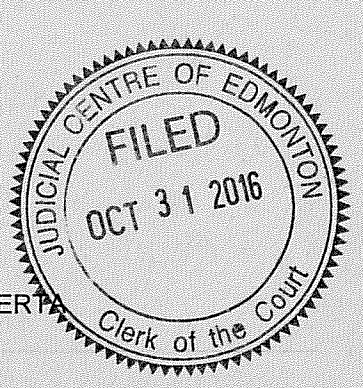
Clerk's Stamp:



COURT FILE NUMBER	1103 14112
COURT:	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE:	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c T-8, AS AMENDED IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT 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, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE and CLARA MIDBO, as Sawridge Trustees for the 1985 Sawridge Trust
DOCUMENT	**BRIEF OF THE TRUSTEES FOR THE 1985 SAWRIDGE TRUST IN RESPONSE TO THE BRIEF OF THE APPLICANT PATRICK TWINN ON BEHALF OF HIMSELF, MELISSA MEGLEY AND ASPEN TWINN; SHELBY TWINN; AND DEBORAH SERAFINCHON**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Attention: Doris Bonora Dentons Canada LLP 2900, 10180 – 101 Street Edmonton, AB T5J 3V5 Telephone: (780) 423-7188 Facsimile: (780) 423-7276 File Number: 551860-1

Clerk's Stamp:

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I. INTRODUCTION

1. This Brief is filed on behalf of the Trustees for the 1985 Sawridge Trust (the "Trustees") in response to the Brief filed by 3 Applicants: (1) Patrick Twinn ("Patrick") on behalf of himself, his infant daughter Aspen Saya Twinn ("Aspen") and his wife Melissa Megley ("Melissa"); (2) Shelby Twinn ("Shelby"); and, (3) Deborah Serafinchon ("Deborah") (collectively the "Applicants"). These submissions also respond to the Applicants' request for advance costs.

2. It is the Trustees' position that the Applicants ought not to be added as parties to the Trustees' Application for Advice and Direction at this late juncture. These applications are filed more than 5 years past the deadline imposed by Order of Justice D.R.G. Thomas dated August 31, 2011.

3. Patrick's application (on behalf of himself, Aspen and Melissa), Shelby's and Deborah's applications to be added as parties should be struck in their entirety.

4. If the Court is inclined to overlook the extremely late filings of applications for party status and further, *only* if the Court believes that key interests remain unrepresented in this Action, which the Trustees deny, then the Trustees propose that the Court define a single class of intervenors ("Class") to advance any and all remaining unrepresented interests.

5. The Trustees further propose that in the interest of cost-efficiency and fairness, if such a Class were to be defined, that it be represented through a Litigation Representative and that a single lawyer be appointed by the Court as *Amicus Curiae* to speak on the Class' behalf. If the Court believes this course of action is required, the Trustees wish to make further representation to define the Class with the necessary appointments.

II. FACTS

6. The Applicants are asking for an Order that they each be added as full Parties to the within Action and that they each receive advance costs in order to protect their individual interests. The application has been brought by:

   (a) Patrick Twinn, who is the son of the late Chief of Sawridge First Nation, Walter Patrick Twinn, is a member of Sawridge First Nation (the "SFN") and beneficiary of the 1985 Trust and will continue to be a beneficiary if the definition is amended as proposed. He married Melissa Megley in July 2016;

   Affidavit of Patrick Twinn, sworn on July 26, 2016 ["Patrick Affidavit"], at paragraphs 7 and 9 **[Tab 1]**

   (b) Patrick Twinn, purports to act on behalf of his infant daughter, Aspen Saya Twinn ("Aspen"), who is a current beneficiary of the 1985 Trust and is already represented by the Office of the Public Guardian and Trustee (the "OPGT");

   Patrick Affidavit, at paragraph 11 **[Tab 1]**

   (c) Patrick Twinn, purports to act on behalf of his wife Melissa Megley ("Melissa"), who is a current beneficiary of the 1985 Trust but not a member of SFN. Patrick Twinn is not a proper litigation representative of Melissa Megley;

Patrick Affidavit, at paragraph 10 **[Tab 1]**
Affidavit of Paul Bujold sworn October 31, 2016
("Bujold Affidavit") , at Exhibit C **[Tab 5]**

(d) Shelby Twinn, is a beneficiary of the 1985 Trust but not a member of the SFN. Shelby is the daughter of Paul Twinn. Paul Twinn is the half-brother of Patrick Twinn and son of the late Chief of SFN, Walter Patrick Twinn. Shelby's sister is represented by the OPGT and Shelby and her sister have identical interests; and

Affidavit of Shelby Twinn, sworn on
July 26, 2016 ["Shelby Affidavit"], at paragraphs 4, 9 and 10 **[Tab 2]**

(a) Deborah Serafinchon, is neither a member of the SFN, nor a beneficiary of the 1985 Trust or a Status Indian. Deborah alleges that she is the illegitimate child of late Chief Walter Patrick Twinn but is not able to prove her paternity to the satisfaction of the federal government and thus Deborah does not have Indian Status.

Affidavit of Deborah Serafinchon, sworn on
July 26, 2016 ["Deborah Affidavit"], at paragraph 11-21 **[Tab 3]**

7. The Trustees' application for advice and direction was filed on June 12, 2011 ("Advice and Direction Application" or "Trustees' Application"); the purpose was to vary the definition of "Beneficiary" in the "1985 Trust to ensure it is non-discriminatory. This action arose as a result of passing of Bill C-31 into law in April 1985, which brought significant changes to the *Indian Act* in respect of First Nation membership and removed gender discrimination within the *Indian Act* to bring it into line with gender equality under the Canadian Charter of Rights and Freedoms.

8. By an Order of Justice D.R.G. Thomas dated August 31, 2011, any person interested in participating in the Advice and Direction Application was to file an affidavit upon which they intended to rely no later than September 30, 2011.

Order of Justice D.R.G. Thomas dated August 31, 2011
filed September 6, 2011 (the "August 11 Order") **[Tab 4]**

9. Patrick, as a member of the SFN, was served with the order of August 31, 2011 by registered mail. However, he clearly missed the deadlines set in the August 11 Order, and chose to wait for 5 years before bringing an application to be added as a party to this action.

Bujold Affidavit, at paragraph 2 **[Tab 5]**

10. Deborah was also served with the August 11 Order by registered mail. However, she clearly missed the deadlines set in the August 11 Order, and chose to wait for 5 years before bringing an application to be added as a party to this action.

Bujold Affidavit, at paragraph 3 **[Tab 5]**

III. ISSUES

A. Addition of Parties

B. Should Patrick, Shelby, Melissa or Aspen be granted Party Status in the Trustees' Application?

C. Should Deborah (who is neither a beneficiary nor a member or status Indian) be granted Party Status in the Trustees' Application?

D. Is the consent of beneficiaries required to vary the 1985 Trust such that they ought to be entitled to party status?

E. Should the Applicants be entitled to advance costs?

F. How should the interests of potentially affected persons, if any, be represented?

IV. LAW AND ARGUMENT

A. Addition of Parties

11. Rules 3.74 and 3.75 of the Alberta *Rules of Court* provide for the qualifications and procedure for addition of parties after the close of proceedings and the addition of parties to an originating application.

Alberta Rules of Court, Alta. Reg. 124/2010 ("*Rules of Court*"), ss. 3.74 and 3.75 **[Tab 6]**

12. Given the nature of the Advice and Direction Application, both Rule 3.74 and Rule 3.75 would apply as they relate to the same fundamental principles.

13. In *Manson Insulation Products Ltd. v. Crossroads C & I Distributors*, Justice Poelman of the Alberta Court of Queen's Bench held that there are three key requirements that arise out of applications to add parties pursuant to Rules 3.74(2)(b) and 3.74(3):

> a) the application must be made by a party;
>
> b) the court must be satisfied that an order should be made; and
>
> c) there must be no prejudice that could not be remedied

Manson Insulation Products Ltd v Crossroads C & I Distributors, 2011 ABQB 51, 2011 CarswellAlta 108, at paragraph 48 **[TAB 7]**

14. It is clear that applications by third parties to be added as "Parties" are not permitted. Any such applications can only seek intervenor status, which is not being sought by the Applicants.

15. Further, in *Castledowns Law Office Management Ltd. v. FastTrack Technologies Inc.*, the Court of Appeal held that:

> 18 Rule 3.74(3) of the Rules of Court expressly provides that an order adding parties should not be granted if doing so would cause prejudice for a party which could not be remedied by a costs award, an adjournment or the imposition of terms.

Castledowns Law Office Management Ltd. v. FastTrack Technologies Inc. 2012 ABCA 219, 2012 CarswellAlta 1203, at paragraph 18 **[Tab 8]**

16. This action has been proceeding for more than 5 years. Significant steps have been taken. Patrick and Deborah were served with the August 11 Order and could have been involved from the beginning. They chose not to abide by a court-ordered imposed deadline. Moreover, they have not advanced any novel arguments. Therefore, their proposed role as parties merely serves to unnecessarily complicate the action.

17. Permitting further parties to be added at this stage causes clear prejudice to the Trustees and all the beneficiaries of the Trust. If any new parties insist on exercising their rights to questioning, they will prolong this litigation by several years. The Court has already narrowed the focus of the questions to be answered and made several key decisions with the goal of setting the matter down in the near future for a hearing. The Trustees believe they are very close to a resolution of this matter. To start fresh with five new litigants will jeopardize the significant progress made.

18. Further, addition of parties at this late juncture would unnecessarily expand the scope of the Trustees' Application. Moreover, such expansion would exponentially increase legal expenses, which, given the Applicants' inability to contribute to pay costs, would result in prejudice to the Trustees and the beneficiaries of the Trust.

B. Should Patrick, Shelby, Melissa or Aspen be granted Party Status in the Trustees' Application?

19. The Trustees respectfully submit that the interests of Patrick, Shelby and Aspen (as current beneficiaries) are already represented in this action such that their addition to the action would be redundant. Melissa cannot be represented by Patrick and she has not filed an application on her own behalf.

Patrick

20. Patrick is a beneficiary and will remain a beneficiary even if the proposed amendments are made. His interests will not be affected.

21. Patrick is a registered member of the SFN. He is a beneficiary of the 1985 Trust and will remain a beneficiary of the 1985 Trust regardless of the amendments. Therefore, he has no interest to protect in this Action. Catherine Twinn is Patrick's mother. She assisted Patrick in his representation by paying the retainer for his lawyers. She has already advanced the same arguments that Patrick is attempting to raise such as the need for beneficiary approval of the amendment. Furthermore, Patrick is agreeable to having an expanded "Beneficiary" definition, which may dilute his interest.

Transcript of Questioning on Affidavit of
Patrick Twinn held September 22, 2016, at page 15 **[Tab 9]**

22. Patrick Twinn admitted in his cross examination on affidavit that his mother, Catherine Twinn, paid the retainer for the Applicants. One can therefore infer that she supports their position and as she is already a party, one can also infer that their positions are already being represented.

23. In addition, Patrick Twinn only answered his undertakings following his questioning on affidavit in support of his application on October 31, 2016 (the morning this Brief was due). He is seeking that the Court grant extraordinary relief, namely, to be added as a party and be granted advance costs; however, he is already causing difficulty with Court-imposed deadlines. He was aware of the Court-imposed brief filing deadlines. His conduct shows that he has a lack of concern for delay of the litigation. Mr. Twinn's failure to answer undertakings promptly relate to the application on his behalf and on behalf of his wife, Melissa, and his daughter, Aspen.

Shelby

24. Shelby is a registered Indian. Shelby and her sister Kaitlin Twinn are both current beneficiaries of the 1985 Trust. It is acknowledged that the Advice and Direction Application could have a potential effect on Shelby's and her sister's beneficiary status.

25. The interests of Shelby and her sister, Kaitlin are exactly the same. Given that Kaitlin is already being represented by the OPGT and considering that the OPGT would be making adequate submissions for protection of her interests, Shelby's interests are appropriately represented. There is no valid and juristic reason for her interests to be added as a party.

26. The Trustees have asked the Office of Public Trustee if their office continues to represent the child beneficiaries who have become adults during the course of litigation. In absence of indication to the contrary, the Trustees have assumed that the OPGT represents the interests of Kaitlin and submits that Shelby's interests are therefore also already represented in the action. The OPGT represents several minors who have interests similar to Shelby and Kaitlin.

Bujold Affidavit at paragraph 4 **[Tab 5]**

27. Finally, Shelby is not a Sawridge Member; she has not applied to be a Sawridge member. At her questioning, Shelby indicated that she is "not sure" if she would apply to be a member of the SFN. This is difficult for the Trustees to hear as the Trustees believe that the trust was created for the *members* of the First Nation as they were defined in 1985 or as they are defined now. But Shelby suggests that she does not wish to be a member of SFN; she only wants money from the trust.

Transcript of Questioning on Affidavit of
Shelby Twinn held September 22, 2016, at page 8 and 9 **[Tab 10]**

Melissa

28. Melissa has not filed her own application to be a party in this action. The Rules of Court do not permit her to be represented by Patrick as her litigation representative (See Rules 2.11-2.14). Thus, she has not met the procedural requirements to be added as a party.

Rules of Court, ss. 2.11-2.14 **[Tab 32]**

29. Patrick and Melissa's counsel is aware of this lack of authority. Earlier in September, she responded to the Trustees' counsel's concern about the procedural error in the application and advised that Melissa will "likely represent herself and will swear an affidavit that will be provided to you in due course".

Bujold Affidavit, Exhibit C **[Tab 5]**

30. As no such affidavit was ever filed, one can infer that Melissa is not interested in her own right to becoming a party to this action.

31. Further, during her lifetime, Melissa, as a dependant of her husband, would be entitled to receive benefits from the Sawridge Trust.

32. Finally, in Patrick's undertaking response number 2, only received on October 31, 2016, the date of this brief, he states he is not representing Melissa.

Undertaking Responses of Patrick Twinn **[Tab 33]**

Aspen

33. Aspen Saya Twinn is an infant beneficiary of the Sawridge Trust and is already represented by the OPGT, as noted at paragraph 20 of the Applicants' brief. There is no valid and juristic reason for requirement of double and/or separate representation of her interests.

Bujold Affidavit, Exhibit C **[Tab 5]**

C. Should Deborah (who is neither a beneficiary nor a member or status Indian) be granted Party Status in the Trustees' Application?

34. Deborah is neither a beneficiary of the 1985 Trust nor a member of the SFN. Deborah is not a registered indian. She states she has no interest in seeking membership of the SFN and has not taken the proper steps to establish her claim as a status Indian through the lineage of Chief Walter Twinn.

35. The Trustees respectfully submit that Deborah's application to be added as a party to the Application is an attempt by her to collaterally attack membership issues in an inappropriate forum. The issue of membership is not in issue in the Application.

36. Deborah has been unsuccessful in establishing her paternity to the Department of Indian Affairs and was told that "the DNA was not good enough". She has also been unsuccessful in seeking assistance with her paternity claim before Lesser Slave Lake Indian Regional Council and received a letter from them advising that the "DNA sample was insufficient". She has not applied for membership of SFN and when asked about her plans to make an application, she responded "I am not sure because the process is long and arduous and painful".

Deborah Transcript, at page 7-9, 11 **[Tab 11]**

37. However, she now seeks to establish Indian status through the back door. Her Application constitutes a collateral attack on the revoked provisions of the *Indian Act* in respect of membership and attempts to expand this litigation. She seeks to amend a revoked piece of legislation in a way that Parliament did not.

38. As noted above, Deborah was also served with the August 31, 2011 Order. However, she clearly missed the deadlines set in the August 31, 2011 Order, and chose to wait for 5 years before bringing an application to be added as a party to this action.

39. In her questioning, Deborah stated that she has no intention of seeking membership in the SFN and had not made any inquiries in that regard.

Transcript of Questioning on Affidavit of Deborah A. Serafinchon held September 22, 2016, at page 11 and 13 **[Tab 11]**

40. The beneficiaries of the 1985 Trust are currently defined as:

> ...all persons who at that time qualify as members of The Sawridge Indian Band No. 454 pursuant to The Indian Act R.S.C. 1970, Chapter I-6...

Sawridge Trust Website – Beneficiaries online: <http://sawridgetrusts.ca/beneficiaries> **[Tab 12]**

41. The Supreme Court of Canada in *British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal)* held that:

> 28 The rule against collateral attack similarly attempts to protect the fairness and integrity of the justice system by preventing duplicative proceedings. It prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route...

British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal), 2011 SCC 52 at 28 **[TAB 13]**

42. Moreover, this Honourable Court is not a proper forum to address Deborah's membership issues. The questions of membership ought to be adjudicated in the proper forum. Given that the operations of First Nations are generally regulated by the Federal Court, it is appropriate for determinations regarding membership or Indian Status to be heard in the Federal Court. The importance of preserving the Federal Court's jurisdiction in matters involving membership was addressed by Justice Thomas in *Sawridge #3*:

> The same is true for this Court attempting to regulate the operations of First Nations, which are 'Bands' within the meaning of the *Indian Act*. The Federal Court is the better forum and now that the Federal Court has commented on the SFN membership process in ***Stoney v Sawridge First Nation,*** there is no need, nor is it appropriate, for this Court to address this subject. If there are outstanding disputes on whether or not a particular person should be admitted or excluded from Band membership then that should be reviewed in the Federal Court, and not in this 1985 Sawridge Trust modification and distribution process.

1985 Sawridge Trust v Alberta (Public Trustee), 2015 ABQB 799, at paragraph 35 **[TAB 14]**

43. Rule 3.68 of the *Rules of Court* provides that a Court may order that all or any part of a claim or defence be struck out if the Court has no jurisdiction, or if a commencement document constitutes an abuse of process.

Rules of Court, s. 3.68 **[Tab 15]**

44. Deborah's addition as a party to this action would accomplish nothing; it would create prejudice to the current parties by clouding the well-defined issues. Her application should be dismissed.

D. Is the consent of beneficiaries required to vary the 1985 Trust such that they ought to be entitled to party status?

45. The Trustees respectfully disagree with paragraph 66 and 67 of the Applicants' brief and state that consent is not required by the beneficiaries to vary the 1985 Trust. In any event, they state that any requirement for consent does not establish rights as a party to this action.

46. The definition of "Beneficiary" in the 1985 Trust is currently discriminatory.

47. It is the position of the Trustees that the consent of the beneficiaries is not necessary in a discriminatory trust as such as position would be unworkable; it is unlikely that any of those who will lose beneficiary status will consent to such a variation.

48. As a stark example, if a trust is created for several beneficiaries, for example, a neo-Nazi organization, the Cancer Society and the Heart and Stroke Foundation, and if the trust required amendment to be compliant with public policy, practically speaking, only the Courts could intervene to amend the trust. It is obvious that the beneficiaries of the void portion of the trust, namely, the neo-Nazis, who would be eliminated, would not consent.

McCorkill v McCorkill Estate, 2014 NBQB 148, at paragraph 90 and 91 **[Tab 29]**

49. Court intervention without beneficiary consent is well-established in law when dealing with discriminatory trusts. In the *Leonard Foundation Trust* case, the Ontario Court of Appeal deleted discriminatory provisions of the trust relating to race, religion, nationality and gender on the basis that they violated the common law doctrine of public policy.

Canada Trust Co v Ontario Human Rights Commission, [1990] OJ No 615 (ONCA), 69 DLR (4th) 321 ("*Leonard Foundation Trust*"), at paragraphs 48, 49 and 53 **[Tab 30]**

Bruce Ziff, *Welcome the Newest Unworthy Heir, (2014) 1 ETR (4th) 76*, at pages 80 and 81 **[Tab 31]**

50. Finally, consent is a live question that will be part of the final determination of this issue. It is the position of the Trustees that the consent of the beneficiaries is not necessary as such a position would be impossible to correct with a discriminatory trust that requires an amendment.

51. By its very nature, a discriminatory trust leaves out individuals from its beneficiary ranks. Only the Courts can remedy this obvious deadlock by exercising its power to amend such a trust by striking words to ensure that trusts are no longer discriminatory.

E. Should the Applicants be entitled to advance costs?

52. The Trustees request that the application for advance costs in favour of the Applicants be dismissed.

53. The three-part test established in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, and confirmed in *Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue Agency)* remains the seminal law on the question of advance costs.

British Columbia (Minister of Forests) v. Okanagan Indian Band, 2003 SCC 71 ("*Okanagan*") **[TAB 16]**

Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue Agency), 2007 SCC 2 ("*Little Sisters*") **[TAB 17]**

54. A party seeking advance or interim costs must convince a court that it meets the "three absolute requirements": impecuniosity; *prima facie* meritorious claim; and, public importance or special circumstances.

55. Further, the Supreme Court in *Okanagan* also suggested that the discretion to award costs prior to final disposition of a case should only be exercised in rare and exceptional circumstances. In *Little Sisters*, the Supreme Court confirmed this proposition:

> 34. ...Nevertheless, the general rule based on principles of indemnity, i.e., that costs follow the cause, has not been displaced. This suggests that policy and indemnity rationales can co-exist as principles underlying appropriate costs awards, even if "[t]he principle that a successful party is entitled to his or her costs is of long standing, and should not be departed from except for very good reasons": Orkin, at p. 2-39...This framework has been adopted in the law of British Columbia by establishing the "costs follow the cause" rule as a default proposition, while leaving judges room to exercise their discretion by ordering otherwise: see r. 57(9) of the Supreme Court of British Columbia Rules of Court, B.C. Reg. 221/90.
>
> ...
>
> 38. It is only a "rare and exceptional" case that is special enough to warrant an advance costs award: *Okanagan*, at para. 1. The standard was indeed intended to be a high one, and although no rigid test can be applied systematically to determine whether a case is "special enough", some observations can be made. As Thackray J.A. pointed out, it was in failing to verify whether the circumstances of this case were "exceptional" enough that the trial judge committed an error in law.
>
> *(emphasis added)*

Little Sisters, at paragraph 34 and 38 **[TAB 17]**

56. In the present case, first and foremost, the Applicants have failed to demonstrate that they are impecunious to an extent that, without an order for advance costs, they would be deprived the opportunity to proceed with the action. Patrick's financial disclosure demonstrates that he owns a home assessed at over $400,000, that he drives a Lexus and has a membership at the Royal Glenora Club.

57. In particular, the Applicants have failed to demonstrate that no other realistic option exists to finance their legal costs, which they have the ability to pursue based on their financial records.

Undertaking Responses of Patrick, Shelby and Deborah regarding their financial status **[Tab 34]**

58. In *Klychak v. Samchuk*, with respect to the first part of *Okanagan* test, Justice Veit of the Alberta Court of Queen's Bench stated:

> 54 Samchuk has not met the first part of the tri-partite test. Even assuming that Samchuk's pension and property settlement are insufficient to fund major litigation, Samchuk has not adequately explored alternative methods of funding litigation. Although at the hearing, his current lawyer expressed the opinion that his own firm may not agree to take on representation of Samchuk on a contingency basis, no application for contingency services had been made to the firm. There was no evidence that Samchuk's cause of action had been presented to other firms, perhaps smaller firms, that might be interested in taking on the work on a contingency basis....

> 55 In addition to services on a contingency basis, another possibility that litigants should be required to explore in Canada today is third party litigation funding...

Klychak v. Samchuk, 2012 ABQB 85 **[TAB 18]**

59. Similarly, in *Fontaine v. Canada (Attorney General)*, Justice Perell of the Ontario Superior Court of Justice suggested that prior to awarding interim or advance costs all realistic alternative avenues to finance including legal aid, pro bono representation, contingency fees and private fundraising efforts must be exhausted. Justice Perell held:

> 62 The jurisdiction to award advance costs is an extra-extra extraordinary jurisdiction. In *Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue Agency)*, *supra* at para. 5, Justices Bastarache and LeBel (Justices Deschamps, Abella, and Rothstein concurring) state that the *ratio* in *Okanagan* applies only to those few situations where a court would be participating in an injustice against the litigant personally and against the public generally if it did not order advance costs to allow the litigant to proceed...
>
> 63 To summarize, a party seeking an order for interim costs must demonstrate: (1) a *prima facie* case of sufficient merit to warrant it being pursued; (2) impecuniousity to the extent that, without assistance, the party would be deprived of the opportunity to proceed with the case; and (3) special circumstances where the award is necessary in the public interest. The three mandatory criteria for an award of interim or advance costs are: merit, impecuniosity, and public interest. The award remains discretionary, and the court will also consider whether there are alternatives to an interim costs award and whether the applicant has exhausted all realistic alternative avenues to finance its case including legal aid, *pro bono* representation, contingency fees, **private fundraising efforts** and class action certification. Interim costs awards are a last resort in circumstances where there are special circumstances and the need for an advance costs award to advance the claim or defence is clearly established. The fulfillment of the three listed conditions is necessary but not sufficient to justify an advance costs order. The court must examine all the circumstances of the case and determine not only if its importance is sufficiently "special" to support an extraordinary order of this sort, but also if there are any other factors which might militate for or against the granting of relief.
>
> *(emphasis added)*

Fontaine v. Canada (Attorney General), 2015 ONSC 7007 **[TAB 19]**

60. Patrick has already paid the $5,000.00 retainer to his counsel through the support of his mother, Catherine Twinn. Shelby also admitted the payment of a retainer and stated that her grandmother, Catherine Twinn, helped with that. Further, they have not demonstrated their inability to obtain a loan. As a result, it is clear that alternate avenues for the Applicants for funding of their application have not been properly explored.

Patrick Transcript, at page 15 **[Tab 9]**
Shelby Transcript, at page 8 **[Tab 10]**

61. Secondly, the Applicants have failed to demonstrate that they have a *prima facie* meritorious claim. The test for a meritorious case is that "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"

Okanagan, at paragraph 40 **[Tab 16]**

62. The claim of the Applicants does not have sufficient merit. Their opportunity to pursue the case would not be forfeited as the Advice and Direction Application will proceed regardless of the Applicants involvement. The interests of all the 1985 Trust beneficiaries will be front and centre and considered by the parties.

63. Thirdly, the Applicants have failed to establish the public importance nature of their claim or special circumstances that are "sufficiently special that it would be contrary to the interests of justice to deny the advanced costs application".

Little Sisters, paragraph 37 **[Tab 17]**

64. There is no public importance to these Applicants' application and the potential effect of the Advice and Direction is not widespread as it deals only with the beneficiaries of the Sawridge Trust.

65. The law with respect to special circumstances was summarized in *Dish Network L.L.C. v. Rex* by Justice Paul Walker of the British Columbia Supreme Court as follows:

> 68 The case law suggests that the following factors demonstrate special circumstances:
>
> (a) the potential effect of the litigation is widespread and significant: *Caron* at para. 44; *Keewatin* at para. 233; *Okanagan* at para. 46; *William* at paras. 44-45;
>
> (b) the outcome of the litigation would resolve continued legal uncertainty: *Caron* at paras. 44-45; *William* at para. 49;
>
> (c) the outcome of the litigation may reduce the need for related litigation, and thereby reduce public and private costs: *William* at paras. 46, 49;
>
> (d) the issue would not be resolved but for the litigation: *Caron*; *Hagwilget* at para. 21; *H. (D.W.)* at paras. 31, 37;
>
> (e) the litigation involves scrutiny of government actions: *C. (L.)* at paras. 80, 91; *Hagwilget* at para. 24;
>
> (f) determination of the issue is an urgent matter: *Hagwilget* at paras. 20-21;
>
> (g) the applicant was forced into the litigation or had no choice but to resort to litigation to assert their rights: *Okanagan; Xeni* at paras. 123-124; *Hagwilget* at para. 22; and
>
> (h) one party controls all of the funds that are at issue in the litigation (e.g. trust and matrimonial litigation): *Little Sisters* at para. 104.

Dish Network L.L.C. v. Rex, 2011 BCSC 1105, 2011 CarswellBC 2124 **[Tab 20]**

66. Clearly, the Applicants' Applications do not fall within any of the above categories. Even though this action deals with a trust, the Applicants have alternate funding sources, Further, all interests will already be considered.

67. In specific response to paragraph 77 of the Applicants' brief and the argument that costs should be paid in non-adversarial matters from the trust, the Trustees submit that the nature of the Applicants' application being adversarial or not adversarial is not relevant for the award of interim costs. The Alberta Court of Appeal in *Deans* confirmed that the three-part test prescribed in

Okanagan Indian Band "established the parameters within which a court's discretion to award interim costs should be exercised":

> 20 Relying on a statement in Okanagan at para. 34, that interim costs are available in "certain trust, bankruptcy and corporate cases", the appellants argue that the majority in that case did not intend to extend the Okanagan test to those types of cases. According to the appellants, costs in pension and trust cases are determined by different principles and are ordinarily granted on a solicitor-and-client basis, payable from the pension or trust fund regardless of the outcome of the case.
>
> 21 However, the statement in Okanagan relied on by the appellants was made in the context of a discussion of the types of cases in which interim costs have historically been granted and the policy reasons for doing so. At para. 31, LeBel J. stated:
>
> > Concerns about access to justice and the desirability of mitigating severe inequality between litigants . . . feature prominently in the rare cases where interim costs are awarded.
> >
> > He found that cases falling within that realm include matrimonial or family cases, as well as "certain trust, bankruptcy and corporate cases." The three part test he prescribed established the parameters within which a court's discretion to award interim costs should be exercised. Nothing in his reasons suggests the test was not intended to apply in the context of pension trust litigation.
>
> : see also Dominion Bridge Inc. (Trustee of) v. All Current & Former Plan Members of the Retirement Income Plan of Dominion Bridge Inc. - Manitoba, 2004 MBCA 180 (Man. C.A. [In Chambers]) at para. 24.

Deans v Thachuk, 2005 ABCA 368 ("*Deans*") at paras 20-21 **[Tab 21]**

68. The Trustees have a fiduciary obligation to protect the 1985 Trust's funds from dilution and to resist unmeritorious claims. The Alberta Court of Appeal in *Deans* discussed this obligation:

> Issues specific to trust cases may also be relevant in this context. Trust litigation may entail unique obligations to preserve the trust fund for the beneficiaries... the courts of equity would not hesitate to use their powers to protect and preserve a trust fund in interlocutory proceedings to ensure that it is not entirely depleted before trial. The obligation to protect the Fund from depletion includes not only the duty to protect it from costs of an unmeritorious suit, but as well the duty to protect it from mismanagement.

Deans at paragraph 42 **[Tab 21]**

69. Estate and Trust litigation is not considered an exception to the basic rule that costs follow the event.

> 8 Costs awards can be used as a powerful tool for ensuring that the justice system functions fairly and efficiently. They can promote settlement, encourage efficiency in the conduct of litigation, and sanction improper conduct. Danier, Okanagan and Little Sisters, all very recent decisions of the Supreme Court of Canada, send a strong collective message that it is the exceptional case that will warrant preferential treatment with respect to costs and that the general rule that costs follow the cause has not been displaced in litigation, even in issues of public importance. It follows that there must be very compelling reasons to immunize a litigant in advance from an adverse costs award.

Foote Estate (Re), 2010 ABQB 197 at para 16 **[Tab 22]**
A. (W.) v. St. Andrew's College, 2008 CarswellOnt 421 at para 8 **[Tab 23]**

70. The Trustees acknowledge that if successfully added to this litigation, the Applicants may make a claim for costs at the end which would be decided on its own merits; however, pending such determination, the Trustees must be provided an opportunity to oppose the Applicants' application and the Applicants' ought not be allowed to carry on this Application at the expense of the Trust.

71. It is especially disconcerting to grant advance costs to Melissa, who has not sworn an affidavit to establish the grounds for advance costs, and to Aspen and Shelby, who already essentially have advance costs paid through the OPGT.

72. Therefore, considering the Applicants' inability to meet the three absolute requirements for interim costs award, the long standing principle of successful party being entitled to costs, the Trustees' obligation to protect trust funds and the court's role to restrict unwarranted litigation, the claim for advance costs ought to be dismissed.

F. How should the interests of potentially affected persons, if any, be represented?

73. If this Honourable Court disagrees with the Trustees' position and concludes that any or all of the Applicants' interests are not currently represented in the within action, which the Trustees deny, then the Trustees would propose that such unrepresented Applicants be represented as a Class by a court-appointed Litigation Representative and be granted rights as a Class of intervenors only. Further, the Trustees propose that the Class be legally represented by an *Amicus Curiae*.

Class Represented by Litigation Representative

74. Rule 2.16 of the Alberta *Rules of Court* provides that in an action concerning trust property, interpretation of written instrument or enactment, where a class of persons who may be interested or affected by a claim can be ascertained, and where having regard to the circumstances the court considers it expedient to make an appointment to save expense, a court-appointed litigation representative must be appointed to make a claim or defend an action:

> **2.16(1)** This rule applies to an action concerning any of the following:
>
> (a) the administration of the estate of a deceased person;
> (b) property subject to a trust;
> (c) the interpretation of a written instrument;
> (d) the interpretation of an enactment.
>
> **2.16(2)** In an action described in subrule (1), a person or class of persons who is or may be interested in or affected by a claim, whether presently or for a future, contingent or unascertained interest, must have a Court-appointed litigation representative to make a claim in or defend an action or to continue to participate in an action, or for a claim in an action to be made or an action to be continued against that person or class of persons, if the person or class of persons meets one or more of the following conditions:
>
> ...
>
> (c) the person, the class or the members of the class can be ascertained and found, but the Court considers it expedient to make an appointment to save expense, having regard to all the circumstances, including the amount at stake and the degree of difficulty of the issue to be determined.

> **2.16(3)** On application by an interested person, the Court may appoint a person as litigation representative for a person or class of persons to whom this rule applies on being satisfied that both the proposed appointee and the appointment are appropriate.

Rules of Court, s. 2.16 **[Tab 24]**

Amicus Curiae

75. Further, in order to control the legal costs of this action and move the matter efficiently to a conclusion, the role of legal counsel should be limited to one of assistance. The Court of Queen's Bench of Alberta has inherent jurisdiction to appoint an *Amicus Curiae* for the Class to assist the Court by ensuring that all the relevant evidence is adduced. In this capacity, the lawyer appointed as Amicus ensures that all feasible options in relation to each issue are investigated and any relevant evidence which the parties have not introduced is brought before the Court. Lawyers who take this approach are expected to introduce in evidence the interests and expressed positions of the beneficiaries in the class.

76. In *Alberta (Minister of Justice) v. Métis Settlements Appeal Tribunal*, 2005 ABCA 143, the Court of Appeal ordered the appointment of an *Amicus Curiae* on behalf of the Elisabeth Metis Settlement as it had a special interest in the appeal and would be directly affected by it because the Tribunal's decision changed the criteria the Settlement was required to use when admitting members.

Alberta (Minister of Justice) v. Métis Settlements Appeal Tribunal, 2005 ABCA 143, at paragraph 10 **[Tab 25]**

77. As the expense of this litigation is an important issue and adding full parties incrementally to this action acts to the detriment of all beneficiaries, a court appointed litigation representative and *Amicus Curiae* is the most suitable way to include any additional applicants to the Action.

78. If the Court decides that a Class is necessary and will be represented by *Amicus Curiae*, it asks that the Court allow the Trustees to forward names of suitable candidates and make further arguments in a future application.

Class of Intervenors

79. Furthermore, the Trustees submit that if the Court considers a Class of unrepresented interests beneficial, such Class should be granted intervenor status to facilitate their application for representation in the action.

80. Rule 2.10 of the Alberta *Rules of Court* provides that:

> "On application, a Court may grant status to a person to intervene in an action subject to any terms and conditions and with the rights and privileges specified by the Court."

Rules of Court, s. 2.10 **[Tab 26]**

81. In *Papaschase Indian Band v. Canada (Attorney General)*, Chief Justice Fraser of the Alberta Court of Appeal held that:

> It may be fairly stated that, as a general principle, an intervention may be allowed where the proposed intervener is specially affected by the decision facing the Court or the proposed intervener has some special expertise or insight to bring to bear on the issues facing the court...

Papaschase Indian Band v. Canada (Attorney General), 2005 ABCA 320 ("*Papaschase*") at paragraph 2 **[Tab 27]**

82. However, the Trustees submit that such intervenor status ought only to include parties that are not currently represented and ought not include parties that are already represented by counsel or the OPGT. In *Papaschase*, the Court held:

> ...As explained by the Supreme Court of Canada in *R. v. Morgentaler, [1993] 1 S.C.R. 462* (S.C.C.) at para. 1: "[t]he purpose of an intervention is to present the court with submissions which are useful and different from the perspective of a non-party who has a special interest or particular expertise in the subject matter of the appeal."

Papaschase, at paragraph 2 **[Tab 27]**

83. Further, pursuant to the Courts' inherent authority to do so, certain terms and conditions should be imposed on any intervenor class to ensure the Advice and Direction Application proceeds in the most efficient way possible. Considering that the Advice and Direction Application is already well advanced, the Trustees propose that the intervenor(s) should only be allowed to participate in the steps to be completed and cannot review or re-litigate any decision made to date.

84. In *Papaschase*, the Court citing a decision of Federal Court stated that the intervenor must take the case as he/she finds it:

> 3 That said, it is clear as noted by the Federal Court of Appeal in *Canada (Minister of Indian & Northern Affairs) v. Corbiere* (1996), 199 N.R. 1 (Fed. C.A.) that ". . . an intervenor in an appellate court must take the case as she finds it and cannot, to the prejudice of the parties, argue new issues which require the introduction of fresh evidence.

Papaschase, at paragraph 3 **[Tab 27]**

85. Regardless, the intervenor Class should also be limited in its representation to avoid further burdening of the Advice and Direction Application and every participant included in the intervenor Class should satisfy the four common law requirements of gaining intervenor status:

(a) Will the proposed intervenor be specifically or directly affected by the decision of the Court;

(b) Will the proposed intervenor bring special expertise or insight to bear on the issues facing the Court;

(c) Are the proposed intervenor's interests at risk of not being fully protected or fully argued by one of the parties; and

(d) Will the intervenors presence provide the Court with fresh information or a fresh perspective on a constitutional or public issue?

Suncor Energy Inc. v Unifor, Local 707 A, 2014 ABQB 555 at paragraph 8 **[Tab 28]**

86. Finally, should the Court consider that an Intervenor Class is necessary to represent any further interests in this matter, the Trustees respectfully ask that the Court permit further written representations on the definition of the Class, and on the appointment of a litigation representative and an *Amicus*.

V. CONCLUSION

87. For the above reasons, the Trustees pray that this Honourable Court order that:

(a) The Application of Patrick be dismissed on his own behalf and on behalf of Melissa and Aspen;

(b) The Application of Shelby be dismissed as her interests are already, directly or indirectly, represented by the OPGT;

(c) The Application of Deborah be dismissed as her application is a collateral attack of the Indian Act and is not properly advanced in this Action;

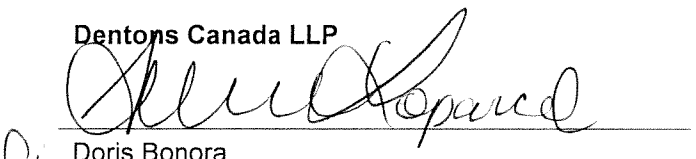
(d) In the alternative, if the Court considers it appropriate to define a class of unrepresented interests, further arguments will be made at a future application to define the Class and for the appointment of a litigation representative and an Amicus; and

(e) The application for Advance Costs be dismissed.

(f) Costs payable on a party and own client costs basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of October, 2016.

