alone but should be remitted to trial. He found that the court had a general discretion to award interim costs in exceptional circumstances, but that constitutional norms did not require such an order to be made in the Bands' favour. The chambers judge found that his jurisdiction to order the Minister to pay the Bands' costs in advance of the trial was very narrow, and that he was precluded from making such an order because that would involve prejudging the case on the merits. He also suggested that the litigation might be able to proceed if the Bands could work out a contingent fee arrangement with counsel.

The Court of Appeal upheld the chambers judge's decision that the just determination of the issues required a trial. It agreed that the principle of access to justice did not oblige the government to fund litigants who could not afford to pay for legal representation in a civil suit, and that s. 35 of the Constitution Act, 1982 did not obligate the government to provide funding for legal fees of an aboriginal band attempting to prove asserted aboriginal rights. However, the Court of Appeal held that the chambers judge placed too much emphasis on concerns about pre-judging the outcome, which were

diminished in light of the special circumstances of the case and the public interest in a proper resolution of the issues. It held that the chambers judge had a discretionary power to order interim costs in favour of the Bands, and that such an order should have been made in the "exceptional" circumstances of this case. The Minister appealed.

Held: The appeal was dismissed.

LeBel J. (McLachlin C.J.C., Arbour, Binnie, Deschamps, Gonthier JJ. concurring): Courts have an inherent discretionary jurisdiction to award costs. The traditional purpose of an award of costs is to indemnify the successful party in respect of the expenses incurred either defending a claim that proved unfounded or in pursuing a valid legal right. However, modern costs rules accomplish various purposes in addition to the traditional objective of indemnification. While the principle of indemnity remains a paramount consideration, a costs award may also serve to encourage settlement, deter frivolous actions and defences, and discourage unnecessary steps in litigation.

The traditional approach to costs can also be seen as being animated by the broad concern to ensure that the justice system works fairly and efficiently. Another relevant consideration, which has increased in importance as litigation over matters of public interest has become more common, is access to justice. In special cases where individual litigants of limited means seek to enforce their constitutional rights, courts often exercise their discretion on costs to avoid the harshness that might result from adherence to the traditional principles. This helps to ensure that ordinary citizens have access to the justice system when they seek to resolve matters of consequence to the community as a whole.

Concerns about access to justice and the desirability of mitigating severe inequality between litigants also feature prominently in the rare cases where interim costs are awarded. An award of interim costs forestalls the danger that a meritorious legal argument will be prevented from going forward merely because a party lacks the financial resources to proceed. The discretionary power to award interim costs is limited to very exceptional cases and ought to be narrowly applied. It is most typically exercised in, but is not limited to, matrimonial or family cases. Interim costs may also be available in certain trust, bankruptcy and corporate cases, where they are awarded to avoid unfairness by enabling impecunious litigants to pursue meritorious claims.

The power to order interim costs is inherent in the nature of the court's equitable jurisdiction. Three criteria are relevant to the exercise of this power. First, the party seeking the order must be impecunious to the extent that, without such an order, that party would be deprived of the opportunity to proceed with the case. Second, the claimant must establish a prima facie case of sufficient merit. Finally, there must be special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate. If the court decides to award interim costs in circumstances where key issues remain live and contested between the parties, it will in a sense be predetermining triable issues. While this may raise concerns about fettering the discretion of the trial judge who will eventually adjudicate the merits of the case, it should not in itself preclude the granting of interim costs if the relevant criteria are met.

In cases of public importance, the usual purposes of costs awards are often superseded by other policy objectives, notably that of ensuring that ordinary citizens have access to the courts to determine their constitutional rights and other issues of broad social significance. Moreover, it is often inherent in the nature of such cases that the issues to be determined are of significance not only to the parties but also to the broader community. As a result, the public interest is served by a proper resolution of those issues. It is for the trial court to determine in each instance whether a particular case, which might

be considered "special" by its very nature as a public interest case, is special enough that the unusual measure of ordering costs would be appropriate.

The criteria for an award of interim costs to be available to an individual Charter claimant of limited means are therefore as follows: (i) the party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial; (ii) the claim to be adjudicated is of sufficient merit that it would be contrary to the interests of justice to forfeit the opportunity to pursue the case merely because the litigant lacks financial means; and (iii) the issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases. If these three conditions are established, then courts have a narrow jurisdiction to order that the impecunious party's costs be paid prospectively. Such orders should be carefully fashioned and reviewed over the course of the proceedings to ensure that concerns about access to justice are balanced against the need to encourage the reasonable and efficient conduct of litigation.

