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,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	BOOK OF AUTHORITIES OF THE APPLICANT BENEFICIARIES PATRICK TWINN, SHELBY TWINN, AND DEBORAH A. SERAFINCHON
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	BORDEN LADNER GERVAIS LLP Barristers and Solicitors Centennial Place, East Tower 1900, 520 – 3rd Avenue SW Calgary, Alberta T2P 0R3 Attention: Nancy L. 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

JUDICIAL CENTRE OF EDMONTON
FILED
SEP 30 2016
Clerk of the Court

LIST OF AUTHORITIES

Tab	Authority
1.	*Rizzo & Rizzo Shoes Ltd (Re),* [1998] 1 SCR 27
2.	*CanadianOxy Chemicals Ltd v Canada (Attorney General)*, [1999] 1 SCR 743
3.	*Indian Act* R.S.C. 1970, Chapter I-6 section 2(1), 5, 6, 10, and 11
4.	*1985 Sawridge Trust v Alberta (Public Trustee)*, 2015 ABQB 799
5.	*Trustee Act* RSA 2000 C.T-8
6.	*Re Lotzkar Estate* 50 D.L.R. (2d) 357
7.	*Taylor v. A.T.A.* 2002 ABQB 554
8.	*Deans v. Thachuk,* 2005 ABCA 368 *("Dean")* citing *Buckton v. Buckton*, [1907] 2 Ch. 406 (A.C.J.)
9.	*Huang v. Telus Corp. Pension Plan (Trustee of)* 2005 ABQB 40
10.	*British Columbia (Minister of Forests) v. Okanagan*, 2003 SCC 71
11.	*Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue Agency)*, 2007 SCC 2 (S.C.C.)
12.	*R. c. Caron* (2009), 446 A.R. 362 (Alta. C.A.)

1998 CarswellOnt 1
Supreme Court of Canada

Rizzo & Rizzo Shoes Ltd., Re

1998 CarswellOnt 1, 1998 CarswellOnt 2, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, 106 O.A.C. 1, 154 D.L.R. (4th) 193, 221 N.R. 241, 33 C.C.E.L. (2d) 173, 36 O.R. (3d) 418 (headnote only), 50 C.B.R. (3d) 163, 76 A.C.W.S. (3d) 894, 98 C.L.L.C. 210-006, J.E. 98-201

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez and Lindy Wagner on their own behalf and on behalf of the other former employees of Rizzo & Rizzo Shoes Limited, Appellants v. Zittrer, Siblin & Associates, Inc., Trustees in Bankruptcy of the Estate of Rizzo & Rizzo Shoes Limited, Respondent and The Ministry of Labour for the Province of Ontario, Employment Standards Branch, Party

Gonthier, Cory, McLachlin, Iacobucci, Major JJ.

Heard: October 16, 1997
Judgment: January 22, 1998
Docket: 24711

Proceedings: reversing (1995), 30 C.B.R. (3d) 1 (C.A.); reversing (1991), 11 C.B.R. (3d) 246 (Ont. Gen. Div.)

Counsel: *Steven M. Barrett* and *Kathleen Martin*, for the appellants.
Raymond M. Slattery, for the respondent.
David Vickers, for the Ministry of Labour for the Province of Ontario, Employment Standards Branch.

Subject: Employment; Insolvency

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

X Priorities of claims
X.2 Preferred claims
X.2.d Wages and salaries of employees
X.2.d.iv Type of wages claimable

Labour and employment law

III Employment standards legislation
III.2 Object of legislation

Labour and employment law

III Employment standards legislation
III.13 Termination of employment

III.13.b Termination pay
III.13.b.i Entitlement

Labour and employment law

III Employment standards legislation
III.13 Termination of employment
III.13.c Severance pay
III.13.c.i Entitlement

Headnote

Bankruptcy — Priorities of claims — Preferred claims — Wages and salaries of employees — Type of wages claimable

Trustee in bankruptcy closed bankruptcy employer's stores and paid employees all outstanding wages, commissions and vacation pay up to termination date — Ministry of Labour determined that employees were owed termination and severance pay, and filed claim with trustee which trustee disallowed — Court of Appeal ultimately upheld trustee's disallowance — Employees appealed — Appeal allowed — Termination resulting from bankruptcy gave rise to unsecured provable claim for termination and severance pay — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 121 — Employment Standards Act, R.S.O. 1980, c. 137, ss. 40(1), 40(7), 40a — Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2(3) — Interpretation Act, R.S.O. 1990, c. I.11, s. 10.

Employment law — Termination and dismissal — Termination of employment by employer — Severance pay under employment standards legislation

Trustee in bankruptcy closed bankruptcy employer's stores and paid employees all outstanding wages, commissions and vacation pay up to termination date — Ministry of Labour determined that employees were owed termination and severance pay, and filed claim with trustee which trustee disallowed — Court of Appeal ultimately upheld trustee's disallowance — Employees appealed — Appeal allowed — Termination resulting from bankruptcy gave rise to unsecured provable claim for termination and severance pay — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 121 — Employment Standards Act, R.S.O. 1980, c. 137, ss. 40 (1), 40(7), 40a — Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2(3) — Interpretation Act, R.S.O. 1990, c. I.11, s. 10.

Faillite — Priorité des créances — Créances prioritaires — Traitements et salaires des employés — Types de traitements exigibles

Syndic a procédé à la fermeture des magasins du failli et a payé tous les traitements, commissions et paies de vacances dus aux employés jusqu'à la date de cessation d'emploi — Ministère du travail a déterminé que les employés avaient droit à une indemnité de cessation d'emploi et a présenté une preuve de réclamation au syndic, lequel a rejeté la preuve de réclamation — Ultérieurement, la Cour d'appel a confirmé la décision du syndic — Employés ont formé un pourvoi — Pourvoi a été accueilli — Cessation d'emploi résultant de la faillite donnait lieu à une réclamation prouvable ordinaire au titre des indemnités de cessation d'emploi — Loi sur la faillite et l'insolvabilité, L.R.C. 1985, c. B-3, art. 121 — Loi sur les normes d'emploi, L.R.O. 1980, c. 137, art. 40(1), 40(7), 40a — Employment Standards Amendment Act, 1981, L.O. 1981, c. 22, art. 2(3) — Loi d'interprétation, L.R.O. 1990, c. I.11, art. 10.

Droit du travail — Cessation d'emploi et indemnité de congédiement — Résiliation du contrat d'emploi par l'employeur — Indemnité de cessation d'emploi en vertu de la législation sur les normes du travail

Syndic a procédé à la fermeture des magasins du failli et a payé tous les traitements, commissions et paies de vacances dus aux employés jusqu'à la date de cessation d'emploi — Ministère du travail a déterminé que les employés avaient droit à une indemnité de cessation d'emploi et a présenté une preuve de réclamation au syndic, lequel a rejeté la preuve de réclamation — Ultérieurement, la Cour d'appel a confirmé la décision du syndic — Employés ont formé un pourvoi — Pourvoi a été accueilli — Cessation d'emploi résultant de la faillite donnait lieu à une réclamation prouvable ordinaire au titre des indemnités de cessation d'emploi — Loi sur la faillite et l'insolvabilité, L.R.C. 1985,

c. B-3, art. 121 — Loi sur les normes d'emploi, L.R.O. 1980, c. 137, art. 40(1), 40(7), 40a — Employment Standards Amendment Act, 1981, L.O. 1981, c. 22, art. 2(3) — Loi d'interprétation, L.R.O. 1990, c. I.11, art. 10.

An employer which operated a chain of shoe stores was petitioned into bankruptcy on April 13, 1989. A receiving order was made the following day, and on that day the employment of the employer's employees ended. The trustee in bankruptcy paid all wages, salaries, commissions, and vacation pay which had been earned by the employees up to the date on which the receiving order was made. A few months later, the provincial Ministry of Labour audited the employer' records, and determined that the former employees were owed termination pay and vacation pay thereon. The Ministry accordingly filed a proof of claim for these amounts with the trustee. The trustee subsequently disallowed the claims, inter alia, on the grounds that the bankruptcy of the employer did not constitute a dismissal of the employees from employment; thus, no entitlement to severance, termination or vacation pay was triggered under the *Employment Standards Act* (the "ESA"), and there was no claim provable in bankruptcy. The Ministry's appeal to the Ontario Court of Justice (General Division) was allowed. On appeal to the Ontario Court of Appeal, the court overturned the decision and restored the trustee's decision. The employees resumed an appeal to the Supreme Court of Canada which had been discontinued by the Ministry.

Held: The appeal was allowed.

Section 40(7) of the ESA provided that where an employee's employment was terminated contrary to the ESA's minimum notice provisions, the employer was required to pay termination pay equal to the amount the employee would have received for the applicable notice period. Section 40a of the ESA further provided that the employer must pay severance pay to each employee whose employment had been terminated, and who had been employed for five years or more. Section 2(3) of the *Employment Standards Amendment Act, 1981* (the "ESAA"), which enacted s. 40a of the ESA, also included a transitional provision such that the amendments did not apply to bankrupt or insolvent employers whose assets had been distributed among creditors or whose proposal under the *Bankruptcy Act* (the "BA") had been accepted prior to the day the amendments received royal assent. A fair, large, and liberal construction of the words "terminated by the employer" was mandated by s. 10 of the *Interpretation Act* if the provisions of the ESA were to be given a meaning consistent with its spirit, purpose, and intention. The purpose of the various provisions of the ESA is to protect employees against the adverse effects of economic dislocation likely to follow from the absence of an opportunity to search for alternative employment. Interpreting ss. 40 and 40a of the ESA to apply only to non-bankruptcy-related terminations was incompatible with the object of that statute, and the objects of the termination and severance pay provisions themselves. Moreover, if the ESA's amendments were not intended to apply to terminations caused by operation of the BA, then the transitional provisions of s. 2(3) of the ESAA would have no readily apparent purpose. The inclusion of s. 2(3) of the ESAA necessarily implied that the severance pay obligation did in fact extend to bankrupt employers. To limit the application of those provisions only to employees not terminated through bankruptcy would lead to absurd results, and defeat the purpose of the ESA. Therefore, termination as a result of an employer's bankruptcy does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the BA for termination and severance pay in accordance with ss. 40 and 40a of the ESA. A declaration that the employer's former employees were entitled to make claims for termination pay, including vacation pay due thereon and severance pay as unsecured creditors, was substitued for the order of the Court of Appeal.

Un employeur, qui exploitait une chaîne de magasins, a fait l'objet de procédures en faillite et a été déclaré failli en date du 13 avril 1989. Une ordonnance de séquestre a été émise le jour suivant et c'est à ce moment que les contrats d'emploi entre l'employeur et ses employés ont pris fin. Le syndic a versé tous les traitements, salaires, commissions et paies de vacances gagnés par les employés à la date de l'ordonnance de séquestre. Quelques mois plus tard, le ministère du Travail de la province a procédé à la vérification des livres de l'employeur et déterminé que les employés avaient droit à une indemnité de cessation d'emploi de même que le montant y afférent à titre de paie de vacances. Le ministère a donc soumis une preuve de réclamation à l'égard de ces montants au syndic. Le syndic a rejeté la preuve

de réclamation au motif, notamment, que la faillite ne constituait pas un congédiement des employés, et ne donnait donc pas droit à une indemnité de cessation d'emploi, une indemnité de licenciement ni une paie de vacances en vertu de la *Loi sur les normes d'emploi* (la « LNE »). Par conséquent, il ne pouvait y avoir de réclamation prouvable à ce titre. Le pourvoi du ministère à la Cour de l'Ontario (Division générale) a été accueilli. En appel à la Cour d'appel de l'Ontario, la Cour a infirmé le jugement de première instance et a confirmé la décision du syndic. Le ministère s'est désisté de son pourvoi et les employés ont repris le pourvoi à la Cour suprême du Canada.

Arrêt: Le pourvoi a été accueilli.

L'article 40(7) de la LNE prévoyait que, lorsque le contrat d'emploi était résilié sans respecter les dispositions de la LNE relatives à l'avis minimal de cessation d'emploi, l'employeur était tenu de verser une indemnité égale au montant que l'employé aurait reçu pour la période d'avis applicable. D'autre part, l'art. 40a de la LNE prévoyait que l'employeur devait verser une indemnité de cessation d'emploi à chaque employé dont le contrat d'emploi a été résilié et qui travaillait pour l'employeur depuis cinq ans ou plus. L'article 2(3) de la *Employment Standards Amendment Act, 1981* (la « ESAA »), qui édictait l'entrée en vigueur l'art. 40a de la LNE, comprenait aussi une disposition transitoire afin que les amendements ne s'appliquent pas aux employeurs faillis ou insolvables dont les biens avaient été distribués aux créanciers et dont la proposition concordataire en vertu de la *Loi sur la faillite et l'insolvabilité* (la « LFI ») avait été acceptée avant le jour où les amendements ont reçu la sanction royale. L'article 10 de la *Loi d'interprétation* commandait une interprétation juste, généreuse et libérale des mots « l'employeur licencie » afin que les dispositions de la LNE aient un sens qui s'accorde avec l'esprit, l'objet et l'intention de cette loi. L'objectif des diverses dispositions de la LNE est de protéger les employés contre les effets nuisibles d'un bouleversement économique soudain qui peuvent survenir en raison de l'absence de la possibilité de chercher un autre emploi. Interpréter les art. 40 et 40a de la LNE de manière à ce qu'ils s'appliquent uniquement lorsque des cessations d'emploi ne résultent pas d'une faillite était contraire à l'objet de cette loi et même à l'objet des dispositions sur l'indemnité de cessation d'emploi. En outre, si les amendements à la LNE n'étaient pas censés s'appliquer aux cessations d'emploi opérées par la LFI, alors les dispositions transitoires de l'art. 2(3) de la ESAA sembleraient dépourvues d'objet. L'inclusion de l'art. 2(3) de la ESAA impliquait nécessairement que l'obligation de verser une indemnité de cessation d'emploi s'étendait aussi aux employeurs faillis. Restreindre l'application de ces dispositions aux seuls employés non licenciés par suite d'une faillite mènerait à des résultats absurdes et viderait la LNE de son objet. Ainsi, aux termes de l'art. 121 de la LFI, la cessation d'emploi découlant de la faillite de l'employeur donne lieu à une réclamation prouvable ordinaire dans la faillite, à titre d'indemnité de licenciement et d'indemnité de cessation d'emploi, conformément aux art. 40 et 40a de la LNE. Une ordonnance déclarant que les anciens employés de l'employeur ont le droit de présenter des demandes d'indemnité de licenciement, y compris la paie de vacances y afférent, et des demandes d'indemnité de cessation d'emploi en tant que créanciers ordinaires a été substituée à l'ordonnance de la Cour d'appel.

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s. 121(1) — considered

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s. 13 — referred to

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Generally — referred to

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s. 40a [en. 1981, c. 22, s. 2(1)] — considered

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s. 40a(1)(a) [en. 1981, c. 22, s. 2(1)] — referred to

s. 40a(1a) [en. 1987, c. 30, s. 5(1)] — considered

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s. 2(1) — considered

s. 2(3) — considered

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s. 10 — considered

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s. 10 — considered

s. 17 — considered

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s. 75(1) — considered

APPEAL by employees of bankrupt employer from decision reported at (1995), 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 22 O.R. (3d) 385, (sub nom. *Ontario Ministry of Labour v. Rizzo & Rizzo Shoes Ltd.*) 95 C.L.L.C. 210-020, (sub nom. *Re Rizzo & Rizzo Shoes Ltd. (Bankrupt)*) 80 O.A.C. 201 (C.A.), reversing decision reported at (1991), 11 C.B.R. (3d) 246, 6 O.R. (3d) 441, 92 C.L.L.C. 14,013 (Gen. Div.), reversing disallowance of claim by trustee in bankruptcy.

POURVOI interjeté par les employés d'un employeur failli à l'encontre d'un arrêt publié à (1995), 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 22 O.R. (3d) 385, (sub nom. *Ontario Ministry of Labour v. Rizzo & Rizzo Shoes Ltd.*) 95 C.L.L.C. 210-020, (sub nom. *Re Rizzo & Rizzo Shoes Ltd. (Bankrupt)*) 80 O.A.C. 201 (C.A.), infirmant un arrêt publié à (1991), 11 C.B.R. (3d) 246, 6 O.R. (3d) 441, 92 C.L.L.C. 14,013 (Gen. Div.), infirmant le rejet par le syndic d'une preuve de réclamation dans la faillite.

The judgment of the court was delivered by *Iacobucci J.*:

1 This is an appeal by the former employees of a now bankrupt employer from an order disallowing their claims for termination pay (including vacation pay thereon) and severance pay. The case turns on an issue of statutory interpretation. Specifically, the appeal decides whether, under the relevant legislation in effect at the time of the bankruptcy, employees are entitled to claim termination and severance payments where their employment has been terminated by reason of their employer's bankruptcy.

1. Facts

2 Prior to its bankruptcy, Rizzo & Rizzo Shoes Limited ("Rizzo") owned and operated a chain of retail shoe stores across Canada. Approximately 65% of those stores were located in Ontario. On April 13, 1989, a petition in bankruptcy was filed against the chain. The following day, a receiving order was made on consent in respect of Rizzo's property. Upon the making of that order, the employment of Rizzo's employees came to an end.

3 Pursuant to the receiving order, the respondent, Zittrer, Siblin & Associates, Inc. (the "Trustee") was appointed as trustee in bankruptcy of Rizzo's estate. The Bank of Nova Scotia privately appointed Peat Marwick Limited ("PML") as receiver and manager. By the end of July, 1989, PML had liquidated Rizzo's property and assets and closed the stores. PML paid all wages, salaries, commissions and vacation pay that had been earned by Rizzo's employees up to the date on which the receiving order was made.

4 In November 1989, the Ministry of Labour for the Province of Ontario (Employment Standards Branch) (the "Ministry") audited Rizzo's records to determine if there was any outstanding termination or severance pay owing to former employees under the *Employment Standards Act*, R.S.O. 1980, c. 137, as amended (the "*ESA*"). On August 23, 1990, the Ministry delivered a proof of claim to the respondent Trustee on behalf of the former employees of Rizzo for termination pay and vacation pay thereon in the amount of approximately $2.6 million and for severance pay totalling $14,215. The Trustee disallowed the claims, issuing a Notice of Disallowance on January 28, 1991. For the purposes of this appeal, the relevant ground for disallowing the claim was the Trustee's opinion that the bankruptcy of an employer does not constitute a dismissal from employment and thus, no entitlement to severance, termination or vacation pay is created under the *ESA*.

5 The Ministry appealed the Trustee's decision to the Ontario Court (General Division) which reversed the Trustee's disallowance and allowed the claims as unsecured claims provable in bankruptcy. On appeal, the Ontario Court of Appeal overturned the trial court's ruling and restored the decision of the Trustee. The Ministry sought leave to appeal from the Court of Appeal judgment, but discontinued its application on August 30, 1993. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested an order granting them leave to appeal. This Court's order granting those applications was issued on December 5, 1996.

2. Relevant Statutory Provisions

6 The relevant versions of the *Bankruptcy Act* (now the *Bankruptcy and Insolvency Act*) and the *Employment Standards Act* for the purposes of this appeal are R.S.C. 1985, c. B-3 (the "*BA*"), and R.S.O. 1980, c. 137, as amended to April 14, 1989 (the "*ESA*") respectively:

Employment Standards Act, R.S.O. 1980, c. 137, as amended:

7.--

(5) Every contract of employment shall be deemed to include the following provision:

All severance pay and termination pay become payable and shall be paid by the employer to the employee in two weekly instalments beginning with the first full week following termination of employment and shall be allocated to such weeks accordingly. This provision does not apply to severance pay if the employee has elected to maintain a right of recall as provided in subsection 40a (7) of the *Employment Standards Act*.

40.-- (1) No employer shall terminate the employment of an employee who has been employed for three months or more unless the employee gives,

(a) one weeks notice in writing to the employee if his or her period of employment is less than one year;

(b) two weeks notice in writing to the employee if his or her period of employment is one year or more but less than three years;

(c) three weeks notice in writing to the employee if his or her period of employment is three years or more but less than four years;

(d) four weeks notice in writing to the employee if his or her period of employment is four years or more but less than five years;

(e) five weeks notice in writing to the employee if his or her period of employment is five years or more but less than six years;

(f) six weeks notice in writing to the employee if his or her period of employment is six years or more but less than seven years;

(g) seven weeks notice in writing to the employee if his or her period of employment is seven years or more but less than eight years;

(h) eight weeks notice in writing to the employee if his or her period of employment is eight years or more,

and such notice has expired.

. . . . .

(7) Where the employment of an employee is terminated contrary to this section,

(a) the employer shall pay termination pay in an amount equal to the wages that the employee would have been entitled to receive at his regular rate for a regular non-overtime work week for the period of notice prescribed by subsection (1) or (2), and any wages to which he is entitled;

. . . . .

40*a* ...

(1a) Where,

(a) fifty or more employees have their employment terminated by an employer in a period of six months or less and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment; or

(b) one or more employees have their employment terminated by an employer with a payroll of $2.5 million or more,

the employer shall pay severance pay to each employee whose employment has been terminated and who has been employed by the employer for five or more years.

Employment Standards Amendment Act, 1981, S.O. 1981, c. 22

2.--(1) Part XII of the said Act is amended by adding thereto the following section:

(3) Section 40*a* of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

Bankruptcy Act, R.S.C. 1985, c. B-3

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

Interpretation Act, R.S.O. 1990, c. I.11

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of any thing that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

. . . . .

17. The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law.

3. Judicial History

A. Ontario Court (General Division) (1991), 6 O.R. (3d) 441 (Ont. Gen. Div.)

7 Having disposed of several issues which do not arise on this appeal, Farley J. turned to the question of whether termination pay and severance pay are provable claims under the *BA*. Relying on *U.F.C.W., Local 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (Ont. S.C.), he found that it is clear that claims for termination and severance pay are provable in bankruptcy where the statutory obligation to provide such payments arose prior to the bankruptcy. Accordingly, he reasoned that the essential matter to be resolved in the case at bar was whether bankruptcy acted as a termination of employment thereby triggering the termination and severance pay provisions of the *ESA* such that liability for such payments would arise on bankruptcy as well.

8 In addressing this question, Farley J. began by noting that the object and intent of the *ESA* is to provide minimum employment standards and to benefit and protect the interests of employees. Thus, he concluded that the *ESA* is remedial legislation and as such it should be interpreted in a fair, large and liberal manner to ensure that its object is attained according to its true meaning, spirit and intent.

9 Farley J. then held that denying employees in this case the right to claim termination and severance pay would lead to the arbitrary and unfair result that an employee whose employment is terminated just prior to a bankruptcy would be entitled to termination and severance pay, whereas one whose employment is terminated by the bankruptcy itself would not have that right. This result, he stated, would defeat the intended working of the *ESA*.

10 Farley J. saw no reason why the claims of the employees in the present case would not generally be contemplated as wages or other claims under the *BA*. He emphasized that the former employees in the case at bar had not alleged that termination pay and severance pay should receive a priority in the distribution of the estate, but merely that they are provable (unsecured and unpreferred) claims in a bankruptcy. For this reason, he found it inappropriate to make reference to authorities whose focus was the interpretation of priority provisions in the *BA*.

11 Even if bankruptcy does not terminate the employment relationship so as to trigger the *ESA* termination and severance pay provisions, Farley J. was of the view that the employees in the instant case would nevertheless be entitled to such payments as these were liabilities incurred prior to the date of the bankruptcy by virtue of s. 7(5) of the *ESA*. He found that s. 7(5) deems every employment contract to include a provision to provide termination and severance pay following the termination of employment and concluded that a contingent obligation is thereby created for a bankrupt employer to make such payments from the outset of the relationship, long before the bankruptcy.

12 Farley J. also considered s. 2(3) of the *Employment Standards Amendment Act, 1981*, S.O. 1981, c. 22 (the "*ESAA*"), which is a transitional provision that exempted certain bankrupt employers from the newly introduced severance pay obligations until the amendments received royal assent. He was of the view that this provision would not have been necessary if the obligations of employers upon termination of employment had not been intended to apply to bankrupt employers under the *ESA*. Farley J. concluded that the claim by Rizzo's former employees for termination pay and severance pay could be provided as unsecured and unpreferred debts in a bankruptcy. Accordingly, he allowed the appeal from the decision of the Trustee.

B. Ontario Court of Appeal (1995), 22 O.R (3d) 385

13 Austin J.A., writing for a unanimous court, began his analysis of the principal issue in this appeal by focussing upon the language of the termination pay and severance pay provisions of the *ESA*. He noted, at p. 390, that the termination pay provisions use phrases such as "[n]o employer shall terminate the employment of an employee" (s. 40(1)), "the notice required by an employer to terminate the employment" (s. 40(2)), and "[a]n employer who has terminated or proposes to terminate the employment of employees" (s. 40(5)). Turning to severance pay, he quoted s. 40*a*(1)(*a*) (at p. 391) which includes the phrase "employees have their employment terminated by an employer". Austin J.A. concluded that this language limits the obligation to provide termination and severance pay to situations in which the employer terminates the employment. The operation of the *ESA*, he stated, is not triggered by the termination of employment resulting from an act of law such as bankruptcy.

14 In support of his conclusion, Austin J.A. reviewed the leading cases in this area of law. He cited *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (Ont. S.C.), wherein Houlden J. (as he then was) concluded that the *ESA* termination pay provisions were not designed to apply to a bankrupt employer. He also relied upon *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (Ont. S.C.), for the proposition that the bankruptcy of a company at the instance of a creditor does not constitute dismissal. He concluded as follows at p. 395:

> The plain language of ss. 40 and 40*a* does not give rise to any liability to pay termination or severance pay except where the employment is terminated by the employer. In our case, the employment was terminated, not by the employer, but by the making of a receiving order against Rizzo on April 14, 1989, following a petition by one of its creditors. No entitlement to either termination or severance pay ever arose.

15 Regarding s. 7(5) of the *ESA*, Austin J.A. rejected the trial judge's interpretation and found that the section does not create a liability. Rather, in his opinion, it merely states when a liability otherwise created is to be paid and therefore it was not considered relevant to the issue before the court. Similarly, Austin J.A. did not accept the lower court's view of s. 2(3), the transitional provision in the *ESAA*. He found that that section had no effect upon the intention of the Legislature as evidenced by the terminology used in ss. 40 and 40*a*.

16 Austin J.A. concluded that, because the employment of Rizzo's former employees was terminated by the order of bankruptcy and not by the act of the employer, no liability arose with respect to termination, severance or vacation pay. The order of the trial judge was set aside and the Trustee's disallowance of the claims was restored.

4. Issues

17 This appeal raises one issue: does the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*?

5. Analysis

18 The statutory obligation upon employers to provide both termination pay and severance pay is governed by ss. 40 and 40*a* of the *ESA*, respectively. The Court of Appeal noted that the plain language of those provisions suggests that termination pay and severance pay are payable only when the employer terminates the employment. For example, the opening words of s. 40(1) are: "No employer shall terminate the employment of an employee...." Similarly, s. 40*a*(1) begins with the words, "Where...fifty or more employees have their employment terminated by an employer...." Therefore, the question on which this appeal turns is whether, when bankruptcy occurs, the employment can be said to be terminated "by the employer".

19 The Court of Appeal answered this question in the negative, holding that, where an employer is petitioned into bankruptcy by a creditor, the employment of its employees is not terminated "by the employer", but rather by operation of law. Thus, the Court of Appeal reasoned that, in the circumstances of the present case, the *ESA* termination pay and severance pay provisions were not applicable and no obligations arose. In answer, the appellants submit that the phrase "terminated by the employer" is best interpreted as reflecting a distinction between involuntary and voluntary termination of employment. It is their position that this language was intended to relieve employers of their obligation to pay termination and severance pay when employees leave their jobs voluntarily. However, the appellants maintain that where an employee's employment is involuntarily terminated by reason of their employer's bankruptcy, this constitutes termination "by the employer" for the purpose of triggering entitlement to termination and severance pay under the *ESA*.

20 At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Recent cases which have cited the above passage with approval include: *Canada (Procureure générale) c. Hydro-Québec*, (sub nom. *R. v. Hydro-Québec*) [1997] 3 S.C.R. 213 (S.C.C.); *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.); *Verdun v. Toronto Dominion Bank*, [1996] 3 S.C.R. 550 (S.C.C.); *Friesen v. R.*, [1995] 3 S.C.R. 103 (S.C.C.).

