COURT FILE NUMBER	1103 14112
COURT:	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE:	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c T-8, AS AMENDED
	IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985
APPLICANTS:	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust
DOCUMENT	**WRITTEN SUBMISSIONS OF THE SAWRIDGE FIRST NATION**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	PARLEE McLAWS LLP 1500 Manulife Place 10180 – 101 Street Edmonton, AB T5J 4K1 **Attention**: Edward H. Molstad, Q.C. Telephone: (780) 423-8500 Facsimile: (780) 423-2870 **File Number**: 64203-7/EHM

TABLE OF CONTENTS

I. INTRODUCTION

1. These submissions concern the Sawridge First Nation's ("**Sawridge**") response to submissions filed by the Office of the Public Guardian and Trustee of Alberta (the "**OPGT**") on August 5, 2016. The OPGT's submissions concern two applications that it filed, wherein it sought orders requiring Sawridge to provide certain records pursuant to Rule 5.13 of the *Rules of Court* (the "***Rules***"). One of the Public Trustee's applications concerns records related to the identification of the pool of potential beneficiaries for the 1985 Sawridge Trust (the "**Beneficiary Application**"). The other application concerns records related to the settlement of the assets in the 1985 Sawridge Trust (the "**Settlement Application**").

2. With regards to the Beneficiary Application, Justice D.R.G. Thomas, in his written reasons for judgment dated December 17, 2015 ("***Sawridge #3***"), directed Sawridge to provide the OPGT with information that would allow it to identify the beneficiaries of the 1985 Sawridge Trust that it represents. He also ordered that the OPGT could file the Beneficiary Application by January 29, 2016, if it required further information or records in order to identify Sawridge's minors. Finally, he ordered that if the OPGT proceeded with an application, then Sawridge was required to provide written submissions in response by March 15, 2016. Further to those reasons for judgment, Sawridge provided the beneficiary-related information to the OPGT on January 18, 2016. The OPGT served the Beneficiary Application and the Settlement Application without written submissions on Sawridge on January 29, 2016. In response, Sawridge filed and served written submissions regarding both applications on March 15, 2016. A copy of the body of those written submissions has been included as **Tab 1** of these submissions.

3. Notwithstanding the fact that the OPGT failed to file written submissions by the January 29, 2016 deadline, Sawridge agreed to allow the OPGT to file and serve its submissions concerning both the Beneficiary Application and the Settlement Application by August 5, 2016, on the basis that Sawridge would be filing a reply to the OPGT's submissions by August 16, 2016. It also indicated that it would be making submissions to the Court regarding costs payable as a result of the OPGT's applications against Sawridge.

4. The OPGT has taken the position that certain terms in *Sawridge #3* related to the Beneficiary Application are ambiguous, and that clarification regarding the meaning of those

terms is required. In relation to the Settlement Application, the OPGT only recently indicated that it would not be proceeding with this application.

5. It is Sawridge's position that there is no merit to the OPGT's argument regarding the Beneficiary Application. The wording of *Sawridge #3* is clear, and Sawridge has provided all of the information that the OPGT needs to identify the minors that it represents. As such, the Beneficiary Application should be dismissed.

6. Sawridge also submits that the OPGT's conduct as against Sawridge is such that an order of costs should be made against the OPGT. The OPGT has taken a number of steps against Sawridge, a non-party to this Action, that resulted in Sawridge incurring significant expenses. The fact that the OPGT is no longer seeking any documents as part of its Rule 5.13 applications demonstrates that the steps taken against Sawridge were unnecessary and unreasonable. As such, Sawridge believes that there are sufficient grounds for the Court to exercise its discretion regarding costs, and to order that costs be paid by the OPGT, without indemnification from the 1985 Sawridge Trust.

II. FACTS

A. *BACKGROUND*

7. As noted above, Sawridge is not a party to this Action. On May 6, 2015, it received a letter from the OPGT indicating that Sawridge may wish to participate in an application that was scheduled for June 30, 2015.

8. On June 15, 2015, the OPGT served a box of written materials on Sawridge. That box of materials included several hundred pages of records, including an Affidavit of Roman Bombak, and a book containing excerpts from pleadings, transcripts, exhibits and answers to undertakings.

9. Included in the OPGT's materials was an Application that was filed by the OPGT on June 12, 2015. In that Application, the OPGT sought *inter alia* the following relief:

> An Order, pursuant to Rule 3.10 and 3.14 of the *Alberta Rules of Court*, requiring the Sawridge Trustees and the Sawridge Band to file Affidavits

> of Records, in accordance with the provisions of Part 5 of the *Alberta Rules of Court* and provide all records in their power and possession that are relevant and material to the issues in the within proceedings, including, but not limited to:
>
> The Sawridge Band membership application and decision process from 1985-present…[1]

10. Prior to Sawridge being served by the OPGT with the Application and the box of supporting materials, questionings were held by the parties to this Action. The OPGT questioned Paul Bujold, the Chief Executive Officer for the 1985 Sawridge Trust, on May 27 and 28, 2014. During that questioning, Mr. Bujold provided a significant amount of information regarding the 1985 Sawridge Trust's assets and regarding the identification of the trust's beneficiaries. Furthermore, he agreed to provide responses to most of the 50 undertakings that were requested by the OPGT during the questioning. Copies of both the transcript from Mr. Bujold's questioning and the answers to his undertakings are included in the OPGT's submissions, as Tabs 'A' and 'B' respectively.

11. The OPGT has not engaged in any further questionings on the answers to Mr. Bujold's undertakings. It is Sawridge's understanding that despite having had the responses to these undertakings for approximately a year and a half, no request has been made to question Mr. Bujold.

12. On June 17, 2015, Sawridge sent a letter to Justice Thomas regarding the application scheduled for June 30, 2015. In that letter, Sawridge indicated that it had requested an adjournment of all matters naming it as a respondent, because it had not received sufficient notice of the OPGT's application. Given the significance of the relief sought against Sawridge, it was seeking a reasonable adjournment to respond to the OPGT. The letter also states that all of the parties except the OPGT had consented to Sawridge's request for an adjournment.[2]

13. A case management conference was held with Justice Thomas on June 24, 2015. Justice Thomas granted Sawridge's request for an adjournment of those matters where it was

---

[1] Application by the Office of the Public Trustee of Alberta, filed June 12, 2015, at para 1. [**Tab 2**]
[2] Letter to Justice D.R.G. Thomas, dated June 17, 2015. [**Tab 3**]

named as a respondent. Justice Thomas also ordered that the OPGT would have to provide full particulars of the relief that it was seeking against Sawridge.[3]

14. During the June 24th case management conference, Sawridge argued that the OPGT should be required to pay Sawridge costs for the adjournment application. Sawridge requested that those costs be payable by the OPGT directly, and not by the 1985 Sawridge Trust. Among other points, Sawridge argued that the OPGT's failure to consent to the adjournment of the matters concerning Sawridge was patently unreasonable, and went against the OPGT's duty as an officer of the Court. Justice Thomas ordered that Sawridge's application for costs of the adjournment application against the OPGT would be reserved to, "the final disposition of this matter."[4]

15. On July 17, 2015, Sawridge was served with an Amended Application by the OPGT, wherein the OPGT indicated that it was seeking an order requiring Sawridge to produce either an Affidavit of Records, or, in the alternative, all relevant and material records related to this Action, including but not limited to the following:

(a) Records related to Sawridge's membership criteria, membership application process and membership decision-making process from 1985-present, including:

(i) All inquiries received about Sawridge membership or the process to apply for Sawridge membership and the responses to said inquiries;

(ii) Any correspondence or documentation submitted by individuals in relation to applying for Sawridge membership, whether or not the inquiry was treated by Sawridge as an actual membership application;

(iii) Complete and incomplete Sawridge membership applications;

(iv) Sawridge membership recommendations, membership decisions by Chief and Council and membership appeal decisions, including any and all information considered by the Membership Review Committee, Chief and Council or the Membership Appeal Committee in relation to membership applications;

---

[3] Order, filed July 17, 2015. **[Tab 4]**
[4] *Ibid.* **[Tab 4]**

(v) Any information that would assist in identification of the minor dependants of individuals who have attempted to apply, are in the process of applying or have applied for Sawridge membership;

(vi) Any other records that would assist in assessing whether or not the Sawridge membership processes are discriminatory, biased, unreasonable, delayed without reason, or otherwise breach Charter principles or the requirements of natural justice (Paragraph 2(i));

(b) Records from Federal Court Actions T-66-86A or T-66-86B (Paragraph 2(ii));

(c) Records from Federal Court Action T-2655-89 (Paragraph 2(iii));

(d) Records that are relevant and material to certain issues set out in Exhibit J to Catherine Twinn's Affidavit dated December 8, 2014 and filed in Court of Queen's Bench Action 1403 04885, including Catherine Twinn's sworn but unfiled Affidavit (Paragraph 2(iv));

(e) Records that are relevant and material to the Sawridge Trustees' proposal to establish a tribunal for determining beneficiary status (Paragraph 2(v));

(f) Records that are relevant and material to conflict of interest issues arising from the multiple roles of the Sawridge Trustees (Paragraph 2(vi)); and

(g) Records that are relevant and material to the details and listing of any assets held in trust by individuals for Sawridge prior to 1982, transferred to the 1982 Trust, and transferred to the 1985 Trust (Paragraph 2(vii)).[5]

16. On August 14, 2015, Sawridge filed written submissions in response to the OPGT's Amended Application. In those submissions, Sawridge argued that since it was not a party to this Action, the OPGT could only obtain disclosure from it through Rule 5.13 of the *Rules*. According to Rule 5.13, a party seeking production from a non-party is required to specify exactly what records are being sought. Given the broad nature of the OPGT's requests for records, Sawridge argued that the OPGT was not entitled to the orders it was seeking.[6]

17. In addition, Sawridge submitted that a number of the OPGT's requests for information or records were irrelevant and not material to this Action, including the OPGT's requests for records related to Sawridge's membership process. Sawridge also wrote that it

[5] Amended Application of the Public Trustee, filed July 16, 2015, at pp 4 and 5. [**Tab 5**]
[6] Brief of the Sawridge First Nation, filed August 14, 2015, at paras 24-33. [**Tab 6**]

denied the suggestion by the OPGT that it was selectively producing records, and noted that the OPGT had failed to provide evidence of said conduct.[7]

18. Finally, Sawridge indicated in its submissions that it would be seeking costs from the OPGT directly (without indemnification from the 1985 Sawridge Trust) related to the Amended Application.[8]

19. The hearing regarding the Amended Application proceeded as scheduled on September 2 and 3, 2015. *Sawridge #3* contains Justice Thomas' reasons for judgment arising from the Amended Application. In *Sawridge #3*, Justice Thomas affirmed that the only way to compel Sawridge to provide records to the OPGT in this Action was through Rule 5.13.[9] He also wrote that the OPGT's Application for production was denied, but that it could (via a Rule 5.13 application) obtain materials/information from Sawridge related to specific matters:

> 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.[10]

20. Justice Thomas also stressed the importance of having the OPGT re-focus its role in this Action. He confirmed that the OPGT's role was not to engage in an assessment of Sawridge's membership process. Rather, the OPGT's role was limited to the following four tasks:

(a) 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;

(b) Examining on behalf of the minor beneficiaries the manner in which the property was placed/settled in the Trust;

---

[7] *Ibid*, at para 47. [**Tab 6**]
[8] *Ibid*, at para 71. [**Tab 6**]
[9] *1985 Sawridge Trust v Alberta (Public Trustee)*, 2015 ABQB 799 ["***Sawridge #3***"], at paras 27 and 28. [**Tab 7**]
[10] *Ibid*, at para 26. [**Tab 7**]

(c) Identifying potential but not yet identified minors who are children of [Sawridge] members or membership candidates; these are potentially minor beneficiaries of the 1985 Sawridge Trust; and

(d) Supervising the distribution process itself.[11]

21. With regards to the second of the above-noted tasks, Justice Thomas affirmed that the OPGT could prepare and serve a Rule 5.13 application on Sawridge regarding the settlement of the assets in the 1985 Sawridge Trust:

> 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.[12]

22. Insofar as the third task, Justice Thomas held that the OPGT was representing (or potentially representing) minors who fell under the following categories:

(a) Minors who are children of members of Sawridge (category 2);

(b) Children of adults who have unresolved applications to join Sawridge (category 4); and

(c) Children of adults who have applied for membership in Sawridge but have had that application rejected and are challenging that rejection by appeal or judicial review (category 6).[13]

23. Justice Thomas ordered that Sawridge was required to provide the OPGT with the following information that would allow the OPGT to identify the minor beneficiaries listed in the above-noted categories:

(a) The names of individuals who have:

(i) made applications to join [Sawridge] which are pending; and

(ii) had applications to join [Sawridge] rejected and are subject to challenge; and

(b) The contact information for those individuals where available.[14]

---

[11] *Ibid*, at para 37. [**Tab 7**]
[12] *Ibid*, at paras 46. [**Tab 7**]
[13] *Ibid*, at paras 56-57. [**Tab 7**]

24. The OPGT was advised that if it required additional documents to assist in identifying the minor beneficiaries, then it could file a Rule 5.13 application related to same:

> 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.[15] [***Emphasis Added***]

25. Finally, with regards to the issue of the costs payable by the OPGT, Justice Thomas wrote the following:

> 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.[16]

B. THE RULE 5.13 APPLICATIONS

26. As noted above and in Sawridge's written submissions of March 15, 2016, it provided the OPGT with a letter on January 18, 2016, wherein it enclosed all of the information that Justice Thomas ordered it to disclose. Sawridge provided a table containing a list of the adult individuals who had applied to join Sawridge, but whose applications were still pending (along with those individual's contact information). Sawridge also provided a list of the adult parents, with contact information, who had made applications for membership for their minor children. Additionally, Sawridge confirmed that there were no membership appeal decisions outstanding, and that there were no membership decisions that were subject to challenge. Sawridge's letter is attached as Tab D to the OPGT's submissions.

---

[14] *Ibid*, at paras 57-58. **[Tab 7]**
[15] *Ibid*, at para 61. **[Tab 7]**
[16] *Ibid*, at para 71. **[Tab 7]**

27. At no time following the receipt of Sawridge's letter of January 18th did the OPGT indicate that it took issue with Sawridge's description of the information contained in that letter. Rather, the OPGT responded to Sawridge's letter by serving it with the Beneficiary Application and the Settlement Application, both of which were filed on January 29, 2016.

28. Rather than identifying any particular information or records that it needed to help it identify the minors that it was representing, the OPGT indicated that it was seeking the following as part of the Beneficiary Application:

> In accordance with para. 61 of Justice Thomas' December 17, 2015 judgment, all documents in the possession of Sawridge First Nation that may assist in identifying current and possible minors who are children of members of the Sawridge First Nation. Information already provided by Paul Bujold on or about May 27, 2014 in response to Undertaking 31 excluded.

29. On March 14, 2016, the OPGT sent Sawridge a letter, wherein it noted that if Sawridge provided the OPGT with (i) an updated list of Sawridge's minor children, and (ii) "a written response to advise whether any of the individuals noted in Schedule 3 in your January 18, 2016 letter with pending membership applications have minor children", then same would satisfy the OPGT for the purpose of the Beneficiary Application.[17] In addition the OPGT confirmed that it wished to either postpone the Settlement Application so that Mr. Bujold could be questioned, or proceed with the Settlement Application as filed.

30. In light of the fact that the Schedule 3 to Sawridge's letter of January 18th contained a list of minors whose parents had applied for membership on their children's behalf, Sawridge wrote to the OPGT seeking clarification regarding its request on March 16, 2016. Sawridge did not receive a response to that request for clarification.

31. On April 5, 2016, the Sawridge Trustees provided the OPGT with an updated list of Sawridge's minors. The e-mail enclosing that information was included as Tab F to the OPGT's submissions.

---

[17] Letter to Parlee McLaws LLP from Hutchison Law, dated March 14, 2015. [**Tab 8**]

32. On July 7, 2016, the OPGT provided Sawridge with copies of the records that it intended to rely upon as part of both the Beneficiary Application and the Settlement Application. Those documents included a number of excerpts from Affidavits sworn by Mr. Bujold, from his questioning, and from his answers to undertakings. In addition, the OPGT provided a copy of an Affidavit sworn by Catherine Twinn, dated September 30, 2015. The OPGT was clear in its letter enclosing its records that it intended to rely on Ms. Twinn's Affidavit as part of both applications.[18]

33. In light of the scope of the requests being made by the OPGT as part of the applications, and given the inflammatory comments made in Ms. Twinn's Affidavit, Sawridge proceeded with questioning based on the evidence being relied upon by the OPGT. Specifically, a further questioning of Mr. Bujold occurred on July 27, 2016.

34. Prior to Mr. Bujold's questioning commencing, the OPGT confirmed on the record that it no longer intended to proceed with the Settlement Application.[19] The OPGT also agreed to a Consent Order regarding the issues of the settlement of the 1985 Sawridge Trust, which states the following:

> UPON HEARING representations from counsel for the Sawridge Trustees that the Sawridge Trustees have exhausted all reasonable options to obtain a complete documentary record regarding the transfer of assets from the 1982 Trust to the 1985 Trust; AND that the parties to this Consent Order have been given access to all documents regarding the transfer of assets from the 1982 Trust to the 1985 Trust that the Trustees have reviewed; AND that the Trustees are not seeking an accounting of the assets transferred into the 1982 Trust; AND that the Trustees are not seeking an accounting of the assets transferred into the 1985 Trust; AND UPON noting that assets from the 1982 Trust were transferred into the 1985 Trust; AND UPON noting that little information is available regarding the transfer of assets from the 1982 Trust to the 1985 Trust.[20] [***Emphasis Added***]

35. During his questioning, Mr. Bujold noted the following:

---

[18] Letter from Hutchison Law, dated July 7, 2016, Exhibit 3 to the Questioning on Affidavit of Paul Bujold.[**Tab 9**]
[19] Transcript of Questioning on Affidavit of Paul Bujold, dated July 27, 2016 ["***2016 Transcript***"], at 5:16-25.
[20] Consent Order regarding settlement of assets, Unfiled. [**Tab 10**]

(a) The OPGT had not questioned him in relation to the undertakings that he provided.[21]

(b) Sawridge had fully cooperated with the Sawridge Trustees' requests for information made regarding the beneficiaries and potential beneficiaries of the 1985 Sawridge Trust.[22]

(c) Sawridge was cooperative in providing information to the Sawridge Trustees regarding the settlement of the assets in the 1985 Sawridge Trust.[23]

(d) Sawridge provided the Sawridge Trustees with a number of records related to membership, including: a membership application form, a flow chart for the membership application process, Sawridge's membership rules, and letters of acceptance or rejection for membership. Those records were in turn sent to the OPGT.[24]

(e) The Affidavit of Catherine Twinn contained a number of statements that are inaccurate and also include inadmissible opinion evidence. [25]

III. ISSUES

36. As noted above, the OPGT has recently advised that it will no longer be proceeding with the Settlement Application. It also advised in its written submissions that it was only seeking clarification regarding certain terms used in *Sawridge #3* that concern the Beneficiary Application. As such, it is Sawridge's understandings that the issues in this application are as follows:

(a) Has Sawridge provided the OPGT with all of the beneficiary-related information that the OPGT requires to identify the minors it represents in this Action?

(b) Is Sawridge entitled to costs directly from the OPGT?

---

[21] *2016 Transcript*, at 13:22-26.
[22] *Ibid*, at 16:9-24.
[23] *Ibid*, at 24:18-27.
[24] *Ibid*, at 34:24-35:12.
[25] *Ibid*, at 37:22-71:9.

IV. ANALYSIS

A. *THE BENEFICIARY APPLICATION*

37. Sawridge adopts its submissions of March 15, 2016 in response to the Beneficiary Application. It remains Sawridge's position that it has complied with Justice Thomas' directions in *Sawridge #3* regarding the production of information to the OPGT.[26] Sawridge also submits that the OPGT failed to articulate its requests for records in the Beneficiary Application with a level of precision that conforms with the requirements under Rule 5.13.[27]

38. In its submissions, the OPGT argues that the terms "unresolved", "rejected" and "unsuccessful", as referred to in *Sawridge #3*, are ambiguous, and that those terms require clarification so that the OPGT may finalize the list of minors that it represents. The OPGT has not indicated that it is seeking further production as part of the Beneficiary Application.