It was apparent from his reasons that had the chambers judge applied these criteria, he would have ordered interim costs in this case. He found as a fact that the Bands were in extremely difficult financial circumstances and could not afford legal representation; that their claims of aboriginal title and rights were prima facie plausible and supported by extensive documentary evidence; and that the case was one of great public importance, raising novel and significant issues of profound importance to the people of British Columbia, the resolution of which would be a major step towards settling the many unresolved problems in the Crown-aboriginal relationship in the province. The circumstances of this case were indeed special, even extreme. Accordingly, the criteria for an award of interim costs were met. The conditions attached to the costs order by the Court of Appeal would encourage the parties to resolve the matter through negotiation and ensure that there would be no temptation for the Bands to drag out the process unnecessarily.

The discretion of a trial court to decide whether or not to award costs has been described as unfettered and untrammelled, subject only to the applicable rules of court and the need to act judicially on the facts of the case. The chambers judge's decision was based on his judicial experience, his view of what justice required, and his assessment of the evidence; it was not to be interfered with lightly. However, an appellate court may and should intervene in discretionary decisions where it finds that the trial judge misdirected himself as to the applicable law or made a palpable error in his assessment of the facts.

Two errors vitiated the chambers judge's decision in this case and called for appellate intervention. First, he overemphasized the importance of avoiding any order that involved prejudging the issues and erred in concluding that his discretion did not extend so far as to empower him to make the requested order. Second, his finding that a contingent fee arrangement might be a viable alternative for funding the litigation was not supported by any evidence, and the prospect of the Bands' hiring counsel on a contingency basis seemed unrealistic.

Major J. (dissenting) (Iacobucci, Bastarache JJ. concurring): Traditionally, costs are awarded at the conclusion of the trial or appellate decision, and almost always to the successful party. In certain cases, interim costs may be awarded to a spouse suing for the division of property as a consequence of separation or divorce, but the ratio of the matrimonial cases makes it clear that such awards preserve the traditional indemnification purpose of costs. To award interim costs when liability remains undecided would be a dramatic extension of the precedent. Awarding costs in advance could be seen as prejudging the merits, as in the absence of compelling reasons, the objectivity of the court making such an order will almost automatically be questioned. Moreover, to do so in a case with serious

constitutional considerations where the Crown is the defending party would be an unusual extension of highly exceptional private law precedent into an area fraught with other implications. While there may be public law questions where access to justice can be provided through the discretionary award of interim costs, such cases must lie closer to the heart of the interim costs case law. The development of the common law of costs should be initiated by trial courts properly exercising their discretionary power, not by appellate reversal of that discretion. In the circumstances of this appeal, the awarding of interim costs was a form of judicially-imposed legal aid. Interim costs should not be expanded to engage the court in essentially funding litigation for impecunious parties and ensuring their access to court. That remedy lies with the legislature and law societies, not the judiciary.

While a case must be exceptional in order to attract interim costs, the proposition that "special circumstances" almost always exist where the public interest is invoked was too broad to meet the exceptional requirement. To say simply that the issues transcend the individual interests in the case and have not yet been resolved does not assist the trial judge in deciding what is "special enough" and provides no ascertainable standard or direction. Even if it were contrary to the interests of justice for an opportunity to pursue a case to be forfeited because the litigant lacks financial means, there was nothing to distinguish the present aboriginal land claims from any other. There was no evidence that these land claims should be considered "exceptional" nor was there anything to establish how the new criteria would apply differently between one impecunious aboriginal party and another.

The interim costs case law suggests narrow guidelines. Interim costs have been awarded in marital cases where some liability is presumed and the indemnificatory purpose of the costs power is fulfilled and in corporate and trust cases where the court grants advanced costs to be paid by the corporation or trust for whose benefit the action is brought. The legal characteristics which explain why marital cases are an exception to the rule that costs "follow the event" are guidelines for the exercise of judicial discretion. At common law, husbands usually had control and legal ownership of the marital purse and property, ensuring in most cases that wives did not have the financial resources to pursue litigation. It was acknowledged in this appeal that each of the Bands was without funds. Generalizing beyond the marital context, there must be a special relationship between the parties such that the cost award would be particularly appropriate. Where no right under s. 35 of the Constitution Act, 1982 was implicated and the matter involved the provincial rather than the federal Crown, this special relationship could not automatically be presumed. Finally, and dispositive of this appeal, there is a presumption in marital cases that the property that is the subject of the dispute is to be shared in some way. In a sense, some liability is assumed; all that is to be litigated is the extent of the liability. The chambers judge's reluctance to prejudge the present case on the merits was appropriate, since it could not be presumed that the Bands would establish even partial aboriginal title.