Dentons Canada LLP



Per: Doris Bonora
Solicitors for the Trustees

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Form 49
[Rule 13.19]

COURT FILE NUMBER	**1103 14112**
COURT	**COURT OF QUEEN'S BENCH OF ALBERTA**
JUDICIAL CENTRE	**EDMONTON**
APPLICANTS	**ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, AND CLARA MIDO, AS TRUSTEES FOR THE 1985 SAWRIDGE TRUST**
RESPONDENT	**IN THE MATTER OF THE TRUSTEE ACT R.S.A. 2000, CT-8 AS AMENDED** **IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO.19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985**
DOCUMENT	**AFFIDAVIT OF PATRICK TWINN**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	BORDEN LADNER GERVAIS LLP Centennial Place, East Tower 1900, 520 – 3 Avenue SW Calgary, Alberta T2P 0R3 Attention: Nancy Golding Q.C/Sandi Shannon Tel: (403) 232-9485/9782 Fax: (403) 266-1395 Email: ngolding@blg.com sshannon@blg.com File no. 443395/01

AFFIDAVIT OF
PATRICK TWINN
Sworn (or Affirmed) on July 26, 2016

I, Patrick Twinn, of the Sawridge Indian Reserve 150 G and the City of Edmonton, in the Province of Alberta, SWEAR/AFFIRM AND SAY THAT:

1. I am one of the Applicant Beneficiaries herein, and as such have knowledge of the matters hereinafter disposed to.

2. This matter involving the Sawridge Band Intervivos Settlement (the "1985 Trust") has been brought forward to the Court by its five trustees: Bertha Twin- L'Hirondelle, Clara Twin-Midbo, Catherine Twinn, Roland C. Twinn, and Walter Felix Twin (hereinafter referred to as the "Sawridge Trustees"). I understand that Justin Twin and Margaret Ward, have replaced Walter Felix Twin who resigned and Clara Midbo, deceased as Sawridge Trustees.

3. I understand that the Sawridge Trustees are seeking the opinion, advice and direction of the Court respecting the administration and management of the property held under the 1985 Trust (the "Advice and Direction Application") in respect to:

    a. the definition of the term "Beneficiaries" contained in the 1985 Trust and if necessary to vary the 1985 Sawridge Trust to clarify the definition of "Beneficiaries"; and

    b. the transfer of assets into the 1985 Trust.

4. I make this Affidavit in support of a motion:

    (i) to be added as a party in the Advice and Direction Application and to have my counsel participate in the Court proceedings relating to the definition of "Beneficiaries" contained in the 1985 Trust and the transfer of assets into the 1985 Trust brought forward by the Sawridge Trustees in the Advice and Direction Application;

    (ii) for an order compelling the Sawridge Trustees to provide an accounting and pass their accounts for the 1985 and 1986 Trusts; and

    (iii) for advance costs and full indemnification of costs from the 1985 Trust and the 1986 Trust.

The Trusts

5. In 1985, my father, Walter Patrick Twinn established the 1985 Trust to hold certain properties in trust for members of the Sawridge First Nation. I understand that the Beneficiaries of the 1985 Trust were defined as all persons who qualified as a member of the Sawridge First Nation pursuant to the provisions of the *Indian Act* as existed on April 15, 1982. The Sawridge Trusts Website provides as follows:

> The beneficiaries of The Sawridge Band Inter-Vivos Settlement at any particular time are all persons who at that time qualify as members of The Sawridge Indian Band No. 454 pursuant to The Indian Act R.S.C. 1970, Chapter I-6 as such provisions existed on the 15th day of April, 1982 and, in the event that such provisions are amended after April 15, 1985, all persons at such particular time

as would qualify for such membership pursuant to the said provisions as they existed on April 15, 1985.

6. In 1986, my Father established the Sawridge Trust, August 15, 1986 (the "1986 Trust") (collectively with the 1985 Trust, the "Sawridge Trusts"). The Sawridge Trusts Website provides as follows:

> The beneficiaries of The Sawridge Trust at any particular time are all persons who at that time qualify as members of The Sawridge Indian Band under the laws of Canada in force at that time, including the membership rules and customary laws of the Sawridge Indian Band as they may exist from time to time to the extent that such membership rules and customary laws are incorporated into, or recognized by the laws of Canada

Attached hereto and marked as Exhibit "A" is a true copy of the Sawridge Trust website "Beneficiaries" tab viewed on July 25, 2016.

Background

7. I was born into the Sawridge First Nation on October 22, 1985. My Father, was the Canadian Chief of the Sawridge First Nation from 1966 to his death, October 30, 1997 ("Chief Walter Twinn").

8. My mother, Catherine Twinn, is a Trustee of the Sawridge Trusts and is a current member of the Sawridge First Nation.

9. I am a recognized member of the Sawridge First Nation (the "Sawridge Band") and have been absolutely entitled as a Beneficiary, without exception, since my birth.

10. I am cohabitating with and on July 30, 2016 will formalize my marriage to my partner and the mother of my daughter, Melissa Megley. Melissa Megley, under the current rules, qualifies as a Beneficiary of the 1985 Trust in her own right. I have been informed by Melissa Megley that she does not consent to the Sawridge Trustees' proposed variation. I do not believe that Melissa will ever be admitted by the Sawridge Band into membership under the current membership process and Membership Rules and therefore will never be a Beneficiary through band membership. Melissa will be excluded as a Beneficiary of the 1985 Trust if the definition of Beneficiary is varied to be band membership as proposed by the Sawridge Trustees in the Advice and Direction Application.

11. My newborn daughter, Aspen Saya Twinn, is the youngest Beneficiary of the 1985 Trust. She is not a Sawridge Band member nor do I believe she will ever be one under the current Sawridge Band leadership. Accordingly, my daughter will be excluded as a Beneficiary of the 1985 Trust if the definition of Beneficiary is varied to be band membership as proposed by the Sawridge Trustees in the Advice and Direction Application. On her behalf, Melissa and I do not consent to this proposed variation.

12. In addition to Melissa Megley and our newborn daughter, my brothers, Sam, Isaac and Cameron have informed me they do not consent, on their own behalf and on behalf of their present or future spouses and issue, to this proposed variation of the definition of Beneficiary in the 1985 Trust.

13. As a descendant and listed member of the Sawridge First Nation, I am a Beneficiary of the 1985 Trust under the current definition of "Beneficiary" and I am directly affected by the Advice and Direction Application being brought forward involving the 1985 Trust.

14. I will continue to be a Beneficiary under the 1985 Trust if the Sawridge Trustees Advice and Direction Application succeeds as I am currently a Sawridge Band member subject to a decision of the Chief and Council, who under the Membership Rules, purport to be able to revoke band membership. The Membership Rules give the Chief and Council what appears to be an absolute discretion over accepting, rejecting and revoking any persons as Sawridge Band members.

15. I also have concerns with the administration of the Trusts. In addition to these concerns outlined below, I believe that there is a conflict of interest between the duties of Sawridge Trustees who were or are elected Band officials and the powers that they held or hold to determine membership in the Sawridge First Nation. I am aware that other First Nation Trusts prohibit elected Band officials, employees and agents to act as Trustees to avoid conflicts of interest and ensure an equality amongst the Trustees. I believe a Trustee must represent all Beneficiaries, past, present and future, not just their political constituency. I believe this does not happen when the Chief is a Trustee and a majority of Trustees are or were elected Band officials, as is the case here.

16. I do not believe that appropriate steps have been taken to properly ascertain all of persons who are Beneficiaries of the 1985 Trust. I and other 1985 Beneficiaries I know of have not been consulted by the Trustees to grandfather us and our issue. Nor have we been asked to consent to substituting the existing Beneficiary definition with band membership. Nor have we been asked to consent to the variation they seek.

17. Further, I believe that vested and potential Beneficiaries are being excluded from Sawridge Band membership as a result of personal animosities and that others are being accepted based on their personal relationships with some of the Sawridge Trustees.

18. I do verily believe that the Trustees' proposed amendment to the definition of "Beneficiary" under the 1985 Trust will result in the exclusion of many of the current 1985 Trust Beneficiaries and many potential Beneficiaries and their issue.

Request for Accounting

19. On April 12, 2016, as a Beneficiary under the 1985 Trust and the 1986 Trust, I sent a request to Paul Bujold requesting an accounting of the 1985 and 1986 Trusts as soon as was practicable.

20. To the best of my knowledge, since September 9, 2009, Mr. Bujold has been the Administrator of the Trusts. This is a salaried position that is contracted for by the Trusts at the discretion of a majority of Trustees.

21. On April 29, 2016, Mr. Bujold responded to my request as follows:

> Thank you for your request for an accounting. Unfortunately, we are unable to address your request at this time.

22. On May 3, 2016, I responded to Mr. Bujold requesting further information as to why the Trusts did not feel that they had to account to their beneficiaries. Both the 1985 Trust and the 1986 Trust explicitly require the Trustees to "keep accounts in acceptable manner of all receipts, disbursements, investments and other transactions in the administration of the Trusts." I also

explained to Mr. Bujold that my understanding is that a trustee must be ready to provide an accounting to a Beneficiary at any time.

23. On May 4, 2016, Mr. Bujold confirmed that the Trustees have kept accounts as required by the Sawridge Trusts and informed me that the Trustees did have plans to account to the Beneficiaries. However, according to Mr. Bujold, an accounting would only be provided after the determination of the Advice and Direction Application and other related Actions. Attached hereto and marked as Exhibit "B" is the email correspondence referred to in paragraphs 20-24 of this my Affidavit.

24. Mr. Bujold further informed me that it was the Trustees' position that "[r]eporting to the beneficiaries is not a simple process and requires some preparation which the Trusts do not have time for at this time because of the many legal actions, apart from the Trusts' own application for Advice and Direction for the 1985 Trust, that need to be managed and responded to." Mr. Bujold also informed me that "[c]urrent Trustee direction is not to do an accounting until the beneficiaries for both Trusts have been ascertained and the transfer of assets for the 1985 Trust is complete, that is impossible at the moment since the matter is currently before the courts."

25. My father now deceased, created the 1985 Trust. My mother is a current Trustee and is a member of the Sawridge First Nation. I am and always have been a recognized member of the Sawridge First Nation. Accordingly, I have always been considered to be a Beneficiary under both the 1985 Trust and the 1986 Trust and I am therefore entitled to an accounting, which to date the Sawridge Trustees have refused to provide.

Need for Advance Costs and Indemnity

26. I am seeking advance costs and full indemnification for costs of this action from the 1985 Trust. Absent this award, there is no other realistic option for me to bring this issue to Court. Without this financial assistance, there is simply no way that I can proceed.

27. Further, I represent interests, including those of my partner and my infant daughter, that are currently not represented in this matter. The interests I represent are of broader public import and I do not believe that they have been previously determined.

28. I am a member of the Sawridge First Nation, born into it by my father, Chief Walter Twinn and my mother, Catherine Twinn. As I was a Sawridge First Nation member at the time the 1985 Trust was created and I remain one today, I should be included as a Party in the Advice and Direction Application presented before the Court regarding the definition of "Beneficiaries" and the transfer of assets with the 1985 Trust, particularly as my consent would be required in a trust variation application.

29. As a Beneficiary under both Sawridge Trusts, I am entitled to an accounting from the Trustees without delay.

SWORN (OR AFFIRMED) BEFORE ME at)
St. Albert,, Alberta, this 26th day of July, 2016.)
)
)
)
)
)
Commissioner for Oaths in and for the)
Province of Alberta) PATRICK TWINN
)
BALRAJ DEOL)
Barrister & Solicitor

Form 49
[Rule 13.19]

COURT FILE NUMBER	**1103 14112**
COURT	**COURT OF QUEEN'S BENCH OF ALBERTA**
JUDICIAL CENTRE	**EDMONTON**
APPLICANTS	**ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, AND CLARA MIDO, AS TRUSTEES FOR THE 1985 SAWRIDGE TRUST**
RESPONDENT	**IN THE MATTER OF THE TRUSTEE ACT R.S.A. 2000, CT-8 AS AMENDED** **IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO.19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Trust")**
DOCUMENT	**AFFIDAVIT OF SHELBY TWINN**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	BORDEN LADNER GERVAIS LLP Centennial Place, East Tower 1900, 520 – 3 Avenue SW Calgary, Alberta T2P 0R3 Attention: Nancy Golding Q.C/Sandi Shannon Tel: (403) 232-9485/9782 Fax: (403) 266-1395 Email: ngolding@blg.com sshannon@blg.com File no. 443395/01

AFFIDAVIT OF
SHELBY TWINN
Sworn (or Affirmed) on July 26, 2016

I, Shelby Twinn, of the City of Edmonton, in the Province of Alberta, SWEAR/AFFIRM AND SAY THAT:

1. I am one of the Applicant Beneficiaries herein, and as such have knowledge of the matters hereinafter disposed to.

2. This matter involving the 1985 Trust has been brought forward to the Court by its five trustees: Bertha Twin- L'Hirondelle, Clara Twin-Midbo, Catherine Twinn, Roland C. Twinn, and Walter Felix Twin (hereinafter referred to as the "Sawridge Trustees"). I understand that Justin Twin and Margaret Ward are now Sawridge Trustees and that they replaced Walter Felix Twin, who resigned, and Clara Midbo who is now deceased.

3. I understand that the Sawridge Trustees are seeking the opinion, advice and direction of the Court respecting the administration and management of the property held under the 1985 Trust (the "Advice and Direction Application") in respect to:

    a. the definition of the term "Beneficiaries" contained in the 1985 Trust, and, if necessary, to vary the 1985 Trust to clarify the definition of "Beneficiaries"; and

    b. the transfer of assets to the 1985 Trust.

4. I am a beneficiary under the current definition of the 1985 Trust. I understand that the Sawridge Trustees, with the exception of Catherine Twinn, are seeking to amend the definition of "Beneficiary" under the 1985 Trust on the basis that it is discriminatory. I understand that they seek to amend the definition of "Beneficiary" to band members only as determined by Chief and Council. Although I am currently a Beneficiary under the 1985 Trust, if the Sawridge Trustees application for Advice and Direction succeeds, I will no longer be a Beneficiary as I am not one of the 44 Sawridge Band members on the Sawridge Band List controlled by Chief and Council.

5. I make this Affidavit in support of a motion:

    (i) to be added as a party in the Advice and Direction Application and to have my counsel participate in the Court proceedings relating to the definition of "Beneficiaries" contained in the 1985 Trust and the transfer of assets into the 1985 Trust brought forward by the Sawridge Trustees in the Advice and Direction Application;

    (ii) for an order compelling the Sawridge Trustees to provide an accounting and pass their accounts for the 1985 Trust; and

    (iii) for advance costs and full indemnification of costs from the 1985 Trust and 1986 Trust.

The Trusts

6. In 1985, my Paternal Grandfather, Walter Patrick Twinn established the 1985 Trust to hold certain properties in trust for members of the Sawridge First Nation the ("Sawridge Band"). I understand that the Beneficiaries of the 1985 Trust were defined as all persons who qualified as a member of the Sawridge First Nation pursuant to the provisions of the Indian Act as they existed on April 15, 1982. The Sawridge Trusts Website provides as follows:

> The beneficiaries of The Sawridge Band Inter-Vivos Settlement at any particular time are all persons who at that time qualify as members of The Sawridge Indian Band No. 454 pursuant to The Indian Act R.S.C. 1970, Chapter I-6 as such provisions existed on the 15th day of April, 1982 and, in the event that such provisions are amended after April 15, 1985, all persons at such particular time as would qualify for such membership pursuant to the said provisions as they existed on April 15, 1985.

7. In 1986, my paternal grandfather established the Sawridge Trust, August 15, 1986 (the "1986 Trust") (collectively with the 1985 Trust, the "Sawridge Trusts"). The Sawridge Trusts Website provides as follows:

> The beneficiaries of The Sawridge Trust at any particular time are all persons who at that time qualify as members of The Sawridge Indian Band under the laws of Canada in force at that time, including the membership rules and customary laws of the Sawridge Indian Band as they may exist from time to time to the extent that such membership rules and customary laws are incorporated into, or recognized by the laws of Canada

8. Attached hereto and marked as Exhibit "**A**" is a true copy of the Sawridge Trusts website "Beneficiaries" tab viewed on July 25, 2016.

Background

9. I was born January 3, 1992, and was raised on the Sawridge First Nation Reserve for the first 5 years of my life. I am entitled to and am registered as an Indian. I am not on the Sawridge Band list, and do not receive any benefits from the Sawridge First Nation.

10. My biological father, Paul Twinn is recognized as a Status Indian with the Canadian Federal Government under the *Indian Act* and is a member of the Sawridge First Nation. My paternal grandfather, Walter Patrick Twinn, was the Canadian Chief of the Sawridge First Nation from 1966 to his date of death, October 30, 1997 ("Chief Walter Twinn").

11. My mother, Kristal Schreiber, was married to Paul Twinn and lived on the Sawridge Indian Reserve until I was 5 years old. She returned only once with my sister and me, in November 1997, for my paternal grandfather's funeral.

12. Around 1998, when I was 6 years old my mother moved us to Prince George, British Columbia and to the best of my knowledge it was around that time that she ceased all contact with the Twin(n) family and the Sawridge First Nation.

13. My biological father has made no effort to have any type of relationship with either myself or my sister. He has never supported us financially, nor did he provide any support to my mother. My mother re-married and although I consider her husband to be my father I was never formally adopted.

14. Despite being the daughter of Paul Twinn and the granddaughter of Chief Walter Twinn, and therefore a Beneficiary of the 1985 Trust under the current definition, I have never been contacted about my being a Beneficiary by any Trust Administrator. The first time that I learned that I was a Beneficiary under the 1985 Trust was in September 2013 through Catherine Twinn.

15. I moved to Alberta in 2013. At that time I contacted Arlene Twinn, my biological father's sister, and was asked to complete a membership application form. I have a number of educational goals and would benefit greatly from being a Beneficiary of the Sawridge Trusts. However, at this time I have a number of reservations about applying to be a member.

16. I am very close with my sister Kaitlin who is three years younger than me, and know her very well and love her deeply. Like myself, my sister is a Beneficiary of the 1985 Trust under its current definition. Kaitlin was included for "grandfathering" in the Trustees' Offer to the Court filed June 12, 2016. I was not. My sister has never been contacted by the Trusts.

17. I do verily believe that my paternal grandfather, who settled the Trusts, would have wanted my sister and me to be Beneficiaries, regardless of our Sawridge Band membership status. I strongly oppose the proposal to change the rules that define Beneficiary in the 1985 Trust to band members as controlled by the Chief and Council as that we would not be Beneficiaries.

18. I believe that the purpose of the 1985 Trust was to ensure that a larger and more inclusive family group beyond that of individual members picked by the Chief and Council. This would include women, who marry male Band members and their children. I believe it is essentially impossible to marry within the Sawridge Band as there are only 44 Sawridge Band members.

Request for Accounting

19. On March 2, 2016 I emailed Paul Bujold, Trusts Administrator the following request:

> I am a beneficiary of the 1985 Trust. I qualify under section 11 (1) (d) of the Indian Act, as it stood April 17, 1982. I write on behalf of myself and others who qualify under these Indian Act provisions. We are entitled to an accounting of the 1985 Trust assets. To start we will need copies of all legal accounts by March 8, 2016, received by the Trust, whether paid or not, arising in relation to the 1985 Trust. We want the full accounting on or before April 4, 2016.

20. On March 18, 2016 Paul Bujold replied saying:

> We cannot provide you with this information at the moment.

Attached hereto and marked as Exhibit **"B"** is a true copy of my correspondence to Paul Bujold dated March 2, 2016, and Paul Bujold's correspondence to me dated March 18, 2016.

21. As a beneficiary of the 1985 Trust, I am entitled to an accounting which to date the Sawridge Trustees have refused to provide. I am concerned about the legal fees paid by the Trusts.

Need for Advance Costs and Indemnity

22. I am seeking advance costs and full indemnification for costs of this action from the 1985 Trust. Absent this award, there is no other realistic option for me to bring this issue to Court. Without this financial assistance, there is simply no way that I can proceed.

23. I do not believe that my sister and I are the only children of the Sawridge First Nation who would qualify as Beneficiaries of the 1985 Trust under the current definition and who would lose their entitlement under the Sawridge Trustees' proposed amendment. I believe that my interests are of

broader public import and to the best of my knowledge, the issues that I raise have not previously been decided.

24. As outlined above, under the current definition of "Beneficiary", my sister and I are Beneficiaries of the 1985 Trust. If the Sawridge Trustees are successful in their application, my sister and I will lose that entitlement. There are no other Parties to this Action at present that I am aware of, like myself and my sister. Accordingly, my opinion, advice and direction for the definition of "Beneficiaries" contained in the 1985 Trust and the transfer of assets into the 1985 Trust brought forward by the Sawridge Trustees in the Advice and Direction Application is critical to reaching a fair and just determination.

SWORN (OR AFFIRMED) BEFORE ME at)
St. Albert, Alberta, this 26th day of July, 2016.)
)
)
)
)
Commissioner for Oaths in and for the)
Province of Alberta) Shelby Twinn

BALRAJ DEOL
Barrister & Solicitor

Form49
[Rule 13.19]

COURT FILE NUMBER	**1103 14112**
COURT	**COURT OF QUEEN'S BENCH OF ALBERTA**
JUDICIAL CENTRE	**EDMONTON**
APPLICANTS	**ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, AND CLARA MIDBO, AS TRUSTEES FOR THE 1985 SAWRIDGE TRUST**
RESPONDENT	**IN THE MATTER OF THE TRUSTEE ACT R.S.A. 2000, CT-8 AS AMENDED** **IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO.19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust)**
DOCUMENT	**AFFIDAVIT OF DEBORAH SERAFINCHON**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	BORDEN LADNER GERVAIS LLP Centennial Place, East Tower 1900, 520 – 3 Avenue SW Calgary, Alberta T2P 0R3 Attention: Nancy Golding Q.C/Sandi Shannon Tel: (403) 232-9485/9782 Fax: (403) 266-1395 Email: ngolding@blg.com/sshannon@blg.com File no. 443395/01

AFFIDAVIT OF
DEBORAH SERAFINCHON

Sworn (or Affirmed) on July 26, 2016

I, Deborah Serafinchon, of the City of Edmonton, in the Province of Alberta, SWEAR/AFFIRM AND SAY THAT:

1. I am one of the Applicant Beneficiaries herein, and as such have knowledge of the matters hereinafter disposed to.

2. This matter involving the 1985 Trust has been brought forward to the Court by the five trustees of the 1985 Trust: Bertha Twin- L'Hirondelle, Clara Twin-Midbo, Catherine Twinn, Roland C. Twinn, and Walter Felix Twin (hereinafter referred to as the "Sawridge Trustees"). I understand that Walter Felix Twin has resigned and that Clara Midbo is now deceased and that they have been replaced as Sawridge Trustees by Justin Twin and Margaret Ward.

3. I understand that the Sawridge Trustees are seeking the opinion, advice and direction of the Court respecting the administration and management of the property held under the 1985 Trust (the "Advice and Direction Application") in respect to:

    a. the definition of the term "Beneficiaries" contained in the 1985 Trust if necessary, to vary the 1985 Trust to clarify the definition of "Beneficiaries"; and

    b. the transfer of assets into the 1985 Trust.

4. I make this Affidavit in support of a motion:

    (i) to be added as a party in the Advice and Direction Application and to have my counsel participate in the Court proceedings relating to the definition of "Beneficiaries" contained in the 1985 Trust and the transfer of assets

into the 1985 Trust brought forward by the Sawridge Trustees in the Advice and Direction Application; and

(ii) for advance costs and full indemnification of costs from the 1985 Trust and the 1986 Trust.

The Trusts

5. In 1985, my father, Walter Patrick Twinn, established the 1985 Trust to hold certain properties in trust for members of the Sawridge First Nation. I understand that the Beneficiaries of the Trust were defined as all persons who at the time qualify as members of the Sawridge Indian Band No. 19 pursuant to the provisions of the Indian Act R.S.C. 1970 as it existed on April 15, 1982. The Sawridge Trusts Website provides as follows:

> The beneficiaries of The Sawridge Band Inter-Vivos Settlement at any particular time are all persons who at that time qualify as members of The Sawridge Indian Band No. 454 pursuant to The Indian Act R.S.C. 1970, Chapter I-6 as such provisions existed on the 15th day of April, 1982 and, in the event that such provisions are amended after April 15, 1985, all persons at such particular time as would qualify for such membership pursuant to the said provisions as they existed on April 15, 1985.

6. In 1986, my Father established the Sawridge Trust, August 15, 1986 (the "1986 Trust") (collectively with the 1985 Trust, the "Sawridge Trusts"). The Sawridge Trusts Website provides as follows:

> The beneficiaries of The Sawridge Trust at any particular time are all persons who at that time qualify as members of The Sawridge Indian Band under the laws of Canada in force at that time, including the membership rules and customary laws of the Sawridge Indian Band as they may exist from time to time to the

extent that such membership rules and customary laws are incorporated into, or recognized by the laws of Canada

7. Attached hereto and marked as Exhibit "A" is a true copy of the Sawridge Trusts website "Beneficiaries" tab viewed on July 25, 2016.

Background

8. I was born on October 2, 1961. My father was the Canadian Chief of the Sawridge First Nation from 1966 to October 30, 1997, when he died ("Chief Walter Twinn").

9. My mother, Lillian McDermott, is recognized as a Status Indian with the Canadian Federal Government under the *Indian Act*. My mother's Indian Registry number has the Sawridge Band 454. My maternal grandmother, is Marie Louise Sawan. Marie Louise Sawan's mother or grandmother was Amelia Nisotesis, sister to my paternal grandfather Paul Twin (Nisotesis). My maternal grandfather, Myles McDermott was also Indian and I believe he was entitled to be recognized as an Indian. His mother, my paternal grandmother, was an Indian from Treaty 8.

10. My biological parents were closely related. I believe my paternal grandfather, Paul Twin (Nisotesis) and my maternal grandmother or great-grandmother, Amelia Nisotesis, were brother and sister and the children of Charles Nisotesis and Isabelle Courteoreille. Both my parents attended Indian Residential School at Grouard.

11. I was born an illegitimate child and was placed in foster care at birth and was raised in that system. As an adult I searched for my birth parents. I discovered my biological mother first who informed me of who my father was. Shortly after I found my mother, she died.

12. I contacted my father in 1996, the year before his death, and we spoke many times. Before we were able to meet, my father passed away suddenly. On the

same day as his passing, I fell in my bathroom and have been wheel chair bound since.

13. Patrick Twinn is my co-Applicant in the within motion. He is also my brother. We share the same father. Patrick Twinn's mother is a member of the Sawridge First Nation (the "Sawridge Band") and a beneficiary under both Sawridge Trusts. Patrick is recognized as a Status Indian and is on the Sawridge Band list. Patrick Twinn is a Beneficiary of the 1985 Trust and the 1986 Trust.

14. Roland C. Twinn is my brother. We share the same father. Roland C. Twinn's mother is Theresa Auger. Roland C. Twinn is currently the elected Chief of the Sawridge First Nation and is a Beneficiary under the 1985 Trust (collectively with Patrick Twinn, my "Brothers"). I understand that Roland Twinn's mother chose to enfranchise for a large per capital pay out and is therefore not a member of the Sawridge First Nation nor a beneficiary of either of the Sawridge Trusts.

15. In 2002, I applied for Indian Status registration through the office of Lesser Slave Lake Indian Regional Council ("LSLIRC"). LSLIRC is governed by a board of 5 Chiefs, my brother Roland C. Twinn being one of them. I have no relationship with Roland C. Twinn. Although both my biological parents qualify as Indians, I have not been registered.

16. At some point, I was informed by LSLIRC that the DNA sample I had provided proving that Chief Walter Twinn was my father was inadequate for registration and that I would need two of my father's sisters to attest that I was his daughter. At the time, there were three living sisters, two of whom, Bertha L'Hirondelle and Clara Midbo are named Trustees in this action. I believe this requirement to be impossible and have since given up obtaining registration.

17. I may be excluded as a Beneficiary under the 1985 Trust as a result of being born an illegitimate female. As an illegitimate female child who is the direct descendant in the male line of a Sawridge First Nation member, I am not entitled to be a Beneficiary as a result of the language in the *Indian Act* of 1970. As male descendants, both my Brothers are. I believe this to be discriminatory.

18. I believe that I should have the same entitlement as my brothers and other siblings who are considered Beneficiaries of the 1985 Trust and the 1986 Trust.

19. I also believe that if the *Indian Act* of 1970 is read to include both male and female offspring of a male Indian, as well as illegitimate and legitimate offspring, then I am entitled to be a Beneficiary under the 1985 Act. I may also have an absolute right from birth to be on the Sawridge Band list. If the proposal of the Sawridge Trustees in the application for Advice and Direction is accepted however, I am not entitled to be a Beneficiary under the 1985 Trust because I am not on the Chief and Council controlled Sawridge Band List.

20. I understand that the Sawridge Trustees, with the exception of Catherine Twinn, are seeking to vary the definition of "Beneficiary" under the 1985 Trust on the basis that they have decided it is discriminatory and that they seek to amend the definition of "Beneficiary" to band members only – a list of individuals that the Chief and Council currently dominate and control. This is, in my experience, a far worse form of discrimination.

21. Accordingly, I am directly affected by the matter brought forward by the Sawridge Trustees in the Advice and Direction Application involving the 1985 Trust and I am a potential Beneficiary thereunder.

Need for Advance Costs and Indemnity

22. I am seeking advance costs and full indemnification for costs of this action from the 1985 Trust. Absent this award, there is no other realistic option for me to bring this issue to Court. Without this financial assistance, there is simply no way that I can proceed.

23. My biological parents found out they were related after I was conceived. As a result of the Residential School program, they were not aware of this fact before. I believe that as a result they did not marry and I was placed in the foster care system. I do not believe that I am the only potential Beneficiary to have been placed in the foster care system or born illegitimate and raised outside of the Sawridge First Nation. This impacts my and others' children and grandchildren. I

believe that a determination of interests like mine are of public importance, and have not been resolved to date. The Court in the Advice and Direction Application is the appropriate forum where these issues can be fairly addressed.

24. As outlined above, both my mother and father are direct descendants of Charles Nisotesis and Isabelle Courteoreille whose names were on the Keenooshayoo's Band Pay List, paid at Sawridge, when Treaty 8 was concluded in 1899 at Lesser Slave Lake. Both were recognized as Status Indians under the *Indian Act*, and in the case of my father, after 1951 when the Band List first appeared, he was on the Sawridge Band List. I should have the same entitlements to the 1985 Trust as my male siblings. I should also have the same entitlements as my female siblings without discrimination based on legitimacy or illegitimacy. I, and people like me, are not currently represented in this Action. Accordingly, my opinion, advice and direction for the definition of "Beneficiaries" contained in the 1985 Trust and the transfer of assets into the 1985 Trust brought forward by the Sawridge Trustees in the Advice and Direction Application is critical to reaching a fair and just determination.

SWORN (OR AFFIRMED) BEFORE ME at St. Albert,, Alberta, this 26th day of July, 2016.

Commissioner for Oaths in and for the Province of Alberta

BALRAJ DEOL
Barrister & Solicitor

DEBORAH SERAFINCHON

	Clerk's stamp:
COURT FILE NUMBER	1103 14112
COURT OF QUEEN'S BENCH OF ALBERTA JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c. T-8, AS AMENDED IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust
DOCUMENT	**Order**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Attention: Doris C.E. Bonora Reynolds, Mirth, Richards & Farmer LLP 3200 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3W8 Telephone: (780) 425-9510 Fax: (780) 429-3044 File No: 108511-001-DCEB

Date on which Order Pronounced: August 31, 2011

Name of Justice who made this Order: D. R. C. Thomas

UPON the application of the Trustees of the 1985 Sawridge Trust (the "Applicants" or the "Trustees"); AND UPON hearing read the Affidavit of Paul Bujold, IT IS HEREBY ORDERED AND DECLARED as follows:

Application

1. An application shall be brought by the Trustees of the 1985 Sawridge Trust for the opinion, advice and direction of the Court respecting the administration and management of the property held under the 1985 Sawridge Trust (hereinafter referred to as the "Advice and Direction Application"). The Advice and Direction Application shall be brought:

    a. To seek direction with respect to the definition of "Beneficiaries" contained in the 1985 Sawridge Trust, and if necessary to vary the 1985 Sawridge Trust to clarify the definition of "Beneficiaries".

    b. To seek direction with respect to the transfer of assets to the 1985 Sawridge Trust.

Notice

2. The Trustees shall send notice of the Advice and Direction Application to the following persons, in the manner set forth in this Order:

    a. The Sawridge First Nation;

    b. All of the registered members of the Sawridge First Nation;

    c. All persons known to be beneficiaries of the 1985 Sawridge Trust and all former members of the Sawridge First Nation who are known to be excluded by the definition of "Beneficiaries" in the Sawridge Trust created on August 15, 1986, but who would now qualify to apply to be members of the Sawridge First Nation;

    d. All persons known to have been beneficiaries of the Sawridge Band Trust created on April 15, 1982 (hereinafter referred to as the "1982 Sawridge Trust"), including any person who would have qualified as a beneficiary subsequent to April 15, 1985;

    e. All of the individuals who have applied for membership in the Sawridge First Nation;

    f. All of the individuals who have responded to the newspaper advertisements placed by the Applicants claiming to be a beneficiary of the 1985 Sawridge Trust;

    g. Any other individuals who the Applicants may have reason to believe are potential beneficiaries of the 1985 Sawridge Trust;

    h. The Office of the Public Trustee of Alberta (hereinafter referred to as the "Public Trustee") in respect of any minor beneficiaries or potential minor beneficiaries; and

    i. The Minister of Aboriginal Affairs and Northern Development Canada (hereinafter referred to as the "Minister") in respect, *inter alia,* of all those

persons who are Status Indians and who are deemed to be affiliated with the Sawridge First Nation by the Minister.

(those persons mentioned in Paragraph 2 (a) – (i) shall collectively be referred to as the "Beneficiaries and Potential Beneficiaries")

3. Notice of the Advice and Direction Application on any person shall not be used by that person to show any connection or entitlement to rights under the 1982 Sawridge Trust or the 1985 Sawridge Trust, nor to entitle a person to being held to be a beneficiary of the 1982 Sawridge Trust or the 1985 Sawridge Trust, nor to determine or help to determine that a person should be admitted as a member of the Sawridge First Nation. Notice of the Advice and Direction Application is deemed only to be notice that a person may have a right to be a beneficiary of the 1982 Sawridge Trust or the 1985 Sawridge Trust and that the person must determine his or her own entitlement and pursue such entitlement.

Dates and Timelines for Advice and Direction Application

4. The Trustees shall, within 10 business days of the day this Order is made, provide notice of the Advice and Direction Application to the Beneficiaries and Potential Beneficiaries in the following manner:

   a. Make this Order available by posting this Order on the website located at www.sawridgetrusts.ca (hereinafter referred to as the "Website");

   b. Send a letter by registered mail to the Beneficiaries and Potential Beneficiaries for which the Applicants have a mailing address and by email to the Beneficiaries and Potential Beneficiaries for which the Applicants have an email address, advising them of the Advice and Direction Application and advising them of this Order and of the ability to access this Order on the Website (hereinafter referred to as the "Notice Letter"). The Notice Letter shall also provide information on how to access court documents on the Website;

   c. Take out an advertisement in the local newspapers published in the Town of Slave Lake and the Town of High Prairie, setting out the same information that is contained in the Notice Letter; and

   d. Make a copy of the Notice Letter available by posting it on the Website.

5. The Trustees shall send the Notice Letter by registered mail and email no later than September 7, 2011.

6. Any person who is interested in participating in the Advice and Direction Application shall file any affidavit upon which they intend to rely no later than September 30, 2011.

7. Any questioning on affidavits filed with respect to the Advice and Direction Application shall be completed no later than October 21, 2011.

8. The legal argument of the Applicants shall be filed no later than November 11, 2011.

9. The legal argument of any other person shall be filed no later than December 2, 2011.

10. Any replies by the Applicant shall be filed no later than December 16, 2011.

11. The Advice and Direction Application shall be heard January 12, 2012 in Special Chambers.

Further Notice and Service Provisions

12. Except as otherwise provided for in this Order, the Beneficiaries and Potential Beneficiaries need not be served with any document filed with the Court in regard to the Advice and Direction Application, including any pleading, notice of motion, affidavit, exhibit or written legal argument.

13. The Applicants shall post any document that they file with the Court in regard to the Advice and Direction Application, including any pleading, notice of motion, affidavit, exhibit or written legal argument, on the Website within 5 business days after the day on which the document is filed.

14. The Beneficiaries and Potential Beneficiaries shall serve the Applicants with any document that they file with the Court in regard to the Advice and Direction Application, including any pleading, notice of motion, affidavit, exhibit or written legal argument, which service shall be completed by the relevant filing deadline, if any, contained in this Order.

15. The Applicants shall post all of the documents the Applicants are served with in this matter on the Website within 5 business days after the day on which they were served.

16. The Applicants shall make all written communications to the Beneficiaries and Potential Beneficiaries publicly available by posting all such communications on the Website within 5 business days after the day on which the communication is sent.

17. The Beneficiaries and Potential Beneficiaries are entitled to download any documents posted on the Website by the Applicants pursuant to the terms of this Order.

18. Notwithstanding any other provision in this Order, the following persons shall be served with all documents filed with the Court in regard to the Advice and Direction Application, including any pleading, notice of motion, affidavit, exhibit or written legal argument:

    a. Legal counsel for the Applicants;

    b. Legal counsel for any individual Trustee;

    c. Legal counsel for any Beneficiaries and Potential Beneficiaries;

    d. The Sawridge First Nation;

    e. The Public Trustee; and

f. The Minister.

Variation or Amendment of this Order

19. Any interested person, including the Applicants, may apply to this Court to vary or amend this Order on not less than 7 days' notice to those persons identified in paragraph 17 of this Order, as well as any other person or persons likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

Justice of the Court of Queen's Bench in Alberta

809772;August 31, 2011

Clerk's stamp:

COURT FILE NUMBER	1103 14112
COURT OF QUEEN'S BENCH OF ALBERTA	EDMONTON
JUDICIAL CENTRE	

IN THE MATTER OF THE TRUSTEE ACT,

R.S.A. 2000, c. T-8, AS AMENDED

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

APPLICANTS	**ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust**
DOCUMENT	**AFFIDAVIT OF PAUL BUJOLD**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP 2900 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3V5 Attention: Doris C.E. Bonora Telephone: (780) 423-7100 Fax: (780) 423-72764 File No: 551860-1-DCEB

Sworn on the 31st day of October, 2016

I, Paul Bujold, of Edmonton, Alberta make oath and say that:

1. I am the Chief Executive Officer of the 1985 Sawridge Trust and as such have personal knowledge of the matters hereinafter deposed to unless stated to be based upon information and belief, in which case I verily believe the same to be true.

2. Pursuant to the Order granted by the Honourable Mr. Justice D.R.G. Thomas on August 31, 2011 (the "August 31 Order"), a copy of which is attached hereto and marked as Exhibit "A", I did serve

Patrick Twinn with a filed copy of the August 31 Order, by sending the same via registered mail to Patrick Twinn at his Edmonton address. I verily believe that the registered mail sent to Patrick Twinn was delivered to his attention.

3. Pursuant to the August 31 Order, I did serve Deborah Serafinchon with a filed copy of the August 31 Order, by sending the same via registered mail to Deborah Serafinchon at the address provided by her in her potential beneficiary application form, a copy of which form is attached hereto and marked as Exhibit "B", which form was received in response to a newspaper advertisement published by the Trustees. I verily believe that the registered mail sent to Deborah Serafinchon was delivered to her attention.

4. I have been advised by Doris Bonora, lawyer for the Trustees of the Sawridge Trust, and verily believe that, her office sent a letter to the Office of the Public Guardian and Trustee asking if their office continues to represent the child beneficiaries who have become adults during the course of litigation. I have been advised by Doris Bonora and verily believe that to date no response has been received from the Office of the Public Guardian and Trustee.

5. Attached hereto and marked as Exhibit "C" to my Affidavit is an email received by Doris Bonora on September 4, 2016 from Sandi Shannon of Borden Ladner Gervais LLP, counsel for Patrick Twinn, Melissa Megley, Shelby Twinn and Deborah Serafinchon advising that Melissa will represent herself and file an affidavit. I am advised by Doris Bonora that no affidavit has been served.

SWORN OR AFFIRMED BY THE DEPONENT BEFORE A COMMISSIONER FOR OATHS IN AND FOR THE PROVINCE OF ALBERTA, AT EDMONTON, ALBERTA ON THE 31st DAY OF OCTOBER, 2016.