22 I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit."

23 Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the *ESA*, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

24 In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 (S.C.C.), at p. 1002, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also *Wallace v. United Grain Growers Ltd.* (1997), 219 N.R. 161 (S.C.C.). It was in this context that the majority in *Machtinger* described, at p. 1003, the object of the *ESA* as being the protection of "...the interests of employees by requiring employers to comply with certain minimum standards, including minimum periods of notice of termination." Accordingly, the majority concluded, at p. 1003, that, "...an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible, is to be favoured over one that does not."

25 The objects of the termination and severance pay provisions themselves are also broadly premised upon the need to protect employees. Section 40 of the *ESA* requires employers to give their employees reasonable notice of termination based upon length of service. One of the primary purposes of this notice period is to provide employees with an opportunity to take preparatory measures and seek alternative employment. It follows that s. 40(7)(a), which provides for termination pay in lieu of notice when an employer has failed to give the required statutory notice, is intended to "cushion" employees against the adverse effects of economic dislocation likely to follow from the absence of an opportunity to search for alternative employment. (Innis Christie, Geoffrey England and Brent Cotter, *Employment Law in Canada* (2nd ed. 1993), at pp. 572-81.

26 Similarly, s. 40*a*, which provides for severance pay, acts to compensate long-serving employees for their years of service and investment in the employer's business and for the special losses they suffer when their employment terminates. In *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546 (Ont. C.A.), Robins J.A. quoted with approval at pp. 556-57 from the words of D.D. Carter in the course of an employment standards determination in *Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont. Arb. Bd.), at p. 19, wherein he described the role of severance pay as follows:

> Severance pay recognizes that an employee does make an investment in his employer's business -- the extent of this investment being directly related to the length of the employee's service. This investment is the seniority that the employee builds up during his years of service....Upon termination of the employment relationship, this investment

> of years of service is lost, and the employee must start to rebuild seniority at another place of work. The severance pay, based on length of service, is some compensation for this loss of investment.

27 In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40*a* of the *ESA* are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes, supra,* at p. 88).

28 The trial judge properly noted that, if the *ESA* termination and severance pay provisions do not apply in circumstances of bankruptcy, those employees 'fortunate' enough to have been dismissed the day before a bankruptcy would be entitled to such payments, but those terminated on the day the bankruptcy becomes final would not be so entitled. In my view, the absurdity of this consequence is particularly evident in a unionized workplace where seniority is a factor in determining the order of lay-off. The more senior the employee, the larger the investment he or she has made in the employer and the greater the entitlement to termination and severance pay. However, it is the more senior personnel who are likely to be employed up until the time of the bankruptcy and who would thereby lose their entitlements to these payments.

29 If the Court of Appeal's interpretation of the termination and severance pay provisions is correct, it would be acceptable to distinguish between employees merely on the basis of the timing of their dismissal. It seems to me that such a result would arbitrarily deprive some employees of a means to cope with the economic dislocation caused by unemployment. In this way the protections of the *ESA* would be limited rather than extended, thereby defeating the intended working of the legislation. In my opinion, this is an unreasonable result.

30 In addition to the termination and severance pay provisions, both the appellants and the respondent relied upon various other sections of the *ESA* to advance their arguments regarding the intention of the legislature. In my view, although the majority of these sections offer little interpretive assistance, one transitional provision is particularly instructive. In 1981, s. 2(1) of the *Employment Standards Amendment Act, 1981,* ("*ESAA*") introduced s.40*a*, the severance pay provision, to the *ESA*. Section 2(2) deemed that provision to come into force on January 1, 1981. Section 2(3), the transitional provision in question provided as follows:

> **2.** ...
>
> (3) Section 40*a* of the said Act does not apply to an employer who became bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

31 The Court of Appeal found that it was neither necessary nor appropriate to determine the intention of the legislature in enacting this provisional subsection. Nevertheless, the court took the position that the intention of the legislature as evidenced by the introductory words of ss. 40 and 40*a* was clear, namely, that termination by reason of a bankruptcy will not trigger the severance and termination pay obligations of the *ESA*. The court held that this intention remained unchanged by the introduction of the transitional provision. With respect, I do not agree with either of these findings. Firstly, in my opinion, the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise and one which has often been employed by this Court (see, e.g., *R. v. Vasil*, [1981] 1 S.C.R. 469 (S.C.C.), at p. 487; *R. v. Paul*, [1982] 1 S.C.R. 621 (S.C.C.), at pp. 635, 653 and 660). Secondly, I believe that

the transitional provision indicates that the Legislature intended that termination and severance pay obligations should arise upon an employers' bankruptcy.

32 In my view, by extending an exemption to employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent, s. 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. It seems to me that, if this were not the case, no readily apparent purpose would be served by this transitional provision.

33 I find support for my conclusion in the decision of Saunders J. in *Royal Dressed Meats Inc.*, *supra*. Having reviewed s. 2(3) of the *ESAA*, he commented as follows:

> ...any doubt about the intention of the Ontario Legislature has been put to rest, in my opinion, by the transitional provision which introduced severance payments into the *ESA*...it seems to me an inescapable inference that the legislature intended liability for severance payments to arise on a bankruptcy. That intention would, in my opinion, extend to termination payments which are similar in character.

34 This interpretation is also consistent with statements made by the Minister of Labour at the time he introduced the 1981 amendments to the *ESA*. With regard to the new severance pay provision he stated:

> The circumstances surrounding a closure will govern the applicability of the severance pay legislation in some defined situations. For example, a bankrupt or insolvent firm will still be required to pay severance pay to employees to the extent that assets are available to satisfy their claims.
>
> . . . . .
>
> ...the proposed severance pay measures will, as I indicated earlier, be retroactive to January 1 of this year. That retroactive provision, however, will not apply in those cases of bankruptcy and insolvency where the assets have already been distributed or where an agreement on a proposal to creditors has already been reached. [Ontario, Legislative Assembly, *Debates*, No. 36, at pp. 1236-37 (June 4, 1981)]

Moreover, in the legislative debates regarding the proposed amendments the Minister stated:

> For purposes of retroactivity, severance pay will not apply to bankruptcies under the Bankruptcy Act where assets have been distributed. However, once this Act receives royal assent, employees in bankruptcy closures will be covered by the severance pay provisions. [Ontario, Legislative Assembly, *Debates*, No. 48, at p. 1699 (June 16, 1981)]

35 Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation. Writing for the Court in *R. v. Morgentaler*, [1993] 3 S.C.R. 463 (S.C.C.), at p. 484, Sopinka J. stated:

> ...until recently the courts have balked at admitting evidence of legislative debates and speeches....The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legislative history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.

36 Finally, with regard to the scheme of the legislation, since the *ESA* is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant (see, e.g., *Abrahams v. Canada (Attorney General)*, [1983] 1 S.C.R. 2 (S.C.C.), at p. 10; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513 (S.C.C.), at p. 537). It seems to me that, by limiting its analysis to the plain meaning of ss. 40 and 40*a* of the *ESA*, the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the Act.

37 The Court of Appeal's reasons relied heavily upon the decision in *Malone Lynch*, *supra*. In *Malone Lynch*, Houlden J. held that s. 13, the group termination provision of the former *ESA*, R.S.O. 1970, c. 147, and the predecessor to s. 40 at issue in the present case, was not applicable where termination resulted from the bankruptcy of the employer. Section 13(2) of the *ESA* then in force provided that, if an employer wishes to terminate the employment of 50 or more employees, the employer must give notice of termination for the period prescribed in the regulations, "and until the expiry of such notice the terminations shall not take effect." Houlden J. reasoned that termination of employment through bankruptcy could not trigger the termination payment provision, as employees in this situation had not received the written notice required by the statute, and therefore could not be said to have been terminated in accordance with the Act.

38 Two years after *Malone Lynch* was decided, the 1970 *ESA* termination pay provisions were amended by the *Employment Standards Act, 1974*, S.O. 1974, c. 112. As amended, s. 40(7) of the 1974 *ESA* eliminated the requirement that notice be given before termination can take effect. This provision makes it clear that termination pay is owing where an employer fails to give notice of termination and that employment terminates irrespective of whether or not proper notice has been given. Therefore, in my opinion it is clear that the *Malone Lynch* decision turned on statutory provisions which are materially different from those applicable in the instant case. It seems to me that Houlden J.'s holding goes no further than to say that the provisions of the 1970 *ESA* have no application to a bankrupt employer. For this reason, I do not accept the *Malone Lynch* decision as persuasive authority for the Court of Appeal's findings. I note that the courts in *Royal Dressed Meats*, *supra*, and *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (B.C. S.C.), declined to rely upon *Malone Lynch* based upon similar reasoning.

39 The Court of Appeal also relied upon *Re Kemp Products Ltd.*, *supra*, for the proposition that although the employment relationship will terminate upon an employer's bankruptcy, this does not constitute a "dismissal". I note that this case did not arise under the provisions of the *ESA*. Rather, it turned on the interpretation of the term "dismissal" in what the complainant alleged to be an employment contract. As such, I do not accept it as authoritative jurisprudence in the circumstances of this case. For the reasons discussed above, I also disagree with the Court of Appeal's reliance on *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343 (Ont. C.A.), which cited the decision in *Malone Lynch*, *supra* with approval.

40 As I see the matter, when the express words of ss. 40 and 40*a* of the *ESA* are examined in their entire context, there is ample support for the conclusion that the words "terminated by the employer" must be interpreted to include termination resulting from the bankruptcy of the employer. Using the broad and generous approach to interpretation appropriate for benefits-conferring legislation, I believe that these words can reasonably bear that construction (see *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025 (S.C.C.)). I also note that the intention of the Legislature as evidenced in s. 2(3) of the *ESSA*, clearly favours this interpretation. Further, in my opinion, to deny employees the right to claim *ESA* termination and severance pay where their termination has resulted from their employer's bankruptcy, would be inconsistent with the purpose of the termination and severance pay provisions and would undermine the object of the *ESA*, namely, to protect the interests of as many employees as possible.

41 In my view, the impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Further, I believe that such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Therefore, I conclude that termination as a result of an employer's bankruptcy does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *BA* for termination and severance pay in accordance with ss. 40 and 40*a* of the *ESA*. Because of this conclusion, I do not find it necessary to address the alternative finding of the trial judge as to the applicability of s. 7(5) of the *ESA*.

42 I note that subsequent to the Rizzo bankruptcy, the termination and severance pay provisions of the *ESA* underwent another amendment. Sections 74(1) and 75(1) of the *Labour Relations and Employment Statute Law Amendment Act,*

1995, S.O. 1995, c. 1, amend those provisions so that they now expressly provide that where employment is terminated by operation of law as a result of the bankruptcy of the employer, the employer will be deemed to have terminated the employment. However, s. 17 of the *Interpretation Act* directs that, "the repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law." As a result, I note that the subsequent change in the legislation has played no role in determining the present appeal.

6. Disposition and Costs

43 I would allow the appeal and set aside paragraph 1 of the order of the Court of Appeal. In lieu thereof, I would substitute an order declaring that Rizzo's former employees are entitled to make claims for termination pay (including vacation pay due thereon) and severance pay as unsecured creditors. As to costs, the Ministry of Labour led no evidence regarding what effort it made in notifying or securing the consent of the Rizzo employees before it discontinued its application for leave to appeal to this Court on their behalf. In light of these circumstances, I would order that the costs in this Court be paid to the appellant by the Ministry on a party-and-party basis. I would not disturb the orders of the courts below with respect to costs.

Appeal allowed.

Pourvoi accueilli.

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1999 CarswellBC 776
Supreme Court of Canada

CanadianOxy Chemicals Ltd. v. Canada (Attorney General)

1999 CarswellBC 776, 1999 CarswellBC 777, [1999] 1 S.C.R. 743, 122 B.C.A.C. 1, 133 C.C.C. (3d) 426, 171 D.L.R. (4th) 733, 200 W.A.C. 1, 23 C.R. (5th) 259, 29 C.E.L.R. (N.S.) 1, 41 W.C.B. (2d) 411

The Attorney General of Canada, Appellant v. CanadianOxy Chemicals Ltd., CanadianOxy Industrial Chemicals Limited Partnership and Canadian Occidental Petroleum Ltd., Respondents and The Attorney General for Ontario, Intervener

Lamer C.J.C., L'Heureux-Dubé, Gonthier, Cory, Iacobucci, Major and Binnie JJ.

Heard: December 10, 1998
Judgment: April 23, 1999
Docket: 25944

Proceedings: additional reasons to (December 10, 1998), Doc. 25944 (S.C.C.); reversing (1997), 145 D.L.R. (4th) 427, 114 C.C.C. (3d) 537, 145 D.L.R. (4th) 427, 90 B.C.A.C. 126, 147 W.A.C. 126 (B.C. C.A.); affirming (1996), 108 C.C.C. (3d) 497, 138 D.L.R. (4th) 104 (B.C.S.C.)

Counsel: *S. David Frankel, Q.C.*, and *Kenneth Yule*, for Appellant.
Gary A. Letcher, *Jonathan S. McLean* and *Eric B. Miller*, for Respondents.
Michal Fairburn, for Intervener.

Subject: Environmental; Criminal; Constitutional

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

VII Pre-trial procedure
VII.1 Search with warrant
VII.1.b Information
VII.1.b.ii Substantive requirements
VII.1.b.ii.C Offence

Criminal law

VII Pre-trial procedure
VII.1 Search with warrant
VII.1.h Miscellaneous

Criminal law

VII Pre-trial procedure
VII.3 Detention of property seized

VII.3.c Return of seized goods
VII.3.c.vii Miscellaneous

Criminal law

XII Extraordinary remedies
XII.1 Certiorari
XII.1.b Powers of court
XII.1.b.i Curing defect in conviction, order or warrant
XII.1.b.i.H Miscellaneous

Environmental law

III Statutory protection of environment
III.3 Environmental offences
III.3.d Practice and procedure
III.3.d.iii Evidence
III.3.d.iii.E Admissibility
III.3.d.iii.E.2 Unreasonable search and seizure

Headnote

Criminal law — Search and seizure — Search with warrant — Issuing warrant — Jurisdiction and discretion of court

Fishery officer swore information and obtained warrant to search company's plant for documents after plant discharged quantity of chlorine into water killing number of fish — Items were seized pursuant to warrant; however additional items were seized under investigators' understanding of "plain view" doctrine — Provincial court found s. 487 warrant could not be used to search for and seize evidence of negligence going to defence of due diligence and quashed both warrants — Crown's appeal to Court of Appeal was dismissed — Crown appealed to Supreme Court of Canada — Section 487(1) of Criminal Code provides that "a justice who is satisfied . . . that there are reasonable grounds to believe that there is in a building, receptacle or place . . . anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence, or will reveal whereabouts of a person who is believed to have committed offence, against this Act or any other Act of Parliament, . . . may at any time issue a warrant." — Appeal allowed — Criminal Code, R.S.C. 1985, c. C-46, s. 487(1).

Droit criminel — Fouille, perquisition et saisie — Perquisition avec mandat — Délivrance du mandat — Compétence et pouvoir discrétionnaire de la cour

Agent des pêches a fait une déclaration sous serment et a obtenu un mandat de perquisition à l'égard d'une usine appartenant à la société, afin de saisir des documents concernant un déversement d'une quantité de chlore dans l'eau qui a tué un grand nombre de poissons — Pièces ont été saisies en vertu du mandat; toutefois d'autres pièces ont été saisies par les enquêteurs en se fondant sur la doctrine du « plain view » — Cour provinciale a statué que le mandat délivré en vertu de l'art. 487 ne pouvait pas servir dans le cardre d'une perquisition et saisie de preuves relatives à la négligence pour repousser une preuve de diligence raisonnable et a cassé les deux mandats — Pourvoi du ministère public à la Cour d'appel a été rejeté — Ministère public a formé un pourvoi à la Cour suprême du Canada — Article 487(1) du Code criminel énonce qu'un juge de paix peut décerner un mandat de perquisition s'il est convaincu qu'il existe un motif raisonnable de croire que dans un endroit il se trouve une chose dont on a des motifs raisonnables de croire qu'elle fournira une preuve touchant la commission d'une infraction ou révèlera l'endroit où se trouve la personne qui est présumée avoir commis une infraction — Pourvoi accueilli — Code criminel, L.R.C. 1985, c. C-46, art. 487(1).

A plant operated by a chemical company discharged a quantity of chlorine into the waters of an inlet, killing a number of fish during a three-and-a-half-hour power outage at the plant. After the discharge, a fishery officer from

the Department of Fisheries and Oceans swore on information and obtained a warrant to search the company's plant for a range of documents relating to process records, plant maintenance, employee training, discipline, and general plant operation. In total 139 items were seized pursuant to the warrant, and 73 additional items were seized under the investigators' understanding of the "plain view" doctrine. The provincial Supreme Court found that a s. 487 warrant could not be used to search for and seize evidence of negligence going to the defence of due diligence and ruled that the documents seized pertaining to the issue of due diligence were not documents with respect to the commission of this particular offence and quashed both warrants. The Crown's appeal to the Court of Appeal was dismissed. The Crown appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

Section 487(1) of *Criminal Code* provides that "a justice who is satisfied . . . that there are reasonable grounds to believe that there is in a building, receptacle or place . . . anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence, or will reveal whereabouts of a person who is believed to have committed offence, against this Act or any other Act of Parliament, . . . may at any time issue a warrant." The natural and ordinary meaning of the phrase "evidence with respect to the commission of an offence" is that anything relevant or rationally connected to the incident under investigation, the parties involved, and their potential culpability falls within the scope of the warrant. One must assume Parliament chose not to limit s. 487(1) to evidence establishing an element of the Crown's prima facie case. To conclude otherwise would effectively delete the phrase "with respect to" from the section. While s. 487(1) is broad enough to authorize the search in question even absent this phrase, the inclusion of these words plainly supports the validity of these warrants. While s. 487(1) may occasion significant invasions of privacy, the public interest requires prompt and thorough investigation of potential offences. It is with respect to that interest that *all* relevant information and evidence should be located and preserved as soon as possible. This interpretation accords with the purposes underlying the Code and the demands of a fair and expeditious administration of justice.

The purpose of s. 487(1) is to allow the investigators to unearth and preserve as much relevant evidence as possible. To ensure that the authorities are able to perform their appointed functions properly, they should be able to locate, examine and preserve all the evidence relevant to events that may have given rise to criminal liability. It is not the role of the police to investigate and decide whether the essential elements of an offence are made out — that decision is the role of the courts. An unnecessary and restrictive interpretation of s. 487(1) defeats its purpose.

Une usine exploitée par une société de produits chimiques a déversé une quantité de chlore dans les eaux d'un bras de mer durant une perte de courant d'une durée de trois heures et demi, tuant ainsi un grand nombre de poissons. À la suite du déversement, un agent des pêches du Ministère des Pêches et des Océans a fait une dénonciation assermentée et a obtenu un mandat de perquisition visant l'usine afin d'y recueillir des documents concernant les dossiers de fabrication, l'entretien de l'usine, la formation des employés, la discipline et l'exploitation de l'usine en général. Au total, 139 pièces ont été saisies en vertu du mandat et les enquêteurs ont saisi 73 pièces additionnelles en se fondant sur leur interprétation de la doctrine des « objets bien en vue ». La Cour suprême de la Colombie-Britannique a conclu qu'un mandat décerné en vertu de l'art. 487 ne permettait pas de perquisitionner et saisir des preuves de négligence se rapportant à la défense fondée sur la diligence raisonnable. Il a été jugé que les pièces saisies concernant la question de l'obligation de diligence n'étaient pas des pièces se rapportant à la commission de cette infraction, si bien que les mandats ont été annulés. Le pourvoi du ministère public à la Cour d'appel a été rejeté. Le ministère public a formé un pourvoi à la Cour suprême du Canada.

Arrêt: Le pourvoi a été accueilli.

L'article 487(1) du *Code criminel* énonce qu'un juge de paix peut décerner un mandat de perquisition s'il est convaincu qu'il existe un motif raisonnable de croire qu'il se trouve en un endroit une chose dont on a des motifs raisonnables

de croire qu'elle fournira un preuve touchant la commission d'une infraction ou révèlera l'endroit où se trouve la personne qui est présumée avoir commis une infraction au Code ou à toute autre loi fédérale. D'après le sens ordinaire de l'expression « preuve touchant la commission d'une infraction », est visé par le mandat tout ce qui a trait ou se rapporte logiquement à l'incident faisant l'objet de l'enquête, aux parties en cause et à leur culpabilité éventuelle. Il faut présumer que le législateur a décidé de ne pas limiter l'art. 487(1) à la preuve établissant un élément faisant partie de la preuve prima facie du ministère public. Parvenir à une autre conclusion reviendrait en réalité à retrancher le mot « touchant » de la disposition. Même amputé de ce mot, l'art. 487(1) est suffisamment large pour autoriser la perquisition dont il est question, mais son insertion dans la disposition appuie manifestement la validité de ces mandats. Bien que l'art. 487(1) puisse occasionner des atteintes importantes à la vie privée, l'intérêt public commande qu'une enquête prompte et approfondie soit menée s'il y a possibilité d'infraction. C'est par rapport à cet intérêt que *tous* les renseignements et éléments de preuve pertinents doivent être trouvés et conservés le plus rapidement possible. Cette interprétation est compatible avec les objets qui sous-tendent le Code et les exigences d'une administration de justice prompte et équitable.

L'article 487(1) vise à permettre aux enquêteurs de découvrir et de conserver le plus d'éléments de preuve pertinents possible. Pour être en mesure d'exercer convenablement les fonctions qui leur ont été confiées, les autorités doivent pouvoir découvrir, examiner et conserver tous les éléments de preuve se rapportant à des événements susceptibles de donner lieu à une responsabilité criminelle. Il n'appartient pas aux policiers de mener une enquête pour décider si les éléments essentiels d'une infraction sont établis - cette décision relève des tribunaux. À cette fin, une interprétation de l'art. 487(1) qui est restrictive et qui ne s'impose pas va à l'encontre du but recherché.

Table of Authorities

Cases considered by/Jurisprudence citée par *Major J.*:

Baron v. R., 93 D.T.C. 5018, (sub nom. *Baron v. Canada)* 78 C.C.C. (3d) 510, (sub nom. *Baron v. Minister of National Revenue)* 146 N.R. 270, 18 C.R. (4th) 374, (sub nom. *Baron v. Canada)* 99 D.L.R. (4th) 350, (sub nom. *Baron v. Canada)* [1993] 1 S.C.R. 416, (sub nom. *Baron v. Canada)* 13 C.R.R. (2d) 65, (sub nom. *Baron v. Canada)* [1993] 1 C.T.C. 111 (S.C.C.) — applied

Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc., (sub nom. *Hunter v. Southam Inc.)* [1984] 2 S.C.R. 145, (sub nom. *Hunter v. Southam Inc.)* 11 D.L.R. (4th) 641, (sub nom. *Hunter v. Southam Inc.)* 55 N.R. 241, 33 Alta. L.R. (2d) 193, (sub nom. *Hunter v. Southam Inc.)* 55 A.R. 291, 27 B.L.R. 297, (sub nom. *Hunter v. Southam Inc.)* 2 C.P.R. (3d) 1, 41 C.R. (3d) 97, (sub nom. *Hunter v. Southam Inc.)* 9 C.R.R. 355, 84 D.T.C. 6467, (sub nom. *Hunter v. Southam Inc.)* 14 C.C.C. (3d) 97, (sub nom. *Director of Investigations & Research Combines Investigation Branch v. Southam Inc.)* [1984] 6 W.W.R. 577 (S.C.C.) — applied

Descôteaux c. Mierzwinski, [1982] 1 S.C.R. 860, 28 C.R. (3d) 289, 1 C.R.R. 318, 44 N.R. 462, 141 D.L.R. (3d) 590, 70 C.C.C. (2d) 385 (S.C.C.) — applied

Domtar Inc., Re (1995), 18 C.E.L.R. (N.S.) 106, (sub nom. *Domtar Inc. v. Canada)* 33 C.R.R. (2d) 161 (B.C. S.C.) — considered

Nelles v. Ontario, 69 O.R. (2d) 448 (note), [1989] 2 S.C.R. 170, 60 D.L.R. (4th) 609, 98 N.R. 321, 35 O.A.C. 161, 41 Admin. L.R. 1, 49 C.C.L.T. 217, 37 C.P.C. (2d) 1, 71 C.R. (3d) 358, 42 C.R.R. 1 (S.C.C.) — considered

Nowegijick v. R., (sub nom. *Norwegijck v. The Queen)* [1983] 1 S.C.R. 29, 83 D.T.C. 5041, 46 N.R. 41, [1983] 2 C.N.L.R. 89, [1983] C.T.C. 20, 144 D.L.R. (3d) 193 (S.C.C.) — considered

R. v. Church of Scientology (1987), 18 O.A.C. 321, (sub nom. *R. v. Church of Scientology of Toronto*) 30 C.R.R. 238, (sub nom. *Church of Scientology v. R. (No. 6)*) 31 C.C.C. (3d) 449 (Ont. C.A.) — considered

R. v. Levogiannis, 25 C.R. (4th) 325, 160 N.R. 371, 85 C.C.C. (3d) 327, 67 O.A.C. 321, [1993] 4 S.C.R. 475, 18 C.R.R. (2d) 242, 16 O.R. (3d) 384 (note) (S.C.C.) — considered

R. v. McIntosh, 36 C.R. (4th) 171, 95 C.C.C. (3d) 481, 21 O.R. (3d) 797 (note), 178 N.R. 161, 79 O.A.C. 81, [1995] 1 S.C.R. 686 (S.C.C.) — considered

R. v. Storrey, 105 N.R. 81, [1990] 1 S.C.R. 241, 37 O.A.C. 161, 53 C.C.C. (3d) 316, 75 C.R. (3d) 1, 47 C.R.R. 210 (S.C.C.) — considered

Rizzo & Rizzo Shoes Ltd., Re, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re*) 221 N.R. 241, (sub nom. *Adrien v. Ontario Ministry of Labour*) 98 C.L.L.C. 210-006, 50 C.B.R. (3d) 163, (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re*) 106 O.A.C. 1, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173 (S.C.C.) — considered

Thomson Newspapers Ltd. v. Canada (Director of Investigation & Research), 76 C.R. (3d) 129, [1990] 1 S.C.R. 425, 67 D.L.R. (4th) 161, 106 N.R. 161, 39 O.A.C. 161, 54 C.C.C. (3d) 417, 29 C.P.R. (3d) 97, 47 C.R.R. 1, 72 O.R. (2d) 415 (note) (S.C.C.) — applied

Statutes considered by/Législation citée par *Major J.*:

Criminal Code/Code criminel, R.S.C./L.R.C. 1985, c. C-46

s. 487(1) [am./mod. R.S.C./L.R.C. 1985, c. 27 (1st Supp./1er suppl.), s. 68(2); am./mod. 1994, c. 44, s. 36] — considered

s. 487(1)(b) [rep. & sub./abr. & rempl. 1994, c. 44, s. 36] — considered

s. 487(1)(d) [en./aj. R.S.C./L.R.C. 1985, c. 27 (1st Supp./1er suppl.), s. 68(2)] — considered

Fisheries Act/Loi sur les pêches, R.S.C./L.R.C. 1985, c. F-14

Generally/en général — considered

s. 36(3) — pursuant to

s. 40(2) — pursuant to

Intrepretation Act/Loi d'interprétation, R.S.C./L.R.C. 1985, c. I-21

s. 12 — considered

Waste Management Act, S.B.C. 1982, c. 41

s. 3(1.1) [en. 1985, c. 52, s. 96(a)] — pursuant to

s. 34(3) — pursuant to

APPEAL by Crown from judgment reported at (1997), 145 D.L.R. (4th) 427, 14 C.C.C. (3d) 537, 90 B.C.A.C. 126, 147 W.A.C. 126 (B.C. C.A.), which found search warrants invalid.

POURVOI du ministère public d'un jugement publié à (1997), 145 D.L.R. (4th) 427, 14 C.C.C. (3d) 537, 90 B.C.A.C. 126, 147 W.A.C. 126 (B.C. C.A.) qui a annulé des mandats de perquisition.

The judgment of the court was delivered by *Major J.*:

1 This appeal raises the question of whether search warrants issued under s. 487(1)(*b*) of the *Criminal Code*, R.S.C. 1985, c. C-46, authorize investigators to search for and seize evidence of negligence in the investigation of strict liability offences. At the conclusion of argument the question was answered in the affirmative and the appeal was allowed with reasons to follow.

I. Facts

2 On October 13, 1994 a chlor-alkali plant operated by the respondents (collectively referred to as "CanadianOxy") in North Vancouver, British Columbia discharged a quantity of chlorine into the waters of Burrard Inlet, killing a number of fish. This incident occurred during a three and a half hour power outage at the plant, as a result of one of two B.C. Hydro 60kv power lines servicing the plant being struck by a tree.