The ratio of the common law dictates the following guidelines for the discretionary, extraordinary award of interim costs: (i) the party seeking the interim costs cannot afford to fund the litigation and has no other realistic manner of proceeding with the case; (ii) there is a special relationship between the parties such that an award of interim costs or support would be particularly appropriate; and (iii) it is presumed that the party seeking interim costs will win some award from the other party. A court should be particularly careful in the exercise of its inherent powers on costs in cases involving the resolution of controversial public questions. Not only was such precedent not required at common law, but also by incorporating such an amorphous concept without clearly defining what constitutes "special circumstances," the distinction between the traditional purpose of awarding costs and concerns over access to justice was blurred. The common law is to advance by increments while generally staying true to the purposes behind its rules. The new criteria endorsed by the majority broadened the scope of interim costs to an undesirable extent and were not supported in the case law. The common law rules

on interim costs should not be advanced through an appellate court ignoring and overturning the trial judge's correctly guided discretion. This is more appropriately a question for the legislature.

A trial judge's discretionary decision on interim costs is owed great deference and should be disturbed only if the judge has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts. If the Supreme Court of Canada were to enlarge the scope for interim costs, it should be seen as a new rule and not an adaption of existing law. On the basis of the law on costs at the time of this application, the chambers judge properly exercised his discretion. He was correct in his assessment that liability remained an open question and that ordering interim costs would inappropriately require prejudging the case. Accordingly, he was justified in concluding that although he had a limited discretion in appropriate circumstances to award interim costs, this case fell far outside that area.

Since the chambers judge committed no error of law and did not commit a "palpable error" in his assessment of the facts, deference should be given to his decision not to exercise his discretion to make the extraordinary grant of interim costs. Each side should bear its own costs.

Autorisés par leurs conseils tribaux respectifs, des membres des bandes indiennes intimées ont commencé à couper du bois sur les terres de la Couronne de la Colombie-Britannique, sans avoir cependant obtenu une autorisation en vertu de la Forest Practices Code of British Columbia Act. Le ministre des Forêts a fait signifier aux bandes indiennes des ordonnances de cessation des travaux et a intenté des procédures afin de les faire respecter. Les bandes indiennes ont déposé un avis de question constitutionnelle, alléguant qu'elles détenaient un titre aborigène sur les terres en question et qu'elles avaient le droit d'y mener des activités d'exploitation forestière. Le ministre a demandé à ce que l'instance soit inscrite pour instruction, tandis que les bandes indiennes insistaient pour que la question soit décidée par procédure sommaire, étant donné qu'elles n'avaient pas de ressources financières suffisantes pour mener un procès long et coûteux. Par ailleurs, elles ont soumis que l'affaire ne devrait se rendre à procès que s'il était ordonné à la Couronne de payer leurs frais juridiques et débours à l'avance, quelle que soit l'issue du procès.

Le juge en chambre a statué que l'affaire ne pouvait être décidée sur la base de la preuve documentaire et de la preuve par affidavit et qu'elle devait être renvoyée à procès. Il a conclu que le tribunal avait compétence pour accorder une provision pour frais, dans des circonstances exceptionnelles, mais que les normes constitutionnelles n'exigeaient pas qu'une telle ordonnance soit faite en faveur des bandes indiennes. Le juge était d'avis que sa compétence pour ordonner au ministre de payer à l'avance les frais des bandes indiennes était très restreinte; il a aussi estimé qu'il ne pouvait rendre une telle ordonnance parce que cela nécessiterait d'examiner le fond de l'affaire. Selon lui, l'instance pourrait probablement procéder si les bandes indiennes arrivaient à conclure une entente d'honoraires conditionnels avec leurs avocats.

La Cour d'appel a confirmé la décision du juge en chambre qu'un règlement équitable de ces questions nécessitait la tenue d'un procès. La Cour était d'accord que le principe de l'accès à la justice n'oblige aucunement le gouvernement à financer les parties qui n'ont pas les moyens de se payer les services d'un avocat dans le cadre d'une poursuite civile, et que l'art. 35 de la Loi constitutionnelle de 1982 n'obligeait pas non plus le gouvernement à fournir du financement à une bande autochtone qui tente de prouver l'existence de droits ancestraux. La Cour a cependant statué que le juge en chambre avait trop insisté sur les préoccupations concernant le danger de préjuger de l'issue de la cause, lesquelles préoccupations étaient atténuées en raison des circonstances spéciales de l'espèce et de l'intérêt du public à ce que les questions en litige soient réglées comme il se doit. Elle a conclu que le juge en chambre

36 There are several conditions that the case law identifies as relevant to the exercise of this power, all of which must be present for an interim costs order to be granted. The party seeking the order must be impecunious to the extent that, without such an order, that party would be deprived of the opportunity to proceed with the case. The claimant must establish a *prima facie* case of sufficient merit to warrant pursuit. And there must be special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate. These requirements might be modified if the legislature were to set out the conditions on which interim costs are to be granted, or where courts develop criteria applicable to a particular situation where interim costs are authorized by statute (as is the case in relation to s. 249(4) of the Ontario *Business Corporations Act*; see *Organ*, *supra*, at p. 213). But in the usual case, where the court exercises its equitable jurisdiction to make such costs orders as it concludes are in the interests of justice, the three criteria of impecuniosity, a meritorious case and special circumstances must be established on the evidence before the court.