PAUL BUJOLD

Commissioner for Oaths in and for the Province of Alberta

DORIS BONORA
Barrister and Solicitor
A Commissioner for Oaths
in and for Alberta

Appointment Expiry Date

This is Exhibit "A" referred to in the
Affidavit of PAUL BUJOLD

Sworn before me this 31st day
of October, 2016

A Commissioner for Oaths
in and for the Province of Alberta

DORIS BONORA
Barrister and Solicitor
A Commissioner for Oaths
in and for Alberta

	Clerk's stamp:
COURT FILE NUMBER	1103 14112
COURT OF QUEEN'S BENCH OF ALBERTA JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c. T-8, AS AMENDED IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust
DOCUMENT	**Order**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Attention: Doris C.E. Bonora Reynolds, Mirth, Richards & Farmer LLP 3200 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3W8 Telephone: (780) 425-9510 Fax: (780) 429-3044 File No: 108511-001-DCEB

Date on which Order Pronounced: August 31, 2011

Name of Justice who made this Order: D. R. C. Thomas

UPON the application of the Trustees of the 1985 Sawridge Trust (the "Applicants" or the "Trustees"); AND UPON hearing read the Affidavit of Paul Bujold, IT IS HEREBY ORDERED AND DECLARED as follows:

Application

1. An application shall be brought by the Trustees of the 1985 Sawridge Trust for the opinion, advice and direction of the Court respecting the administration and management of the property held under the 1985 Sawridge Trust (hereinafter referred to as the "Advice and Direction Application"). The Advice and Direction Application shall be brought:

    a. To seek direction with respect to the definition of "Beneficiaries" contained in the 1985 Sawridge Trust, and if necessary to vary the 1985 Sawridge Trust to clarify the definition of "Beneficiaries".

    b. To seek direction with respect to the transfer of assets to the 1985 Sawridge Trust.

Notice

2. The Trustees shall send notice of the Advice and Direction Application to the following persons, in the manner set forth in this Order:

    a. The Sawridge First Nation;

    b. All of the registered members of the Sawridge First Nation;

    c. All persons known to be beneficiaries of the 1985 Sawridge Trust and all former members of the Sawridge First Nation who are known to be excluded by the definition of "Beneficiaries" in the Sawridge Trust created on August 15, 1986, but who would now qualify to apply to be members of the Sawridge First Nation;

    d. All persons known to have been beneficiaries of the Sawridge Band Trust created on April 15, 1982 (hereinafter referred to as the "1982 Sawridge Trust"), including any person who would have qualified as a beneficiary subsequent to April 15, 1985;

    e. All of the individuals who have applied for membership in the Sawridge First Nation;

    f. All of the individuals who have responded to the newspaper advertisements placed by the Applicants claiming to be a beneficiary of the 1985 Sawridge Trust;

    g. Any other individuals who the Applicants may have reason to believe are potential beneficiaries of the 1985 Sawridge Trust;

    h. The Office of the Public Trustee of Alberta (hereinafter referred to as the "Public Trustee") in respect of any minor beneficiaries or potential minor beneficiaries; and

    i. The Minister of Aboriginal Affairs and Northern Development Canada (hereinafter referred to as the "Minister") in respect, *inter alia,* of all those

persons who are Status Indians and who are deemed to be affiliated with the Sawridge First Nation by the Minister.

(those persons mentioned in Paragraph 2 (a) – (i) shall collectively be referred to as the "Beneficiaries and Potential Beneficiaries")

3. Notice of the Advice and Direction Application on any person shall not be used by that person to show any connection or entitlement to rights under the 1982 Sawridge Trust or the 1985 Sawridge Trust, nor to entitle a person to being held to be a beneficiary of the 1982 Sawridge Trust or the 1985 Sawridge Trust, nor to determine or help to determine that a person should be admitted as a member of the Sawridge First Nation. Notice of the Advice and Direction Application is deemed only to be notice that a person may have a right to be a beneficiary of the 1982 Sawridge Trust or the 1985 Sawridge Trust and that the person must determine his or her own entitlement and pursue such entitlement.

Dates and Timelines for Advice and Direction Application

4. The Trustees shall, within 10 business days of the day this Order is made, provide notice of the Advice and Direction Application to the Beneficiaries and Potential Beneficiaries in the following manner:

   a. Make this Order available by posting this Order on the website located at www.sawridgetrusts.ca (hereinafter referred to as the "Website");

   b. Send a letter by registered mail to the Beneficiaries and Potential Beneficiaries for which the Applicants have a mailing address and by email to the Beneficiaries and Potential Beneficiaries for which the Applicants have an email address, advising them of the Advice and Direction Application and advising them of this Order and of the ability to access this Order on the Website (hereinafter referred to as the "Notice Letter"). The Notice Letter shall also provide information on how to access court documents on the Website;

   c. Take out an advertisement in the local newspapers published in the Town of Slave Lake and the Town of High Prairie, setting out the same information that is contained in the Notice Letter; and

   d. Make a copy of the Notice Letter available by posting it on the Website.

5. The Trustees shall send the Notice Letter by registered mail and email no later than September 7, 2011.

6. Any person who is interested in participating in the Advice and Direction Application shall file any affidavit upon which they intend to rely no later than September 30, 2011.

7. Any questioning on affidavits filed with respect to the Advice and Direction Application shall be completed no later than October 21, 2011.

8. The legal argument of the Applicants shall be filed no later than November 11, 2011.

9. The legal argument of any other person shall be filed no later than December 2, 2011.

10. Any replies by the Applicant shall be filed no later than December 16, 2011.

11. The Advice and Direction Application shall be heard January 12, 2012 in Special Chambers.

Further Notice and Service Provisions

12. Except as otherwise provided for in this Order, the Beneficiaries and Potential Beneficiaries need not be served with any document filed with the Court in regard to the Advice and Direction Application, including any pleading, notice of motion, affidavit, exhibit or written legal argument.

13. The Applicants shall post any document that they file with the Court in regard to the Advice and Direction Application, including any pleading, notice of motion, affidavit, exhibit or written legal argument, on the Website within 5 business days after the day on which the document is filed.

14. The Beneficiaries and Potential Beneficiaries shall serve the Applicants with any document that they file with the Court in regard to the Advice and Direction Application, including any pleading, notice of motion, affidavit, exhibit or written legal argument, which service shall be completed by the relevant filing deadline, if any, contained in this Order.

15. The Applicants shall post all of the documents the Applicants are served with in this matter on the Website within 5 business days after the day on which they were served.

16. The Applicants shall make all written communications to the Beneficiaries and Potential Beneficiaries publicly available by posting all such communications on the Website within 5 business days after the day on which the communication is sent.

17. The Beneficiaries and Potential Beneficiaries are entitled to download any documents posted on the Website by the Applicants pursuant to the terms of this Order.

18. Notwithstanding any other provision in this Order, the following persons shall be served with all documents filed with the Court in regard to the Advice and Direction Application, including any pleading, notice of motion, affidavit, exhibit or written legal argument:

    a. Legal counsel for the Applicants;

    b. Legal counsel for any individual Trustee;

    c. Legal counsel for any Beneficiaries and Potential Beneficiaries;

    d. The Sawridge First Nation;

    e. The Public Trustee; and

f. The Minister.

Variation or Amendment of this Order

19. Any interested person, including the Applicants, may apply to this Court to vary or amend this Order on not less than 7 days' notice to those persons identified in paragraph 17 of this Order, as well as any other person or persons likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

Justice of the Court of Queen's Bench in Alberta

809772;August 31, 2011

This is Exhibit "B" referred to in the
Affidavit of PAUL BUJOLD

Sworn before me this 31st day
of October, 2016

A Commissioner for Oaths
in and for the Province of Alberta

DORIS BONORA
Barrister and Solicitor
A Commissioner for Oaths
in and for Alberta

BENEFICIARY APPLICATION FORM

PERSONAL INFORMATION

NAME	Deborah	Anne	Serafinchon				
	First Name(s)	Middle Name(s)	Last Name(s)				
MAILING ADDRESS		12233-47 St	Edmonton	AB	T5W 2X6	Canada	
	Apt/P.O. Box	Street Address	Town	Prov	Postal Code	Country	
DATE OF BIRTH	09	10	1961	BIRTH CERTIFICATE[1]			
	Day	Month	Year	Number			
PLACE OF BIRTH	Edmonton			COUNTRY CA			
Telephone	780 477-1133		780 691 6032	780 642 4364	serafinc@ca.ibm.com djseraf@telus.net		
	Home Phone	Home Fax	Cell Phone	Work Phone	Email Address		

STATUS NUMBER		ARE YOU MARRIED TO A BAND MEMBER?	☐YES ☑NO	IF YES, BAND NUMBER?		DID YOU ENFRANCHISE?	☐YES ☑NO	IF YES, WHEN, WHICH CATEGORY?	

IF YOU ENFRANCHISED UNDER THE INDIAN ACT, PROVIDE DETAILS INCLUDING SHARE OF PER CAPITA MONIES RECEIVED.			
ARE YOU DESCENDED FROM, MARRIED TO OR ADOPTED BY ONE OF THE ORIGINAL SAWRIDGE TREATY 8 SIGNATORIES?	☑YES ☐NO	IF YES, PROVIDE DETAILS	Father Walter Twinn
IF MARRIED, DID YOUR MARRIAGE PRODUCE AND CHILDREN? IF YES, DETAIL NAMES OF CHILDREN.	Neil Serafinchon Lisa Serafinchon John Serafinchon	DID YOU SUBSEQUENTLY RE-MARRY TO ANOTHER PERSON? IF YES, DETAIL NAMES OF CHILDREN AND SPOUSE.	
YOUR STATUS UNDER INDIAN ACT OR PAY LIST AT TIME OF APPLICATION	(~~ate~~) application is pending on Indian Status		
WHY DO YOU FEEL YOU ARE ELIGIBLE AS A TRUST BENEFICIARY?	I feel I am eligible due to my family relationship ~~commitment~~, character, lifestyle, descent & connections I feel I am entitled as a direct descendant of Walter Twinn		
HAVE YOU OR YOUR ANCESTORS LIVED ON THE SAWRIDGE LANDS INCLUDING POST TREATY LANDS SET ASIDE FOR THE EXCLUSIVE USE OF THE SAWRIDGE BAND?	☑YES ☐NO	IF YES, PROVIDE DETAILS	My biological father lived on the Sawridge reserve along with my brothers & sisters

MARITAL STATUS (check one)	Married	Single	Divorced	Widowed	Common-Law	Other (Specify)
	✓					

BE SURE TO FILL IN OTHER SIDE OF THIS FORM AS WELL

[1] A copy of the certificate of birth or baptism must be produced with the application. If no certificate is available, then applicants must produce an affidavit confirming the materials contained in the application with the application.

Parents Information

Name of Mother	Lillian M McDermott			Name of Father	Walter Twinn		
Date of Birth	04 (Day)	01 (Month)	43 (Year)	Date of Birth	29 (Day)	03 (Month)	1934 (Year)
Status under Indian Act or Pay List at Birth[2,3]	Status			Status under Indian Act or Pay List at Birth[2,3]			
Is your Mother a Sawridge Band member?	☐Yes ☑No No	If Yes, what is her Band Number?		Is your Father a Sawridge Band member?	☐Yes ☐No	If Yes, what is his Band Number?	75
Did your Mother enfranchise?	☐Yes ☑No	If Yes, when and in which category?		Did your Father enfranchise?	☐Yes ☑No	If Yes, when and in which category?	
Address	Apt/ P.O. Box, Street Address, Town, Province, Postal Code, Country			Address	PO Box 1460 Slave Lake AB Canada T0G 2A0		
If deceased – Date of Death	30 (Day)	08 (Month)	2000 (Year)	If deceased – Date of Death	30 (Day)	10 (Month)	1997 (Year)

Grandparents Information

Name of Maternal Grandmother				Name of Maternal Grandfather	(Alexander)		
Date of Birth	Day	Month	Year	Date of Birth	Day	Month	Year
Status under Indian Act or Pay List at Birth				Status under Indian Act or Pay List at Birth[2,3]			
Did your Maternal Grandmother enfranchise?	☐Yes ☐No	If Yes, when and in which category?		Did your Maternal Grandfather enfranchise?	☐Yes ☐No	If Yes, when and in which category?	
Name of Paternal Grandmother	Irene Cunningham			Name of Paternal Grandfather	Paul Neesokasis		
Date of Birth	5 (Day)	Dec (Month)	1905 (Year)	Date of Birth	6 (Day)	APR (Month)	1888 (Year)
Status under Indian Act or Pay List at Birth	Under Current Indian Act entitled to be recognized as Indian			Status under Indian Act or Pay List at Birth[2,3]	Treaty Indian		
Did your Paternal Grandmother enfranchise?	☐Yes ☑No	If Yes, when and in which category?		Did your Paternal Grandfather enfranchise?	☐Yes ☑No	If Yes, when and in which category?	

Signature	I hereby certify that the information in this form is true and correct. I give permission to Sawridge Trusts to share this information with those who need it to determine my status as a beneficiary.	Date	

PLEASE DO NOT FORGET TO SEND COPIES OF RELEVANT DOCUMENTS LISTED BELOW, IF APPLICABLE.

MAIL APPLICATION AND DOCUMENTS TO:

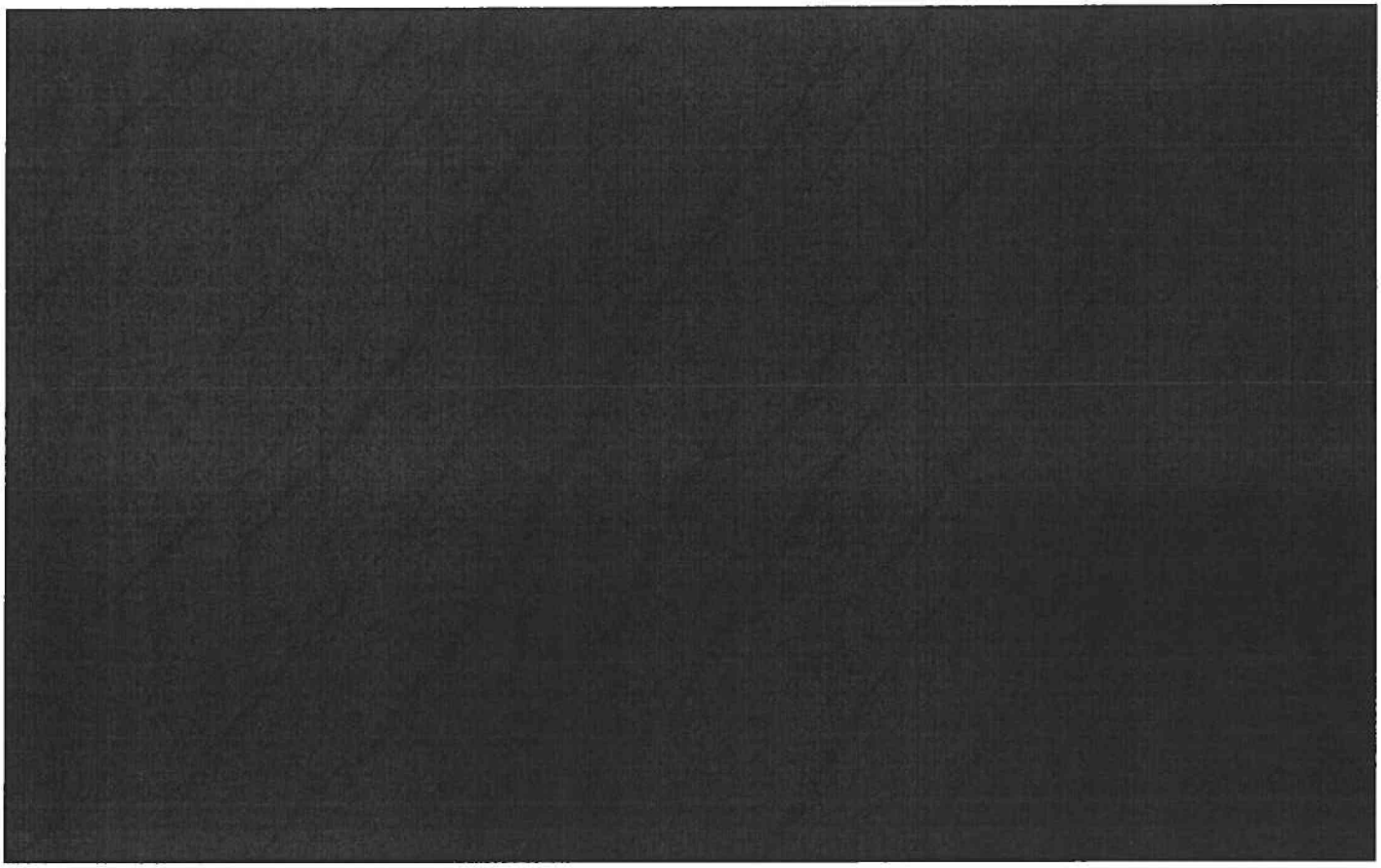
Sawridge Trusts, 801, 4445 Calgary Trail NW, Edmonton, AB T6H 5R7, Fax: (780) 988-7724, Email: general@sawridgetrusts.ca

This is Exhibit "C" referred to in the
Affidavit of PAUL BUJOLD

Sworn before me this 31st day
of October, 2016

A Commissioner for Oaths
in and for the Province of Alberta

DORIS BONORA
Barrister and Solicitor
A Commissioner for Oaths
in and for Alberta



From: Shannon, Sandi [mailto:SShannon@blg.com]
Sent: 4-Sep-16 9:27 PM
To: Bonora, Doris
Cc: Golding, Nancy L.
Subject: RE: Sawridge Band Inter Vivos Settlement

Hello Doris,

We have discussed with our clients and are available for questioning on September 22, 2016. Please note that Shelby's availability is limited to before 11 a.m. Please let us know who you intend to question.

With respect to Aspen we understand that the OPGT will represent her and at this time do not foresee applying to make someone her litigation representative. We will advise if for whatever reason this changes.

With respect to Melissa she will likely represent herself and will swear an affidavit that will be provided to you in due course. If you intend to question Melissa please be advised that she has a newborn and will only be able to sit for a maximum of 2 hrs at a time.

Kind Regards,
Sandi

BLG
Borden Ladner Gervais

Sandi Shannon
Associate
T 403.232.9782 | F 403.266.1395 | M 403.232.9500 | sshannon@blg.com
Centennial Place, East Tower, 1900, 520 – 3rd Ave S W, Calgary, AB, Canada T2P 0R3

Alta. Reg. 124/2010, s. 3.74

s 3.74 Adding, removing or substituting parties after close of pleadings

Currency

3.74Adding, removing or substituting parties after close of pleadings

3.74(1) After close of pleadings, no person may be added, removed or substituted as a party to an action started by statement of claim except in accordance with this rule.

3.74(2) On application, the Court may order that a person be added, removed or substituted as a party to an action if

(a) in the case of a person to be added or substituted as plaintiff, plaintiff-by-counterclaim or third party plaintiff, the application is made by a person or party and the consent of the person proposed to be added or substituted as a party is filed with the application;

(b) in the case of an application to add or substitute any other party, or to remove or to correct the name of a party, the application is made by a party and the Court is satisfied the order should be made.

3.74(3) The Court may not make an order under this rule if prejudice would result for a party that could not be remedied by a costs award, an adjournment or the imposition of terms.

Currency
Alberta Current to Gazette Vol. 112:19 (October 15, 2016)

End of Document

Alta. Reg. 124/2010, s. 3.75

s 3.75 Adding, removing or substituting parties to originating application

Currency

3.75Adding, removing or substituting parties to originating application

3.75(1) In an action started by originating application no party or person may be added or substituted as a party to the action except in accordance with this rule.

3.75(2) On application of a party or person, the Court may order that a person be added or substituted as a party to the action,

(a) in the case of a person to be added or substituted as an originating applicant, if consent of the person proposed to be added or substituted is filed with the application;

(b) in the case of an application to add or substitute a person as a respondent, or to remove or correct the name of a party, if the Court is satisfied the order should be made.

3.75(3) The Court may not make an order under this rule if prejudice would result for a party that could not be remedied by a costs award, an adjournment or the imposition of terms.

Currency

Alberta Current to Gazette Vol. 112:19 (October 15, 2016)

End of Document

2011 ABQB 51
Alberta Court of Queen's Bench

Manson Insulation Products Ltd. v. Crossroads C & I Distributors

2011 CarswellAlta 108, 2011 ABQB 51, [2011] A.W.L.D. 2214, [2011] A.W.L.D. 2215, [2011] A.W.L.D. 2221, [2011] A.J. No. 91, 197 A.C.W.S. (3d) 379

Manson Insulation Products Ltd., Plaintiff and Crossroads C & I Distributors, Yellow Cross Operating GP Inc. carrying on business under the firm name and style of Crossroads C & I Distributors, Johns Manville Canada Inc. and Johns Manville Corp., Defendants

Crossroads C & I Distributors, Yellow Cross Operating GP Inc. carrying on business under the firm name and style of Crossroads C & I Distributors, Plaintiff by Counterclaim (Defendant) and Manson Insulation Products Ltd., Defendants by Counterclaim (Plaintiff)

G.H. Poelman J.

Heard: December 7, 2010
Judgment: January 25, 2011
Docket: Edmonton 0903-17546

Counsel: Michael J. McCabe, Q.C., for Plaintiff
Hein Poulus, Q.C., Matthew Synnott, for Defendants, Crossroads C & I Distributors, Yellow Cross Operating GP Inc. carrying on business under the firm name and style of Crossroads C & I Distributors
Erin J. Baker, for Defendants, Johns Manville Canada Inc., Johns Manville Corp.
Michael S. Sestito, for Shawn Tilson, Keith Eaman

Subject: Civil Practice and Procedure; Contracts

Headnote

Civil practice and procedure --- Disposition without trial — Preliminary determination of question of law or fact — Procedure

Predecessors of plaintiff and defendant entered into distribution agreement — Predecessor of defendant was to be exclusive distributor of plaintiff's products, including insulation — Product specifications and prices were supposed to be included in schedules but were not — Agreement provided that any successors were to assume responsibilities under agreement — Plaintiff and defendant acquired their respective predecessors but did not give notice of assignment of agreement — Defendant started purchasing insulation from another supplier when plaintiff altered its insulation — Plaintiff commenced action against defendant for damages for breach of contract — Plaintiff brought application for declaration that agreement was valid and enforceable as between plaintiff and defendant — Application dismissed — Plaintiff was required to obtain order pursuant to R. 7.1(1) of Rules of Court directing preliminary determination of issue — Preliminary determination of issue under R. 7.1(3) was premised on such order having already been obtained — Two-stage procedure permitted court to screen which issues should proceed to preliminary determination — In any event, declaration sought by plaintiff would not have disposed of all or part of claim, substantially shortened trial, or saved expense — If agreement was declared to be enforceable, determinations would still have to be made as to whether defendant had breached agreement or engaged in tortious conduct and what relief should flow — Declaration would not have avoided need to call particular witnesses.

Civil practice and procedure --- Summary judgment — Evidence on application — Admissions

Predecessors of plaintiff and defendant entered into distribution agreement — Predecessor of defendant was to be exclusive distributor of plaintiff's products, including insulation — Product specifications and prices were supposed to be included in schedules but were not — Agreement provided that any successors were to assume responsibilities under agreement — Plaintiff and defendant acquired their respective predecessors but did not give notice of assignment of agreement — Defendant started purchasing insulation from another supplier when plaintiff altered its insulation — Plaintiff commenced action against defendant for damages for breach of contract — Plaintiff brought application for summary judgment based on admissions — Application dismissed — Admissions relating to defendant's understanding that agreement would continue to have effect after assignment did not address defendant's most significant defences — Defendant's admissions did not address whether agreement was legally enforceable in face of failure to include specified information in schedules — Defendant had not been involved in executing agreement so could not speak to its validity at outset — One witness's thoughts and understandings did not constitute clear legally-effective admissions required for summary judgment — Defendant's acceptance of assignment from predecessor did not address whether binding contractual relationship arose between defendant and plaintiff.

Civil practice and procedure --- Pleadings — Amendment — Grounds for amendment — To raise new cause of action or defence — Miscellaneous

Predecessors of plaintiff and defendant entered into distribution agreement — Predecessor of defendant was to be exclusive distributor of plaintiff's products, including insulation — Plaintiff and defendant acquired their respective predecessors but did not give notice of assignment of agreement — Defendant started purchasing insulation from another supplier when plaintiff altered its insulation — Plaintiff commenced action against defendant for damages for breach of contract — Defendant commenced counterclaim for declaration that agreement was unenforceable or had been repudiated — Defendant brought application for leave to amend statement of defence and counterclaim to add predecessors and their principals as parties and to particularize defences — Application granted — Proposed amendments to defences were adequately supported by evidence, did not cause prejudice, and were not hopeless — Basis for adding predecessors and their principals as parties was supported by adequate evidence even if weak — No assertion of prejudice was made — Production of documents had not yet been completed and examinations for discovery had not yet commenced — Expiration of limitation period was not issue — New causes of action were at least arguable.

APPLICATION by plaintiff for preliminary determination of issue or for summary judgment based on admissions; CROSS-APPLICATION by defendant for leave to amend statement of defence and counterclaim.

G.H. Poelman J.:

I. The Proceedings

1 The applications before the Court arise out of an action commenced by Manson Insulation Products Ltd. (which the parties style "New Manson") on November 6, 2009 (an amended statement of claim filed on March 16, 2010). The main defendant for present purposes is Crossroads C & I Distributors (which the parties style "New Crossroads").

2 The action seeks to enforce and obtain damages for breach of a distribution agreement (the "Distribution Agreement") made as of June 6, 2008 between Manson Insulation, Inc. ("Old Manson") and Crossroads C & I Distributors Inc. ("Old Crossroads"). Under the Distribution Agreement, Old Manson appointed Old Crossroads as exclusive distributor for insulation products and the parties undertook minimum supply and purchase obligations to each other.

3 By its previous solicitors, New Crossroads defended and counterclaimed on December 11, 2009. It alleged, *inter alia*, that the Distribution Agreement was unenforceable as between the original parties, that its assignment from Old Manson to New Manson was not enforceable, and that New Manson had committed repudiatory breaches.

46 The principles summarized by Wittmann C.J.Q.B. were not premised on particular words in the old rules. Rather, they arose from the function of pleadings before our contemporary common law courts. As stated by Bensler J.:

> [18] This discretion [to amend pleadings] exists because "pleadings are not a meaningless ritual incantation or medieval superstition; they fulfil the first rule of natural justice, knowledge of the case against one": *Waquan v. Canada*, 2002 ABCA 110, 303 A.R. 43, 2 Alta. L.R. (4th) 1 at para. 85. Furthermore, with the Court bound to decide a matter upon the issues pled before it, accurate pleadings are necessary for just decisions. [8]

C. Legal Principles: Amendments Adding Parties:

47 Rule 3.74 governs amendments that add parties. It provides as follows:

> 3.74(1) After close of pleadings, no person may be added, removed or substituted as a party to an action started by statement of claim except in accordance with this rule.
>
> (2) On application, the Court may order that a person be added, removed or substituted as a party to an action if
>
> (a) in the case of a person to be added or substituted as plaintiff, plaintiff-by-counterclaim or third party plaintiff, the application is made by a person or party and the consent of the person proposed to be added or substituted as a party is filed with the application;
>
> (b) in the case of an application to add or substitute any other party, or to remove or to correct the name of a party, the application is made by a party and the Court is satisfied the order should be made.
>
> (3) The Court may not make an order under this rule if prejudice would result for a party that could not be remedied by a costs award, an adjournment or the imposition of terms.

48 The material parts for this application, where there is no consent, are rules 3.74(2)(b) and 3.74(3). These establish three requirements:

a) the application must be made by a party;

b) the court must be satisfied that an order should be made; and

c) there must be no prejudice that could not be remedied.

49 The amendment application is made by New Manson, a party to both the claim and counterclaim. Thus, the first requirement is satisfied.

50 The rule gives no express guidance on what is meant by the second requirement, that the court be satisfied. It clearly intends to confer discretion on the court. Discretionary powers of the court must, of course, be exercised judicially — that is, in accordance with accepted principles.

51 In my view, for the reasons given above, the guidelines established by the authorities under the former rules should again inform the court's discretion under rule 3.74(2)(b). There is, therefore, no reason to take a different approach in principle to amendments that add parties, subject of course to the express inclusion of prejudice considerations in rule 3.74(3).

52 The third element, prejudice, is a consideration in any amendment application, according to the authorities. It is given more prominence where new parties are added, presumably because they are more likely to expand the scope and expense of an action, and may be particularly be affected where the action is well advanced or limitation periods have passed.

2012 ABCA 219
Alberta Court of Appeal

Castledowns Law Office Management Ltd. v. FastTrack Technologies Inc.

2012 CarswellAlta 1203, 2012 ABCA 219, [2012] A.W.L.D. 3904, 219 A.C.W.S. (3d) 84, 533 A.R. 287, 557 W.A.C. 287, 75 Alta. L.R. (5th) 125

Castledowns Law Office Management Ltd., 104 Street Law Office Management Ltd., Roy Nickerson, Trudy Nickerson, Westering Heights Estates Ltd., KSA Holdings Inc., David Mercer, Paul Foisy and Marianna Foisy and 1131102 Alberta Ltd. Respondents (Plaintiffs) and FastTrack Technologies Inc. Appellant (Defendant)

Keith Ritter, J.D. Bruce McDonald, Myra Bielby JJ.A.

Heard: June 8, 2012
Judgment: July 11, 2012
Docket: Edmonton Appeal 1103-0301-AC

Counsel: J.R. Vaage, J.A. Caruk for Appellant / Defendant
E. Mirth, Q.C., E.M. MacInnis, Q.C. for Respondents / Plaintiffs

Subject: Civil Practice and Procedure; Property

Headnote

Civil practice and procedure --- Pleadings — Amendment — Grounds for refusal — Prejudice or injustice

Vendor entered into agreements to sell office building to defendant F Inc., and later plaintiff C Ltd. — C Ltd. successfully brought action against vendor and F Inc. for specific performance and removal of caveat; F Inc. unsuccessfully brought counterclaim for damages — Vendor sold property to C Ltd., who later transferred property to related company 104 Ltd. — F Inc. successfully appealed trial decision on liability — More than year after appeal decision, F Inc. brought unsuccessful application to amend counterclaim to add claim for specific performance and add new parties — Case management judge found that non-compensable prejudice was established because of four-year period between trial and application and because other parties relied on fact that original counterclaim was for monetary compensation only — F Inc. appealed — Appeal dismissed — Case management judge correctly determined that F Inc. did not meet legal requirements for requested amendments — Case management judge made no palpable and overriding error in concluding that non-compensable prejudice would arise if F Inc. were allowed to amend its counterclaim as requested — Prejudice arose where third parties acquired intervening interests in property, which occurred in this case — There was no explanation as to why F Inc. delayed to amend its counterclaim for four years after trial ended.

APPEAL by defendant potential purchaser from judgment dismissing its application to amend counterclaim to add claims and parties after its appeal was allowed from trial judgment dismissing its claim.

Per curiam:

Overview

1 This appeal was dismissed at the end of oral argument, with reasons to follow. These are those reasons. They address the circumstances in which pleadings may be amended and defendants added as parties in advance of a retrial

17 The burden is on the party resisting the amendment to show that it would suffer non-compensable prejudice were the amendment to be allowed; see *Hodge v. Carey Industrial Services Ltd.* (1997), 50 Alta. L.R. (3d) 306 (Alta. Master) at para 10, (1997), 202 A.R. 154 (Alta. Master).

18 Rule 3.74(3) of the Rules of Court expressly provides that an order adding parties should not be granted if doing so would cause prejudice for a party which could not be remedied by a costs award, an adjournment or the imposition of terms.

19 Thus, the existence of non-compensable prejudice bears on both FastTrack's application to amend the prayer for relief and to add new defendants to its counterclaim.

2. Have the respondents established that they would suffer non-compensable prejudice if the amendments were allowed?

20 The case management judge found that non-compensable prejudice was established and for that reason refused the proposed amendments. Noting that the application to amend had not been brought until four years after the liability trial, she rejected the argument that FastTrack's failure to obtain a stay of the trial decision pending appeal precluded it from seeking to amend its pleadings earlier than it did. She also noted that FastTrack had not applied to amend its pleadings to seek anything other than damages, even though it was aware that the circumstances surrounding the property had changed during the four-year period, and in particular, that the land had been transferred for consideration and that a mortgage had been registered against its title by a third party.

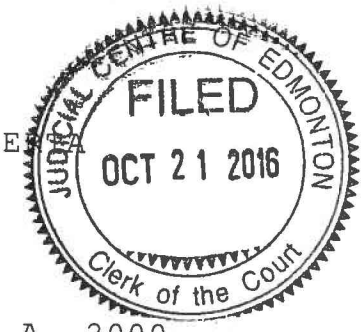
21 She found that the four-year period between the trial and FastTrack's application to amend its counterclaim had the effect that the "serious prejudice to [Castledowns] is absolute". The case management judge noted that "much has changed" and that the parties had properly relied on court decisions, court orders and Land Titles Registry proceedings in making decisions throughout the four-year period. The respondents had relied on the fact that FastTrack's original counterclaim was for monetary compensation only, a remedy which would not interfere with their ability to deal with the land as they did. The case management judge decided that to allow an amendment now to pleadings, which would seek to undo those dealings, would result in prejudice which could not be remedied through costs, an adjournment or other terms.

22 In this appeal, FastTrack argued that the case management judge erred in principle because the only type of prejudice relevant to an application to amend pleadings is prejudice to a respondent's ability to defend its case; an example is where critical documentary evidence has disappeared due to the passage of time. However, FastTrack offered no authority to support that proposition. In the decisions in which the disappearance of evidence was found to amount to prejudice, neither the Master in *McCormick (Next Friend of) v. Boychuk*, 2008 ABQB 728, [2008] A.J. No. 1324 (Alta. Master), nor this court in *Hunter Financial Group Ltd. v. Maritime Life Assurance Co.*, 2009 ABCA 199, 457 A.R. 271 (Alta. C.A.), purported to limit the relevant type of prejudice to this situation.

23 All interlocutory steps and the first trial itself were conducted on the basis that FastTrack was claiming damages only. FastTrack argued before this court that the parties "understood" that it was claiming the land itself, despite the contents of its pleadings. It submitted that the parties' knowledge of this could be inferred from their knowledge of both FastTrack's caveat and the vendor's offer to transfer title to whichever party the judge determined was entitled to it. FastTrack argued that the trial judge recognized that it was claiming to acquire the land itself, citing the first sentence of his trial decision: "[t]his action involves competing claims for specific performance..." However, FastTrack did not ask for specific performance in its pleadings and, of course, the trial judge did not grant FastTrack specific performance.

24 A review of the facts here discloses some reason for FastTrack's failure to seek an amendment prior to trial. At the time the initial counterclaim was issued, FastTrack could not have advanced a claim for specific performance against Castledowns because title to the land was not then in Castledowns' name. That possibility first arose when the land was transferred into Castledowns' name in 2007, at the conclusion of the trial. Similarly, FastTrack now proposes to amend its counterclaim to seek an order that land now owned by 104 Street Law be transferred to it but it could not have claimed

ORIGINAL



COURT FILE NO: 1103 14112

COURT: QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE: EDMONTON

IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c.T-8 as amended

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

APPLICANTS: ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE and CLARA MIDBO, as TRUSTEES FOR THE 1985 SAWRIDGE TRUST

QUESTIONING ON AFFIDAVIT

OF

PATRICK TWINN

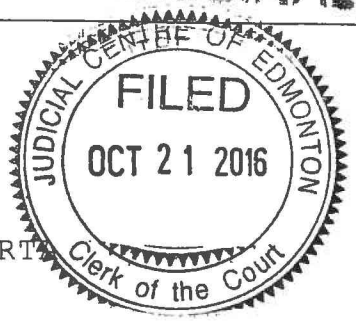
Ms. D.C.E. Bonora	For the Applicants
Ms. S.J. Shannon	For Shelby Twinn, Patrick Twinn and Deborah Serafinchon
Ms. C.C. Osualdini	For Catherine Twinn
Susan Stelter	Court Reporter

Edmonton, Alberta

22 September, 2016

Q My question is specifically with respect to the beneficiary definition of the Trust?
A M-hm.
Q Do you understand the topic now?
A Yeah, I understand the topic, yeah.
Q So with respect to the beneficiary definition of the Trust I am asking you is it acceptable to you to have a definition that has a number of people beyond the members of the Sawridge First Nation?
A Beyond the members today, yes.
Q In your application you are applying to become a party, correct?
A Yup.
Q And you hired Borden Ladner Gervais?
A M-hm.
Q You have to say yes or no.
A Yes.
Q And can you tell me if you paid them a retainer?
A I did.
Q And what was the retainer that you paid them?
A $5,000.
Q And you paid that personally?
A Yes, I did receive some support from my mom for that, but.
Q In paragraph 3 of your Affidavit you talk about the application being in relation to the definition of beneficiaries and the transfer of assets. Do you see

ORIGINAL



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QUESTIONING ON AFFIDAVIT

OF

SHELBY TWINN

Ms. D.C.E. Bonora	For the Applicants
Ms. S.J. Shannon	For Shelby Twinn, Patrick Twinn and Deborah Serafinchon
Ms. C.C. Osualdini	For Catherine Twinn
Susan Stelter	Court Reporter

Edmonton, Alberta

22 September, 2016

Q You have to say yes because she can't record a nod.
And when you retained Borden Ladner Gervais did you pay them a retainer?
A I personally did not pay them a retainer. My grandmother helped us out in that.
Q Who is your grandmother?
A Catherine.
Q Catherine Twinn?
A Yup.
Q So Catherine Twinn paid the retainer for Borden Ladner Gervais?
A Yes.
Q Do you know the amount of the retainer?
A No.
Q Can you undertake to find that out for me?
A Yes.
Q Okay.

UNDERTAKING NO. 1:
RE ADVISE THE AMOUNT OF RETAINER PAID TO BORDEN LADNER GERVAIS.

Q MS. BONORA: Now you advised that you are not a member of Sawridge First Nation?
A Yes.
Q And have you ever applied to be a member of the Sawridge First Nation?
A No.
Q Do you ever intend to apply to be a member of the

Sawridge First Nation?

A That is still up in the air. Depending on how I feel -- as I am a young adult I don't know where I am at emotionally, and when I know to take that I will, and until then I am not sure.

Q Okay. You say that you are a beneficiary of the 1985 Trust, correct?

A Yes.

Q And is it your understanding that you are a beneficiary because you are the child of a male member of Sawridge First Nation?

A Yes.

Q And so your father is Paul Twinn?

A Yes.

Q And he is a member of the Sawridge First Nation?

A Yes.

Q And he is also the brother to Patrick Twinn?

A Yes.

Q And he is also an applicant in this application?

A Patrick.

Q Yes. And Aspen is Patrick's daughter?

A Yes.

Q And so Aspen is your cousin?

A Yes.

Q Okay. And there is no other way that you are a beneficiary of the 1985 Trust, correct?

MS. SHANNON: I am not sure she can answer that,

COURT FILE NO: 1103 14112

COURT: QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE: EDMONTON

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QUESTIONING ON AFFIDAVIT

OF

DEBORAH A. SERAFINCHON

Ms. D.C.E. Bonora	For the Applicants
Ms. S.J. Shannon	For Shelby Twinn, Patrick Twinn and Deborah Serafinchon
Ms. C.C. Osualdini	For Catherine Twinn
Susan Stelter	Court Reporter

Edmonton, Alberta

22 September, 2016

A My mother told me that, and I had DNA testing done. And he told me. He never denied it when I spoke to him.
Q Okay. And you have not produced your DNA testing for this action?
A I don't believe so.
Q And if we look at paragraph 15 of your Affidavit you have said that you applied for Indian status registration?
A M-hm.
Q Sorry?
A Sorry, go ahead.
Q Through the office of Lesser Slave Lake Indian Regional Council.

Can you tell me what process you went through?

A Honestly, I believe this was the second time I applied, and I had submitted all of the information that I had at that time to -- oh, God, that was so long ago. I can't remember when I submitted it. I think it was to the band office or to the Lesser -- somebody. As a matter of fact, maybe I even gave it to Catherine and she submitted it for me. It was like a long time ago.
Q Okay. And is it your belief that the Lesser Slave Lake Indian Regional Council grant Indian status?
A I have no idea, to be quite honest with you, how the process is. All I know is I keep putting in applications and it didn't work.