3 The company reported the discharge to the authorities and an investigation by the Department of Fisheries and Oceans followed. Fishery Officer Robert Tompkins went to the plant that night, spoke with the Plant Chemist, and seized a number of documents. He also seized samples of dead fish recovered in the vicinity of the plant by the Harbour Master's patrol vessel. He advised the Plant Manager that he had reasonable grounds to believe that an offence had been committed under the *Fisheries Act*, R.S.C. 1985, c. F-14.

4 Over a short time Tompkins made three further visits to the plant, formally interviewed the Plant Chemist, was shown the valve which the company had identified as the cause of the discharge and was provided with certain documents. His request to interview additional employees was refused.

5 Tompkins subsequently made a written request to CanadianOxy's counsel for additional technical information believed relevant for Environment Canada's Pollution Abatement Division to assess whether the discharge had been preventable. Only a few of these questions were answered.

6 On March 16, 1995, five months after the discharge, Tompkins swore an information and obtained a warrant to search the respondents' plant for a range of documents relating to process records, plant maintenance, employee training, discipline, and general plant operations. In the information, Tompkins described the reasons for seeking this information:

> The business records ... are required to establish and prove that CanadianOxy Chemicals Ltd .... operate a chlor-alkali plant that discharges effluent to the waters of Burrard Inlet near North Vancouver, B.C., that the release of effluent with a chlorine concentration exceeding 10 ppm, which I know would be acutely lethal to fish, occurred on October 13, 1994, and that the company could have taken additional reasonable measures to prevent the release of a deleterious substance into water frequented by fish....
>
> ...I have reasonable grounds to believe that correspondence had been generated by company personnel in January 1994, and that maintenance was performed in March 1994, and again in October 1994, and that the company conducted their own investigation, prepared reports, and provided information regarding the incident until February 1995....
>
> It is necessary to examine effluent discharge records, effluent water quality sampling and analysis records, mechanical and instrument maintenance records, environmental control records, instrument calibration records and flow rate calculation records covering an extended period of time before and after October 13, 1994. This will ...permit analysis of the maintenance programs undertaken by CanadianOxy Chemicals Ltd.

> It is necessary to examine company personnel records covering the period between January 1, 1994 and February 28, 1995...to determine if any company employees have been disciplined in any manner as a result of this incident....

7 The warrant was executed on March 17, 1995. In total 139 items were seized pursuant to the warrant, and 73 additional items were seized under the investigators' understanding of the "plain view" doctrine. Following the search, Tompkins learned by coincidence of an adverse ruling by a British Columbia Provincial Court judge on the validity of a similar seizure in an unrelated case. As a result, he sought legal advice with respect to a number of the items taken.

8 On April 26, 1995, Tompkins made two applications to a Justice of the Peace, one for an order to return the documents which had been improperly seized under the first warrant, and the second for a new warrant to re-seize 13 of the items returned which were relevant to the investigation. These orders were granted and executed the same day.

9 On June 15, 1995 the respondents were charged with:

> (a) depositing, or permitting the deposit, of a deleterious substance in waters frequented by fish, contrary to ss. 36(3) and 40(2) of the *Fisheries Act*; and
>
> (b) introducing, or causing or allowing the introduction of waste into the environment, contrary to ss. 3(1.1) and 34(3) of the *Waste Management Act*, S.B.C. 1982, c. 41 (now R.S.B.C. 1996, c. 482).

10 The respondents subsequently brought a motion to quash the warrants alleging that s. 487(1) of the *Criminal Code* had been exceeded. The warrants were broad enough to authorize a search for evidence of negligence which if found would negate a defence of due diligence.

II. Judicial History

A. British Columbia Supreme Court (1996), 138 D.L.R. (4th) 104 (B.C. S.C.)

11 Sigurdson J. felt bound by *Domtar Inc., Re* (1995), 18 C.E.L.R. (N.S.) 106 (B.C. S.C.), which held that a s. 487 warrant could not be used to search for and seize evidence of negligence going to the defence of due diligence. As a result, he ruled that the documents seized pertaining to the issue of due diligence were not documents with respect to the commission of this particular offence and quashed both warrants.

B. British Columbia Court of Appeal (1997), 145 D.L.R. (4th) 427 (B.C. C.A.)

12 In dismissing the appeal, Goldie J.A. (Carrothers J.A. concurring) held that the appellant had failed to demonstrate on any reasonable construction that s. 487(1)(*b*) authorizes the issuance of a warrant that includes a search for evidence with respect to due diligence in a regulatory offence. In dissent, Southin J.A. concluded that a warrant can issue upon proper evidence to search for and seize things relating to the question of due diligence.

III. Analysis

13 At issue is whether search warrants issued pursuant to s. 487(1) of the *Criminal Code* are limited only to evidence relevant to an element of the offence which is part of the Crown's *prima facie* case, or whether such warrants encompass evidence that may relate to potential defences, such as due diligence, which may or may not be raised at the trial. The relevant section of the *Code* provides:

> 487. (1) A justice who is satisfied by information on oath in Form 1 that there are reasonable grounds to believe that there is in a building, receptacle or place
>
> .....

> (*b*) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence, or will reveal the whereabouts of a person who is believed to have committed an offence, against this Act or any other Act of Parliament,
>
> . . . . .
>
> may at any time issue a warrant under his hand authorizing a person named therein or a peace officer
>
> (*d*) to search the building, receptacle or place for any such thing and to seize it... [Emphasis added.]

14 Statutory provisions should be read to give the words their most obvious ordinary meaning which accords with the context and purpose of the enactment in which they occur; *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at paras. 21-22. It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids. In our opinion there is no such ambiguity in s. 487(1).

A. The Ordinary Meaning of the Words

15 On a plain reading, the phrase "evidence with respect to the commission of an offence" is a broad statement, encompassing all materials which might shed light on the circumstances of an event which appears to constitute an offence. The natural and ordinary meaning of this phrase is that anything relevant or rationally connected to the incident under investigation, the parties involved, and their potential culpability falls within the scope of the warrant.

16 This reading is supported by Dickson J.'s interpretation of almost identical language in *Nowegijick v. R.*, [1983] 1 S.C.R. 29 (S.C.C.), at p. 39:

> The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters. [Emphasis added.]

17 We can assume that Parliament chose not to limit s. 487(1) to evidence establishing an element of the Crown's *prima facie* case. To conclude otherwise would effectively delete the phrase "with respect to" from the section. While s. 487(1) is broad enough to authorize the search in question even absent this phrase, the inclusion of these words plainly supports the validity of these warrants.

18 The respondents urged that s. 487(1) be given a restrictive reading in accordance with the principle that an ambiguous penal statute should be interpreted in a manner most favourable to an accused: see *R. v. McIntosh*, [1995] 1 S.C.R. 686 (S.C.C.), at para. 39. That argument was rejected as, in our opinion, this section is neither ambiguous, nor the type of penal provisions to which the rule should apply. Instead, s. 487 should be given a liberal and purposive interpretation; *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12.

19 While s. 487(1) is part of the *Criminal Code*, and may occasion significant invasions of privacy, the public interest requires prompt and thorough investigation of potential offences. It is with respect to that interest that *all* relevant information and evidence should be located and preserved as soon as possible. This interpretation accords with the purposes underlying the *Criminal Code* and the demands of a fair and expeditious administration of justice.

B. Purpose of the Search Warrant Provisions of the Criminal Code

20 A primary, though not exclusive, purpose of the *Criminal Code*, and penal statutes in general, is to promote a safe, peaceful and honest society, This is achieved by providing guidelines prohibiting unacceptable conduct, and providing for the just prosecution and punishment of those who transgress these norms. The prompt and comprehensive investigation of potential offences is essential to fulfilling that purpose. The point of the investigative phase is to gather all the relevant evidence in order to allow a responsible and informed decision to be made as to whether charges should be laid.

21 At the investigative stage the authorities are charged with determining the following: What happened? Who did it? Is the conduct criminally culpable behaviour? Search warrants are a staple investigative tool for answering those questions, and the section authorizing their issuance must be interpreted in that light.

22 The purpose of s. 487(1) is to allow the investigators to unearth and preserve as much relevant evidence as possible. To ensure that the authorities are able to perform their appointed functions properly they should be able to locate, examine and preserve all the evidence relevant to events which may have given rise to criminal liability. It is not the role of the police to investigate and decide whether the essential elements of an offence are made out — that decision is the role of the courts. The function of the police, and other peace officers, is to investigate incidents which might be criminal, make a conscientious and informed decision as to whether charges should be laid, and then present the full and unadulterated facts to the prosecutorial authorities. To that end an unnecessary and restrictive interpretation of s. 487(1) defeats its purpose. See *R. v. Church of Scientology* (1987), 31 C.C.C. (3d) 449 (Ont. C.A.), p. 475:

> Police work should not be frustrated by the meticulous examination of facts and law that is appropriate to a trial process.... There may be serious questions of law as to whether what is asserted amounts to a criminal offence.... However, these issues can hardly be determined before the Crown has marshalled its evidence and is in a position to proceed with the prosecution.

23 Moreover, extrinsic factors such as the accused's motive or the failure to exercise due diligence are often relevant to determining whether the event which triggered the investigation in the first place is criminally culpable. Everyone, including accused persons, who lacks the means of obtaining and preserving evidence prior to trial has an interest in seeing that these facts are brought to light. It would be undesirable if a narrow reading of s. 487(1) resulted in either inculpatory or exculpatory evidence being lost because of the investigators' inability to secure it. See *R. v. Storrey*, [1990] 1 S.C.R. 241 (S.C.C.), *per* Cory J., at p. 254:

> The essential role of the police is to investigate crimes. That role and function can and should continue after they have made a lawful arrest. The continued investigation will benefit society as a whole and not infrequently the arrested person. It is in the interest of the innocent arrested person that the investigation continue so that he or she may be cleared of the charges as quickly as possible.

24 It is important that an investigation unearth as much evidence as possible. It is antithetical to our system of justice to proceed on the basis that the police, and other authorities, should only search for evidence which incriminates their chosen suspect. Such prosecutorial "tunnel vision" would not be appropriate: see *The Commission on Proceedings Involving Guy Paul Morin: Report*, vol. 1 (1998), *per* the Honourable F. Kaufman at pp. 479-82.

25 In *Nelles v. Ontario*, [1989] 2 S.C.R. 170 (S.C.C.), Lamer J. (later C.J.C.) stated for the majority that:

> Traditionally the Crown Attorney has been described as a "minister of justice" and "ought to regard himself as part of the Court rather than as an advocate". (Morris Manning, "Abuse of Power by Crown Attorneys", [1979] *L.S.U.C. Lectures* 571, at p. 580, quoting Henry Bull, Q.C.) As regards the proper role of the Crown Attorney, perhaps no more often quoted statement is that of Rand J. in *Boucher v. The Queen*, [1955] S.C.R. 16, at pp. 23-24:
>
> > It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility.

26 The majority of the British Columbia Court of Appeal found that the word "commission" in s. 487(1) restricted its application to evidence that the accused had done those acts, or allowed those omissions, which constitute the elements

of the offence. The criminal justice system is not solely concerned with whether a *prima facie* case can be made out against an accused, but whether he or she is *ultimately guilty*. The dissenting reasons of Southin J.A. are persuasive on both the purpose and meaning of s. 487(1). At para. 63 she stated:

> ...I would translate the words in issue to mean "touching upon whether a breach of the law involving a penal sanction has occurred". Whether or not there can be said to have been such a breach depends upon whether there can be a penal sanction and there can be no sanction without a conviction.

27 In addition, as pointed out by the intervener Attorney General of Ontario, denying the Crown the ability to gather evidence in anticipation of a defence would have serious consequences on the functioning of our justice system. In order to be fair, the criminal process must "enable the trier of fact to 'get at the truth and properly and fairly dispose of the case' while at the same time providing the accused with the opportunity to make a full defence"; *R. v. Levogiannis*, [1993] 4 S.C.R. 475 (S.C.C.), at p. 486. This reciprocal fairness demands that the Crown be able to fairly seek and obtain evidence rebutting the accused's defences. If the respondents' submission on the interpretation of s. 487(1) were accepted, a search warrant would never be available for this purpose. This narrow interpretation would frustrate the basic imperative of trial fairness and the search for truth in the criminal process.

C. Privacy Concerns

28 There is no doubt that search warrants are highly intrusive, and that an investigation bearing on the issue of due diligence could, as Shaw J. pointed out in *Domtar Inc., Re*, supra, at p. 119, "entail a detailed inquiry into the affairs of a corporation over a period of several years". This Court has endorsed the importance of privacy and the need to constrain search powers within reasonable limits; *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, [1984] 2 S.C.R. 145 (S.C.C.); *Descôteaux c. Mierzwinski*, [1982] 1 S.C.R. 860 (S.C.C.), at p. 889; *Thomson Newspapers Ltd. v. Canada (Director of Investigation & Research)*, [1990] 1 S.C.R. 425 (S.C.C.), at pp. 520-22; *Baron v. R.*, [1993] 1 S.C.R. 416 (S.C.C.), at pp. 436-37.

29 The broad powers contained in s. 487(1) do not authorize investigative fishing expeditions, nor do they diminish the proper privacy interests of individuals or corporations. This is particularly true with respect to personnel records which may contain a great deal of highly personal information unrelated to the investigation at hand. Judges and magistrates should continue to apply the standards and safeguards which protect privacy from unjustified searches and seizures.

30 In this case, however, the specific terms of the warrant were not at issue, as the respondents challenged only the underlying authority to grant warrants for the purpose of investigating the presence of negligence. In our opinion both a plain reading of the relevant section and consideration of the role and obligations of state investigators support the conclusion that s. 487(1) authorized the granting of the warrants at issue.

IV. Disposition

31 The appeal is allowed, without costs, as agreed by counsel.

Appeal allowed.

Pourvoi accueilli.

End of Document

CHAPTER I-6

An Act respecting Indians

SHORT TITLE

Short title

1. This Act may be cited as the *Indian Act*. R.S., c. 149, s. 1.

INTERPRETATION

Definitions

2. (1) In this Act

"band" «*bande*"band" means a body of Indians

(*a*) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after the 4th day of September 1951,

(*b*) for whose use and benefit in common, moneys are held by Her Majesty, or

(*c*) declared by the Governor in Council to be a band for the purposes of this Act;

"child" «*enfant*"child" includes a legally adopted Indian child;

"council of the band" «*conseil...*"council of the band" means

(*a*) in the case of a band to which section 74 applies, the council established pursuant to that section,

(*b*) in the case of a band to which section 74 does not apply, the council chosen according to the custom of the band, or, where there is no council, the chief of the band chosen according to the custom of the band;

"Department" «*Ministère*"Department" means the Department of Indian Affairs and Northern Development;

"elector" «*électeur*"elector" means a person who

(*a*) is registered on a Band List,

(*b*) is of the full age of twenty-one years, and

(*c*) is not disqualified from voting at band elections;

CHAPITRE I-6

Loi concernant les Indiens

TITRE ABRÉGÉ

Titre abrégé

1. La présente loi peut être citée sous le titre : *Loi sur les Indiens*. S.R., c. 149, art. 1.

INTERPRÉTATION

Définitions

2. (1) Dans la présente loi

«bande» *"band"*«bande» signifie un groupe d'Indiens,

a) à l'usage et au profit communs desquels, des terres, dont le titre juridique est attribué à Sa Majesté, ont été mises de côté avant ou après le 4 septembre 1951,

b) à l'usage et au profit communs desquels, Sa Majesté détient des sommes d'argent, ou

c) que le gouverneur en conseil a déclaré être une bande aux fins de la présente loi;

«biens» *"estate"*«biens» comprend les biens réels et personnels et tout intérêt dans un terrain;

«conseil de la bande» *"council..."*«conseil de la bande» signifie

a) dans le cas d'une bande à laquelle s'applique l'article 74, le conseil établi conformément audit article;

b) dans le cas d'une bande à laquelle l'article 74 n'est pas applicable, le conseil choisi selon la coutume de la bande ou, en l'absence d'un conseil, le chef de la bande choisi selon la coutume de la bande;

«deniers des Indiens» *"Indian moneys"*«deniers des Indiens» signifie toutes les sommes d'argent perçues, reçues ou détenues par Sa Majesté à l'usage et au profit des Indiens ou des bandes;

«électeur» *"elector"*«électeur» signifie une personne qui

a) est inscrite sur une liste de bande,

b) a vingt et un ans révolus, et

c) n'a pas perdu son droit de vote aux élections de la bande;

"estate" «*biens*»
"estate" includes real and personal property and any interest in land;

"Indian" «*Indien*»
"Indian" means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian;

"Indian moneys" «*deniers...*»
"Indian moneys" means all moneys collected, received or held by Her Majesty for the use and benefit of Indians or bands;

"intoxicant" «*spiritueux*»
"intoxicant" includes alcohol, alcoholic, spirituous, vinous, fermented malt or other intoxicating liquor or combination of liquors and mixed liquor a part of which is spirituous, vinous, fermented or otherwise intoxicating and all drinks or drinkable liquids and all preparations or mixtures capable of human consumption that are intoxicating;

"member of a band" «*membre...*»
"member of a band" means a person whose name appears on a Band List or who is entitled to have his name appear on a Band List;

"mentally incompetent Indian" «*Indien mentalement incapable*»
"mentally incompetent Indian" means an Indian who, pursuant to the laws of the province in which he resides, has been found to be mentally defective or incompetent for the purposes of any laws of that province providing for the administration of estates of mentally defective or incompetent persons;

"Minister" «*Ministre*»
"Minister" means the Minister of Indian Affairs and Northern Development;

"registered" «*inscrit*»
"registered" means registered as an Indian in the Indian Register;

"Registrar" «*registraire*»
"Registrar" means the officer of the Department who is in charge of the Indian Register;

"reserve" «*réserve*»
"reserve" means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band;

"superintendent" «*surintendant*»
"superintendent" includes a commissioner, regional supervisor, Indian superintendent, assistant Indian superintendent and any other person declared by the Minister to be a superintendent for the purposes of this Act, and with reference to a band or a reserve, means the superintendent for that band or reserve;

"surrendered lands" «*terres...*»
"surrendered lands" means a reserve or part of a reserve or any interest therein, the legal title to which remains vested in Her Majesty, that has been released or surrendered by the band for whose use and benefit

«enfant» *"child"*
«enfant» comprend un enfant indien légalement adopté;

«Indien» *"Indian"*
«Indien» signifie une personne qui, conformément à la présente loi, est inscrite à titre d'Indien ou a droit de l'être;

«Indien mentalement incapable» *"mentall*
«Indien mentalement incapable» signifie un Indien qui, conformément aux lois de la province où il réside, a été déclaré mentalement déficient ou incapable, aux fins de toute loi de cette province régissant l'administration des biens de personnes mentalement déficientes ou incapables;

«inscrit» *"register*
«inscrit» signifie inscrit comme Indien dans le registre des Indiens;

«membre d'une bande» *"member*
«membre d'une bande» signifie une personne dont le nom apparaît sur une liste de bande ou qui a droit à ce que son nom y figure;

«ministère» *"Depart*
«ministère» signifie le ministère des Affaires indiennes et du Nord canadien;

«Ministre» *"Ministe*
«Ministre» désigne le ministre des Affaires indiennes et du Nord canadien;

«registraire» *"Registr*
«registraire» désigne le fonctionnaire du ministère qui est préposé au registre des Indiens;

«réserve» *"reserve"*
«réserve» signifie une parcelle de terrain dont le titre juridique est attribué à Sa Majesté et qu'Elle a mise de côté à l'usage et au profit d'une bande;

«spiritueux» *"intoxica*
«spiritueux» comprend l'alcool, une liqueur ou une combinaison de liqueurs alcooliques, spiritueuses, vineuses, à base de malt fermenté ou autrement enivrantes et une liqueur mélangée dont une partie est spiritueuse, vineuse, fermentée ou autrement enivrante, et tous les breuvages ou boissons et tous les mélanges ou préparations susceptibles de consommation par l'homme, qui sont enivrants;

«surintendant» *"superint*
«surintendant» comprend un commissaire, un surveillant régional, un surintendant des Indiens, un surintendant adjoint des Indiens et toute autre personne que le Ministre a déclarée un surintendant aux fins de la présente loi, et, relativement à une bande ou une réserve, signifie le surintendant de cette bande ou réserve;

«terres cédées» *"surrender*
«terres cédées» signifie une réserve ou partie d'une réserve, ou tout intérêt y afférent, dont le titre juridique demeure attribué à Sa Majesté et que la bande à l'usage et au profit de laquelle il avait été mis de côté a abandonné ou cédé.

and may by proclamation revoke any such declaration.

et peut par proclamation révoquer toute semblable déclaration.

Certain sections inapplicable to Indians living off reserves

(3) Sections 114 to 123 and, unless the Minister otherwise orders, sections 42 to 52 do not apply to or in respect of any Indian who does not ordinarily reside on a reserve or on lands belonging to Her Majesty in right of Canada or a province. R.S., c. 149, s. 4; 1956, c. 40, s. 1.

(3) Les articles 114 à 123 et, sauf si le Ministre en ordonne autrement, les articles 42 à 52 ne s'appliquent à aucun Indien, ni à l'égard d'aucun Indien, ne résidant pas ordinairement dans une réserve ou sur des terres qui appartiennent à Sa Majesté du chef du Canada ou d'une province. S.R., c. 149, art. 4; 1956, c. 40, art. 1.

Certains articles ne s'appliquent pas aux Indiens vivant hors des réserves

DEFINITION AND REGISTRATION OF INDIANS

DÉFINITION ET ENREGISTREMENT DES INDIENS

Indian Register

5. An Indian Register shall be maintained in the Department, which shall consist of Band Lists and General Lists and in which shall be recorded the name of every person who is entitled to be registered as an Indian. R.S., c. 149, s. 5.

5. Est maintenu au ministère un registre des Indiens, lequel consiste dans des listes de bande et des listes générales et où doit être consigné le nom de chaque personne ayant droit d'être inscrite comme Indien. S.R., c. 149, art. 5.

Registre des Indiens

Band Lists and General Lists

6. The name of every person who is a member of a band and is entitled to be registered shall be entered in the Band List for that band, and the name of every person who is not a member of a band and is entitled to be registered shall be entered in a General List. R.S., c. 149, s. 6.

6. Le nom de chaque personne qui est membre d'une bande et a droit d'être inscrite doit être consigné sur la liste de bande pour la bande en question, et le nom de chaque personne qui n'est pas membre d'une bande et a droit d'être inscrite doit apparaître sur une liste générale. S.R., c. 149, art. 6.

Listes de bande et listes générales

Deletions and additions

7. (1) The Registrar may at any time add to or delete from a Band List or a General List the name of any person who, in accordance with this Act, is entitled or not entitled, as the case may be, to have his name included in that List.

7. (1) Le registraire peut en tout temps ajouter à une liste de bande ou à une liste générale, ou en retrancher, le nom de toute personne qui, d'après la présente loi, a ou n'a pas droit, selon le cas, à l'inclusion de son nom dans cette liste.

Additions et retranchements

Date of change

(2) The Indian Register shall indicate the date on which each name was added thereto or deleted therefrom. R.S., c. 149, s. 7.

(2) Le registre des Indiens doit indiquer la date où chaque nom y a été ajouté ou en a été retranché. S.R., c. 149, art. 7.

Date du changement

Existing lists to constitute Register

8. The band lists in existence in the Department on the 4th day of September 1951 shall constitute the Indian Register, and the applicable lists shall be posted in a conspicuous place in the superintendent's office that serves the band or persons to whom the List relates and in all other places where band notices are ordinarily displayed. R.S., c. 149, s. 8.

8. Les listes de bande dressées au ministère le 4 septembre 1951 constituent le registre des Indiens et les listes applicables doivent être affichées à un endroit bien en vue dans le bureau du surintendant qui dessert la bande ou les personnes visées par la liste et dans tous les autres endroits où les avis concernant la bande sont ordinairement affichés. S.R., c. 149, art. 8.

Les listes existantes constituent le registre

Deletions and additions may be protested

9. (1) Within six months after a list has been posted in accordance with section 8 or within three months after the name of a person has been added to or deleted from a Band List or a General List pursuant to section 7

9. (1) Dans les six mois de l'affichage d'une liste conformément à l'article 8 ou dans les trois mois de l'addition du nom d'une personne à une liste de bande ou à une liste générale, ou de son retranchement d'une telle liste, en vertu de l'article 7,

Les retranchements et les additions peuvent être l'objet d'une protestation

all the powers of a commissioner under Part I of the *Inquiries Act*; the judge shall decide whether the person in respect of whom the protest was made is, in accordance with this Act, entitled or not entitled, as the case may be, to have his name included in the Indian Register, and the decision of the judge is final and conclusive.

les pouvoirs d'un commissaire en vertu de la Partie I de la *Loi sur les enquêtes*. Le juge doit décider si la personne qui a fait l'objet de la protestation a ou n'a pas droit, selon le cas, d'après la présente loi, à l'inscription de son nom au registre des Indiens, et la décision du juge est définitive et péremptoire.

One reference only

(5) Not more than one reference of a Registrar's decision in respect of a protest may be made to a judge under this section.

(5) La décision du registraire à l'égard d'une protestation ne peut être renvoyée qu'une seule fois devant un juge aux termes du présent article.

Un seul renvoi

Burden of proof

(6) Where a decision of the Registrar has been referred to a judge for review under this section, the burden of establishing that the decision of the Registrar is erroneous is on the person who requested that the decision be so referred. R.S., c. 149, s. 9; 1956, c. 40, s. 2.

(6) Lorsque la décision du registraire a été renvoyée devant un juge, pour revision, aux termes du présent article, il incombe à la personne qui a demandé ce renvoi d'établir que la décision du registraire est erronée. S.R., c. 149, art. 9; 1956, c. 40, art. 2.

Fardeau de la preuve

Wife and minor children

10. Where the name of a male person is included in, omitted from, added to or deleted from a Band List or a General List, the names of his wife and his minor children shall also be included, omitted, added or deleted, as the case may be. R.S., c. 149, s. 10.

10. Lorsque le nom d'une personne du sexe masculin est inclus dans une liste de bande ou une liste générale, ou y est ajouté ou omis, ou en est retranché, les noms de son épouse et de ses enfants mineurs doivent également être inclus, ajoutés, omis ou retranchés, selon le cas. S.R., c. 149, art. 10.

L'épouse et les enfants mineurs

Persons entitled to be registered

11. (1) Subject to section 12, a person is entitled to be registered if that person

(*a*) on the 26th day of May 1874 was, for the purposes of *An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, being chapter 42 of the Statutes of Canada, 1868, as amended by section 6 of chapter 6 of the Statutes of Canada, 1869, and section 8 of chapter 21 of the Statutes of Canada, 1874, considered to be entitled to hold, use or enjoy the lands and other immovable property belonging to or appropriated to the use of the various tribes, bands or bodies of Indians in Canada;

(*b*) is a member of a band

(i) for whose use and benefit, in common, lands have been set apart or since the 26th day of May 1874, have been agreed by treaty to be set apart, or

(ii) that has been declared by the Governor in Council to be a band for the purposes of this Act;

(*c*) is a male person who is a direct descendant in the male line of a male

11. (1) Sous réserve de l'article 12, une personne a droit d'être inscrite si

a) elle était, le 26 mai 1874, aux fins de la loi alors intitulée: *Acte pourvoyant à l'organisation du Département du Secrétaire d'État du Canada, ainsi qu'à l'administration des Terres des Sauvages et de l'Ordonnance*, chapitre 42 des Statuts du Canada de 1868, modifiée par l'article 6 du chapitre 6 des Statuts du Canada de 1869 et par l'article 8 du chapitre 21 des Statuts du Canada de 1874, considérée comme ayant droit à la détention, l'usage ou la jouissance des terres et autres biens immobiliers appartenant aux tribus, bandes ou groupes d'Indiens au Canada, ou affectés à leur usage;

b) elle est membre d'une bande

(i) à l'usage et au profit communs de laquelle des terres ont été mises de côté ou, depuis le 26 mai 1874, ont fait l'objet d'un traité les mettant de côté, ou

(ii) que le gouverneur en conseil a déclarée une bande aux fins de la présente loi;

c) elle est du sexe masculin et descendante directe, dans la ligne masculine, d'une personne du sexe masculin décrite à l'alinéa

Personnes ayant droit à l'inscription

person described in paragraph (*a*) or (*b*);

(*d*) is the legitimate child of

(i) a male person described in paragraph (*a*) or (*b*), or

(ii) a person described in paragraph (*c*);

(*e*) is the illegitimate child of a female person described in paragraph (*a*), (*b*) or (*d*); or

(*f*) is the wife or widow of a person who is entitled to be registered by virtue of paragraph (*a*), (*b*), (*c*), (*d*) or (*e*).