37 Although a litigant who requests interim costs must establish a case that is strong enough to get over the preliminary threshold of being worthy of pursuit, the order will not be refused merely because key issues remain live and contested between the parties. If the court does decide to award interim costs in such circumstances, it will in a sense be predetermining triable issues, since it will have to decide that one side will receive its costs before it is known who will win on the merits (and since the winner is usually entitled to costs). As a result, concerns may arise about fettering the discretion of the trial judge who will eventually be called upon to adjudicate the merits of the case. This in itself should not, however, preclude the granting of interim costs if the relevant criteria are met. As Macdonald J. noted in *Organ*, *supra*, the court's discretion must be exercised with particular caution where it is being asked to predetermine an issue in this sense, but it does not follow that the court would be going beyond the limits of its discretion if it were to grant the order. I therefore disagree with the conclusion of the New Brunswick Court of Queen's Bench in *New Brunswick (Minister of Health & Community Services) v. G. (J.)* (1995), 131 D.L.R. (4th) 273 (N.B. Q.B.), that costs cannot be ordered at the commencement of a proceeding in the absence of express statutory authority to award costs regardless of the outcome of the proceeding (p. 283) (this case was eventually overturned by this Court in [1999] 3 S.C.R. 46 (S.C.C.), but the interim costs issue was a secondary one that was not dealt with on appeal). As I stated above, the power to order costs contrary to the cause is always implicit in the court's discretionary jurisdiction as to costs, as is the power to order interim costs.

(5) Interim Costs in Public Interest Litigation

38 The present appeal raises the question of how the principles governing interim costs operate in combination with the special considerations that come into play in cases of public importance. In cases of this nature, as I have indicated above, the more usual purposes of costs awards are often superseded by other policy objectives, notably that of ensuring that ordinary citizens will have access to the courts to determine their constitutional rights and other issues of broad social significance. Furthermore, it is often inherent in the nature of cases of this kind that the issues to be determined are of significance not only to the parties but to the broader community, and as a result the public interest is served by a proper resolution of those issues. In both these respects, public law cases as a class can be distinguished from ordinary civil disputes. They may be viewed as a subcategory where the "special circumstances" that must be present to justify an award of interim costs are related to the public importance of the questions at issue in the case. It is for the trial court to determine in each instance whether a particular case, which might be classified as "special" by its very nature as a public interest case, is special enough to rise to the level where the unusual measure of ordering costs would be appropriate.

39 One factor to be borne in mind by the court in making this determination is that in a public law case costs will not always be awarded to the successful party if, for example, that party is the government and the opposing party is an individual *Charter* claimant of limited means. Indeed, as the *B. (R.)* case demonstrates,

2016 ABQB 512
Alberta Court of Queen's Bench

C. (L.) v. Alberta

2016 CarswellAlta 1763, 2016 ABQB 512, [2016] A.W.L.D. 4088, 270 A.C.W.S. (3d) 479

LC, EMP by her Litigation Representative Phillip Tinkler, DC by his next friend LC and CC by her next friend LC (Plaintiffs) and Her Majesty the Queen In Right of Alberta and Metis Settlements Child & Family Services, Region 10 (Defendants)

Robert A. Graesser J.

Heard: July 29, 2016
Judgment: September 15, 2016
Docket: Edmonton 0703-10836

Counsel: R.P. Lee, for Plaintiffs
P. Barber, G.K. Epp, W.K. Branch, Q.C., for Defendants

Subject: Civil Practice and Procedure; Evidence; Family; Public

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Evidence

VIII Affidavits
VIII.10 Miscellaneous

Headnote

Evidence --- Affidavits — Miscellaneous

Action was certified as class proceeding — Plaintiff's litigation guardian swore affidavit in support of application of class counsel for order requiring defendant Crown to pay advance costs to him to conduct class action — Crown applied to strike out exhibits from litigation guardian's affidavit — Application granted in part — Child advocate's report should be struck from affidavit — Report, by itself, was not evidence and attaching it to affidavit, without more, did not make it evidence — Report might be secondary authority in relation to social facts but such authorities did not need to be introduced by affidavit — Materials from other trust litigation should be struck out, as they were not evidence and were irrelevant to issues to be determined on underlying application — Budget did not need to be struck out — Budget was document provided to litigation guardian as client by his lawyer — While much of introduction to budget might be characterized as legal argument, in context here it also provided explanation for how some aspects of budget had been put together.

APPLICATION by defendant Crown to strike out exhibits from litigation guardian's affidavit filed in support of class counsel's application for advance costs.