39. With regards to the term "unresolved", Justice Thomas employs this term in reference to the following category of beneficiaries that the OPGT is representing: "children of adults who have unresolved applications to join the SFN..."[28] A reading of Justice Thomas' reasons very clearly confirms that the term "unresolved" refers to completed applications for membership with Sawridge that have not been decided pursuant to Sawridge's own membership process. Earlier in his reasons for judgment, Justice Thomas states that the OPGT is only representing, "children of persons who have, at a minimum, completed a Sawridge Band membership application."[29] That statement confirms that in order to be considered an unresolved application, an applicant must have at least submitted a completed application for membership. Furthermore, Justice Thomas' use of the word "resolved" to describe completed membership determinations supports this interpretation.[30]

40. Sawridge has provided the OPGT with up to date information regarding individuals who have made applications for membership where a decision has not yet been reached (i.e., where a decision is pending). It is clear that based on that information, the OPGT

---

[26] Written submissions of the Sawridge First Nation, dated March 15, 2016, at paras 14-15. **[Tab 1]**
[27] *Ibid*, at paras 16-18. **[Tab 1]**
[28] *Sawridge #3*, at para 56. **[Tab 7]**
[29] *Ibid*, at para 52. **[Tab 7]**
[30] *Ibid*, at para 49. **[Tab 7]**

can very easily ascertain the identity of all of the minor children of adults who have unresolved applications to join Sawridge. Accordingly, it is submitted that no further disclosure is required in relation to this category of minors.

41. In addition, Sawridge (in an effort to assist the OPGT) provided it with information regarding children whose parents had completed applications for membership on their behalf. That information has further facilitated the OPGT's objective of identifying the minors that it represents.

42. Insofar as the terms "rejected" and "unsuccessful", both terms are used by Justice Thomas to refer to individuals who have applied for membership in Sawridge, but whose applications have been denied. Specifically, Justice Thomas noted that the OPGT was only representing those minors who are children of applicants for membership who are challenging Sawridge's decision to deny their applications, or who can still advance such a challenge.[31]

43. Further to Justice Thomas' reasons, Sawridge advised the OPGT that the last application for membership that was denied by Sawridge was on December 9, 2013, and that no proceedings had been commenced related to that decision. As such, and given that there are no pending proceedings regarding membership disputes, there are no minors who fall into what Justice Thomas referred to as category 6.

44. The OPGT has suggested at Paragraph 27 of its submissions that its issues with the above-noted terms have in part arisen as a result of Sawridge's Membership Rules. Sawridge submits that the OPGT's comments regarding its Membership Rules are patently incorrect. Sawridge's membership process is straightforward. That process allows applicants to submit completed application for membership, and provides those applicants with the ability to appeal any decisions made concerning their membership. This process is far from being a confusing process, as is alleged by the OPGT. Furthermore, the OPGT has failed to point to anything that suggests that the Membership Rules have led to any confusion regarding the terms used by Justice Thomas. Consequently, no weight should be given to the OPGT's statements.

---

[31] *Ibid*, at paras 56-58. [**Tab 7**]

45. The OPGT's decision to raise the issue of membership yet again is in direct contravention of *Sawridge #3*. The form of Order prepared by the parties arising from Sawridge #3 is clear that, "the Public Trustee shall not engage in collateral attacks on membership processes of the SFN..." Justice Thomas' reasons for judgment similarly confirm that the OPGT should not be conducting an "open-ended inquiry into membership of Sawridge Band..."[32] The fact that the OPGT has chosen to make reference to issues it believes exist with Sawridge's membership process is inappropriate, and should be taken into consideration as part of Sawridge's application for costs.

46. In its submissions, the OPGT refers to the Alberta Court of Appeal's decision in *RBC v Kaddoura*. That case is distinguishable from this application, as the passages cited by the OPGT concerned disclosure obligations by a party to an action. In contrast, the Beneficiary Application concerns disclosure by a non-party to this Action under Rule 5.13.

47. In closing, it is Sawridge's position that the OPGT now has all of the information that it requires in order to identify the minors that it represents. As such, and given that the OPGT has failed to identify any further records or information that it requires, it is submitted that the Beneficiary Application should be dismissed.

B. THE OPGT SHOULD PAY COSTS TO SAWRIDGE

i. The Costs Exemption and Advanced Costs Orders Do Not Apply

48. As the OPGT has noted in prior appearances, its argument that it should not be liable for costs rests on an Order that was made by Justice Thomas at the outset of the OPGT's involvement in this Action. That Order states that the OPGT would be exempt from the responsibility to pay costs to other parties to this Action:

> The Public Trustee will be exempted from any responsibility to pay the costs of the other parties in the within proceedings.[33] [***Emphasis Added***]

49. The Order also states the following regarding the OPGT's liability for costs:

---

[32] *Ibid*, at para 36. [**Tab 7**]
[33] Order of Justice Thomas, filed September 20, 2012. [**Tab 11**]

> The Public Trustee shall receive full, and advance, indemnification for its costs for participation in the within proceedings, to be paid by the Sawridge Trust.[34] [***Emphasis Added***]

50. A reading of the plain language of the above-referenced Order indicates that the OPGT is only exempt from paying costs to other parties to this Action. The Order does not state that the exemption from costs would extend to costs payable to non-parties to this Action such as Sawridge. As such, it is submitted that the costs exemption that was made by Justice Thomas does not preclude Sawridge from claiming costs as against the OPGT without indemnification from the 1985 Sawridge Trust.

51. Similarly, the plain language of the Order confirms that the OPGT is only entitled to indemnification for its costs for participation. The Order does not state that the OPGT would be able to seek indemnification from the 1985 Sawridge Trust for any costs that were awarded against it as part of this Action. Rather, it is submitted that the Order only extends to those legal costs that the OPGT has incurred in its representation of the minor beneficiaries.

52. This interpretation of the Order is supported by the fact that reading the Order more broadly would result in an unfair prejudice to any non-parties to this Action and to the 1985 Sawridge Trust. The OPGT has the ability by virtue of the *Rules* to advance applications against individuals and entities that are not parties to this Action. For example, it can (as it did with Sawridge) file an application to compel a non-party to provide disclosure. If the costs exemption were interpreted so as to include non-parties, then any innocent party who was brought into this Action by the OPGT would not have any recourse for costs, notwithstanding the fact that they may have been improperly brought into the litigation.

53. With regards to the 1985 Sawridge Trust, interpreting the above Order as compelling the trust to pay any award of costs made against the OPGT would result in the trust being liable for matters that are entirely out of its control. In other words, the 1985 Sawridge Trust could be held responsible for improper litigation-related decisions which were made by the OPGT, regardless of the position taken in relation to those decisions. This interpretation, it is

---

[34] *Ibid.* [**Tab 11**]

submitted, would cause an unreasonable prejudice to the trust, and consequently to its beneficiaries, including those beneficiaries that are being represented by the OPGT.

54. Finally, it is submitted that the exceptional nature of the orders made by Justice Thomas suggests that they must be strictly interpreted by this Honourable Court.

ii. The Costs Exemption and Advanced Costs Orders Are Not Absolute

55. Even if the costs exemption and the related advance costs order compelling the Sawridge Trustees to pay the OPGT's costs did apply to Sawridge, the mere fact that those orders have been made does not bar this Court from revisiting the issue of costs. As Justice Binnie noted in *R. v Caron*, awards of advanced costs, "should be carefully fashioned and reviewed over the course of the proceedings to ensure that concerns about access to justice are balanced against the need to encourage the reasonable and efficient conduct of litigation..."[35]

56. Similarly, in *1985 Sawridge Trust v Alberta (Public Trustee)* ("***Sawridge #2***"), the Court of Appeal affirmed that the advance costs order in this Action would be subject to oversight and further directions by the Court.[36]

57. Interpreting orders granting exemptions from costs in an absolute fashion would have a deleterious effect on the litigation process. Costs are awarded for a number of reasons, including in order to discourage unnecessary steps being taken as part of litigation.[37] If a party was guaranteed to never be subject to an award of costs, then that party would be at liberty to take any position it wished, notwithstanding the lack of any merit to that position.

58. The above-noted issue was well summarized by the Court in *Children's Aid Society of St. Thomas (City) & Elgin (County) v S. (L.)*. That case concerned whether the Ontario Office of the Children's Lawyer ("**OCL**") should be held liable for costs resulting from an unnecessary multi-day trial. The OCL argued that it should not be held liable for costs arising from that trial for a number of reasons. The Court disagreed, and ordered costs against the OCL.

---

[35] *R. v Caron*, 2011 SCC 5, at para 47. **[Tab 12]**
[36] *1985 Sawridge Trust v Alberta (Public Trustee)*, 2013 ABCA 226 [***"Sawridge #2"***], at para 29. **[Tab 13]**
[37] *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 [***"Okanagan"***], at paras 22 and 26. **[Tab 14]**

In coming to its decision, the Court noted the following regarding the danger associated with taking an absolute view of a costs exemption:

> 53 A sense of immunity from costs may blind or desensitize a party or non-party litigant to the fact that other litigants are incurring costs and expenses to be involved in the court process. Immunity from costs could result in lack of accountability to the court process.
>
> 54 No participant in litigation should have *carte blanche* to pursue litigation that has no focus and no evidentiary basis, without running the risk of being held accountable for wasting time and money and an order to pay compensatory costs to indemnify the other litigants.[38] [***Emphasis Added***]

59. Furthermore, the *Rules* provide the Court with the means of varying orders such as the costs exemption order. The foundational provisions of the *Rules* confirm that the *Rules* (including those rules that concern costs) must be interpreted in a manner that encourages timely and cost-effective litigation.[39] The *Rules* go on to state that parties must, "refrain from filing applications or taking proceedings that do not further the purpose and intention of these rules."[40] If a party violates those foundational rules, then the Court is given broad discretion to make orders to implement the intention of the *Rules*.[41]

60. Finally, it is important to note that interpreting an award for costs in an absolute fashion would run contrary to the discretionary aspect of costs. Case law is clear that the Court of Queen's Bench is vested with a discretionary power over costs.[42] Interpreting an order as removing the Court's ability to exercise its ability to award costs throughout proceedings is in direct conflict with this well-recognized discretionary authority.

61. Sawridge submits that if the costs exemption applies to Sawridge, then this Honourable Court has the ability to vary the terms of same to allow Sawridge to claim costs against the OPGT. Specifically, it is submitted that the Court should exercise its discretion to grant costs to Sawridge based on the OPGT's conduct during these proceedings. That conduct

---

[38] *Children's Aid Society of St. Thomas (City) & Elgin (County) v S. (L.)*, 2004 CarswellOnt 390 (Ct J), at paras 53 and 54. [**Tab 15**]
[39] *Rules of Court*, Alta Reg 124/2010 ["***Rules of Court***"], at 1.2(1) and (2). [**Tab 16**]
[40] *Ibid*, at 1.2(3)(c). [**Tab 16**]
[41] *Ibid*, at 1.4. [**Tab 16**]
[42] *Okanagan*, at para 19. [**Tab 14**]

(as summarized below) has been unreasonable and unnecessary, and has resulted in significant time and money being wasted. It is accordingly appropriate for the Court to make an award.

62. As noted above, Sawridge has been involved in this Action since May 2015 as a result of the OPGT bringing an application to compel it to produce records. Since May 2015, the OPGT has taken a number of unreasonable or unnecessary steps which have resulted in direct prejudices against Sawridge. Those steps most notably include the following:

(a) In June 2015, the OPGT refused to consent to Sawridge's reasonable request for an adjournment of the portions of the OPGT's application that concerned Sawridge. The OPGT's position resulted in Sawridge being required to attend chambers to obtain an adjournment.

(b) The OPGT failed to exhaust all of its possible avenues for obtaining production from the parties to this Action before taking the exceptional step of seeking records from Sawridge (a non-party). The OPGT could have (as it had done in 2014) made requests for records to the Sawridge Trustees, or if necessary proceeded with further examinations on the answers to Mr. Bujold's undertakings. Rather than taking these steps, the OPGT opted to take the unnecessary step of pulling Sawridge into this Action. That step is especially unnecessary given that, as Mr. Bujold noted during his most recent questioning, Sawridge had been cooperating completely with any requests for records made by the Sawridge Trustees.[43]

(c) The OPGT proceeded with an Application for a broad array of records from Sawridge, despite it being clear in law that Sawridge was not a party to this Action, and that it was accordingly only required to provide records in accordance with Rule 5.13. Justice Thomas concurred with this position in *Sawridge #3*, and dismissed the OPGT's Amended Application for production. Given the number of types of records that were being requested by the OPGT and given the significance of the request that the OPGT was making, Sawridge was required to prepare lengthy written submissions, and to attend two days of applications.

[43] *2016 Transcript*, at 13:22-26, 16:9-24, 24:18-27, and 34:24-35:12.

(d) With regards to the Beneficiary Application, the OPGT failed to take reasonable steps to avoid the need for this Application. As noted above, the OPGT's sole concerns at this point regarding the Beneficiary Application are related to the interpretation of certain words in Sawridge's letter of January 18, 2016, and in *Sawridge #3*. Rather than approaching Sawridge regarding these interpretational issues, the OPGT waited until August 5th to advise Sawridge and the parties to this Action of its position. Had the OPGT raised this issue sooner, there may not have been a need to prepare submissions and to appear before this Honourable Court.

(e) Insofar as the Settlement Application, the OPGT's decision to withdraw its application shortly before the parties' submissions were due is another example of unreasonable conduct. In the Settlement Application, the OPGT requested ten different categories of records, many of which would have required significant work to find given that they dated back to the 1970s. Up until recently, the OPGT had continued to represent that it was going to proceed with the Settlement Application. Accordingly, Sawridge, in accordance with *Sawridge #3*, proceeded to prepare and file written submissions in response to the Settlement Application. It was only recently that the OPGT decided to abandon the Settlement Application. That decision, it is important to note, was made despite the fact that since filing and serving the Settlement Application in January 2016, the OPGT had not received any new information concerning the settlement of the assets in the 1985 Sawridge Trust.

(f) In addition to the above-noted conduct regarding the two Rule 5.13 applications, the OPGT's conduct regarding the evidence it intended to rely upon as part of these applications also resulted in unnecessary effort being expended by Sawridge. Rule 6.3 of the *Rules* is clear that an applicant is required to, "identify the material or evidence intended to be relied on [as part of an application]," and must serve on all parties, "any affidavit or other evidence in support of [an]

application."[44] The OPGT failed to particularize the evidence that it was relying upon in both the Settlement Application and the Beneficiary Application. It was not until July 7, 2016 that the OPGT finally advised Sawridge of what records it intended to rely upon.

63. The costs exemption was briefly addressed by the Court of Appeal in *Sawridge #2*. It wrote at the time that an exemption from costs was appropriate, because the Court, "has ample other means to control the conduct of the parties and the counsel."[45] As has been noted above, the Court has taken a number of steps to try and refocus the OPGT's conduct during this Action. To date, those steps have not resulted in any less unnecessary steps being undertaken as a result of the OPGT's conduct. While the Court of Appeal may have been of the opinion that other steps could be taken to control the OPGT, it is clear from its conduct that those steps have not been effective. As such, it is submitted that the issue of using costs to address the OPGT's conduct must be revisited.

64. In summary, Sawridge's involvement in this Action came as a result of the OPGT requesting that it produce a number of records. Since becoming involved in this Action, Sawridge has been required to attend a number of in person hearings, and has had to respond to at least three Applications filed against it by the OPGT. Sawridge has complied with all orders concerning it, and has to date only provided the OPGT with the information it was required to produce pursuant to *Sawridge #3*. Notwithstanding the OPGT's voluminous requests for records at the outset, it has now decided on its own that it no longer requires any records from Sawridge, and that it has sufficient information regarding both the 1985 Sawridge Trust's beneficiaries and regarding the settlement of its assets. The OPGT's decision to essentially abandon its request for records from Sawridge, especially when taking into account all of the steps that were taken to arrive at this point, is a perfect example of unnecessary litigation.

---

[44] *Rules of Court*, at 6.3(2)(c) and 6.3(3)(b). [**Tab 16**]
[45] *Sawridge #2*, at para30. [**Tab 13**]

iii. The Costs Payable to Sawridge

65. The *Rules of Court* state that as a respondent to the OPGT's applications, Sawridge is entitled to claim costs.[46] Furthermore, case law is clear that the Court has the discretion to award costs against a party to a non-party.[47]

66. The starting point for any decision regarding the quantum of costs is the *Rules of Court*. They provide, *inter alia*, that the Court may consider a number of factors when assessing the appropriate scale of costs:

> (a) the conduct of a party that was unnecessary or that unnecessarily lengthened or delayed the action or any stage or step of the action;
>
> (b) a party's denial of or refusal to admit anything that should have been admitted;
>
> (c) whether a party started separate actions for claims that should have been filed in one action or whether a party unnecessarily separated that party's defence from that of another party;
>
> (d) whether any application, proceeding or step in an action was unnecessary, improper or a mistake;
>
> (e) an irregularity in a commencement document, pleading, affidavit, notice, prescribed form or document;
>
> (f) a contravention of or non-compliance with these rules or an order;
>
> (g) whether a party has engaged in misconduct. [48]

67. While costs are normally calculated in accordance with the applicable columns in Schedule C of the *Rules*, Courts have been willing to award enhanced costs in a number of circumstances. Those circumstances include cases where, for example, a party has proceeded with litigation despite clearly having a minimal chance of success.[49] In addition, Courts have been willing to order enhanced costs to a party as a result of the late adjournment of

---

[46] *Rules of Court*, at 10.28. [**Tab 16**]
[47] *Manning v Epp*, 2006 CarswellOnt 6508 (Sup Ct J), at paras 18-20. [**Tab 17**]
[48] *Rules of Court*, at 10.33. [**Tab 16**]
[49] *Francescutto (Guardian ad litem of) v Strata Plan K227*, 1994 CarswellBC 741 (SC), at paras 5 and 6. [**Tab 18**]

applications,[50] or where the conduct of a party, "falls far short of what is expected from a responsible litigant."[51]

68. In *Hill v Hill*, the Court of Appeal noted that the following factors could be considered when determining if it were appropriate to order enhanced costs against a party:

(a) The winning party's legal fees;

(b) Whether the losing party brought any wasteful motions;

(c) Whether the losing party's zeal in bringing the action necessitated a strong response by the winning party;

(d) Whether the losing party's accusations were grounded; and

(e) The amount at issue.[52]

69. During the course of these proceedings against Sawridge, the OPGT engaged in a variety of conduct (as summarized above) which, based on the wording of the *Rules*, would militate in favour of a more substantial award of costs. The OPGT's conduct resulted in unnecessary steps being taken by all parties, and in unneeded delays in this Action. Additionally, the fact that the OPGT has effectively withdrawn all of its production-related applications against Sawridge is indicative of the unnecessary nature of those applications. Finally, the Applications prepared by the OPGT as part of the Settlement Application and the Beneficiary Application both contained irregularities regarding the relief sought and the evidence to be relied upon that weigh in favour of granting enhanced costs.

70. Based on the above, and taking into account the OPGT's conduct as summarized in these submissions, Sawridge submits that an enhanced scale of costs should be awarded against the OPGT. Sawridge proposes that those costs be payable as either a multiple of column 5 of Schedule C, or in a lump sum. Those costs should be payable in relation to the following steps:

---

[50] *Edwards v Resort Villa Management Ltd*, 2015 ABQB 424, at para 96. [**Tab 19**]
[51] *Kent v Law Society of Alberta*, 2015 ABQB 432, at paras 18 and 19. [**Tab 20**]
[52] *Hill v Hill*, 2013 ABCA 313, at paras 11, 14, 17, and 39. [**Tab 21**]

(a) The adjournment application of June 24, 2015;

(b) The application before Justice Thomas on September 2 and 3, 2015, including the cost of preparing written submissions; and

(c) This application, including costs for the cross-examination on Affidavit of Mr. Bujold, the cost of preparing multiple written submissions, and of the withdrawal of the Settlement Application.

V. RELIEF REQUESTED

71. For the above reasons, the respondent Sawridge prays that this Honourable Court orders as follows:

(a) That the Beneficiary Application be dismissed; and

(b) That costs be paid to Sawridge by the OPGT on an enhanced basis and on the basis that the costs not be indemnified by the 1985 Sawridge Trust.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of August, 2016.

PARLEE McLAWS LLP

EDWARD H. MOLSTAD, Q.C.
Solicitors for the Sawridge First Nation

LIST OF AUTHORITIES

Tab 1

COURT FILE NUMBER	1103 14112
COURT:	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE:	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c T-8, AS AMENDED
	IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985
APPLICANTS:	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust
DOCUMENT	**BRIEF OF THE SAWRIDGE FIRST NATION**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	PARLEE McLAWS LLP 1500 Manulife Place 10180 – 101 Street Edmonton, AB T5J 4K1 **Attention**: Edward H. Molstad, Q.C. Telephone: (780) 423-8500 Facsimile: (780) 423-2870 **File Number**: 64203-7/EHM

Clerk's Stamp

TABLE OF CONTENTS

I. INTRODUCTION

1. Further to Justice D.R.G. Thomas' reasons for judgment dated December 17, 2015,[1] the Sawridge First Nation ("Sawridge") was served with two applications by the Public Trustee of Alberta (the "Public Trustee") on January 29, 2016. In both of its applications, the Public Trustee is seeking orders to compel Sawridge to provide certain records pursuant to Rule 5.13 of the *Rules of Court*. One of the Public Trustee's applications concerns records related to the identification of the pool of potential beneficiaries for the 1985 Sawridge Trust (the "Beneficiary Application"). The other application concerns records related to the settlement of the assets in the 1985 Sawridge Trust (the "Settlement Application").