Exception

(2) Paragraph (1)(*e*) applies only to persons born after the 13th day of August 1956. R.S., c. 149, s. 11; 1956, c. 40, s. 3.

Persons not entitled to be registered

12. (1) The following persons are not entitled to be registered, namely,

(*a*) a person who

(i) has received or has been allotted half-breed lands or money scrip,

(ii) is a descendant of a person described in subparagraph (i),

(iii) is enfranchised, or

(iv) is a person born of a marriage entered into after the 4th day of September 1951 and has attained the age of twenty-one years, whose mother and whose father's mother are not persons described in paragraph 11(1)(*a*),(*b*) or (*d*) or entitled to be registered by virtue of paragraph 11(1)(*e*),

unless, being a woman, that person is the wife or widow of a person described in section 11, and

(*b*) a woman who married a person who is not an Indian, unless that woman is subsequently the wife or widow of a person described in section 11.

Protest re illegitimate child

(2) The addition to a Band List of the name of an illegitimate child described in paragraph 11(1)(*e*) may be protested at any time within twelve months after the addition, and if upon the protest it is decided that the father of the child was not an Indian, the child is not entitled to be registered under that paragraph.

Certificate

(3) The Minister may issue to any Indian to whom this Act ceases to apply, a certificate to that effect.

Exception

(4) Subparagraphs (1)(*a*)(i) and (ii) do not apply to a person who

a) ou *b*);

d) elle est l'enfant légitime

(i) d'une personne du sexe masculin décrite à l'alinéa *a*) ou *b*), ou

(ii) d'une personne décrite à l'alinéa *c*);

e) elle est l'enfant illégitime d'une personne du sexe féminin décrite à l'alinéa *a*), *b*) ou *d*); ou

f) elle est l'épouse ou la veuve d'une personne ayant le droit d'être inscrite aux termes de l'alinéa *a*), *b*), *c*), *d*) ou *e*).

Exception

(2) L'alinéa (1)*e*) s'applique seulement aux personnes nées après le 13 août 1956. S.R., c. 149, art. 11; 1956, c. 40, art. 3.

Personnes n'ayant pas droit à l'inscription

12. (1) Les personnes suivantes n'ont pas le droit d'être inscrites, savoir:

a) une personne qui

(i) a reçu, ou à qui il a été attribué, des terres ou certificats d'argent de métis,

(ii) est un descendant d'une personne décrite au sous-alinéa (i),

(iii) est émancipée, ou

(iv) est née d'un mariage contracté après le 4 septembre 1951 et a atteint l'âge de vingt et un ans, dont la mère et la grand-mère paternelle ne sont pas des personnes décrites à l'alinéa 11(1)*a*),*b*) ou *d*) ou admises à être inscrites en vertu de l'alinéa 11(1)*e*),

sauf si, étant une femme, cette personne est l'épouse ou la veuve de quelqu'un décrit à l'article 11, et

b) une femme qui a épousé un non-Indien, sauf si cette femme devient subséquemment l'épouse ou la veuve d'une personne décrite à l'article 11.

Protestation au sujet d'un enfant illégitime

(2) L'addition, à une liste de bande, du nom d'un enfant illégitime décrit à l'alinéa 11(1)*e*) peut faire l'objet d'une protestation en tout temps dans les douze mois de l'addition et si, à la suite de la protestation, il est décidé que le père de l'enfant n'était pas un Indien, l'enfant n'a pas le droit d'être inscrit selon cet alinéa.

Certificat

(3) Le Ministre peut délivrer à tout Indien auquel la présente loi cesse de s'appliquer, un certificat dans ce sens.

Exception

(4) Les sous-alinéas (1)*a*)(i) et (ii) ne s'appliquent pas à une personne qui,

4

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

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

X Practice and procedure
X.5 Discovery
X.5.c Miscellaneous

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.

Table of Authorities

Cases considered by *D.R.G. Thomas J.*:

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s. 2(1) "band" — referred to

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s. 209 — referred to

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R. 5.2 — referred to

R. 5.5-5.9 — referred to

R. 5.13 — considered

R. 5.13(1) — considered

R. 6.3 — considered

R. 9.19 — considered

Regulations considered:

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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:

1. to be appointed as the litigation representative of minors interested in this proceeding;

2. for the payment of advance costs on a solicitor and own client basis and exemption from liability for the costs of others; and

3. for an advance ruling that information and evidence relating to the membership criteria and processes of the Sawridge Band is relevant material.

April 5, 2012 - the Sawridge Trustees and the SFN resisted the Public Trustee's application.

June 12, 2012 - I concluded that a litigation representative was necessary to represent the interests of the minor beneficiaries and potential beneficiaries of the 1985 Sawridge Trust, and appointed the Public Trustee in that role: *Sawridge #1*, at paras 28-29, 33. I ordered that Public Trustee, as a neutral and independent party, should receive full and advance indemnification for its activities in relation to the Sawridge Trust (***Sawridge #1***, at para 42), and permitted steps to investigate "... the Sawridge Band membership criteria and processes because such information may be relevant and material ..." (***Sawridge #1***, at para 55).

June 19, 2013 - the Alberta Court of Appeal confirmed the award of solicitor and own client costs to the Public Trustee, as well as the exemption from unfavourable cost awards (***Sawridge #2***).

April 30, 2014 - the Trustees and the Public Trustee agreed to a consent order related to questioning of Paul Bujold and Elizabeth Poitras.

June 24, 2015 - the Public Trustee's application directed to the SFN was stayed and the Public Trustee was ordered to provide the SFN with the particulars of and the basis for the relief it claimed. A further hearing was scheduled for June 30, 2015.

June 30, 2015 - after hearing submissions, I ordered that:

- the Trustee's application to settle the Trust was adjourned;

• the Public Trustee file an amended application for production from the SFN with argument to be heard on September 2, 2015; and

• the Trustees identify issues concerning calculation and reimbursement of the accounts of the Public Trustee for legal services.

September 2/3, 2015 - after a chambers hearing, I ordered that:

• within 60 days the Trustees prepare and serve an affidavit of records, per the *Alberta Rules of Court*, Alta Reg 124/2010 [the "*Rules*", or individually a "*Rule*"],

• the Trustees may withdraw their proposed settlement agreement and litigation plan, and

• some document and disclosure related items sought by the Public Trustee were adjourned *sine die*. ("September 2/3 Order")

October 5, 2015 - I directed the Public Trustee to provide more detailed information in relation to its accounts totalling $205,493.98. This further disclosure was intended to address a concern by the Sawridge Trustees concerning steps taken by the Public Trustee in this proceeding.

6 Earlier steps have perhaps not ultimately resolved but have advanced many of the issues which emerged in mid-2015. The Trustees undertook to provide an Affidavit of Records. I have directed additional disclosure of the activities of the legal counsel assisting the Public Trustee to allow the Sawridge Trustees a better opportunity to evaluate those legal accounts. The most important issue which remains in dispute is the application by the Public Trustee for the production of documents/information held by the SFN.

7 This decision responds to that production issue, but also more generally considers the current state of this litigation in an attempt to refocus the direction of this proceeding and the activities of the Public Trustee to ensure that it meets the dual objectives of assisting this Court in directing a fair distribution scheme for the assets of the 1985 Sawridge Trust and the representation of potential minor beneficiaries.

III. The 1985 Sawridge Trust

8 *Sawridge #1* at paras 7-13 reviews the history of the 1985 Sawridge Trust. I repeat that information verbatim, as this context is relevant to the role and scope of the Public Trustee's involvement in this matter:

> [8] In 1982 various assets purchased with funds of the Sawridge Band were placed in a formal trust for the members of the Sawridge Band. In 1985 those assets were transferred into the 1985 Sawridge Trust. [In 2012] the value of assets held by the 1985 Sawridge Trust is approximately $70 million. As previously noted, the beneficiaries of the Sawridge Trust are restricted to persons who were members of the Band prior to the adoption by Parliament of the *Charter* compliant definition of Indian status.
>
> [9] In 1985 the Sawridge Band also took on the administration of its membership list. It then attempted (unsuccessfully) to deny membership to Indian women who married non-aboriginal persons: ***Sawridge Band v. Canada***, 2009 FCA 123, 391 N.R. 375, leave denied [2009] S.C.C.A. No. 248. At least 11 women were ordered to be added as members of the Band as a consequence of this litigation: ***Sawridge Band v. Canada***, 2003 FCT 347, 2003 FCT 347, [2003] 4 F.C. 748, affirmed 2004 FCA 16, [2004] 3 F.C.R. 274. Other litigation continues to the present in relation to disputed Band memberships: ***Poitras v. Sawridge Band***, 2012 FCA 47, 428 N.R. 282, leave sought [2012] S.C.C.A. No. 152.

[10] At the time of argument in April 2012, the Band had 41 adult members, and 31 minors. The Sawridge Trustees report that 23 of those minors currently qualify as beneficiaries of the 1985 Sawridge Trust; the other eight minors do not.

[11] At least four of the five Sawridge Trustees are beneficiaries of the Sawridge Trust. There is overlap between the Sawridge Trustees and the Sawridge Band Chief and Council. Trustee Bertha L'Hirondelle has acted as Chief; Walter Felix Twinn is a former Band Councillor. Trustee Roland Twinn is currently the Chief of the Sawridge Band.

[12] The Sawridge Trustees have now concluded that the definition of "Beneficiaries" contained in the 1985 Sawridge Trust is "potentially discriminatory". They seek to redefine the class of beneficiaries as the present members of the Sawridge Band, which is consistent with the definition of "Beneficiaries" in another trust known as the 1986 Trust.

[13] This proposed revision to the definition of the defined term "Beneficiaries" is a precursor to a proposed distribution of the assets of the 1985 Sawridge Trust. The Sawridge Trustees indicate that they have retained a consultant to identify social and health programs and services to be provided by the Sawridge Trust to the beneficiaries and their minor children. Effectively they say that whether a minor is or is not a Band member will not matter: see the Trustee's written brief at para. 26. The Trustees report that they have taken steps to notify current and potential beneficiaries of the 1985 Sawridge Trust and I accept that they have been diligent in implementing that part of my August 31 Order.

IV. The Current Situation

9 This decision and the June 30 and September 2/3, 2015 hearings generally involve the extent to which the Public Trustee should be able to obtain documentary materials which the Public Trustee asserts are potentially relevant to its representation of the identified minor beneficiaries and the potential minor beneficiaries. Following those hearings, some of the disagreements between the Public Trustee and the 1985 Sawridge Trustees were resolved by the Sawridge Trustees agreeing to provide a *Rules* Part V affidavit of records within 60 days of the September 2/3 Order.

10 The primary remaining issue relates to the disclosure of information in documentary form sought by the Public Trustee from the SFN and there are also a number of additional ancillary issues. The Public Trustee seeks information concerning:

1. membership in the SFN,

2. candidates who have or are seeking membership with the SFN,

3. the processes involved to determine whether individuals may become part of the SFN,

4. records of the application processes and certain associated litigation, and

5 how assets ended up in the 1985 Sawridge Trust.

11 The SFN resists the application of the Public Trustee, arguing it is not a party to this proceeding and that the Public Trustee's application falls outside the *Rules*. Beyond that, the SFN questions the relevance of the information sought.

V. Submissions and Argument

A. The Public Trustee

12 The Public Trustee takes the position that it has not been able to complete the responsibilities assigned to it by me in *Sawridge #1* because it has not received enough information on potential, incomplete and filed applications to join the SFN. It also needs information on the membership process, including historical membership litigation scenarios, as well as data concerning movement of assets into the 1985 Sawridge Trust.

13 It also says that, without full information, the Public Trustee cannot discharge its role in representing affected minors.

14 The Public Trustee's position is that the Sawridge Band is a party to this proceeding, or is at least so closely linked to the 1985 Sawridge Trustees that the Band should be required to produce documents/information. It says that the Court can add the Sawridge Band as a party. In the alternative, the Public Trustee argues that *Rules* 5.13 and 9.19 provide a basis to order production of all relevant and material records.

B. The SFN

15 The SFN takes the position that it is not a party to the Trustee's proceedings in this Court and it has been careful not to be added as a party. The SFN and the Sawridge Trustees are distinct and separate entities. It says that since the SFN has not been made a party to this proceeding, the *Rules* Part V procedures to compel documents do not apply to it. This is a stringent test: *Trimay Wear Plate Ltd. v. Way*, 2008 ABQB 601, 456 A.R. 371 (Alta. Q.B.); *Wasylyshen v. Canadian Broadcasting Corp.*, [2006] A.J. No. 1169 (Alta. Q.B.).

16 The only mechanism provided for in the *Rules* to compel a non-party such as the SFN to provide documents is *Rule* 5.13, and its function is to permit access to specific identified items held by the third party. That process is not intended to facilitate a 'fishing expedition' (*Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 94 A.R. 17, 63 Alta. L.R. (2d) 189 (Alta. Q.B.)) or compel disclosure (*Gainers Inc. v. Pocklington Holdings Inc.* (1995), 169 A.R. 288, 30 Alta. L.R. (3d) 273 (Alta. C.A.)). Items sought must be particularized, and this process is not a form of discovery: *Esso Resources Canada Ltd. v. Stearns Catalytic Ltd.* (1989), 98 A.R. 374, 16 A.C.W.S. (3d) 286 (Alta. Q.B.).

17 The SFN notes the information sought is voluminous, confidential and involves third parties. It says that the Public Trustee's application is document discovery camouflaged under a different name. In any case, a document is only producible if it is relevant and material to the arguments pled: *Rule* 5.2; *Weatherill Estate v. Weatherill*, 2003 ABQB 69, 337 A.R. 180 (Alta. Q.B.).

18 The SFN takes the position that *Sawridge #1* ordered the Public Trustee to investigate two points: 1) identifying the beneficiaries of the 1985 Sawridge Trust; and 2) scrutiny of transfer of assets into the 1985 Sawridge Trust. They say that what the decision in *Sawridge #1* did not do was authorize interference or duplication in the SFN's membership process and its results. Much of what the Public Trustee seeks is not relevant to either issue, and so falls outside the scope of what properly may be sought under *Rule* 5.13.

19 Privacy interests and privacy legislation are also factors: *Royal Bank of Canada v. Trang*, 2014 ONCA 883 (Ont. C.A.) at paras 97, (2014), 123 O.R. (3d) 401 (Ont. C.A.) ; *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5. The Public Trustee should not have access to this information unless the SFN's application candidates consent. Much of the information in membership applications is personal and sensitive. Other items were received by the SFN during litigation under an implied undertaking of confidentiality: *Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc.*, 2008 SCC 8, [2008] 1 S.C.R. 157 (S.C.C.). The cost to produce the materials is substantial.

20 The SFN notes that even though it is a target of the relief sought by the Public Trustee that it was not served with the July 16, 2015 application, and states the Public Trustee should follow the procedure in *Rule* 6.3. The SFN expressed concern that the Public Trustee's application represents an unnecessary and prejudicial investigation which ultimately harms the beneficiaries and potential beneficiaries of the 1985 Sawridge Trust. In *Sawridge #2* at para 29, the Court of Appeal had stressed that the order in *Sawridge #1* that the Public Trustee's costs be paid on a solicitor and own client basis is not a "blank cheque", but limited to activities that are "fair and reasonable". It asks that the Public Trustee's application be dismissed and that the Public Trustee pay the costs of the SFN in this application, without indemnification from the 1985 Sawridge Trust.

C. The Sawridge Trustees

21 The Sawridge Trustees offered and I ordered in my September 2/3 Order that within 60 days the Trustees prepare and deliver a *Rule* 5.5-5.9 affidavit of records to assist in moving the process forward. This resolved the immediate question of the Public Trustee's access to documents held by the Trustees.

22 The Trustees generally support the position taken by the SFN in response to the Public Trustee's application for Band documents. More broadly, the Trustees questioned whether the Public Trustee's developing line of inquiry was necessary. They argued that it appears to target the process by which the SFN evaluates membership applications. That is not the purpose of this proceeding, which is instead directed at re-organizing and distributing the 1985 Sawridge Trust in a manner that is fair and non-discriminatory to members of the SFN.

23 They argue that the Public Trustee is attempting to attack a process that has already undergone judicial scrutiny. They note that the SFN's admission procedure was approved by the Minister of Indian and Northern Affairs, and the Federal Court concluded it was fair: *Stoney v. Sawridge First Nation*, 2013 FC 509, 432 F.T.R. 253 (Eng.) (F.C.). Further, the membership criteria used by the SFN operate until they are found to be invalid: *Huzar v. Canada*, [2000] F.C.J. No. 873 (Fed. C.A.) at para 5, (2000), 258 N.R. 246 (Fed. C.A.). Attempts to circumvent these findings in applications to the Canadian Human Rights Commission were rejected as a collateral attack, and the same should occur here.

24 The 1985 Sawridge Trustees reviewed the evidence which the Public Trustee alleges discloses an unfair membership admission process, and submit that the evidence relating to Elizabeth Poitras and other applicants did not indicate a discriminatory process, and in any case was irrelevant to the critical question for the Public Trustee as identified in *Sawridge #1*, namely that the Public Trustee's participation is to ensure minor children of Band members are treated fairly in the proposed distribution of the assets of the 1985 Sawridge Trust.

25 Additional submissions were made by two separate factions within the Trustees. Ronald Twinn, Walter Felix Twin, Bertha L'Hoirondelle and Clara Midbo argued that an unfiled affidavit made by Catherine Twinn was irrelevant to the Trustees' disclosure. Counsel for Catherine Twinn expressed concern in relation to the Trustee's activities being transparent and that the ultimate recipients of the 1985 Sawridge Trust distribution be the appropriate beneficiaries.

VI. Analysis

26 The Public Trustee's application for production of records/information from the SFN is denied. First, the Public Trustee has used a legally incorrect mechanism to seek materials from the SFN. Second, it is necessary to refocus these proceedings and provide a well-defined process to achieve a fair and just distribution of the assets of the 1985 Sawridge Trust. To that end, the Public Trustee may seek materials/information from the Sawridge Band, but only in relation to specific issues and subjects.

A. Rule 5.13

27 I agree with the SFN that it is a third party to this litigation and is not therefore subject to the same disclosure procedures as the Sawridge Trustees who are a party. Alberta courts do not use proximal relationships as a bridge for disclosure obligations: *Trimay Wear Plate Ltd. v. Way*, at para 17.

28 If I were to compel document production by the Sawridge Band, it would be via *Rule* 5.13:

> 5.13(1) On application, and after notice of the application is served on the person affected by it, the Court may order a person who is not a party to produce a record at a specified date, time and place if
>
> (a) the record is under the control of that person,
>
> (b) there is reason to believe that the record is relevant and material, and
>
> (c) the person who has control of the record might be required to produce it at trial.

(2) The person requesting the record must pay the person producing the record an amount determined by the Court.

29 The modern *Rule* 5.13 uses language that closely parallels that of its predecessor *Alberta Rules of Court*, Alta Reg 390/1968, s 209. Jurisprudence applying *Rule* 5.13 has referenced and used approaches developed in the application of that precursor provision: *Toronto Dominion Bank v. Sawchuk*, 2011 ABQB 757, 530 A.R. 172 (Alta. Master); *Z. (H.) v. Unger*, 2013 ABQB 639, 573 A.R. 391 (Alta. Q.B.). I agree with this approach and conclude that the principles in the pre-*Rule* 5.13 jurisprudence identified by the SFN apply here: *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*; *Gainers Inc. v. Pocklington Holdings Inc.*; *Esso Resources Canada Ltd. v. Stearns Catalytic Ltd.*

30 The requirement for potential disclosure is that "there is reason to believe" the information sought is "relevant and material". The SFN has argued relevance and materiality may be divided into "primary, secondary, and tertiary" relevance, however the Alberta Court of Appeal has rejected these categories as vague and not useful: *Kaddoura v. Hanson*, 2015 ABCA 154 (Alta. C.A.) at para 15, (2015), 15 Alta. L.R. (6th) 37 (Alta. C.A.).

31 I conclude that the only documents which are potentially disclosable in the Public Trustee's application are those that are "relevant and material" to the issue before the court.

B. Refocussing the role of the Public Trustee

32 It is time to establish a structure for the next steps in this litigation before I move further into specific aspects of the document production dispute between the SFN and the Public Trustee. A prerequisite to any document disclosure is that the information in question must be *relevant*. Relevance is tested *at the present point*.

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 Sawridge Trustee's proposed scheme. What is critical is that the distribution plan can be critically tested by the Public Trustee to permit this Court to arrive at a fair outcome.

41 I anticipate the critical question for the Public Trustee at this step will be to evaluate whether any differential treatment between adult beneficiaries and the children of adult beneficiaries is or is not fair to those children. I do not see that the particular identity of these individuals is relevant. This instead is a question of fair treatment of the two (or more) categories.

42 On September 3, 2015, the 1985 Sawridge Trustees withdrew their proposed distribution arrangement. I direct the Trustees to submit a replacement distribution arrangement by January 29, 2016.

43 The Public Trustee shall have until March 15, 2016 to prepare and serve a *Rule* 5.13(1) application on the SFN which identifies specific documents that it believes are relevant and material to test the fairness of the proposed distribution arrangement to minors who are children of beneficiaries or potential beneficiaries.

44 If necessary, a case management meeting will be held before April 30, 2016 to decide any disputes concerning any *Rule* 5.13(1) application by the Public Trustee. In the event no *Rule* 5.13(1) application is made in relation to the distribution scheme the Public Trustee and 1985 Sawridge Band Trustees shall make their submissions on the distribution proposal at the pre-April 30 case management session.

Task 2 - Examining potential irregularities related to the settlement of assets to the Trust

45 There have been questions raised as to what assets were settled in the 1985 Sawridge Trust. At this point it is not necessary for me to examine those potential issues. Rather, the first task is for the Public Trustee to complete its document request from the SFN which may relate to that issue.

46 The Public Trustee shall by January 29, 2016 prepare and serve a *Rule* 5.13(1) application on the Sawridge Band that identifies specific types of documents which it believes are relevant and material to the issue of the assets settled in the 1985 Sawridge Trust.

47 A case management hearing will be held before April 30, 2016 to decide any disputes concerning any such *Rule* 5.13(1) application by the Public Trustee.

Task 3 - Identification of the pool of potential beneficiaries

48 The third task involving the Public Trustee is to assist in identifying potential minor beneficiaries of the 1985 Sawridge Trust. The assignment of this task recognizes that the Public Trustee operates within its Court-ordered role when it engages in inquiries to establish the pools of individuals who are minor beneficiaries and potential minor beneficiaries. I understand that the first category of minor beneficiaries is now identified. The second category of potential minor beneficiaries is an area of legitimate investigation for the Public Trustee and involves two scenarios:

1. an individual with an unresolved application to join the Sawridge Band and who has a child; and

2. an individual with an unsuccessful application to join the Sawridge Band and who has a child.

49 I stress that the Public Trustee's role is limited to the representation of potential child beneficiaries of the 1985 Sawridge Trust only. That means litigation, procedures and history that relate to past and resolved membership disputes are not relevant to the proposed distribution of the 1985 Sawridge Trust. As an example, the Public Trustee has sought records relating to the disputed membership of Elizabeth Poitras. As noted, that issue has been resolved through litigation in the Federal Court, and that dispute has no relation to establishing the identity of potential minor beneficiaries. The same is true of any other adult Sawridge Band members.

50 As Aalto, J. observed in *Poitras v. Sawridge Band*, 2013 FC 910, 438 F.T.R. 264 (Eng.) (F.C.), "[M]any gallons of judicial ink have been spilt" in relation to the gender-based disputes concerning membership in the SFN. I do not believe it is necessary to return to this issue. The SFN's past practise of relentless resistance to admission into membership of aboriginal women who had married non-Indian men is well established.

51 The Public Trustee has no relevant interest in the children of any parent who has an unresolved application for membership in the Sawridge Band. If that outstanding application results in the applicant being admitted to the SFN then that child will become another minor represented by the Public Trustee.

52 While the Public Trustee has sought information relating to incomplete applications or other potential SFN candidates, I conclude that an open-ended 'fishing trip' for unidentified hypothetical future SFN members, who may also have children, is outside the scope of the Public Trustee's role in this proceeding. There needs to be minimum threshold proximity between the Public Trustee and any unknown and hypothetical minor beneficiary. As I will stress later, the Public Trustee's activities need to be reasonable and fair, and balance its objectives: cost-effective participation in this process (i.e., not unreasonably draining the Trust) and protecting the interests of minor children of SFN members. Every dollar spent in legal and research costs turning over stones and looking under bushes in an attempt to find an additional, hypothetical minor beneficiary reduces the funds held in trust for the known and existing minor children who are potential beneficiaries of the 1985 Sawridge Trust distribution and the clients of the Public Trustee. Therefore, I will only allow investigation and representation by the Public Trustee of children of persons who have, at a minimum, completed a Sawridge Band membership application.

53 The Public Trustee also has a potential interest in a child of a Sawridge Band candidate who has been rejected or is rejected after an unsuccessful application to join the SFN. In these instances the Public Trustee is entitled to inquire whether the rejected candidate intends to appeal the membership rejection or challenge the rejection through judicial review in the Federal Court. If so, then that child is also a potential candidate for representation by the Public Trustee.

54 This Court's function is not to duplicate or review the manner in which the Sawridge Band receives and evaluates applications for Band membership. I mean by this that if the Public Trustee's inquiries determine that there are one or more outstanding applications for Band membership by a parent of a minor child then that is not a basis for the Public Trustee to intervene in or conduct a collateral attack on the manner in which that application is evaluated, or the result of that process.

55 I direct that this shall be the full extent of the Public Trustee's participation in any disputed or outstanding applications for membership in the Sawridge Band. This Court and the Public Trustee have no right, as a third party, to challenge a crystalized result made by another tribunal or body, or to interfere in ongoing litigation processes. The Public Trustee has no right to bring up issues that are not yet necessary and relevant.

56 In summary, what is pertinent at this point is to identify the potential recipients of a distribution of the 1985 Sawridge Trust, which include the following categories:

1. Adult members of the SFN;

2. Minors who are children of members of the SFN;

3. Adults who have unresolved applications to join the SFN;

4. Children of adults who have unresolved applications to join the SFN;

5. Adults who have applied for membership in the SFN but have had that application rejected and are challenging that rejection by appeal or judicial review; and

6. Children of persons in category 5 above.

57 The Public Trustee represents members of category 2 and potentially members of categories 4 and 6. I believe the members of categories 1 are 2 are known, or capable of being identified in the near future. The information required to identify persons within categories 3 and 5 is relevant and necessary to the Public Trustee's participation in this proceeding. If this information has not already been disclosed, then I direct that the SFN shall provide to the Public Trustee by January 29, 2016 the information that is necessary to identify those groups:

1. The names of individuals who have:

   a) made applications to join the SFN which are pending (category 3); and

   b) had applications to join the SFN rejected and are subject to challenge (category 5); and

2. The contact information for those individuals where available.

58 As noted, the Public Trustee's function is limited *to representing minors*. That means the Public Trustee:

1. shall inquire of the category 3 and 5 individuals to identify if they have any children; and

2. if an applicant has been rejected whether the applicant has challenged, or intends to challenge a rejection by appeal or by judicial proceedings in the Federal Court.

59 This information should:

1. permit the Public Trustee to know the number and identity of the minors whom it represents (category 2) and additional minors who may in the future enter into category 2 and become potential minor recipients of the 1985 Sawridge Trust distribution;

2. allow timely identification of:

a) the maximum potential number of recipients of the 1985 Sawridge Trust distribution (the total number of persons in categories 1-6);

b) the number of adults and minors whose potential participation in the distribution has "crystalized" (categories 1 and 2); and

c) the number of adults and minors who are potential members of categories 1 and 2 at some time in the future (total of categories 3-6).

60 These are declared to be the limits of the Public Trustee's participation in this proceeding and reflects the issues in respect to which the Public Trustee has an interest. Information that relates to these issues is potentially relevant.

61 My understanding from the affidavit evidence and submissions of the SFN and the 1985 Sawridge Trustees is that the Public Trustee has already received much information about persons on the SFN's membership roll and prospective and rejected candidates. I believe that this will provide all the data that the Public Trustee requires to complete Task 3. Nevertheless, the Public Trustee is instructed that if it requires any additional documents from the SFN to assist it in identifying the current and possible members of category 2, then it is to file a *Rule* 5.13 application by January 29, 2016. The Sawridge Band and Trustees will then have until March 15, 2016 to make written submissions in response to that application. I will hear any disputed *Rule* 5.13 disclosure application at a case management hearing to be set before April 30, 2016.