Q Okay. So you are not aware that it is actually the federal government through Indian Affairs that grants Indian status?
A Well, I had thought at that time that if I applied to them they would be able to help me get the application through to the government or --
Q And have you made any inquiries of any federal departments, Indian Affairs, about your Indian status?
A Yes, I did send in an application, and I am going to be honest with you, I have no idea what year, when, how, what order it was in. But I did send in an application including my DNA and was told that the DNA was not good enough.
Q So to date you haven't been granted Indian status?
A No.
Q And so do you have any written proof of the applications that you made to them?
A Probably not because I lost a lot of papers in a flood in my basement.
Q Oh, that is always unfortunate. So you wouldn't have any correspondence that you exchanged with the Lesser Slave Lake Indian Regional Council?
A Probably not.
Q Okay. Would you be able to check and see if you had any?
A Of course.
MS. SHANNON: We will take that under advisement.

MS. BONORA: Okay.

UNDERTAKING NO. 2: (UNDER ADVISEMENT) RE CHECK RECORDS AND PRODUCE ANY CORRESPONDENCE EXCHANGED WITH THE LESSER SLAVE LAKE INDIAN REGIONAL COUNCIL.

Q MS. BONORA: So in paragraph 16 you talk about the fact that the Lesser Slave Lake Indian Regional Council informed you that the DNA sample was inadequate for registration.

A Okay. Again, I'm not sure, because it was so long ago, if it was actually them or if it was the letter I got from the government. But I do know that I received a letter saying that the DNA sample was insufficient and that I would need to get Affidavits from Walter's siblings.

Q And so you were told that you would need two of your father's sisters to attest that you were his daughter, correct?

A Yes.

Q And you have not done that?

A Sorry. No, I have not done that.

Q And you just told me about a letter that you received either from the Lesser Slave Lake Indian Regional Council or from the federal government. Do you think that you would have a copy of that letter?

A Probably not. Again, there were a whole bunch of papers destroyed in a flood, so.

beneficiary, but.
Q But today you believe that you are not a beneficiary?
A No.
Q And if the definition is amended to be such that the beneficiaries will be the Sawridge First Nation members, then you will also not be a beneficiary; is that correct?
A Like I said, that is part of the reason that we are here, is to make sure that I am not discriminated against and not excluded.
Q Okay. So I am just going to ask you the question again. If the definition is changed so that the beneficiary definition in the Trust is Sawridge First Nation members, is it correct that you will not be a beneficiary?
A Not necessarily, because if I get my membership done I would be, wouldn't I?
Q Right. And have you made an application for membership?
A Not yet.
Q Are you planning to make an application for membership?
A I am going to be honest with you. I am not sure because the process is long and arduous and painful.
Q And when you say the process is long and arduous and painful, how do you know that?
A Because I have seen some of the -- I had an application, one of the very first ones, that was for

Q So did you fill in the applications and submit them to the Sawridge First Nation?
A No.
Q And who told you that your potential to be made a member was slim to none?
A My sister.
Q And who is that?
A Arlene.
Q Okay. And did you investigate with anyone at the Sawridge First Nation in the administration or in Chief and council about your ability to become a member of Sawridge First Nation?
A It is kind of hard to talk to people who don't speak to you.
Q So does that mean that you did not make those inquiries?
A I did not.
Q And in terms of the application that you are making, you wish to add illegitimate females to the class of beneficiaries in the 1985 Trust, correct?
A Say that again, sorry?
Q In terms of what you would like to do in terms of being added as a party, you would like to add a class of illegitimate females to the class of beneficiaries in the 1985 Trust?
A I don't know so much as I want to add a class, as I would like it not to include illegitimate or gender.

Q Okay.
A I believe that my entitlement should be the same as theirs.
Q Okay. And you are not aware that your brother's entitlement come from the fact that they are the children of two members?
A That they are the --
Q The children of two members of the Sawridge First Nation?
A And my mother is a descendant as well.
Q Right. But we confirm that your mother was not a member of the Sawridge First Nation, correct?
A No, but her ancestry is, so she should have been as well.
Q So when I asked you your mother is not a member, is that correct, you answered no.

Your mother, can you tell me for sure was your mother a member --

A My mother has passed away.
Q Was your mother a member of Sawridge First Nation?
A She wasn't on the band list.
Q In paragraph 19 of your Affidavit you are asking for a change to the Indian Act; is that correct?
A Yup. Well, I am hoping that, again, that there is no gender included and/or legitimacy.
Q Okay. And then you say, in paragraph 19, "I may also have an absolute right from birth to be on the Sawridge

Beneficiaries

Beneficiaries must presently meet the following requirements set out in the Trust Deeds of the two Trusts:

The Sawridge Band Inter-Vivos Settlement, 15 April 1985

"The beneficiaries of The Sawridge Band Inter-Vivos Settlement at any particular time are all persons who at that time qualify as members of The Sawridge Indian Band No. 454 pursuant to The Indian Act R.S.C. 1970, Chapter I-6 as such provisions existed on the 15th day of April, 1982 and, in the event that such provisions are amended after April 15, 1985, all persons at such particular time as would qualify for such membership pursuant to the said provisions as they existed on April 15, 1985."

The Sawridge Trust, 15 August 1986

"The beneficiaries of The Sawridge Trust at any particular time are all persons who at that time qualify as members of The Sawridge Indian Band under the laws of Canada in force at that time, including the membership rules and customary laws of The Sawridge Indian Band as they may exist from time to time to the extent that such membership rules and customary laws are incorporated into, or recognized by the laws of Canada."

2011 SCC 52
Supreme Court of Canada

British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal)

2011 CarswellBC 2702, 2011 CarswellBC 2703, 2011 SCC 52, [2011] 12 W.W.R. 1, [2011] 3 S.C.R. 422, [2011] B.C.W.L.D. 7337, [2011] B.C.W.L.D. 7338, [2011] B.C.W.L.D. 7441, [2011] B.C.W.L.D. 7442, [2011] B.C.W.L.D. 7444, [2011] B.C.W.L.D. 7477, [2011] A.C.S. No. 52, [2011] S.C.J. No. 52, 2012 C.L.L.C. 230-001, 207 A.C.W.S. (3d) 375, 23 B.C.L.R. (5th) 1, 25 Admin. L.R. (5th) 173, 311 B.C.A.C. 1, 337 D.L.R. (4th) 413, 421 N.R. 338, 529 W.A.C. 1, 73 C.H.R.R. D/1, 95 C.C.E.L. (3d) 169

Workers' Compensation Board of British Columbia (Appellant) and Guiseppe Figliola, Kimberley Sallis, Barry Dearden and British Columbia Human Rights Tribunal (Respondents) and Attorney General of British Columbia, Coalition of BC Businesses, Canadian Human Rights Commission, Alberta Human Rights Commission and Vancouver Area Human Rights Coalition Society (Interveners)

McLachlin C.J.C., Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein, Cromwell JJ.

Heard: March 16, 2011
Judgment: October 27, 2011
Docket: 33648

Proceedings: reversing *British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal)* (2010), 2 B.C.L.R. (5th) 274, 2010 CarswellBC 330, 2010 BCCA 77, 316 D.L.R. (4th) 648, 284 B.C.A.C. 50, 3 Admin. L.R. (5th) 49 (B.C. C.A.); reversing *British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal)* (2009), 2009 CarswellBC 737, 2009 BCSC 377, 67 C.H.R.R. D/195, 93 B.C.L.R. (4th) 384, 96 Admin. L.R. (4th) 250 (B.C. S.C.)

Counsel: Scott A. Nielsen, Laurel Courtenay for Appellant
Lindsay Waddell, James Sayre, Kevin Love for Respondents, Guiseppe Figliola, Kimberley Sallis, Barry Dearden
Jessica M. Connell, Katherine Hardie for Respondent, British Columbia Human Rights Tribunal
Jonathan G. Penner for Intervener, Attorney General of British Columbia
Peter A. Gall, Q.C., Nitya Iyer for Intervener, Coalition of BC Businesses
Sheila Osborne-Brown, Philippe Dufresne for Intervener, Canadian Human Rights Commission
Janice R. Ashcroft for Intervener, Alberta Human Rights Commission
Ryan D.W. Dalziel for Intervener, Vancouver Area Human Rights Coalition Society

Subject: Occupational Health and Safety; Public; Constitutional; Civil Practice and Procedure; Employment

Headnote

Administrative law --- Standard of review — Reasonableness — Patently unreasonable

Human rights --- Practice and procedure — Commissions and boards of inquiry — Powers

Discretion to dismiss complaints — Complainants with work-related chronic pain appealed to review division of Workers' Compensation Board, alleging that Board's chronic pain compensation policy was contrary to Human Rights Code — Review officer held policy did not contravene Code — Instead of seeking judicial review, complainants filed complaints with Human Rights Tribunal making same allegations — Board brought motion to dismiss complaints under s. 27(1)(f) of Code on basis that complaints had been appropriately dealt with in another proceeding — Tribunal dismissed application, concluding that substance of complaints was not appropriately dealt

with in review process — Board applied for judicial review — Chambers judge granted application, concluding same issues had already been decided by review officer — Complainants appealed — Court of Appeal held standard of review was patent unreasonableness, and found chambers judge's reasons did not identify patently unreasonable behaviour — Board appealed to Supreme Court of Canada — Appeal allowed — Tribunal's decision set aside; complaints dismissed — Tribunal's decision was patently unreasonable — Tribunal based its decision to proceed with complaints and have them relitigated on predominantly irrelevant factors and ignored its true mandate under s. 27(1)(f) of Code — Tribunal's strict adherence to application of issue estoppel was overly formalistic interpretation of s. 27(1)(f) of Code, particularly of phrase "appropriately dealt with" — Complainants were trying to relitigate in different forum.

Droit administratif --- Norme de contrôle — Caractère raisonnable — Manifestement déraisonnable

Droits de la personne --- Procédure — Commissions et tribunaux — Pouvoirs

Pouvoir discrétionnaire de rejeter les plaintes — Plaignants souffraient de douleurs chroniques liées au travail et ont interjeté appel devant la section de révision de la Workers' Compensation Board de la Colombie-Britannique (« Commission »), soutenant que la politique de l'indemnité fixe pour les douleurs chroniques contrevenait au Human Rights Code de la Colombie-Britannique (« Code ») — Agent de révision a conclu que la politique n'enfreignait pas le Code — Plutôt que de demander un contrôle judiciaire de la décision de l'agent de révision, les plaignants ont déposé devant le tribunal des droits de la personne (« Tribunal ») des plaintes reprenant les mêmes arguments — Commission a présenté au Tribunal une requête pour rejet des plaintes en vertu de l'art. 27(1)(f) du Code, faisant valoir que les plaintes avaient fait l'objet d'un examen de façon appropriée dans une autre instance — Tribunal a rejeté la requête, concluant que le fond de la plainte n'avait pas fait l'objet d'un examen de façon appropriée dans le cadre du processus de révision — Commission a déposé une requête en contrôle judiciaire — Juge siégeant en cabinet a accueilli la requête, estimant que l'agent de révision avait déjà statué de façon définitive sur les mêmes questions — Plaignants ont interjeté appel — Cour d'appel a conclu que la norme de contrôle applicable était celle de la décision manifestement déraisonnable et que les motifs de la juge siégeant en cabinet ne relevaient aucun comportement manifestement déraisonnable — Commission a formé un pourvoi devant la Cour suprême du Canada — Pourvoi accueilli — Décision du Tribunal annulée et plaintes rejetées — Décision du Tribunal était manifestement déraisonnable — Décision du Tribunal de recevoir les plaintes et de les entendre de nouveau reposait principalement sur des facteurs non pertinents et ne tenait pas compte du mandat véritable que lui conférait l'art. 27(1)(f) du Code — En s'en tenant à l'application stricte de la préclusion découlant d'une question déjà tranchée, le Tribunal a donné une interprétation trop formaliste à l'art. 27(1)(f) du Code et, plus particulièrement, aux mots [TRADUCTION] « a été statué de façon appropriée » — Plaignants cherchaient à soulever de nouveau la question devant un autre forum.

The complainants with work-related chronic pain appealed to the review division of the Workers' Compensation Board, alleging that the Board's chronic pain compensation policy was contrary to s. 8 of the B.C. Human Rights Code. A review officer held the policy was not contrary to the Code. Instead of seeking judicial review of the review officer's decision, the complainants filed complaints with the Human Rights Tribunal based on the same allegations.

The Board brought a motion to have the Tribunal dismiss the complaints pursuant to s. 27(1)(f) of the Code, which provides that a complaint may be dismissed where the substance of the complaint has been appropriately dealt with in another proceeding. The Tribunal dismissed the Board's motion, concluding that the substance of the complaints was not appropriately dealt with in the review process.

On judicial review, the Tribunal's decision was set aside by a chambers judge who concluded that the same issues had already been conclusively decided by the review officer and that the Tribunal had failed to take into proper account the principles of res judicata, collateral attack, and abuse of process. The chambers judge found the complaints to the Tribunal were a veiled attempt to circumvent judicial review. The complainants appealed.

2848; *Boucher c. Stelco Inc.*, 2005 SCC 64, [2005] 3 S.C.R. 279 (S.C.C.); *Dominion Ready Mix Inc. c. Rocois Construction Inc.*, [1990] 2 S.C.R. 440 (S.C.C.), at p. 448).

26 As a result, given that multiple tribunals frequently exercise concurrent jurisdiction over the same issues, it is not surprising that the common law doctrines also find expression in the administrative law context through statutory mechanisms such as s. 27(1)(f). A brief review of these doctrines, therefore, can be of assistance in better assessing whether their underlying principles have been respected in this case.

27 The three preconditions of issue estoppel are whether the same question has been decided; whether the earlier decision was final; and whether the parties, or their privies, were the same in both proceedings (*Angle v. Minister of National Revenue* (1974), [1975] 2 S.C.R. 248 (S.C.C.), at p. 254). These concepts were most recently examined by this Court in *Danyluk*, where Binnie J. emphasized the importance of finality in litigation: "A litigant ... is only entitled to one bite at the cherry.... Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided" (para. 18). Parties should be able to rely particularly on the conclusive nature of administrative decisions, he noted, since administrative regimes are designed to facilitate the expeditious resolution of disputes (para. 50). All of this is guided by the theory that "estoppel is a doctrine of public policy that is designed to advance the interests of justice" (para. 19).

28 The rule against collateral attack similarly attempts to protect the fairness and integrity of the justice system by preventing duplicative proceedings. It prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route: see *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585 (S.C.C.), and *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 (S.C.C.).

29 Both collateral attack and *res judicata* received this Court's attention in *Boucher*. The Ontario Superintendent of Pensions had ordered and approved a partial wind-up report according to which members of the plan employed in Quebec were not to receive early retirement benefits, due to the operation of Quebec law. The employees were notified, but chose not to contest the Superintendent's decision to approve the report. Instead, several of them started an action against their employer in the Quebec Superior Court claiming their entitlement to early retirement benefits. LeBel J. rejected the employees' claim. Administrative law, he noted, has review mechanisms in place for reducing error or injustice. Those are the mechanisms parties should use. The decision to pursue a court action instead of judicial review resulted in "an impermissible collateral attack on the Superintendent's decision" (para. 35):

> Modern adjective law and administrative law have gradually established various appeal mechanisms and sophisticated judicial review procedures, so as to reduce the chance of errors or injustice. Even so, the parties must avail themselves of those options properly and in a timely manner. Should they fail to do so, the case law does not in most situations allow collateral attacks on final decisions.... [para. 35]

30 In other words, the harm to the justice system lies not in challenging the correctness or fairness of a judicial or administrative decision in the proper forums, it comes from inappropriately circumventing them (*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 (S.C.C.), at para. 46).

31 And finally, we come to the doctrine of abuse of process, which too has as its goal the protection of the fairness and integrity of the administration of justice by preventing needless multiplicity of proceedings, as was explained by Arbour J. in *Toronto (City)*. The case involved a recreation instructor who was convicted of sexually assaulting a boy under his supervision and was fired after his conviction. He grieved the dismissal. The arbitrator decided that the conviction was admissible evidence but not binding on him. As a result, he concluded that the instructor had been dismissed without cause.

2015 ABQB 799
Alberta Court of Queen's Bench

1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)

2015 CarswellAlta 2373, 2015 ABQB 799, [2016] A.W.L.D. 313, 262 A.C.W.S. (3d) 1

In the Matter of the Trustees Act, RSA 2000, c T-8, as amended

In the Matter of The Sawridge Band Inter Vivos Settlement Created by Chief Walter Patrick Twinn, of the Sawridge Indian Band, No. 19, now known as the Sawridge Indian Band, on April 15, 1985 (the "1985 Sawridge Trust")

Ronald Twinn, Catherine Twinn, Walter Felix Twin, Bertha L'Hoirondelle and Clara Midbo, As Trustees for the 1985 Sawridge Trust, Respondents and Public Trustee of Alberta, Applicant

D.R.G. Thomas J.

Heard: September 2, 2015; September 3, 2015
Judgment: December 17, 2015
Docket: Edmonton 1103-14112

Counsel: Janet Hutchison, Eugene Meehan, Q.C., for Applicant, Public Trustee of Alberta
Edward H. Molstad, Q.C., for Respondent, Sawridge First Nation
Doris Bonora, Marco S. Poretti, for Respondents, 1985 Sawridge Trustees
J.J. Kueber, Q.C., for Ronald Twinn, Walter Felix Twin, Bertha L'Hoirondelle and Clara Midbo
Karen Platten, Q.C., for Catherine Twinn

Subject: Civil Practice and Procedure; Constitutional; Estates and Trusts; Public; Human Rights

Headnote

Aboriginal law --- Practice and procedure — Discovery — Miscellaneous

Band set up trust to hold Band property on behalf of its members — Trustees sought court advice and direction with respect to proposed definition to term "beneficiaries" of trust — Public Trustee brought successful application to be appointed litigation representative of interested minors, on condition that costs would be paid by trust and that it would be shielded from any costs liability — Public Trustee brought application for production of records and information from band — Information sought concerned band membership, members who had or were seeking band membership, processes involved to determine whether individuals may become part of band, records of application processes and associated litigation, and how assets ended up in trust — Band resisted application — Application dismissed — Public Trustee used legally incorrect mechanism to seek materials from Band — Band was third party to litigation and therefore was not subject to same disclosure proceedings as trustees, who were parties — Proximal relationships were not to be used as bridge for disclosure obligations — Only documents which were potentially disclosable in Public Trustee's application were those that were relevant and material to issue before court — It was further necessary to refocus proceedings and provide well-defined process to achieve fair and just distribution of trust assets — Future role of Public Trustee was to be limited to representing interests of existing and potential minor beneficiaries, examining manner in which property was placed in trust on behalf of minor beneficiaries, identifying potential but not yet identified minors who were children of band members or membership candidates, and supervising distribution process — Public trustee was to have until March 15, 2016, to prepare and serve application on band which identified documents it believed to be relevant and material to test fairness of proposed distribution arrangement to minors who are children of beneficiaries or potential beneficiaries — Public

Trustee was to have until January 29, 2016 to prepare and serve application on band identifying specific documents relevant and material to issue of assets settled in trust — Public Trustee may seek materials and information from Band, but only in relation to specific issues and subjects — Public Trustee had no right to engage, and was not to engage, in collateral attacks on membership processes of band and trustees had no right to engage in collateral attacks on band's membership processes.

APPLICATION by Public Trustee for production of records and information from band.

***D.R.G. Thomas J.*:**

I Introduction

1 This is a decision on a production application made by the Public Trustee and also contains other directions. Before moving to the substance of the decision and directions, I review the steps that have led up to this point and the roles of the parties involved. Much of the relevant information is collected in an earlier and related decision, *1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)*, 2012 ABQB 365 (Alta. Q.B.) ["*Sawridge #1*"], (2012), 543 A.R. 90 (Alta. Q.B.) affirmed 2013 ABCA 226, 553 A.R. 324 (Alta. C.A.) ["*Sawridge #2*"]. The terms defined in *Sawridge #1* are used in this decision.

II. Background

2 On April 15, 1985, the Sawridge Indian Band, No. 19, now known as the Sawridge First Nation [sometimes referred to as the "Band", "Sawridge Band", or "SFN"], set up the 1985 Sawridge Trust [sometimes referred to as the "Trust" or the "Sawridge Trust"] to hold some Band assets on behalf of its then members. The 1985 Sawridge Trust and other related trusts were created in the expectation that persons who had previously been excluded from Band membership by gender (or the gender of their parents) would be entitled to join the Band as a consequence of amendments to the *Indian Act*, RSC 1985, c I-5, which were being proposed to make that legislation compliant with the *Canadian Charter of Rights and Freedoms*, Part 1, *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the "*Charter*"].

3 The 1985 Sawridge Trust is administered by the Trustees [the "Sawridge Trustees" or the "Trustees"]. The Trustees had sought advice and direction from this Court in respect to proposed amendments to the definition of the term "Beneficiaries" in the 1985 Sawridge Trust (the "Trust Amendments") and confirmation of the transfer of assets into that Trust.

4 One consequence of the proposed amendments to the 1985 Sawridge Trust would be to affect the entitlement of certain dependent children to share in Trust assets. There is some question as to the exact nature of the effects, although it seems to be accepted by all of those involved on this application that some children presently entitled to a share in the benefits of the 1985 Sawridge Trust would be excluded if the proposed changes are approved and implemented. Another concern is that the proposed revisions would mean that certain dependent children of proposed members of the Trust would become beneficiaries and be entitled to shares in the Trust, while other dependent children would be excluded.

5 Representation of the minor dependent children potentially affected by the Trust Amendments emerged as an issue in 2011. At the time of confirming the scope of notices to be given in respect to the application for advice and directions, it was observed that children who might be affected by the Trust Amendments were not represented by independent legal counsel. This led to a number of events:

August 31, 2011 - I directed that the Office of the Public Trustee of Alberta [the "Public Trustee"] be notified of the proceedings and invited to comment on whether it should act in respect of any existing or potential minor beneficiaries of the Sawridge Trust.

February 14, 2012 - The Public Trustee applied:

33 In *Sawridge #1* I at paras 46-48 I determined that the inquiry into membership processes was relevant because it was a subject of some dispute. However, I also stressed the exclusive jurisdiction of the Federal Court (paras 50-54) in supervision of that process. Since *Sawridge #1* the Federal Court has ruled in *Stoney v. Sawridge First Nation* on the operation of the SFN's membership process.

34 Further, in *Sawridge #1* I noted at paras 51-52 that in *783783 Alberta Ltd. v. Canada (Attorney General)*, 2010 ABCA 226, 322 D.L.R. (4th) 56 (Alta. C.A.), the Alberta Court of Appeal had concluded this Court's inherent jurisdiction included an authority to make findings of fact and law in what would nominally appear to be the exclusive jurisdiction of the Tax Court of Canada. However, that step was based on *necessity*. More recently in *Strickland v. Canada (Attorney General)*, 2015 SCC 37 (S.C.C.), the Supreme Court of Canada confirmed the Federal Courts decision to refuse judicial review of the *Federal Child Support Guidelines*, SOR/97-175, not because those courts did not have potential jurisdiction concerning the issue, but because the provincial superior courts were better suited to that task because they "... deal day in and day out with disputes in the context of marital breakdown ...": para 61.

35 The same is true for this Court attempting to regulate the operations of First Nations, which are 'Bands' within the meaning of the *Indian Act*. The Federal Court is the better forum and now that the Federal Court has commented on the SFN membership process in *Stoney v. Sawridge First Nation*, there is no need, nor is it appropriate, for this Court to address this subject. If there are outstanding disputes on whether or not a particular person should be admitted or excluded from Band membership then that should be reviewed in the Federal Court, and not in this 1985 Sawridge Trust modification and distribution process.

36 It follows that it will be useful to re-focus the purpose of the Public Trustee's participation in this matter. That will determine what is and what is not *relevant*. The Public Trustee's role is not to conduct an open-ended inquiry into the membership of the Sawridge Band and historic disputes that relate to that subject. Similarly, the Public Trustee's function is not to conduct a general inquiry into potential conflicts of interest between the SFN, its administration and the 1985 Sawridge Trustees. The overlap between some of these parties is established and obvious.

37 Instead, the future role of the Public Trustee shall be limited to four tasks:

1. Representing the interests of minor beneficiaries and potential minor beneficiaries so that they receive fair treatment (either direct or indirect) in the distribution of the assets of the 1985 Sawridge Trust;

2. Examining on behalf of the minor beneficiaries the manner in which the property was placed/settled in the Trust; and

3. Identifying potential but not yet identified minors who are children of SFN members or membership candidates; these are potentially minor beneficiaries of the 1985 Sawridge Trust; and

4. Supervising the distribution process itself.

38 The Public Trustee's attention appears to have expanded beyond these four objectives. Rather than unnecessarily delay distribution of the 1985 Sawridge Trust assets, I instruct the Public Trustee and the 1985 Sawridge Trustees to immediately proceed to complete the first three tasks which I have outlined.

39 I will comment on the fourth and final task in due course.

Task 1 - Arriving at a fair distribution scheme

40 The first task for the 1985 Sawridge Trustees and the Public Trustee is to develop for my approval a proposed scheme for distribution of the 1985 Sawridge Trust that is fair in the manner in which it allocates trust assets between the potential beneficiaries, adults and children, previously vested or not. I believe this is a largely theoretical question and the exact numbers and personal characteristics of individuals in the various categories is generally irrelevant to the

Alta. Reg. 124/2010, s. 3.68

s 3.68 Court options to deal with significant deficiencies

Currency

3.68Court options to deal with significant deficiencies

3.68(1) If the circumstances warrant and a condition under subrule (2) applies, the Court may order one or more of the following:

(a) that all or any part of a claim or defence be struck out;

(b) that a commencement document or pleading be amended or set aside;

(c) that judgment or an order be entered;

(d) that an action, an application or a proceeding be stayed.

3.68(2) The conditions for the order are one or more of the following:

(a) the Court has no jurisdiction;

(b) a commencement document or pleading discloses no reasonable claim or defence to a claim;

(c) a commencement document or pleading is frivolous, irrelevant or improper;

(d) a commencement document or pleading constitutes an abuse of process;

(e) an irregularity in a commencement document or pleading is so prejudicial to the claim that it is sufficient to defeat the claim.

3.68(3) No evidence may be submitted on an application made on the basis of the condition set out in subrule (2)(b).

3.68(4) The Court may

(a) strike out all or part of an affidavit that contains frivolous, irrelevant or improper information;

(b) strike out all or any pleadings if a party without sufficient cause does not

(i) serve an affidavit of records in accordance with rule 5.5,

(ii) comply with rule 5.10, or

(iii) comply with an order under rule 5.11.

Currency

Alberta Current to Gazette Vol. 112:19 (October 15, 2016)

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

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

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 — Particular orders as to costs — "Costs in any event"

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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

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, it is possible (although still unusual) for costs to be awarded in favour of the *unsuccessful* party if the court considers that this is necessary to ensure that ordinary citizens will not be deterred from bringing important constitutional arguments before the courts. Concerns about prejudging the issues are therefore attenuated in this context since costs, even if awarded at the end of the proceedings, will not necessarily reflect the outcome on the merits. Another factor to be considered is the extent to which the issues raised are of public importance, and the public interest in bringing those issues before a court.

40 With these considerations in mind, I would identify the criteria that must be present to justify an award of interim costs in this kind of case as follows:

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.

41 These are necessary conditions that must be met for an award of interim costs to be available in cases of this type. The fact that they are met in a particular case is not necessarily sufficient to establish that such an award should be made; that determination is in the discretion of the court. If all three conditions are established, 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, which is also one of the purposes of costs awards. When making these decisions courts must also be mindful of the position of defendants. The award of interim costs must not impose an unfair burden on them. In the context of public interest litigation judges must be particularly sensitive to the position of private litigants who may, in some ways, be caught in the crossfire of disputes which, essentially, involve

2007 SCC 2
Supreme Court of Canada

Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue Agency)

2007 CarswellBC 78, 2007 CarswellBC 79, 2007 SCC 2, [2007] 1 S.C.R. 38, [2007] B.C.W.L.D. 538, [2007] B.C.W.L.D. 548, [2007] B.C.W.L.D. 612, [2007] S.C.J. No. 2, 150 C.R.R. (2d) 189, 153 A.C.W.S. (3d) 46, 215 C.C.C. (3d) 449, 235 B.C.A.C. 1, 275 D.L.R. (4th) 1, 356 N.R. 83, 37 C.P.C. (6th) 1, 388 W.A.C. 1, 53 Admin. L.R. (4th) 153, 62 B.C.L.R. (4th) 40, 78 W.C.B. (2d) 316, J.E. 2007-211

Little Sisters Book and Art Emporium (Appellant) and Commissioner of Customs and Revenue and Minister of National Revenue (Respondents) and Attorney General of Ontario, Attorney General of British Columbia, Canadian Bar Association, Egale Canada Inc., Sierra Legal Defence Fund and Environmental Law Centre (Interveners)

McLachlin C.J.C., Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein JJ.

Heard: April 19, 2006
Judgment: January 19, 2007
Docket: 30894

Proceedings: affirming *Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue)* (2005), (sub nom. *Little Sisters Book & Art Emporium v. Minister of National Revenue)* 344 W.A.C. 246, 208 B.C.A.C. 246, 249 D.L.R. (4th) 695, [2005] B.C.J. No. 291, 127 C.R.R. (2d) 165, 38 B.C.L.R. (4th) 288, 193 C.C.C. (3d) 491, 7 C.P.C. (6th) 333, 2005 CarswellBC 321, 2005 BCCA 94 (B.C. C.A.); reversing *Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue)* (2004), 31 B.C.L.R. (4th) 330, 2004 CarswellBC 1370, 2004 BCSC 823 (B.C. S.C.)

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George H. Copley, Q.C. for Intervener, Attorney General of British Columbia
J.J. Camp, Q.C., Melina Buckley for Intervener, Canadian Bar Association
Cynthia Peterson for Intervener, Egale Canada Inc.
Chris Tollefson, Robert V. Wright for Interveners, Sierra Legal Defence Fund, Environment Law Centre

Subject: Civil Practice and Procedure; Customs; International; Corporate and Commercial; Constitutional; Family

Headnote

Civil practice and procedure --- Costs — Particular orders as to costs — Miscellaneous orders

Plaintiff was bookstore and art emporium that catered to lesbian and gay community in city — Customs prohibited importation of certain publications as obscene — Plaintiff applied for declaration that legislation was applied in unconstitutional manner — Plaintiff filed notice of constitutional question challenging validity of definition of obscenity previously established by Supreme Court of Canada — Plaintiff's application for order of advance costs was granted in part — Customs successfully appealed, and order was set aside — Plaintiff appealed further — Appeal dismissed — Public interest advance costs orders are to remain special and, as result, exceptional — Such orders must be granted with caution, as last resort, in circumstances where need for them is clearly established — In present case, there was serious issue justifying decision to have matter proceed to trial — However, it was error to hold that public importance requirement was satisfied — "Systemic Review" aspect of claim did not bring case within scope of advance costs remedy; Systemic Review was not necessarily based on prohibition, detention, or

even delay of any books belonging to plaintiff — Plaintiff did not provide prima facie evidence that it continued to be targeted — "Four Books Appeal" concerned no interest beyond that of plaintiff, and therefore was not special enough to justify award of advance costs — It is only when public importance of a case can be established regardless of ultimate holding on merits that a court should consider this requirement satisfied.

International trade and customs --- Appraisal of value and determination of tariff classification — Appeal, re-determination or re-appraisal — Appeal to court — Appeal to other courts

Plaintiff was bookstore and art emporium that catered to lesbian and gay community in city — Customs prohibited importation of certain publications as obscene — Plaintiff applied for declaration that legislation was applied in unconstitutional manner — Plaintiff filed notice of constitutional question challenging validity of definition of obscenity previously established by Supreme Court of Canada — Plaintiff's application for order of advance costs was granted in part — Customs successfully appealed, and order was set aside — Plaintiff appealed further — Appeal dismissed — Public interest advance costs orders are to remain special and, as result, exceptional — Such orders must be granted with caution, as last resort, in circumstances where need for them is clearly established — In present case, there was serious issue justifying decision to have matter proceed to trial — However, it was error to hold that public importance requirement was satisfied — "Systemic Review" aspect of claim did not bring case within scope of advance costs remedy; Systemic Review was not necessarily based on prohibition, detention, or even delay of any books belonging to plaintiff — Plaintiff did not provide prima facie evidence that it continued to be targeted — "Four Books Appeal" concerned no interest beyond that of plaintiff, and therefore was not special enough to justify award of advance costs — It is only when public importance of a case can be established regardless of ultimate holding on merits that a court should consider this requirement satisfied.

Constitutional law --- Procedure in constitutional challenges — Costs

Plaintiff was bookstore and art emporium that catered to lesbian and gay community in city — Customs prohibited importation of certain publications as obscene — Plaintiff applied for declaration that legislation was applied in unconstitutional manner — Plaintiff filed notice of constitutional question challenging validity of definition of obscenity previously established by Supreme Court of Canada — Plaintiff's application for order of advance costs was granted in part — Customs successfully appealed, and order was set aside — Plaintiff appealed further — Appeal dismissed — Public interest advance costs orders are to remain special and, as result, exceptional — Such orders must be granted with caution, as last resort, in circumstances where need for them is clearly established — In present case, there was serious issue justifying decision to have matter proceed to trial — However, it was error to hold that public importance requirement was satisfied — "Systemic Review" aspect of claim did not bring case within scope of advance costs remedy; Systemic Review was not necessarily based on prohibition, detention, or even delay of any books belonging to plaintiff — Plaintiff did not provide prima facie evidence that it continued to be targeted — "Four Books Appeal" concerned no interest beyond that of plaintiff, and therefore was not special enough to justify award of advance costs — It is only when public importance of a case can be established regardless of ultimate holding on merits that a court should consider this requirement satisfied.

Procédure civile --- Frais — Ordonnances particulières en matière de frais — Ordonnances diverses

Demanderesse exploitait un magasin de livres et d'arts qui desservait la communauté gaie et lesbienne de la ville — Douanes interdisaient l'importation de certaines publications parce qu'elles étaient obscènes — Demanderesse a demandé qu'il soit déclaré que la loi était appliquée de manière inconstitutionnelle — Demanderesse a déposé un avis de question constitutionnelle, ayant l'intention de contester la validité de la définition de l'obscénité déterminée antérieurement par la Cour suprême du Canada — Demanderesse a demandé une provision pour frais et celle-ci a été accordée en partie — Douanes ont interjeté appel avec succès, et l'ordonnance a été infirmée — Demanderesse a interjeté appel de nouveau — Pourvoi rejeté — Ordonnances octroyant une provision pour frais pour des motifs d'intérêt public doivent demeurer spéciales et, de ce fait, exceptionnelles — De telles ordonnances doivent être accordées avec circonspection, comme dernier recours, lorsque leur nécessité a été clairement établie — Dans ce cas-ci, la question était sérieuse et elle justifiait la décision qu'elle se rende jusqu'à procès — Il était cependant

33 An exceptional convergence of factors occurred in *Okanagan*. At the individual level, the case was of the utmost importance to the bands. They were caught in a grave predicament: the costs of the litigation were more than they could afford, especially given pressing needs like housing; yet a failure to assert their logging rights would seriously compromise those same needs. On a broader level, the case raised aboriginal rights issues of great public importance. There was evidence that the land claim advanced by the bands had *prima facie* merit, but the courts had yet to decide on the precise mechanism for advancing such claims — the fundamental issue of general importance had not been resolved by the courts in other litigation. However the case was ultimately decided, it was in the public interest to have the matter resolved. For both the bands themselves and the public at large, the litigation could not, therefore, simply be abandoned. In these exceptional circumstances, this Court held that the public's interest in the litigation justified a structured advance costs order insofar as it was necessary to have the case move forward.

34 In essence, *Okanagan* was an evolutionary step, but not a revolution, in the exercise of the courts' discretion regarding costs. As was explained in that case, the idea that costs awards can be used as a powerful tool for ensuring that the justice system functions fairly and efficiently was not a novel one. Policy goals, like discouraging — and thus sanctioning — misconduct by a litigant, are often reflected in costs awards: see M. M. Orkin, *The Law of Costs* (2nd ed. (loose-leaf)), vol. 1, at § 205.2(2). Nevertheless, the general rule based on principles of indemnity, i.e., that costs follow the cause, has not been displaced. This suggests that policy and indemnity rationales can co-exist as principles underlying appropriate costs awards, even if "[t]he principle that a successful party is entitled to his or her costs is of long standing, and should not be departed from except for very good reasons": Orkin, at p. 2-39. This framework has been adopted in the law of British Columbia by establishing the "costs follow the cause" rule as a default proposition, while leaving judges room to exercise their discretion by ordering otherwise: see r. 57(9) of the Supreme Court of British Columbia *Rules of Court*, B.C. Reg. 221/90.

35 *Okanagan* did not establish the access to justice rationale as the paramount consideration in awarding costs. Concerns about access to justice must be considered with and weighed against other important factors. Bringing an issue of public importance to the courts will not automatically entitle a litigant to preferential treatment with respect to costs: *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69 (S.C.C.); *O.P.E.I.U., Local 378 v. British Columbia Hydro & Power Authority*, [2005] B.C.J. No. 9, 2005 BCSC 8 (B.C. S.C.); *MacDonald v. University of British Columbia* (2004), 26 B.C.L.R. (4th) 190, 2004 BCSC 412 (B.C. S.C.). By the same token, however, a losing party that raises a serious legal issue of public importance will not necessarily bear the other party's costs: see, e.g., *Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4 (S.C.C.) at para. 69; *Valhalla Wilderness Society v. British Columbia (Ministry of Forests)* (1997), 4 Admin. L.R. (3d) 120 (B.C. S.C.). Each case must be considered on its merits, and the consequences of an award for each party must be weighed seriously: see *Sierra Club of Western Canada v. British Columbia (Chief Forester)* (1994), 117 D.L.R. (4th) 395 (B.C. S.C.), at pp. 406-7, aff'd (1995), 126 D.L.R. (4th) 437 (B.C. C.A.).

36 *Okanagan* was a step forward in the jurisprudence on advance costs — restricted until then to family, corporate and trust matters — as it made it possible, in a public law case, to secure an advance costs order in special circumstances related to the public importance of the issues of the case (*Okanagan*, at para. 38). In other words, though now permissible, public interest advance costs orders are to remain special and, as a result, exceptional. These orders must be granted with caution, as a last resort, in circumstances where the need for them is clearly established. The foregoing principles could not yield any other result. If litigants raising public interest issues will not always avoid adverse costs awards at the conclusion of their trials, it can only be rarer still that they could benefit from advance costs awards. An application for advance costs may be entertained only if a litigant establishes that it is impossible to proceed with the trial and await its conclusion, and if the court is in a position to allocate the financial burden of the litigation fairly between the parties.

37 The nature of the *Okanagan* approach should be apparent from the analysis it prescribes for advance costs in public interest cases. A litigant must convince the court that three absolute requirements are met (at para. 40):

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.

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.

38 It is only a "rare and exceptional" case that is special enough to warrant an advance costs award: *Okanagan*, at para. 1. The standard was indeed intended to be a high one, and although no rigid test can be applied systematically to determine whether a case is "special enough", some observations can be made. As Thackray J.A. pointed out, it was in failing to verify whether the circumstances of this case were "exceptional" enough that the trial judge committed an error in law.

39 First, the injustice that would arise if the application is not granted must relate both to the individual applicant and to the public at large. This means that a litigant whose case, however compelling it may be, is of interest only to the litigant will be denied an advance costs award. It does not mean, however, that every case of interest to the public will satisfy the test. The justice system must not become a proxy for the public inquiry process, swamped with actions launched by test plaintiffs and public interest groups. As compelling as access to justice concerns may be, they cannot justify this Court unilaterally authorizing a revolution in how litigation is conceived and conducted.