2. It is Sawridge's position that the Public Trustee should not be entitled to all of the records that it is seeking as part of its two applications. With regards to the Beneficiary Application, the Public Trustee has been provided with information that would allow it to identify the number and identity of the minors who it represents and who it may represent. Furthermore, the Public Trustee has failed to specify what records it is requesting from Sawridge as part of this application.

3. Insofar as the Settlement Application, a number of the Public Trustee's requests for records are irrelevant, as they do not concern the settlement of the assets into the 1985 Sawridge Trust; rather, a number of those requests are focused on quantifying the assets in the 1985 Sawridge Trust, and on attempting to determine how certain assets were disposed of well before the trust's inception. Those requests, it is submitted, are irrelevant to what Justice Thomas described as "potential irregularities" related to the settlement of the assets in the 1985 Sawridge Trust.

II. BENEFICIARY APPLICATION

A. *BACKGROUND*

4. In his reasons for judgment, Justice Thomas directed Sawridge to provide the Public Trustee with information that would allow the Public Trustee to identify the following:

---

[1] *1985 Sawridge Trust v Alberta (Public Trustee)*, 2015 ABQB 799 ["***Sawridge #2***"]. **[Tab B1]**

1. The names of individuals who have:

    a) made applications to join Sawridge which are pending; and

    b) had applications to join Sawridge rejected and are subject to challenge; and

2. The contact information for those individuals where available.[2]

5. Pursuant to that direction, Sawridge sent a letter to the Public Trustee on January 18, 2016, which included all of the above-listed information. As part of that letter, Sawridge provided a table containing a list of all of the adult individuals who had applied to join Sawridge, but whose applications were still pending with their contact information. Sawridge also provided a list of all of the adult parents, with contact information, who had made applications for membership for their minor children. Additionally, Sawridge confirmed that there were no membership appeal decisions outstanding, and that there were no membership decisions that were subject to challenge in accordance with the relevant limitations period under the Sawridge Constitution and its laws. A copy of that letter has been included as **Tab C1** of these submissions. The attached copy of the letter does not contain the tables referred to above, as those tables contain private and confidential information.

6. On January 29, 2016, the Public Trustee served Sawridge with the Beneficiary Application. According to the Public Trustee's application, it is seeking the following records from Sawridge:

> In accordance with para. 61 of Justice Thomas' December 17, 2015 judgment, all documents in the possession of Sawridge First Nation that may assist in identifying current and possible minors who are children of members of the Sawridge First Nation. Information already provided by Paul Bujold on or about May 27, 2014 in response to Undertaking 31 excluded.

7. The undertaking response referred to in the above paragraph was included in the Public Trustee's document titled, "excerpts from pleadings, transcripts, exhibits and answers to undertakings," which was filed on June 12, 2015, at pp. 153-155. That undertaking response is a

[2] *Ibid*, at para 57.

two-page table that outlines all of the minors who are currently members of Sawridge, and indicates whether those minors are currently beneficiaries of the 1985 Sawridge Trust.

B. *SUBMISSIONS*

8. As noted above, the production of records by a non-party to an action is governed by Rule 5.13 of the *Rules of Court*. That rule creates a narrow exception to the general rule that parties are typically only allowed disclosure from other parties to an action. It states as follows:

> 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.[3]

9. Case law is clear that Rule 5.13 is not intended to give a party to an action the right to obtain document discovery from a third party. Rule 5.13 exists to allow parties access to clearly specified records held by a third party; it cannot be relied upon by parties to engage in a fishing expedition, or to compel a third party to disclose records that they may have.[4]

10. The party seeking the records from a third party has the burden of establishing that the Court should order the production of those records.[5]

11. In light of the specific nature of the request under Rule 5.13, the applicant party must clearly identify the records being sought from the third party, and must establish that the third party has said records in its possession. The moving party must accordingly describe the records being sought with a level of precision, and must provide evidence establishing that the

---

[3] *Rules of Court*, at 5.13. **[Tab A1]**
[4] *Ed Miller Sales & Rentals Ltd v Caterpillar Tractor Co*, (1988) 63 Alta LR (2d) 189 (QB) ["***Ed Miller***"], at para 13 **[Tab B2]**; see also *Trimay Wear Plate v Way*, 2008 ABQB 601 ["***Trimay***"], at paras 13 and 18. **[Tab B3]**
[5] *Metropolitan Trust Co. of Canada v. Peters*, 1996 CarswellAlta 274 (CA), at para 4. **[Tab B4]**

third party has those records.[6] Failing to adequately describe a record is fatal to an application under Rule 5.13.[7] In addition, if a description is worded in a manner that looks to compel discovery from a party, then that application will be denied.[8]

12. In *Trimay Wear Plate v Way*, for example, Justice Graesser held that the defendants were not entitled to certain records sought from a third party under the previous version of Rule 5.13 (Rule 209), because of a lack of specificity in their request. The defendants' requests in that action were drafted in the following manner:

> (a) documents surrounding 735458's [the Third Party] ownership of Trimay [the Plaintiff], which they say are relevant to whether any proprietary processes or technology exist;
>
> (b) documents concerning 735458's and Alberta Industrial's business dealings with Trimay, which they say are relevant to Trimay's costs and are thus relevant to Trimay's damage claim;
>
> (c) documents concerning Alberta Industrial's business dealings with Trimay which they say relate to the former the Defendants' allegations about mismanagement of Trimay and are thus relevant to damages; and
>
> (d) documents of both 735458 and Alberta Industrial relating to the former senior manager, which they say go to Trimay's damage claim.[9]

13. Justice Graesser held that the defendants' requests were not worded with sufficient specificity to determine if the third party had any relevant or material records. As such, the application was (with the exception of two requests specific documents) dismissed.[10]

14. In his reasons for judgment, Justice Thomas identified three categories of minors who were potential recipients of a distribution of the 1985 Sawridge Trust:

(a) Minors who are children of members of Sawridge;

(b) Children of adults who have unresolved applications to join Sawridge; and

---

[6] *Ed Miller*, supra note 4, at paras 13-17. **[Tab B2]**
[7] *Esso Resources Canada Limited v Lloyd's Underwriters & Companies*, 1990 ABCA 144, at paras 12 and 13. **[Tab B5]**
[8] *Gainers Inc. v Pocklington Holdings Inc.*, 1995 CarswellAlta 200 (CA), at para 16. **[Tab B6]**
[9] *Trimay*, supra note 4, at para 12. **[Tab B3]**
[10] *Ibid*, at para 24. **[Tab B3]**

(c) Children of adults who have applied for membership in Sawridge, but have had their application rejected and are challenging that rejection by appeal or judicial review.[11]

15. Sawridge, in its letter of January 18, 2016, provided the Public Trustee with all of the information that would allow it to identify the minors in the last two of the categories listed above. Insofar as the second category, Sawridge provided a list of the adults who had pending applications to Sawridge, as well as a list of adults who had made applications for membership on behalf of their minor children. With regards to the third category, Sawridge confirmed that no appeals had been commenced or could be commenced in relation to any membership applications. As such, and given that information concerning the minors who are currently members of Sawridge was already provided to the Public Trustee as part of Mr. Bujold's undertaking responses, it is Sawridge's position that the Public Trustee does not require any further documents related to same.

16. Furthermore, even if additional records were necessary to identify the minor beneficiaries that the Public Trustee is representing, the Public Trustee's request under Rule 5.13 fails to articulate what documents it is seeking with any level of precision. As noted in the above-cited cases, an applicant is required to provide a precise description of what records it is seeking from a third party under Rule 5.13. Rather than specifying what documents it is seeking, the Public Trustee has simply requested all documents that "may" assist in identifying the minor beneficiaries. That request, it is submitted, is far too broadly worded to be permitted under Rule 5.13.

17. Another issue raised by the manner in which the Public Trustee has framed its request for records is that Sawridge is unable to determine if any of the records that are being sought are producible, or if Sawridge would oppose their production. Some of the records being requested by the Public Trustee may contain confidential information regarding applicants for membership or regarding Sawridge itself. Given that the Public Trustee has not specified which documents it is seeking, Sawridge is unable to say if any records containing confidential

[11] *Sawridge #2*, supra note 1, at para 56. **[Tab B1]**

information are being sought, and is accordingly unable to know whether it needs to raise an objection related to same.

18. The issue of identifying what is being sought by the Public Trustee is rendered even more difficult by the fact that the Public Trustee has indicated in its application that it is relying on, "all relevant materials filed to date" in this action. As a non-party, Sawridge has not necessarily been privy to all of the filings in this action. Importantly, the Public Trustee has failed to provide any indication of what evidence it will rely on, and is instead suggesting that Sawridge should comb through the tomes of records that have been filed in order to guess what the Public Trustee deems is a "relevant document" for the purpose of this application. This failure to specify what evidence is being relied upon runs contrary to the principle of precisely framing a request under Rule 5.13.

III. SETTLEMENT APPLICATION

A. *BACKGROUND*

19. The first Order pronounced in this action is dated August 31, 2011. That Order was pronounced by Justice Thomas, and outlines the scope of the application being made by the 1985 Sawridge Trust's trustees for advice and direction.[12] That Order notes at paragraph 1(b) that one of the purposes of this action is to seek direction, "with respect to the transfer of assets to the 1985 Sawridge Trust."

20. In the Affidavit of Mr. Bujold filed by the trustees of the 1985 Sawridge Trust in support of their application for advice and direction, Mr. Bujold noted the following regarding the advice and direction being sought:

> 25. The Trustees seek the Court's direction to declare that the asset transfer was proper and that the assets in the 1985 Trust are held in trust for the benefit of the beneficiaries of the 1985 Trust.[13]

21. In his reasons for judgment, Justice Thomas indicated that certain questions had been raised regarding the settlement of the assets in the 1985 Sawridge Trust. Accordingly, he

---

[12] Order of Justice D.R.G. Thomas, dated August 31, 2011. [**Tab C2**]
[13] Affidavit of Paul Bujold, sworn September 12, 2011, at para 25. [**Tab C3**]

ordered that the Public Trustee could serve Sawridge with an application under Rule 5.13 concerning the assets settled in the 1985 Sawridge Trust. [14]

22. On January 29, 2016, the Public Trustee served Sawridge with the Settlement Application. In that application, the Public Trustee indicated that it was seeking ten different categories of records from Sawridge. Those various categories are outlined at paragraph 1 of the Settlement Application.

B. *SUBMISSIONS*

23. Case law is clear that the Public Trustee must demonstrate that the records that it is seeking from Sawridge are relevant and material to the issues in dispute in this action. The *Rules of Court* affirm that a party is only required to disclose records that are relevant and material. Relevance and materiality are generally defined by the parties' pleadings:

> 5.2(1) For the purposes of this Part, a question, record or information is relevant and material only if the answer to the question, or the record or information, could reasonably be expected
>
> (a) to significantly help determine one or more of the issues raised in the pleadings, or
>
> (b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings. [*Emphasis Added*][15]

24. In addition to reviewing the parties' pleadings, a Court must, when determining whether a record is producible, review a moving party's reason for seeking a record from another party. In *Weatherill (Estate of) v Weatherill*, one of the leading cases concerning applications for document production, Justice Slatter affirmed that a document's relevance is determined based on the issues in a given action, and that said issues are defined (per the *Rules of Court*) based on the parties' pleadings.[16] With regards to materiality, Justice Slatter noted that a document will be material to an action if that document would help determine one of the issues that arises in the

---

[14] *Sawridge #2*, supra note 1, at paras 45-47. **[Tab B1]**
[15] *Rules of Court*, at R.5.2. **[Tab A2]**
[16] *Weatherill (Estate of) v Weatherill*, 2003 ABQB 69, at paras 16. **[Tab B7]**

parties' pleadings. He also affirms that a Court must review a party's line of argument in order to determine whether a document is needed to prove a fact related to one of the issues.[17]

25. A party looking to obtain a record from another party, as with most applications, has the burden of proving that said record is relevant and material.[18] If a moving party fails to meet its burden of proving that a record should be produced, then a Court must dismiss that party's application for disclosure.[19]

26. From the outset of this action, the issue regarding the settlement of the assets in the 1985 Sawridge Trust has not concerned the quantification of those assets. At no time has an application been brought for an accounting of those assets; nor has any tracing-type application been brought in relation to the assets.

27. Rather, and as indicated in the first Order pronounced by Justice Thomas and in Mr. Bujold's Affidavit, the issue regarding the settlement of the assets concerns the actual transfer of those assets to the 1985 Sawridge Trust. That transfer, as was noted in Mr. Bujold's Affidavit, occurred in April of 1985. Accordingly, it is Sawridge's position that the only documents related to the assets in the 1985 Sawridge Trust that are relevant and material to this action are those that concern the actual transfer of the assets into that trust.

28. Based on its position regarding the Public Trustee's requests for records, Sawridge provided the Public Trustee with a response to its request in paragraph 1(c). That response was provided via letter on March 11, 2016. A copy of that letter has been included at **Tab C4** of these submissions. Sawridge indicated that it did not have any other records concerning the subject matter of that request.

29. A number of the Public Trustee's requests for records concern matters that predate the transfer of the assets to the 1985 Sawridge Trust. Specifically, certain requests concern records related to assets held by certain individuals in the 1970s (paragraph 1(a)), to the settlement of certain assets in the 1982 Sawridge Trust (paragraphs 1(b) and 1(j)), and to other

---

[17] *Ibid*, at paras 16-17. [**Tab B7**]
[18] *Re/Max Real Estate (Edmonton) Ltd v Border Credit Union Ltd*, (1988), 60 Alta LR (2d) 356 (Master Funduk), at paras 20-21. [**Tab B8**]
[19] *Dow Chemical Canada Inc v Nova Chemicals Corporation*, 2015 ABQB 2, at paras 21 and 42 – 44. [**Tab B9**]

matters that predate April of 1985 (paragraphs 1(e), 1(f), and 1(h)). These records are neither relevant nor material to the issue that is the subject of this action, being the actual transfer of the assets to the 1985 Sawridge Trust.

30. Similarly, a number of the other requests concern the identification of the assets located in the 1985 Sawridge Trust. The requests for records concerning transfers that occurred into the trust following its settlement in April of 1985 (paragraph 1(d)) and concerning certain matters in the 1985 Sawridge Trust's financial statements (paragraph 1(g)) are again irrelevant and not material to the issue of the transfer of the assets into the 1985 Sawridge Trust. As eluded to above, the Trustees of the 1985 Sawridge Trust are not seeking an accounting of the trust's assets, or any similar remedy.

31. With regards to paragraph 1(i) of the Public Trustee's application, Sawridge again takes the position that the records being sought regarding the transfers of funds that purportedly occurred in 1984 and 1985 are irrelevant to this action. Additionally, no evidence has been provided to support this request by the Public Trustee. An applicant under Rule 5.13 has the burden of proving that a third party possesses a record. As no evidence has been referred to by the Public Trustee in relation to this request, it is Sawridge's position that the Public Trustee's request under paragraph 1(i) should be dismissed.

32. Sawridge also takes the position that the Public Trustee's request under paragraph 1(j) is irrelevant to the issue of the transfer into the 1985 Sawridge Trust. The Public Trustee has requested records that concern the assets that certain individuals intended to be included in the 1982 Sawridge Trust. The question of intent in these circumstances is irrelevant to the actual transfer that took place.

33. In conclusion, Sawridge's position is that the Public Trustee's requests in the Settlement Application run contrary to Justice Thomas' attempt to refocus the role of the Public Trustee in this action. Justice Thomas was clear in his reasons for judgment that an application under Rule 5.13 was, "not intended to facilitate a 'fishing trip'."[20] The Public Trustee has ignored Justice Thomas' finding in this regard, and has attempted to request a number of records that are not clearly identified and that are irrelevant and immaterial to this action.

---

[20] *Sawridge #2*, supra note 1, at para 16. **[Tab B1]**

IV. RELIEF REQUESTED

34. For the above reasons, the respondent Sawridge prays that the contested portions of the Public Trustee's applications for disclosure be dismissed, with costs payable by the Public Trustee on the basis that these costs shall not be paid by the Sawridge Trust.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of March, 2016.

PARLEE McLAWS LLP

EDWARD H. MOLSTAD, Q.C.
Solicitors for the Sawridge First Nation

LIST OF AUTHORITIES

A. LEGISLATION AND RULES

Tab 1 *Rules of Court*, Alta Reg 124/2010, 5.13

Tab 2 *Rules of Court*, Alta Reg 124/2010, 5.2

B. CASE LAW

Tab 1 *1985 Sawridge Trust v Alberta (Public Trustee)*, 2015 ABQB 799

Tab 2 *Ed Miller Sales & Rentals Ltd v Caterpillar Tractor Co*, (1988) 63 Alta LR (2d) 189 (QB)

Tab 3 *Trimay Wear Plate v Way*, 2008 ABQB 601

Tab 4 *Metropolitan Trust Co. of Canada v. Peters*, 1996 CarswellAlta 274 (CA)

Tab 5 *Esso Resources Canada Limited v Lloyd's Underwriters & Companies*, 1990 ABCA 144

Tab 6 *Gainers Inc. v Pocklington Holdings Inc.*, 1995 CarswellAlta 200 (CA)

Tab 7 *Weatherill (Estate of) v Weatherill*, 2003 ABQB 69

Tab 8 *Re/Max Real Estate (Edmonton) Ltd v Border Credit Union Ltd*, (1988), 60 Alta LR (2d) 356 (Master Funduk)

Tab 9 *Dow Chemical Canada Inc v Nova Chemicals Corporation*, 2015 ABQB 2

C. PRIOR ORDERS

Tab 1 Letter from Counsel for Sawridge, dated January 18, 2016

Tab 2 Order of Justice D.R.G. Thomas, pronounced August 31, 2011, filed September 6, 2011

Tab 3 Excerpt from Affidavit of Paul Bujold, sworn September 12, 2011

Tab 4 Letter from Counsel for Sawridge, dated March 11, 2016

Tab 2

Clerk's Stamp:

COURT FILE NUMBER:	1103 14112
COURT OF QUEEN'S BENCH OF ALBERTA JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A 2000,C. T-8, AS AMENDED IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19, now known as SAWRIDGE FIRST NATION, ON APRIL 15, 1985 (the "1985" Sawridge Trust")
APPLICANTS	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust
DOCUMENT	**APPLICATION BY THE OFFICE OF THE PUBLIC TRUSTEE OF ALBERTA**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**HUTCHISON LAW** #155, 10403 – 122 Street Edmonton, AB T5N 4C1 Attention: **Janet L. Hutchison** Telephone: (780) 423-3661 ext.225 Fax: (780) 426-1293 File: 51433 JLH

NOTICE TO RESPONDENTS

This application is made against you. You are a respondent.

You have the right to state your side of this matter before the Justice.

To do so, you must be in Court when the application is heard as shown below:

Date: June 30, 2015
Time: 2:00PM

Where: Law Courts Building
1A Sir Winston Churchill Square,
Edmonton, Alberta T5J 3Y2

Before: Justice D.R.G. Thomas in Chambers

Go to the end of this document to see what else you can do and when you must do it.