Robert A. Graesser J.:

Introduction

1 This application arises in the context of the class proceeding certified in this matter on July 11, 2016.

2 Mr. Lee brought an application for advance costs in June, 2016 to require Her Majesty the Queen ("HMQ") to pay advance costs to him to conduct the class action. This application on behalf of HMQ arises in their defence of that application.

3 In support of the application, EMP's litigation representative, Phillip Tinkler, swore an affidavit on July 19, 2016.

4 In his affidavit, Mr. Tinkler swears that he has "personal knowledge of the matters to which I depose in this Affidavit except where I state my information to be based on information and belief, in which case I verily believe the same to be true." He goes on to attach:

- Exhibit A: a copy of the July 2016 special report of the Office of the Child and Youth Advocate Alberta titled *Voices for Change: Aboriginal Child Welfare in Alberta*;

- Exhibit B: a budget Mr. Lee has prepared. He goes on to swear as to what he has been told about the budget by Mr. Lee; and

- Exhibits C-N: copies of court documents and correspondence relating to Action No. 1003 14112, an action brought by the Trustees of the 1985 Sawridge Trust.

5 HMQ has applied to strike these Exhibits from Mr. Tinkler's affidavit, arguing that:

- Exhibit A: the Special Report, contravenes Rule 13.8 as Mr. Tinkler has not sworn as to his belief in the truth of the report; that it is not evidence and it is inadmissible hearsay. Further, it is irrelevant to the issues on the application;

- Exhibit B: the budget contains an introduction that is argument and not evidence; and

- Exhibits C-N: the Sawridge Trust documents, are objectionable for the same reasons. They are also barred by Rule 6.11(f) as they are not evidence.

6 EMP responds that the Court has previously ruled that Reports from the Child Advocate could be admitted in evidence, citing an order in this action dated October 20, 2010. That order was granted in an application by HMQ to strike pleadings in this action, which apparently allowed certain portions of these reports into evidence.

7 EMP also responds that in *Daniels v. Canada (Minister of Indian Affairs and Northern Development)*, 2016 SCC 12 (S.C.C.), the Truth and Reconciliation Report (2015) was considered with as an "authority" along with other reports, including various Royal Commission Reports. That decision was an application for declarations in relation to Metis and non-status Indians. EMP also cites *Winnipeg Child & Family Services (Central Area) v. W. (K.L.)*, [2000] 2 S.C.R. 519 (S.C.C.), where the report of the case cites the Third Annual Report of the Child Advocate under "Authors cited" and it is referred to in the decision.

8 EMP argues that it is not necessary for the deponent of an affidavit to state a belief in the truth of the exhibits attached, citing Rule 13.21 which permits records to be exhibited to affidavit.

9 Alternatively, EMP asks that the Court use its curative power to waive any non-compliance or irregularity in Mr. Tinkler's affidavit.

10 With respect to the Sawridge Trust documents, EMP argues that they are relevant to show the reasonableness of the request for advance costs here as opposed to the hourly rates charged to the Public

Trustee in that action, citing *1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)*, 2012 ABQB 365 (Alta. Q.B.).

11 With respect to the budget, EMP argues that the manner in which the budget was calculated "is relevant to assist the Court in assessing its reasonableness".

12 EMP as an alternative seeks an order that she be permitted to question the Child Advocate and the Public Trustee "with advanced costs payable to EMP for conducting the questioning."

13 In her Sur-Reply Brief, EMP argues that the materials attached to Mr. Tinkler's affidavit ought to be permitted on the basis stated in *R. v. Spence*, [2005] 3 S.C.R. 458, 2005 SCC 71 (S.C.C.), where Justice Binnie discussed "social fact" evidence. Paras 57 and 58 are quoted, and they bear repeating here:

> 57 "Social fact" evidence has been defined as social science research that is used to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a particular case: see, e.g., C. L'Heureux-Dubé, "Re-examining the Doctrine of Judicial Notice in the Family Law Context" (1994), 26 *Ottawa L. Rev.* 551, at p. 556. As with their better known "legislative fact" cousins, "social facts" are general. They are not specific to the circumstances of a particular case, but if properly linked to the adjudicative facts, they help to explain aspects of the evidence. Examples are the Court's acceptance of the "battered wife syndrome" to explain the wife's conduct in *R. v. Lavallee*, 1990 CanLII 95 (SCC), [1990] 1 S.C.R. 852, or the effect of the "feminization of poverty" judicially noticed in *Moge v. Moge*, 1992 CanLII 25 (SCC), [1992] 3 S.C.R. 813, at p. 853, and of the systemic or background factors that have contributed to the difficulties faced by aboriginal people in both the criminal justice system and throughout society at large in *R. v. Wells*, [2000] 1 S.C.R. 207, 2000 SCC 10 (CanLII), at para. 53, and in *R. v. Gladue*, 1999 CanLII 679 (SCC), [1999] 1 S.C.R. 688, at para. 83.
>
> 58 No doubt there is a useful distinction between "adjudicative facts" (the where, when and why of what the accused is alleged to have done) and "social facts" and "legislative facts" which have relevance to the reasoning process and may involve broad considerations of policy: Paciocco and Stuesser, at p. 286. However, simply categorizing an issue as "social fact" or "legislative fact" does not license the court to put aside the need to examine the trustworthiness of the "facts" sought to be judicially noticed. Nor are counsel encouraged to bootleg "evidence in the guise of authorities": *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, 1999 CanLII 640 (SCC), [1999] 3 S.C.R. 845, at para. 3.