Task 4 - General and residual distributions

62 The Sawridge Trustees have concluded that the appropriate manner to manage the 1985 Sawridge Trust is that its property be distributed in a fair and equitable manner. Approval of that scheme is Task 1, above. I see no reason, once Tasks 1-3 are complete, that there is any reason to further delay distribution of the 1985 Sawridge Trust's property to its beneficiaries.

63 Once Tasks 1-3 are complete the assets of the Trust may be divided into two pools:

Pool 1: trust property available for immediate distribution to the identified trust beneficiaries, who may be adults and/or children, depending on the outcome of Task 1; and

Pool 2: trust funds that are reserved at the present but that may at some point be distributed to:

a) a potential future successful SFN membership applicant and/or child of a successful applicant, or

b) an unsuccessful applicant and/or child of an unsuccessful applicant who successfully appeals/challenges the rejection of their membership application.

64 As the status of the various outstanding potential members of the Sawridge Band is determined, including exhaustion of appeals, the second pool of 'holdback' funds will either:

1. be distributed to a successful applicant and/or child of the applicant as that result crystalizes; or

2. on a pro rata basis:

a) be distributed to the members of Pool 1, and

b) be reserved in Pool 2 for future potential Pool 2 recipients.

65 A minor child of an outstanding applicant is a potential recipient of Trust property, depending on the outcome of Task 1. However, there is no broad requirement for the Public Trustee's direct or indirect participation in the Task 4 process, beyond a simple supervisory role to ensure that minor beneficiaries, if any, do receive their proper share.

C. Disagreement among the Sawridge Trustees

66 At this point I will not comment on the divergence that has arisen amongst the 1985 Sawridge Trustees and which is the subject of a separate originating notice (Docket 1403 04885) initiated by Catherine Twinn. I note, however, that much the same as the Public Trustee, the 1985 Sawridge Trustees should also refocus on the four tasks which I have identified.

67 First and foremost, the Trustees are to complete their part of Task 1: propose a distribution scheme that is fair to all potential members of the distribution pools. This is not a question of specific cases, or individuals, but a scheme that is fair to the adults in the SFN and their children, current and potential.

68 Task 2 requires that the 1985 Sawridge Trustees share information with the Public Trustee to satisfy questions on potential irregularities in the settlement of property into the 1985 Sawridge Trust.

69 As noted, I believe that the information necessary for Task 3 has been accumulated. I have already stated that the Public Trustee has no right to engage and shall not engage in collateral attacks on membership processes of the SFN. The 1985 Sawridge Trustees, or any of them, likewise have no right to engage in collateral attacks on the SFN's membership processes. Their fiduciary duty (and I mean all of them), is to the beneficiaries of the Trust, and not third parties.

D. Costs for the Public Trustee

70 I believe that the instructions given here will refocus the process on Tasks 1 - 3 and will restrict the Public Trustee's activities to those which warrant full indemnity costs paid from the 1985 Sawridge Trust. While in *Sawridge #1* I had directed that the Public Trustee may inquire into SFN Membership processes at para 54 of that judgment, the need for that investigation is now declared to be over because of the decision in *Stoney v. Sawridge First Nation*. I repeat that inquiries into the history and processes of the SFN membership are no longer necessary or relevant.

71 As the Court of Appeal observed in *Sawridge #2* at para 29, the Public Trustee's activities are subject to scrutiny by this Court. In light of the four Task scheme set out above I will not respond to the SFN's cost argument at this point, but instead reserve on that request until I evaluate the *Rule* 5.13 applications which may arise from completion of Tasks 1-3.

Application dismissed.

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

RSA 1980 cT-10 s40

Personal liability

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

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

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

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

RSA 1980 cT-10 s41

Variation of Trusts

Variation of trusts

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

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

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

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

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

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

(iii) is to be made by instalments, or

(iv) is subject to a discretion to be exercised during any period by executors and trustees, or by trustees, as to the person or persons who may be paid or may receive the capital or income, including rents and profits, or as to the time or times at which or the manner in which payments or transfers of capital or income may be made,

and

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

(i) by merger, however occurring;

(ii) by consent of all the beneficiaries;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Application to court for advice

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

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

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

RSA 1980 cT-10 s43

6

1965 CarswellBC 13
British Columbia Court of Appeal

Lotzkar Estate, Re

1965 CarswellBC 13, 50 D.L.R. (2d) 357, 51 W.W.R. 99

Re Lotzkar Estate

Davey, Sheppard and Lord, JJ.A.

Judgment: March 11, 1965

Counsel: *A. McEachern* , for Etta Lotzkar.
F. H. Bonnell, Q.C. , for Montreal Trust Company.
W. J. Wallace , for Leon Lotzkar.
Miss M. F. Southin , for issue of the residuary beneficiaries.

Subject: Estates and Trusts

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Civil practice and procedure

XXIII Costs
XXIII.2 Jurisdiction and discretion as to costs

Estates and trusts

I Estates
I.5 Construction of wills
I.5.d Practice and procedure on application for construction of will
I.5.d.v Costs

Headnote
Estates — Construction of wills — Practice and procedure on application for construction of will — Costs

Principles.

The general rule as to costs both at trial and on appeal is that costs follow the event unless the court "shall for good cause otherwise order."

In making an order for costs following litigation arising out of the administration of an estate the court whose opinion is first sought ought to follow principles which are well established by the authorities.

Parties who are led into litigation by the conduct of the testator should normally be paid their costs out of the estate. *Hillam v. Walker* (1827) 1 Hagg Ecc 71, at 75, 162 ER 510; *Twist v. Tye* [1902] P 92, at 94, 71 LJP 47.

Further, there must be such difficulty that the executor could not administer without coming to the court for construction of the will, or for other advice, and it must be a matter such that the executor could not be expected

to rely on the advice of his solicitor, a rule which may be followed if the application is brought by a beneficiary and adopted by the executor. *Cherry v. Mott* (1836) 1 My & Cr. 123, 5 LJ Ch 65, at 68, 40 ER 323; *Re Bradshaw; Bradshaw v. Bradshaw*, [1902] 1 Ch. 436 , at 450, 71 LJ Ch 230, followed.

"Good cause" within the meaning of M.R. 976 would exclude instances where the executor should proceed on the advice of his solicitor rather than incur the costs of an application and cases where the application is in form for the construction of a will but in substance is to determine a right asserted by one of the parties without reasonable grounds therefor. *Re Buckton; Buckton v. Buckton*, [1907] 2 Ch. 406, 76 LJ Ch 584 ; *Re Halston; Ewen v. Halston*, [1912] 1 Ch. 435 , at 439, 81 LJ Ch 265, applied.

Although on an appeal the rule is that where the appeal is taken the costs are dealt with in the usual way where the appeal fails. *Re Fleck* (1923-24) 55 O.L.R. 441 , at 447 (C.A.), applied; where the matter involves the construction of a will and it is proper that a second opinion be taken, costs may be allowed out of the estate, especially where large interests including the interests of unborn persons are at stake. *Re Stuart; Johnson v. Williams*, [1940] 4 All E.R. 80 , at 81, 84 Sol J 524, applied.

The judgment of the court was delivered by *Sheppard, J.A.* :

1 On delivering judgment in this appeal, costs were reserved in the event of the parties not agreeing, and motion has now been made for an order for costs.

2 In the trial court by M.R. 976, and in the appeal court by sec. 30 of the *Court of Appeal Act* , RSBC, 1960, ch. 82, the costs follow the event unless the court "shall for good cause otherwise order," and the question is what is "good cause" in such a proceeding to construe the will of the deceased in order that the administration may proceed.

3 In *Hillam v. Walker* (1827) 1 Hagg Ecc 71, 162 ER 510, the court stated at p. 75:

> But I act on the principle which always guides this Court in decreeing costs out of the estate, viz. that the party was led into the contest by the state in which the deceased left his papers.

4 Hence, the principle on which the costs are given out of the estate is that the parties were led into the litigation by the conduct of the testator: *Hillam v. Walker, supra* , and *Twist v. Tye* [1902] P 92, 71 LJP 47, where Gorrell Barnes, J. said at p. 94:

> Speaking generally, there are in this Division two classes of cases in which there should be, and generally is, a departure from the ordinary rule: the first is where the litigation has been brought about through the conduct of the testator or testatrix; and the second is where the parties who have failed have reasonably been led into the litigation by a bona fide belief in their case, and have, therefore, felt it desirable to inquire into the testamentary dispositions of the testator or testatrix.

5 Further, there must be such difficulty that the executor cannot administer without coming to the court for construction of the will or other advice and it is not such a matter that the executor is expected to rely upon the advice of his solicitor. In *Cherry v. Mott* (1836) 1 My & Cr 123, 5 LJ Ch 65, 40 ER 323, the master of the rolls said at p. 68:

> There is no doubt about the general rule. Where the testator has created such a difficulty, that those who have to administer his estate, cannot administer it without coming to the Court for directions, then that estate must pay the expenses of clearing away that doubt.

6 That rule may be followed if the application be brought by a beneficiary and be adopted by the executors: *Re Bradshaw; Bradshaw v. Bradshaw*, [1902] 1 Ch. 436, 71 LJ Ch 230 , *per* Kekewich, J. at p. 450. Hence "good cause" will exclude instances where the executor should proceed on the advice of his solicitor rather than incur the costs of

an application, and will also exclude those cases where the application is in form for the construction of a will but in substance is to determine a right asserted by one of the parties without reasonable grounds therefor: *Re Buckton; Buckton v. Buckton*, [1907] 2 Ch. 406, 76 LJ Ch 584 , applied in *Re Halston; Ewen v. Halston*, [1912] 1 Ch. 435, 81 LJ Ch 265 , by Eve, J. at p. 439. While there may be other instances when such costs may be allowed out of the estate it is apparent that such order does not follow as a matter of course, and the general rule is that the costs are to follow the event.

7 On appeal, the general rule is that where the appeal is taken the costs are dealt with in the usual way where the appeal fails. In *Re Fleck* (1923-24) 55 O.L.R. 441 , Hodgins, J.A. said at pp. 447-8:

> The appeal must be dismissed with costs. I should have been disposed, because the difficulty here is caused by the testator's language alone, to give costs out of the estate. But costs of an unsuccessful appeal do not come within the rule applied, for that reason, to the costs of the original application or action. These costs are considered to be part of the administration expenses: *Trethewy v. Helyar* (1876) 4 Ch D 53, 46 LJ Ch 125; *Re Reeves Trusts* (1877) 4 Ch D 841, 46 LJ Ch 412; *Re Hall-Dare; Le Marchant v. Lee Warner*, [1916] 1 Ch. 272, 85 LJ Ch 365 . Where an appeal is taken, the costs are dealt with in the usual way where that appeal fails: see *Rowland v. Morgan* (1848) 18 LJ Ch 78, 13 Jur (Pt. 1) 23; *Tucker v. Hernaman* (1853) 4 De GM & G 395, 22 LJ Ch 791, 43 ER 561; *Re Butterworth; Ex parte Russell* (1882) 19 Ch D 588, 602, 51 LJ Ch 521; *Westminster Corpn. v. Rector and Wardens of St. George, Hanover Square*, [1909] 1 Ch. 592 , at 614, 78 LJ. Ch 581.

8 When the matter is the construction of a will and it is proper that a second opinion be taken, then the costs may be allowed out of the estate: *Re Stuart; Johnson v. Williams*, [1940] 4 All E.R. 80, 84 Sol J 524 , where Clauson, L.J. said at p. 81:

> It is most important that there should be no mistake about the power of the court to order that, and it is equally important that we should be quite clear that it is to be exercised only in the proper cases. The cases where the court will exercise that power are, I think, exceptional. Sometimes there are cases where large interests are at stake, very often interests of unborn persons and so on, and it is perfectly proper that a second opinion should be taken. In cases of that kind, the court does make this exception. In this particular case, the point was quite fairly brought before the court by the trustees. There is an appeal, which has been argued, and which is without foundation. In those circumstances, I cannot conceive of any course being taken except that of ordering the unsuccessful appellant to pay costs.

9 In this instance the problem is the construction of the will of the testator, and large interests are at stake including interests of unborn persons. Here there is an appeal by counsel for the issue born and unborn of the residuary beneficiaries and an appeal by the widow. Another appeal was merely formal and has not contributed to the costs.

10 Referring to the costs, the Montreal Trust Company as one of the executors has brought this application for the construction of the will. That application was due to the conduct of the testator, namely, the state of his will, which has led the parties into the proceeding, and the difficulty was such that it was proper to come to the court for advice. It is undoubtedly a proper case for seeking the assistance of the court. Hence, this executor should have costs in the court below on a solic itor-and-client basis. As to the costs of the appeal, it was formerly the practice not to allow the executor (or trustee) the costs on appeal because he generally must be taken to have assumed a position comparable to that of a stakeholder. However, this practice has relaxed somewhat as stated in *Re Stuart; Johnson v. Williams, supra* , by Luxmoore, L.J. as follows, at p. 82:

> With regard to the question of appearance by the tees, although it used to be the practice, in cases where notice had been given, on occasions to deprive the trustees of their costs, I think that the more recent practice has been to say that the trustees ought to appear in the Court of Appeal, because it is necessary for them to see that the order which relates to the administration of the estate is properly carried out. I think that it would be contrary to modern practice to deprive the trustees on an originating summons of their costs in the Court of Appeal.

11 On this appeal, counsel for this executor was asked for information which required an answer. Hence, the attendance of the executor was necessary and its costs of appeal should be allowed on a solicitor-and-client basis. In taxing such costs including counsel fees and incidental matters it should be borne in mind that the real contest was between counsel for the issue of the beneficiaries on the one hand and counsel for the widow, Mrs. Lotzkar, on the other, and in that contest this executor was essentially neutral.

12 As to the costs of the widow, Mrs. Lotzkar, she is one of the executors, but on this application her interest is that of beneficiary. On the original hearing, she should have the costs on a solicitor-and-client basis, as this is a proper case for an application to the court to construe the will. On appeal, the widow appealed from the judgment below and opposed the appeal of the issue of the residuary beneficiaries, and as a general rule she would be ordered to pay the costs of the appeal on a party-and-party basis. However, there are special circumstances here which would induce the court to order otherwise.

13 (1) This is a proper case for a second opinion within *Re Stuart; Johnson v. Williams, supra* , as may be seen from the three varying opinions among the four judges, and the costs are not too important having regard to the size of the estate and the amount following upon the construction of the will.

14 (2) There are unusual circumstances in this case which should not be overlooked in a discretionary matter of costs. The assets of this estate included the stock-in-trade of a junk business, which was carried on the books at $70,000. The executors obtained an appraisal from an evaluator who evaluated the stock-in-trade at $206,862. Thereafter the executors had to consider offers for the sale of the business and eventually received an offer of $350,000. This was refused at the insistence of the widow who thereupon proceeded to realize in the usual manner, which resulted in the stock-in-trade realizing $1,030,031.25. Further, out of the housekeeping moneys allowed by her husband she saved a substantial sum during her married life and this amount ($55,000) she handed over to the executors to be dealt with as part of the estate. She has also provided the appeal book which was used on this appeal thereby making it possible for the appeal by the issue, born and unborn of the beneficiaries and further, while the widow was given an income, that money has been spent by her not on herself but on the children.

15 Her costs will be paid out of the estate on a solicitor-and-client basis.

16 As to the costs of those the issue of the residuary beneficiaries, counsel was appointed by the court in view of the fact that the representation was for the issue born and unborn. Moreover, the contention for these children has succeeded substantially in the court below and has fully succeeded on appeal. Under the circumstances these costs in the court below and on this appeal should be paid out of the estate on a solicitor-and-client basis.

17 The other parties are Leon Lotzkar, one of the executors, and also the children of the deceased who are married daughters and residuary beneficiaries; these merely stated that they supported the construction of the will proposed by the widow. There appears no reason why they could not have joined Mrs. Lotzkar to be represented by the same counsel as suggested in *Re Stuart; Johnson v. Williams, supra* , hence these parties should pay their own costs.

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2002 ABQB 554
Alberta Court of Queen's Bench

Taylor v. A.T.A.

2002 CarswellAlta 1689, 2002 ABQB 554, [2002] A.J. No. 1571

ROGER TAYLOR AND SANDRA DENNEY ON THEIR OWN BEHALF, AND ON BEHALF OF ALL THOSE PERSONS ENTITLED TO RECEIVE BENEFITS OR PAYMENTS, NOW OR IN THE FUTURE, FROM THE ALBERTA TEACHERS' ASSOCIATION OFFICE STAFF PENSION PLAN (Plaintiffs) and THE ALBERTA TEACHERS' ASSOCIATION (Defendant)

Sanderman J.

Heard: April 24, 2002
Judgment: June 3, 2002
Docket: Edmonton 9603-13948

Counsel: *Elizabeth M. Regan*, *Julie C. Lloyd*, for Plaintiffs
Greg A. Harding, *Q.C.*, for Defendant

Subject: Corporate and Commercial; Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Civil practice and procedure

V Parties
V.8 Representative or class proceedings not under class proceedings legislation
V.8.d Requirements
V.8.d.iv Common interests

Civil practice and procedure

V Parties
V.8 Representative or class proceedings not under class proceedings legislation
V.8.i Examination for discovery

Civil practice and procedure

XXIII Costs
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XXIII.12.b Representative or class proceedings not under Class Proceedings Acts

Pensions

I Private pension plans
I.5 Practice in pension actions
I.5.b Parties

Pensions

I Private pension plans

I.5 Practice in pension actions
I.5.d Costs

Headnote

Pensions — Practice in pension actions — Parties

Practice — Parties — Representative or class proceedings not under class proceedings legislation — Requirements — Common interests

Practice — Parties — Representative or class proceedings not under class proceedings legislation — Examination for discovery

Practice — Costs — Costs of particular proceedings — Representative or class proceedings not under Class Proceedings Acts

Pensions — Practice in pension actions — Costs

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Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68
R. 42 — considered

R. 601(1) — referred to

***Sanderman J.*:**

1 Mr. Taylor and Ms. Denney are the named representatives in a class action brought on behalf of individuals entitled to receive benefits from a pension plan. They seek injunctive relief and an order directing the defendant to account for its actions. Damages are not sought by the plaintiffs. They allege that the defendant has used monies from a pension fund to pay administrative costs. They claim that this is inappropriate and should stop. They ask for reimbursement in relation to the funds used for this purpose.

2 During the past year, the parties have been working diligently towards obtaining an early trial date. It is in the best interests of all to have this matter resolved as quickly as possible. This litigation has been under case management. Collectively, the parties filed three Notices of Motion seeking specific relief. These Notices of Motion were set to be heard on April 24, 2002.

3 In addition to the three matters scheduled the defendant brought a further application. The defendant objected to me hearing the plaintiff's requests that the costs of this action be paid from the pension plan until notice of the request was given to all members of the class.

4 The defendant urged me to insure that all class members had notice of the impending application in relation to costs. The purpose of giving notice is to insure the fair conduct of the proceedings. Members of the class can make an individual decision whether or not they want to be part of the action. They can determine the benefits and risks that might accrue to them by staying in the lawsuit. They are placed in a position where they can make informed decisions. They can take steps to protect their interests as they see fit. A transparency is brought to the conduct of the proceedings that would not be present absent the notice. Members put on notice can take steps to guarantee the adequacy of the representation brought on their behalf.

5 There is no statute in this province that governs class actions. Rule 42 of the Alberta Rules of Court allows for this type of lawsuit. This Rule states:

> Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all.

6 In the absence of legislation governing this type of action, the court must fill the void under its inherent power to settle the rules of practice and procedure in relation to disputes that may arise during the litigation. The court is charged with the responsibility of striking a balance between efficiency and fairness. As a general rule, all potential class members should be informed of the existence of the lawsuit, of the common issues that the lawsuit seeks to resolve, and of the right of each class member to opt out (*Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.)).

7 There are exceptions to this general rule. Although there is no legislation in this province governing class actions, the Alberta Law Reform Institute has prepared a report in relation to this topic. I have been directed to this report, to legislation in other provinces, and to reports from Law Reform Commissions in other provinces. A common theme in the reports and legislation is apparent. The supervising court is given the discretion to dispense with notice to all members of the class if it is considered proper to do so. This is one of those cases. Notice is given to a class member so that individual can decide whether or not to opt out of the lawsuit. In certain cases the right to opt out is meaningless. It is meaningless, as a practical matter, if the member would be affected by a decision of the court notwithstanding an informed decision to opt out.

8 If the plaintiffs are successful in this action, the remedy obtained will be an order directing the defendant to repay administrative costs withdrawn from the plan and to stop this activity in the future. The opting out by any class member or group of members could not change this potential outcome or affect the individual rights of someone choosing to opt out.

9 Individual relief is not sought in this action. Giving notice to class members to allow them to opt out of the litigation is meaningless in this case.

10 Notice is given to class members so that they can judge for themselves the adequacy of the representation that the class is receiving. In this case, notice is not necessary for that purpose. The individuals affected by this litigation are small in number. The litigation has been in existence for over five years. Informal discussions in the work place and meetings called to discuss the litigation have generally kept most members of the class informed as to developments.

11 Adequacy of representation does not appear to be a real concern. The matter is efficiently moving to trial where both sides of the issue will be clearly placed before the court. Giving notice at this time would slow the progress made by counsel in advancing the litigation and would add nothing to the concept of fairness. This is clearly one of those cases where notice need not be given to all class members at this time. This situation would change if there is a material change in the circumstances of the case. If a serious settlement proposal was made by the defendant that required consideration by the plaintiffs then it would be necessary to notify all class members. For the purposes of these applications, it is not necessary.

12 The plaintiffs ask for their costs in this action, on a solicitor and client basis, payable from the Alberta Teachers Association Office Staff Pension Plan Fund forthwith and on an ongoing basis, as incurred. The class that is represented by the nominal plaintiffs is a small class. There are approximately 150 members. They are not high wage earners. The cost of continuing the litigation has become prohibitive for them. Certain members of the class have indicated that they can no longer contribute to the ongoing legal costs. The nominal plaintiffs fear that if the litigation is not funded by the pension plan then it will have to cease. The plaintiffs urge the court to grant their request as they feel that this litigation is important to the class and the imbalance in financial resources should not determine its outcome.

13 There is no doubt that the defendant is in a much better position to fund the lawsuit. Impecuniosity on the part of a party involved in this type of litigation is not enough to establish the grounds for making such an order. It is merely a factor that has to be taken into consideration but is not overly significant in determining the success of the application.

14 The defendant strenuously objects to the payment of costs from the fund. The defendant feels that to make such an award in this case would be entirely inappropriate. To order costs now would fetter the discretion of the judge hearing the trial. The defendant claims that in this adversarial litigation the normal rules in relation to costs should apply and that that determination cannot be made until the issue has been decided at trial.

15 The defendant claims that the plaintiffs' allegation of a breach of a fiduciary duty is clearly indicative of the adversarial nature of the litigation. The defendant suggests that the plaintiffs will not be able to prove the allegations contained in the Statement of Claim and that they should be responsible for costs. The defendant claims that if it is successful in the litigation the granting of the relief requested would frustrate the defendant in its efforts to claim its costs. This is the major concern of the defendant.

16 The defendant argues that the collective ability of the class to fund the litigation has not been exhausted. If the litigation is so important to the class, its members should be able to come up with the resources to continue the action. The defendant argues that the plaintiff cannot show that any financial difficulty being encountered by the class comes as a result of the actions of the defendant.

17 In addition to this, the defendant firmly suggests that its conduct toward the plaintiffs in this litigation is not blameworthy and therefore would not attract such discretionary relief. For all of these reasons, the defendant asks that this application be dismissed.

18 It is not unusual in pension litigation, for the costs at trial, to be made payable out of the pension fund, regardless of the success of the parties. This is often seen, although such an order is not mandatory. In certain circumstances, a court can make an order granting the costs requested by the plaintiffs. All of the factors surrounding the lawsuit must be considered in determining whether it is fair to contemplate making such an order.

19 A fundamental consideration is the motivation behind the lawsuit. I do not share the defendant's view that this litigation is so adversarial in nature. In theory, the litigation should be non-adversarial.

20 The members belonging to the plan are asking the court to interpret a course of action followed by the defendant. They seek a declaration as to whether the action was permissible or prohibited. If permissible, the defendant can continue to do what it has been doing. If prohibited, it must desist and repay funds to the plan.

21 If the defendant sought the same declaration from the court before embarking upon this course of action, I doubt very much whether the defendant would have characterized the litigation as adversarial.

[1]

22 This is litigation that should be non-adversarial. It has been brought by the plaintiffs, in essence, on behalf of the pension plan to determine how it will be run in the future. The litigation is not being advanced for the personal benefit of the nominal plaintiffs.

23 This non-adversarial litigation being brought by individuals on behalf of the pension plan is proving to be a financial hardship. Litigation is costly. Certainly, the conduct of the defendant is not blameworthy and the substantial costs incurred cannot be attributed to this.

24 A review of the totality of the circumstances surrounding this litigation makes it clear that it would be fair to grant the relief requested by the plaintiffs.

25 This is an appropriate case for costs to be paid from the pension fund as this litigation concerns an issue central to the management of the fund. This is not adversarial litigation, in theory, even though the defendant characterizes it as such and has defended vigorously. The principals stated in *Buckton, Re*, [1907] 2 Ch. 406 (Eng. Ch. Div.) and referred to with approval in many subsequent cases are applicable to this litigation. Therefore, the wide discretion authorized by Rule 601(1) of the Alberta Rules of Court is engaged and the relief sought by the plaintiffs is granted.

26 The defendant feels somewhat frustrated by the answers it received from Roger Taylor, one of the two named representatives of the class, at his Examination for Discovery in relation to the litigation. He has been examined on two occasions. The defendant is somewhat perplexed that his knowledge in relation to matters dealing with the pension plan is limited. His personal knowledge is minimal and he has done little to inform himself in relation to pertinent developments.

27 Consequently, the defendant seeks an order allowing it to examine and discover other persons entitled to receive benefits or payments from the pension plan. The defendant has provided a list of current or former employees who served on the pension plan committee at different times. The defendant believes that the knowledge possessed by some of these individuals in relation to decisions made at important times that affected the administration of the pension plan far exceeds the knowledge possessed by Mr. Taylor. That is a valid belief having regard to some of his answers. That is the basis for the defendant's desire to examine them.

28 If that application is not successful, the defendant desires to have Mr. Taylor either removed as a named representative of the class and that someone with greater knowledge be substituted in his place or designated as an additional named representative. The thrust of the application made by the defendant is to be able to examine someone who has knowledge of the decisions that were made that brought changes to the administration of the plan. The defendant claims that it is fundamental to its defence to be able to examine such a person. Paragraph 20 of the Statement of Defence is pointed to. It states:

> At all material times, the Plaintiffs were fully aware of the matters alleged in the Statement of claim, acquiesced in the matters of which they now complain thereby causing the Defendant to believe that the Plaintiffs had no objection to its conduct and consequently the Defendant has been prejudiced. The Plaintiffs are guilty of prolonged, inordinate and inexcusable delay in bringing this action and in seeking the relief claimed herein. In the circumstances, the

> Defendant claims that the Plaintiffs are estopped or barred by laches from claiming the alleged or any relief against the Defendant.

29 The plaintiffs' reply that the request being made by the defendant is premature. They point to the fact that the second named representative, Ms. Denney has yet to be examined. The knowledge possessed by her and revealed upon her examination may alleviate some of the frustration felt by the defendant. Her examination is scheduled for the latter part of the month of June.

30 The test that has to be met by the defendant in convincing the court to grant the application to examine class members other than the representatives has been set out by Chief Justice McLaughlin in *Western Canadian Shopping Centres Inc. v. Dutton*, [2000] S.C.J. No. 63 (S.C.C.) . Speaking for the Supreme Court of Canada at para. 59 she stated:

> One of the benefits of a class action is that discovery of the class representatives will usually suffice and make unnecessary discovery of each individual class member. Cases where individual discovery is required of all class members are the exception rather than the rule. Indeed, the necessity of individual discovery may be a factor weighing against allowing the action to proceed in representative form.
>
> I would allow the defendants to examine the representative plaintiffs as of right. Thereafter, examination of other class members should be available only by order of the court, upon the defendants showing reasonable necessity.

31 The defendant must show reasonable necessity before its application can be seriously considered. The scheme envisioned by Chief Justice McLaughlin is that the examination of the representative plaintiffs as of right will take place. Only after that has been completed would one be able to determine whether it is required to examine other class members. Ms. Denney's examination must be completed before this question can be answered. The application is premature.