40 Second, the advance costs award must be an exceptional measure; it must be in the interests of justice that it be awarded. Therefore, the applicant must explore all other possible funding options. These include, but are not limited to, public funding options like legal aid and other programs designed to assist various groups in taking legal action. An advance costs award is neither a substitute for, nor a supplement to, these programs. An applicant must also be able to demonstrate that an attempt, albeit unsuccessful, has been made to obtain private funding through fundraising campaigns, loan applications, contingency fee agreements and any other available options. If the applicant cannot afford all costs of the litigation, but is not impecunious, the applicant must commit to making a contribution to the litigation. Finally, different kinds of costs mechanisms, like adverse costs immunity, should also be considered. In doing so, courts must be careful not to assume that a creative costs award is merited in every case; such an award is an exceptional one, to be granted in special circumstances. Courts should remain mindful of all options when they are called upon to craft appropriate orders in such circumstances. Also, they should not assume that the litigants who qualify for these awards must benefit from them absolutely. In the United Kingdom, where costs immunity (or "protective orders") can be ordered in specified circumstances, the order may be given with the caveat that the successful applicant cannot collect anything more than modest costs from the other party at the end of the trial: see *R. (on the application of Corner House Research) v. Secretary of State for Trade & Industry*, [2005] 1 W.L.R. 2600, [2005] EWCA Civ 192 (Eng. C.A.), at para. 76. We agree with this nuanced approach.

41 Third, no injustice can arise if the matter at issue could be settled, or the public interest could be satisfied, without an advance costs award. Again, we must stress that advance costs orders are appropriate only as a last resort. In *Okanagan*, the bands tried, before seeking an advance costs order, to resolve their disputes by avoiding a trial altogether. Likewise, courts should consider whether other litigation is pending and may be conducted for the same purpose, without requiring

2012 ABQB 85
Alberta Court of Queen's Bench

Klychak v. Samchuk

2012 CarswellAlta 118, 2012 ABQB 85, [2012] A.W.L.D. 1736, [2012] A.W.L.D. 1740, [2012] A.W.L.D. 1745, 212 A.C.W.S. (3d) 323, 532 A.R. 259

Albert Klychak, Plaintiff and Donald Samchuk, Defendant

Albert Klychak, Plaintiff and Donald Samchuk, Defendant

Donald Samchuk, Plaintiff and Anfred & Co. Inc. and Albert Klychak, Defendants

J.B. Veit J.

Heard: November 4-8, 2011
Judgment: February 2, 2012
Docket: Edmonton 0703-11199, 0803-10406, 0803-13340

Counsel: Chad C. Bowie, for Mr. Klychak
Jeremy L. Taylor, for Mr. Samchuk

Subject: Civil Practice and Procedure

Headnote

Civil practice and procedure --- Pre-trial procedures — Consolidation or hearing together — Hearing together or sequentially

S claimed he was partner in feedlot operation with K, to whose sister he was married — One of two properties in feedlot operation was registered in S's name — S bought second property with funds advanced by K — Relationship between S and K's sister soured and S claimed K acted improperly to obtain properties — S claimed K improperly obtained title to feedlot property and sold assets of business — S obtained lis pendens on feedlot property — K made demand on loan for second property and began foreclosure proceedings, while sister of K obtained lis pendens against second property — K brought second caveat against second property — S brought action against K regarding claimed partnership interest — K brought action in unjust enrichment claiming he was beneficial owner of second property — S brought motion that mortgage, unjust enrichment and partnership actions be tried together, and that advance costs be ordered — Motion granted with respect to hearings, advance costs not ordered by caveat ordered postponed — Relationship between K and S was common thread in all proceedings — Extent of farming activities was not factor in determining if separate trials should be held — While greater efficiency was factor in determining method of trial, greater concern was similarity of issues and trying evidence together — Separate trials could lead to inconsistent results, as K could not be both mortgagee, as claimed in foreclosure proceedings, and owner, as claimed in enrichment proceedings — No prejudice occurred from hearing actions together.

Civil practice and procedure --- Costs — Miscellaneous

S claimed he was partner in feedlot operation with K, to whose sister he was married — One of two properties in feedlot operation was registered in S's name — S bought second property with funds advanced by K — Relationship between S and K's sister soured and S claimed K acted improperly to obtain properties — S claimed K improperly obtained title to feedlot property and sold assets of business — S obtained lis pendens on feedlot property — K made demand on loan for second property and began foreclosure proceedings, while sister of K obtained lis pendens against second property — K brought second caveat against second property — S brought action against

K regarding claimed partnership interest — K brought action in unjust enrichment claiming he was beneficial owner of second property — S brought motion that mortgage, unjust enrichment and partnership actions be tried together, and that advance costs be ordered — Motion granted with respect to hearings, advance costs not ordered by caveat ordered postponed — S was not entitled to funding by way of contribution from K — S had not established he was unable to fund litigation — Litigation did not involve public interest and special considerations did not apply — Even if S's pension and property were not sufficient to fund litigation he had not explored other options or more efficient methods of pursuing proceedings — K did not advance any independent support for his claim in constructive trust or unjust enrichment — K ordered to postpone his caveat on second property — Postponement of caveat would allow S to pay off note and fund litigation.

Civil practice and procedure --- Discovery — Discovery of documents — Affidavit of documents — Miscellaneous

Penalty for late delivery.

MOTION to hear actions together and for advance or interim funding.

J.B. Veit J.:

Summary

1 Donald Samchuk asks the court to order that three actions involving himself and Albert Klychak be tried together, or one after the other. Samchuk also asks the court for an order compelling Klychak, or Klychak's company, to provide him with advance, sometimes called interim, costs for one or more of the three actions.

2 The three actions arise from events which occurred during the period from late 2002 to early 2008 in the business and personal relationships of Mr. Klychak and Mr. Samchuk. The first two actions were initiated by Mr. Klychak and relate to property located near Leduc, Alberta. In a "foreclosure action", Klychak is claiming against Samchuk on a $150,000.00 promissory note executed by the latter in 2004 and secured by Klychak as mortgagee on the Leduc property, which was acquired by Samchuk in 2004 with money advanced by Klychak. Samchuk's defence of that action includes a claim that the action is void because Klychak did not comply with the notice requirements in the *Farm Debt Mediation Act*. In that action, Samchuk has also counterclaimed, stating that the foreclosure action is an abuse of process because it was instituted by Klychak to deprive Samchuk of his interest in a cattle feedlot partnership between the two. In an "unjust enrichment action" or "caveat action" dealing with the same Leduc property, Klychak claims that he is the beneficial owner of the Leduc property as a result of having advanced all of the money used to purchase the property. The third action, hereafter referred to as the "partnership action", was initiated by Mr. Samchuk relatively shortly after the filing by Klychak of his "unjust enrichment" action; in the "partnership action", Samchuk claims to be a partner of Klychak, and Klychak's company, in a feedlot operation established at Devon, Alberta in 2002. Samchuk alleges that his contribution to the partnership was farming know-how and Klychak's contribution was money.

3 Because of the inter-related parties and issues and danger of inconsistent verdicts, the interests of justice are best served by hearing the three actions together.

4 Case law establishes a tri-partite test for the award of advance, or interim, costs in commercial litigation: the applicant must establish that he genuinely cannot afford to pay for the litigation, the applicant's claim must be *prima facie* meritorious, and there must be special circumstances. Here, even if Samchuk's claim - at least for quantum meruit payment - is *prima facie* meritorious and even if Samchuk has established special circumstances based on the misunderstanding concerning accrued interest, Samchuk has not established that he genuinely cannot afford to pay for the litigation. He has presented no evidence, for example, of the unavailability to him of legal services on a contingency basis or of his inability to access third party litigation funding: *Dugal v. Manulife Financial Corp.* [2011 CarswellOnt 1889 (Ont. S.C.J.)]. Nor has he indicated his inability to pay instalments relative to litigation process rather than an inability to meet today the anticipated total cost of litigation: *C. (L.)*.

the problems that had arisen in relation to the non-existent accrued interest, it was not unreasonable to wait until the required affidavit was actually filed before starting the questioning.

46 In summary, the benefits of hearing all three actions together vastly outweigh the disadvantages of doing so. Indeed, as Mr. Klychak himself put it, "we can litigate the issue with respect to both pieces of property".

47 The parties must now return to case management to work out litigation plans, including, for example, the potential for the trial of any discrete issues that might help to advance an overall resolution of the dispute.

48 But the real problem here is not how and when the various proceedings should be heard, but whether Mr. Klychak should be required to help defray the costs of Mr. Samchuk's litigation and, if so, whether it should be by direct contribution - an advance of costs - or by indirect contribution - a postponement of the second caveat on the Leduc property, and I turn to those issues next.

3. Is Samchuk entitled to advance, or interim, costs from Klychak?

49 Samchuk has not established an entitlement to advance, or interim, costs from Klychak: he does not meet the first part of the tri-partite test for the award of advance, or interim, costs in commercial litigation. Even if Samchuk has established that his claim - at least for quantum meruit payment - is *prima facie* meritorious and even if he has established special circumstances based on the misunderstanding concerning accrued interest - he has not established that he genuinely cannot afford to pay for the litigation.

50 The Supreme Court of Canada began its analysis of advance or interim costs in public interest litigation with the following summary of the existing, in the context original, law with respect to interim costs in all litigation:

> 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.

51 It is only in public interest litigation that additional, special, considerations come into play. There are no such considerations here. Therefore, we are left with the original three considerations that apply in the civil context, including ordinary commercial litigation. In other words, Klychak is in error when he states that the third criterion for advance costs is that the issues raised in the litigation are of public importance; consideration of that factor is only required in public interest litigation. Klychak appears to have been misled by a casual linking, in *Caron*, of those two concepts. The distinction between special circumstances, and public importance as a special circumstance, is usefully drawn by the SCC in paras. 36 and 38 of *Okanagan Indian Band* and by our Court of Appeal in *Deans* at para. 17.

(i) Has Samchuk established that he requires advance costs in order to proceed with the litigation?

52 Samchuk has not provided any evidence that he is impecunious to the extent that he requires an order for advance costs in order to proceed with the litigation.

53 The high, in some cases prohibitively high, cost of litigation today seriously concerns all those who champion access to justice: we have failed as a society if those who with serious legal positions are excluded from the courts because they cannot afford to be there. At the same time, however, it would be naive, dangerous and unfair to routinely require financially well off litigants to financially support litigation against themselves. It is therefore reasonable, as a first step, to require a litigant who asks for advance costs to establish that without those costs, they will be unable to proceed with the litigation.

54 Samchuk has not met the first part of the tri-partite test. Even assuming that Samchuk's pension and property settlement are insufficient to fund major litigation, Samchuk has not adequately explored alternative methods of funding litigation. Although at the hearing, his current lawyer expressed the opinion that his own firm may not agree to take on

representation of Samchuk on a contingency basis, no application for contingency services had been made to the firm. There was no evidence that Samchuk's cause of action had been presented to other firms, perhaps smaller firms, that might be interested in taking on the work on a contingency basis. Klychak's own litigation is apparently being undertaken on a contingency basis. The apparent rise in the value of Devon Property #1 makes the potential for contingency realistic, even though some law firms might also look for real property security to secure their contingency interest. I note that in *C. (L.)* evidence was available to the chambers judge about contingency representation: see para. 87. Samchuk argued that Klychak had not proved that contingency representation was available; with respect, such an argument reverses the onus.

55 In addition to services on a contingency basis, another possibility that litigants should be required to explore in Canada today is third party litigation funding: *Dugal*. It may well be that, in appropriate circumstances, the cost of third party litigation funding is itself a recoverable cost: *Do (Next Friend of)*.

56 Finally, when addressing the issue of impecuniosity, an applicant should be prepared to address the need for financing at various stages of litigation. Klychak challenges Samchuk's estimate of $150,000.00 as being required to fund the litigation here. However, a real issue is not whether $150,000.00 is too high an estimate of the cost of litigation to conclusion, but what steps need to be done to get to the first potential determination of rights such as the mandatory alternate dispute resolution step. Relatively few of the actions which are initiated in Alberta actually go to trial; most are settled. Rather than focussing on the cost of completing the litigation, Samchuk should focus on the cost of getting the actions to a stage where settlement is at least possible. In order to achieve that result in an economical and yet fair way, Samchuk should consider whether some mechanisms are more cost efficient than others; for example, whether answers to interrogatories would be as effective as questioning while being considerably less costly.

57 In summary on this point, I am not satisfied from the evidence presented on the application that Samchuk is impecunious within the meaning of the first part of the tripartite test.

(ii) Prima facie meritorious case

58 Although it is not possible at this stage of proceedings to determine if Samchuk has a meritorious partnership claim, it is possible to say that, *prima facie*, he has meritorious claim based in *quantum meruit*. Although there is apparently no evidence of time sheets or daytimers or independent recording of hours spent, the evidence presented on the motion establishes that Samchuk did work on the feedlot operation. Although the size of his claim is unclear, the existence of a claim is clear. Indeed, the very placing of Devon Property #1 in Samchuk's name is some evidence to support Samchuk's claim of a special relationship between Klychak and himself.

(iii) Special circumstances

59 The special circumstances required in civil litigation include a wide range of possibilities, starting from the entitlement and financial dependence of matrimonial property litigation. Here, the special circumstances include the features relating to the misunderstanding that occurred between the parties that led to the transfer by Samchuk to Klychak of Devon Property #1. Neither Klychak's lawyer nor Samchuk's lawyer would have deliberately ignored the wording of the promissory note in facilitating a transfer of property worth $725,000.00; nevertheless, the transfer occurred. This is a special circumstance which may be considered to be somewhat analogous to the type of special circumstance found by the Court of Appeal in *Deans* at para. 45.

(iv) Failure to meet all three parts of the test

60 By failing to meet the first part of the test, Samchuk has failed to meet the common law test for advance costs.

4. Is Samchuk entitled to a postponement of Klychak's second caveat?

2015 ONSC 7007, 2015 CarswellOnt 17295, 260 A.C.W.S. (3d) 462, 80 C.P.C. (7th) 136

2015 ONSC 7007
Ontario Superior Court of Justice

Fontaine v. Canada (Attorney General)

2015 CarswellOnt 17295, 2015 ONSC 7007, 260 A.C.W.S. (3d) 462, 80 C.P.C. (7th) 136

Larry Philip Fontaine in his personal capacity and in his capacity as the Executor of the estate of Agnes Mary Fontaine, deceased, Michelline Ammaq, Percy Archie, Charles Baxter Sr., Elijah Baxter, Evelyn Baxter, Donald Belcourt, Nora Bernard, John Bosum, Janet Brewster, Rhonda Buffalo, Ernestine Caibaiosai-Gidmark, Michael Carpan, Brenda Cyr, Deanna Cyr, Malcolm Dawson, Ann Dene, Benny Doctor, Lucy Doctor, James Fontaine in his personal capacity and in his capacity as the Executor of the Estate of Agnes Mary Fontaine, deceased, Vincent Bradley Fontaine, Dana Eva Marie Francey, Peggy Good, Fred Kelly, Rosemarie Kuptana, Elizabeth Kusiak, Theresa Larocque, Jane McCullum, Cornelius McComber, Veronica Marten, Stanley Thomas Nepetaypo, Flora Northwest, Norman Pauchey, Camble Quatell, Alvin Barney Saulteaux, Christine Semple, Dennis Smokeyday, Kenneth Sparvier, Edward Tapiatic, Helen Winderman and Adrian Yellowknee, Plaintiffs and The Attorney General of Canada, The Presbyterian Church in Canada, The General Synod of the Anglican Church of Canada, The United Church of Canada, The Board of Home Missions of the United Church of Canada, The Women's Missionary Society of the Presbyterian Church, The Baptist Church in Canada, Board of Home Missions and Social Services of the Presbyterian Church in Bay, The Canada Impact North Ministries of the Company for the Propagation of the Gospel in New England (also known as the New England Company), The Diocese of Saskatchewan, The Diocese of the Synod of Cariboo, The Foreign Mission of the Presbyterian Church in Canada, The Incorporated Synod of the Diocese of Huron, The Methodist Church of Canada, The Missionary Society of the Anglican Church of Canada, The Missionary Society of the Methodist Church of Canada (also known as the Methodist Missionary Society of Canada), The Incorporated Synod of the Diocese of Algoma, The Synod of the Anglican Church of the Diocese of Quebec, The Synod of the Diocese of Athbasca, The Synod of the Diocese of Brandon, The Anglican Synod of the Diocese of British Columbia, The Synod of the Diocese of Calgary, The Synod of the Diocese of Keewatin, The Synod of the Diocese of Qu'Appelle, The Synod of the Diocese of New Westminister, The Synod of the Diocese of Yukon, The Trustee Board of the Presbyterian Church in Canada, The Board of Home Missions and Social Service of the Presbyterian Church of Canada, The Women's Missionary Society of the United Church of Canada, Sisters of Charity, a Body Corporate also known as Sisters of Charity of St. Vincent de Paul, Halifax, also known as Sisters of Charity Halifax, Roman Catholic Episcopal Corporation of Halifax, Les Soeurs de Notre Dame-Auxiliatrice, Les Soeurs de St. Francois d'Assise, Insitut des Soeurs du Bon Conseil, Les Soeurs de Saint-Joseph de Saint Hyancithe, Les Soeurs de Jesus-Marie, Les Soeurs de l'Assomption de la Sainte Vierge, Les Soeurs de l'Assomption de la Saint Vierge de l'Alberta, Les Soeurs de la Charite de St.-Hyacinthe, Les Oeuvres Oblates de l'Ontario, Les Residences Oblates du Quebec, La Corporation Episcopale Catholique Romaine de la Baie James (The

2015 ONSC 7007, 2015 CarswellOnt 17295, 260 A.C.W.S. (3d) 462, 80 C.P.C. (7th) 136

Roman Catholic Episcopal Corporation of James Bay), The Catholic Diocese of Moosonee, Soeurs Grises de Montreal/Grey Nuns of Montreal, Sisters of Charity (Grey Nuns) of Alberta, Les Soeurs de la Charite des T.N.O., Hotel-Dieu de Nicolet, The Grey Nuns of Manitoba Inc.-Les Soeurs Grises du Manitoba Inc., La Corporation Episcopale Catholique Romaine de la Baie d'Hudson — The Roman Catholic Episcopal Corporation of Hudson's Bay, Missionary Oblates — Grandin Province, Les Oblats de Marie Immaculee du Manitoba, The Archiepiscopal Corporation of Regina, The Sisters of the Presentation, The Sisters of St. Joseph of Sault St. Marie, Sisters of Charity of Ottawa, Oblates of Mary Immaculate — St. Peter's Province, The Sisters of Saint Ann, Sisters of Instruction of the Child Jesus, The Benedictine Sisters of Mt. Angel Oregon, Les Peres Montfortains, The Roman Catholic Bishop of Kamloops Corporation Sole, The Bishop of Victoria, Corporation Sole, The Roman Catholic Bishop of Nelson, Corporation Sole, Order of the Oblates of Mary Immaculate in the Province of British Columbia, The Sisters of Charity of Providence of Western Canada, La Corporation Episcopale Catholique Romaine de Grouard, Roman Catholic Episcopal Corporation of Keewatin, La Corporation Archiépiscopale Catholique Romaine de St. Boniface, Les Missionnaires Oblates Sisters de St. Boniface-The Missionary Oblates Sisters of St. Boniface, Roman Catholic Archiepiscopal Corporation of Winnipeg, La Corporation Episcopale Catholique Romaine de Prince Albert, The Roman Catholic Bishop of Thunder Bay, Immaculate Heart Community of Los Angeles CA, Archdiocese of Vancouver — the Roman Catholic Archbishop of Vancouver, Roman Catholic Diocese of Whitehorse, The Catholic Episcopale Corporation of Mackenzie Fort Smith, The Roman Catholic Episcopal Corporation of Prince Rupert, Episcopal Corporation of Saskatoon, OMI Lacombe Canada Inc. and Mt. Angel Abbey Inc., Defendants

Perell J.

Judgment: November 13, 2015
Docket: 00-CV-192059

Counsel: E. Anthony Ross, Q.C., Katrina Marciniak, for Applicants
Leona K. Tesar, for Attorney General of Canada

Subject: Civil Practice and Procedure; Public

Headnote

Aboriginal law --- Miscellaneous

Federal government resolved proceedings relating to Indian Residential Schools (IRS) by entering into Indian Residential Schools Settlement Agreement (IRSSA) — IRSSA included common experience payments for all Aboriginal persons who attended IRS's and separate claims process for Aboriginal persons who had suffered abuse at IRS's — Claimant was 82-year-old disabled, unemployed, and impoverished Aboriginal woman who had been student at institution that was not yet recognized as IRS — Claimant brought motion for directions under IRSSA seeking advance costs award so she could pursue claims under IRSSA — Motion granted — Claimant was granted advance costs award of $70,000 inclusive of counsel fees, disbursements, expert fees, and taxes subject to subsequent assessment of costs — IRSSA expressly provided for possibility of adding further IRS's, and expressly provided for costs being paid to those who could establish that another institution should be recognized as IRS — Court's normal costs jurisdiction was available in circumstances of this case — Federal government acknowledged court's jurisdiction to award advance costs in appropriate cases — Claimant's case had sufficient merit to warrant it being

41. These are necessary conditions that must be met for an award of interim costs to be available in cases of this type. The fact that they are met in a particular case is not necessarily sufficient to establish that such an award should be made; that determination is in the discretion of the court. If all three conditions are established, 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, which is also one of the purposes of costs awards. When making these decisions courts must also be mindful of the position of defendants. The award of interim costs must not impose an unfair burden on them. In the context of public interest litigation judges must be particularly sensitive to the position of private litigants who may, in some ways, be caught in the crossfire of disputes which, essentially, involve the relationship between the claimants and certain public authorities, or the effect of laws of general application. Within these parameters, it is a matter of the trial court's discretion to determine whether the case is such that the interests of justice would be best served by making the order.

62 The jurisdiction to award advance costs is an extra-extra extraordinary jurisdiction. In *Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue Agency)*, *supra* at para. 5, Justices Bastarache and LeBel (Justices Deschamps, Abella, and Rothstein concurring) state that the *ratio* in *Okanagan* applies only to those few situations where a court would be participating in an injustice against the litigant personally and against the public generally if it did not order advance costs to allow the litigant to proceed. At paras. 36, 38-42, Justices Bastarache and LeBel state:

36. *Okanagan* was a step forward in the jurisprudence on advance costs — restricted until then to family, corporate and trust matters — as it made it possible, in a public law case, to secure an advance costs order in special circumstances related to the public importance of the issues of the case (*Okanagan*, at para. 38). In other words, though now permissible, public interest advance costs orders are to remain special and, as a result, exceptional. These orders must be granted with caution, as a last resort, in circumstances where the need for them is clearly established. The foregoing principles could not yield any other result. If litigants raising public interest issues will not always avoid adverse costs awards at the conclusion of their trials, it can only be rarer still that they could benefit from advance costs awards. An application for advance costs may be entertained only if a litigant establishes that it is impossible to proceed with the trial and await its conclusion, and if the court is in a position to allocate the financial burden of the litigation fairly between the parties.

38. It is only a "rare and exceptional" case that is special enough to warrant an advance costs award: *Okanagan*, at para. 1. The standard was indeed intended to be a high one, and although no rigid test can be applied systematically to determine whether a case is "special enough", some observations can be made. As Thackray J.A. pointed out, it was in failing to verify whether the circumstances of this case were "exceptional" enough that the trial judge committed an error in law.

39. First, the injustice that would arise if the application is not granted must relate both to the individual applicant and to the public at large. This means that a litigant whose case, however compelling it may be, is of interest only to the litigant will be denied an advance costs award. It does not mean, however, that every case of interest to the public will satisfy the test. The justice system must not become a proxy for the public inquiry process, swamped with actions launched by test plaintiffs and public interest groups. As compelling as access to justice concerns may be, they cannot justify this Court unilaterally authorizing a revolution in how litigation is conceived and conducted.

40. Second, the advance costs award must be an exceptional measure; it must be in the interests of justice that it be awarded. Therefore, the applicant must explore all other possible funding options. These include, but are not limited to, public funding options like legal aid and other programs designed to assist various groups in taking legal action. An advance costs award is neither a substitute for, nor a supplement to, these programs. An applicant must also be able to demonstrate that an attempt, albeit unsuccessful, has been made to obtain private funding through fundraising campaigns, loan applications, contingency fee agreements and any other available options. If

> the applicant cannot afford all costs of the litigation, but is not impecunious, the applicant must commit to making a contribution to the litigation. Finally, different kinds of costs mechanisms, like adverse costs immunity, should also be considered. In doing so, courts must be careful not to assume that a creative costs award is merited in every case; such an award is an exceptional one, to be granted in special circumstances. Courts should remain mindful of all options when they are called upon to craft appropriate orders in such circumstances....
>
> 41. Third, no injustice can arise if the matter at issue could be settled, or the public interest could be satisfied, without an advance costs award. Again, we must stress that advance costs orders are appropriate only as a last resort. In *Okanagan*, the bands tried, before seeking an advance costs order, to resolve their disputes by avoiding a trial altogether. Likewise, courts should consider whether other litigation is pending and may be conducted for the same purpose, without requiring an interim order of costs. Courts should also be mindful to avoid using these orders in such a way that they encourage purely artificial litigation contrary to the public interest.
>
> 42. Finally, the granting of an advance costs order does not mean that the litigant has free rein. On the contrary, when the public purse — or another private party — takes on the burden of an advance costs award, the litigant must relinquish some manner of control over how the litigation proceeds. The litigant cannot spend the opposing party's money without scrutiny. The benefit of such funding does not imply that a party can, at will, multiply hours of preparation, add expert witnesses, engage in every available proceeding, or lodge every conceivable argument. A definite structure must be imposed or approved by the court itself, as it alone bears the responsibility for ensuring that the award is workable.

63 To summarize, a party seeking an order for interim costs must demonstrate: (1) a *prima facie* case of sufficient merit to warrant it being pursued; (2) impecuniousity to the extent that, without assistance, the party would be deprived of the opportunity to proceed with the case; and (3) special circumstances where the award is necessary in the public interest. The three mandatory criteria for an award of interim or advance costs are: merit, impecuniosity, and public interest. The award remains discretionary, and the court will also consider whether there are alternatives to an interim costs award and whether the applicant has exhausted all realistic alternative avenues to finance its case including legal aid, *pro bono* representation, contingency fees, private fundraising efforts and class action certification. Interim costs awards are a last resort in circumstances where there are special circumstances and the need for an advance costs award to advance the claim or defence is clearly established. The fulfillment of the three listed conditions is necessary but not sufficient to justify an advance costs order. The court must examine all the circumstances of the case and determine not only if its importance is sufficiently "special" to support an extraordinary order of this sort, but also if there are any other factors which might militate for or against the granting of relief.

64 Canada relies on *Fontaine v. Canada (Attorney General)*, 2012 BCSC 313 (B.C. S.C.) (private boarding houses) in support of its submission that the court not award advance costs in the case at bar. In that case the requestor sought advance costs with respect to an RFD to add private boarding homes to the IRSSA. Justice Brown concluded that the Order should not be made against Canada as *class action administrator* because there was no indication that Canada *as administrator* has been either in breach of or derelict in that duty here and thus there was no basis to visit the cost of the application on Canada as administrator. Justice Brown added that Canada *as defendant* would likely oppose the application and the costs that were incurred could be dealt with under the regular cost rules applicable to court proceedings. Thus, Justice Brown was not asked to consider the court's jurisdiction to award advance costs under very rare and exceptional circumstances. The case does not assist Canada in the immediate motion.

65 Canada relies on *Fontaine v. Canada (Attorney General)*, 2014 BCSC 2531 (B.C. S.C.) (Bronstein advance costs), in support of its submission that the court not award advance costs in the case at bar. In the Bronstein advance costs case, the Tsilhqot'in National Government applied for standing and for advance costs in an RFD with respect to the conduct of Stephen Bronstein and Ivon Johnny in representing class members in making claims under the IRSSA. It was alleged that Mr. Johnny had extorted money and encouraged claimants to falsify claims.

2011 BCSC 1105
British Columbia Supreme Court

Dish Network L.L.C. v. Rex

2011 CarswellBC 2124, 2011 BCSC 1105, [2011] B.C.W.L.D. 7345, [2011] B.C.W.L.D. 7372, [2011] B.C.W.L.D. 7373, 206 A.C.W.S. (3d) 478, 240 C.R.R. (2d) 71, 8 C.P.C. (7th) 264

Dish Network L.L.C., Plaintiff and Richard Rex, Richard Rex d.b.a. Can-Am Satellites, Richard Rex d.b.a. CanAm Satellites, Richard Rex, d.b.a. www.smalldish.com, Susan Goodwin, Kendra Day, Deborah Wilkinson Katalin Kupser a.k.a. Kathy Kupser, Mario Teixeira, John Doe, Jane Doe and other persons unknown who have conspired with the named Defendants, Defendants

Directv, Inc., Plaintiff and Richard Rex, Richard Rex d.b.a. Can-Am Satellites, Richard Rex d.b.a. CanAm Satellites, Richard Rex d.b.a. www.smalldish.com, Richard Rex d.b.a. www.smalldish.proboards54.com, Susan Goodwin, John Doe, Jane Doe and other persons unknown who have conspired with the named Defendants, Defendants

Bell ExpressVu Limited Partnership, Plaintiff and Richard Rex, Richard Rex d.b.a. Can-Am Satellites, Richard Rex, d.b.a. CanAm Satellites, Richard Rex d.b.a. Can Am Satellites, Richard Rex d.b.a. www.smalldish.com, Richard Rex d.b.a. www.smalldish.proboards54.com, Susan Goodwin, John Doe, Jane Doe and other persons unknown who have conspired with the named Defendants, Defendants

Paul W. Walker J.

Heard: January 11-13, 2011
Judgment: August 15, 2011
Docket: Vancouver S094747, S084517, S085635

Counsel: P.G. Foy, Q.C., R. Dawkins, for Plaintiff
J.J.M. Arvay, Q.C., A. Latimer, for Defendants
D. Nygard, N. Murray, for Attorney General of Canada

Subject: Public; Constitutional; Civil Practice and Procedure; Human Rights

Headnote

Communications law --- Regulation of radio and television — Miscellaneous issues

Applicant owned grey market satellite business which involved sale to Canadian residents of subscriptions to encrypted satellite television signals provided by two companies based in United States, D and DTV — Canadian residents would purchase decoding boxes from applicant's business and provide fictitious addresses in United States to D and DTV in order to access encrypted satellite television signals — D, DTV, and Bell brought separate proceedings against applicant, seeking injunctive relief and both statutory and common law damages — Applicant sought brought application for advance costs in order to fund challenge pursuant to ss. 1 and 2(b) of Canadian Charter of Rights and Freedoms — Applicant sought to strike down certain provisions of Radiocommunication Act (Act), which he said effectively prohibited Canadian consumers from purchasing encrypted television broadcast signals from foreign broadcasters — Applicant met conditions required for award of advance costs to pursue narrower challenge concerning combined effect of Order in Council and Act — Quantum of advanced costs to be funded would be determined on step-by-step basis, through proactive case management, and hard cap would be imposed — Preliminary funding in amount of $35,000.00 would be provided to applicant, with 50% to be paid by

Crown and 50% to be paid by broadcasters — Parties would provide detailed budgets and litigation plans within next 45 days — Large number of applicant's customers were ethnic and elderly and wished to maintain links with their culture and heritage — Applicant was impecunious and not able to fund Charter challenge — Applicant demonstrated that he made appropriate efforts to raise funds for Charter challenge — Encrypted broadcast signals contained expressive content, bringing them within scope of s. 2(b) of Charter — Impugned sections of Act was to control expression — It was appropriate to consider case on basis of reasonable hypothetical that there was foreign DTH program provider willing to sell its program signals to Canadian residents — Issues raised in litigation were such that interests of justice would not be served if applicant's Charter challenge was abandoned due to lack of financial resources.

Constitutional law --- Charter of Rights and Freedoms — Nature of rights and freedoms — Freedom of expression — Miscellaneous

Applicant owned grey market satellite business which involved sale to Canadian residents of subscriptions to encrypted satellite television signals provided by two companies based in United States, D and DTV — Canadian residents would purchase decoding boxes from applicant's business and provide fictitious addresses in United States to D and DTV in order to access encrypted satellite television signals — D, DTV, and Bell brought separate proceedings against applicant, seeking injunctive relief and both statutory and common law damages — Applicant sought brought application for advance costs in order to fund challenge pursuant to ss. 1 and 2(b) of Canadian Charter of Rights and Freedoms — Applicant sought to strike down certain provisions of Radiocommunication Act (Act), which he said effectively prohibited Canadian consumers from purchasing encrypted television broadcast signals from foreign broadcasters — Applicant met conditions required for award of advance costs to pursue narrower challenge concerning combined effect of Order in Council and Act — Quantum of advanced costs to be funded would be determined on step-by-step basis, through proactive case management, and hard cap would be imposed — Preliminary funding in amount of $35,000.00 would be provided to applicant, with 50% to be paid by Crown and 50% to be paid by broadcasters — Parties would provide detailed budgets and litigation plans within next 45 days — Large number of applicant's customers were ethnic and elderly and wished to maintain links with their culture and heritage — Applicant was impecunious and not able to fund Charter challenge — Applicant demonstrated that he made appropriate efforts to raise funds for Charter challenge — Encrypted broadcast signals contained expressive content, bringing them within scope of s. 2(b) of Charter — Impugned sections of Act was to control expression — It was appropriate to consider case on basis of reasonable hypothetical that there was foreign DTH program provider willing to sell its program signals to Canadian residents — Issues raised in litigation were such that interests of justice would not be served if applicant's Charter challenge was abandoned due to lack of financial resources.

Civil practice and procedure --- Costs — Particular orders as to costs — Miscellaneous

Applicant owned grey market satellite business which involved sale to Canadian residents of subscriptions to encrypted satellite television signals provided by two companies based in United States, D and DTV — Canadian residents would purchase decoding boxes from applicant's business and provide fictitious addresses in United States to D and DTV in order to access encrypted satellite television signals — D, DTV, and Bell brought separate proceedings against applicant, seeking injunctive relief and both statutory and common law damages — Applicant sought brought application for advance costs in order to fund challenge pursuant to ss. 1 and 2(b) of Canadian Charter of Rights and Freedoms — Applicant sought to strike down certain provisions of Radiocommunication Act (Act), which he said effectively prohibited Canadian consumers from purchasing encrypted television broadcast signals from foreign broadcasters — Applicant met conditions required for award of advance costs to pursue narrower challenge concerning combined effect of Order in Council and Act — Quantum of advanced costs to be funded would be determined on step-by-step basis, through proactive case management, and hard cap would be imposed — Preliminary funding in amount of $35,000.00 would be provided to applicant, with 50% to be paid by Crown and 50% to be paid by broadcasters — Parties would provide detailed budgets and litigation plans within next 45 days — Large number of applicant's customers were ethnic and elderly and wished to maintain links with

their culture and heritage — Applicant was impecunious and not able to fund Charter challenge — Applicant demonstrated that he made appropriate efforts to raise funds for Charter challenge — Encrypted broadcast signals contained expressive content, bringing them within scope of s. 2(b) of Charter — Impugned sections of Act was to control expression — It was appropriate to consider case on basis of reasonable hypothetical that there was foreign DTH program provider willing to sell its program signals to Canadian residents — Issues raised in litigation were such that interests of justice would not be served if applicant's Charter challenge was abandoned due to lack of financial resources.

APPLICATION for advance costs in order to fund challenge pursuant to ss. 1 and 2(b) of *Canadian Charter of Rights and Freedoms*.

***Paul W. Walker J.*:**

I. Introduction

1 The applicant, Richard Rex, seeks an order for advance costs in order to fund a challenge he has brought pursuant to the *Canadian Charter of Rights and Freedoms*, R.S.C. 1985, App. II, No. 44, Schedule B. Mr. Rex seeks to strike down certain provisions of the *Radiocommunication Act*, R.S.C. 1985, c. R-2 which he says effectively prohibit Canadian consumers from purchasing encrypted television broadcast signals from foreign broadcasters.

2 The present litigation arises from Mr. Rex's "grey market" satellite businesses which involve the sale to Canadian residents of subscriptions to encrypted satellite television signals provided by two companies based in the United States, Dish Network L.L.C. ("Dish") and DIRECTV, Inc. ("DIRECTV"). Mr. Rex has carried on business under the names of Can-Am Satellites ("Can-Am"), www.smalldish.com, and Digital Valley Entertainment.

3 Canadian residents have purchased decoding boxes and ancillary equipment from Mr. Rex's businesses and provided fictitious addresses in the United States to Dish and DIRECTV in order to access encrypted satellite television signals. The grey market is unlike the "black market", where television programming is pirated. In the grey market, Canadian residents pay for their subscriptions.

4 Dish is incorporated in both Colorado and Texas. Its principal place of business is in Englewood, Colorado. Dish is the plaintiff in VA S094747.

5 DIRECTV is incorporated in California, and maintains its principal place of business in El Segundo. DIRECTV is the plaintiff in VA S084517.

6 Neither Dish nor DIRECTV are registered under any Canadian or provincial statute to carry on business in any province in Canada.

7 Bell ExpressVu Limited Partnership is a limited partnership constituted under the *Limited Partnership Act*, R.S.O. 1990, c. L-16. Bell ExpressVu, now known as "Bell TV" ("Bell"), is the general partner of the limited partnership. It maintains its main operational office in Toronto. Bell is the plaintiff in VA S085635.

8 The Attorney General for Canada ("Canada") is an intervenor on Mr. Rex's *Charter* challenge and on this application.

9 Dish, DIRECTV, and Bell have brought separate proceedings seeking, *inter alia*, injunctive relief and both statutory and common law damages against Mr. Rex and others for facilitating access to encrypted television broadcast signals from the United States contrary to the *Radiocommunication Act*. I have been appointed the case management judge for each of those proceedings. The quantum of damages has yet to be specified.

10 Mr. Rex's application for advance costs is brought in all three actions.

private and/or public issue judged and resolved by the courts. If the statement is confined to systemic injustice in this sense, I agree with the conclusion of Bastarache and LeBel JJ. that "[a]n advance costs award should remain a last resort" (para. 78).

[Emphasis added]

68 The case law suggests that the following factors demonstrate special circumstances:

(a) the potential effect of the litigation is widespread and significant: *Caron* at para. 44; *Keewatin* at para. 233; *Okanagan* at para. 46; *William* at paras. 44-45;

(b) the outcome of the litigation would resolve continued legal uncertainty: *Caron* at paras. 44-45; *William* at para. 49;

(c) the outcome of the litigation may reduce the need for related litigation, and thereby reduce public and private costs: *William* at paras. 46, 49;

(d) the issue would not be resolved but for the litigation: *Caron*; *Hagwilget* at para. 21; *H. (D.W.)* at paras. 31, 37;

(e) the litigation involves scrutiny of government actions: *C. (L.)* at paras. 80, 91; *Hagwilget* at para. 24;

(f) determination of the issue is an urgent matter: *Hagwilget* at paras. 20-21;

(g) the applicant was forced into the litigation or had no choice but to resort to litigation to assert their rights: *Okanagan; Xeni* at paras. 123-124; *Hagwilget* at para. 22; and

(h) one party controls all of the funds that are at issue in the litigation (e.g. trust and matrimonial litigation): *Little Sisters* at para. 104.

69 Special circumstances do not exist where the issues do not transcend the applicant and may not exist where the issues affect only a small group of people. For example, *Roberts* involved the personal tax appeals of three individuals involving taxation of a fraction of their income. The Court found that special circumstances did not exist because the outcome of the case was not expected to affect more than 100 taxpayers' pending objections. In *Robertson* and *Charkaoui, Re*, special circumstances did not exist because there was no evidence that the issue of interest to the applicants would have major repercussions on other persons or groups.

IV. Issues

70 Accordingly, the issues to be determined on this application fall into three categories: the litigant's financial impediments, and the merits and public importance of the litigation.

71 The financial issues are Mr. Rex's ability to afford to pay for the litigation and whether no other reasonable option exists for bringing the issues to trial, such that the litigation would not be able to proceed if the order were not made.

72 The merits issue may be stated in the following way: is the *Charter* challenge *prima facie* meritorious, or, in other words, is there sufficient merit such that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited if Mr. Rex lacks the financial means to pursue it?

73 The public importance issues for determination, arising from the majority decision in *Okanagan*, are whether Mr. Rex's *Charter* litigation is of exceptional public importance such that the case requires determination regardless of Mr. Rex's personal interests. This also involves consideration of whether the issues in the litigation have been resolved in previous cases.