Analysis

Child Advocate's Report

14 The underlying application is for advance costs. The law relating to the availability of advance costs is set out mainly in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 (S.C.C.) and *Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue Agency)*, 2007 SCC 2, [2007] 1 S.C.R. 38 (S.C.C.). I dealt with these principles recently in *C. (L.) v. Alberta*, 2016 ABQB 491 (Alta. Q.B.). I will briefly repeat excerpts from those cases and from *R. c. Caron*, 2011 SCC 5 (S.C.C.).

15 The test for advance costs relates to three things, described at para 40 of *Okanagan*:

> 1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial — in short, the litigation would be unable to proceed if the order were not made.

2. The claim to be adjudicated is prima facie meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.

3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

16 There is ultimately a broad discretion for the Courts to exercise in dealing with such applications. *Little Sisters* discusses the broad discretion for the Courts at para 37:

> In analysing these requirements, the court must decide, with a view to all the circumstances, whether the case is sufficiently special that it would be contrary to the interests of justice to deny the advance costs application, or whether it should consider other methods to facilitate the hearing of the case. The discretion enjoyed by the court affords it an opportunity to consider all relevant factors that arise on the facts.

17 *R. c. Caron* emphasizes this residual discretion in para 6:

> [6] ...Okanagan was based on the strong public interest in obtaining a ruling on a legal issue of exceptional importance that not only transcended the interest of the parties but also would, in the absence of public funding, have failed to proceed to a resolution, creating an injustice...

18 It is particularly noteworthy that *R. v. Spence* warns that the simple characterization of social fact does not address its trustworthiness, which must still be done. As well, counsel should not "bootleg evidence in the guise of authorities".

19 The public interest is a very important aspect of an advance costs application. I recognize that the action that I have certified is not an action on behalf of aboriginal children. Some aboriginal children are undoubtedly among the child plaintiff class. But many others are not aboriginal. This is not an action about how the Government has treated aboriginal children, it is about the Government's failure to follow its legislated obligations to a number of children in care, regardless of their ancestry or background. While the class proceeding clearly seeks damages for the benefit of the individual plaintiffs, there is undoubtedly a public interest aspect to the litigation: considerations of the rule of law and the extent to which the government should be accountable for failure to follow its legislated obligations.

20 *R. v. Spence* is a case about challenges for cause in jury selection. The decision deals with judicial notice and social science evidence:

> 53 Still less can it be said that such favouritism satisfies the more stringent test of judicial notice adopted by this Court in *Find*, at para. 48, *per* McLachlin C.J.:
>
> Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy.

21 From these decisions, it can be concluded that the Report from the Office of the Child and Youth Advocate is not evidence. The Supreme Court has included similar reports (like the 2015 Truth and Reconciliation Report) under the category of "authors", which is a subset of secondary authorities.

22 A research paper, like a book or journal article, may have some persuasive value but is not of itself evidence of anything. In the area of social fact, it seems to me that if a litigant alleges a particular social fact or set of social facts, it may (as suggested in *R. v. Spence*) consider the extent to which the Court may take judicial notice of the facts alleged. The litigant might also state what he or she understands to be social fact, and cite in support research papers, journal articles or books.

23 Merely attaching a research paper to an affidavit, without more, is not helpful and proves nothing. That invites the question "so what?".

24 In this case, it is not clear at all from Mr. Tinkler's affidavit what the Report is being appended for. What is the point to be made by referring to it? Merely attaching a document, without more, offends Rule 13.18:

> 13.18(1) An affidavit may be sworn
>
> a) on the basis of personal knowledge, or
>
> b) on the basis of information known to the person swearing the affidavit and that person's belief.
>
> (2) If an affidavit is sworn on the basis of information and belief, the source of the information must be disclosed in the affidavit.
>
> (3) If an affidavit is used in support of an application that may dispose of all or part of a claim, the affidavit must be sworn on the basis of the personal knowledge of the person swearing the affidavit.

25 HMQ cites *Mikisew Cree First Nation v. Canada*, 2002 ABCA 110 (Alta. C.A.), which makes the point that affidavits on information and belief are admissible "only if the affidavit contains statements as to the belief of the deponent" (at para 12).