Remedy claimed or sought:

I. Production of Records

1. An Order, pursuant to Rule 3.10 and 3.14 of the *Alberta Rules of Court*, requiring the Sawridge Trustees and the Sawridge Band to file Affidavits of Records, in accordance with the provisions of Part 5 of the *Alberta Rules of Court* and provide all records in their power and possession that are relevant and material to the issues in the within proceeding, including, but not limited to:

   i.) The Sawridge Band membership application and decision process from 1985-present, including:

      a.) All inquiries received about Sawridge Band membership or the process to apply for Sawridge Band membership and the responses to said inquiries;

      b.) Any correspondence or documentation submitted by individuals in relation to applying for Sawridge Band membership, whether or not the inquiry was treated by Sawridge Band as an actual membership application;

      c.) Complete and incomplete Sawridge Band membership applications;

      d.) Sawridge Band membership recommendations, membership decisions by Chief and Council and membership appeal decisions, including any and all information considered by the Membership Review Committee, Chief and Council or the Membership Appeal Committee in relation to membership applications;

      e.) Any information that would assist in identification of the minor dependants of individuals who have attempted to apply, are in the process of applying or have applied for Sawridge Band membership;

      f.) Documents produced in Federal Court Action T-66-86;

g.) Documents produced in Federal Court Action T-2655-89, including the entire document collection Sawridge Band made available to the Sawridge Trustees;

ii.) The issues set out as E.1, E.3, E.4 or E.6, in Exhibit J to Catherine Twinn's Affidavit dated December 8, 2014, and filed in Court of QB Action No. 1403 04885, including Catherine Twinn's sworn but unfiled affidavit, if it references said issues;

iii.) Any other relevant and material records available to counsel for the Sawridge Trustees as a result of Court of QB Action No. 1403 04885;

iv.) The Sawridge Trustee's previous proposal to establish a tribunal to determine beneficiary status, including information regarding any concerns around the Sawridge Band membership process affecting the Trust's beneficiary identification process;

v.) Conflict of interest issues arising from the multiple roles of Sawridge Trustees, including their roles as beneficiaries, within Sawridge Band government and in the Sawridge membership process;

vi.) The details and listing of any assets held in trust by individuals for Sawridge Band prior to 1982; the details and listing of any assets transferred from individuals to the 1982 Trust; and the details and listing of the assets transferred into the 1985 Trust;

2. An Order confirming that bare assertions of confidentiality and privacy over Band membership information and Band membership application documentation does not supercede the Court's June 12, 2012 Order, absent application by the Sawridge Band or the Sawridge Trustees to establish the documents are subject to a recognized ground of legal privilege.

3. In the alternative, should the Court conclude this issue is beyond the scope of the June 12, 2012 order, and if the parties cannot arrive at agreement on further and better production within 30 days, the matter should be set down for a special chambers hearing.

4. Any proposed or adopted litigation plan should be amended to reflect the relief requested in paragraphs 1-3.

II. Queen's Bench Action No. 1403 04885,

5. An order requiring the parties in the within proceeding and Queen's Bench Action No. 1403 04885 to provide the Court with a mutually agreeable written update, or if

agreement on said update is not possible, to schedule a further case management conference within 60 days of the production requested in paragraphs 1 and 2.

6. Specifically, the parties will update the Court on matters including:

    i.) The merits of consolidation of the two actions, or alternatives such as concurrent or consecutive hearings.

    ii.) The merits of a further order under Part 5 to permit questioning of individual Trustees, members of the Membership Review Committee or members of Sawridge Band government on matters relevant and material to the within action.

7. Any proposed or adopted litigation plan should be amended to reflect the relief requested in paragraph 5 and 6.

III. Advice and Direction

8. An Order providing the Court's advice and directions on the following matters:

    i.) Confirmation of the ability of counsel in the within proceeding to communicate with any or all counsel in Queen's Bench Action No. 1403 04885 whether individually or as a group on any matters related to:

        a.) The evidence produced pursuant to the order requested in paragraph 1 (ii) and (iii);
        b.) The real issues in dispute in either proceeding;
        c.) The merits of consolidation, or concurrent hearings, of the two proceedings;
        d.) The most efficient way to resolve the issues that overlap as between the two proceedings; or
        e.) Any other matter consistent with the purposes of the *Alberta Rules of Court*.

    ii.) Confirmation that the Court's costs order of June 12, 2012 (as upheld by the Court of Appeal), includes indemnification of the Public Trustee for costs associated with legal agency services that may be incurred from time to time.

Grounds for making this application:

I. Production of Records

9. The June 12, 2012 Reasons for judgment acknowledge the relevance and materiality of information that permit assessment of the Sawridge Band membership process. The need for information to assist the Public Trustee in identifying potential minor beneficiaries was also acknowledged.

10. The parties in the within proceeding are not currently subject to a general obligation to produce all relevant and material evidence. This has created the potential for selective production that does not support the purposes of the *Alberta Rules of Court* or serve the interests of the administration of justice.

11. The existence of actual, or potential, conflicts of interest around the Sawridge Band membership process requires more extensive production than normally applied to originating applications.

12. The Public Trustee cannot effectively represent, or protect the interests of, minor beneficiaries without full disclosure of relevant and material evidence. In particular, the Public Trustee cannot adequately identify the potential minor beneficiaries without full disclosure.

13. Currently, the Public Trustee does not have access to the same relevant and material evidence that is available to the Sawridge Trustees and Sawridge Band regarding that proceeding. Full and objective disclosure is required to remedy that imbalance.

14. Only full and fair pre-hearing disclosure will permit the parties to do the work required to effectively narrow the issues for hearing.

15. The Court has the discretion to apply all, or part, of the rules of production in Part 5 of the *Alberta Rules of Court* to applications, where appropriate. Requiring the Sawridge Trustees and Sawridge Band to file Affidavits of Records would remedy the production issues that are arising in the within proceedings.

16. In relation to relevance and materiality of evidence regarding the Sawridge Band membership process, the Court's June 12, 2012 Reasons for Judgement found those matters were relevant and that the Public Trustee could explore those matters, including, information that would assist in identifying potential minor beneficiaries.

17. The Sawridge Band, through answers to undertakings from the Sawridge Trustees, has refused to produce membership files and documents relevant to the membership decision-making process. The refusal is based on a bare assertion of confidentiality and privacy, without substantive grounds to demonstrate a recognized legal privilege.

18. If this issue goes beyond the scope of the June 12, 2012 order, and absent agreement amongst the parties, an application for further and better production will be required.

II. Queen's Bench Action No. 1403 04885,

19. The Public Trustee was previously unaware of the December 17, 2014 court appearance in QB Action No. 1403 04885. The Public Trustee has not had an opportunity to address the Court in relation to the overlap of the legal and factual issues raised in proceedings.

20. While more information is required, the pleadings indicate demonstrable overlaps on key issues:

SIMILARITIES	
Issue #1: Who qualifies as Band Member/ Beneficiary-identification	
QB 1103 14112: • "The Public Trustee seeks to investigate these issues... to reassure itself (and the Court) that the beneficiary class can and has been adequately defined. [para 46, Justice D.R.G. Thomas, June 12, 2012 Reasons for Judgment ("Reasons") • "... it would be peculiar if, in varying the definition of "Beneficiaries" in the trust documents, that the Court did not make some sort of inquiry as to the membership application process that the Trustees and the Chief and Council acknowledge is underway" [para 48, Reasons] • "This Court has an obligation to make inquiries as to the procedure and status of Band memberships where a party (or its representative) who is potentially a claimant to the Trust queries whether the beneficiary class can be "ascertained" [para 49, Reasons] • "The Trustees seek this Court's direction in setting the procedure for seeking the opinion, advice and direction of the Court in regard to: (a) Determining the Beneficiaries of the 1985 Trust" [para 14(a), Affidavit of Paul Bujold, August 30, 2011]	**QB 1403 04885:** • "Examination of and ensuring that the system for ascertaining beneficiaries of the Trusts is fair, reasonable, timely, unbiased and in accordance with *Charter* principles and natural justice;" [Exhibit J, para E(3), Affidavit of Ms. Twinn, December 8, 2014]
Issue #2: Existence of Conflicts of Interest affecting Membership process, Trustees, or both	
QB 1103 14112: • "...the Sawridge Trustees are personally affected by the assignment of persons inside and outside the Trust." [para 23, Reasons] • "...the key players in both the administration of the Sawridge Trust and of the Sawridge	**QB 1403 04885:** • "Seeks advice and direction regarding the proper composition of the Board of trustees, including elimination or reduction of the number of elected officials of the Sawridge Indian Band." [Application for Advice and

Band overlap and these persons are currently entitled to shares of the Trust property. The members of the Sawridge Band Chief and Council are elected by and answer to an interested group of persons, namely those who will have a right to share in the 1985 Sawridge Trust. These facts provide a logical basis for a concern by the Public Trustee and this Court of a potential for an unfair distribution of the assets of the 1985 Sawridge Trust." [para 25, Reasons] • "I reject the position of the Sawridge Band that there is no potential for a conflict of interest to arise in these circumstances." [para 26, Reasons] • "The Sawridge Trustees and the adult members of the Sawridge Band (including the Chief and Council) are in a potential conflict between their personal interests and their duties as fiduciaries" [para 28, Reasons] • "The Public Trustee's role is necessary due to the potential conflict of interest of other litigants and the failure of the Sawridge Trustees to propose alternative independent representation." [para 42, Reasons]	Direction, September 26, 2014] • "Trustee selection and succession, including issues of conflict of interest now and in the future, including examination of a separated model to remove conflict of interest, be it actual, structural or of the appearance of conflict of interest;" [Exhibit J, para E(1), Affidavit of Ms. Twinn, December 8, 2014]
Issue #3: Transfer of Assets to 1985 Trust	
QB 1103 14112: • "To seek direction with respect to the transfer of assets to the 1985 Sawridge Trust" [para 1(b), Order by Justice D.R.G. Thomas, September 6, 2011]	**QB 1403 04885:** • "Determination of how assets were held and transferred from Trust inception to the present day;" [Exhibit J, para E(6), Affidavit of Ms. Twinn, December 8, 2014]
Issue #4: Administration and Management of 1985 Trust	
QB 1103 14112: • "An application shall be brought by the Trustees of the 1985 Sawridge Trust for the opinion, advice and direction of the Court respecting the administration and management of the property held under the 1985 Sawridge Trust (hereinafter referred to	**QB 1403 04885:** • "I have serious concerns regarding the administration of the Trusts and it is my belief that it is important and my duty that this information be brought to the attention of the Court. It is my intention to provide a copy of my Affidavit, unfiled, to the Court at the

as the "Advice and Direction Application")." [para 1, Order by Justice D.R.G. Thomas, September 6, 2011] • The Public Trustee of Alberta must protect the interests of any minor beneficiaries or potential beneficiaries in relation to the 1985 Trust. [*Public Trustee Act*, s.21 and s.22]	hearing of this application so that the confidentiality of the subject matter of my Affidavit can be maintained pending further direction from this Honourable Court on how to proceed in this regard."[para 16, Affidavit of Ms. Twinn, December 8, 2014] • "...I have raised the issues of trustee succession, accountability, beneficiary determination, undue influence and conflict of interest on numerous occasions, including putting forward a proposal in writing shortly after the June 12, 2012 decision issued by Justice Thomas in QB Action No. 1103-14112, but have been unable to obtain any results. A recent example of this is in May 2014 when I provided a Binding Issue Resolution Process Agreement to the other trustees for their review and comment in order to set out a process in which to discuss and resolve the issues that are the subject matter of the Application. The other trustees refused and/or willfully failed to engage in this or any process. I believe that I have exhausted my ability to address these matters internally and that adjudication by the Courts has become the only avenue available to address and resolve these matters. Attached as Exhibit "J" to my Affidavit is a copy of the Binding Issue Process Agreement I circulated." [para 23, Affidavit of Ms. Twinn, December 8, 2014]
DISSIMILARITIES	
QB 1103 14112:	**QB 1403 04885:**
• "To seek direction with respect to the definition of "Beneficiaries" contained in the 1985 Sawridge Trust, and if necessary to vary the 1985 Sawridge Trust to clarify the definition of "Beneficiaries"." [para 1(a), Order by Justice D.R.G. Thomas, September 6, 2011]	• Not in issue
• Not in issue	• Approval of appointment of individual Trustees

21. Once all parties are on an even playing field in relation to relevant and material evidence, consolidation must be considered to assess whether it would best serve the interests of the administration of justice, save time and resources, and reduce the combined time for hearing the applications, without creating undue prejudice to any party.

22. The parties should update the case management judge on this issue within a reasonable time after the additional document production contemplated by paragraph 1 is received.

III. Advice and Direction

i.) Communication Between Counsel

23. Communications as between counsel in a proceeding and in related proceedings is a normal occurrence. Such communications can serve to narrow issues in dispute and avoid duplication of effort. Such communications increase the opportunities for settlement and pre-trial resolution and focus all parties on issues that actually require the assistance of the Court.

24. Communication between counsel acting in the within proceeding and counsel acting in QB Action No. 1403 04885, particularly given the overlapping issues, should be encouraged rather than circumscribed.

ii.) Costs

25. The Court ordered the Sawridge Trustees to provide the Public Trustee for "full and advance indemnification" for its costs to participate in the within proceeding. The plain meaning of indemnification applies and should include all reasonable costs incurred by the Public Trustee.

26. The Sawridge Trustees object to the Public Trustees incurring costs related to the use of agent counsel who may work with existing counsel from time to time to move this proceeding forward.

27. The Public Trustee has taken care to propose agent counsel who is already highly experienced in the relevant areas of law and has specific experience on matters related to Sawridge Band membership issues. As such, agent counsel that have been proposed are in a position to provide more cost effective services than agent counsel lacking this background.

28. The Public Trustee's requests for resources in order to fulfill its role in this proceeding have been, and remain, reasonable and certainly less extensive than the resources available to the Applicants.

Material or evidence to be relied upon:

1. Excerpts from the transcript from the Questioning of Paul Bujold, held May 27 & 28, 2014;

2. Excerpts from the transcripts from the Questioning of Elizabeth Poitras, held May 29, 2014 and April 9, 2015;

3. Exhibits from the Questioning of Paul Bujold;

4. Exhibits from the Questioning of Elizabeth Poitras;

5. Excerpts from the Answers to Undertakings of Paul Bujold, received December 1, 2014;

6. Affidavit of Roman Bombak, dated June 12, 2015

7. Pleadings filed in Queen's Bench Action No. 1403 04885

8. Pleadings filed in Queen's Bench Action No. 1103 14112

9. Such further and other materials as Counsel may advise and this Honourable Court may allow.

Applicable rules:

10. *Alberta Rules of Court* 1.2, 1.4, 3.10, 3.14, 3,72, 4.11, 5.1, 5.2 , 6.3, and 6.11

Applicable Acts and regulation:

11. *Public* Trustee *Act*, S.A. 2004, c. P-44.1 s. 5, 21 and 22

Any irregularity complained of or objection relied on:

12. The Sawridge Band, through the Sawridge Trustees, has refused to produce relevant and material evidence regarding the Sawridge Band membership process. This is impeding the Public Trustee's ability to effectively represent the interests of minor beneficiaries, and potential minor beneficiaries.

How the application is proposed to be heard or considered:

13. The application is to be heard in Chambers before the Justice D.R.G. Thomas on June 30, 2015, at 2:00PM.

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the applicant what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on that date and at the time shown at the beginning of the form. If you intend to rely on an affidavit or other evidence when the application is heard or considered, you must reply by giving reasonable notice of the material to the applicant.

Tab 3

PARLEE McLAWS LLP
BARRISTERS & SOLICITORS | PATENT & TRADEMARK AGENTS

June 17, 2015

EDWARD H. MOLSTAD, Q.C.
DIRECT DIAL: 780.423.8506
DIRECT FAX: 780.423.2870
EMAIL: emolstad@parlee.com
OUR FILE #: 64203-7/EHM
FAXED TO (780) 427-0334

Court of Queen's Bench of Alberta
6th Floor Law Courts Building
1A Sir Winston Churchill Square
Edmonton, Alberta
T5J 0R2

Attention: The Honourable Mr. Justice D.R.G. Thomas

Dear Sir:

Re: Sawridge Band Inter Vivos Settlement (1985 Sawridge Trust); QB Action No. 1103 14112

Further to Ms Hutchison's letter of June 17th, 2015, we are enclosing a copy of our letter which was sent to her on the morning of June 17th, 2015.

We have requested an adjournment of all matters that purport to name Sawridge First Nation as a respondent.

All of the parties with the exception of the Public Trustee (Ms Kennedy has advised that she will not be appearing at this Application) have agreed to consent to the adjournment of all matters that purport to name Sawridge First Nation as a Respondent.

Some of the other parties take the position that other matters should be dealt with on June 30th, 2015 however; these matters do not involve the Sawridge First Nation.

The issue between the Public Trustee and Sawridge First Nation is not the date of service.

The issue is that we received no notice prior to June 15th, 2015 (when the Public Trustees voluminous Motion material arrived on the writer's desk) that an Application will be made purporting to name Sawridge First Nation as a Respondent and seeking relief that would substantially affect the rights of the Sawridge First Nation.

There is nothing in Ms Hutchison letter of May 15th, 2015 to suggest that an Application would be made purporting to name Sawridge First Nation as a Respondent and that the Application would substantially affect the rights of the Sawridge First Nation.

We wish to ensure that the Sawridge First Nation is given a reasonable time to respond to this Application purporting to name them as a Respondent.

We also wish to ensure that the matters to be dealt with on June 30th, 2015 do not involve Sawridge First Nation and that there will be no need for Sawridge First Nation to file Reply Submissions.

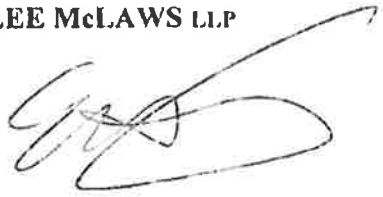
We would request a telephone conference with the Court and all parties at a time convenient to the Court in order to speak to this matter.

We would suggest that this take place on June 23rd, 2015 subject to the availability of the Court and the parties.

We thank you for your assistance.

Yours truly,

PARLEE McLAWS LLP



EDWARD H. MOLSTAD, Q.C.

EHM/tlk

Cc: Hutchison Law Attention: Janet Hutchison
Cc: Reynolds Mirth Richards & Farmer LLP Attention: Marco Poretti
Cc: Bryan & Company Attention: Nancy Cumming, Q.C.
Cc: Dentons LLP Attention: Doris Bonora
Cc: McLennan Ross LLP Attention: Karen Platten, Q.C.
Cc: CLA Piper Attention: Priscilla Kennedy

ALL VIA E-MAIL ONLY

PARLEE McLAWS LLP

June 17, 2015

EDWARD H. MOLSTAD, Q.C.
DIRECT DIAL: 780.423.8506
DIRECT FAX: 780.423.2870
EMAIL: emolstad@parlee.com
OUR FILE #: 64203.7/EHM

Hutchison Law
#155, 10403 – 122 Street
Edmonton, AB T5N 4C1

Attention: Janet L. Hutchison

Dear Madam:

Re: Sawridge Band Inter Vivos Settlement Created by Chief Walter Patrick Twinn, of the Sawridge Indian Band No. 19., now known as Sawridge First Nation, on April 15, 1985 (the "Sawridge Trust") v. Roland Twinn et al
Queen's Bench Action No. 1103 14112

Further to our telephone conference on June 16th, 2015, we would confirm that we received by way of courier on June 15th, 2015, the following:

1. Document entitled "Application by Office of the Public Trustee of Alberta". We note that this document does not name the Respondents to your application.
2. Affidavit of Roman Bombak.
3. Exerpts from the pleadings, transcripts, exhibits, and answers to undertakings.
4. Written brief of the Applicant, the Public Trustee of Alberta.

We would confirm that we represent the Sawridge First Nation.

The Sawridge First Nation is not a party to the proceedings, Court File #1103 14112.

On April 5th, 2012, Mr. Justice Thomas enquired as to whether the Sawridge First Nation wished to be added as a party to these proceedings.

On May 7th, 2012, we wrote to Mr. Justice Thomas advising that full party status was not necessary.

On May 14th, 2012, Mr. Justice Thomas wrote to counsel for the parties and again invited Sawridge First Nation to consider again his invitation to seek full party status.

On May 29th, 2012, we advised Mr. Justice Thomas that Sawridge continues to be of the view that full party status will not be necessary.

On or about May 15th, 2015, we received your letter, a copy of which is attached as Appendix "1".

There is nothing in this letter (Appendix "1") indicating that an application would be made with Sawridge First Nation as a respondent and further that the application would substantially affect the rights of the Sawridge First Nation.

We responded to your letter on May 19th, 2015, requesting that we be provided with a copy of your application materials and once in receipt we would then seek instructions from our client as to whether we should attend. We further indicated that we would be available on June 30th, 2015.

The application purports to require production from Sawridge First Nation pursuant to Rule 5.13 and included in the application for production are documents that you describe as "Documents produced in Federal Court Action T-66-86".

As you are aware (you acted for one of the Interveners in Actions T-66-86A and T-66-86B), the trial of these actions were heard together and involved a number of parties. In the second trial, the parties included Sawridge First Nation, Tsuu T'ina First Nation, and the Crown. The Interveners who participated in the second trial were Congress of Aboriginal Peoples, Native Council of Canada (Alberta), Non Status Indian Association of Alberta, and Native Women's Association of Canada.

These actions were commenced in 1986 and proceeded through a long history that involved two trials. The issue was the constitutionality of certain 1985 amendments to the Indian Act which are referred to as "Bill C-31" and certain related amendments. The Plaintiffs argued that Bill C-31 infringed their constitutionally protected right to determine their own citizenship.

The motion that you have filed which we assume is directed at the Sawridge First Nation although not named as a respondent, will involve considerable work in order to prepare a response.