2005 ABCA 368
Alberta Court of Appeal

Deans v. Thachuk

2005 CarswellAlta 1518, 2005 ABCA 368, 2005 C.E.B. & P.G.R. 8177 (headnote only), [2005] A.J. No. 1421, [2006] 4 W.W.R. 698, 144 A.C.W.S. (3d) 25, 20 E.T.R. (3d) 19, 23 C.P.C. (6th) 100, 261 D.L.R. (4th) 300, 360 W.A.C. 326, 376 A.R. 326, 48 C.C.P.B. 65, 52 Alta. L.R. (4th) 41

Dennis Black Deans, Nelson Russling, Terence Day, and James Sharp on their own behalf and on behalf of all beneficiaries of the Edmonton Pipe Industry Pension Plan (Appellants / Plaintiffs) and Bob Thachuk, Cliff Williams, Rob Kinsey, M.B. Strong, R. Garon, H. Cicconi, J. Curtis, J. Falvo, H. Morissette, R. Shirriffs, R. Auger, G. Dobson, N. Frederiksen, R. Dubord, W. Shaughnessy, P. Stalenhoef, G. Panas, H. Blakely and L. Matychuk (Respondents / Defendants)

Fraser C.J.A., Russell J.A., Sirrs J. (ad hoc)

Heard: May 9, 2005
Judgment: October 27, 2005 *
Docket: Edmonton Appeal 0403-0156-AC

Proceedings: reversing *Deans v. Thachuk* (2004), [2005] 1 W.W.R. 522, 356 A.R. 303, 8 E.T.R. (3d) 75, 41 C.C.P.B. 27, 32 Alta. L.R. (4th) 102, 2004 CarswellAlta 514, 2004 ABQB 265 (Alta. Q.B.)

Counsel: J.C. Lloyd for Appellants
B.G. Kapusianyk for Respondent
J. Rosselli for Board of Trustees of the Edmonton Pipe Industry Pension Fund (Not a Party to the Appeal)

Subject: Corporate and Commercial; Civil Practice and Procedure; Estates and Trusts

Headnote

Pensions --- Practice in pension actions — Costs

Unionized employees were members of pension plan which was established by declaration of trust — Trust agreement provided that legal costs for proceedings against trustees were to be paid by trust fund, except where action was for gross negligence or bad faith by trustees — Review conducted for Superintendent of Pensions found significant lack of due diligence by board of trustees of pension fund — Members of union brought action on behalf of all beneficiaries of plan against existing and former trustees for breach of duty, gross negligence and wilful misconduct — Plaintiffs applied on close of pleadings for interim costs to be paid from trust fund — Application was dismissed — Chambers judge found that plan had over 5,000 members who had not been actively solicited for funds, and since only small minority of members responded to call for funds, it was fair to infer that majority were satisfied with trustees and that plaintiffs had not established that they were impecunious — Chambers judge found that there was insufficient evidence that members' other potential funding resources had been depleted — It was uncertain that action was in best interests of all members given expense and possible inability of trustees to pay damages — There was insufficient evidence of special circumstances warranting order — Employees brought appeal — Appeal allowed — Chambers judge did not err in applying Supreme Court of Canada's three-part test for interim costs in instant pension trust litigation, as test was applicable to case at bar — Chambers judge did err in using canvass of other members in determination of interim costs award, because proceedings commencing before introduction of Class Proceedings Act did not require that notice to all members of class be given — Chambers

judge's conclusion that action was not worthy of pursuit because of poor prospect of recovery was not supported by evidence of respondents' net worth, nor was inquiry into likelihood of recovery required under second step of test — Chambers judge failed to take into account fact that trust litigation entails unique obligation to preserve fund for beneficiaries, which gave rise to special circumstances required by third step of test — Chambers judge failed to take into account that damages were sought on behalf of beneficiaries, not merely for named plaintiffs — Interim funds to be awarded to plaintiffs through examinations for discovery, with leave to reapply thereafter.

Civil practice and procedure --- Costs — Funds liable for payment of costs

Unionized employees were members of pension plan which was established by declaration of trust — Trust agreement provided that legal costs for proceedings against trustees were to be paid by trust fund, except where action was for gross negligence or bad faith by trustees — Review conducted for Superintendent of Pensions found significant lack of due diligence by board of trustees of pension fund — Members of union brought action on behalf of all beneficiaries of plan against existing and former trustees for breach of duty, gross negligence and wilful misconduct — Plaintiffs applied on close of pleadings for interim costs to be paid from trust fund — Application was dismissed — Chambers judge found that plan had over 5,000 members who had not been actively solicited for funds, and since only small minority of members responded to call for funds, it was fair to infer that majority were satisfied with trustees and that plaintiffs had not established that they were impecunious — Chambers judge found that there was insufficient evidence that members' other potential funding resources had been depleted — It was uncertain that action was in best interests of all members given expense and possible inability of trustees to pay damages — There was insufficient evidence of special circumstances warranting order — Employees brought appeal — Appeal allowed — Chambers judge did not err in applying Supreme Court of Canada's three-part test for interim costs in instant pension trust litigation, as test was applicable to case at bar — Chambers judge did err in using canvass of other members in determination of interim costs award, because proceedings commencing before introduction of Class Proceedings Act did not require that notice to all members of class be given — Chambers judge's conclusion that action was not worthy of pursuit because of poor prospect of recovery was not supported by evidence of respondents' net worth, nor was inquiry into likelihood of recovery required under second step of test — Chambers judge failed to take into account fact that trust litigation entails unique obligation to preserve fund for beneficiaries, which gave rise to special circumstances required by third step of test — Interim funds to be awarded to plaintiffs through examinations for discovery, with leave to reapply thereafter.

APPEAL by employee members of pension fund from judgment reported at *Deans v. Thachuk* (2004), [2005] 1 W.W.R. 522, 356 A.R. 303, 8 E.T.R. (3d) 75, 41 C.C.P.B. 27, 32 Alta. L.R. (4th) 102, 2004 CarswellAlta 514, 2004 ABQB 265 (Alta. Q.B.), denying that their interim legal costs should be paid by pension fund.

***Per curiam*:**

Nature of Proceedings

1 This is an appeal (with leave) from the dismissal of an application for the appellants' interim legal costs to be paid from the Edmonton Pipe Industry Pension Trust Fund (the "Fund").

Background

2 The appellants are members of a union representing plumbers and pipe-fitters. As such, they are entitled to benefits under the Edmonton Pipe Industry Pension Plan (the "Plan"). The Plan was established in October 1968 by an Agreement and Declaration of Trust, which was amended in December 2001. The Declaration of Trust created the Fund to provide retirement, death and disability benefits for Plan members. It provided for the appointment of a Board of Trustees (the "Trustees") consisting of representatives from both the union and the employers.

18 In their application before the chambers judge, the appellants invited her to invoke the principles from *Okanagan*. However, they now argue in this Court that *Okanagan* should not be applied to pension trust litigation cases. Instead, they claim the only questions to be asked are whether the claim is *prima facie* meritorious and whether the litigation is brought for the benefit of all the beneficiaries of the plan, citing *Buckton, Re*, [1907] 2 Ch. 406 (Eng. Ch. Div.) ("*Buckton, Re*") and *McDonald v. Horn* (1994), [1995] 1 All E.R. 961 (Eng. C.A.) ("*Horn*"). They say that where both questions are answered in the affirmative, the interim order should be granted.

19 The appellants submit that, in considering an award of interim costs in the context of pension and trust litigation, the focus must be on the nature of the issue to be addressed in the litigation and not on the characteristics of the applicant for the award. In particular, they argue that an applicant for such an award in pension trust cases should not be required to demonstrate impecuniosity. They also contend they should not be required to demonstrate the likelihood of recoverability, as found by the chambers judge.

20 Relying on a statement in *Okanagan* at para. 34, that interim costs are available in "certain trust, bankruptcy and corporate cases", the appellants argue that the majority in that case did not intend to extend the *Okanagan* test to those types of cases. According to the appellants, costs in pension and trust cases are determined by different principles and are ordinarily granted on a solicitor-and-client basis, payable from the pension or trust fund regardless of the outcome of the case.

21 However, the statement in *Okanagan* relied on by the appellants was made in the context of a discussion of the types of cases in which interim costs have historically been granted and the policy reasons for doing so. At para. 31, LeBel J. stated:

> Concerns about access to justice and the desirability of mitigating severe inequality between litigants . . . feature prominently in the rare cases where interim costs are awarded.

He found that cases falling within that realm include matrimonial or family cases, as well as "certain trust, bankruptcy and corporate cases." The three part test he prescribed established the parameters within which a court's discretion to award interim costs should be exercised. Nothing in his reasons suggests the test was not intended to apply in the context of pension trust litigation.

: see also *Dominion Bridge Inc. (Trustee of) v. All Current & Former Plan Members of the Retirement Income Plan of Dominion Bridge Inc. - Manitoba*, 2004 MBCA 180 (Man. C.A. [In Chambers]) at para. 24.

22 It is not disputed that the appellants have established personal impecuniosity. What is at issue is the extent to which an applicant for interim costs, acting in a representative capacity in an action involving a pension trust fund, is required to canvas all the members of the plan for financial support for the litigation or pursue contingency fee arrangements, in order to satisfy the first criteria of the three part test in *Okanagan* The second issue is whether the likelihood of recoverablity is a proper factor to consider in weighing the merit of the case. Neither of those issues obviates the application of the three part test. Rather each of those issues can be addressed in the application of that test.

23 As no error of law has been shown in the decision of the chambers judge to apply the three-part test prescribed in *Okanagan*, the first ground of appeal is dismissed.

Did the chambers judge err in her application of the three-part test established in Okanagan?

(a) Impecuniosity

24 In *Okanagan* at para. 34, LeBel J. held that impecuniosity should not prevent litigants from pursuing meritorious claims. [para.34] He stated that

41 The Court in *Okanagan* at para. 36 made the general observation that the power to order interim costs is inherent in the nature of the equitable jurisdiction as to costs. Accordingly, factors of an equitable nature may be relevant considerations in determining the existence of special circumstances. With respect to special circumstances, Lane J. in *Townsend v. Florentis*, [2004] O.T.C. 313, 2004 CarswellOnt 1402 (Ont. S.C.J.) at paras. 56-57 noted:

> [T]here must exist some factor which decisively lifts the applicant's case out of the generality of cases. The existence of issues going beyond the interests of the parties alone would seem to be one possible example of the minimum required. . . . The mere 'leveling of the playing field', although an admirable objective, would deprive the Third Test [in ***Okanagan***] of any real meaning . . . .

42 Issues specific to trust cases may also be relevant in this context. Trust litigation may entail unique obligations to preserve the trust fund for the beneficiaries: see *Liddell v. Deacou* (1873), 20 Gr. 70 (Ont. Ch.); *Cummings v. McFarlane* (1851), 2 Gr. 151 (U.C. Ch.); and *Andrews v. Barnes* (1887), 39 Ch. D. 133 at 134 (Eng. Ch. Div.) per Kay J., aff'd *Andrews v. Barnes* (1888), 39 Ch. D. 133 at 137 (Eng. C.A.). In *Mediterranea Raffineria Siciliana Petroli S.p.a. v. Mabanaft G.m.b.h.* (December 1, 1978, Eng. C.A.) [unreported], cited in *Bankers Trust Co. v. Shapira*, [1980] 3 All E.R. 353 (Eng. C.A.) at 357, Templeman L.J. noted that the courts of equity would not hesitate to use their powers to protect and preserve a trust fund in interlocutory proceedings to ensure that it is not entirely depleted before trial. The obligation to protect the Fund from depletion includes not only the duty to protect it from costs of an unmeritorious suit, but as well the duty to protect it from mismanagement.

43 In *Buckton, Re, supra*, Kekewich J. identified three categories of cases involving costs in trust litigation. The first are actions by trustees for guidance from the court as to the construction or the administration of a trust. In such cases, the costs of all parties necessarily incurred for the benefit of the estate will be paid from the fund. The second are actions by others relating to some difficulty of construction or administration of a trust that would have justified an application by the trustees, where costs of all parties necessarily incurred for the benefit of the trust will also be paid from the fund. The third are actions by some beneficiaries making claims which are adverse or hostile to the interests of other beneficiaries. In those cases, the usual rule that the unsuccessful party bears the costs will apply.

44 The chambers judge held that the present case is adversarial because damages are being sought rather than declaratory relief. That factor weighed against an award of interim costs in her decision, presumably because she was concerned that a damage award in favour of the appellants could jeopardize the Fund. Ultimately, she determined there was insufficient evidence of special circumstances to warrant the exercise of the Court's authority to grant interim costs.

45 However, the chambers judge overlooked the following factors:

> 1. The action involves allegations of bad faith, conflict of interest, gross negligence, wilful misconduct, lack of due diligence, and failure to comply with statutory requirements on the part of the Trustees, resulting in financial difficulties now facing the Plan;
>
> 2. Many of those allegations are substantiated by an independent report prepared by an expert accounting body;
>
> 3. The independent report was initiated and issued by the Superintendent;
>
> 4. The decision not to pursue litigation with respect to the administration of the Fund was made by the Trustees, and concerned the actions of some of their fellow Trustees;
>
> 5. The appellants, acting on behalf of all the beneficiaries, are entitled to be satisfied that the Fund was being administered properly; and
>
> 6. Damages are sought on behalf of all the beneficiaries of the Fund, and not merely for the named appellants.

2010 ABQB 197
Alberta Court of Queen's Bench

Foote Estate, Re

2010 CarswellAlta 513, 2010 ABQB 197, [2010] 7 W.W.R. 165, [2010] A.W.L.D. 2085, [2010] A.W.L.D. 2086, [2010] A.W.L.D. 2181, [2010] A.W.L.D. 2182, [2010] A.J. No. 315, 25 Alta. L.R. (5th) 36, 484 A.R. 188, 56 E.T.R. (3d) 203, 85 C.P.C. (6th) 303

In the Matter of the Estate of Eldon Foote

Trudy David, Douglas Foote, Debbie Entwistle, Dean Foote & Laurie Evans and Anne Foote (Applicants / Plaintiffs) and The Estate of Eldon Douglas Foote and the Lord Mayor's Charitable Fund and the Edmonton Community Foundation (Respondents / Defendants)

Robert A. Graesser J.

Heard: March 10, 2010
Judgment: March 22, 2010
Docket: Edmonton ES03 119897

Proceedings: additional reasons to *Foote Estate, Re* (2009), 16 Alta. L.R. (5th) 249, 53 E.T.R. (3d) 19, 2009 CarswellAlta 1854, 2009 ABQB 654 (Alta. Q.B.)

Counsel: John M. Hope, Q.C., Bryan Kwan for Trudy David, Douglas Foote, Debbie Entwistle, Dean Foote & Laurie Evans
Scott J. Hammel, Sandra L. Hawes for Anne Foote
Daniel Hagg, Q.C. for Estate of Eldon Douglas Foote
Bruce Comba for Lord Mayor's Charitable Fund
Karen Platten, Anita Mohan for Edmonton Community Foundation

Subject: Civil Practice and Procedure; International; Estates and Trusts

Headnote

Civil practice and procedure --- Costs — Effect of success of proceedings — Successful party deprived of costs — Jurisdiction and discretion of court

In earlier decision, court ruled that EF was domiciled on Norfolk Island, Australian territory, at date of death on May 17, 2004 — Each of successful respondents, executor and two residual beneficiaries, Edmonton Community Foundation and Lord Mayor of Melbourne Charitable Fund applied for costs of proceedings on solicitor and client basis against applicants, widow and five children — Respondents applied for assessment of costs — Costs denied — Executor and estate were not entitled to recover any costs from widow and children — Questions that were subject matter of litigation resulted from manner in which EF chose to draft will and dispose of estate — Further, public interest was invoked as result of poison pill clause — While that issue was dealt with in accordance with Norfolk Island law, it was necessary to determine EF's domicile before that issue can be addressed — Factors dictated that estate and Executor should not recover costs from widow and children, despite fact that estate was successful in arguing that EF's domicile was Norfolk Island.

Civil practice and procedure --- Costs — Offers to settle or payment into court — Offers to settle — General principles

In earlier decision, court ruled that EF was domiciled on Norfolk Island, Australian territory, at date of death on May 17, 2004 — Widow and children sought payment of solicitor and client costs from estate — Costs awarded —

Having regard to complexity of matter and size of estate, it was reasonable for widow and children to involve counsel and second counsel — Pursuit of litigation was reasonable — No offers of judgment or settlement were bettered by executor or estate — Appropriate for applicants to recover costs, on solicitor and client basis, from estate.

ASSESSMENT of costs related to judgment reported at *Foote Estate, Re* (2009), 16 Alta. L.R. (5th) 249, 53 E.T.R. (3d) 19, 2009 CarswellAlta 1854, 2009 ABQB 654 (Alta. Q.B.), which ruled that testator was domiciled on Norfolk Island, Australian territory, at date of death on May 17, 2004.

Robert A. Graesser J.:

Introduction

1 This decision on costs follows my earlier decision on the late Eldon Foote's domicile, *Foote Estate, Re*, 2009 ABQB 654 (Alta. Q.B.).

2 In that decision, I ruled that Eldon Foote was domiciled on Norfolk Island, an Australian territory, at the date of his death on May 17, 2004.

3 Each of the successful Respondents, the Executor and the two residual beneficiaries, the Edmonton Community Foundation and the Lord Mayor of Melbourne Charitable Fund now applies for costs of the proceedings on a solicitor and client basis against the Applicants, Mr. Foote's widow Anne and 5 of his 6 children, Douglas, Trudy, Dean, Laurie and Debbie.

4 Anne and the children seek payment of their solicitor and client costs from the Estate.

Background

5 These proceedings were commenced by Anne and the children for advice and directions as to Mr. Foote's domicile as well as the validity or enforceability of a so-called poison pill clause in Mr. Foote's will, essentially disinheriting a beneficiary who challenged the will. Anne and the children intended to bring family relief claims against the Estate, but were concerned about the poison pill provision, and realized that an issue with respect to family relief claims, wherever they were brought, would be Mr. Foote's domicile at his death. It is common ground that domicile at death will determine the applicable law with respect to family relief claims.

6 I was appointed case manager of the application for advice and directions. The first major application related to determining the proper forum for the domicile hearing. Anne and the children argued for Alberta; the Executor and residual beneficiaries argued for Norfolk Island or Australia. I ruled in *Foote Estate, Re*, 2007 ABQB 654 (Alta. Q.B.) that the Alberta courts had jurisdiction to determine domicile, and directed that the issue be tried here. Costs of the forum application were reserved, to be dealt with in the domicile proceedings.

7 The issue worked its way through document production and discoveries, and was tried over three weeks in the spring of 2009.

Position of the Parties

8 The Executor and the Edmonton Community Foundation seek costs of all proceedings on a solicitor and client basis from Anne and the children; alternatively they seek party and party costs on a multiple of Column 5 of Schedule C of the *Rules of Court*. The Lord Mayor seeks costs of the domicile proceedings on a solicitor and client basis, or alternatively on a multiple of Column 5, but submits that Anne and the children should have their costs from the Respondents on the same scale with respect to the forum application.

9 The basis for the position of the Respondents can be summarized as follows:

1. Modern law holds that the rule "costs follow the event" generally applies to estate litigation;

2. They were successful;

3. Once document discovery took place and discoveries were completed, it should have been obvious to the unsuccessful Applicants that they would not be successful; and

4. Costs are in the discretion of the Court, and the Court should exercise its discretion in favour of a solicitor and client costs award.

10 With respect to their position on elevated Schedule C costs, they point to the size of the Estate - something in excess of $120,000,000.00.

11 In support of their positions, they cite:

Anderson Estate, Re, 2009 ABQB 663 (Alta. Q.B.); *Babchuk v. Kutz*, 2007 ABQB 88 (Alta. Q.B.); *College of Physicians & Surgeons (Alberta) v. H. (J.)*, 2009 ABQB 48 (Alta. Q.B.); *McCullough Estate v. McCullough*, 1998 ABCA 38 (Alta. C.A.); *McDougald Estate v. Gooderham*, [2005] O.J. No. 2432 (Ont. C.A.); *Mitchell v. Gard* (1863), 164 E.R. 1280 (Eng. Prob. Ct.); *Petrowski v. Petrowski Estate*, 2009 ABQB 753 (Alta. Q.B.); *Riva v. Robinson*, 2000 ABQB 391 (Alta. Surr. Ct.); *Salter v. Salter Estate*, [2009] O.J. No. 2328 (Ont. S.C.J.); *Popke v. Bolt*, 2005 ABQB 861 (Alta. Q.B.); and *St. Onge Estate v. Breau*, 2009 NBCA 36 (N.B. C.A.).

12 Anne and the children argue for their solicitor and client costs out of the Estate, on the basis that the circumstances of this case fall within the established exceptions to the "costs follow the event" rule. They also point to the Court's general discretion, and argue that the circumstances and size of the Estate warrant a solicitor and client cost award in their favour.

13 In support of their position, they cite:

Alberta Rules of Court, Alta Reg. 390/1968, Rule 607; *Corlet, Re*, [1938] 3 W.W.R. 20 (Alta. T.D.); *Hegedus Estate v. Paul (Guardian of)* (1999), 71 Alta. L.R. (3d) 179 (Alta. Surr. Ct.); *Ross v. Redl Estate*, 2009 SKQB 266 (Sask. Q.B.); *Schuttler v. Anderson* (1999), 246 A.R. 17 (Alta. Q.B.); *Scramstad v. Stannard*, [1997] A.J. No. 302 (Alta. Q.B.); *Seward v. Seward Estate* (1997), 201 A.R. 77 (Alta. Q.B.); and Stevenson & Côté, *Annotated Rules of Court 2009*, 601. *Law*

14 The basic principles for costs in estate litigation have been summarized by Moen J. in *Babchuk v. Kutz*, 2007 ABQB 88 (Alta. Q.B.) and *Petrowski v. Petrowski Estate*, 2009 ABQB 753 (Alta. Q.B.). In *Babchuk*, the daughters of the testator unsuccessfully challenged his will on the basis of lack of testamentary capacity. The successful executor sought costs on the basis of double party/party costs (but not as a result of bettering an offer); the unsuccessful daughters sought their costs on a solicitor client basis payable out of the estate. Moen J. denied any costs to the unsuccessful daughters, and awarded the executor single party/party costs against them.

15 In *Petrowski*, the defendant executrix successfully defended a claim of undue influence against herself and the estate, as well as for family relief. The unsuccessful applicant sought costs on a solicitor and client basis from the estate, and the executrix sought costs from the unsuccessful defendant. Moen J. denied the unsuccessful applicant his costs, and ordered that he pay the executrix's costs on Column 5, doubled for steps after she had made a formal offer of accepting a discontinuance of action without costs.

16 As a result of Moen J.'s thorough review of the law on costs payable by an estate, and recovery of costs by a successful executor, it is not necessary for me to deal with most of the cases cited to me. It is clear from her decisions that there are a number of well-established principles in Alberta:

1. The Court has a discretion with respect to costs, but that discretion must be exercised judicially (*Babchuk* at para. 5);

2. The "modern" approach to costs in estate litigation requires careful scrutiny of the litigation to restrict unwarranted litigation and protect estates from being depleted by such litigation (*Babchuk* at para. 6);

3. Payment of an unsuccessful party's costs out of the estate requires analysis of a number of factors:

A. Did the testator cause the litigation?

B Was the challenge reasonable?

C. Was the conduct of the parties reasonable?

D. Was there an allegation of undue influence?

E. Were there different issues or periods of time in which costs should differ?

F. Were there offers to settle? (*Babchuk* at para. 8);

4. There is a residual discretion where factors such as who initiated the proceedings (*Babchuk*, para. 70), and the size of the estate (*Babchuk*, para. 72) may be relevant;

5. Costs for a successful claimant in family relief claims are generally awarded on a solicitor and client basis (*Petrowski*, para. 62);

6. Costs in favour of an unsuccessful family relief claimant are an exception to the basic rule that costs follow the event (*Petrowski*, para. 68 and para. 74);

7. Estate litigation is no longer treated as an exception to the basic rule that costs follow the event, approving *St. Onge Estate v. Breau*, 2009 NBCA 36 (N.B. C.A.) (*Petrowski*, paras. 76 - 78);

8. Costs will normally follow the event in estate litigation, unless the challenge to the estate was reasonable (*Petrowski* at para. 78), or on the basis of a public policy exception recognizing society's interest in only probating valid wills (*Petrowski* at para. 79).

17 I agree with these statements as to the general law relating to estate action costs in Alberta.

18 In *Petrowski*, Moen J. considered the issue of solicitor client costs in favour of the estate or executor, and stated at para. 14:

> While costs are almost entirely in the discretion of the court, solicitor-client costs should only be resorted to where the facts so warrant. This is not such a case. While the Plaintiff was unsuccessful, there is no evidence of unreasonable or vexatious conduct which would warrant an elevation from party-party costs.

19 I echo her words in that respect.

20 In *Anderson Estate, Re*, 2009 ABQB 663 (Alta. Q.B.), Veit J. was not referred to *Babchuk*, but came to the same conclusion as did Moen J. with respect to *St. Onge Estate*. She emphasized, at para. 9, that in pursuing estate litigation, the parties should carefully scrutinize "the merits of a claim; determine who bears the onus of proof, and whether the litigation falls withing one of the recognized exceptions (to the costs follow the event rule in modern litigation)".

21 The "recognized exceptions" as noted by the New Brunswick Court of Appeal are:

2008 CarswellOnt 421
Ontario Superior Court of Justice

A. (W.) v. St. Andrew's College

2008 CarswellOnt 421, [2008] O.J. No. 352, 164 A.C.W.S. (3d) 23, 58 C.P.C. (6th) 350

W.A. and V.A. v. St. Andrew's College and John Bradley

Lax J.

Heard: January 29, 2008
Judgment: February 4, 2008
Docket: 05-CV-287961CP

Counsel: B.C. McPhadden, F. Gouriou for Plaintiffs / Moving Parties
C.G. Paliare, O. Soriano for Defendant / Responding Party, St. Andrew's College

Subject: Civil Practice and Procedure; Public

Headnote

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Costs, fees and disbursements — General principles

WA brought action on behalf of proposed class of former students of boy's school who alleged that they were sexually assaulted by defendant B approximately 50 years ago and by VA on behalf of proposed class of family members — With respect to motion for certification, it was anticipated that college would take position that WA was not adequate representative plaintiff — Plaintiffs brought motion to add or substitute PM as representative plaintiff of student class on condition that PM would be immune from liability for costs — Plaintiff submitted that action raised matter of public interest under s. 31(1) of Class Proceedings Act, 1992 and narrow issue was whether PM should be granted advance immunity from liability for costs — Motion granted in part — Plaintiffs were at liberty to add or substitute PM as representative plaintiff, but advance immunity from liability for costs was not ordered for him — Ordering advance costs immunity would be contrary to well- established principles of awarding costs following cause and would be unfair having regard to legislative intent of Act — Legislature sought to strike fair balance between plaintiffs and defendants on issue of costs by rejecting provision for costs immunity and allowing contingency fee arrangements, class proceedings fund, section 31(1) of Act, and court's discretion about costs — PM did not claim to be impecunious and pursued no options for protecting himself against adverse costs award including seeking financial support from other class members or from class proceedings fund — Ordering advance costs immunity on basis that action raised matter of public interest would distort balance legislature sought to achieve between plaintiffs and defendants and also remove discretion court has under s. 31(1) of Act with respect to costs.

Education law --- Miscellaneous issues

Advance costs immunity in proposed class proceeding — WA brought action on behalf of proposed class of former students of boy's school who alleged that they were sexually assaulted by defendant B approximately 50 years ago and by VA on behalf of proposed class of family members — With respect to motion for certification, it was anticipated that college would take position that WA was not adequate representative plaintiff — Plaintiffs brought motion to add or substitute PM as representative plaintiff of student class on condition that PM would be immune from liability for costs — Plaintiff submitted that action raised matter of public interest under s. 31(1) of Class Proceedings Act, 1992 and narrow issue was whether PM should be granted advance immunity from liability for

costs — Motion granted in part — Plaintiffs were at liberty to add or substitute PM as representative plaintiff, but advance immunity from liability for costs was not ordered for him — Ordering advance costs immunity would be contrary to well- established principles of awarding costs following cause and would be unfair having regard to legislative intent of Act — Legislature sought to strike fair balance between plaintiffs and defendants on issue of costs by rejecting provision for costs immunity and allowing contingency fee arrangements, class proceedings fund, section 31(1) of Act, and court's discretion about costs — PM did not claim to be impecunious and pursued no options for protecting himself against adverse costs award including seeking financial support from other class members or from class proceedings fund — Ordering advance costs immunity on basis that action raised matter of public interest would distort balance legislature sought to achieve between plaintiffs and defendants and also remove discretion court has under s. 31(1) of Act with respect to costs.

MOTION by plaintiffs to add or substitute person as representative plaintiff in proposed class proceeding on condition that he be given advance immunity from liability for costs.

Lax J.:

1 This action is brought by W.A., on behalf of a proposed class of former students of St. Andrew's College ("SAC") who allege they were sexually assaulted by the defendant Bradley, and by V.A. on behalf of a proposed class of family members. The motion for certification has not been heard, but it is anticipated that SAC will take the position on the certification motion that W.A. is not an adequate representative plaintiff. The plaintiffs bring this motion to add or substitute P.M. as a representative plaintiff of the student class, but on the condition that P.M. is immune from liability for costs. If P.M. is added, it will be determined on the motion for certification whether P.M. is an adequate representative plaintiff under section 5 of the *Class Proceedings Act, 1992*. ("CPA"). The narrow issue on this motion is whether the court should grant P.M. advance immunity from liability for costs.

2 The plaintiffs submit that the order sought is novel only as to timing and that there is ample precedent for relieving representative plaintiffs of liability for costs in class proceedings, notwithstanding they are unsuccessful on a motion for certification. They contend that the action raises a matter of "public interest", engaging section 31(1) of the CPA and a matter of "importance" under Rule 57.01(d) of the *Rules of Civil Procedure*, sufficient to support the unusual order they request. They also submit that the case raises access to justice considerations as apart from W.A. and P.M., there are no other known class members who are willing and/or suitable representative plaintiffs.

3 There is no precedent for the order sought, but it is common ground that the court has a broad discretion regarding costs. SAC acknowledges that interim costs orders and an advance costs immunity ruling fall within that broad discretion, but contend that such orders are limited to rare and exceptional cases and this is not one. It advances two main submissions: First, the relief sought is in essence a form of interim costs order and this case does not satisfy any of the preconditions for such an extraordinary order. Second, the factors to be considered for an advance ruling that no costs be awarded against the proposed representative plaintiff are not capable of assessment at this early stage of the proceeding. It also denies that this case involves a matter of public interest.

4 It is now well established that the CPA, notwithstanding its stated policy objective to promote access to justice, does not insulate representative plaintiffs or class members from the possible costs consequences of unsuccessful litigation: *Smith v. Canadian Tire Acceptance Ltd.*, [1995] O.J. No. 327 (Ont. Gen. Div.) at para. 59, aff'd, [1995] O.J. No. 3380 (Ont. C.A.); *Gariepy v. Shell Oil Co.*, [2002] O.J. No. 3495 (Ont. S.C.J.), aff'd, [2004] O.J. No. 5309 (Ont. S.C.J.). Moreover, Ontario, unlike other class proceeding jurisdictions such as British Columbia, has not sought to interfere with the normal rule that costs will ordinarily follow the event: *Pearson v. Inco Ltd.*, [2006] O.J. No. 991 (Ont. C.A.) at para. 13, citing *Gariepy* at para. 9; *Smith*; *Williams* at paras. 13-15.

5 Although the clear legislative intent in class proceedings is to reject costs immunity, I accept the plaintiffs' submission that there is ample precedent for relieving representative plaintiffs of liability for costs in class proceedings,

notwithstanding they are unsuccessful on a motion for certification: *Abdool v. Anaheim Management Ltd.*, [1993] O.J. No. 1820 (Ont. Gen. Div.), aff'd, [1995] O.J. No. 16 (Ont. Div. Ct.); *Williams v. Mutual Life Assurance Co. of Canada*, [2001] O.J. No. 445 (Ont. S.C.J.), aff'd, [2001] O.J. No. 4952 (Ont. Div. Ct.) at para. 26; *Joanisse v. Barker*, [2003] O.J. No. 4081 (Ont. S.C.J.); *Moyes v. Fortune Financial Corp.*, [2002] O.J. No. 4298 (Ont. S.C.J.); *Vennell v. Barnado's*, [2004] O.J. No. 4171 (Ont. S.C.J.). In no case has this determination been made before a motion for certification has been argued and determined.

6 It cannot be assumed that class proceedings invariably engage access to justice concerns sufficient to justify withholding costs from the successful party: *Kerr v. Danier Leather Inc.*, [2007] S.C.J. No. 44 (S.C.C.) at para. 69. Neither can it be assumed that access to justice is the paramount consideration in awarding costs: *Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue Agency)*, [2007] S.C.J. No. 2 (S.C.C.) at para. 35, citing, *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371 (S.C.C.). Moreover, litigants raising public interest issues will not always avoid adverse costs awards at the conclusion of their trials and it is rarer still that they could benefit from advance costs awards: *Little Sisters* at para. 36.

7 P.M. does not seek to have his costs paid in advance by SAC or by the Canadian taxpayer as was the case in *Okanagan* and *Little Sisters*, but this is not a case that is concerned with providing access to justice to historically disadvantaged individuals as it was in *Okanagan*, a factor that may be relevant to the existence of a public interest: see *Vennell* at para. 32. It is not a case like *Okanagan* where the band's impecuniosity prevented the trial from proceeding and the court concluded that it would be participating in an injustice — against the litigant personally and against the public generally — if it did not order advance costs to permit the litigation to proceed. This case raises unproven allegations of sexual abuse which are alleged to have occurred in a private, elite boys' school more than fifty years ago. This alone does not dictate the conclusion that it involves a matter of public interest. While the plaintiffs make allegations, which if proven, raise serious concerns about the protection of young people in settings of this kind, not every situation of vulnerability and alleged exploitation brings a claim within section 31(1) of the CPA as a matter of public interest. Comparisons to *Vennell*, *Joanisse* and *Cloud* are not persuasive on the record that is before me.

8 Costs awards can be used as a powerful tool for ensuring that the justice system functions fairly and efficiently. They can promote settlement, encourage efficiency in the conduct of litigation, and sanction improper conduct. *Danier*, *Okanagan* and *Little Sisters*, all very recent decisions of the Supreme Court of Canada, send a strong collective message that it is the exceptional case that will warrant preferential treatment with respect to costs and that the general rule that costs follow the cause has not been displaced in litigation, even in issues of public importance. It follows that there must be very compelling reasons to immunize a litigant in advance from an adverse costs award.

9 In exercising discretion with respect to an award of costs, the court is to consider the factors enumerated in Rule 57.01(1), which include the result in the proceeding, written offers to settle, the principle of indemnity, the amount of costs an unsuccessful party could reasonably expect to pay (to be determined with reference to its own costs), complexity, importance, and conduct. None of these factors can be considered until the motion for certification is determined or, if the action is certified, after a judgment on common issues. If the action is certified, it is the common issues judge who will determine an appropriate costs award having regard to these factors. To immunize a plaintiff at this stage from an adverse costs award would fetter the discretion given to the common issues trial judge.

10 W.A. and V.A. have not been examined in relation to certification. Their adequacy as proposed representative plaintiffs has yet to be decided. It would not be sound policy to permit a proposed class proceeding to be commenced with a proposed representative plaintiff who may or may not have a certifiable claim and then permit the plaintiffs to add or substitute additional parties on an advance costs immunity basis. If this was permitted, proposed plaintiffs whose adequacy was questioned would simply be replaced with plaintiffs who have been immunized against costs. This is clearly contrary to the legislative intent, which specifically rejected the recommendation of the Ontario Law Reform Commission that the CPA provide for costs immunity and instead chose other means. The availability of contingency fee arrangements under s. 33(1) of the CPA, the Class Proceedings Fund, section 31(1) of the CPA, as well as the court's

Alta. Reg. 124/2010, s. 2.16

s 2.16 Court-appointed litigation representatives in limited cases

Currency

2.16Court-appointed litigation representatives in limited cases

2.16(1) This rule applies to an action concerning any of the following:

(a) the administration of the estate of a deceased person;

(b) property subject to a trust;

(c) the interpretation of a written instrument;

(d) the interpretation of an enactment.

2.16(2) In an action described in subrule (1), a person or class of persons who is or may be interested in or affected by a claim, whether presently or for a future, contingent or unascertained interest, must have a Court-appointed litigation representative to make a claim in or defend an action or to continue to participate in an action, or for a claim in an action to be made or an action to be continued against that person or class of persons, if the person or class of persons meets one or more of the following conditions:

(a) the person, the class or a member of the class cannot be readily ascertained, or is not yet born;

(b) the person, the class or a member of the class, though ascertained, cannot be found;

(c) the person, the class or the members of the class can be ascertained and found, but the Court considers it expedient to make an appointment to save expense, having regard to all the circumstances, including the amount at stake and the degree of difficulty of the issue to be determined.

2.16(3) On application by an interested person, the Court may appoint a person as litigation representative for a person or class of persons to whom this rule applies on being satisfied that both the proposed appointee and the appointment are appropriate.

Currency
Alberta Current to Gazette Vol. 112:19 (October 15, 2016)

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2005 ABCA 143
Alberta Court of Appeal

Alberta (Minister of Justice) v. Métis Settlements Appeal Tribunal

2005 CarswellAlta 431, 2005 ABCA 143, [2005] A.W.L.D. 1739, [2005] A.J. No. 362, 138 A.C.W.S. (3d) 588, 346 W.A.C. 34, 367 A.R. 34, 8 C.P.C. (6th) 195

Minister of Justice and Attorney General of Alberta (Appellant / Intervener) and Hazel Vicklund (Not Party to Appeal / Appellant) and Peavine Métis Settlement (Not Party to Appeal / Respondent) and Judy Willier (Not Party to Appeal / Affected Party) and Métis Settlements Appeal Tribunal (Respondent / Respondent) and Elizabeth Metis Settlement (Applicant)

Fraser C.J.A., Costigan, Ritter JJ.A.

Heard: March 17, 2005
Oral reasons: March 17, 2005
Written reasons: April 6, 2005
Docket: Edmonton Appeal 0403-0352-AC

Counsel: M.A. Unsworth for Appellant / Minister of Justice and Attorney General of Alberta
R.S. Maurice for Respondent / Métis Settlements Appeal Tribunal
T.R. Owen for Applicant, Elizabeth Metis Settlement

Subject: Public; Civil Practice and Procedure; Constitutional

Headnote

Aboriginal law --- Practice and procedure — Parties — Intervenors

Appeal Tribunal found that s. 75(2)(a) of Métis Settlements Act was of no force or effect because it violated s. 15 of Canadian Charter of Rights and Freedoms — Effect was to expand categories of Indians eligible for membership in settlement — Alberta was granted leave to appeal on questions related to ss. 1 and 15 of Charter — Chambers justice declined to add Elizabeth Métis Settlement as party — Elizabeth Métis Settlement then applied for intervenor status — Application granted — Settlement had special interest as it was directly affected by tribunal's decision — Settlement was also permitted to raise possible application of s. 25 of Charter — Case was exception to rule refusing intervenors to expand issues on appeal — Application of ss. 1 and 15 were arguably inextricably linked to s. 25.

APPLICATION for intervenor status on appeal of decision under *Métis Settlements Act*.

***Fraser C.J.A.*:**

1 The Attorney General of Alberta (Alberta) is appealing a decision of the Metis Settlements Appeal Tribunal, Order No. 160, in which the Tribunal found that s. 75(2)(a) of the *Metis Settlements Act*, R.S.A. 2000, c. M-14, is of no force or effect because it violates s. 15 of the *Charter*. This section provides:

> 75(2) An Indian registered under the *Indian Act* (Canada) or a person who is registered as an Inuk for the purposes of a land claims settlement may be approved as a settlement member if
>
> (a) the person was registered as an Indian or an Inuk when less than 18 years old,

that it will not be leading any additional evidence beyond that adduced to date. Alberta has advised that it may wish to call additional evidence depending on the arguments made by the Settlement, and presumably Ms. Willier. We leave this issue of fresh evidence by Alberta for consideration by the appeal panel hearing this appeal.