32 If the extent of the information possessed by Ms. Denney is similar to that of Mr. Taylor, the position taken prematurely by the defendant on this application would be strengthened immeasurably. Hopefully, her knowledge far exceeds that of Mr. Taylor.

33 I have been directed to the Alberta Law Reform Institute Final Report on class actions that was released in December of 2000. At page 119 of that report the Alberta Law Reform Institute came to a conclusion in relation to a class member's duty to inform themself. The report states:

> Our conclusion is that for discovery purposes, a representative plaintiff should be treated like a plaintiff in an ordinary proceeding. Individual class members should not be treated as corporate officers or employees of the representative plaintiff unless the representative plaintiff is a corporation and they are in fact officers or employees of that corporate representative plaintiff. On discovery, the representative plaintiff might be compelled to make inquiries of individual class members but would not be under a duty to inform themself.

34 The Institute's analysis was thorough. The conclusion reached is supportable. Still, it would certainly be prudent for Ms. Denney to make the appropriate inquiries of individual class members in relation to areas where her knowledge is deficient before she appears for her Examination for Discovery. If her knowledge is lacking, I would be prepared to direct that the defendant be able to select two individuals from the list of former and current employees who have served on the pension plan committee for additional examination. Some thought and consideration should always go into the determination of who can adequately fill the roll of a representative plaintiff in a class action in order to avoid the necessity of examining additional members.

35 The defendant seeks an order compelling Mr. Taylor to re-attend at an Examination For Discovery to answer certain questions objected to and undertakings refused or taken under advisement. Mr. Taylor was examined by counsel for the defendant on January 23, 2002 and February 15, 2002. Certain questions were not answered. The defendant wants answers to those questions. The pleadings filed by the parties determine the scope of what is relevant and material during the examination process.

36 Justice Perras said in *D'Elia v. Dansereau*, [2000] A.J. No. 731 (Alta. Q.B. [In Chambers]) at para.17:

> Any analysis to determine the propriety of disputed questions on oral discovery must start by examining the pleadings. Henceforth, the pleadings will be of considerable importance in focusing the issues which in turn will give meaning to materiality and relevance of oral discovery in terms of ascertaining the facts. So in my view, relevant questions will be those questions having regard to the pleadings that elicit facts that are in issue or facts that make facts in issue, more probable than not.

37 The amended Statement of Claim filed by the plaintiffs alleges that the pension plan is a trust. It is further alleged that the actions of the defendant had the effect of revoking the trust in the absence of an express reservation of power allowing it to do so. As a result of this activity, the members of the plan had their interest in the plan and the benefits flowing from membership altered. A remedy is sought based on these allegations.

38 It is clear that the plaintiffs claim that a trust in which they had an interest has been affected by the operation of the pension plan by the defendant. The defendant wants to be able to question Mr. Taylor in relation to the nature of the trust in existence and facts surrounding its operation during certain periods of time. The defendant seeks a clear identification of certain documents.

39 The plaintiff objects to answering most of these questions on the grounds that the question asked is a question of law and therefore forbidden. In addition certain questions are objected to on the basis of relevance. Reliance is placed upon the decision of *Can-Air Services Ltd. v. British Aviation Insurance Co.*, [1988] A.J. No. 1022 (Alta. C.A.) . The passages relied upon are found in the words of Cote J.A. He stated:

> On what facts do you rely..."does not ask for facts which the witness knows or can learn. Nor does it ask for facts which may exist. Instead it makes the witness choose from some set of facts, discarding those upon which he does not "rely" and naming only those on which he does "rely". The questioner here does not really dispute much the same interpretation of its question. (I will call it "the questioner".)
>
> Because the question demands a selection, it demands a product of the witness' planning. How he is to select is unclear. He may have to decide what evidence is then available or is legally admissible. The question really asks how his lawyer will prove the plea.
>
> ...
>
> Another fundamental rule is that an examination for discovery may seek only facts, not law: Turta v. C.P.R. (1951) 2 W.W.R. (ns) 628, 63102 (Alta.); cf. Curlett v. Can. Fire Ins. Co. [1938] 3 W.W.R. 357 (Alta.). These questions try to evade that rule by forcing the witness to think of the law applicable or relied upon, then use it to perform some operation (selecting facts),and then announce the result.

40 I am of the belief that the plaintiff wants to apply this authority in much too rigid a fashion. A more balanced approach is found in the decision of Justice Hugessen in *Montana Band v. R.* (1999), [2000] 1 F.C. 267 (Fed. T.D.). At paragraph 23 he stated:

> There is of course no question that examination on discovery is designed to deal with matters of fact. "Pure" questions of law are obviously an improper matter to put to a deponent. It is likewise with argumentative questions and questions which ask a party to state what evidence it proposes to lead at trial. But the line is rarely clear or easy to draw. Questions may mix fact and law or fact and argument; they may require the deponent to name a witness; they may still be proper. So too, questions relating to facts which may have legal consequences or which may themselves be the consequence of the adoption of a certain view of the law are nonetheless questions of fact and may be put on discovery.

41 Continuing on at para. 27 he stated:

> In my view, the proper approach is to be flexible. Clearly the kinds of questions which were aptly criticized in Can-Air, supra, note 5, can easily become abusive. On the other hand a too rigid adherence to the rules therein laid down is likely to frustrate the very purpose of examination on discovery. While it is not proper to ask a witness what evidence he or she has to support an allegation, it seems to me to be quite a different thing to ask what facts are known to the party being discovered which underlie a particular allegation in the pleadings. While the answer may have a certain element of law in it, it remains in essence a question of fact. Questions of this sort may be essential to a discovery for the purposes of properly defining the issues and avoiding surprise; if the pleadings do not state the facts upon which an allegation is based then the party in whose name that pleading is filed may be required to do so.

42 A flexible as opposed to an overly rigid approach should be applied to matters of this sort. It is against this backdrop that I view the application of the defendant. I have had an opportunity to review the transcript of the Examination for Discovery and have had an opportunity to place the questions objected to in a proper context. The defendant, in its materials, seeks answers to certain questions. The plaintiff's materials set out the objections raised.

43 Of the first set of questions addressed by the defendant, four should be answered. Questions 1, 3, 21, and 23 should be answered. These are not pure questions of law. The other questions in this group need not be answered as valid objections have been raised. The undertakings relating to this series of questions need not be answered. Valid objections have been raised.

44 Of the remaining outstanding questions, five have to be answered. Questions 5, 7, 10, 11, and 13 should be answered by Mr. Taylor. These are proper questions. The remaining questions need not be answered. The other undertakings need not be fulfilled.

45 Hopefully, the examination of Ms. Denney will proceed without difficulty and this matter can move one step closer to trial. The need for an early trial is obvious. This matter should not be allowed to remain unsettled between the parties. There is an obvious common interest to have the trial of this matter proceed.

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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

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Civil practice and procedure

XXIV Costs
XXIV.18 Funds liable for payment of costs

Pensions

I Private pension plans
I.5 Practice in pension actions
I.5.d Costs

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.

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Thompson v. Lamport (1945), [1945] S.C.R. 343, [1945] 2 D.L.R. 545, 1945 CarswellOnt 97 (S.C.C.) — referred to

Townsend v. Florentis (2004), [2004] O.T.C. 313, 2004 CarswellOnt 1402 (Ont. S.C.J.) — considered

Western Canadian Shopping Centres Inc. v. Dutton (2001), 94 Alta. L.R. (3d) 1, 2001 SCC 46, 2001 CarswellAlta 884, 2001 CarswellAlta 885, (sub nom. *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere)* 201 D.L.R. (4th) 385, 272 N.R. 135, 8 C.P.C. (5th) 1, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, [2001] 2 S.C.R. 534 (S.C.C.) — considered

Statutes considered:

Class Proceedings Act, S.A. 2003, c. C-16.5
Generally — referred to

s. 20 — referred to

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)
Generally — referred to

Pension Benefits Standards Act, 1985, R.S.C. 1985, c. 32 (2nd Supp.)
Generally — referred to

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.

3 Under the Trust Agreement, the Trustees had discretion to invest the Fund's assets in compliance with applicable statutes and regulations. It provided, amongst other things, that:

> the costs and expenses of any action, suit or proceeding brought by or against the Trustees or any of them (including counsel fees), shall be paid from the Trust Fund, except in relation to matters as to which it shall be adjudged in such action, suit or proceeding that such Trustees were acting in bad faith, or were grossly negligent in the performance of their duties hereunder.

The appellants contend that provision preserves the right of beneficiaries seeking redress against the Trustees to have their legal costs paid by the Trust Fund. However, the 2001 amendment deleted that provision from the Trust Agreement. The appellants allege any amendment thereto is of no force and effect.

4 As a result of complaints of non-compliance with provincial and federal pension legislation, the Provincial Superintendent of Pensions (the "Superintendent") instructed Price Waterhouse Coopers ("PWC") to conduct a review of the Plan. That review culminated in a report, dated June 30, 2000, which identified several significant breaches of compliance and unsound administrative practices. The Superintendent viewed those breaches as "serious". They included: investing the Plan's assets in excess of the limits prescribed by the *Pension Benefits Standards Act*, R.S.C. 1985, c. 32 (2nd Supp.), Schedule III ("*PBSA*") and the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"); acquiring excess voting interest in a golf course in breach of the *PBSA*; pledging the Plan's assets as security in contravention of the *ITA*; and investing in self-directed, high risk investments.

5 The PWC report also found a significant lack of due diligence by the Trustees prior to entering into self-directed investments, including: failure to undertake a thorough risk analysis of investments; failure to consult legal counsel and

the Superintendent to determine if the investments were in compliance with the legislation; and failure to establish a methodology to assess the performance of self-directed assets. The report concluded that, had the self-directed assets been left with professional money managers, the present net assets of the Plan would have been $27.5 million higher, and that:

> It would be difficult not to conclude that the failure to comply with legislation and failure to adhere to basic governance procedures has made a significant contribution to the current financial difficulties facing the Plan.

6 In November 2000, Plan members were informed that the Superintendent had engaged PWC to review the governance, administration, management, compliance, finances and investments of the Fund, and that the review had disclosed some concerns.

7 In March 2001, the Trustees reported to Plan members that concerns disclosed in the PWC report had arisen during the terms of some former Trustees. The current Trustees, some of whom were also Trustees when the concerns arose and are respondents in this appeal, assured Plan members that their focus was on resolving the issues in the best interests of the Plan and its members.

8 Although the Trustees did not distribute the PWC report to Plan members, the appellant, Dennis Black Deans, obtained a copy from the office of the Provincial Information and Privacy Commission. On June 26, 2002, the appellants filed a statement of claim on their own behalf and on behalf of all of the beneficiaries of the Plan, alleging breach of fiduciary duties, gross negligence and wilful misconduct by present and former trustees of the Plan and its employee administrator, Bob Thachuk. The Trustees declined to finance the lawsuit from the Fund.

9 As of September 30, 2002 there were 5,547 active members of the Plan and 1,308 pensioners. Approximately 200 of the Plan members who were informally canvassed voluntarily contributed financially toward the appellants' legal costs. Based on the number of contributors to the costs of the action, the respondents contend the appellants represent only two to three percent of the beneficiaries of the Plan.

10 On February 3, 2004, the appellants' first application to have their legal fees and disbursements paid from the Fund was dismissed as pleadings had not yet closed. However, they were granted leave to reapply at a later date. A second application, which is the subject of this appeal, was dismissed on April 2, 2004. Leave to appeal was granted June 9, 2004.

11 The chambers judge rejected suggestions that the appellants were required to challenge the Trustees through the electoral process before commencing litigation. However, she found there was no organized funding campaign to collect donations to fund the litigation.

12 Evidence suggests that the majority of the members of the Plan were not dissatisfied with the manner in which the Trustees responded to the concerns identified by the Superintendent: union members refused the resignations tendered by the 4 union trustees in office in June, 2001; three of the current union trustees, who are respondents in this appeal, were re-elected in the January, 2003 election; and each of the appellants was unsuccessful in his bid for election as a union trustee at the same election.

Issues

13 Did the chambers judge err in law in determining that the test prescribed by the Supreme Court of Canada to determine interim costs applies in the context of pension litigation?

14 If the chambers judge did not err in relying on the Supreme Court of Canada's test, did she err in her application of that test?

Standard of Review

15 The standard of appellate review on questions of law is correctness, and on questions of fact is palpable and overriding error: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33 (S.C.C.) at paras. 10, 25 & 27.

16 A discretionary decision as to costs may be set aside if an appellate court finds that a judge has misdirected herself as to the applicable law or made a palpable error in her assessment of the facts. "[T]he criteria for the exercise of a judicial discretion are legal criteria, and their definition as well as a failure to apply them or a misapplication of them raise questions of law which are subject to appellate review": *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371, 2003 SCC 71 (S.C.C.) at para. 43 ("*Okanagan*"), citing *Pelech v. Pelech*, [1987] 1 S.C.R. 801 (S.C.C.), at 814-15.

Analysis

Did the chambers judge err in law in determining that the test prescribed by the Supreme Court ofCanada to determine interim costs applies in the context of pension litigation?

17 The chambers judge applied the three-part test for an exercise of the discretionary power to award interim costs prescribed by the Supreme Court of Canada in *Okanagan* at para. 36. There, LeBel J., speaking for the majority, prescribed the following criteria for an award of interim costs:

> (a) the claimant must be impecunious to the extent that without such an order, the claimant would be deprived of the opportunity to proceed with the case;
>
> (b) the claimant must establish a *prima facie* case of sufficient merit to warrant pursuit; and
>
> (c) 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.

However, in this case, the chambers judge was not satisfied the appellants met these criteria.

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

> [t]he 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:
>
> *Okanagan* at para. 36.

25 In this case, the chambers judge rejected the Trustees' argument that the Fund's assets were relevant to the determination of impecuniosity, but found insufficient evidence that the appellants' other potential funding resources had been depleted. In her view, before asserting they could not afford the litigation, the appellants should have formally canvassed all members of the Plan on whose behalf the action was brought, or pursued a contingency fee arrangement.

26 However, because only a small percentage of members responded to the informal canvassing for funds, it can be inferred that the majority of them were satisfied with the Trustees' response to concerns regarding the administration of the Fund. Moreover, since the majority of members refused to accept the resignation of, and even re-elected, the four union Trustees, it seems patent that any formal canvas for funds to support the litigation would have been futile.

27 This litigation predates the Class Proceedings Act, S.A 2003, c. C-16.5. Section 20 of that Act requires a representative plaintiff to give class members notice that the action has been certified to proceed as a class proceeding. However, before that Act was proclaimed, the Supreme Court of Canada held that, because a judgment in a representative action is not binding on a class member unless that member has been notified of the suit, "prudence suggests that all potential class members be informed of the existence of the suit . . . ": *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, 2001 SCC 46 (S.C.C.) at para. 49. So while notice may be prudent, it appears that prior to the enactment of the *Class Proceedings Act*, notice was not essential for a representative action to proceed. But, in the absence of notice to the class members, the cost of conducting such an action falls on the representatives. Since formal notice was not a prerequisite to a representative action when this proceeding arose, it follows that the support of the majority of Plan members need not be established.

28 It is not clear from the chambers judge's reasons how any subsequent application for interim costs should be resolved if a formal canvas proved entirely unsuccessful. But it seems implicit that in such an event, the intent of the chambers judge is that the action would not be able proceed, whether or not the suit is meritorious. That being so, the requirement to canvas Plan members for financial support cannot be justified, because it would effectively preclude the possibility of interim costs in such cases.

29 While the prospect of a contingency fee arrangement might dictate against the remedy of interim costs, there must be evidence that such an arrangement is a viable alternative: *Okanagan* at para. 44. Although there was no such evidence in this case, it seems clear that such an arrangement is not realistic in view of concerns expressed by the chambers judge regarding the poor prospect of recovery.

30 Accordingly, the chambers judge erred in relying on the lack of evidence of a formal canvas or the prospect of a contingency arrangement, and disregarding undisputed evidence of the appellants' personal impecuniosity.

(b) Prima Facie Case

31 The chambers judge was satisfied there was sufficient evidence of gross negligence or wilful misconduct to justify the matter going forward "at least to the conclusion of the discoveries." However, she concluded that, because it was not clear whether the respondents had sufficient funds to make pursuit of the lawsuit worthwhile, any victory for the appellants would be hollow. It is implicit in her reasons that she relied on that factor in declining interim costs. However, the conclusion that the action was not worthy of pursuit due to a poor prospect of recovery does not appear to be supported by evidence of the net worth of the respondents. The chambers judge also placed reliance on the decision of the Trustees not to pursue the litigation themselves in declining the remedy. It must be noted that some of those Trustees are also some of the respondents in this action.

32 The appellants acknowledge that *prima facie* merit is a reasonable prerequisite to an interim costs order. But they quarrel with the onus placed on them by the chambers judge to demonstrate the ability of the respondents to satisfy a damages award, and to provide assurance that the lawsuit is in the long-term interests of Plan members. No authorities have been cited in support of their position.

33 In *Okanagan*, LeBel J. held that the case must be strong enough to step past the preliminary threshold of being worthy of pursuit, but the order should not be refused merely because key issues remain live and contested between the parties. Nor should it be refused because of concerns about fettering the discretion of the trial judge in adjudicating the merits of the case.

34 In *Horn*, *supra*, Hoffmann L.J. reasoned that unlike ordinary trust beneficiaries, pension plan members, as contributors to the trust fund, have a commercial relationship with it and are therefore entitled to be satisfied the trust fund is being properly administered. Because pension funds are a special form of trust, he found an analogy between beneficiaries and corporate shareholders. Thus, he determined that when beneficiaries of pension trusts bring an action on behalf of the trust, they should enjoy the same right of indemnity as corporate shareholders in derivative actions.

35 Hoffmann L.J., at 974, cautioned that the power to order "preemptive" costs in a pension fund case should be exercised with considerable care, although in his view that did not require a close examination of the merits of the dispute. Rather, the question is whether a sufficient case for further investigation has been established. If so, the most economical form of investigation should be chosen. Hoffmann L.J. noted that even if further investigation is required, it need not necessarily take the form of a full scale trial, and might extend only to discovery or involve the appointment of judicial trustees with power to take possession of the documents and investigate for themselves.

36 Here, the chambers judge recognized that although there are some elements of this litigation analogous to a derivative action, leave is required to commence such actions and will only be granted if the court is satisfied that the proceeding is in the best interests of the corporation. Inferentially, she was thus disinclined to follow the reasoning of

Hoffmann L.J. in *Horn.* However, since it was open to her to determine whether it was in the best interests of the Plan members to provide interim costs funding, that was not a proper ground on which to distinguish *Horn*.

37 In pension trust cases, the obligation to preserve the trust fund for the beneficiaries, to the extent reasonably possible, requires a balancing of the cost of the litigation with the prospect of recovery if successful. But those factors must also be balanced against what Hoffmann L.J. agreed was a moral right of beneficiaries to be satisfied that the trust fund is being properly administered, given their commercial relationship with it: *Horn* at 973.

38 Moreover, in the face of allegations of significant breaches of trust, which are substantiated in an independent report, reliance on the prospect of recoverability is contrary to public policy interests of ensuring that wrongdoers are held legally responsible for their actions regardless of their financial circumstances. And in any event, those circumstances may change dramatically throughout the course of the litigation and the life of any ensuing judgment.

39 The second part of the test established in *Okanagan* requires only that the case be strong enough to get over the preliminary threshold of being worthy of pursuit. It does not require a close examination of the merits of the dispute, nor the prospects of success, including the likelihood of recovery. The action here is of sufficient merit to warrant pursuit and the appellants have therefore met the second part of the test for interim costs.

(c) Special Circumstances

40 The third step in determining whether interim costs should be granted requires proof of "special circumstances sufficient to satisfy the court that the case is within a narrow class of cases where this extraordinary exercise of its powers is appropriate": *Okanagan* at para. 36.

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.

Those factors are sufficient to constitute special circumstances, which are not outweighed by concerns regarding the prospect of recoverability. Failure to give adequate weight to those circumstances in addressing the best interests of the beneficiaries constitutes an error of law.

Did the chambers judge err in interpreting the indemnification provision of the agreement?

46 Although it is not strictly necessary for the resolution of this appeal to address the interpretation of the indemnification provision in the agreement, having heard oral submissions on the issue we do wish to offer the following comment.

47 Generally, trustees are entitled to indemnity for all costs and expenses properly incurred in the due administration of the trust, including solicitor-client costs "in all proceedings in which some question or matter in the course of the administration is raised as to which the trustee has acted prudently and properly": *Thompson v. Lamport*, [1945] S.C.R. 343 (S.C.C.), at 356.

48 The indemnification provision in the agreement in this case specifies that no costs are payable if the trustees are found to have acted in bad faith or to have been grossly negligent. If the provision is interpreted as permitting any party to recover its costs from the Fund, it would lead to the anomalous result that parties bringing an action against the Trustees would be able to claim their costs from the Fund if the Trustees acted properly in respect of the matter adjudicated, but not if the Trustees had acted improperly. The more reasonable interpretation of the intent of this provision was to allow the Trustees to recover their costs, both in actions they commenced on behalf of the Fund and in actions brought against them, rather than to allow the other parties to these actions to recover their costs from the Fund. That interpretation leads to the conclusion that the appellants can only claim interim costs on the basis of the common law principles enunciated in *Okanagan*.

49 Thus the chambers judge did not err in declining to interpret the indemnification provision to apply to the appellants' application for legal costs in their action against the Trustees.

Conclusion

50 While the chambers judge did not err in finding that the three-part test prescribed in *Okanagan* applies in applications for interim costs in pension trust fund cases, she did err in her application of that test by finding the appellants were obliged to canvas the Plan members for financial support for the litigation to establish impecuniosity, and by finding that the prospect of recoverability outweighed other, more critical, special circumstances warranting interim costs.

51 Accordingly, the appeal is allowed and interim costs are awarded to the appellants from the Fund through examinations for discovery, with leave to reapply thereafter.

Appeal allowed.

Footnotes

* Leave to appeal to the S.C.C. refused: *Deans v. Thachuk* (2006), 2006 CarswellAlta 447, 2006 CarswellAlta 448 (S.C.C.)

End of Document

9

Most Negative Treatment: Not followed
Most Recent Not followed: Dinney v. Great-West Life Assurance Co. | 2007 MBQB 120, 2007 CarswellMan 413, 64 C.C.P.B. 104, 217 Man. R. (2d) 46 | (Man. Q.B., May 22, 2007)

2005 ABQB 40
Alberta Court of Queen's Bench

Huang v. Telus Corp. Pension Plan (Trustee of)

2005 CarswellAlta 93, 2005 ABQB 40, 2005 C.E.B. & P.G.R. 8147 (headnote only), [2005] 9 W.W.R. 51, [2005] A.W.L.D. 928, [2005] A.W.L.D. 929, [2005] A.W.L.D. 930, [2005] A.W.L.D. 972, [2005] A.W.L.D. 973, [2005] A.J. No. 50, 136 A.C.W.S. (3d) 1127, 13 E.T.R. (3d) 233, 372 A.R. 336, 41 Alta. L.R. (4th) 107, 44 C.C.P.B. 100

Robert Cheng-Yah Huang (Hereinafter Referred To As "Huang"), Stephen Wal-Kwok Wong (Hereinafter Referred To As "Wong"), Frederick Halsey (Hereinafter Referred To As "Halsey"), John Zukiwski (Hereinafter Referred To As "Zzukiwski"), Bas Visser (Hereinafter Referred To As "Visser"), Greg Springall (Hereinafter Referred To As "Springall"), and Paul Power (Hereinafter Referred To As "Power") (Plaintiffs) and Jim Drinkwater, Robert Gardner, Ken Bolstad, Hugh Tanner, Nadia Mursky, Patricia Mackenzie and Don Baillie, In Their Capacity As Trustees of the Telus Corporation Pension Plan (Defendants)

Moreau J.

Heard: September 14-16, 2004
Judgment: January 20, 2005*
Docket: Edmonton 0203-02378

Counsel: Richard B. Drewry, Q.C. for Plaintiffs
Bryan J. Kickham for Defendants

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

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Civil practice and procedure

IX Pleadings
IX.2 Statement of claim
IX.2.f Striking out for absence of reasonable cause of action
IX.2.f.ix Miscellaneous

Civil practice and procedure

XXII Limitation of actions
XXII.1 Principles
XXII.1.a Statutory limitation periods
XXII.1.a.i General principles

Civil practice and procedure

XXII Limitation of actions

XXII.6 Trusts
XXII.6.a Action against trustee
XXII.6.a.i General principles

Pensions

I Private pension plans
I.3 Surplus funds
I.3.c Use of surplus
I.3.c.iii Enhanced members' benefits

Headnote

Civil practice and procedure --- Limitation of actions — Trusts — Action against trustee — General

Plaintiffs were employees of T Corp. and members of T Corp. pension plan ("TCPP") — In 1993 plaintiffs accepted employment in T Corp.'s related company, S Inc., and received brochures from S Inc. regarding its pension plan which stated that T Corp.'s pension plan and S Inc.'s plan were similar — S Inc. also provided total results incentive ("TRI"), which was bonus program based on corporate performance — Plaintiffs elected to transfer their TCPP entitlements to S Inc.'s plan — Several years later, S Inc. was wound up and plaintiffs were repatriated to T Corp. — S Inc.'s pension plan had $53-million surplus, which was distributed among its shareholders, including T Corp. — Membership in TCPP was compulsory for repatriated employees — Between 1999 and 2000, plaintiffs were terminated by T Corp. and T Corp. refused to include TRI paid to plaintiffs as part of their pensionable earnings — Plaintiffs brought proceedings against trustees of TCPP alleging that trustees had breached their duty to plaintiffs in excluding TRI — Trustees contended that two-year limitation period started to run from May 1999 when they made final decision not to include TRI in pensionable earnings and communicated decision to plaintiffs — Since statement of claim was not filed until February 2002, trustees claimed action was statute-barred — Plaintiffs countered by claiming that relief they sought was declaratory relief and therefore Limitations Act did not apply — Limitations Act could not be circumvented by alleging that action was one for declaratory relief — Although statement of claim included request for declaration that basic pension payable under TCPP was to include TRI, thrust of litigation was interpretation of trust documents to determine whether trustees were in breach of their obligations to plaintiffs — Plaintiffs were seeking retroactive institution of benefits based on TRI being included in pensionable earnings — Such order would require trustees to act and prayer for relief did include request for money judgment — Accordingly, thrust of action was request for remedial order and not declaratory order.

Civil practice and procedure --- Limitation of actions — General principles — Statutory limitation periods — General

Plaintiffs were employees of T Corp. and members of T Corp. pension plan ("TCPP") — In 1993 plaintiffs accepted employment in T Corp.'s related company, S Inc., and received brochures from S Inc. regarding its pension plan which stated that T Corp.'s pension plan and S Inc.'s plan were similar — S Inc. also provided total results incentive ("TRI"), which was bonus program based on corporate performance — Plaintiffs elected to transfer their TCPP entitlements to S Inc.'s plan — Several years later, S Inc. was wound up and plaintiffs were repatriated to T Corp. — S Inc.'s pension plan had $53-million surplus, which was distributed among its shareholders, including T Corp. — Membership in TCPP was compulsory for repatriated employees — Between 1999 and 2000 plaintiffs were terminated by T Corp. and T Corp. refused to include TRI paid to plaintiffs as part of their pensionable earnings — Plaintiffs brought proceedings against trustees of TCPP alleging that trustees had breached their duty to plaintiffs in excluding TRI — Trustees contended that two-year limitation period started to run from May 1999 when they made final decision not to include TRI in pensionable earnings and communicated decision to plaintiffs — Since statement of claim was not filed until February 2002, trustees claimed plaintiffs' claims were statute-barred, and issue arose as to when exactly limitation period began to run — Limitation period began to run for each plaintiff when employment was terminated — When trustees made decision to exclude TRI and communicated that decision to plaintiffs, decision had potential of affecting plaintiffs' pension amounts — However, determination of plaintiffs'

pensionable earnings could not be made until employment was terminated, since calculation was done of basis of highest five years — No injury was suffered by individual plaintiff until his pension was in fact calculated including years of service at S Inc. but excluding TRI earned during those years — Accordingly it was at point of termination that cause of action crystallized and became discoverable — At that point plaintiffs were well aware of their cause of action and should not be allowed to sleep on their rights.