We would confirm that we have advised you that we will not have sufficient time to prepare a response to this application and as a result we will be requesting that Mr. Justice Thomas adjourn this motion as it relates to the Sawridge First Nation to allow time to prepare.

In our telephone conversation on June 16th, 2015, all of the other parties legal counsel agreed to consent to our request for an adjournment. (Ms. Kennedy did not participate in our telephone conference and has advised she will not be appearing at this application.) You indicated that you required further time to obtain instructions from the Public Trustee in this regard and you advised that you will be responding to our request today Wednesday, June 17th, 2015.

In the event that your client does consent to our request for an adjournment, we will forward a copy of this letter to Mr. Justice Thomas advising that all parties have agreed to the adjournment of this matter and requesting that it be re-scheduled in late September/early October, subject to the availability of all counsel.

In the event that your client does not consent to our request for an adjournment, we shall forward a copy of this letter to Mr. Justice Thomas and request that he schedule a telephone conference with all counsel in order to speak to this matter.

Yours truly,

PARLEE McLAWS LLP

EDWARD H. MOLSTAD, Q.C.
EHM/ied
Enclosure

Cc: Reynolds Mirth Richards & Farmer LLP Attention: Marco Poretti
Cc: Bryan & Company Attention: Nancy Cumming, Q.C.
Cc: Dentons LLP Attention: Doris Bonora
Cc: McLennan Ross LLP Attention: Karen Platten, Q.C.
Cc: CLA Piper Attention: Priscilla Kennedy

ALL VIA E-MAIL ONLY

APPENDIX "1"

HUTCHISON LAW

#155 Glenora Gates
10403 122 Street
Edmonton, Alberta
T5N 4C1

Telephone (780) 423-3661
Fax: (780) 426-1293
Email: jhutchison@jlhlaw.ca
Website: www.jlhlaw.ca

* Janet L. Hutchison, L.L.B.
Rebecca C. Warner, B.A., J.D., Student-at-Law

Our File: 51433 JLH

SENT BY EMAIL ONLY

May 15, 2015

Reynolds Mirth Richards & Farmer LLP
Suite 3200 Manulife Place
10180 - 101 Street
Edmonton, Alberta T5J 3W8

Attention: Marco Poretti

Dentons LLP
2900 Manulife Place
10180 - 101 Street
Edmonton Alberta T5J 3V5

Attention: Doris Bonora

Bryan & Company
#2600 Manulife Place
10180 – 101 Street
Edmonton, Alberta
T5J 3Y2

Attention: Nancy Cumming, Q.C.

McLennan Ross LLP
600 McLennan Ross Building
12220 Stony Plain Road
Edmonton, Alberta
T5N 3Y4

Attention: Karen Platten, Q.C.

Parlee McLaws LLP
1500 Manulife Place
10180-101 Street
Edmonton, Alberta
T5J 4K1

Attention: Edward Molstad, Q.C.

DLA Piper
Suite 1201, Scotia Tower 2
10060 Jasper Ave
Edmonton, Alberta
T5J 4E5

Attention: Priscilla Kennedy

Dear Sirs and Mesdames:

Re: Sawridge Band Inter Vivos Settlement (1985 Sawridge Trust); QB Action No. 1103 14112

I am writing in response to Ms. Bonora's email communications sent Saturday May 9, 2015, at 4:33 PM and Thursday, May 14, 2015 at 10:31PM. I have attached copies of those emails for the benefit of Mr. Poretti, Ms. Platten and Ms. Cumming, who were not copied on those

communications. I have attached a copy of our letter of May 6, 2015 (to Mr. Poretti and Ms. Bonora) to provide context to all other counsel. I have included Mr. Molstad and Ms. Kennedy in this communication to deal with the possibility their respective clients may wish to take a position on the pending application.

As I have advised Ms. Bonora and Mr. Poretti, and now advise all other counsel, the Public Trustee has instructed us to file an application for advice and direction. The application will include requests for advice and direction on all issues arising out of the email exchanges between counsel between April 21-27, 2015.

The application materials are in the process of being prepared. As the application will also be seeking joinder of QB Action No. 1103 14112 and QB Action 1404-04885, those materials will also be served on Ms. Platten and Ms. Cumming in due course.

To the extent that Ms. Bonora's May 9 and 14, 2015 email communications, or other email communications, require a further response, the Public Trustee will address its response to Justice Thomas in the course of the pending application.

In relation to the scheduling of the application, I note Ms. Bonora has taken the step of contacting Justice Thomas for available dates. I would appreciate hearing from all counsel regarding their availability for a June 30, 2015 appearance.

Thank you for your attention to this matter.

Yours truly,

HUTCHISON LAW

PER: JANET L. HUTCHISON
JLH/cm
Enclosure

cc: Client

Janet Hutchison

From: Bonora, Doris <doris.bonora@dentons.com>
Sent: Saturday, May 09, 2015 4:33 PM
To: 'Janet Hutchison' (jhutchison@jlhlaw.ca)
Subject: Sawridge trusts

Janet

Thank you for your recent meeting. I wonder if you could advise if you met with Karen Platten and if so what information you received and what documents you obtained.

We look forward to your response.

Doris

DENTONS Doris C.E. Bonora
Partner

D +1 780 423 7188
doris.bonora@dentons.com
Bio | Website

Dentons Canada LLP
2900 Manulife Place, 10180 - 101 Street Edmonton, AB T5J 3V5 Canada

FMC is proud to join Salans and SNR Denton as a founding member of Dentons.

Janet Hutchison

From: Bonora, Doris <doris.bonora@dentons.com>
Sent: Thursday, May 14, 2015 10:30 PM
To: 'Janet Hutchison' (jhutchison@jlhlaw.ca)
Subject: Case managment with Justice Thomas

We have confirmed that Justice Thomas has June 30 at 2pm available for a case management conference. Can you please confirm if you are available for that date. We need to proceed with our litigation. We wish to discuss the litigation plan and if you have other issues that need to be addressed, we can certainly discuss them at that time as well. Once we confirm the date, we can determine the agenda for the case management meeting. We would also appreciate an answer to our inquiry on whether you have met with Karen Platten.

Doris

DENTONS

Doris C.E. Bonora
Partner

D +1 780 423 7188
doris.bonora@dentons.com
Bio | Website

Dentons Canada LLP
2900 Manulife Place, 10180 - 101 Street Edmonton, AB T5J 3V5 Canada

FMC is proud to join Salans and SNR Denton as a founding member of Dentons.

HUTCHISON LAW

#155 Glenora Gates
10303 122 Street
Edmonton, Alberta
T5N 4C1

Telephone: (780) 423-3661
Fax: (780) 426-1293
Email: jhutchison@jlhlaw.ca
Website: www.jlhlaw.ca

* Janet L. Hutchison, LL.B.
Rebecca C. Warner, B.A., J.D., Student-at-Law

Our File: 51433 JLH

SENT BY EMAIL ONLY

May 6, 2015

Reynolds Mirth Richards & Farmer LLP
Suite 3200 Manulife Place
10180 - 101 Street
Edmonton, Alberta T5J 3W8

Attention: Marco Poretti

Dentons LLP
2900 Manulife Place
10180 - 101 Street
Edmonton Alberta T5J 3V5

Attention: Doris Bonora

Dear Sir and Madam:

Re: Sawridge Band Inter Vivos Settlement (1985 Sawridge Trust); QB Action No. 1103 14112

Further to our correspondence of May 5, 2015, I am writing to advise that I have instructions from the Public Trustee of Alberta to:

1.) Postpone the questioning of Paul Bujold to a later date;

2.) File an application for, *inter alia*, the advice and direction of the Court in this proceeding.

Your offices were already aware that the Public Trustee proposed to bring an application to address issues around production of documents in the within proceeding. That application was not anticipated to impact the scheduled questioning. However, the email exchanges between April 21-27, 2015 have raised more immediate issues on which the Public Trustee requires guidance from the Court. The nature of these issues requires our client to have that guidance before questioning can proceed.

The Public Trustee's application will address issues, including the following :

a.) Should the within proceeding and QB Action No. 1404 04885 be joined;

b.) The respective roles of all counsel involved in the within proceeding and QB Action No. 1404 04885;

c.) Whether any counsel have conflicts of interest (in either matter) and if so, how to address said conflicts of interest;

d.) Whether the Court should exercise its discretion under Rule 3.10 of the *Alberta Rules of Court* to apply Part 5 of the Rules, in whole or in part, to the within proceeding;

e.) Setting an appropriate schedule/ litigation plan for remaining steps in the proceeding (or joined proceedings).

The Public Trustee will be contacting the Court regarding Justice Thomas' availability and will serve materials in this application as expeditiously as possible

Thank you for your attention to this matter.

Yours truly,

HUTCHISON LAW

PER: JANET L. HUTCHISON
JLH/cm
Enclosure

cc: Client

Tab 4

Form 11
[Rule 3.31]

Clerk's Stamp

COURT FILE NUMBER	1103 14112
COURT:	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE:	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c T-8, AS AMENDED
	IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS:	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust (the "Sawridge Trustees")
DOCUMENT	**ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Parlee McLaws LLP Barristers & Solicitors Patent & Trademark Agents 1500, 10180-101 Street Edmonton, AB T5J 4K1 Attention: Edward H. Molstad, Q.C. Telephone: (780) 423-8500 Facsimile: (780) 423-2870 File No.: 64203.7/EHM

DATE ON WHICH ORDER WAS PRONOUNCED: June 24, 2015

LOCATION WHERE ORDER WAS PRONOUNCED: Edmonton, Alberta

NAME OF JUSTICE WHO MADE THIS ORDER: Hon. Justice D.R.G. Thomas

UPON NOTING the presence of the following counsels:

- Marco Poretti and Doris Bonora – Counsel for the Sawridge Trustees;
- Joseph Kueber, Q.C. – Counsel for the Sawridge Trustees in Court of Queen's Bench Action No. 1403 04885;
- Janet Hutchison – Counsel for the Office of the Public Trustee;
- Edward H. Molstad, Q.C. – Counsel for the Sawridge First Nation; and
- Karen Platten, Q.C. – Counsel for Catherine Twinn;

AND UPON REVIEWING the Notice of Application filed by the Office of the Public Trustee on June 12, 2015, returnable June 30, 2015 (the "Public Trustee's Notice");

AND UPON REVIEWING the Notice of Application filed by the Sawridge Trustees on June 12, 2015, returnable June 30, 2015 (the "Trustees Notice");

AND UPON REVIEWING the written submissions forwarded to the Court by Counsel for the Sawridge First Nation, dated June 17, 2015;

AND UPON REVIEWING the written submissions forwarded to the Court by Counsel for the Office of the Public Trustee, dated June 17, 2015;

AND UPON REVIEWING the written submissions forwarded to the Court by Counsel for the Trustees in the within Action, dated June 19, 2015;

AND UPON REVIEWING the written submissions forwarded to the Court by Counsel for the Sawridge Trustees in Court of Queen's Bench Action No. 1403 04885, dated June 19, 2015;

AND UPON hearing from all Counsels present.

IT IS HEREBY ORDERED THAT:

Sawridge First Nation

1. The Sawridge First Nation's Application for an adjournment of all matters which are directed at the Sawridge First Nation or in which they are named as Respondent in the Public Trustee Notice is granted. That adjournment is granted on the basis that it shall be *sine die*.

2. The Office of the Public Trustee shall, within a reasonable time following the June 30, 2015 hearing scheduled in this matter, provide the Sawridge First Nation with full particulars with respect to the relief being claimed against the Sawridge First Nation and the grounds upon which that relief is being claimed.

3. The Sawridge First Nation's Application for costs of its adjournment Application on the basis that the costs be paid by the Office of the Public Trustee without indemnification from the 1985 Sawridge Trust is reserved to the final disposition of this matter.

June 30, 2015 Hearing

4. The Court will address the merits of the settlement Application brought as part of the Trustees Notice, as described at paragraph 2 of the Trustees Notice, during the hearing scheduled for June 30, 2015.

5. The Court will also address the following matters during the hearing scheduled for June 30, 2015:

    a. The Office of the Public Trustee's Application for advice and direction regarding communication between all counsel in the within proceeding and in Court of Queen's Bench Action No. 1403 04885, as described at paragraph 8(i) of the Public Trustee Notice;

    b. The Office of the Public Trustee's Application for advice and direction regarding the costs Order of June 12, 2012, as described at paragraph 8(ii) of the Public Trustee Notice;

    c. The Sawridge Trustees' Application for advice and direction regarding costs, as described at paragraphs 3 and 4 of the Trustees Notice; and

    d. The Sawridge Trustees' Application for advice and direction on its proposed Litigation Plan, as described at paragraph 1 of the Trustees Notice.

Hon. Justice D.R.G. Thomas

Tab 5

Clerk's Stamp:

COURT FILE NUMBER: 1103 14112

COURT OF QUEEN'S BENCH OF ALBERTA EDMONTON
JUDICIAL CENTRE

IN THE MATTER OF THE TRUSTEE ACT, R.S.A 2000,C. T-8, AS AMENDED

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

APPLICANTS
(RESPONDENTS, in this Application)

ROLAND TWINN,
CATHERINE TWINN,
WALTER FELIX TWIN,
BERTHA L'HIRONDELLE, and
CLARA MIDBO, as Trustees for the 1985 Sawridge Trust

(APPLICANT in this Application)

OFFICE OF THE PUBLIC TRUSTEE OF ALBERTA

(Additional RESPONDENT in this Application)

THE SAWRIDGE BAND

DOCUMENT

AMENDED APPLICATION BY THE OFFICE OF THE PUBLIC TRUSTEE OF ALBERTA

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

HUTCHISON LAW
#155, 10403 – 122 Street
Edmonton, AB T5N 4C1

Attention: **Janet L. Hutchison**
Telephone: (780) 423-3661 ext.225
Fax: (780) 426-1293
File: 51433 JLH

NOTICE TO RESPONDENTS

This application is made against you. You are a respondent.

You have the right to state your side of this matter before the Justice.

To do so, you must be in Court when the application is heard as shown below:

Date: June 30, 2015 (adjourned to September 2 and 3, 2015)
Time: 2:00PM (10:00AM on September 2 and 3, 2015)

Where: Law Courts Building
1A Sir Winston Churchill Square,
Edmonton, Alberta T5J 3Y2

Before: Justice D.R.G. Thomas in Chambers

Go to the end of this document to see what else you can do and when you must do it.

Remedy claimed or sought:

1. Production of Records

1. An Order, pursuant to Rule 3.10 and 3.14 of the *Alberta Rules of Court*, requiring the Sawridge Trustees to file an Affidavit of Records, in accordance with the provisions of Part 5 of the *Alberta Rules of Court* and provide all records in their power and possession, or which the Sawridge Trustees have reviewed or otherwise accessed, and that are relevant and material to the issues in the within proceeding, including, but not limited to:

    i.) The Sawridge Band membership criteria, membership application process and membership decision-making processes from 1985-present, including:

        a.) All inquiries received about Sawridge Band membership or the process to apply for Sawridge Band membership and the responses to said inquiries;

        b.) Any correspondence or documentation submitted by individuals in relation to applying for Sawridge Band membership, whether or not the inquiry was treated by Sawridge Band as an actual membership application;

        c.) Complete and incomplete Sawridge Band membership applications;

        d.) Sawridge Band membership recommendations, membership decisions by Chief and Council and membership appeal decisions, including any and all information considered by the Membership Review Committee, Chief and

Council or the Membership Appeal Committee in relation to membership applications;

e.) Any information that would assist in identification of the minor dependants of individuals who have attempted to apply, are in the process of applying or have applied for Sawridge Band membership;

f.) Records from Federal Court Action T-66-86A or T-66-86B that are in the power or possession of the Sawridge Trustees, or which the Trustees have reviewed or otherwise accessed, and which are relevant and material to the Sawridge Band membership criteria, membership applications, or membership decision-making processes;

g.) Records from Federal Court Action T-2655-89 that are in the power or possession of the Sawridge Trustees, or which the Trustees have reviewed or otherwise accessed, which are relevant and material to the Sawridge Band membership criteria, membership applications, or membership decision-making processes, including the entire document collection the Sawridge Band made available to the Sawridge Trustees;

h.) Any other records that would assist in assessing whether or not the Sawridge Band membership processes are discriminatory, biased, unreasonable, delayed without reason, or otherwise breach Charter principles or the requirements of natural justice.

ii.) Records relevant and material to the issues set out as E.1, E.3, E.4 or E.6, in Exhibit J to Catherine Twinn's Affidavit dated December 8, 2014, and filed in Court of QB Action No. 1403 04885, including Catherine Twinn's sworn but unfiled affidavit, if it references said issues;

iii.) Any other relevant and material records available to counsel for the Sawridge Trustees as a result of Court of QB Action No. 1403 04885;

iv.) Records relevant to the Sawridge Trustee's proposals to establish a tribunal to determine beneficiary status, including information regarding any concerns around the Sawridge Band's the Sawridge Band membership criteria, membership applications, or membership decision-making processes as they affect the Trust's beneficiary identification process;

v.) Records relevant to conflict of interest issues arising from the multiple roles of Sawridge Trustees, including their roles as Band members, beneficiaries, within the Sawridge Band government and as decision makers within in the Sawridge Band membership process;

vi.) Records providing the details and listing of any assets held in trust by individuals for the Sawridge Band prior to 1982; the details and listing of any assets

transferred from individuals to the 1982 Trust; and the details and listing of the assets transferred into the 1985 Trust;

2. An Order, pursuant to Rule 3.10 and 3.14 of the *Alberta Rules of Court*, requiring the Sawridge Band to file Affidavits of Records in accordance with the provisions of Part 5 of the *Alberta Rules of Court*, or in the alternative, an Order pursuant to Rule 5.13 of the *Alberta Rules of Court*, requiring Sawridge Band to provide all records in their power and possession that are relevant and material to the issues in the within proceeding, including, but not limited to:

   i.) The Sawridge Band membership criteria, membership application process and membership decision-making processes from 1985-present, including:

      a.) All inquiries received about Sawridge Band membership or the process to apply for Sawridge Band membership and the responses to said inquiries;

      b.) Any correspondence or documentation submitted by individuals in relation to applying for Sawridge Band membership, whether or not the inquiry was treated by Sawridge Band as an actual membership application;

      c.) Complete and incomplete Sawridge Band membership applications;

      d.) Sawridge Band membership recommendations, membership decisions by Chief and Council and membership appeal decisions, including any and all information considered by the Membership Review Committee, Chief and Council or the Membership Appeal Committee in relation to membership applications;

      e.) Any information that would assist in identification of the minor dependants of individuals who have attempted to apply, are in the process of applying or have applied for Sawridge Band membership;

      f.) Any other records that would assist in assessing whether or not the Sawridge Band membership processes are discriminatory, biased, unreasonable, delayed without reason, or otherwise breach Charter principles or the requirements of natural justice.

   ii.) Records from Federal Court Action T-66-86A or T-66-86B, which are relevant and material to the Sawridge Band membership criteria, membership application process and membership decision-making processes

   iii.) Records from Federal Court Action T-2655-89 which are relevant and material to the Sawridge Band membership criteria, membership application process and membership decision-making processes, including the entire document collection the Sawridge Band made available to the Sawridge Trustees;

iv.) Records in the power and possession of the Sawridge Band relevant and material to the issues set out as E.1, E.3, E.4 or E.6, in Exhibit J to Catherine Twinn's Affidavit dated December 8, 2014, and filed in Court of QB Action No. 1403 04885, including Catherine Twinn's sworn but unfiled affidavit, if it references said issues;

v.) Records in the possession or control of the Sawridge Band, and relevant or material to the Sawridge Trustee's proposals to establish a tribunal to determine beneficiary status, including information regarding any concerns around the Sawridge Band membership process affecting the Trust's beneficiary identification process;

vi.) Records in the possession or control of the Sawridge Band and relevant or material to conflict of interest issues arising from the multiple roles of Sawridge Trustees, including their roles as Band members, beneficiaries, within Sawridge Band government and in the Sawridge membership process;

vii.) Records relevant and material to the details and listing of any assets held in trust by individuals for Sawridge Band prior to 1982; the details and listing of any assets transferred from individuals to the 1982 Trust; and the details and listing of the assets transferred into the 1985 Trust;

3. An Order, directed to the Sawridge Trustees and the Sawridge Band, confirming that bare assertions of confidentiality and privacy over Sawridge Band membership information and Sawridge Band membership application documentation does not supercede the Court's June 12, 2012 Order, absent application by the Sawridge Band or the Sawridge Trustees to establish the documents are subject to a recognized ground of legal privilege.

4. In the alternative, should the Court conclude this issue is beyond the scope of the June 12, 2012 order, and if the parties cannot arrive at agreement on further and better production within 30 days, the matter should be set down for a special chambers hearing.