10 There remains the issue of Ms. Willier's representation. She is the only one whose substantive rights are directly affected by the Tribunal's decision and the only one arguing for a robust interpretation of s. 15. But she is unrepresented. Both Alberta and the Settlement oppose Ms. Willier's interests, albeit for different reasons. Since the Tribunal is effectively precluded from arguing the merits of its own decision, that leaves no one to take a position opposite to Alberta's and the Settlement's. This being so, and given the significant public interest dimension to this issue, we consider this an appropriate case in which to appoint an *amicus curiae* to represent Ms. Willier's interests and we so order. The Court will notify the parties of the name of the *amicus* in due course.

Application granted.

Alta. Reg. 124/2010, s. 2.10

s 2.10 Intervenor status

Currency

2.10Intervenor status
On application, a Court may grant status to a person to intervene in an action subject to any terms and conditions and with the rights and privileges specified by the Court.

Currency
Alberta Current to Gazette Vol. 112:19 (October 15, 2016)

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2005 ABCA 320
Alberta Court of Appeal

Papaschase Indian Band No. 136 v. Canada (Attorney General)

2005 CarswellAlta 1407, 2005 ABCA 320, [2005] A.J. No. 1273, 143 A.C.W.S. (3d) 211, 363 W.A.C. 301, 380 A.R. 301

Rose Lameman, Francis Saulteaux, Nora Alook, Samuel Waskewitch, and Elsie Gladue on their own behalf and on behalf of all descendants of the Papaschase Indian Band No. 136 (Respondents / Appellants / Plaintiffs) and Attorney General of Canada (Respondent / Respondent / Defendant) and Her Majesty the Queen in Right of Alberta (Respondent / Respondent / Third Party) and Federation of Saskatchewan Indian Nations (Applicant)

Fraser C.J.A., Picard J.A., and Russell J.A.

Heard: September 22, 2005
Judgment: September 22, 2005
Docket: Edmonton Appeal 0403-0299-AC

Counsel: J. Tannahill-Marcano for Respondents, Rose Lameman et al.
M.E. Annich for Respondent, Attorney General of Canada
S. Latimer for Respondent, Canada
D.N. Kruk for Respondent, Alberta
M.J. Ouellette for Applicant Proposed Intervener, Federation of Saskatchewan Indian Nations

Subject: Public; Civil Practice and Procedure; Constitutional

Headnote

Aboriginal law --- Practice and procedure — Parties — Intervenors

Lawsuit brought by Indian band against Crown sought declaration that P Band No. 136 was recognized band under Treaty 6 and Indian Act — Matter was appealed — Federation of Saskatchewan Indian Nations ("FSIN") represented 74 First Nations in Saskatchewan — FSIN applied for intervenor status at appeal hearing — Application granted — Issues in case involved whether provincial limitation periods can oust protection afforded under s. 35(1) of Constitution Act, 1982, and whether appellants had standing to pursue their claim — FSIN should be permitted to intervene with respect to those issues — FSIN possessed some special expertise and insight that will assist court in determining outcome of appeal on certain issues.

Civil practice and procedure --- Parties — Intervenors — General principles

Lawsuit brought by Indian band against Crown sought declaration that P Band No. 136 was recognized band under Treaty 6 and Indian Act — Matter was appealed — Federation of Saskatchewan Indian Nations ("FSIN") represented 74 First Nations in Saskatchewan — FSIN applied for intervenor status at appeal hearing — Application granted — Issues in case involved whether provincial limitation periods can oust protection afforded under s. 35(1) of Constitution Act, 1982, and whether appellants had standing to pursue their claim — FSIN should be permitted to intervene with respect to those issues — FSIN possessed some special expertise and insight that will assist court in determining outcome of appeal on certain issues.

APPLICATION by federation of Saskatchewan First Nations for leave to intervene in appeal of action involving constitutional rights of aboriginal band.

Fraser C.J.A.:

1 This is an application for intervener status by the Federation of Saskatchewan Indian Nations (FSIN). The respondents in this application, Rose Lameman et al. (who are the appellants in the main action and are referred to herein as the "appellants"), support FSIN's application, but the application is opposed by the respondent, Canada. The respondent, Her Majesty the Queen in Right of Alberta, takes no position on this issue.

2 It may be fairly stated that, as a general principle, an intervention may be allowed where the proposed intervener is specially affected by the decision facing the Court or the proposed intervener has some special expertise or insight to bring to bear on the issues facing the court. As explained by the Supreme Court of Canada in *R. v. Morgentaler*, [1993] 1 S.C.R. 462 (S.C.C.) at para. 1: "[t]he purpose of an intervention is to present the court with submissions which are useful and different from the perspective of a non-party who has a special interest or particular expertise in the subject matter of the appeal."

3 That said, it is clear as noted by the Federal Court of Appeal in *Canada (Minister of Indian & Northern Affairs) v. Corbiere* (1996), 199 N.R. 1 (Fed. C.A.) that ". . . an intervenor in an appellate court must take the case as she finds it and cannot, to the prejudice of the parties, argue new issues which require the introduction of fresh evidence."

4 FSIN applies for intervener status on the basis that it represents 74 First Nations in Saskatchewan whose interests will be specially affected by the outcome of this appeal. It also claims expertise in the subject matters of the appeal. The FSIN's mandate is to enhance, protect and promote treaty and inherent rights of its member First Nations, and under its land and resource portfolio, the FSIN runs the Indian rights and treaties research program responsible for researching, preparing and submitting specific claims on behalf of Saskatchewan First Nations. FSIN points to this research work as an indication of the expertise that it has developed in a number of the issues facing this Court. As a result, FSIN proposes to make submissions as an intervener in support of the appellants on certain of those issues.

5 A two-step approach is commonly used to determine an intervener application. The Court typically first considers the subject matter of the proceeding and second, determines the proposed intervener's interest in that subject matter. It is clear from reviewing the appellants' factum that there are three main issues on the appeal:

> 1. The tests for striking pleadings and summary judgment and, in particular, whether summary judgment is appropriate for resolution of complex evidentiary and novel legal issues based on aboriginal and treaty rights.
>
> 2. Whether the appellants lack standing to assert claims based on aboriginal and treaty rights because they are not a band. This, in turn, involves a number of potential issues including treaty rights under Treaty 6 and constitutional protection of treaty and aboriginal rights under s. 35(1) of the *Constitution Act, 1982*.
>
> 3. To what extent, if any, provincial limitation periods can be invoked to extinguish aboriginal or treaty rights.

6 In cases involving constitutional issues or which have a constitutional dimension to them, courts are generally more lenient in granting intervener status: *R. v. Trang*, [2002] 8 W.W.R. 755, 2002 ABQB 185 (Alta. Q.B.), and *Alberta Sports & Recreation Assn. for the Blind v. Edmonton (City)* (1993), [1994] 2 W.W.R. 659 (Alta. Q.B.). Similarly, appellate courts are more willing to consider intervener applications than courts of first instance. As noted by Hugessen J. in *Federation of Saskatchewan Indians v. Canada (Attorney General)*, 2002 FCT 1001 (Fed. T.D.) :

> . . . [T]he test for allowing intervener standing for argument at the appellate level is necessarily different from that which is used at trial; trials must remain manageable and the parties must be able to define the issues and the evidence on which they will be decided. An appellate court on the other hand deals with a pre-established record that is not

2014 ABQB 555
Alberta Court of Queen's Bench

Suncor Energy Inc. v. Unifor, Local 707 A

2014 CarswellAlta 1655, 2014 ABQB 555, [2014] A.W.L.D. 4600, 245 A.C.W.S. (3d) 198, 596 A.R. 390

Suncor Energy Inc., Applicant and Unifor, Local 707 A, Respondent

Neil Wittmann C.J.Q.B.

Heard: September 4, 2014
Judgment: September 8, 2014
Docket: Calgary 1401-03831

Counsel: Peter A. Gall, Q.C., for Applicants
John Carpenter, Vanessa Cosco, for Respondent, Unifor
Barbara Johnston, Q.C., April Kosten, for Respondent, Suncor

Subject: Civil Practice and Procedure; Public; Labour

Headnote

Labour and employment law --- Labour law — Labour arbitrations — Judicial review — Procedure upon review

Union and employer were parties to policy grievance arbitration with respect to random alcohol and drug testing policy of employer — Three-member panel decided by majority that policy was unreasonable exercise of employer's management rights and allowed grievance — Employer sought judicial review — Applicants brought application seeking leave to attain intervener status, jointly, in judicial review application — Application granted — Proper exercise of discretion in matter was to allow applicants joint intervener status at judicial review application — Applicants had special and direct interest — Applicants would bring special or fresh perspective to issue before court — Applicants' interests might not be fully protected by employer — From constitutional and public interest dimensions, underlying issue was important.

APPLICATION by applicants seeking leave to attain intervener status, jointly, in judicial review application.

Neil Wittmann C.J.Q.B.:

Introduction

1 Unifor, Local 707 A ("the Union") and Suncor Energy Inc. ("the Employer"), are parties to a policy Grievance Arbitration, [2014] A.G.A.A. No. 6, with respect to the Random Alcohol and Drug Testing Policy ("the Policy") of the Employer. A three member panel decided by a majority that the Policy was an unreasonable exercise of the Employer's management rights and allowed the grievance. The Employer has sought judicial review in this Court and a hearing has been scheduled for October 23rd and 24th, 2014. The Applicants, the Mining Association of Canada ("MAC") and Enform Canada ("Enform") have sought leave to attain intervener status, jointly, in the judicial review application. The Union opposes this Court granting intervener status to the Applicants. The Employer supports this Court granting intervener status to the Applicants.

Background

2 The Random Alcohol and Drug Testing Policy Grievance Arbitration to be reviewed consists of 592 paragraphs without appendices. The dissent is 242 paragraphs.

3 From that decision, it appears that alcohol and drug testing in the workplace takes on many forms including testing post-incident, testing upon reasonable grounds, testing as follow-up post rehabilitation and return to work testing. Collectively, it is common ground that this is "for cause" testing. Random testing is the issue in the Grievance Arbitration. At bottom, the parties seem to agree, supported by case authority, most recently, *Irving Pulp & Paper Ltd. v. CEP, Local 30*, 2013 SCC 34 (S.C.C.), that the arbitration jurisprudence involves balancing safety in the workplace against privacy concerns. In the Grievance Arbitration, the majority relied heavily on *Irving Pulp & Paper*

4 MAC is a non-profit national organization purporting to be the voice of the Canadian mining and mineral processing industry. One of its top priorities is workplace safety. Enform is similarly a not for profit organization which promotes workplace safety in the upstream oil and gas industry. It is comprised of six trade associations representing different aspects of the upstream oil and gas industry. Those six associations are the Canadian Association of Petroleum Producers, the Petroleum Services Association of Canada, the Canadian Association of Oil Well Drilling Contractors, the Canadian Energy Pipeline Association, the Canadian Association of Geophysical Contractors, and the Explorers and Producers Association of Canada.

5 The Applicants' written brief is replete with the safety objectives of their respective organizations.

6 There appears to be no dispute that parts of the Union workplace in the oil sands may be classified as dangerous. A description of the activities performed, including the equipment used, its size, the number of incidents or accidents occurring, including deaths, seems to demonstrate danger. As will be briefly seen however, the issue is how dangerous, weighed against the privacy concerns or rights of the individuals who work there, who are members of the Union.

The Test for Intervener Status

7 Although the *Alberta Rules of Court* ("ARC") in ARC 2.10 provide that a Court may grant status to a person to intervene subject to any terms and conditions and with the rights and privileges specified by the Court, no test is set forth to guide the Court in intervention applications. The common law governs.

8 None of the parties disputes the test to guide judicial discretion. As set forth in the Applicants' brief, the considerations are as follows:

> 1. Will the proposed interveners be specially or directly affected by the decision of the Court: *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2005 ABCA 320, [2005] A.J. No. 1273 (Alta. C.A.) at paragraph 2; *Knox v. Conservative Party of Canada*, 2007 ABCA 141 (Alta. C.A.) at paragraph 5; *Alberta (Minister of Justice) v. Métis Settlements Appeal Tribunal*, 2005 ABCA 143 (Alta. C.A.) at paragraph 4; *R. v. Finta*, [1993] 1 S.C.R. 1138 (S.C.C.), at 1143; *Carbon Development Partnership v. Alberta (Energy & Utilities Board)*, 2007 ABCA 231, [2007] A.J. No. 727 (Alta. C.A. [In Chambers]) at paragraph 10.
>
> 2. Will the proposed interveners bring special expertise or insight to bear on the issues facing the Court: *Papaschase* at paragraph 2; *Goudreau v. Falher Consolidated School District No. 69*, 1993 ABCA 72 (Alta. C.A.) at paragraph 17. This question is akin to whether an intervener would provide "fresh information or fresh perspective". *Reference re Workers' Compensation Act, 1983 (Newfoundland)*, [1989] 2 S.C.R. 335 (S.C.C.), at 340; *Stewart Estate v. 1088294 Alberta Ltd.*, 2014 ABCA 222 (Alta. C.A.) at paragraph 7.
>
> 3. Are the proposed interveners' interests at risk of not being fully protected or fully argued by one of the parties: *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2002 ABCA 243 (Alta. C.A.) at paragraph 2; *Gift Lake Métis Settlement v. Métis Settlements Appeal Tribunal (Land Access Panel)*, 2008 ABCA 391 (Alta. C.A.) at paragraph 6; Metis Settlements Appeal Tribunal at paragraph 4.

4. Will the interveners presence "provide the Court with fresh information or a fresh perspective on a constitutional or public issue" *Reference re Workers' Compensation Act, 1983 (Newfoundland)* at 340; *Papaschase* at paragraph 9.

Another factor is whether granting a right to intervene would unduly prejudice a party.

9 Not surprisingly, although the parties and the proposed interveners agree on the factors articulated above, they disagree on the proper application of them.

Applying the Test

1. Specially or Directly Affected

10 The Applicants say they are specially affected by the issue before the Court and have a direct material interest in making certain that the safety concerns presented by alcohol and drug use of employees, in high risk or safety sensitive industries, are addressed when determining the legality of random drug and alcohol testing. They reference not only a social and corporate responsibility, but also numerous regulatory statutes. The Applicants make the point that this Court's decision in the Judicial Review application will have a significant precedential effect on subsequent arbitrations and court cases dealing with random testing and therefore a significant impact on the Applicants' industries and interests.

11 The Union says the Applicants do not have any special or direct interest and point out that it is insufficient for the proposed intervener to be simply "concerned about the effect of a decision" or "its precedential value": *University of British Columbia Faculty Assn. v. University of British Columbia*, 2008 BCCA 376, [2008] B.C.J. No. 1823 (B.C. C.A. [In Chambers]) at paragraphs 9-10. They state that it must be more than "simply jurisprudential": *Papaschase* at paragraph 8. The Union points out that one arbitration board is not bound by the decision of another, even on a similar issue: *Camp Hill Hospital v. N.S.N.U.* (1989), 66 D.L.R. (4th) 711 (N.S. C.A.), at 714 -715.

12 On this issue, I accept that the Applicants have a special and direct interest. Their concerns and mandates include workplace safety in a dangerous workplace. The industries they represent and the associations involved include the Employer that will be before the Court, an oil sands employer. While it may not be enough for an intervener to concern itself with the jurisprudential or precedential effect of a decision which directly affects them, if the implementation of the decision has direct ramifications for the Applicants' members, surely they have a direct and special interest, not necessarily in the specific outcome of the case, but in the proper balancing test that will be applied to determine whether a random alcohol and drug testing is allowed in any Applicants' workplace.

2. Special Expertise / Insight into the Issue

13 The Applicants refer to MAC being permitted to intervene in a wide range of cases including those involving drug and alcohol testing. Enform, they say, has special expertise or insight with respect to the reasonableness of random drug and alcohol testing as part of broad risk mitigation. The Union says the Applicants have no special expertise, nor any fresh perspective. The Union argues because you say you have it doesn't make it so: *Pedersen v. Van Thournout*, 2008 ABCA 192, [2008] A.J. No. 543 (Alta. C.A.) at paragraph 11. There, the Court stated that the special expertise or unique insight must be articulated so as to demonstrate the special expertise or fresh perspective which was not done in that case.

14 During oral argument, the Applicants' counsel tendered the Employer's brief for the Judicial Review which was ordered filed by this Court approximately two months in advance of the hearings. The brief was provided to the Court without objection by the Union. It contains 133 pages plus appendices. Counsel for the Applicants referred to the index and indicated the Applicants have no intention of repeating arguments made in the Judicial Review by the Employer but rather wish to argue the broader perspective, from an industry standpoint, as to what *Irving Pulp & Paper* actually decided in terms of how or what factors ought to be properly considered or weighed in balancing privacy interests against safety interests. The Union says that the only issue before the Judicial Review Court in this case will be whether the decision of the arbitration panel was reasonable. The Applicants, on the other hand, say that is only part of the issue, the

2014 NBBR 148, 2014 NBQB 148
New Brunswick Court of Queen's Bench

McCorkill v. McCorkill Estate

2014 CarswellNB 425, 2014 CarswellNB 426, 2014 NBBR 148, 2014 NBQB 148, 1104
A.P.R. 21, 1 E.T.R. (4th) 41, 243 A.C.W.S. (3d) 774, 377 D.L.R. (4th) 537, 424 N.B.R. (2d) 21

Isabelle Rose McCorkill, Applicant and Fred Gene Streed, Executor of the Estate of Harry Robert McCorkill (aka McCorkell), Deceased, Respondent and The Province of New Brunswick as represented by the Attorney General, The Center for Israel and Jewish Affairs, League for Human Rights of B'Nai Brith Canada, and The Canadian Association for Free Expression, Interveners

William T. Grant J.

Heard: January 27-28, 2014
Judgment: June 5, 2014
Docket: S/M/49/13

Counsel: Marc-Antoine Chiasson, for Applicant
John D. Hughes, for Respondent
Richard A. Williams, for Intervener, Province of New Brunswick as represented by the Attorney-General
Danys R.X. Delaquis, for Intervener, Centre for Israel and Jewish Affairs
Catherine A. Fawcett, for Intervener, League for Human Rights of B'Nai Brith Canada
Andy Lodge, for Intervener, Canadian Association for Free Expression

Subject: Civil Practice and Procedure; Constitutional; Estates and Trusts; Employment

Headnote

Estates and trusts --- Estates — Legacies and devises — Conditional gifts — Grounds for invalidity — Public policy grounds — Miscellaneous

Testator died in 2004, having made last will and testament in 2000 — In dispositive clause, testator transferred property to trustee to pay debts and taxes, and to transfer residue of estate to corporation in United States — Sister of testator brought application for declaration that bequest was void as illegal and/or contrary to public policy, on ground that corporation was neo-Nazi group — Application granted; residue to be divided among next of kin — Publications from group could only be described as racist, white-supremacist and hate-inspired — While they might be protected under U.S. Constitution, s. 1 of Canadian Charter of Rights and Freedoms provides for reasonable limits on rights and freedoms — Section 319 of Criminal Code of Canada makes public incitement of hatred criminal offence — Group's association with such views were not "dated" — Engaging in activity prohibited by Parliament through enactment of Criminal Code fell squarely within rubric of public policy violation — Group's communications and activities contravened values of Charter, provincial human rights legislation and international conventions which Canada had signed — While jurisprudence on voiding bequests on grounds of public policy tended to deal with conditions attached to specific bequests, facts of this case were so strong that they rendered this case indistinguishable from such other cases — Unlike most beneficiaries, group had foundational documents which stated its purpose — They consistently showed that group stood for principles and policies, and means to implement them, that were both illegal and contrary to public policy in Canada.

if the court allowed this bequest to stand it would increase the risk of opening the door to bequests to other criminal organizations.

88 Moreover, the jurisprudence concerning cases that are contrary to public policy goes back 200 years in the English common law tradition and more than a century in Canada alone. Despite that long history, it can hardly be said that there has been a deluge of cases where the courts have intervened in an estate or trust or even a contract on the grounds of public policy.

89 I therefore find that while the voiding of a bequest based on the character of the beneficiary is, and will continue to be, an unusual remedy, where, as here, the beneficiary's *raison d'être* is contrary to public policy, it is the appropriate remedy.

Disposition

90 In summary, I find that the purposes of the National Alliance and the activities and communications which it undertakes to promote its purposes are both illegal in Canada and contrary to the public policy of both Canada and New Brunswick. Consequently, I declare the residual bequest to it in the will of Harry Robert McCorkill to be void.

91 I further declare that as a result of this finding, there is an intestacy with respect to the residue of the estate of Harry Robert McCorkill and that the residue shall be divided amongst the next of kin of the said Harry Robert McCorkill in accordance with the *Devolution of Estates Act*, R.S.N.B. 1973 c.D-9, as amended.

92 With respect to the administration of the estate, Ms. McCorkill requests that I direct Mr. Streed to turn the assets of the estate over to her lawyer in trust and order Mr. Streed to pass his accounts within 30 days. However, I have not, by this decision, removed Mr. Streed as executor or otherwise invalidated the will nor has Ms. McCorkill provided any grounds for removing Mr. Streed as executor. That would require a separate application under the Probate Rules.

93 With respect to Mr. Streed's accounts, if he wishes to have them passed for whatever reason, including if he wishes to resign as executor, then he can renew the application he previously made for that purpose to the Probate Court.

94 Ms. McCorkill also requests, and I hereby make, an order permanently enjoining any individual associated with the estate from distributing, paying or transferring the residue of the estate or any part thereof to the National Alliance without further order of either this Court or the Probate Court.

Costs

95 Ms. McCorkill is entitled to her costs on a solicitor and client basis from the estate. Mr. Streed is also entitled to his costs from the estate on a solicitor and client basis. While he has not been successful, he did not write the will. Mr. McCorkill did and Mr. Streed had a duty to propound it as the surviving executor.

96 The province has not requested costs and CAFE has been unsuccessful in its intervention. While the submissions of CIJA and B'nai Brith have both been helpful, their own purposes were also served by intervening so I will award them each a lump sum of $3,000.00 including disbursements to be paid out of the estate.

Application granted.

End of Document

1990 CarswellOnt 486
Ontario Supreme Court, Court of Appeal

Canada Trust Co. v. Ontario (Human Rights Commission)

1990 CarswellOnt 486, [1990] O.J. No. 615, 12 C.H.R.R. D/184, 20 A.C.W.S. (3d) 736, 37 O.A.C. 191, 38 E.T.R. 1, 69 D.L.R. (4th) 321, 74 O.R. (2d) 481

RE LEONARD FOUNDATION TRUST; CANADA TRUST CO. v. ONTARIO HUMAN RIGHTS COMMISSION; ROYAL ONTARIO MUSEUM et al. (intervenors)

Robins and Tarnopolsky JJ.A. and Osler J. (ad hoc)

Heard: September 7 and 8, 1989
Judgment: April 24, 1990
Docket: Doc. Nos. CA586/87 and CA622/87

Counsel: *Janet E. Minor*, for appellant Ontario Human Rights Commission.
Alan P. Shanoff and *Francy Kussner*, for intervenor-appellant Royal Ontario Museum.
H. Donald Guthrie, Q.C., and *John W.R. Day*, for respondent Canada Trust Co.
William L.N. Somerville, Q.C., *Lindsay A. Histrop*, for intervenor Class of Persons Eligible to Receive Scholarships from the Leonard Foundation.
Stan J. Sokol, for intervenor Public Trustee.

Subject: Estates and Trusts; Constitutional

Headnote

Human Rights --- What constitutes discrimination — Race, ancestry or place of origin — General

Human rights — Jurisdiction of Supreme Court — Trust established to provide scholarships on discriminatory basis — Complaint filed under Human Rights Code — Trustee seeking Court's direction as to validity of trust — Court having jurisdiction to give directions — Human Rights Code, 1981, S.O. 1981, c. 53.

Trusts and trustees — Express trusts — Creation — Public policy — Charitable trust established to provide scholarships — Recipients of scholarships, members of management committee and Judges from whom advice and direction might be sought restricted to white, Protestant, British subjects — Discriminatory provisions invalid, as infringing public policy.

Charities — Nature of gift — Public policy — Charitable trust established to provide scholarships — Recipients of scholarships, members of management committee and Judges from whom advice and direction might be sought restricted to white, Protestant, British subjects — Discriminatory provisions invalid, as infringing public policy.

Charities — Doctrine of cy-près — When cy-près doctrine applicable — Public policy — Charitable trust established to provide scholarships — Recipients of scholarships, members of management committee and Judges from whom advice and direction might be sought restricted to white, Protestant, British subjects — Discriminatory provisions invalid, as infringing public policy — Property subject to trust applied cy-près by striking out invalid discriminatory provisions.

The founder of a charity should understand therefore that he cannot create a charity that shall be forever exempt from modification.

[Emphasis added.] See, generally, Waters, op. cit, at 611-632; *Power v. Attorney General for Nova Scotia* (1903), 35 S.C.R. 182; *Re Fitzpatrick; Fidelity Trust Co. v. St. Joseph's Vocational School of Winnipeg*, 16 E.T.R. 221, [1984] 3 W.W.R. 429, 6 D.L.R. (4th) 644, 27 Man. R. (2d) 285 (Q.B.); *Re Tacon; Public Trustee v. Tacon*, [1958] Ch. D. 447, [1958] 1 All E.R. 163; and *Re Dominion Students' Hall Trust*, [1947] Ch. 183.

Disposition

48 To give effect to these reasons, I would strike out the recitals and remove all restrictions with respect to race, colour, creed or religion, ethnic origin and sex as they relate to those entitled to the benefits of the trust and as they relate to the qualifications of those who may be members of the General Committee or give judicial advice and, as well, as they relate to the schools, universities or colleges in which scholarships may be enjoyed. (The provision according preferences to sons and daughters of members of the classes of persons specified in the trust document remains unaffected by this decision.) I would answer the questions posed as follows.

49 Q.1(ii) — Yes, the provisions of the trust which confine management, judicial advice, schools, universities and colleges and benefits on grounds of race, colour, ethnic origin, creed or religion and sex are void as contravening public policy.

50 Q.1(i), (iii) and (iv) — It is not necessary to answer these questions.

51 Q.2 — No.

52 Q.3 — Yes.

53 Q.4 — As before, but with the deletion of the discriminatory restrictions mentioned in the answer to Q.1(ii).

54 Q.5 and 6 — The application form should be changed in accordance with this decision.

55 In the result, I would allow the appeal, set aside the order of McKeown J. and issue judgment as aforesaid. The costs of the appeal and of the application before McKeown J. shall be paid to the parties on a solicitor-and-client basis out of the corpus of the trust.

***Tarnopolsky J.A.*:**

I. The Judicial History and the Issues

56 This case concerns appeals from the judgment of McKeown J., dated August 10, 1987, upon an application, under s. 60 of the *Trustee Act*, R.S.O. 1980, c. 512 and rr. 14.05(2) and (3) of the *Rules of Civil Procedure*, by The Canada Trust Company, as the successor trustee under an Indenture made on December 28, 1923, between one Reuben Wells Leonard, the settlor, and the Toronto General Trusts Corporation, the Trustee, for advice and direction upon the following questions arising out of the administration of the trust created by the Indenture:

> 1. Are any of the provisions of, or the policy established under the Indenture made the 28th day of December, 1923 between Reuben Wells Leonard, Settlor of the First Part, and The Toronto General Trusts Corporation, Trustee of the Second Part (the 'Indenture') set out in Schedule A hereunder void or illegal or not capable of being lawfully administered by the applicant The Canada Trust Company, successor trustee thereunder, and/or the General Committee and other committees referred to in the Indenture, by reason of
>
> (i) public policy as declared in the *Human Rights Code*, 1981 (the '*Code*');

Welcome the Newest Unworthy Heir

Bruce Ziff*

A. Introduction

In *McCorkill v. McCorkill Estate*,[1] a New Brunswick court invalidated a large testamentary gift to a neo-Nazi organization. In doing so, the court extended the reach of the doctrine of public policy as a means to challenge the legality of property transfers. In this short note I will reflect on the reasons advanced in the case, and the implications of the ruling.

B. The Case

The case of *McCorkill v. McCorkill Estate* Estate involved the will of one Harry McCorkill, who passed away in 2004. The will gave his entire estate to the National Alliance (N.A.), an American-based neo-Nazi organization to which McCorkill belonged. In 2010, the executor applied for, and was granted, Letters Probate. At that point, the estate was valued at approximately $250,000.

However, in 2013, McCorkill's sister challenged the validity of the will, arguing that the gift to the National Alliance was contrary to public policy. An *ex parte* order was granted freezing the distribution of the estate pending the determination of the sister's challenge.[2] Shortly afterwards, intervener status was granted to the province of New Brunswick, the Centre for Israel and Jewish Affairs, the League for Human Rights of B'Nai Brith Canada, and the Canadian Association for Free Expression.

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*Professor of Law, University of Alberta. I am grateful to Eric Adams for his helpful comments.

[1]2014 NBQB 148, 2014 CarswellNB 425. The judgment also appears in this volume at 41*ff*.

[2]*McCorkill v. McCorkill Estate*, 2013 CarswellNB 433, 91 E.T.R. (3d) 324. For other interlocutory proceedings, see *McCorkill v. McCorkill Estate*, 2013 CarswellNB 761, 2013 NBQB 317; *McCorkill v. McCorkill Estate*, 2013 CarswellNB 754, 2013 NBQB 419; *McCorkill v. McCorkill Estate*, 2013 CarswellNB 753, 2014 NBQB 10, leave to appeal refused: 2014 CarswellNB 56, 1079 A.P.R. 386 (C.A.).

the land.[16] That collateral attack effectively destroyed the efficacy of racial restrictive covenants in Canada. Some provinces put the matter beyond dispute, enacting legislation prohibiting the kind of restrictions found in these cases.[17]

In 1990, the legality of discriminatory conditions was revisited in the *Leonard Foundation Trust* case,[18] arguably the most important Canadian decision on the doctrine of public policy. *Leonard* involved a trust created by one Col. Reuben Wells Leonard, a Canadian patriot, mining magnate, and philanthropist. In 1916, Col. Leonard established a large trust designed to provide bursaries to needy students. Its terms were revised in 1920 and 1923. Leonard died in 1930, leaving the 1923 version unaltered.

The 1923 document contained a series of recitals that were designed to explain the rationale for the scheme as embodied in the operative part of the trust. Those recitals are a kind of political tract, hinting at a set of strongly held political views. In brief, Leonard believed in the innate superiority of the white race, and in the enduring importance of both the British Empire and the Christian religion in its Protestant form. In consequence, he established a fund for bursaries tenable only by white, Protestant, British subjects. Both male and female students were eligible, though no more than 25% of the monies allocated in any given year could be awarded to female applicants.[19]

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[16]*Re Noble and Wolf*, [1951] S.C.R. 64, 1950 CarswellOnt 127.

[17]See, *e.g.*, *Land Title Act*, R.S.B.C. 1996, s. 222(1), which provides: "A covenant that, directly or indirectly, restricts the sale, ownership, occupation or use of land on account of the sex, race, creed, colour, nationality, ancestry or place of origin of a person, however created, whether before or after the coming into force of this section, is void and of no effect." Such covenants continue to come to light within British Columbia land titles: see "Vancouver real estate titles reveal city's racist history.", online: <www.cbc.ca/news/canada/british-columbia/vancouver-real-estate-titles-reveal-city-s-racist-history-1.2747924>. Human rights codes typically also restrict discrimination in the renting or selling property: see, *e.g.*, *Re Peach Estate*, 2009 NSSC 383, 2010 CarswellNS 29.

[18]*Canada Trust Co. v. Ontario Human Rights Commission*, 1990 CarswellOnt 486, 74 O.R. (2d) 481 (C.A.).

[19]For more on Colonel Leonard's beliefs and their influence on his trust, see B. Ziff, *Unforeseen Legacies: Reuben Wells Leonard and the Leonard Foundation Trust* (Toronto: U.T.P. & Osgoode Society for Legal History, 2000).

The Leonard Trust was administered on this basis for decades. However, by the 1980s, the appropriateness of the bursary scheme had become a matter of public debate, particularly in Ontario, the site of the Leonard Foundation. When the Ontario Human Rights Commission commenced proceedings, the Leonard trustees applied to the Supreme Court of Ontario for directions as to the validity of the trust.

At first instance, the trust was upheld in its entirety; not a comma was touched. Proprietary freedom was regarded as the trumping value.[20] Three years later, the Ontario Court of Appeal reversed that decision, holding that the trust violated the common law doctrine of public policy. In the result, all of the provisions relating to race, religion, nationality, and gender were deleted, leaving a general charitable trust for the advancement of education. The Foundation continues to operate under these modified terms of reference.

Robins J.A. (with whom Osler J. concurred) took the view that the Leonard Foundation Trust, tenable at public universities, and available to members of the public at large, was to be regarded as a public or at least a *quasi*-public institution. Controversially, he looked to the recitals to see if the founding rationale of that institution could pass muster. (The judge at first instance had held that the recitals could not be relied upon for that purpose.[21]) Robins J.A. concluded that "[t]o say that a trust premised on these notions of racism and religious superiority contravenes contemporary public policy is to expatiate the obvious".[22] Tarnopolsky J.A. wrote a concurring opinion, holding that discriminatory trusts of this nature were presumptively invalid. In so doing, he accepted the prospect that a trust premised on affirmative action could be valid.

The reasoning of the majority, so heavily reliant on the offensive ideologies set out in the recitals, left open the proper analysis where there were no such statements, but merely discriminatory qualifications.[23]

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[20] *Canada Trust Co. v. Ontario (Human Rights Commission)*, 1987 CarswellOnt 651, 27 E.T.R. 193 (H.C.).

[21] *Id.* at paras. 22*ff*.

[22] *Supra* note 18, at para. 39. *Cf. Kay v South Eastern Sydney Area Health Service*, [2003] NSWSC 292.

[23] The recitals at issue in *Leonard* were not part of the 1916 and 1920 iterations of the Leonard Foundation Trust.

Alta. Reg. 124/2010, s. 2.11

s 2.11 Litigation representative required

Currency

2.11Litigation representative required
Unless otherwise ordered by the Court, the following individuals or estates must have a litigation representative to bring or defend an action or to continue or to participate in an action, or for an action to be brought or to be continued against them:

(a) an individual under 18 years of age;

(b) an individual declared to be a missing person under section 7 of the *Public Trustee Act*;

(c) an adult who, in respect of matters relating to a claim in an action, lacks capacity, as defined in the *Adult Guardianship and Trusteeship Act*, to make decisions;

(d) an individual who is a represented adult under the *Adult Guardianship and Trusteeship Act* in respect of whom no person is appointed to make a decision about a claim;

(e) an estate for which no personal representative has obtained a grant under the *Surrogate Rules* (Alta. Reg. 130/95) and that has an interest in a claim or intended claim.

Amendment History
Alta. Reg. 122/2012, s. 2

Currency
Alberta Current to Gazette Vol. 112:19 (October 15, 2016)

End of Document

Alta. Reg. 124/2010, s. 2.12

s 2.12 Types of litigation representatives and service of documents

Currency

2.12Types of litigation representatives and service of documents

2.12(1) There are 3 types of litigation representatives under these rules:

(a) an automatic litigation representative described in rule 2.13;

(b) a self-appointed litigation representative under rule 2.14;

(c) a Court-appointed litigation representative under rule 2.15, 2.16 or 2.21.

2.12(2) Despite any other provision of these rules, if an individual has a litigation representative in an action,

(a) service of a document that would otherwise be required to be effected on the individual must be effected on the litigation representative, and

(b) service of a document on the individual for whom the litigation representative is appointed is ineffective.

Currency

Alberta Current to Gazette Vol. 112:19 (October 15, 2016)

End of Document

Alta. Reg. 124/2010, s. 2.13

s 2.13 Automatic litigation representatives

Currency

2.13Automatic litigation representatives
If an individual or estate is required to have a litigation representative under rule 2.11, a person is an automatic litigation representative for the individual or estate if the person has authority to commence, compromise, settle or defend a claim on behalf of the individual or estate under any of the following:

(a) an enactment;

(b) an instrument authorized by an enactment;

(c) an order authorized under an enactment;

(d) a grant or an order under the *Surrogate Rules* (Alta. Reg. 130/95);

(e) an instrument, other than a will, made by a person, including, without limitation, a power of attorney or a trust.

Amendment History
Alta. Reg. 140/2013, s. 2

Currency
Alberta Current to Gazette Vol. 112:19 (October 15, 2016)

End of Document

Alta. Reg. 124/2010, s. 2.14

s 2.14 Self-appointed litigation representatives

Currency

2.14Self-appointed litigation representatives

2.14(1) If an individual or estate who is required to have a litigation representative under rule 2.11 does not have one, an interested person

(a) may file an affidavit in Form 1 containing the information described in subrule (2), and by doing so becomes the litigation representative for that individual or estate, and

(b) where an interested person has, or proposes to, become the litigation representative under clause (a) for an estate, the interested person must serve notice of the appointment in Form 2 on the beneficiaries and heirs at law of the deceased.

2.14(2) The affidavit must include

(a) the interested person's agreement in writing to be the litigation representative,

(b) the reason for the self-appointment,

(c) the relationship between the litigation representative and the individual or estate the litigation representative will represent,

(d) a statement that the litigation representative has no interest in the action adverse in interest to the party the litigation representative will represent,

(e) if the litigation representative is an individual, a statement that the litigation representative is a resident of Alberta,

(f) if the litigation representative is a corporation, the place of business or activity of the corporation in Alberta, and

(g) an acknowledgment of potential liability for payment of a costs award attributable to or liable to be paid by the litigation representative.

2.14(3) If a person proposes to become a self-appointed litigation representative for the estate of a deceased person, the affidavit referred to in subrule (2) must, in addition to the matters set out in subrule (2), disclose any of the following matters that apply:

(a) whether the estate has a substantial interest in the action or proposed action;

(b) whether the litigation representative has or may have duties to perform in the administration of the estate of the deceased;

(c) whether an application has been or will be made for administration of the estate of the deceased;

(d) whether the litigation representative does or may represent interests adverse to any other party in the action or proposed action.

(e) [Repealed Alta. Reg. 143/2011, s. 2(b).]

2.14(4) A person proposing to become a self-appointed litigation representative has no authority to make or defend a claim or, without the Court's permission, to make an application or take any proceeding in an action, until the affidavit referred to in subrule (1)(a) is filed.