26 *Rumley v. British Columbia*, 2003 BCSC 234 (B.C. S.C.) deal with the prejudice if reports (there, Ombudsman and Royal Commission reports) were admitted in evidence for the truth of their contents. That position was rejected in that case.

27 EMP refers to Rule 13.21 and says "the document speaks for itself". Rule 13.21 states:

> 13.21(1) record to be used with an affidavit must be
>
> a) an exhibit to the affidavit, and
>
> b) identified by a certificate of the person administering the oath.
>
> (2) If the total number of pages of an affidavit and attached exhibits is 25 or more,
>
> a) the exhibits must be separated by tabs, and the pages within each tab must be numbered consecutively, or
>
> b) the pages of the affidavit and all exhibits must be consecutively numbered using a single series of numbers.
>
> (3) An exhibit to an affidavit must be attached or appended to the affidavit when the affidavit is filed unless
>
> a) the exhibit is unduly large or bulky and can be adequately identified,

b) the exhibit has already been filed and is identified, or

c) the Court otherwise orders.

28 This Rule does not give documents any evidentiary value by simply attaching them to an affidavit without proof of the truth of their contents. Some things are evidence by themselves, such as statutes and public documents under the *Alberta Evidence Act*, RSA 2000 c A-21.

29 In her argument, EMP points out that HMQ filed an affidavit of Danielle Lorieau which appended as exhibits various pieces of correspondence passing between Mr. Barber and Mr. Lee.

30 As with Mr. Tinkler's affidavit, Ms. Lorieau makes no comment about the truth of the contents of the letters, and I expect that HMQ's response to any criticism of the form of her affidavit would be "the letters speak for themselves".

31 This tit-for-tat argument emphasizes the practice (which appears to have become commonplace) of counsel trying to put their correspondence and records into evidence through their assistants or others, so that counsel is not exposed to cross-examination. The deponent generally has no knowledge of the subject matter and any cross-examination of him or her would be useless.

32 The "old" practice was to have the client swear such an affidavit, with the downside that this made the client subject to cross-examination, and cross-examination on affidavits is not limited by the contents of the affidavit.

33 The current practice is, in my view, a questionable one that essentially makes the lawyer a witness in the cause but with no opportunity to challenge or question what the lawyer wants put forward. It is a practice that I believe should be used sparingly and only with respect to virtually uncontested matters.

34 A further objection by HMQ is that the Report is hearsay and should not be admitted on that basis. I accept that the Report is hearsay. The Child Advocate is not a party to this litigation and he is not subject to cross-examination on his report. But hearsay is not always inadmissible. It may, for example, be used in interlocutory applications.

35 There has been no argument on point, but it seems likely that an application for advance costs would be characterized as "interlocutory". An order for advance costs is an interim order, subject to revision at the end of the trial (or on a change in circumstances or by the terms of the cost order itself).

36 So a hearsay objection on the application is not particularly well-founded. That being said, there is a difference that may be given to the weight afforded to hearsay evidence as opposed to direct evidence. I do not find the hearsay objection to be applicable to this application.

37 Here, I am satisfied that the Child Advocate's report should be struck from Mr. Tinkler's affidavit. It is not evidence, and Mr. Tinkler does not adopt the report in any fashion.

38 It may be that it is relevant in argument as a secondary authority, or to support a "social fact". But simply introducing it in the fashion "now shown to me and marked Exhibit A to my affidavit" is improper.

Sawridge Trust Litigation Materials

39 HMQ has a number of objections to these materials being attached to Mr. Tinkler's affidavit. In addition to the objections raised with respect to the Child Advocate's report, HMQ refers to Rule 6.11(f) concerning the use of materials from other lawsuits.

40 Rule 6.11 provides:

> 6.11(1) When making a decision about an application the Court may consider only the following evidence:
>
> a) affidavit evidence, including an affidavit by an expert;
>
> b) a transcript of questioning under this Part;
>
> c) the written or oral answers, or both, to questions under Part 5 that may be used under rule 5.31;
>
> d) an admissible record disclosed in an affidavit of records under rule 5.6;
>
> e) anything permitted by any other rule or by an enactment;
>
> f) evidence taken in any other action, but only if the party proposing to submit the evidence gives every other party written notice of that party's intention 5 days or more before the application is scheduled to be heard or considered and obtains the Court's permission to submit the evidence;
>
> g) with the Court's permission, oral evidence, which, if permitted, must be given in the same manner as at trial.

41 Some of the Exhibits are affidavits sworn in the Sawridge Trust litigation. Some of the Exhibits are applications, briefs and correspondence in that action.

42 In my view, HMQ's objections to these materials are well-founded. Mr. Tinkler's affidavit is defective in that he fails to swear as to any evidentiary value for these materials. Additionally, pleadings and briefs are not evidence (see *L. (T.) v. Alberta (Director of Child Welfare)*, 2006 ABQB 104 (Alta. Q.B.)).