Pensions — Surplus funds — Use of surplus — Enhanced members' benefits

Plaintiffs were employees of T Corp. and members of T Corp. pension plan ("TCPP") — In 1993 plaintiffs accepted employment in T Corp's related company, S Inc., and received brochures from S Inc. regarding its pension plan which stated that T Corp.'s pension plan and S Inc.'s plan were similar — S Inc. also provided total results incentive ("TRI"), which was bonus program based on corporate performance — Plaintiffs elected to transfer their TCPP entitlements to S Inc.'s plan — Several years later, S Inc. was wound up and plaintiffs were repatriated to T Corp. — S Inc.'s pension plan had $53-million surplus, which was distributed among its shareholders, including T Corp. — Membership in TCPP was compulsory for repatriated employees — Between 1999 and 2000, plaintiffs were terminated by T Corp. and T Corp. refused to include TRI paid to plaintiffs as part of their pensionable earnings — Plaintiffs brought proceedings against trustees of TCPP alleging that trustees had breached their duty to plaintiffs in excluding TRI — Decision of trustees was fair and equitable and should not be interfered with — Trustees' decision was consistent with trust documents since documents reflected intention of settlors that pensionable earnings be tied to mandatory pension contributions — Although surplus existed in S Inc.'s plan, surpluses could not be used for benefit of particular group of beneficiaries — Trustees' decision was consistent and evenhanded as between T Corp.'s members and repatriated members of TCPP, as it linked earnings to pension contributions — Although repatriated employees were not provided with opportunity while employed at S Inc. to make contributions on TRI, they were able to, and in fact did, invest higher amounts in their RRSPs.

Pensions — Practice in pension actions — Costs

Plaintiffs were employees of T Corp. and members of T Corp. pension plan ("TCPP") — In 1993 plaintiffs accepted employment in T Corp's related company, S Inc., and received brochures from S Inc. regarding its pension plan which stated that T Corp.'s pension plan and S Inc.'s plan were similar — S Inc. also provided total results incentive ("TRI"), which was bonus program based on corporate performance — Plaintiffs elected to transfer their TCPP entitlements to S Inc.'s plan — Several years later, S Inc. was wound up and plaintiffs were repatriated to T Corp. — S Inc.'s pension plan had $53-million surplus, which was distributed among its shareholders, including T Corp. — Membership in TCPP was compulsory for repatriated employees — Between 1999 and 2000, plaintiffs were terminated by T Corp. and T Corp. refused to include TRI paid to plaintiffs as part of their pensionable earnings — Plaintiffs brought proceedings against trustees of TCPP alleging that trustees had breached their duty to plaintiffs in excluding TRI, and issue arose as to whether plaintiffs, as members of TCPP, were entitled to costs in any event of cause since issue was one of interpretation of pension plan — Trustees sought award of solicitor-client costs against plaintiffs — Solicitor-client costs of plaintiffs were to be paid from TCPP — There were no circumstances alleged by trustees that would justify award of solicitor-client costs against unsuccessful plaintiffs — Plaintiffs' claim was not devoid of merit since expert actuarial opinion differed on whether TRI was properly excluded from pensionable earnings — Fact that proceedings were commenced by statement of claim and that remedial order was sought against trustees did not disentitle plaintiffs from requesting costs in any event of cause — Proceedings were not unduly protracted and parties were able to reduce trial time by compiling agreed statement of facts — Regardless of outcome of this action, pensions of other members of TCPP would not be affected — Also, clarification as to meaning of earnings was of some importance to other members of TCPP.

Civil practice and procedure — Pleadings — Statement of claim — Striking out for absence of reasonable cause of action — General principles

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Statutes considered:

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s. 11 — considered

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s. 1(i) "remedial order" — considered

s. 3(1) — considered

s. 3(1)(a) — considered

s. 3(5) — considered

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s. 43(1) — considered

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R. 410 — considered

R. 410(e)(i) — considered

R. 410(f) — referred to

Regulations considered:

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Income Tax Regulations, C.R.C. 1978, c. 945

s. 100(1) "remuneration"

ACTION by members of pension plan against trustees of plan for alleged wrongful exclusion of incentive bonuses from pensionable earnings.

Moreau J.:

I. Introduction

1 The Plaintiffs are members of the TELUS Corporation Pension Plan (the "TCPP"). They claim that the Defendant trustees of the TCPP (the "Trustees") wrongly refused to include incentive bonuses they received while employed for a period of time by another corporation established by TELUS and other telecommunication firms as pensionable earnings for the calculation of their pension benefits. The Trustees maintain that their decision not to include the incentive bonuses (upon which no pension contributions had been made by the Plaintiffs) in their calculation of the Plaintiffs' pension benefits was a reasonable decision which should not be interfered with by the Court. In any event, the Trustees argue that the claims of the Plaintiffs are barred by the provisions of the *Limitations Act*, R.S.A. 2000, c.L-12, and amendments thereto.

II. Background Facts

i. The Plaintiffs' termination and transfer from TELUS to the new corporation

2 Prior to January 1, 1993 (and January 1, 1997 for the Plaintiff Mr. Power) the Plaintiffs were employees of TELUS (formerly AGT) and members of the TELUS Corporation Pension Plan (the "TCPP"). The TCPP is a "defined benefit pension plan" and thus provides a guaranteed fixed monthly pension based on a specific formula. To calculate pension benefits, the TCPP considers "Final Average Earnings", the average of the employee's highest five of the last ten years of pensionable earnings with TELUS or a reciprocating employer. The TCPP is "contributory", both TELUS and its employees make contributions to the plan.

3 On January 1, 1993 (and January 1, 1997 for Mr. Power) the Plaintiffs were among approximately 190 employees of AGT and other related companies who were offered employment with Stentor Resource Centre Inc. ("Stentor"). Stentor was incorporated in approximately 1992 for the purpose of coordinating the activities of a number of telecommunications corporations across Canada, including TELUS. The Plaintiffs' employment with AGT was terminated and they accepted positions at Stentor at a base rate of pay which was the same or slightly higher than with AGT. It is clear from the evidence that there were no representations made to the Plaintiffs when they transferred to Stentor that they would return to AGT (or TELUS) at some point, nor did they have any expectation that this would be the case.

4 I find that in the fall of 1992, the Plaintiffs received informational brochures from Stentor regarding the contemplated Stentor pension plan (the "SPP"). The brochures explained the three pension options available to them which, once selected, would be "locked in". Like the TCPP, Options 1 and 2 were "defined benefit plans". Under Option 1, Stentor assumed all of the contributions to the pension. Under Option 2, both the employee and Stentor contributed, thus providing a higher pension. Option 3 was a "defined contribution" plan, under which the pension benefits were not in a guaranteed fixed amount, but depended on a number of factors, such as interest rates and investment income earned on pension contributions. One brochure noted that each option had a different impact on the amount that the pension plan member was entitled to invest in an RRSP. The Plaintiffs were also invited (among other AGT employees) to attend informational workshops on their transition to Stentor, conducted by TELUS and Stentor in the fall of 1992.

5 Based on the testimony of Mr. Killick, director of project management in consumer services at TELUS, I find that the Stentor booklet (Exh. 1, Tab 15) was distributed to the Plaintiffs before they left TELUS. This booklet described the TCPP and Option 2 as "similar" and provided the following definition of "earnings":

> Earnings - your base pay. Under Option 1, earnings also includes your total results incentive up to the target amount.

6 The "total results incentive" ("TRI") referred to in the booklet was a bonus program based on corporate performance established by Stentor for its employees. At the time the Plaintiffs (with the exception of Mr. Power) left TELUS in January 1993, there was no similar bonus program in place for AGT employees. It was only in 1994 that "variable pay" ("VP"), an incentive program based on corporate or departmental performance, was introduced by TELUS.

7 Mr. Huang acknowledged at trial that he would have understood from the Stentor booklet that Option 2 only included base pay. I find this to be the clear implication of the definition of "earnings" in the Stentor booklet. I also find that the representation made to Mr. Huang in Stentor's October 8, 1992 written offer of employment that "...Stentor will provide a flexible benefits package comparable to the one offered by AGT Limited" would not have created an expectation in transferring employees that TRI would be pensionable, as there was no similar program in existence at AGT at the time.

8 All of the Plaintiffs, like most of the transferring employees, elected to transfer their TCPP entitlements to Option 2 of the SPP. Mr. Huang testified that he did so because of the similarity in the two plans, both being shared cost defined benefit pension plans.

9 Commencing in 1994, Stentor paid TRI to the Plaintiffs in addition to their monthly base pay. The Plaintiffs made no pension contributions on their TRI, consistent with having selected SPP Option 2. Mr. Huang acknowledged that he made greater contributions to his RRSP than would have been the case had he been required to make pension contributions on his TRI. He confirmed that he contributed the maximum allowed on his RRSP while employed by Stentor.

10 Mr. Visser acknowledged that he made no pension contributions on TRI and that TRI would not have been included in his pensionable earnings had he retired from Stentor. Like Mr. Huang, he also contributed the maximum to his RRSP while at Stentor and was aware that the amount he contributed to an employment pension affected the amount that he would be eligible to contribute to his RRSP.

11 Mr. Halsey's recollection of the events of his transfer from AGT to Stentor was crisp, as he took careful notes at workshops offered about the transfer in October 1992. In his notes, he had described Option 2 as being "close" to the pension he had been receiving at AGT. He was aware on joining Stentor that TRI was a bonus, but indicated at trial that he was unsure whether he was aware that pension contributions were not taken on TRI.

12 Stentor and the Trustees of the TCPP entered into a Reciprocal Agreement executed on March 1, 1995, and dated as of January 1, 1993, which dealt with the transfer of TELUS employee pensions to Stentor. By the time the Reciprocal Agreement was actually executed in 1995, the TRI program at Stentor and the VP program at TELUS were both in existence.

13 The Plaintiffs claim that there was no specific discussion at workshops and meetings about whether pension contributions would be made on TRI was not disputed by Mr. Killick. He referred to a power point presentation given to transferring employees in the fall of 1992 which described Option 2 as a "Contributory Defined Benefit". He acknowledged that he had neither the SPP nor the Reciprocal Agreement to consult with when he transferred to Stentor. However, the information booklet which was provided to the Plaintiffs before their move to Stentor also provided a 1-800 phone number to call for further information.

ii. The Plaintiffs' return to TELUS

14 A decision was made to wind up Stentor. On wind-up, the SPP had a surplus of approximately $53 million, which was distributed among its shareholders, including TELUS.

15 Approximately 120 Stentor employees transferred back to TELUS (the "repatriated employees"). Membership in the TCPP was compulsory for the repatriated employees. With the exception of Mr. Power, the Plaintiffs transferred

back between 1996 and 1999. Mr. Power was terminated from Stentor in late 1999 but did not return to TELUS. He was treated, however, as a member of the TCPP for pension purposes and his pension entitlements were transferred from the SPP to the TCPP.

16 Upon returning to TELUS, the repatriated employees were provided with information booklets about the TCPP. One of these (Exh.1, Tab 13) described the TCPP as a "defined benefit pension plan" and stated that the pension did not depend on the amount contributed by the employee. Another brochure provided to repatriated employees (Exh.1, Tab 14) stated that the pension benefit was not directly related to contributions to the plan or the investment earnings on those contributions. However, this comment was made in the context of contrasting the "defined benefit pension plan" with the "defined contribution plan"; in the case of the latter plan, the brochure pointed out that the pension benefit was "directly related to the money contributed to the plan plus the investment earnings on those contributions." As noted by counsel for the Trustees, neither of these informational brochures provided to repatriated employees suggested that pension benefits did not depend on the fact of contributions being made by the employee.

17 Most of the Plaintiffs, on returning to TELUS from Stentor, signed a document stating:

> I hereby agree to the transfer of my pension benefit credits under the Stentor Pension Plan to the Telus Corporation Pension Plan, *based on the terms and conditions of a reciprocal arrangement between the two pension plans.*
>
> I understand that the Telus Corporation Pension Plan will recognize my pensionable service originally transferred to the Stentor Pension Plan, *as well as my pensionable service earned with Stentor*. I further understand that *from my date of transfer to AGT Limited, my pension benefits will be determined exclusively* in accordance with the terms and conditions of the *Telus Corporation Pension Plan*.
>
> [emphasis added]

18 Mr. Visser received a written offer of employment from TELUS, dated December 12, 1998, which stated:

> Your compensation and other terms and conditions of employment will be administered in accordance with those currently existing at Telus Communications. Upon receipt of your acceptance of this offer, arrangements will be made to initiate review and reinstatement of your bridged pension and selected benefit options.

19 Mr. Halsey received an offer of employment from TELUS dated December 18, 1996 advising that the obligation for his basic pension, "along with monies behind that benefit", would be transferred from the SPP to the TCPP. The offer stated that his pension benefit would be provided under the terms and conditions of the TCPP. He was advised that "earnings" during his previous employment with AGT and Stentor would be included, if necessary, in calculating his highest five-year average earnings. He was aware that pension contributions were being deducted from VP, which he recalled receiving every year after his return to TELUS. He acknowledged that there were differences between the SPP and the TCPP, and that in general, pension contributions were higher for the TELUS plan.

20 Mr. Killick, also a repatriated employee, recalled the assurances given by the then president of TELUS to repatriating employees of Stentor that "when you come back to TELUS ... you will be treated no differently than any other TELUS employee".

iii) Communications about and decision on the issue of whether TRI would be included in pensionable earnings

21 In 1998, Mr. Duane Block, the manager of pension administration for TELUS, first learned from the Plaintiff, Mr. Zukiski, that the repatriated employees had raised the issue of whether the TRI paid to them by Stentor would be included in their pensionable earnings. To that point, the TCPP had not been crediting TRI paid to employees who had returned from Stentor to TELUS before 1998 as pensionable earnings. In early 1999, a group of repatriated employees, including the Plaintiffs (except Halsey and Power) sent letters and otherwise communicated with TELUS seeking clarification as to the treatment of their pension benefits in the Reciprocal Agreement.

22 Mr. Huang, designated by the repatriated employees as their contact person, wrote to Mr. Block on April 14, 1999 and expressed concern that the assets transferred from Stentor to fund the pensions of the repatriated employees may or may not be sufficient to meet the obligations of the TCPP. In his letter he referred to: (1) the different definitions of "earnings" under the TCPP (base pay plus service awards, incentives, etc.) and Option 2 of the SPP (only base pay); (2) TCPP's definition of "Earnings" which included the remuneration paid by a Reciprocating Employer; and (3) the effect of the TCPP's definition of earnings resulting in remuneration (base pay plus service awards, incentives, etc.) of repatriated Stentor employees being recognized for pension purposes without contributions having been made on TRI. Recognizing this was "not fair" to the existing TCPP members, Mr. Huang went on to suggest that a solution was for the repatriated employees to "make up the difference" (i.e. pay pension contributions on the TRI portion of their Stentor earnings) to integrate them back into the TCPP. Mr. Huang acknowledged at trial that by making this offer, he was linking pension contributions to pensionable earnings.

23 Mr. Huang's letter recognized that the inclusion of TRI in pensionable earnings was to be discussed by the Trustees at their upcoming April 21, 1999 meeting. After advancing a number of reasons for the Trustees to adopt his proposed solution to integrate the repatriated employees into TELUS, he urged the Trustees to establish a fair policy. He did not ask to attend the Trustees' meeting, nor was he, or any other repatriated employee, invited to attend.

24 Mr. Block testified that one of his duties as manager of pension administration for TELUS was to collect information on the matters coming before the Trustees. He also acted as their advisor, as the Trustees did not have formal training in pension issues. He acknowledged that neither he nor the Trustees sought a legal opinion, or advice from TCPP's actuaries on the TRI issue. He noted that as the Plaintiffs had selected Option 2, Stentor had not provided any information to TELUS relating to the amount of TRI earned by the Plaintiffs when their pensions were being transferred to TELUS.

25 Mr. Block prepared and circulated a package of materials on the TRI issue to the Trustees in advance of their April 21, 1999, which was not provided to the Plaintiffs at the time. The package consisted of:

> 1. A copy of a letter dated March 5, 1999 from several repatriated employees, including Mr. Huang, seeking clarification of the treatment of the SPP options under the Reciprocal Agreement;
>
> 2. A copy of a letter dated March 17, 1999 from the Vice-Chair of the Board of Trustees, Mr. Jim Drinkwater (also Vice President and Treasurer of TELUS at the time), to Mr. Zukiwski. Mr. Drinkwater advised that he believed that calculating Final Average Earnings without reference to TRI received by former Stentor employees was appropriate, but that the matter would be referred to the Trustees at their April 21, 1999 meeting. The letter added that under the TCPP and Trust Agreement, the Trustees were empowered to determine procedures used to implement the Plan and to resolve disputes regarding earnings. Mr. Zukiwski's letter to which Mr. Drinkwater was responding was not included by Mr. Block in the package of materials he provided to the Trustees.
>
> 3. An Interoffice Memorandum dated March 23, 1999 from Mr. Block to Mr. Huang which responded to the March 5, 1999 letter from the repatriated employees and provided clarification as to the application of the Reciprocal Agreement to the three pension options available under the SPP.
>
> 4. A one-page Briefing Document dated March 24, 1999 from Mr. Block to Mr. Gary Goertz, Chair of the Board of Trustees, who had received communications directly from Mr. Zukiwski. The document acknowledged that the definition of earnings contained in the TCPP was "not helpful" in resolving whether TRI should be included in pensionable earnings. He went on to point out that if TRI was to be included in pensionable earnings, a precedent could be established for employees requesting that other non-pensionable earnings be included in the TCPP. He added:

> One other issue that leads to further complications is the Integration 98 Stentor project. This repatriation of employees to the Owner companies has raised issues around the process used to calculate the transfer values. The Stentor plan has a surplus and it is the proposal that the transfer values be adjusted to include a pro rata share of the surplus. If it were to become common knowledge that the transfer value included surplus, I am sure that the repatriated employees would feel that excluding TRI was very unfair.

Mr. Block acknowledged under cross-examination that he never advised the Trustees of the amount of the Stentor surplus, some $53 million.

> 5. Mr. Huang's letter of April 14, 1999 to Mr. Block;
>
> 6. A Background Analysis together with a six-page attachment received from Stentor's actuaries describing the SPP pension options. One of these attachments, entitled "Questions and Answers" issued in September 1995, stated:
>
> > Your Average Pensionable Earnings under Option 1 includes the Total Results Incentive (and similar amounts for your owner company service). For Option 2, Average Pensionable Earnings are calculated using base pay only. The owner company pension plans that Option 1 is similar to included compensation elements like the Total Results Incentive (TRI).
> >
> > That's why the TRI is included in Option 1 pensionable earnings. *The owner company pension plans that Options 2 and 3 are similar but do not include elements like TRI. So Options 2 and 3 use base pay. In designing the pension options, we increased the benefits under Option 2 and the contributions under Option 3 to recognize that these options do not include TRI.*
> >
> > [emphasis added]

26 The Background Analysis addressed each of the arguments originally advanced by Mr. Zukiski. It added that if the current process used to calculate pensionable earnings was changed to include TRI, an inequity would be created by allowing one group of employees to have non-pensionable TRI added to their Final Average Earnings while other members with other non-pensionable earnings could not. The Analysis went on to review the definition of earnings in the TCPP and the authority it gave to the Trustees to determine the issue.

> 7. A one-page "Recommendation" prepared by Mr. Block, urging the Trustees to continue with the current definition of pensionable earnings for repatriated employees which excluded TRI. He summarized the interpretation issue before the Trustees as follows:
>
> > The definition of earnings in the TCPP is not clear as there is no definition of what is considered remuneration. The Stentor Pension Plan defines earnings as base pay. The Reciprocal Agreement with Stentor is silent on the exact definition of earnings to be used. Our current practice is to exclude TRI in the calculation of Stentor pensionable earnings based on the definition of earnings and that pension contributions have been paid on base pay only.
> >
> > To pursue a change in the definition of pensionable earnings for Stentor employees would establish a precedent for other TELUS employees to request other non-pensionable earnings be included in the definition of pensionable earnings in such plans as the TELUS Edmonton Pension Plan. Also, a change to the definition for this group of members would be unfair to those individuals who went to Stentor, retired and did not have the TRI included as pensionable earnings for their pension benefit calculation.

27 On April 21, 1999, five of six Trustees of the TCPP met. Mr. Block was unsure whether the seventh Trustee position was vacant at the time; in any event, no issue as to quorum was raised before me. Of the five Trustees at the meeting who voted on the TRI issue, a majority of them were employee-elected. Also present was the TCPP's actuary. The Trustees

voted four to one not to alter the current practice of interpreting "earnings" in the TCPP to exclude TRI. The April 21 st meeting was not audio-recorded and Mr. Block could not locate his notes of the meeting.

28 Mr. Huang was informed of the Trustees' decision by letter from Mr. Drinkwater dated May 13, 1999, which stated:

> ...the current method of calculating Final Average Earnings, which excludes the Total Results Incentive (TRI) payments received while you were at Stentor, is appropriate. With this *final decision*, this matter is now closed.
>
> [emphasis added]

29 At trial, Mr. Huang acknowledged that from this letter, he concluded that TRI would not be included in the calculation of his pensionable earnings. He testified that he proceeded to distribute Mr. Drinkwater's letter of May 13, 1999. At trial, Mr. Halsey indicated he was aware from discussions with Mr. Huang of the Trustees' decision not to include TRI received from Stentor in pensionable earnings.

30 Mr. Visser was somewhat evasive about how and when he received word of the Trustees' decision on TRI and whether it would affect the calculation of his pension; he acknowledged being aware of communications "back and forth". I find that Mr. Visser, who had been among those repatriated employees who signed correspondence directed to the Trustees before their meeting of April 21, 1999, became aware shortly thereafter of the of the outcome of the meeting and the impact of the Trustee's decision on his pension benefits, namely that they would amount to less than if TRI was included in the calculation of his pensionable earnings.

iv) The Plaintiffs' termination from TELUS

31 The Plaintiffs were terminated by TELUS (except Power who was terminated by Stentor) between June 5, 1999 and July 7, 2000. At the time of their termination, their pension benefits were calculated based on:

> (a) information received from Stentor as to their base pay, which did not include TRI; and
>
> (b) their pensionable earnings while employed by TELUS, which included any VP received by them (from which mandatory pension contributions had been deducted).

32 On their termination, each of the Plaintiffs was provided with a pension "estimate", which stated that the estimate was subject to change. These estimates also stated that the pension statement "did not bind either TELUS or the TCPP to a payment of a pension of the amount stated." Finalized pension amounts were communicated to each of the Plaintiffs in 2001 or 2002.

33 Mr. Halsey was terminated from TELUS on July 14, 1999. He acknowledged receiving a retirement estimate dated August 21, 1999 from the TCPP, which included the proviso that its figures were an "estimate" of the amount of pension he could expect to receive, that every effort had been made to ensure accuracy, but that "the figures given are unaudited and therefore, subject to change". Mr. Block acknowledged that the August 21, 1999 letter did not reflect a final pension amount and that the proviso relating to the figures being unaudited applied to all pension estimates.

34 The Plaintiffs commenced this action against the Trustees on February 1 st , 2002.

v) Conduct of Stentor and Misrepresentation

35 I agree with the submission of the Trustees that evidence as to the conduct of officers and employees of Stentor and their communications with the Plaintiffs in late 1992 prior to their transfer to Stentor are not particularly germane to their claim against the Trustees. No claim was pursued against Stentor. The fact that there was little discussion about the implications of selecting Option 2 of the SPP for the purpose of calculating the Plaintiffs' pension entitlements accruing while they were employed at Stentor does not, in my view, further their claim against the TCPP, as the Plaintiffs did not then have any expectation of being eventually repatriated to TELUS. Nor is there any suggestion in the evidence that

TELUS had any expectation of their return. In any event, misrepresentation was not pleaded in the statement of claim and there is no suggestion in the evidence that TELUS or the Trustees specifically represented to the Plaintiffs that the TRI that they received from Stentor would be pensionable. Indeed, Mr. Huang acknowledged at trial that had he retired from Stentor, TRI would not have been included in pensionable earnings.

III. The Issues

36 The issues in this lawsuit are:

1. Does the statement of claim disclose a cause of action?

2. Are the claims of the Plaintiffs barred by the *Limitations Act*, R.S.A. 2000, c.L-12?

3. What is the appropriate standard of review?

4. Did the Trustees' breach their duty to the Plaintiffs in excluding TRI from pensionable earnings?

5. Are the Plaintiffs, as members of the TCPP, entitled to costs in any event of the cause, the issue being one of interpretation of a pension plan?

IV. Discussion

1. Does the statement of claim disclose a cause of action?

37 The Trustees argue that the Plaintiffs' cause of action was not clearly articulated and that the statement of claim does not comply with Rule 115 of the *Alberta Rules of Court*. They conceded, however, that a cause of action need not be stated in the pleadings. I am satisfied that sufficient particulars of a cause of action in breach of trust were disclosed in the statement of claim, namely that: (1) the Plaintiffs were members of the TCPP and the Defendants were Trustees of the TCPP; (2) the TCPP was created by a trust agreement; (3) the TCPP had an obligation to provide the Plaintiffs with a pension in accordance with a stated formula; (4) the Trustees refused to recognize TRI earnings as pensionable; and (5) the Plaintiffs had been paid a pension which was correspondingly less than what they alleged they were entitled to.

2. Are the claims of the Plaintiffs barred by the Limitations Act?

38 I reject the Plaintiffs' contention that no facts were pleaded by the Trustees in support of their limitation defence, as paragraph 12 of the statement of defence referred to the fact that the Trustees' decision to exclude TRI from pensionable earnings was made in April 1999 and communicated to the Plaintiffs on May 13, 1999. These facts, in my view, provide sufficient particularity of the limitation defence in this case, as the statement of claim attributed the Plaintiffs' losses to the decision of the Trustees to exclude TRI from their pensionable earnings.

39 The Trustees argue that s.3(1) of the *Limitations Act* is a bar to the Plaintiffs' claim:

3(1) Subject to section 11, if a claimant does not seek a remedial order within

(a) *2 years after the date on which the claimant first knew, or in the circumstances ought to have known*,

(i) that the injury for which the claimant seeks a *remedial order* had occurred,

(ii) that the injury was attributable to conduct of the defendant, and

(iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,

or

(b) 10 years after the claim arose,

whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

[emphasis added]

Section 1(i) of the Act defines a "remedial order":

1 In this Act ...

(i) "remedial order" means a judgment or an order made by a court in a civil proceeding requiring a defendant to comply with a duty or to pay damages for the violation of a right, but excludes

(i) a declaration of rights and duties, legal relations or personal status,

(ii) the enforcement of a remedial order,

(iii) judicial review... or

(iv) a writ of habeas corpus.

40 It is clear from Mr. Huang's letter to Mr. Block of April 14, 1999 that the Plaintiffs were aware that the Trustees would be deciding the issue of whether TRI was to be included in their pensionable earnings at their meeting of April 21, 1999. The Trustees submit that the two-year limitation period started to run from the point they made their final decision not to include TRI in the pensionable earnings of repatriated employees and communicated that decision to the Plaintiffs through Mr. Huang in May of 1999. As the statement of claim was filed on February 1, 2002, approximately two years and eight months after the Trustees' decision was communicated to them, the Plaintiffs' action is statute-barred.

41 In response, the Plaintiffs submit that as they are seeking declaratory relief, the *Limitations Act* does not apply. Alternatively, if a two-year limitation applies, then: 1) as pension benefits had not yet been paid to the Plaintiffs when the Trustees decided the TRI issue, the limitation period did not start to run until the Plaintiffs received the final calculation of their pension benefits in 2001 or 2002, and thus, the action was brought within the limitation period; or 2) as pension benefits are paid monthly, the "injury" suffered by the Plaintiffs re-occurs monthly, and thus, renews the two-year limitation period.

i. Claim for declaratory relief

42 The prayer for relief in the statement of claim included a request for a declaration that the basic pension payable under the TCPP is to be calculated on earnings, including TRI. Under s.1(i) of the *Limitations Act*, declarations are excluded from the definition of remedial orders to which the two-year limitation would otherwise apply. The Plaintiffs submit that without a declaratory order as to what earnings are to be included in pensionable earnings, there would be no basis upon which the Court could award judgment for any future shortfalls.

43 The Trustees submit in response that in order to determine whether the s.1(i) exclusion applies, it is necessary to identify the true nature, or thrust, of the Plaintiffs' claim. If, in essence, the Plaintiffs are seeking an order that would have the effect of compelling the Trustees to do something, the limitation period of two years should apply. The Trustees maintain that what the Plaintiffs have sought amounts to a remedial order because the declaration requested would have the effect of granting them a money judgment, as was the case in *Blair v. Desharnais*, 2003 ABQB 657 (Alta. Q.B.).

44 In *Blair*, the plaintiff mortgagee sought a declaration as to the amount owing under a mortgage and for an order for foreclosure and possession. Watson J. granted the defendant mortgagor's application to dismiss the claim on the basis that it was barred by the *Limitations Act*. He stated at para. 35 that the order sought "was carrying baggage with it", which amounted to a remedial order.