Amendment History
Alta. Reg. 143/2011, s. 2

Currency
Alberta Current to Gazette Vol. 112:19 (October 15, 2016)

End of Document

COURT FILE NUMBER	**1103-14112**
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT R.S.A. 2000, CT-8 AS AMENDED
	IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO.19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Trust")
APPLICANTS	**ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, AND CLARA MIDO, AS TRUSTEES FOR THE 1985 SAWRIDGE TRUST**

UNDERTAKING RESPONSES OF PATRICK TWINN
FROM THE QUESTIONING ON AFFIDAVIT ON SEPTEMBER 22, 2016

Tab	Undertaking	Status
1.	ADVISE IF APPLICATION ON BEHALF OF PATRICK TWINN'S DAUGHTER IS STILL BEING PURSUED NOW THAT THE OFFICE OF PUBLIC TRUSTEE AND GUARDIANSHIP IS INVOLVED. **Answer: Currently the OPT is representing Aspen, however, I reserve my right to apply to be involved on her behalf in the future.**	
2.	ADVISE IF PATRICK TWINN'S WIFE WILL BE MAKING HER OWN INDEPENDENT APPLICATION TO BECOME A PARTY IN THE ACTION. **Answer: No. I will also not represent her in these proceedings.**	

Tab	Undertaking	Status
3.	ADVISE WHAT IS MEANT BY THE PHRASE "WITHOUT EXCEPTION" IN PARAGRAPH 9 OF PATRICK TWINN'S AFFIDAVIT. **Answer: That there has never been a time in my life that I am aware of that I have not been a Beneficiary.**	
4.	ADVISE WHY PATRICK TWINN IS A BENEFICIARY OF THE 1986 TRUST. **Answer: To the best of my knowledge, as a member of the Sawridge Indian Band, I qualify as a Beneficiary of the 1986 Trust. I believe I have been on the Band List since shortly after my birth.**	
5.	ADVISE IF PATRICK TWINN BELIEVES THE APPEAL TO THE ELECTORS AFTER THE CHIEF AND COUNCIL MAKE A DECISION ABOUT MEMBERSHIP IS FLAWED. Answer: **On the band website, there is no specified set criteria for how membership decisions are made that I am aware of. From my observation the process appears to be subjective rather than objective. This, in my opinion, causes concerns with the process and I am personally aware of some circumstances which show this.** **For example:** **1. I understand that a decision about membership is voted on only by those who attend each meeting where membership applications are reviewed and considered rather than everyone eligible to vote voting which could lead to inconsistent results.** **2. Gina Donald submitted 3 membership applications – the 1st application in 1990s; the 2nd in 2005; "the band lost both applications"; Gina Donald submitted a 3rd application in 2009. To date, the chief and council have not made a decision on her application. Both her parents are registered Indians. Her mother, Lily Potskin, was court ordered on to the band list in 2003. In contrast, the children of Clara Midbo and Frieda Draney, sisters to my late father, were added to the band list within a month or**	

Tab	Undertaking	Status
	so of applying. 3. It is my understanding that my nephew Kieran Cardinal's father is the half-brother of Chief Roland Twinn and Kieran should have been on the band membership list yet Kieran was forced to go through a process that took more than two decades.	
6.	ADVISE OF PATRICK TWINN'S POSITION ON HOW THE DEFINITION OF BENEFICIARY SHOULD CHANGE IN THE 1985 TRUST. (UNDER ADVISEMENT) Answer: Once I am a party I am open to discussing the definition of Beneficiary with the parties affected and the trustees and counsel.	
7.	ADVISE IF PATRICK TWINN BELIEVES THE CHAIR AND ADMINISTRATOR ARE A PARTY TO THE ACTION. (UNDER ADVISEMENT) Answer: Brian Heidecker and Paul Bujold were in the room during my questioning and so I thought that was because they were Parties to the Action.	
8.	ADVISE IF BERTHA IS STILL PART OF THE ELDERS COMMITTEE. Answer: I cannot speak to this as fact as I am not Bertha, but to the best on my knowledge no she is not, I believe she was an elected official from 1997 – 2015.	

Tab	Undertaking	Status
9.	CONFIRM THAT AT THIS POINT OTHER THAN BERTHA, THE ONLY ELECTED OFFICIAL WOULD BE THE CHIEF. **Answer: I cannot speak to this as fact as I am not an elected official however to the best of my knowledge, Roland is currently the only elected official however, Bertha L'Hirondelle and Justin Twin only ceased to be elected officials February, 2015. Clara Midbo was also an elected official.**	
10.	ADVISE IF CURRENTLY A MAJORITY OF THE TRUSTEES ARE ELECTED BAND OFFICIALS. **Answer: see my answer to questions 9.**	
11.	ADVISE IF PATRICK TWINN MEANT ANYTHING ELSE IN RESPECT OF PAST BENEFICIARIES IN PARAGRAPH 15 OF HIS AFFIDAVIT, OTHER THAN DECEASED BENEFICIARIES. **Answer: What I meant by past beneficiaries is the interest of deceased Beneficiaries surviving children and/or spouses who may also be Beneficiaries.**	
12.	REVIEW RECORDS AND ADVISE IF PATRICK TWINN RECEIVED A LETTER FROM THE TRUST IN 2011 NOTIFYING HIM OF A COURT ACTION. (UNDER ADVISEMENT) **Answer: No. Nor has Paul Bujold communicated with me as he promised in his January 4, 2010 letter.**	
13.	PRODUCE ALL FINANCIAL STATEMENTS, INCLUDING EMPLOYMENT INCOME, ASSETS AND THEIR VALUES, AND SUPPORTING DOCUMENTS IN RESPECT OF THE APPLICATION FOR FULL INDEMNIFICATION. **Answer: See attached.**	

DATE OF MAILING: 24-MAY-2016

WALTER PATRICK TWINN

YOUR PAYMENT SUMMARY

Payment due	$3,236.55
Due date	Jun 30, 2016

To avoid late-payment penalties, pay in full by the due date.

2016 PROPERTY TAX NOTICE — ACCOUNT

Description	Tax Rate	Amount
Municipal Taxes		
Residential	.0056427	$2,282.47
Local Improvement Charges		
Annual Local Improvements		$225.08
Total		$2,507.55
Provincial Education Taxes (Collected on behalf of Alberta Government)		
Residential	.0023178	$937.55
Provincial Education Requisition Allowance		
Residential	.0000435	$17.59
Total		$955.14
2016 Property Taxes		**$3,462.69**
Balance as of May 2, 2016		($226.14)
Total Payment Due		**$3,236.55**

2016 ASSESSMENT
$404,500

TAXATION YEAR
January 1 - December 31, 2016

PROPERTY DETAILS

Account Owners: Walter Patrick Twinn

Property Address:

Legal Description:

2015 Property Tax: $3,124.65

Your municipal tax levy includes $330.27 for policing.

For 2016, an additional $7.7 million has been dedicated to the Neighbourhood Renewal Program. Your share of this amount is $11.41

See reverse for more information

Please do not mark above this line

2016 PROPERTY TAX NOTICE - REMITTANCE

Copy mailed to SCOTIA MORTGAGE CORPORATION

Account:
Property Address:
Account Owners: Walter Patrick Twinn
Mortgage:

DUE DATE Jun 30, 2016

PAYMENT DUE $3,236.55

AMOUNT PAID

:03339=900:

96

Scotiabank®

Page created on Oct 19, 2016 - 11:50 a.m. ET

Banking

Apply for more banking products

Account			Balance $	Quick Menu
Basic Banking Plan -			5,022.10	
Money Master -			0.00	
	Total Banking Balance	CAD	$5,022.10	

Investments

Apply for more investing products

Account			Balance $	Quick Menu
Registered Savings - -		CAD	1,787.99	
		USD	0.00	
Registered Savings -		CAD	8,067.36	
		USD	0.00	
Tax-Free Savings -		CAD	3,834.70	
		USD	0.00	
	Total Investments Balance	CAD	13,690.05	
		USD	0.00	
	Consolidated Investments Balance	CAD	$13,690.05	

Borrowing

Apply for more borrowing products

Account			Balance $	Quick Menu
Scotia Momentum No-Fee VISA -			1,166.55	
Scotia Total Equity Plan -				
Scotia Mortgage -			321,579.58	
	Total Borrowing & Credit Cards	CAD	$322,746.13	

Additional Assets & Liabilities

Edit

Scotia iTRADE Practice Account

Practice makes perfect

Practice trading equities, options and mutual funds with virtual money.* Learn more about Scotia iTRADE Practice Accounts.

Enroll for a Practice Account today!

OR open a new Scotia iTRADE account.

Additional details you may need:

HollisWealth™ account balance(s) show a market value as of the previous business day and are based on the account currency.

US dollar account balances are converted to Canadian dollars using a market rate from the previous day's closing and are given for information purposes only. Foreign exchange rates can fluctuate at any time and the amount stated here may not be the rate applicable to any transaction.

Monthly Expenses

Monthly Income	
BCG	4,644.28
Rent	1,150.00
Other	
Total	5,794.28
Monthly Expenses	
House	
Mortgage	2,105.22
Epcor	150
Direct Energy	150
Shaw	200
Telus	100
Insurance	
Maintenance	100
Property Taxes	275
Vechicle	
Lexus Canada	518.46
Insurance	125
Auto Gas	150
Auto Maintenance	75
Personal	
Food	600
Clothing	150
Entertainment	400
Royal Glenora Club	275
Investments	300
[redacted]	
Total Expenses	5,673.68
NOI	120.60

DD144

354, 10113 - 104 Street
Edmonton, Alberta T5J 1A1

Non-Negotiable -- This is not a cheque.

09/30/2016 $**4,644.28

Twinn, Walter P.

.....4,644.28

Ballad Consulting Group Inc.

Twinn, Walter P. 09/30/2016 DD144

For Pay Period: 09/30/2016

	Hours	Period	YTD
Salary	162.50	6,500.00	36,982.75
Gross Pay		6,500.00	36,982.75
Gross Paid		6,500.00	36,982.75

	Period	YTD
CPP	307.31	1,744.01
EI	122.20	695.28
Tax	1,390.32	7,727.80
LTD premium	35.89	179.45
Withheld	1,855.72	10,346.54
Net Pay	4,644.28	26,636.21
EI Insurable Hours	162.50	
Vacation		3.90
Paid Leave		1.29
Days 3		
Days 4		
Days 5		

THIS IS NOT A TAX BILL YOUR TAX NOTICE WILL ARRIVE IN MAY 2016

DATE OF MAILING: 04-JAN-2016

JOHN SERAFINCHON
DEBORAH A MCDERMOTT

YOUR PROPERTY IS ASSESSED AT

$251,500

This value is determined by the City based on local market conditions as of July 1, 2015.

2016 PROPERTY ASSESSMENT NOTICE—ACCOUNT

ASSESSMENT DETAILS

Property Use
100% SINGLE FAMILY DWELLING (100)
Taxable

Assessment Class **Status**
Residential 100%

ESTIMATED PROPERTY TAX

2016 Assessment: $251,500
2015 Assessment: $264,000

2016 Estimated Taxes: $1,922.00
2015 Taxes: $2,046.00

This estimate does not include 2016 budget increases. Refer to the back of this notice for more details.

PROPERTY DETAILS

Valuation Group
Residential North
Neighbourhood

Property Type
Land and Improvement
Property Address

School Support Declaration
Public 50%
Separate 50%
Undeclared 0%

Account Owners
John Serafinchon; Deborah A Mcdermott

Legal Description

Learn how assessment relates to taxes and confirm assessment details about your property.
Your password: UZBF4
edmonton.ca/assessment

Address concerns related to your assessment or update information about your property.
assessment@edmonton.ca
or call **311** (780-442-5311).

Learn more about the Assessment Review Board complaint process or file a formal complaint.
edmontonarb.ca
Deadline: 11-MAR-2016 Fee: $50

Are we addressing your assessment-related needs? Tell us about your experience.
edmonton.ca/assessment


ATB Online
Account Activity
ATB Investor Services
Current Balance: 915.17

Capital One

Customer Relations 1-800-481-3239
www.capitalone.ca

Statement Period: Aug 27 - Sep 26, 2016

MINIMUM PAYMENT NOTICE: If you make only the minimum payment, we estimate that it will take you 28 years to pay off your balance.

Gold MasterCard®

New Balance	Minimum Payment	Due Date
$2,348.17	$67.00	Oct 22, 2016

Please pay at least this amount

Credit Limit: $2,300.00	Cash Advance Credit Limit: $2,300.00
Available Credit: $0.00	Available Credit for Cash Advances: $0.00

Capital One

New Balance	Minimum Payment	Due Date
$2,348.17	$67.00	Oct 22, 2016

Please pay at least this amount.

Amount Enclosed .

DEBORAH SERAFINCHON

Capital One Bank (Canada Branch)
P.O. Box 521 Scarborough STN D
Scarborough, ON M1R 5S4

Gold MasterCard®

New Balance	Minimum Payment	Due Date
$2,348.17	$67.00	Oct 22, 2016

Credit Limit:	$2,300.00
Available Credit:	$0.00
Cash Advance Credit Limit:	$2,300.00
Available Credit for Cash Advances:	$0.00

Government of Alberta
Statement of Earnings and Withholdings
Non-Negotiable Retain For Your Records

Pay Group:	MON-Salaried	Business Unit	
Pay Begin Date:	09/25/2016	Advice #:	
Pay End Date:	10/08/2016	Advice Date:	10/07/2016

Deborah Serafinchon

Employee ID:
Department:
Location:
Job Title:
Pay Rate:
Ministry:

TAX DATA:	Federal	AB
Net Claim Amt.:	11,474.00	18,451.00
Spcl. Letters:		
Addl. Pct.:		
Addl. Amt.:		

HOURS AND EARNINGS

		Current			YTD	
Description	Rate	Hours	Earnings	Hours	Earnings
Salary			2,066.65	1,442.75	40,803.71
Time and onehalf overtime	47.855793	21.00	1,004.97	90.25	4,189.00
Acting Incumbent Pay			0.00		2,403.10
Special Leave			0.00	7.25	206.67
Wage - Regular Retro			0.00		1,822.40
TOTAL:		21.00	3,071.62	1,540.25	49,424.88

TAXES

Description	Current	YTD
CIT	584.30	7,904.06
CPP	145.77	2,320.40
EI	57.75	929.19
TOTAL:	787.82	11,153.65

BEFORE-TAX DEDUCTIONS

Description	Current	YTD
Pension Public Service	241.80	5,183.98
Union Dues	25.83	565.39
TOTAL:	267.63	5,749.37

AFTER-TAX DEDUCTIONS

Description	Current	YTD
MyCHOICE Enhanc Presc Drug	32.92	667.76
MyCHOICE Enhanced Dental Fa	13.67	268.60
MyCHOICE Ext Med Enhanced	30.31	588.92
MyCHOICE Core Life 2.5X	3.55	65.42
CHOICE AD/D	0.31	6.14
MyCHOICE Dependents Life Ins	2.19	43.80
Long Term Disability Income	28.01	556.06
TOTAL:	110.96	2,196.70

EMPLOYER PAID BENEFITS

Description	Current	YTD
MyCHOICE Enhanc Presc Drug	26.53	521.24
MyCHOICE Enhanced Dental Fa	51.56	1,013.20
MyCHOICE Ext Med Enhanced	13.66	265.40
MyCHOICE Core Life 2.5X*	7.23	131.76
CHOICE AD/D*	0.62	12.34
Long Term Disability Income	28.01	556.06
Pension Public Service	241.80	5,183.98

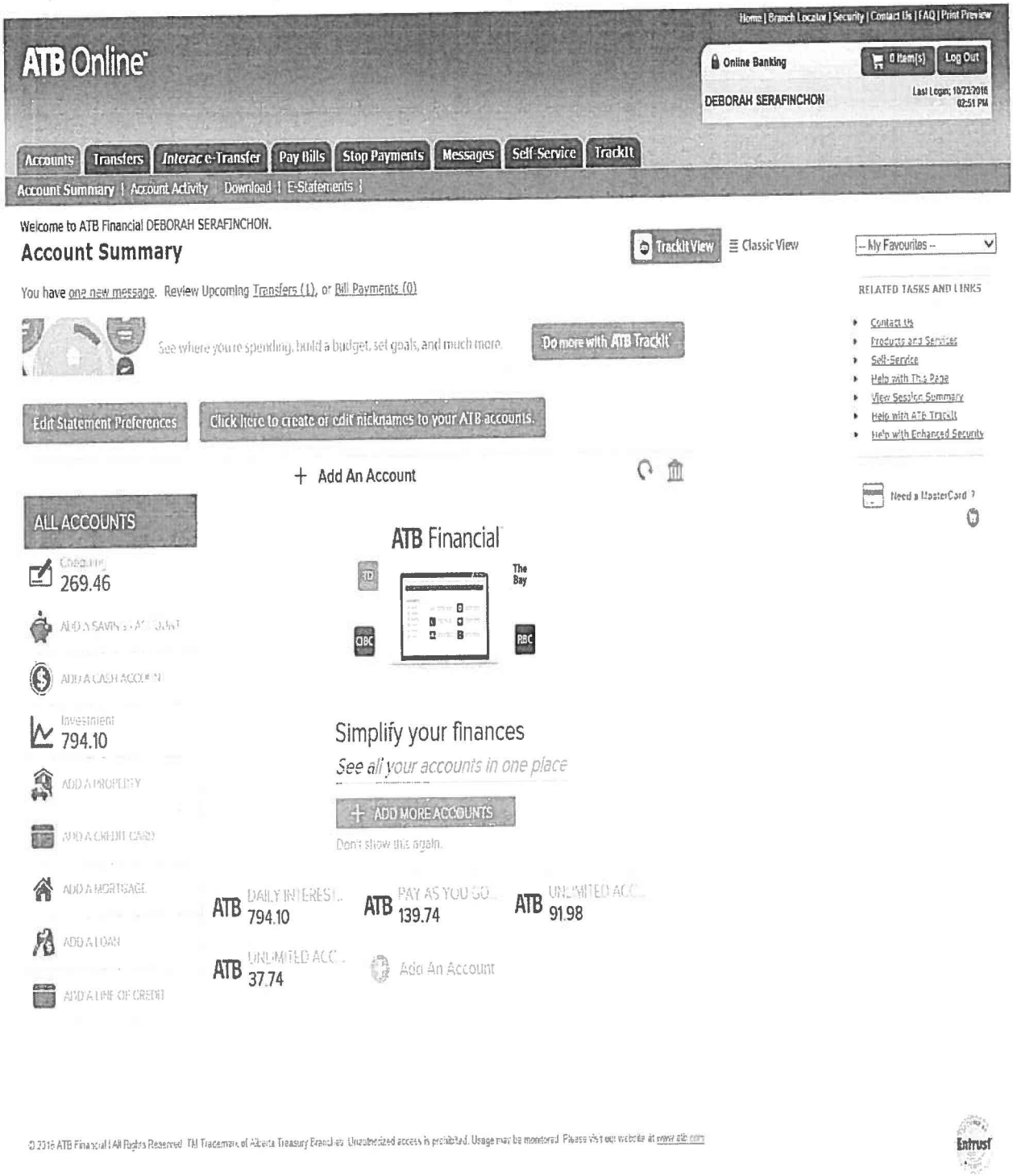
*TAXABLE

	TOTAL GROSS	CIT TAXABLE GROSS	TOTAL TAXES	TOTAL DEDUCTIONS	NET PAY
Current	3,071.62	2,811.84	787.82	378.59	1,905.21
YTD	49,424.88	43,819.61	11,153.65	7,946.07	30,325.16

NET PAY DISTRIBUTION

	Account Type	Account Number	Amount
Advice	Checking		$1,809.95
	Checking		$95.26
		TOTAL:	$1,905.21

MESSAGE:



SECTION 2

VEHICLE MAKE: Dodge

YEAR: 2010

VEHICLE ACCESS CODE (VAC):

MODEL OR SERIES: Caravan

BODY COLOUR: Red

FUEL: Flexible

VEHICLE STYLE: Van

LICENCED MASS:

VEHICLE IDENTIFICATION NO. (VIN):

UNIT NO.:

VEHICLE STATUS: active

REGULATIONS:

BUS CAPACITY:

SPECIAL CONDITIONS:

MOTOR HOME SUPERSTRUCTURE / SECONDARY PARTS DESCRIPTION
YEAR-MAKE:

SERIAL NO.:

LICENCE PLATE NO. CLASS
3
EXPIRES ~~2016/10/31~~ REGISTRIES

NOT VALID UNLESS STAMPED BY REGISTRY AGENT OFFICE
VALIDATED
OCT 29 2015
SHERWOOD PARK
ALBERTA N820

This Certificate is to be signed on the back by the registrant(s) and presented on demand of a Peace Officer.

REGISTRAR OF MOTOR VEHICLE SERVICES

Alberta
Vehicle Registration Certificate

SECTION 1

VALIDATION NUMBER

EXPIRES IN 2016

This certificate is not valid unless a validation sticker is affixed on section 1 and the Registry Agent office stamp appears in section 2.

LICENCE PLATE NO.	CLASS	LICENCED MASS	VEHICLE STATUS
	3	Kg.	active
EXPIRES	TYPE OF OPERATION		
2016/10/31	Passenger		

REGISTRATION NO.: R134709021

IF LEASED VEHICLE, LEASING COMPANY NAME AND MVID

NAME & ADDRESS OF REGISTRANT(S): SERAFINCHON DEBORAH ANNE

TYPE: INDIVIDUAL

CLIENT'S MVID

REG3136 (98/10) MVD9009

CONTRACT #

Other Fees (continued)	

DISCLOSURE STATEMENT (The following information is effective as of the date of this Contract)

1	CASH SELLING PRICE (incl. delivery and extras)	$	18,105.25
2	GST/HST	+ $	905.26
3	PST	+ $	0.00
4	WARRANTY/SERVICE/GAP CONTRACT	+ $	0.00
5	LICENCE	+ $	0.00
6	GASOLINE	+ $	0.00
7	**CASH PRICE**	= $	19,010.51
8	OPTIONAL INSURANCES (incl. taxes)	+ $	0.00
9	PPSA REGISTRATION FEES	+ $	31.00
10	ADMINISTRATION FEE	+ $	499.00
11	**BALANCE DUE (7+8+9+10)**	= $	19,540.51
12	CASH DOWN PAYMENT (incl. rebates)	- $	550.00
13	TRADE-IN ALLOWANCE	- $	0.00
14	LIEN PAYOUT ON TRADE-IN	+ $	0.00
15	**LOAN AMOUNT (11-12-13+14)**	= $	18,990.51
16	TOTAL OF ADVANCES (11-10-9+14)	= $	19,010.51

Provincial Disclosure (Manitoba/Saskatchewan/Nova Scotia/New Brunswick):

(a)	Total Cash Price (7+8+9)	$	19,041.51
(b)	Balance of Total Cash Price ((a)-12-13)	$	18,491.51
(c)	Balance Owing ((b) + 28)	$	36,326.16
(d)	Aggregate Cost ((a) + 28)	$	36,876.16
(e)	Balance of Cash Price (7 - 12 -13)	$	18,460.51
(f)	Fees & Insurance (8 + 9)	$	31.00

PAYMENT INFORMATION

17	TERM / NUMBER OF BI-WEEKLY PAYMENTS		156
18	AMORTIZATION PERIOD OF CONTRACT		156
19	LOAN AMOUNT ADVANCE DATE		DEC/19/2011
20	REGULAR PAYMENT DATE		EVERY 2ND MONDAY
21	FIRST REGULAR PAYMENT DATE		JAN/02/2012
22	LAST REGULAR PAYMENT DATE		NOV/27/2017
23	REGULAR BI-WEEKLY PAYMENT	$	232.86
24	TOTAL NUMBER OF REGULAR PAYMENTS		155
25	FINAL PAYMENT	$	232.86
26	FINAL PAYMENT DATE		DEC/11/2017
27	TOTAL AMOUNT PAYABLE (23x24+25)	$	36,326.16

INTEREST AND COST OF BORROWING

	ANNUAL INTEREST RATE		24.50%
	COST OF BORROWING		
	TOTAL INTEREST	$	17,335.65
	ADMINISTRATION FEE (10)	+ $	499.00
28	**COST OF BORROWING**	=$	17,834.65
	ANNUAL PERCENTAGE RATE		25.67%

(Cost of Borrowing expressed as an annual interest rate)

Interest is charged daily at the Annual Interest Rate on the outstanding Loan Amount from the Loan Amount Advance Date. If you do not pay any Regular Payment or the Final Payment when due, interest will be charged on those overdue amounts at 10% above the Annual Interest Rate until those amounts are paid in full. **Default Charges:** If you do not pay any amount when due, you must (i) reimburse us for the full amount of all legal costs and other expenses that we incur to collect the amount that you owe to us, and (ii) pay us $75 for each cheque or other pre-authorized debit that is not honoured (unless prohibited by law).

Prepayment and Application of Payments: You may prepay all or any part of the Loan Amount at any time without charge or penalty, but if you prepay part of the Loan Amount you must still continue to pay each Regular Payment when it is due. Each payment that you make (other than for a specific fee) is applied first to interest, then to the outstanding Loan Amount and then to default charges and administration fees. If you prepay the Loan Amount in full, we will refund to you a portion of the administration fee in Line 10 of the Disclosure Statement determined by multiplying the amount by a fraction which is the number of days in the unexpired portion of the Term of the Contract divided by the number of days in the Term of the Contract.

Optional Services: Any optional insurance fees are included in each Regular Payment and must be paid by you with each Regular Payment. You have the right to cancel any optional insurance upon giving 30 days notice in writing. **PLEASE NOTE:** By signing below, **(A)** you acknowledge that you have read all sections of this Contract including the Additional Provisions on the pages that follow, and that the Additional Provisions and Dealer's Assignment and Transfer Agreement are a part of this Contract, **(B)** you acknowledge that we remain the owner of the Vehicle until you pay the Loan Amount, interest thereon and all fees and charges that you owe to us under this Contract (collectively, with all other obligations hereunder, the "Obligations") and that we therefore have a purchase-money security interest in the Vehicle as security for payment of your Obligations; and **(C)** you acknowledge that you have received a completed copy of this Contract and that this Contract has been assigned to TD Financing Services Inc.

DATED AT EDMONTON THIS 19 DAY OF DEC, 2011.

X _____ Dealer's Signature

X _____ Buyer's Signature

X _____ Co-Buyer's Signature

X _____ Co-Signor's Signature

Freedom Ford Sales Ltd.
7505 – 75 St. NW
Edmonton, AB T6C 4H8
Phone: 780-462-7575 Fax: 780-468-2719
customercare@freedomfordsales.com • www.freedomford.ca

CONDITIONS ON BACK FORM PART OF THIS CONTRACT

G.S.T. # R101888634

DAY	MONTH	YEAR
20	JUL	2016

PURCHASER (PLEASE PRINT) DEBORAH ANNE SERAFINCHON		ADDRESS	APT. No.
CITY EDMONTON	PROV. AB	POSTAL CODE T5W 2X6	RES. PHONE	E-mail
EMPLOYER		OCCUPATION	BUS PHONE

OPT.	OPTIONAL EQUIP.	PRICE
	BASIC VEHICLE	43995.00
	TOTAL CASH SALE PRICE	43995.00

I/WE HEREBY OFFER TO PURCHASE FROM THE ABOVE DEALER, THE FOLLOWING MOTOR VEHICLE AND ALL OPTIONAL EQUIPMENT AND ACCESSORIES ON THE TERMS AND CONDITIONS HEREIN SET FORTH, INCLUDING THE CONDITIONS ON THE BACK HEREOF. WE DO NOT GUARANTEE YEAR OF THIS MOTOR VEHICLE.

NEW		MODEL YEAR 2013	MAKE FORD	MODEL NAME F150 PICKUP	MODEL No. W1E	COLOUR RED
DEMO		SERIAL No.				STOCK No.
USED	XX					

IF DEMONSTRATOR WARRANTY TIME IS MEASURED FROM ______ DISTANCE TRAVELLED MI / KM XX 60548 PURCHASER'S INITIALS

WARRANTIES NEW: MANUFACTURERS WARRANTY
USED: NO WARRANTY UNLESS STATED AS FOLLOWS:

TRADE IN DESCRIPTION & LIEN DISCLOSURE

☐ G.S.T. NON-REGISTRANT ☐ G.S.T. REGISTRANT
G.S.T. REGISTRANT NO. G.S.T. DUE ON TRADE IN
YEAR N/A MAKE MODEL
SERIAL No.
MI / KM ODOMETER READING

I HEREBY TRANSFER TO THE DEALER ALL MY RIGHT, TITLE AND OWNERSHIP IN THE MOTOR VEHICLE, AND I DECLARE I AM THE SOLE OWNER AND POSSESSOR OF SAME AND THAT THERE ARE NO MORTGAGES, LIENS, NOTES OR CLAIMS OF ANY KIND OR NATURE ADVERSE TO MY RIGHTS OF, UPON OR AGAINST THE VEHICLE OTHER THAN AS STATED BELOW.

I HEREBY STATE THAT TO THE BEST OF MY KNOWLEDGE THE ODOMETER READING AS STATED ABOVE INDICATES THE TOTAL DISTANCE ACTUALLY TRAVELLED BY THE VEHICLE.

PURCHASER INITIALS X ______

LIEN PAYBLE TO N/A
ADDRESS ESTIMATED AMOUNT $ ______

TERMS OF SETTLEMENT

PURCHASER INSURANCE INFORMATION

NAME OF INSURANCE COMPANY
POLICY No. EXPIRY DATE
NAME OF AGENT PHONE No.
DRIVER'S LICENSE No. EXPIRY DATE
THIS AGREEMENT SUBJECT TO FOLLOWING ADDITIONAL PROVISIONS

PRIVACY NOTICE

THE DEALER INTENDS TO COLLECT, USE AND DISCLOSE YOUR PERSONAL INFORMATION IN ACCORDANCE WITH THE PRIVACY POLICY SET FORTH ON THE REVERSE PAGE. PLEASE REVIEW THE PRIVACY POLICY CAREFULLY AND INITAL IF YOU WISH TO OPT OUT AND LIMIT THE PURPOSES FOR WHICH THE DEALER CAN COLLECT, USE OR DISCLOSE YOUR PERSONAL INFORMATION.

TOTAL BALANCE DUE 47624.47

EXTENDED WARRANTY CONTRACT

☐ OFFERED ☐ ACCEPTED ☒ REFUSED

PURCHASER INITALS X ______

ACKNOWLEDGEMENT OF CONDITIONS

THE PURCHASER UNDERSTANDS THAT THIS AGREEMENT DOES NOT BECOME BINDING ON THE PARTIES HERETO UNTIL ACCEPTED AND EXECUTED BY A DULY AUTHORIZED OFFICIAL OF THE DEALER. DEPOSITS, PARTIAL PAYMENTS AND DOWN PAYMENTS ARE NON-REFUNDABLE. THE PURCHASER ACKNOWLEDGES HAVING READ THE CONDITIONS AND WARRANTIES AND STIPULATIONS CONTAINED HEREIN, INCLUDING THOSE SET OUT ON THE REVERSE SIDE HEREOF, AND AGREES THAT ALL SUCH CONDITIONS AND WARRANTIES FORM PART OF AND ARE INCLUDED IN THIS AGREEMENT. IF THE PURCHASER IS AN INDIVIDUAL, THE PURCHASER CONSENTS TO ANY PUBLIC BODY DISCLOSING PERSONAL INFORMATION ABOUT THE PURCHASER IN CONNECTION WITH THE SALE, PURCHASE OR FINANCING OF THE MOTOR VEHICLE.

ACTUAL DELIVERY DATE

DAY	MONTH	YEAR

SALESPERSON'S NAME (PRINT)

SALESPERSON'S SIGNATURE

DEALER ACCEPTANCE

DATE 20 JUL 2016

NAME OF OFFICIAL (PRINT)

SIGNATURE TITLE

THIS ORDER IS NOT BINDING UNLESS ACCEPTED BY AN AUTHORIZED OFFICIAL OF THE DEALER.

BILL OF SALE DATED THIS 20 DAY OF JUL 2016.

PURCHASER'S SIGNATURE X ______

OFFICE USE ONLY

CUSTOMER COPY

INSURE VERBAL AGREEMENTS ARE IN WRITING

In the Provincial Court of Alberta

Docket: FF903 002746/lmc

Application under the *Family Law Act*

Between:

Deborah Anne SERAFINCHON
John Albert SERAFINCHON

Applicant(s)

and

Lisa Chantel SERAFINCHON
Darcy Walter SMOOK

Respondent(s)

Consent Guardianship Order

Heard before the Honourable Judge P. E. Kvill
at Edmonton Family Court
on January 26, 2015

The Applicants, Deborah Anne SERAFINCHON and John Albert SERAFINCHON, have applied to the Court for an Order to be appointed as a guardian of the child:

Summer Anne SERAFINCHON, born July 17, 2007

The Applicants, Deborah Anne SERAFINCHON and John Albert SERAFINCHON, were present in Court, and were not represented by counsel.

The Respondents, Lisa Chantel SERAFINCHON and Darcy Walter SMOOK, were not present in Court, were not represented by counsel and consented to this application in their filed responses.

The Court has read the Claim and the documents filed with the Court. The Court makes this Order after hearing what was presented.

The Court finds that:

1. Deborah Anne SERAFINCHON and John Albert SERAFINCHON reside in Alberta.
2. Deborah Anne SERAFINCHON and John Albert SERAFINCHON are suitable and are able and willing to exercise the powers, responsibilities and entitlements of guardianship regarding the child.
3. It is in the best interests of the child for Deborah Anne SERAFINCHON and John Albert SERAFINCHON to be appointed as a guardian's of the child.

The Court orders that:

1. Deborah Anne SERAFINCHON and John Albert SERAFINCHON are appointed as a guardian of the child.
2. This Order shall remain in effect until further Order of this Court.

for ~~Provincial Court Judge or~~ Clerk of the Court

Royal Bank of Canada
P.O. Bag Service 2650
Calgary AB T2P 2M7

Your RBC personal banking account statement

From August 24, 2016 to September 23, 2016

SHELBY THERESA TWINN

Summary of your account for this period

RBC Signature No Limit Banking™

Royal Bank of Canada

Your opening balance on August 24, 2016	$1,740.89
Total deposits into your account	+ 3,249.65
Total withdrawals from your account	- 2,833.80
Your closing balance on September 23, 2016	**= $2,156.74**

Details of your account activity

Your investment statement
July 01, 2016 to September 30, 2016

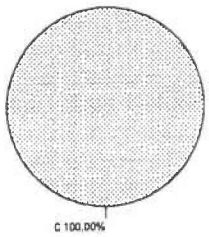
Royal Mutual Funds Inc.
Group Registered Retirement Savings Plan

Your account number **Your branch**

SHELBY THERESA TWINN

Your beneficiary information

Summary of your investments	Value on Jun 30 2016 ($)	Value on Sep 30 2016 ($)	Change ($)	Investment mix Sep 30 2016 (%)
A Money Market Funds				
B Fixed Income Funds				
C Balanced Funds	1,279.00	1,956.66	677.66	
D Canadian Equity Funds				
E U.S. Equity Funds				
F International Equity Funds				
G Global Equity Funds				
Total	$1,279.00	$1,956.66	$677.66	



Value of your account on September 30, 2016	$1,956.66	$1,956.66	$1,956.66

Your account performance

For important information about this summary page, please see the end of this statement.

RBC
Royal Bank

RBC Rewards® Visa‡ Gold

SHELBY THERESA TWINN

STATEMENT FROM AUG 26 TO SEP 26, 2016

RBC ROYAL BANK
CREDIT CARD PAYMENT CENTRE
P.O.BOX 4016, STATION "A"
TORONTO, ONTARIO M5W 2E6

NEW BALANCE	MINIMUM PAYMENT	PAYMENT DUE DATE	AMOUNT PAID
$3,190.25	$69.00	OCT 21, 2016	$

RBC Rewards® Visa‡ Gold

Payment options
- Telephone banking 1-800-769-2511
- Online banking www.rbcroyalbank.com
- RBC Royal Bank ATM
- RBC Royal Bank Branch

SHELBY THERESA TWINN

MEDICARD
iFinance®
CANADA

Telephone: 1-888-689-9876 Fax: 1-888-689-9862 www.medicard.com

Send Completed Documents to either:
iFinance by Email: credit@medicard.com
or
iFinance by Fax: 1-888-689-9862

May, 4, 2016

Shelby T. Twinn

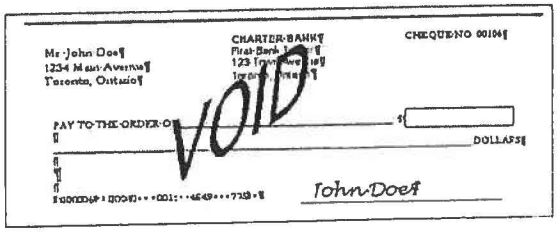
Ms Twinn:

iFinance Canada Inc (iFinance) is pleased to inform you that your application for financing for the sum of $9,130.14 has been approved.

Your payments will be $251.30 dollars. iFinance will debit your chequing account on the 15th day of each month for 60 months beginning June 15, 2016. (see the enclosed Disclosure Statement).

a) iFinance will provide financing only upon receipt of the following signed document (stated in 1).
b) Upon receipt of the documents, iFinance will inform Enagic Canada Corporation that financing has been approved.
c) The funds will be paid directly to Enagic Canada Corporation.

1. Sign the enclosed form titled: "Disclosure Statement". Retain a copy for your records.
2. Scan and email (or fax) a personalized cheque marked void (or photocopy of) to iFinance. Counter cheques are not accepted.
3. Scan and email (or fax) lightly copied government issued photo and signature identification.



Note: For your convenience, you can use this page as your cover sheet when faxing to iFinance.

If there is any change of address or Bank Account, it is your obligation to inform iFinance immediately.

Jasmine Gale
iFinance, Credit Department

Contact Agent: Jasmine G. 1-888-689-9876, Extension 116

TERRACOR INDUSTRIES LTD
350, 10403 172ND STREET, EDMONTON, AB T5S 1K9

PAYMENT DATE: 20161021 (Y/A M/M D/J)
PAY END DATE: 20161015 (Y/A M/M D/J)

STATEMENT OF EARNINGS AND DEDUCTIONS

EARNINGS	DATE YMMDD	RATE	CURRENT HRS/UNITS	CURRENT AMOUNT	YTD HRS/UNITS	YTD AMOUNT
REGULAR		20.0000	73.00	1460.00	1503.63	30336.60
OVERTIME		30.0000	0.50	15.00	30.00	922.50
STAT HOL		20.0000	8.00	160.00	56.00	1120.00
VAC TERM		0.0000	0.00	0.00	0.00	726.00
EETXLIFE		0.0000	0.00	6.98	0.00	146.58
ERRRSP%		0.0000	0.00	49.05	0.00	971.38
ADVANCE		0.0000	0.00	0.00	0.00	210.00
TOTAL EARNINGS				1691.03		34433.06
LESS TAXABLE BENEFITS				56.03		1117.96
TOTAL GROSS				1635.00		33315.10

DEDUCTIONS	CURRENT AMOUNT	YTD AMOUNT	DEDUCTIONS	CURRENT AMOUNT	YTD AMOUNT
CPP	77.29	1552.91	EI CONT	30.74	622.37
FEDL TAX	232.69	4536.09	RRSP%EAR	49.05	916.18
ADVANCE	0.00	210.00	LTD	51.03	1071.63
TOTAL DEDUCTIONS				440.80	8909.18

NET PAY 1194.20

OTHER	CURRENT	YTD
VAC ACCR	59.00	524.36

NON NEGOTIABLE

SAVINGS ACCT:
DEDN. DEP. ACCT:
EMPL./PAYEE ID.:
OCCUPATION: ADMIN
NO. PAY PER.: 21 OF 27

NET PAY: $***1194.20

NOTIFICATION OF DEPOSIT TO ACCT.:

3

TWINN SHELBY

RBC Royal Bank®

Close

Credit Line

20 Oct 2016

CAD Credit Line

Credit Limit:	$ 8,670.45	**Payment Due Date:**	15 Nov 2016
Current Balance:	$ 8,670.45	**Interest Rate:**	6.20%
Credit Available:	$ 0.00	**Payment Amount:**	$ 133.26

Alberta GOVERNMENT

Vehicle Registration Certificate

Tab Validation Number

VEHICLE DESCRIPTION — **SECTION 2**

VEHICLE MAKE: Dodge
YEAR: 2005
VEHICLE ACCESS CODE (VAC):
MODEL OR SERIES: Neon Canada
BODY COLOR: M. Blue
FUEL: Gas
VEHICLE STYLE: 4 door
LICENCED MASS: kg
VEHICLE IDENTIFICATION NUMBER (VIN):
UNIT NUMBER:
VEHICLE STATUS: rebuilt
REGULATIONS:
BUS CAPACITY:
SPECIAL CONDITIONS:

SECTION 1

LICENCE PLATE NO.	CLASS	LICENCED MASS	VEHICLE STATUS
	3	kg	rebuilt

EXPIRY DATE (Y/M/D): 2017/09/30
TYPE OF OPERATION: Passenger

REGISTRATION NUMBER:
IF LEASED VEHICLE, LEASING COMPANY NAME AND MVID:

MOTOR HOME SUPERSTRUCTURE / SECONDARY PARTS DESCRIPTION

MAKE:
MODEL OR SERIES:
SERIAL NUMBER:
YEAR:

EXPIRY DATE (Y/M/D): 2017/09/30

NAME & ADDRESS OF REGISTRANT(S)

TYPE: INDIVIDUAL
CLIENTS MVID:

TWINN SHELBY THERESA

REGISTRY AGENT:

This Certificate to be signed on the back by the registrant(s) and presented on demand of a Peace Officer.

VALIDATED: 2016/10/06

ISSUED 2016/10/06
MAXIMUM SERVICE AMOUNT $*******84.45

REG0405 (2015/12)