43 EMP argues that the materials are relevant to show that the hourly rate sought by Mr. Lee in the advance costs application is reasonable.

44 Thomas J's decision at *1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)*, 2012 ABQB 365 (Alta. Q.B.) imposes no limitations or restrictions on what legal fees are to be reimbursed by the Trust.

45 That decision was affirmed by the Court of Appeal at [*Edmonton Police Service v. Alberta (Law Enforcement Review Board)*] 2013 ABCA 236 (Alta. C.A.). There, the Court of Appeal commented on the absence of limitations at para 29:

> [29] The Trustees submit the chambers judge erred by awarding advance costs without any restrictions or guidelines. In our view, this complaint is premature and an issue not yet canvassed by the court. We would add that an award of advanced costs should not be construed as a blank cheque. The respondent fairly concedes that the solicitor and client costs incurred by it will be subject to oversight and further direction by the court from time to time regarding hourly rates, amounts to be paid in advance and other mechanisms for ensuring that the quantum of costs payable by the Trust is fair and reasonable. The subject order merely establishes that advance costs are payable; the mechanism for obtaining payment and guidelines for oversight has yet to be addressed by the judge dealing with the application for advice and directions.

46 These decisions show that the quantification of advance costs is premature. The points Mr. Lee seeks to make are essentially made by the two Court decisions.

47 My conclusion is that the Sawridge Trust materials are irrelevant such that the other objections to their inclusion in Mr. Tinkler's affidavit need not be dealt with any further.

48 The Sawridge Trust materials shall be struck from Mr. Tinkler's affidavit.

Budget

49 Mr. Tinkler's references to the budget are slightly different than his references to the Report and the Sawridge Trust materials. He includes a paragraph on what Mr. Lee has told him about the budget.

50 The budget itself is detailed as to the anticipated steps and the estimated time for each step. HMQ does not object to the budget being attached, but does object to the "introduction" or preamble, which contains comments on costs in other class proceedings and comments on how he perceives HMQ conducts litigation.

51 HMQ objects to the introduction on the same basis as above: it is attached to the affidavit without any statement by Mr. Tinkler as to the truth of its contents.

52 At the outset of this discussion, I do not see that the proposed budget needed to be put forward by way of an affidavit. It could have been submitted to the Court directly by counsel, just as counsel might submit a draft form of order before the application is heard.

53 It might have been helpful for Mr. Tinkler to opine (as client) on the reasonableness of the budget, and the reasonableness of the basis for the manner in which the budget has been prepared, but that is not the case here.

54 Instead, comments on its reasonableness have been put forward in the budget itself, as well as by Mr. Tinkler swearing as to what he has been told by counsel.

55 The budget is relevant to this application, and the basis for it is also relevant.

56 The supporting information could likely have all been put forward through legal argument. However, here EMP chose to put that information before the Court through Mr. Tinkler.

57 That makes Mr. Tinkler subject to cross-examination on what he has been told, among other things. I express no opinion on the extent to which any solicitor and client privilege has been waived by the contents of Mr. Tinkler's affidavit.

58 While what Mr. Tinkler swears he has been told by Mr. Lee is hearsay, I have already observed that hearsay is not objectionable on an interlocutory application.

59 There are portions of the introduction that could be characterized as inflammatory, but I cannot say that it is irrelevant to consider how an opposing party is likely to conduct litigation in preparing a budget. Something being inflammatory is not of itself objectionable to admissibility. I do not strike the budget, or the introduction to it.

Cross Application to Cross-Examine

60 In her reply brief, EMP seeks as an alternative remedy an order permitting her to question the Child Advocate and the Public Trustee. There is no specific notice of application regarding this request. HMQ is not required to produce the Child Advocate or the Public Trustee for cross-examination. If EMP considers that their evidence is important for the purposes of the application, she can always use Rule 6.8 to question either or both of them.

Conclusion

61 In summary, I conclude that the Child Advocate's Report *Voices for Change: Aboriginal Child Welfare in Alberta* should be struck from Mr. Tinkler's affidavit. The Report by itself is not evidence, and simply appending it to an affidavit without more does not make it evidence. It may be a secondary authority in relation to social facts; such authorities do not need to be introduced by way of affidavit.

62 The materials from the Sawridge Trust litigation should also be struck. Appending these materials without more does not make them evidence. They are also irrelevant to the issues to be determined on the underlying advance costs application.

63 The budget need not be struck. It is a document provided to him as client by his lawyer. He has sworn as to some of what his lawyer has told him about the budget I agree that much of the introduction to the budget might be characterized as legal argument, but in the context here, it also serves as an explanation for how some aspects of the budget has been put together. As noted above, I express no views on the extent to which any solicitor client privilege may have been waived through Mr. Tinkler's affidavit.

Application granted in part.

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