45 Similarly, in *Daniels v. Mitchell*, 2004 ABQB 177 (Alta. Q.B.), Rowbotham J. held that an application for foreclosure of a mortgage was a "remedial order" and therefore subject to limitation periods. At para. 9, she cited L. Sarna: *The Law of Declaratory Judgments*, 2d ed. (Toronto: Carswell, 1988), who described the declaratory judgment as:

> ... a judicial statement confirming or denying a legal right of the applicant. Unlike most rulings, the declaratory judgment merely declares and goes no further in providing relief as to the applicant than stating his rights.

46 *Brennenstuhl v. Trynchy*, [2002] A.J. No. 582 (Alta. Q.B.) involved an application to dismiss, as limitation-barred, a claim for a declaration that the relationship between the plaintiff and one of the defendants was that of equitable mortgagor/mortgagee. Murray J. found that the declaration sought would have the effect of reflecting the true nature of the relationship between the parties and that the consequence of this determination gave rise to a right of foreclosure and sale. Murray J. cited at para. 68 the following passage from I. Zamir, *The Declaratory Judgement* (London: Stevens & Sons Limited, 1962) at 3:

> ... A declaration made by the court is not a mere opinion devoid of legal effect: the controversy between the parties is thereby determined and becomes a res judicata. Hence, if the defendant subsequently acts contrary to the declaration, his act will be unlawful. The plaintiff may then again resort to the court, this time for damages to compensate him for loss suffered or for a decree to enforce his declared right. Apprehensive of such consequences, the defendant will usually yield to the declaratory judgment. Where, however, the plaintiff has good ground to fear that the declaration will not be strictly observed, he may in cases in which he is entitled to executory relief - claim together with the declaration an award of damages, an order of specific performance, an injunction, etc.

47 Murray J. referred at para. 69 to the Court's jurisdiction to make original and supervisory declarations, again citing Zamir at 69-70:

> ... the original jurisdiction may be invoked for the determination of disputes at first instance; the supervisory jurisdiction is exercised to review decisions arrived at by other bodies. In many cases the courts have both original and supervisory jurisdictions. Accordingly, upon a particular issue they may be resorted to either in the first instance or, if the issue has already been decided by another authority, for the review of that decision. Furthermore, both original and supervisory jurisdictions may be exercised in one action: the court may declare invalid a decision of an administrative authority and then proceed to declare upon the disputed right or another related right of the plaintiff.

48 Murray J. noted at para. 70 that declaratory relief may be sought to determine whether a contract was formed, whether it has been breached or terminated, and whether in the circumstances of the case it is enforceable. He concluded that the basic thrust of the claim before him was one for declaratory relief and that it fell within the exclusion of s.1(i) of the *Limitations Act*.

49 In *Yellowbird v. Samson Cree Nation No. 444*, 2003 ABQB 535 (Alta. Q.B.), the plaintiff sought a declaration that she was a member of the Sampson Cree Nation and damages for loss of benefits as a member. The Master refused the Band's application to dismiss the plaintiff's claim. Gallant J. dismissed the Band's appeal on other grounds, but also addressed whether a two-year limitation applied to the plaintiff's claim. Citing *Kourtessis v. Minister of National Revenue*, [1993] 2 S.C.R. 53 (S.C.C.) at para. 42, Gallant J. noted at para. 35 that declaratory relief at common-law was discretionary and rarely granted, as the courts refused to grant a declaration where: 1) alternative remedies were available; and 2) no other remedies were sought. However, he noted that the second basis for refusing a declaration was legislatively removed in Alberta by s.11 of the *Judicature Act*, R.S.A. 2000, c.J-2, which provides:

> 11. No proceeding is open to objection on the ground that a judgment or order sought is declaratory only, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

Relying on *Solosky v. Canada* (1979), [1980] 1 S.C.R. 821 (S.C.C.), at 831, Gallant J. referred at para. 36 to three pre-requisites for the granting declaratory relief:

1. The issue must be real and not theoretical;

2. The person raising it must have a real interest; and

3. There must be someone with a true interest to oppose the declaration.

50 Gallant J. noted at para. 37 that the declaration sought in *Brennenstuhl* would have had the effect of giving the plaintiff significant financial benefits. In the case before him, the plaintiff sought a declaration that she was entitled to all benefits associated with membership in the Samson Cree Nation which she had not received previously, along with future benefits. Gallant J. concluded that the general thrust of the claim was declaratory in that it was the determination of the Plaintiff's status which led to the consequential relief.

51 However, in *Daniels*, Rowbotham J. held that an application for an order for foreclosure is an application for a "remedial order" as it goes beyond declaring the status of the parties, and is not merely an affirmation of a "right or duty". She distinguished *Brennenstuhl* on the basis that there, the parties were not seeking to enforce their remedies under a mortgage but rather the determination of what their true relationship was.

52 It is the Trustees' position that the essence of the Plaintiffs' claim is one of breach of trust. They referred to the Alberta Law Reform Institute's *Report No. 55*, (Edmonton: Alberta Law Reform Institute, December, 1989) which preceded the enactment of the *Limitations Act*. As noted by Kenny J. in *Malsbury v. Lefthand Estate*, 2003 ABQB 218 (Alta. Q.B.), it is helpful to look at the Institute's Report as its recommendations were largely accepted by the legislature and the new Act closely resembles the Institute's model. Although the 1980 Act exempted certain claims based on breach of trust from its application, the Institute recommended that a two-year limitation apply to such cases, stating at pp. 36-37:

> The ultimate limitation period we recommend will give trustees the same protection that it gives to other potential defendants. It will protect them from the prejudicial risks of stale evidence, guard them from incurring reasonable economic costs, help assure them of legal decisions based on current socio-economic values, and enable them to look forward to eventual peace and repose.

53 The Institute pointed out at p. 52 that remedial orders require a defendant to comply either with an affirmative duty to do something, or with a negative duty to refrain from doing something. The Report noted that declarations are excluded from limitation periods as, strictly speaking, they do not order anyone to do or refrain from doing anything. Persons usually comply with their duties without judicial coercion:

> The Act does not apply where the claimant seeks a declaration of rights and duties based on contract, trust, restitution, property, or statute, e.g. the interpretation of a legal document such as a mortgage, a lease, a contract, a will or a trust ...

54 The Report provided an example of a trust situation in which a two year limitation period would be triggered:

> Example #2: The trustee, in breach of the terms of the trust, wrongfully retains trust property, and (a) the beneficiary has or ought to have knowledge of the breach but simply waits more than 2 years to litigate ...

55 L. Sarna in *The Law of Declaratory Judgments* commented at p. 31 on the dangers associated with issuing a declaration where another suitable remedy exists, namely:

> ... to erode the divisions between recourses and subsume all relevant writs and motions under the umbrella of the declaratory proceeding. While all judgments are declaratory in that they explicitly or implicitly recognize rights, there has been no statutory impetus to denude all recourses of their intrinsic characteristics by endowing them with the attributes of the declaratory proceeding....To determine that a litigant should have the right to choose a declaratory route over all other equally suitable routes is in some manner to permit the use of a general tool for a specialized function and ultimately to permit the abandonment of the special tools available.

56 Although the three requirements in *Solosky* are met in this case, I am of the view that the thrust of the litigation is the interpretation of the trust documents and Reciprocal Agreement to determine whether the Trustees were in breach of their trust obligations towards the Plaintiff. The Plaintiffs are seeking the retroactive institution of benefits based on TRI being included in pensionable earnings. Such an order will require the Trustees to act; indeed, the prayer for relief in the statement of claim includes a request for a money judgment. While the result of the proceedings will also clarify the duties of the Trustees as regards to future payments of benefits, the thrust of the action is a request for a remedial order. Bearing in mind the concerns of L. Sarna noted above, I am of the view that the *Limitations Act* cannot be circumvented in this case by alleging that the action is one for declaratory relief.

57 The Plaintiffs have pleaded facts that give rise to a cause of action in breach of trust. Accordingly, the limitation applicable to their action is one of two years.

ii. Discoverability

58 S. 3(5) of the *Limitation Act* states:

> (5) Under this section
>
> > (a) the claimant has the burden of proving that a remedial order was sought within the limitation provided by subsection (1)(a), and
> >
> > (b) the defendant has the burden of proving that a remedial order was not sought within the limitation period provided by subsection (1)(b).

59 Having determined that what is being sought here is a remedial order, the Plaintiffs bear the burden of proving that they commenced their action within the two-year limitation period.

60 The Plaintiffs maintain that while they were still employed by TELUS, they could not know whether they would suffer any loss as a result of the decision of the Trustees, pension benefits being calculated on their best five years of service, which may not have included the years they spent at Stentor. Accordingly, the two-year limitation could not run from the communication to them of the Trustees' decision not to include TRI in pensionable earnings in May, 1999, as they were still employed by TELUS at that time.

61 In response, the Trustees submit that Mr. Huang was actively seeking clarification of the status of the pension benefits of repatriated employees in the spring of 1999 and expressed a concern in his letter of April 14, 1999 that older repatriated employees "will be short-changed". They argue that this was indicative of his awareness that the pension of those employees would be affected by the Trustees' decision.

62 I find that when the Trustees decided to exclude TRI from pensionable earnings on April 21, 1999 and communicated their decision to the Plaintiffs through Mr. Huang in May 1999, their decision had the *potential* to affect the Plaintiffs' pension amounts. However, a determination of the Plaintiffs' highest five years could not be made until their employment was terminated. No injury was suffered by an individual Plaintiff until his pension was *in fact* calculated including the years of service at Stentor, but excluding TRI earned during those years. It was at this point that a cause of action crystallized.

63 I find that this cause of action became discoverable at the point when the Plaintiffs were notified of their pension calculation upon termination. At that point, the Plaintiffs already knew that the Trustees had made a final decision to exclude TRI from pensionable earnings and also knew that their best five years *would in fact* include Stentor years of service.

64 I reject the Plaintiffs' argument that the limitation period in this case started to run, not when they received the *estimate* of their pension entitlement, but rather when they were provided with the *final* calculations of their pension

benefits which, for most of the Plaintiffs, was in 2001 (and for Mssrs. Springall and Visser in 2002). The estimate provided to Mr. Halsey contained the express reservation that the figures it disclosed were unaudited, and therefore subject to change, and that the figures did not bind TELUS to a payment in the amount stated. I find that this reservation applied only to the accuracy of the calculations from an actuarial perspective, not to the principle that TRI would not be included in pensionable earnings. That issue was decided with finality by the Trustees and communicated in those terms to Mr. Huang in Mr. Drinkwater's letter of May 13, 1999.

65 Mr. Huang received a statement outlining his pension contributions dated "as of May 29, 1999", and which did not include TRI, in early July 1999. I find that at this latter point in time, the cause of action was discoverable in that it would have then been confirmed to him that (1) his years of service included years of service at Stentor and (2) his pensionable earnings did not include TRI.

66 Mr. Halsey's employment was terminated as of August 13, 1999 and he was given, at that time, a "Retirement Estimate" outlining his pension contributions. He testified that he was already aware from Mr. Huang that the Trustees had turned down the request to include TRI in pensionable earnings and that by the time he received the August 13, 1999 pension estimate, he was aware that this remained the case. I find that the cause of action was discoverable to Mr. Halsey on or about August 13, 1999 when it was confirmed to him that (1) his years of service included years of service at Stentor and (1) his pensionable earnings did not include TRI.

67 Mr. Zukiwski was terminated on June 30, 1999. He bears the burden of proving that the remedial order was sought within the two year limitation under s.3(5) of the Act. There was no evidence before me to suggest that Mr. Zukiwski was unaware of the decision of the Trustees at the time of his termination or that he did not concurrently receive an estimate of his pension benefits at termination which did not include TRI. Mr. Zukiwski had been corresponding with Mr. Block on the issue in the months prior to his termination. Accordingly, he has not established that the statement of claim was filed within the two-year limitation period.

68 In the case of the Plaintiffs Wong, Visser, and Springall, the evidence before me is that their termination date, when they would have received an estimate of their pension entitlement excluding TRI, occurred after February 1, 2000. Accordingly, I am of the view that the claim as it relates to them was filed within the time limitations prescribed by s.3(1)(a) of the Act.

69 As to Mr. Power, although he was terminated from Stentor on November 15, 1999, he was treated as a member of the TCPP for pension purposes. The Trustees commented in their preliminary written argument submitted prior to trial that "... all Plaintiffs (with the possible exception of Power) had full knowledge of the decision of the Trustees [as to TRI]". It was unclear from the evidence whether Mr. Power was in fact made aware of the Trustees' decision in or about May 1999 and when he received the pension estimate which the other Plaintiffs received from TELUS upon termination. Accordingly, I am of the view that the Trustees have not established that the claim of Mr. Power is statute-barred.

iii. Monthly renewal of limitation period

70 The Plaintiffs submit that the shortfall experienced with each monthly pension benefit payment (as a result of the decision to exclude TRI from pensionable earnings) creates a new cause of action. According to this reasoning, each monthly payment is subject to its own limitation period. Thus, the claims of the Plaintiffs Huang, Halsey and Zukiwski for the pension shortfalls experienced during the two years preceding the filing of their Statements of Claim should not be statute-barred. According to the Plaintiffs' argument, should the Trustees continue to make pension payments that exclude TRI from their calculation, this would entitle all of the Plaintiffs (and anyone in that class) to bring an action at any point in the future; the limitation period would only bar claims for damages arising prior to two years before the filing of the statement of claim.

71 In support, the Plaintiffs argue that the situation is analogous to a claim under a disability policy, where the courts have held that each month in which a disabled person is denied payment constitutes a distinct cause of action. This

principle, as it relates to disability policies, appears to be well settled in Ontario: see for example *Zappone v. Mutual of Omaha Insurance Co.* (1983), 1 D.L.R. (4th) 455 (Ont. H.C.); *Coombe v. Constitution Insurance Co.* (1980), 115 D.L.R. (3d) 499 (Ont. C.A.).

72 The Alberta Court of Appeal reached a similar conclusion in *Movold v. Alberta Motor Assn. Insurance Co.* (1987), 51 Alta. L.R. (2d) 47 (Alta. C.A.), a case of a disability insurance policy that provided a weekly payment for a period of continuous disability. The Court cited *Dowhaniuk v. Western Union Insurance Co.* (1976), [1977] 1 W.W.R. 553 (Alta. Dist. Ct.) as authority for the proposition that under such a contract, a new cause of action arises each week in which a plaintiff is denied payment: see also *Cathcart v. Sun Life of Canada* (2002), 8 Alta. L.R. (4th) 292, 2002 ABQB 827 (Alta. Q.B.); *Naboulsi v. UNUM Life Insurance Co. of America* (1998), 9 C.C.L.I. (3d) 100 (Alta. Master).

73 In my view, the cause of action in the case of a retirement pension is distinguishable from the cause of action that renews each month under a disability insurance contract. The renewal of a cause of action in the disability context is not simply based on the fact that payments are made on a periodic basis; rather it is the very nature of the disability contract that requires this interpretation. The contractual basis for the payment of benefits is continuing disability and the insurer is entitled to review the insured's condition on an ongoing basis. As stated by Stevenson D.C.J. (as he was then) at para. 12 of *Dowhaniuk*, "... there is no cause of action for disability payments until the person has been disabled for [that time period]". It is in this sense, not the mere fact that the insured's benefits are paid monthly, that a new cause of action arises with each month the insured remains or becomes disabled.

74 While the Trustees have an ongoing obligation to make retirement pension payments to the Plaintiffs every month, the terms on which these payments are based are set at the point when employment ceases. There is no ongoing evaluation of eligibility; the cause of action in breach of trust (if proved) crystallizes at termination. The Plaintiffs knew or ought to have known of their cause of action when they were notified of their pension calculation, having been previously informed of the Trustees' decision to exclude TRI from pensionable earnings.

75 This interpretation accords with the three rationales for limitation provisions identified by the Supreme Court of Canada in *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549 (S.C.C.) at para. 34 (citing with approval *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6 (S.C.C.), at 29-30):

> There are three, and they may be described as the certainty, evidentiary, and diligence rationales...
>
> Statutes of limitations have long been said to be statutes of repose ... The reasoning is straightforward enough. There comes a time, it is said, when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations... The second rationale is evidentiary and concerns the desire to foreclose claims based on stale evidence. Once the limitation period has lapsed, the potential defendant should no longer be concerned about the preservation of evidence relevant to the claim.
>
> Finally, plaintiffs are expected to act diligently and not "sleep on their rights"; statutes of limitation are an incentive for plaintiffs to bring suit in a timely fashion.

76 This reasoning is also reflected in *Roberts v. R.*, [2002] 4 S.C.R. 245 (S.C.C.), in which two Bands were claiming lands as part of their respective reserves. One of the Bands sued the Crown for breaching its fiduciary duties in keeping poor records regarding reserves. The Plaintiffs argued that a fresh breach occurred for every day they were denied their lands. Binnie J., for the Court, stated at para. 135:

> Acceptance of such a position would, of course, defeat the legislative purpose of limitation periods. For a fiduciary, in particular, there would be no repose. In my view such a conclusion is not compatible with the intent of the legislation... it was open to both bands to commence action no later than 1943 when the Department of Indian Affairs finally amended the relevant Schedule of Reserves. There was no repetition of an allegedly injurious act after that date. The damage (if any) had been done. There is nothing in the circumstances of this case to relieve

> the appellants of the general obligation imposed on all litigants either to sue in a timely way or to forever hold their peace.

77 In this case, my finding that the limitation period starts to run only when both the elements of termination and notification are present provides some measure of certainty and repose to the Trustees of pension plans and does not work an unfairness on those in the position of the Plaintiffs. At the point of termination and notification, the Plaintiffs were well aware of their cause of action and should not then be allowed to "sleep on their rights", particularly given the difficulties of proof with the passage of time. Accordingly, I reject the Plaintiffs' argument that the action of the Plaintiffs Huang, Halsey and Zukiwski are not statute-barred as regards pension shortfalls accruing within a two-year period prior to the filing of the Statement of Claim.

3. What is the appropriate standard of review?

i. The Trust Agreement

78 The Plaintiffs must establish the following elements to succeed in their action for breach of trust:

> (a) There was a trust relationship between themselves and the Trustees;
>
> (b) There was a particular duty under the trust owed by the Trustees to the Plaintiffs;
>
> (c) The Trustees breached that duty;
>
> (d) The breach caused injury to the Plaintiffs.

79 As noted by Cory J., for the majority of the Court, in *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611 (S.C.C.) at para. 47, a pension fund is created pursuant to a pension plan either by way of contract or by way of trust. Whether or not any given fund is subject to a trust is determined by the principles of trust law:

> If there has been some express or implied declaration of trust, and an alienation of trust property to a trustee for the benefit of the employees, then the pension fund will be a trust fund.

80 Cory J. added at para. 48 that if no trust is created, then the administration and distribution of the pension fund will be governed solely by the terms of the pension plan. When a trust is created, the funds are subject to the requirements of trust law. He stated at para. 52 that the first step is to determine whether or not the pension fund is in fact a pension trust, which will most often be revealed by the wording of the pension plan itself, but may also be implied from the plan and the way the pension fund is set up.

81 The matter of whether the pension fund in this case is a trust did not appear to be in dispute. Indeed, the trust agreement is a clear declaration of an intention to create a trust, as evidenced by its title ("Agreement and Declaration of Trust"), its preambles and the provisions of Art. 11.01:

> As it is desired to establish the Trust Fund to be held and administered for the benefit of...;
>
> As TELUS Corporation desires the Trustees to hold and administer the Trust Fund...;
>
> As each of the Trustees has accepted the trusts created and established under the Trust Agreement ...
>
> . . .
>
> 11.01 The undersigned Trustees hereby accept the trusts created and established by the Trust Agreement...

82 Thus, I find that the pension fund in this case is impressed with a trust and subject to all applicable trust principles. The Trust Agreement sets out the following duties and responsibilities of the Trustees:

5.01. The Trustees shall have the following duties and responsibilities:

(a) to operate and administer the Trust Fund for the purpose of providing Benefits subject always to the limitations and conditions contained in the Trust Agreement, in the Plan [the TCPP] and the PBSA [the Pension Benefits Standards Act, 1985 as amended];

(b) to undertake all duties, functions, and to exercise such powers as are necessary to administer the Plan;

(c) . . .

(d) to adopt such policies, procedures, rules or regulations as they deem necessary for the carrying out of their trusts, consistent with the Trust Agreement, the Plan and with the requirements of any applicable federal and provincial legislation;

(e) to establish procedures to be followed in applying for Benefits and in obtaining and reviewing evidence necessary to establish a right to such Benefits;

(f) to pay or provide for the payment of Benefits to those eligible to receive the same in accordance with the Plan;

(g) - (j) . . .

(k) to exercise the care, diligence and skill in the administration of the Trust Fund that a reasonable and prudent person would exercise in comparable situations.

Article 5.02 gives additional powers to the Trustees, among them the following:

(a) - (h) . . .

(i) Claims: to compromise, settle, arbitrate and release claims or demands in favour or against the Trust Fund or the Trustees, on such terms and conditions as the Trustees may deem advisable;

(j) - (t) . . .

(u) Acts: to do all acts, whether or not expressly authorized herein, which the Trustees may deem necessary or proper for the protection of the property held hereunder;

(v) - (x) . . .

(y) Interpretation: *to interpret the Trust Agreement and the Plan and any related documents;* and

(z) . . .

[emphasis added]

Art.5.10 states:

5.10 *The Plan and amendments thereto and all Trustees decisions, rules, regulations, policies and procedures made or established in accordance with the Trust Agreement or the Plan, shall be binding upon the Trustees, the parties hereto, any Member and their respective heirs, executors, administrators, successors and assigns.*

[emphasis added]

83 The TCPP provides as follows regarding the powers and duties of the Trustees:

17.02 The Trustees shall determine any procedures to recognize, apply or implement the Plan or changes to the Plan.

17.05 Any dispute relating to Credited Service or Earnings shall be resolved by the Trustees by referring to the records maintained by the Corporation.

17.18 The Plan may be amended from time to time by TELUS Corporation, in any respect except that no amendment shall contravene PBSA or the Income Tax Act. TELUS Corporation in considering any amendment may seek of receive advice from the Trustees. Any amendment to the Plan shall be implemented as soon as is reasonably possible administratively after notice of such amendment is given to the Trustees by TELUS Corporation.

17.19 No changes to the Plan shall decrease any of the benefits that the Member, Spouse, Dependent Child or Children, Dependent Family Member or Beneficiary receives or is entitled to receive at the date of the change to the Plan.

84 As the settlors empowered the Trustees to interpret the Trust Agreement, the TCPP and related documents, what is the extent of the Court's review jurisdiction?

ii. Positions of the Parties

85 It is the Plaintiffs' position that the Trust Agreement does not give the Trustees an unfettered discretion to make decisions which affect the pension entitlement of the members of the TCPP, as their decisions must, according to Art. 5.10, be "... made or established in accordance with the Trust Agreement or the [Pension] Plan ...". As the Plaintiffs' claim raises legal questions as to the interpretation of written instruments, they submit that the standard of review is that of *correctness*. Although acknowledging that the Trustees are empowered to interpret the TCPP, the Plaintiffs submit that the Trustees are not entitled to effectively amend the TCPP by "interpretation". As "earnings" is clearly defined in the TCPP as meaning "remuneration", the Trustees were bound by the plain meaning of that term.

86 It is the position of the Trustees that they possess discretionary powers in relation to the trust they administer. Accordingly, the Court ought not interfere with the exercise of these powers unless it concludes that the Trustees acted *unreasonably*. The Trustees note that Art. 5.02(y) of the trust agreement confers upon them broad powers of interpretation and that their decisions are binding on the members of the TCPP under Art. 5.10. They also point out that Art. 17.05 confers upon them the power to resolve disputes over earnings.

87 The Plaintiffs respond that Art. 17.05 of the TCPP merely directs the Trustees to resolve any disputes relating to credited service or earnings by referring to the records maintained by the corporation. They maintain that a reasonable interpretation of this provision is that it relates to the length of credited service or the amount of a member's earnings in a given year, not to a dispute involving the actual meaning of "earnings".

iii) Case and other authorities

88 In *Boe v. Alexander* (1987), 41 D.L.R. (4th) 520 (B.C. C.A.) (leave to appeal to the S.C.C. refused, (1988), 43 D.L.R. (4th) vii), the Court considered a provision in an agreement to establish a pension plan which gave to the plan's trustees the power to construe the terms of the plan. The agreement added: "[a]ny such determination and any such construction adopted by the Trustees in good faith shall be binding upon all parties hereto and the beneficiaries hereof." Without commenting on whether the trustees' power to interpret the provisions of a pension plan was a "discretionary power", MacDonald J.A., for the Court, agreed with the trial judge that the jurisdiction of the Court to review the exercise of a trustee's discretion cannot be displaced by even the broadest language creating discretion. MacDonald J.A. approved at para. 6 the trial judge's identification of four situations in which the court's reviewing jurisdiction can be invoked notwithstanding the presence of a privative clause, namely when the trustees (1) fail to exercise the discretion at all; (2) act dishonestly; (3) fail to exercise the level of prudence to be expected from a reasonable businessman; or (4) fail to hold the balance evenly between beneficiaries, or act in a manner prejudicial to the interests of a beneficiary. The trial judge referred to these four situations as examples of the general requirement that trustees act reasonably.

89 D.W.M. Waters, in *Law of Trusts in Canada* 2nd ed. (Toronto: Carswell, 1984), summarized the role of trustees at p. 787:

> It is a primary duty upon Trustees that in all their dealings with trust affairs, they act in such a way that, if there are two or more beneficiaries, each beneficiary receives exactly what the terms of the trust conferred upon him and otherwise receives no advantage or suffers no burden which other beneficiaries do not share. In this way, the Trustees act impartially; they hold an even hand.... Still the duty of the Trustees is to carry out the terms of the trust as they find them, and to ensure that in the administration of the trust, they do not give any advantage or impose burden when that advantage or burden is not found in the terms of the trust.
>
> The duty to act impartially is usually associated in practice with circumstances where the Trustees have administrative powers which involve the exercise of discretion.

90 DW.M. Waters commented on the proper role of the Court in supervising the exercise of discretionary powers by trustees at pp. 758-59:

> ... all trustee discretions involve the question of how far the courts are thereby excluded
>
> ... The creator of the trust...does not intend the courts to make discretionary decisions.

91 In *Edge v. Pensions Ombudsman*, [1999] 4 All E.R. 546 (Eng. C.A.), Chadwick L.J., for the Court, discussed at p. 567 the obligations of trustees of a pension trust entrusted with the exercise of a discretionary power:

> The essential requirement is that the trustees address themselves to the question what is fair and equitable in all the circumstances. The weight to be given to one factor as against another is for them.
>
> Properly understood, the so-called duty to act impartially - on which the ombudsman placed such reliance - is no more than the ordinary duty which the law imposes on a person who is entrusted with the exercise of a discretionary power: that he exercises the power for the purpose for which it is given, giving proper consideration to the matters which are relevant and excluding from consideration matters which are irrelevant. If pension fund trustees do that, they cannot be criticised if they reach a decision which appears to prefer the claims of one interest - whether that of employers, current employees or pensioners - over others. The preference will be the result of a proper exercise of a discretionary power.

92 In *Rivett v. Hospitals of Ontario Pension Plan*, [1995] O.J. No. 3270 (Ont. Gen. Div.) the interpretation of the phrase "during five consecutive years prior to the Member's date of retirement" in the text of a pension plan was in issue. Farley J. considered the dictionary definition of "year" and concluded that an interpretation of that term to mean a period of 365 days before a certain date, and not a calendar year, achieved fairness between the members of the plan. However, he also considered at para. 26 the reality that extra money to fund the plaintiff's interpretation of the plan provision "... must come from somewhere - it does not come from out of thin air ..." and recognized that to the extent that the employee received the extra benefit, there was a corresponding burden on the employers and employees who were required to contribute their share to the plan. Farley J. considered at para. 28 whether a pension plan administrator has the discretionary power relating to interpretation. He referred to *Massaro v. Labourers' Pension Plan of British Columbia* (1989), 58 D.L.R. (4th) 370 (B.C. C.A.) at p. 374:

> By the authority given to the trustees under art. III, s. 3 they defined the conditions of eligibility. Once that was done the definition became a matter of construction. The trustees, in respect of the construction of the plan, are in no different position than parties to a contract who have settled upon the language of their choice. That language may become the subject of interpretation to ascertain the meaning of the words. In this task, discretion plays no part. In my view, the trustees are subject to the same rules of contract interpretation.