5. Any proposed or adopted litigation plan should be amended to reflect the relief requested in paragraphs 1-34.

II. Queen's Bench Action No. 1403 04885,

6. An order requiring the parties in the within proceeding and Queen's Bench Action No. 1403 04885 to provide the Court with a mutually agreeable written update, or if agreement on said update is not possible, to schedule a further case management conference within 60 days of the production requested in paragraphs 1 and 2.

7. Specifically, the parties will update the Court on matters including:

i.) The merits of consolidation of the two actions, or alternatives such as concurrent or consecutive hearings.

ii.) The merits of a further order under Part 5 to permit questioning of individual Trustees, members of the Membership Review Committee or members of Sawridge Band government on matters relevant and material to the within action.

8. Any proposed or adopted litigation plan should be amended to reflect the relief requested in paragraph 5 and 6.

III. Advice and Direction

9. An Order providing the Court's advice and directions on the following matters:

   i.) Confirmation of the ability of counsel in the within proceeding to communicate with any or all counsel in Queen's Bench Action No. 1403 04885 whether individually or as a group on any matters related to:

      a.) The evidence produced pursuant to the order requested in paragraph 1 (ii) and (iii);
      b.) The real issues in dispute in either proceeding;
      c.) The merits of consolidation, or concurrent hearings, of the two proceedings;
      d.) The most efficient way to resolve the issues that overlap as between the two proceedings; or
      e.) Any other matter consistent with the purposes of the *Alberta Rules of Court*.

   ii.) Confirmation that the Court's costs order of June 12, 2012 (as upheld by the Court of Appeal), includes indemnification of the Public Trustee for costs associated with legal agency services that may be incurred from time to time.

Grounds for making this application:

I. Production of Records

10. The June 12, 2012 Reasons for judgment acknowledge the relevance and materiality of information that permit assessment of the Sawridge Band membership process. The need for information to assist the Public Trustee in identifying potential minor beneficiaries was also acknowledged.

11. Neither the Sawridge Trustees nor the Sawridge Band are currently subject to a general obligation to produce all relevant and material evidence. This has created the potential for selective production that does not support the purposes of the *Alberta Rules of Court* or serve the interests of the administration of justice.

12. The existence of actual, or potential, conflicts of interest around the Sawridge Band membership process requires more extensive production than normally applied to originating applications.

13. The Public Trustee cannot effectively represent, or protect the interests of, minor beneficiaries without full disclosure of relevant and material evidence. In particular, the Public Trustee cannot adequately identify the potential minor beneficiaries without full disclosure.

14. Currently, the Public Trustee does not have access to the same relevant and material evidence that is available to the Sawridge Trustees and Sawridge Band regarding that proceeding. Full and objective disclosure is required to remedy that imbalance.

15. Only full and fair pre-hearing disclosure will permit the parties to do the work required to effectively narrow the issues for hearing.

16. The Court has the discretion to apply all, or part, of the rules of production in Part 5 of the *Alberta Rules of Court* to applications, where appropriate. Requiring the Sawridge Trustees and Sawridge Band to file Affidavits of Records would remedy the production issues that are arising in the within proceedings.

17. In relation to relevance and materiality of evidence regarding the Sawridge Band membership process, the Court's June 12, 2012 Reasons for Judgement found those matters were relevant and that the Public Trustee could explore those matters, including, information that would assist in identifying potential minor beneficiaries.

18. The Court has discretion to compel production of relevant and material Records from Sawridge Band whether it is a party in the within proceeding or not, pursuant to Rule 5.13.

19. The Sawridge Band, through answers to undertakings from the Sawridge Trustees, has refused to produce membership files and documents relevant to the membership decision-making process. The refusal is based on a bare assertion of confidentiality and privacy, without substantive grounds to demonstrate a recognized legal privilege.

20. If this issue goes beyond the scope of the June 12, 2012 order, and absent agreement amongst the parties, an application for further and better production will be required.

II. Queen's Bench Action No. 1403 04885,

21. The Public Trustee was previously unaware of the December 17, 2014 court appearance in QB Action No. 1403 04885. The Public Trustee has not had an opportunity to address the Court in relation to the overlap of the legal and factual issues raised in proceedings.

22. While more information is required, the pleadings indicate demonstrable overlaps on key issues:

SIMILARITIES	
Issue #1: Who qualifies as Band Member/ Beneficiary-identification	
QB 1103 14112: • "The Public Trustee seeks to investigate these issues... to reassure itself (and the Court) that the beneficiary class can and has been adequately defined. [para 46, Justice D.R.G. Thomas, June 12, 2012 Reasons for Judgment ("Reasons") • "... it would be peculiar if, in varying the definition of "Beneficiaries" in the trust documents, that the Court did not make some sort of inquiry as to the membership application process that the Trustees and the Chief and Council acknowledge is underway" [para 48, Reasons] • "This Court has an obligation to make inquiries as to the procedure and status of Band memberships where a party (or its representative) who is potentially a claimant to the Trust queries whether the beneficiary class can be "ascertained" [para 49, Reasons] • "The Trustees seek this Court's direction in setting the procedure for seeking the opinion, advice and direction of the Court in regard to: (a) Determining the Beneficiaries of the 1985 Trust" [para 14(a), Affidavit of Paul Bujold, August 30, 2011]	**QB 1403 04885:** • "Examination of and ensuring that the system for ascertaining beneficiaries of the Trusts is fair, reasonable, timely, unbiased and in accordance with *Charter* principles and natural justice;" [Exhibit J, para E(3), Affidavit of Ms. Twinn, December 8, 2014]
Issue #2: Existence of Conflicts of Interest affecting Membership process, Trustees, or both	
QB 1103 14112: • "...the Sawridge Trustees are personally affected by the assignment of persons inside and outside the Trust." [para 23, Reasons] • "...the key players in both the administration of the Sawridge Trust and of the Sawridge	**QB 1403 04885:** • "Seeks advice and direction regarding the proper composition of the Board of trustees, including elimination or reduction of the number of elected officials of the Sawridge Indian Band." [Application for Advice and

Band overlap and these persons are currently entitled to shares of the Trust property. The members of the Sawridge Band Chief and Council are elected by and answer to an interested group of persons, namely those who will have a right to share in the 1985 Sawridge Trust. These facts provide a logical basis for a concern by the Public Trustee and this Court of a potential for an unfair distribution of the assets of the 1985 Sawridge Trust." [para 25, Reasons] • "I reject the position of the Sawridge Band that there is no potential for a conflict of interest to arise in these circumstances." [para 26, Reasons] • "The Sawridge Trustees and the adult members of the Sawridge Band (including the Chief and Council) are in a potential conflict between their personal interests and their duties as fiduciaries" [para 28, Reasons] • "The Public Trustee's role is necessary due to the potential conflict of interest of other litigants and the failure of the Sawridge Trustees to propose alternative independent representation." [para 42, Reasons]	Direction, September 26, 2014] • "Trustee selection and succession, including issues of conflict of interest now and in the future, including examination of a separated model to remove conflict of interest, be it actual, structural or of the appearance of conflict of interest;" [Exhibit J, para E(1), Affidavit of Ms. Twinn, December 8, 2014]
<u>Issue #3</u>: Transfer of Assets to 1985 Trust	
<u>QB 1103 14112:</u> • "To seek direction with respect to the transfer of assets to the 1985 Sawridge Trust" [para 1(b), Order by Justice D.R.G. Thomas, September 6, 2011]	**<u>QB 1403 04885:</u>** • "Determination of how assets were held and transferred from Trust inception to the present day;" [Exhibit J, para E(6), Affidavit of Ms. Twinn, December 8, 2014]
<u>Issue #4</u>: Administration and Management of 1985 Trust	
<u>QB 1103 14112:</u> • "An application shall be brought by the Trustees of the 1985 Sawridge Trust for the opinion, advice and direction of the Court respecting the administration and management of the property held under the 1985 Sawridge Trust (hereinafter referred to	**<u>QB 1403 04885:</u>** • "I have serious concerns regarding the administration of the Trusts and it is my belief that it is important and my duty that this information be brought to the attention of the Court. It is my intention to provide a copy of my Affidavit, unfiled, to the Court at the

as the "Advice and Direction Application")." [para 1, Order by Justice D.R.G. Thomas, September 6, 2011] • The Public Trustee of Alberta must protect the interests of any minor beneficiaries or potential beneficiaries in relation to the 1985 Trust. [*Public Trustee Act*, s.21 and s.22]	hearing of this application so that the confidentiality of the subject matter of my Affidavit can be maintained pending further direction from this Honourable Court on how to proceed in this regard."[para 16, Affidavit of Ms. Twinn, December 8, 2014] • "...I have raised the issues of trustee succession, accountability, beneficiary determination, undue influence and conflict of interest on numerous occasions, including putting forward a proposal in writing shortly after the June 12, 2012 decision issued by Justice Thomas in QB Action No. 1103-14112, but have been unable to obtain any results. A recent example of this is in May 2014 when I provided a Binding Issue Resolution Process Agreement to the other trustees for their review and comment in order to set out a process in which to discuss and resolve the issues that are the subject matter of the Application. The other trustees refused and/or willfully failed to engage in this or any process. I believe that I have exhausted my ability to address these matters internally and that adjudication by the Courts has become the only avenue available to address and resolve these matters. Attached as Exhibit "J" to my Affidavit is a copy of the Binding Issue Process Agreement I circulated." [para 23, Affidavit of Ms. Twinn, December 8, 2014]
DISSIMILARITIES	
QB 1103 14112:	**QB 1403 04885:**
• "To seek direction with respect to the definition of "Beneficiaries" contained in the 1985 Sawridge Trust, and if necessary to vary the 1985 Sawridge Trust to clarify the definition of "Beneficiaries"." [para 1(a), Order by Justice D.R.G. Thomas, September 6, 2011]	• Not in issue
• Not in issue	• Approval of appointment of individual Trustees

23. Once all parties are on an even playing field in relation to relevant and material evidence, consolidation must be considered to assess whether it would best serve the interests of the administration of justice, save time and resources, and reduce the combined time for hearing the applications, without creating undue prejudice to any party.

24. The parties should update the case management judge on this issue within a reasonable time after the additional document production contemplated by paragraph 1 is received.

III. Advice and Direction

i.) Communication Between Counsel

25. Communications as between counsel in a proceeding and in related proceedings is a normal occurrence. Such communications can serve to narrow issues in dispute and avoid duplication of effort. Such communications increase the opportunities for settlement and pre-trial resolution and focus all parties on issues that actually require the assistance of the Court.

26. Communication between counsel acting in the within proceeding and counsel acting in QB Action No. 1403 04885, particularly given the overlapping issues, should be encouraged rather than circumscribed.

ii.) Costs

27. The Court ordered the Sawridge Trustees to provide the Public Trustee for "full and advance indemnification" for its costs to participate in the within proceeding. The plain meaning of indemnification applies and should include all reasonable costs incurred by the Public Trustee.

28. The Sawridge Trustees object to the Public Trustees incurring costs related to the use of agent counsel who may work with existing counsel from time to time to move this proceeding forward.

29. The Public Trustee has taken care to propose agent counsel who is already highly experienced in the relevant areas of law and has specific experience on matters related to Sawridge Band membership issues. As such, agent counsel that have been proposed are in a position to provide more cost effective services than agent counsel lacking this background.

30. The Public Trustee's requests for resources in order to fulfill its role in this proceeding have been, and remain, reasonable and certainly less extensive than the resources available to the Applicants.

Material or evidence to be relied upon:

1. Excerpts from the transcript from the Questioning of Paul Bujold, held May 27 & 28, 2014;

2. Excerpts from the transcripts from the Questioning of Elizabeth Poitras, held May 29, 2014 and April 9, 2015;

3. Exhibits from the Questioning of Paul Bujold;

4. Exhibits from the Questioning of Elizabeth Poitras;

5. Excerpts from the Answers to Undertakings of Paul Bujold, received December 1, 2014;

6. Affidavit of Roman Bombak, dated June 12, 2015

7. Pleadings filed in Queen's Bench Action No. 1403 04885

8. Pleadings filed in Queen's Bench Action No. 1103 14112

9. Such further and other materials as Counsel may advise and this Honourable Court may allow.

Applicable rules:

10. *Alberta Rules of Court* 1.2, 1.4, 3.10, 3.14, 3,72, 4.11, 5.1, 5.2 , 6.3, and 6.11

Applicable Acts and regulation:

11. *Public Trustee Act*, S.A. 2004, c. P-44.1 s. 5, 21 and 22

Any irregularity complained of or objection relied on:

12. The Sawridge Band, through the Sawridge Trustees, has refused to produce relevant and material evidence regarding the Sawridge Band membership process. This is impeding the Public Trustee's ability to effectively represent the interests of minor beneficiaries, and potential minor beneficiaries.

How the application is proposed to be heard or considered:

13. The application is to be heard in Chambers before the Justice D.R.G. Thomas on June 30, 2015, at 2:00PM. (now adjourned to September 2 and 3, 2015)

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the applicant what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on that date and at the time shown at the beginning of the form. If you intend to rely on an affidavit or other evidence when the application is heard or considered, you must reply by giving reasonable notice of the material to the applicant.

Tab 6

COURT FILE NUMBER	1103 14112	Clerk's Stamp
COURT:	COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE:	EDMONTON	
	IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c T-8, AS AMENDED IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985	
APPLICANTS:	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust	
DOCUMENT	**BRIEF OF SAWRIDGE FIRST NATION**	
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	PARLEE McLAWS LLP 1500 Manulife Place 10180 – 101 Street Edmonton, AB T5J 4K1 **Attention**: Edward H. Molstad, Q.C. Telephone: (780) 423-8500 Facsimile: (780) 423-2870 **File Number**: 64203-7/EHM	

TABLE OF CONTENTS

I. INTRODUCTION

1. The Sawridge First Nation ("Sawridge") is not a party to these proceedings; however, Sawridge has been named a respondent in the within application by the Office of the Public Trustee of Alberta (the "Public Trustee"). The Public Trustee is seeking an order requiring Sawridge to disclose a plethora of records concerning matters dating back 30 years. The disclosure sought includes requests for private confidential information concerning Sawridge's members and membership applicants, records from court actions that spanned decades and that are protected under an implied undertaking of confidentiality, and a number of unspecified requests for what the Public Trustee describes as "relevant and material" documents.

2. Sawridge submits that the Public Trustee has failed to establish that it should be entitled to the records it is seeking from Sawridge. The requests for records sought by the Public Trustee go beyond what can be requested of Sawridge as a non-party to this matter. Furthermore, the Public Trustee has failed to establish the relevance and materiality of a number of the records sought, and has failed to establish that the records are of significant enough necessity to the within matter that they should be disclosed, despite the existence of strong countervailing privacy and other reasons militating against production.

3. The Public Trustee's requests, rather than helping advance the matters in this proceeding, would only unnecessarily prejudice Sawridge and the adjudication of the matters at issue. Rather than attempting to obtain relevant and material records from a party to the within proceeding and then making an application for third party disclosure, the Public Trustee has improperly directed its initial request for records at Sawridge. The form of the Public Trustee's request is indicative of a desire to turn this matter into an inquiry regarding Sawridge's membership, rather than focusing on the actual issues to be adjudicated.

II. STATEMENT OF FACTS

Background/Parties

4. The within matter is related to the Sawridge Band Inter Vivos Settlement Created by Chief Walter Patrick Twinn, of the Sawridge Indian Band, No. 19, now known as the Sawridge First Nation, on April 15, 1985 (the "Sawridge Trust"), and concerns an application by

the Sawridge Trust's Trustees (the "Sawridge Trustees") for advice and direction related to defining who is a beneficiary of that trust.[1]

5. The Public Trustee was, by order of Justice D.R.G. Thomas, named as a party to this matter in order to represent, "the 31 minors who are children of current Sawridge First Nation members as well as any minors who are children of applicants seeking to be admitted into membership of the Sawridge First Nation."[2]

6. Sawridge and the Sawridge Trust are distinct entities.

7. Since this matter was commenced, the Sawridge Trustees, with (when necessary) the assistance of Sawridge, have provided the Public Trustee with extensive disclosure. That disclosure is referred to at **Tab 2** and **Tab 7** of the Affidavit of Roman Bombak, filed by the Public Trustee. The records contained in those tabs indicate that the Sawridge Trustees have produced records which include the following:

(a) Sawridge's current membership application form;

(b) Sawridge's Membership Rules, Membership Appeal Process and a Membership Application Process chart;

(c) Sawridge's Membership application statistics by year;

(d) A chart outlining the relationship of admitted members of Sawridge with council members;

(e) Sawridge's Constitution;

(f) Sawridge's Governance Act;

(g) Rejection and acceptance letters to individual applicants for membership;

(h) Letters setting out missing information for certain membership applications;

---

[1] *1985 Sawridge Trust v Alberta (Public Trustee)*, 2012 ABQB 365, ["***1985 Sawridge Trust – QB***"] at para 2 **[Tab B1]**.

[2] Order of Justice D.R.G. Thomas, pronounced June 12, 2012, filed September 20, 2012, at para 1. **[Tab C1]**

(i) A list of the members of Sawridge's Membership Committee;

(j) A list of Sawridge's Chief and Council from 1985 to present;

(k) Information related to members of Sawridge's positions on committees and boards;

(l) A list of membership applications both completed and pending, including the application dates and the dates that decisions were made regarding the applications; and

(m) An updated list of all of the dependent children that qualified as beneficiaries under the Sawridge Trust, and those that did not qualify.[3]

8. On July 17, 2015, Sawridge, through its counsel, was served with a copy of an Amended Application by the Public Trustee, returnable September 2 and 3, 2015. Therein, the Public Trustee, at Paragraph 2, seeks an Order directing Sawridge to either file an Affidavit of Records or, in the alternative, an Order requiring Sawridge to produce all relevant and material records related to these proceedings, including but not limited to:

(a) Records related to Sawridge's membership criteria, membership application process and membership decision-making process from 1985-present, including:

(i) All inquiries received about Sawridge membership or the process to apply for Sawridge membership and the responses to said inquiries;

(ii) Any correspondence or documentation submitted by individuals in relation to applying for Sawridge membership, whether or not the inquiry was treated by Sawridge as an actual membership application;

(iii) Complete and incomplete Sawridge membership applications;

(iv) Sawridge membership recommendations, membership decisions by Chief and Council and membership appeal decisions, including any and all

[3] Affidavit of Roman Bombak, filed June 12, 2015 ["***Bombak Affidavit***"], at tabs 2 and 7.

information considered by the Membership Review Committee, Chief and Council or the Membership Appeal Committee in relation to membership applications;

(v) Any information that would assist in identification of the minor dependants of individuals who have attempted to apply, are in the process of applying or have applied for Sawridge membership;

(vi) Any other records that would assist in assessing whether or not the Sawridge membership processes are discriminatory, biased, unreasonable, delayed without reason, or otherwise breach Charter principles or the requirements of natural justice (Paragraph 2(i));

(b) Records from Federal Court Actions T-66-86A or T-66-86B (Paragraph 2(ii));

(c) Records from Federal Court Action T-2655-89 (Paragraph 2(iii));

(d) Records that are relevant and material to certain issues set out in Exhibit J to Catherine Twinn's Affidavit dated December 8, 2014 and filed in Court of Queen's Bench Action 1403 04885, including Catherine Twinn's sworn but unfiled Affidavit (Paragraph 2(iv));

(e) Records that are relevant and material to the Sawridge Trustees' proposal to establish a tribunal for determining beneficiary status (Paragraph 2(v));

(f) Records that are relevant and material to conflict of interest issues arising from the multiple roles of the Sawridge Trustees (Paragraph 2(vi)); and

(g) Records that are relevant and material to the details and listing of any assets held in trust by individuals for Sawridge prior to 1982, transferred to the 1982 Trust, and transferred to the 1985 Trust (Paragraph 2(vii)).[4]

[4] Amended Application of the Public Trustee, filed July 16, 2015, at pp 4 and 5.

Summary of Sawridge Policies on Membership

9. Sawridge has enacted Membership Rules.[5] Those rules outline the membership application process and a number of other matters relevant to Sawridge's control over its membership.

10. On August 24, 2009, Sawridge passed its *Constitution Act* (the "*SFN Constitution*") by a referendum. The *SFN Constitution* affirms, among other points, that Sawridge shall have control of its own membership in conformity with its laws, codes, customs, practices, traditions and values.[6]

11. Since passing the *SFN Constitution*, Sawridge has also passed legislation that affirm that personal information provided to Sawridge and its employees is kept confidential, and that it will not be disclosed.[7] The confidentiality provisions of Sawridge's legislation extend to the information that it receives from members and applicants for membership.[8]

12. As part of its membership application process, Sawridge receives a significant amount of information concerning membership applicants, including personal information and documents (e.g. social insurance number, birth certificate and driver's license) related to the applicants, personal information concerning the applicants' families, and information concerning the applicants' financial resources, criminal history and health.[9]

Federal Court Actions T66-86-A and T66-86-B

13. Federal Court Actions T66-86-A and T66-86-B concerned a constitutional challenge to certain provisions of the *Indian Act* concerning First Nations' membership (the "Constitutional Actions"). Specifically, the plaintiffs in the Constitutional Actions sought a declaration that certain 1985 and 1988 amendments to the *Indian Act* were unconstitutional. These amendments included provisions which purport to add certain categories of persons to the

---

[5] See *Bombak Affidavit*, at tab 2, pp 69-71.
[6] *Bombak Affidavit*, at tab 2, pp 94 and 101.
[7] See *Sawridge Governance Act*, passed October 16, 2010, at Part III, ss. 2(10), 4 – 12; *Bombak Affidavit*, at tab 2, pp 74, 82, 84 and 85.
[8] Sawridge Indian Band Membership Application Form, wherein it is explicitly stated that the answers to the questions in the form would be kept confidential; *Bombak Affidavit*, at tab 2, p 15.
[9] *Bombak Affidavit*, at tab 2, pp 16-23.

First Nations' membership lists without their knowledge or consent. The plaintiffs claimed that these provisions violate their aboriginal and treaty rights regarding the determination of membership, as protected by section 35(1) of the *Constitution Act*, 1982.

14. The Constitutional Actions were initially commenced on January 15, 1986, with six representative First Nations participating. An initial trial was held in 1993. The plaintiffs in the first trial were the Sawridge Indian Band (now Sawridge), the Ermineskin Band and the Sarcee Band (now known as the Tsuu T'ina First Nation). The other parties were Her Majesty the Queen (defendant), the Native Council of Canada (intervener), the Native Council of Canada (Alberta) (intervener), and the Non-Status Indian Association of Alberta (intervener).[10] The decision from the first trial was released in 1995. The 1995 decision was set aside and the Constitutional Actions were sent down for retrial as a result of a Federal Court of Appeal decision in 1997.

15. The second trial began in 2007, following 10 more years of record production and discovery.[11] The plaintiffs in the second trial were Sawridge and the Tsuu T'ina First Nation. The defendant was Her Majesty the Queen, and the interveners were the Congress of Aboriginal Peoples, the Native Council of Canada (Alberta), the Non-Status Indian Association of Alberta and the Native Women's Association of Canada.

16. In light of the number of years of litigation involved in the Constitutional Actions, the amount of evidence and records related to same is voluminous.

Federal Court Action T2655-89

17. Federal Court Action T2655-89 was commenced in 1989 by Elizabeth Poitras, and initially concerned whether Ms. Poitras was entitled to membership in Sawridge (the "Poitras Action").[12] Ms. Poitras named Walter Patrick Twinn, The Council of the Sawridge Band and Her Majesty the Queen in Right of Canada as Represented by the Minister of Indian Affairs and Northern Development as defendants in that action.

---

[10] *Sawridge Band v Canada*, [1996] 1 FCR 3. **[Tab B2]**
[11] For a brief overview of the Constitutional Actions, see *Sawridge Band v Canada*, 2009 FCA 123, at paras 1-5. **[Tab B3]**
[12] For an overview of the Poitras Action, see *Poitras v Sawridge Band*, 2013 FC 910, ["***Poitras***"] at para 10. **[Tab B4]**

18. The Poitras Action was stayed pending the outcome of the Constitutional Actions, because the Constitutional Actions concerned issues that were similar to those raised by Ms. Poitras. During that stay, the parties engaged in certain steps to move the action forward, including the production of records.

19. In 2003, Justice Hugessen ordered that Sawridge enter or register on its membership list the names of individuals who acquired the right to be members through the amendments to the *Indian Act* that were the subject of the Constitutional Actions. Ms. Poitras was one of the individuals who acquired membership in Sawridge as a result of that order.[13]

20. In 2010, Justice Hugessen held that in light of the Constitutional Actions having been decided, and given that Ms. Poitras became a member of Sawridge as a result of that action, the issue of Ms. Poitras' membership was now moot.[14]

21. On August 23, 2013, Justice Aalto ordered that Ms. Poitras could amend her claim to include a claim for damages.[15] The damages claim is still before the Federal Court.

22. In light of the number of years that the Poitras Action has proceeded, Sawridge's production from that action contains approximately 7,100 records.

III. ISSUES

23. The sole issue in the within application that concerns Sawridge is whether this Honourable Court should grant the Order sought by the Public Trustee in Paragraph 2 of the Public Trustee's Amended Application, filed July 16, 2015, requiring Sawridge to produce the listed records.

IV. ANALYSIS

A. *Fundamentals of Disclosure by Third Parties – Scope of Request*

24. At the outset, it is important to note that the within matter was commenced by an originating application and not by a Statement of Claim. Accordingly, the rules pertaining to the

---

[13] *Sawridge Band v Canada*, [2003] 4 FCR 748. **[Tab B5]**
[14] *Poitras*, supra note 12, at paras 10-12. **[Tab B4]**
[15] *Ibid.* **[Tab B4]**

disclosure of documents in Part 5 of the *Rules of Court* (including the rules related to the preparation of an Affidavit of Records) do not apply to these proceedings unless this Honourable Court orders otherwise.[16] This Court has not made any Orders to date that would lead to the rules in Part 5 being applied.

25. If this Court were to use its discretion to apply Part 5 of the *Rules of Court*, then it would only be able to compel parties to the within matter to produce an Affidavit of Records. Generally, parties to an action are only entitled to document discovery from the other parties named in that action. The *Rules of Court*, for example, state that only parties to an action are required to prepare an Affidavit of Records.[17] The rules do not state that a non-party is required to produce an Affidavit of Records.

26. The *Rules of Court* create a narrow exception to this general rule, and provide parties with a means of accessing particular records held by a third party. Specifically, Rule 5.13 provides as follows:

> 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.[18]

27. Case law is clear that Rule 5.13 is not intended to give a party to an action the right to obtain document discovery from a third party to that action.[19] Rule 5.13 exists to allow parties access to clearly specified records held by a third party; it cannot be relied upon by

---

[16] *Rules of Court*, Alta Reg 124/2010 ["***Rules of Court***"], at 3.14. [**Tab A1**]
[17] *Rules of Court*, at 5.5(1). [**Tab A2**]
[18] *Rules of Court*, at 5.13. [**Tab A3**]
[19] *InnerSense International Inc. v University of Alberta* 2007 ABQB 157, at para 6. [**Tab B6**]

parties to engage in a fishing expedition, or to compel a third party to disclose records that they may have.[20]

28. The party seeking records from a third party has the burden of establishing that the Court should order the production of those records.[21]

29. In light of the specific nature of the request under Rule 5.13, the applicant party must clearly identify the records being sought from the third party, and must establish that the third party has said records in its possession. The moving party must accordingly describe the records being sought with a level of precision, and must provide evidence establishing that the third party has those records.[22] Failing to adequately describe a record is fatal to an application under Rule 5.13.[23] In addition, if a description is worded in a manner that looks to compel discovery from a party, then that application will be denied.[24]

30. The mere fact that there is a close relationship between a third party to an action and a party to that action is not a basis for ordering disclosure from the third party. The *Rules of Court* clearly distinguish between parties and non-parties. Neither the express wording of the *Rules of Court* nor the case law interpreting said rules indicates that the disclosure-related rules that apply to parties can apply to non-parties solely because of the proximity of the relationship between those parties.[25]

31. In the within application, the Public Trustee is seeking to have Sawridge produce a significant number and variety of records. Notably, the Public Trustee has requested that Sawridge provide all documents that are "relevant and material to the issues in the within proceedings."

32. Sawridge submits that the Public Trustee's request is clearly an attempt to obtain document discovery from Sawridge, despite Sawridge not being a party to the within

---

[20] *Ed Miller Sales & Rentals Ltd v Caterpillar Tractor Co*, (1988) 63 Alta LR (2d) 189 (QB) ["***Ed Miller***"], at para 13 **[Tab B7]**; see also *Trimay Wear Plate v Way*, 2008 ABQB 601 ["***Trimay***"], at paras 13 and 18. **[Tab B8]**

[21] *Wasylyshen v Canadian Broadcasting Corp.*, [2006] AJ No 1169 (QB) ["***Wasylyshen***"], at para 6. **[Tab B9]**

[22] *Ed Miller*, supra note 20, at paras 13-15. **[Tab B7]**

[23] *Esso Resources Canada Limited v Lloyd's Underwriters & Companies*, 1990 ABCA 144 ["***Esso***"], at paras 12 and 13. **[Tab B10]**

[24] *Gainers Inc. v Pocklington Holdings Inc.*, 1995 CarswellAlta 200 (CA), at para 16. **[Tab B11]**

[25] *Trimay*, supra note 20, at para 17. **[Tab B8]**

proceedings. Rather than asking Sawridge to produce certain records, as is allowed under Rule 5.13, the Public Trustee has framed its request using language that mirrors the document production provisions of the *Rules of Court*. In light of the above-cited authorities, it is submitted that the Public Trustee's request should accordingly be dismissed.

33. Even if Sawridge were able to discern what particular records the Public Trustee is seeking, Sawridge submits that no evidence has been proffered to suggest that it has any of the types of records that have been requested. Particularly, the Public Trustee has failed to provide any evidence that suggests that Sawridge has documents in its possession related to the requests outlined in Paragraphs 2(iv) to 2(vii). Those requests all concern records related to the Sawridge Trust, its trustees and beneficiaries, and the trust property. Given that the Sawridge Trust and Sawridge are distinct entities, it is submitted that it cannot be said that Sawridge would have any records in its possession related to those requests. As such, it should not be ordered to disclose any of those records.

B. Fundamentals of Disclosure by Third Parties – Relevance and Materiality

Defining Relevance and Materiality

34. In order for a document to be considered producible by either a party to an action or a third party, that document must be relevant and material to the issues in dispute. The *Rules of Court* affirm that a party is only required to disclose documents that are relevant and material. Relevance and materiality are defined based upon the parties' pleadings:

> 5.2(1) For the purposes of this Part, a question, record or information is relevant and material only if the answer to the question, or the record or information, could reasonably be expected
>
> (a) to significantly help determine one or more of the issues raised in the pleadings, or
>
> (b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings. [*Emphasis Added*][26]

35. In addition to reviewing the parties' pleadings, a court must, when determining whether a record is producible, review a moving party's reason for seeking a record from another

[26] *Rules of Court*, at R.5.2. **[Tab A4]**

party. In *Weatherill (Estate of) v Weatherill*, one of the leading cases concerning applications for document production, Justice Slatter affirmed that a document's relevance is determined based on the issues in a given action, and that said issues are defined (per the *Rules of Court*) based on the parties' pleadings.[27] With regards to materiality, Justice Slatter noted that a document will be material to an action if that document would help determine one of the issues that arises in the parties' pleadings. He also affirms that a Court must review a party's line of argument in order to determine whether a document is needed to prove a fact related to one of the issues.[28]

36. Courts in a number of cases have affirmed that the *Rules of Court* do not allow parties to obtain the disclosure of records that are of tertiary relevance. Case law distinguishes between facts that are of primary, secondary and tertiary relevance. Facts that are of primary relevance are facts that are in issue, and facts that are of secondary relevance are facts from which primary facts can be inferred. While parties are entitled to discovery related to primary and secondary facts, they are not entitled to discovery related to "information that could reasonably be expected to lead to facts or records of secondary relevance" (i.e., tertiary facts).[29]

37. A party looking to obtain a record from another party, as with most applications, has the burden of proving that said record is relevant and material.[30] In order to satisfy this burden of proof, the moving party must provide evidence that establishes that the subject record is relevant and material to the issues in an action. Whether or not a court orders the disclosure of a record thus becomes a question of evidence regarding the particular record being sought.[31]

38. If a moving party fails to meet its burden of proving that a record should be produced, then a court must dismiss that party's application for disclosure. In *Dow Chemical Canada Inc v Nova Chemicals Corporation*, for example, Chief Justice Wittmann refused to

---

[27] *Weatherill (Estate of) v Weatherill*, 2003 ABQB 69, at paras 16. **[Tab B12]**
[28] *Ibid*, at paras 16-17. **[Tab B12]**
[29] *NAC Constructors Ltd. v Alberta Capital Region Wastewater Commission*, 2006 ABCA 246, at para 12. **[Tab B13]**
[30] *Re/Max Real Estate (Edmonton) Ltd v Border Credit Union Ltd*, (1988), 60 Alta LR (2d) 356 (Master Funduk), at paras 20-21. **[Tab B15]**
[31] *Ibid*, at paras 20-21 **[Tab B15]**; see also *Dow Chemical Canada Inc v Nova Chemicals Corporation*, 2015 ABQB 2 [**"Dow Chemical"**], at para 21. **[Tab B14]**

grant an Order compelling the production of certain documents sought by plaintiffs to a commercial dispute, because the plaintiffs failed to meet their burden of proof.[32]

Relevance and Materiality of Membership Issues

39. Any assessment of relevance and materiality must be determined based on the issues before this Honourable Court, as referred to in the pleadings. Those issues were clearly outlined by Justice Thomas in his Order of August 31, 2011. That Order states that the purposes of this matter are the following:

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

(b) To seek direction with respect to the transfer of assets to the 1985 Sawridge Trust.[33]

40. In Justice Thomas' June 12, 2012 decision in these proceedings, he elaborated upon the scope of the membership-related issues that could be addressed in the context of this matter. Specifically, Justice Thomas noted that Sawridge's membership definition and application process were relevant and material to this matter, and that, accordingly, the Public Trustee was entitled to proceed with examinations related to same.[34] Importantly, Justice Thomas also noted that the Public Trustee's examinations could not interfere with or duplicate Sawridge's membership application process and the processes associated to individual membership decisions.[35]

41. The Order arising from the June 12, 2012 decision explicitly provides what questions the Public Trustee may ask in relation to Sawridge's membership:

> The Public Trustee may inquire, on questioning on affidavits, into the process the Sawridge Band uses to determine membership, the Sawridge

---

[32] *Dow Chemical, ibid*, at paras 21 and 44. **[Tab B14]**
[33] Order of Justice D.R.G. Thomas, pronounced August 31, 2011, filed September 6, 2011, at para 1. **[Tab C2]**
[34] *1985 Sawridge Trust – QB*, supra note 1, at para 55. **[Tab B1]**
[35] *Ibid*, at paras 53-54. **[Tab B1]**

> Band membership definition and into the status and number of Band membership applications that are currently awaiting determination.[36]

42. As is clear from the plain wording of Justice Thomas' decision and of his Order, the only aspects of the Sawridge's membership process that are relevant and material for the purposes of this matter concern the process used to determine and define membership, and the status and number of applications currently awaiting determination. Accordingly, it is submitted that the Public Trustee is only entitled to records related to those membership-related issues. Again, given that Sawridge is not a party to the within proceedings, it maintains that said disclosure is not properly given by it.

43. The Public Trustee's request for records goes significantly further than what Justice Thomas held was relevant and material. Rather, a number of the records that have been requested by the Public Trustee concern individual membership decisions and the processes related thereto. Paragraph 2(i) of its Amended Application, for example, contains requests for records related to individual applications, correspondences related to those applications, and decisions made concerning those applications. Compelling the disclosure of those records would directly interfere with both the regime that Sawridge has in place for addressing individual membership decisions, and the Federal Court process for reviewing those decisions. In light of Justice Thomas' previous decision, it is submitted that disclosure should not be ordered.

44. Similarly, the Public Trustee's request for records from the Constitutional Actions cannot be granted, because those records are neither relevant nor materials to the issues in this matter. The records in the Constitutional Actions are records that concern the issues being litigated therein (i.e., whether amendments to the *Indian Act* violated the applicants' aboriginal and treaty right to govern themselves in relation to their membership). The issues raised in the Constitutional Actions are in no way related to the issues in the within proceedings, as described above. Accordingly, and given that the Public Trustee has failed to provide any evidence to establish the relevance and materiality of any records from the Constitutional Actions, it is submitted that this Honourable Court should not order the production of same.

---

[36] Order of Justice D.R.G. Thomas, pronounced June 12, 2012, filed September 20, 2012, at para 4. **[Tab C1]**

45. Furthermore, none of the records from the Poitras Action can be said to be either relevant or material to these proceedings. The membership-related aspects of that decision were not determined in the course of that action, but rather were determined as a result of the ruling in the Constitutional Actions that Ms. Poitras was entitled to membership in Sawridge on the basis of her status under Bill C-31. Her membership status is unique to her and cannot be said to be indicative of the process of membership for Sawridge. The particulars of Ms. Poitras' membership claim have been addressed and are therefore not relevant to this matter. The action has continued as a claim for damages for which no evidence has been produced to show that the records are relevant and material to this matter. As such, it is submitted that none of the records in the Poitras Action are properly producible by Sawridge. In any event, the Public Trustee has access to such records through Ms. Poitras and if they believe any such records are producible, they may ask Ms. Poitras for them.

46. In its submissions, the Public Trustee suggests that individual information is relevant and material to determining issues arising from Sawridge's membership process generally. In support of this submission, it has provided examples of information from individual membership applicants who have experienced alleged difficulties with the membership process. Rather than being illustrative of the need for disclosure of records related to individual applications and membership decisions, those examples re-affirm that there are processes already in place to address the particular issues that are raised in those membership cases. In Ms. Poitras' case, for example, she was able to address her concerns related to her membership through the Federal Court.

47. In its Affidavit and written submissions, the Public Trustee alleges directly and indirectly that Sawridge and the Sawridge Trustees have been selective in the records that have been produced in these proceedings.[37] Despite making numerous allegations related to same, the Public Trustee has failed to provide any evidence supporting those allegations. The only attempt to proffer evidence related to these alleged disclosure-related issues is contained in the Affidavit sworn by Roman Bombak, which merely discusses the Public Trustee's "apprehension"

[37] *Bombak Affidavit*, at paras 10-11, tab 11, pp 3, 166, 168-169; see also Written Brief of the Applicant, the Public Trustee of Alberta, filed June 12, 2015, at paras 19, 67, 68, and 74.

regarding disclosure, and appends certain correspondences that fail to demonstrate any misfeasance by Sawridge or the Sawridge Trustees.[38]

48. In light of the lack of evidence to substantiate the Public Trustee's allegations regarding the selective production of records, Sawridge submits that the Public Trustee has failed to establish that there has been any withholding of relevant and material records by either the Sawridge Trustees or by Sawridge. Rather, the Sawridge Trustees have been forthright in producing relevant and material records requested by the Public Trustee. Sawridge has assisted where it was able to provide information. This is evident in the many references in the undertakings to information being supplied by Sawridge. To suggest that Sawridge or the Sawridge Trustees have engaged in any improper conduct is inflammatory at best.

49. Finally, it is respectfully submitted that the Public Trustee's requests for membership-related records constitute an attempt to usurp the usual rules for determining a record's producibility. Rather than simply requesting those records that are relevant and material to the issues in this matter, the Public Trustee has attempted to define relevance and materiality based on issues that it believes are relevant and material. Accordingly, Sawridge submits that any order for production should not be based on the Public Trustee's proposed definition of relevance and materiality.

C. *Fundamentals of Disclosure by Third Parties – Necessity of Disclosure*

50. A third party cannot be compelled to disclose records when those records could be obtained through a party to the action.[39] The production of records by a third party to an action is an exceptional remedy. Accordingly, disclosure should only be ordered where production is not available through the parties. In *Esso*, Justice Stevenson, writing for a majority of the Court of Appeal, explained that the previous iteration of Rule 5.13 could not be used to compel disclosure by a third party where disclosure could be provided by a party to an action:

> In my view this rule should not be used against a non-party unless it can be shown that the document is in existence and not available through other means, in this case, through a party. If the document is relevant, and was in the possession of the

[38] *Bombak Affidavit*, at paras 10-11, p 3.
[39] *Esso*, supra note 23, at para 12. **[Tab B10]**

> plaintiffs they are required to disclose its existence under rule 186, and may be asked about its disposition in the course of oral discovery.[40] [*Emphasis Added*]

51. Pursuant to Justice Thomas' decision, the Public Trustee proceeded with its examination of Paul Bujold on May 27 and 28, 2014. During Mr. Bujold's questioning, fifty undertakings were requested, and responses were provided on or around December 1, 2014, via letter.[41]

52. The Public Trustee has failed to establish that Sawridge should be ordered to produce any records rather than having said records be produced by the Sawridge Trustees. The Sawridge Trustees have to date provided the Public Trustee with answers to all relevant and material questions and requests for records. In light of the fact that no Order has been required against Sawridge in order to obtain these records, it is respectfully submitted that any proper disclosure requests made by the Public Trustee could be addressed via the Sawridge Trustees.

53. The Sawridge Trustees have indicated that they are prepared to complete an Affidavit of Records in relation to this matter. Once the Sawridge Trustees have prepared their Affidavit of Records, the Public Trustee will presumably have the ability to question the Sawridge Trustees' representative regarding that production. If, following that process, there are certain records that have not been provided to the Public Trustee and that could (pursuant to the above-described law) be disclosed by a third party, then it may be appropriate to bring an application to compel Sawridge to disclose certain records. The Public Trustee's application, having preceded all of the above, is premature.

54. With regards to the documents sought in Paragraph 2(iii), that action, as noted above, was an action commenced by Elizabeth Poitras. Ms. Poitras being a party to that action has access to any documents that could be produced as part of this matter, and over which no implied undertaking applies. Ms. Poitras and the Public Trustee's interactions indicate that the Public Trustee could obtain copies of Ms. Poitras' records from her. The Public Trustee's counsel attended at the questioning of Ms. Poitras in relation to her affidavit. During that questioning, the Public Trustee's counsel objected to questions on behalf of Ms. Poitras, directed Ms. Poitras not to answer a question, responded to undertaking requests on Ms. Poitras' behalf,

---

[40] *Ibid.* **[Tab B10]**
[41] *Bombak Affidavit*, at Exhibit 7, pp. 142-157.

intervened on her behalf, and in doing so conducted herself as if she and Ms. Poitras had a solicitor-client relationship.[42] As is made clear by Ms. Poitras' involvement in these proceedings and based on her relationship with the Public Trustee, the Public Trustee has clear access to the records from the Poitras Action through her. Accordingly, it is submitted that there need not be any Order made in relation to those records.

D. Balancing a Record's Probative Value and its Prejudicial Effects

55. Prior to making any determinations regarding the production of records, the Court must consider whether compelling the disclosure of said records would result in a prejudice.[43] Specifically, the Court must look at the probative value of records being sought, and determine if that value outweighs the prejudicial effect of that production. The need to consider the balancing of the probative value and the prejudicial effect of disclosing records is affirmed in the *Rules of Court*.[44]

Harmful Disclosure of Private Information

56. One way in which harm can arise as a result of a record being disclosed is that said disclosure would lead to the production of sensitive personal information. Courts have recognized the importance of protecting individuals' rights to privacy in their information, and that same could be of greater importance than the production of records.[45]

57. The relationship between informational privacy and a Court's use of its discretion to compel a non-party to disclose records was addressed at length by the Ontario Court of Appeal in *RBC*. That case concerned a request by the applicant bank to obtain copies of a mortgage discharge statement concerning individuals from another bank. The respondent bank refused to disclose the mortgage statement, because it argued that doing so would violate the *Personal Information Protection and Electronic Documents Act* ("*PIPEDA*"). The Court of Appeal held that the information contained in the mortgage statement (the current balance of the mortgage)

---

[42] See Transcript of Questioning on Affidavit of Elizabeth Poitras, dated April 9, 2015, at p 23; Excerpts from Pleadings, Transcripts, Exhibits and Answers to Undertakings, filed June 12, 2015, at p212.
[43] *GWL Properties Ltd v WR Grace & Co of Canada Ltd*, 1992 CarswellBC 227 (SC), at para 8. **[Tab B16]**
[44] *Rules of Court*, at Rule 5.3(1). **[Tab A5]**
[45] *Royal Bank of Canada v Trang*, 2014 ONCA 883 ["***RBC***"], at paras 87-89. **[Tab B17]**

was personal information that was protected by *PIPEDA*.[46] In light of the fact that the personal information was protected by *PIPEDA*, and given the nature of that information, the Court affirmed that the respondent bank was not required to disclose the mortgage statement.

58. Similarly, in *Kiedynk v John Doe*, Justice Virtue affirmed that legislative provisions limiting the disclosure of information by an entity must be taken into account when considering whether a record should be produced.[47] Particularly, Justice Virtue noted that a hospital was not required to produce records concerning patients pursuant to a request under the previous version of Rule 5.13, because that disclosure would run contrary to the explicit bar against disclosure contained in the Alberta *Hospitals Act*.[48]

59. One factor that is important when determining whether a record containing personal information should be disclosed is whether the subject matter of that information has provided consent to disclose the information. In *RBC*, the Court of Appeal affirmed that under *PIPEDA*, personal information cannot be disclosed without express consent if that information is sensitive and if the subject matter of that information could not reasonably expect that the information would be disclosed.[49]

60. As is made clear by the membership-related records that have already been disclosed to the Public Trustee, the records it is seeking concerning individual membership applications contain a significant amount of personal information related to applicants and their families. Given the amount of private information contained in the applications, it is submitted that any probative elements related to those applications are eclipsed by the prejudicial effect they would cause to the membership applicants' rights to keep their personal information confidential.

61. Sawridge submits that as a First Nation that falls under the scope of federal legislation, its disclosure of personal information would be governed by *PIPEDA*.[50] In light of the holding in *RBC*, and taking into account the express statements in Sawridge's own laws

---

[46] *Ibid*, at paras 36 and 51. **[Tab B17]**
[47] *Kiedynk v John Doe*, 1991 CarswellAlta 37 (QB). **[Tab B18]**
[48] *Ibid*, at paras 20-21. **[Tab B18]**
[49] *RBC*, supra note 45, at para 63. **[Tab B17]**
[50] *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5, at ss. 2(1) and 4(1)(b). **[Tab A6]**

concerning the confidential nature of information that it receives, it is accordingly submitted that this Honourable Court should not compel Sawridge to produce individual membership applications.

62. Furthermore, the decision in *RBC* indicates that the Public Trustee should not be entitled to records containing particular applicants' personal information without first obtaining their express consent. As noted above, the applicants are required to give very sensitive personal information to Sawridge as part of the application process. In addition, the applicants have a clear reasonable expectation that their personal information will not be disclosed; specifically, the *SFN Constitution*, the *Governance Act* and the first page of Sawridge's membership application form all affirm that the information provided as part of the application process will be kept confidential. Accordingly, and given that the applicants have not consented to any disclosure, Sawridge submits that the Public Trustee should not be entitled to any records concerning individual membership applications.

Financial Harm

63. Another harm that is relevant to assessing the merits in compelling disclosure is the expense and effort required to proceed with that disclosure. Rule 5.3 explicitly states that a court must consider whether the production of a record will result in an expense that is disproportionate to the likely benefit of disclosing that record.[51]

64. In its Amended Application (particularly Paragraphs 2(i) to (iii)), the Public Trustee has asked that Sawridge review decades of materials related to its membership and related to litigation matters, and that it only provide those documents that it deems relevant and material. The sheer volume of the amount of records that Sawridge would be required to review would necessarily result in Sawridge incurring a very significant expense. That expense is of great importance when compared to the relatively minor probative value of the records sought by the Public Trustee in relation to the individual membership applications.

[51] *Rules of Court*, at Rule 5.3(1)(b). [**Tab A5**]

E. Implied Undertaking of Confidentiality

65. At common law, records produced during an action are subject to an implied undertaking of confidentiality. In *Juman v Doucette*, Justice Binnie affirmed that the undertaking existed for a number of reasons, including to ensure complete disclosure by parties during litigation. As was noted by the Justice, "this is of particular interest in an era where documentary production is of a magnitude as often to preclude careful pre-screening…"[52]

66. Rule 5.33 affirms that documents disclosed pursuant to the *Rules of Court* are under an implied undertaking of confidentiality, and that (subject to fulfilling certain criteria) those documents cannot be used for other purposes.[53]

67. In order to set the implied undertaking aside, a party must establish it is in the public interest for the implied undertaking to be removed, and that said public interest is greater than the value of the undertaking.[54] In making this assessment, courts have emphasized the exceptional nature of removing the undertaking. In *Juman*, Justice Binnie noted that, "unless an examinee is satisfied that the undertaking will only be modified or varied by the court in exceptional circumstances, the undertaking will not achieve its intended purpose."[55]

68. In addition, in order to remove the implied undertaking, all parties who are affected (i.e., the parties to the action during which the records were disclosed) must be given notice of the application to remove the undertaking.[56]

69. The Public Trustee has requested that Sawridge produce relevant and material records from the Constitutional Actions and from the Poitras Action. The Public Trustee has not specified whether those requests would exclude documents that are subject to the implied undertaking of confidentiality.

70. If the request includes documents covered by the implied undertaking of confidentiality, then Sawridge submits that the request should be dismissed, because the Public

---

[52] *Juman v Doucette*, 2008 SCC 8 [***Juman***"], at para 26. **[Tab B19]**
[53] *Rules of Court*, Alta Reg 124/2010, at R. 5.33. **[Tab A7]**
[54] *Juman*, supra note 52, at para 30 **[Tab B19]**; see also *Kent v Martin*, 2013 ABQB 27, at para 6. **[Tab B20]**
[55] *Juman*, *ibid*, at para 32. **[Tab B19]**
[56] *Ibid*, at para 52. **[Tab B19]**

Trustee has failed to provide adequate notice to the other parties to the Constitutional Actions and the Poitras Action. With regards to the Constitutional Actions, the Public Trustee has failed to provide notice to the Tsuu T'ina First Nation, Her Majesty the Queen, or to any of the interveners. Insofar as the Poitras Action, the Public Trustee has failed to provide notice to the Attorney General of Canada.

V. RELIEF REQUESTED

71. For the above reasons, the respondent Sawridge prays that the Public Trustee's application for disclosure be dismissed, with costs payable by the Public Trustee on the basis that these costs shall not be paid by the Sawridge Trust.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of August, 2016.

PARLEE McLAWS LLP

EDWARD H. MOLSTAD, Q.C.
Solicitors for the Sawridge First Nation

LIST OF AUTHORITIES

A. LEGISLATION AND RULES

B. CASE LAW

Tab 12 *Weatherill (Estate of) v Weatherill*, 2003 ABQB 69

Tab 13 *NAC Constructors Ltd. v Alberta Capital Region Wastewater Commission*, 2006 ABCA 246

Tab 14 *Dow Chemical Canada Inc v Nova Chemicals Corporation*, 2015 ABQB 2

Tab 15 *Re/Max Real Estate (Edmonton) Ltd v Border Credit Union Ltd*, (1988), 60 Alta LR (2d) 356 (Master Funduk)

Tab 16 *GWL Properties Ltd v WR Grace & Co of Canada Ltd*, 1992 CarswellBC 227 (SC)

Tab 17 *Royal Bank of Canada v Trang*, 2014 ONCA 883

Tab 18 *Kiedynk v John Doe*, 1991 CarswellAlta 37 (QB)

Tab 19 *Juman v Doucette*, 2008 SCC 8

Tab 20 *Kent v Martin*, 2013 ABQB 27

C. PRIOR ORDERS

Tab 1 Order of Justice D.R.G. Thomas, pronounced June 12, 2012, filed September 20, 2012

Tab 2 Order of Justice D.R.G. Thomas, pronounced August 31, 2011, filed September 6, 2011

Tab 7

Court of Queen's Bench of Alberta

Citation: 1985 Sawridge Trust v Alberta (Public Trustee), 2015 ABQB 799

Date: 20151217
Docket: 1103 14112
Registry: Edmonton

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

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")

Between:

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

Reasons for Judgment
of the
Honourable Mr. Justice D.R.G. Thomas

Table of Contents

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 v Alberta (Public Trustee)***, 2012 ABQB 365 [***"Sawridge #1"***], 543 AR 90 affirmed 2013 ABCA 226, 553 AR 324 [***"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 AR 371; ***Wasylyshen v Canadian Broadcasting Corp.***, [2006] AJ No 1169 (Alta QB).

[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 AR 17, 63 Alta LR (2d) 189 (Alta QB)) or compel disclosure (***Gainers Inc. v Pocklington Holdings Inc.*** (1995), 169 AR 288, 30 Alta LR (3d) 273 (Alta CA)). Items sought must be particularized, and this process is not a form of discovery: ***Esso Resources Canada Ltd. v Stearns Catalytic Ltd.*** (1989), 98 AR 374, 16 ACWS (3d) 286 (Alta CA).

[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 AR 180.

[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 at paras 97, 123 OR (3d) 401; *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: ***Juman v Doucette; Doucette (Litigation Guardian of) v Wee Watch Day Care Systems,*** 2008 SCC 8, [2008] 1 SCR 157. 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 FTR 253. Further, the membership criteria used by the SFN operate until they are found to be invalid: ***Huzar v Canada***, [2000] FCJ No 873 at para 5, 258 NR 246. 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 AR 172; ***H.Z. v Unger***, 2013 ABQB 639, 573 AR 391. 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: ***Royal Bank of Canada v Kaddoura***, 2015 ABCA 154 at para 15, 15 Alta LR (6th) 37.

[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 DLR (4th) 56, 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, 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 Twinn***, 2013 FC 910, 438 FTR 264, "[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.

Heard on the 2nd and 3rd days of September, 2015.
Dated at the City of Edmonton, Alberta this 17th day of December, 2015.

D.R.G. Thomas
J.C.Q.B.A.

Appearances:

Janet Hutchison
(Hutchison Law)
and
Eugene Meehan, QC
(Supreme Advocacy LLP)
for the Public Trustee of Alberta / Applicant

Edward H. Molstad, Q.C.
(Parlee McLaws LLP)
for the Sawridge First Nation / Respondent

Doris Bonora
(Dentons LLP)
and
Marco S. Poretti
(Reynolds Mirth Richards & Farmer)
for the 1985 Sawridge Trustees / Respondents

J.J. Kueber, Q.C.
(Bryan & Co.)
for Ronald Twinn, Walter Felix Twin,
Bertha L'Hoirondelle and Clara Midbo

Karen Platten, Q.C.
(McLennan Ross LLP)
For Catherine Twinn

Tab 8

HUTCHISON LAW

Our File: 51433 JLH

SENT BY EMAIL ONLY

March 14, 2016

Parlee McLaws LLP
1500 Manulife Place
10180-101 Street
Edmonton, Alberta
T5J 4K1

Attention: Edward Molstad, Q.C. and Gabrial Joshee-Arnal

Dear Sirs:

Re: Sawridge Band Inter Vivos Settlement (1985 Sawridge Trust); QB Action No. 1103 14112

Thank you for your letter of March 10, 2016. By way of response on the OPGT's 5.13 application on membership:

1. The OPGT understands the December 17, 2015 decision to indicate that the OPGT does still act as litigation representative for some (but no longer all) potential minor beneficiaries (see para. 37 of Thomas' December 17, 2015 decision – Task #1 and #3). The OPGT understands the potential minor beneficiaries may include minors who are children of SFN members or some membership candidates (see para. 37 of Thomas' December 17, 2015 decision – Task #1 and #3). While the OPGT recognizes the other aspects of the December 17, 2015 decision severely restricts which minor children are potential beneficiaries represented by the OPGT, children of existing members and children of individuals who SFN has deemed to have "completed" a membership application do appear to still be contemplated as minors the OPGT could represent.

#190 Broadway Business Square, 130 Broadway Boulevard, Sherwood Park, Alberta, T8H 2A3
Telephone: (780) 417-7871, Fax: (780) 417-7872
Email: jhutchison@jlhlaw.ca Website: www.jlhlaw.ca

2. The Trustees previously provided the names and contact information for the minor children of existing Sawridge Band members. However, that information was only current to December 9, 2013.

As such, the OPGT would accept:

1. An update to the August 30, 2011 and May 14, 2014 tables (provided at Undertaking #31 of Paul Bujold) listing minor children of Sawridge First Nation members; and

2. A written response to advise whether any of the individuals noted in Schedule 3 in your January 18, 2016 letter with pending membership applications have minor children.

If the SFN will voluntarily provide this information, the OPGT will confirm to the Court that, at least while Sawridge #3 remains operative, this satisfies the OPGT's Rule 5.13 application.

By way of response on the OPGT's 5.13 application on assets:

1. Regarding SFN's comments on the Rule 5.13 assets application regarding specificity of the requests, we would remind the SFN that the OPGT did not have the benefit of questioning Mr. Bujold on these matters before filing the application. This limitation was noted in the 5.13 application filed. The OPGT prepared the 5.13 application to the best of its ability given all circumstances noted in the filed application. The OPGT maintain the requests are reasonable and comply with the December 17, 2015 decision.

2. Regarding relevance of the request, on review of the March 11, 2016 correspondence, it is apparent that the Trustees and SFN have a different understanding of the scope of relevance in relation to the aspect of the main application that seeks an order regularizing the transfer of assets to the 1985 Trust. The OPGT remains of the view the requests made in the January 29, 2016 applications are relevant and material to examining whether there were any irregularities in the settlement of assets into the 1985 Trust.

3. The OPGT acknowledges it is unfortunate the deadline for the 5.13 application preceded the OPGT's questioning of Paul Bujold on assets. Had the OPGT been given the opportunity to question Mr. Bujold on assets (including his Affidavit of Records and Answers to Undertakings), it may have been possible to narrow the document requests further, or even obtain all documents from the Trustees. However, the December 17, 2015 decision did not permit the OPGT this option.

4. The OPGT is willing to jointly request that Justice Thomas postpone dealing with the 5.13 asset application until after Mr. Bujold is questioned on assets. As you will gather from our initial response on the litigation plan, we expect that would occur after the May

4, 2016 appeal is decided. If that information provides the OPGT with the information it seeks regarding the asset transfer, the OPGT would certainly review the necessity of the current Rule 5.13 asset application at that time;

5. If the SFN is not agreeable to this joint proposal to Justice Thomas, the OPGT has given instructions to proceed with the Rule 51.3 assets application as filed.

Please do not hesitate to call my directly should you wish to discuss any of the foregoing.

Thank you for your attention to this matter.

Yours truly,

HUTCHISON LAW

PER: JANET L. HUTCHISON
JLH/cm

cc: The Office of the Public Trustee

cc: E. Meehan, Q.C., Supreme Advocacy LLP

cc: M.Poretti, RMRF LLP

cc: D. Bonora, Dentons LLP

cc: P. Kennedy, DLA Piper LLP

cc: K. Platten, Q.C., McLennan Ross LLP

cc: N. Cumming, Q.C., Bryan & Co.

Tab 9

EXHIBIT: 3
QUESTIONING OF: Paul Bujold
Date: July 27, 2016
Allison Hawkins CSR(A)

Doris M. McKenna

From: Meghan Russ <mruss@jlhlaw.ca>
Sent: Thursday, July 07, 2016 4:17 PM
To: doris.bonora@dentons.com; Edward H. Molstad; MPoretti@rmrf.com; kplatten@mross.com; cosualdini@mross.com
Cc: emeehan@supremeadvocacy.ca; mfmajor@supremeadvocacy.ca
Subject: Sawridge Trust - 51433/JLH - Email #1
Attachments: 2016.07.07 ALL COUNSEL.pdf; 2015.09.30-AFFADAVIT-C-TWINN.pdf

To all,

Please find enclosed our correspondence of today's date and electronic copies of the documents referred to in the correspondence.

I will be sending a further email with additional attachments to ensure that the size of attachment does not create difficulties with receipt.

For documents where the only available electronic copy is on the Sawridge Trusts website, we have provided a hyper link directly to the document for your convenience.

1.) Paul Bujold, September 6, 2011 Affidavit- http://sawridgetrusts.ca/upload/files/1/docs/Affidavit%20of%20Paul%20Bujold,%20Procedural%20Court%20Order,%20Justice%20D.R.G.%20Thomas,%201103%2014112%20filed,%201985%20Trust,%20110901.pdf

2.) Paul Bujold Affidavit, filed September 13, 2011 - http://sawridgetrusts.ca/upload/files/1/docs/Affidavit%20of%20Paul%20Bujold%20filed%20for%20Advice%20and%20Direction%20in%20the%201985%20Trust.pdf

3.) Supplemental Affidavit of Paul Bujold, filed September 30, 2011- http://sawridgetrusts.ca/upload/files/1/docs/Supplemental%20Affidavit%20filed%20by%20Paul%20Bujold%20on%20the%20Application%20for%20Advice%20and%20Direction,%20110930.pdf

We have not attached copies of the referenced correspondence from counsel, as they originated from Dentons or Parlee's. However, if copies of those items are required, please do not hesitate to advise us and copies will be scanned in and sent to you.

Thank you for your attention to this matter.

Meghan Russ
Paralegal

Hutchison Law
#190 Broadway Business Square
130 Broadway Boulevard
Sherwood Park, Alberta T8H 2A3
Phone: 780-417-7871
Fax: 780-417-7872

HUTCHISON LAW

Our File: 51433 JLH

SENT BY EMAIL ONLY

July 7, 2016

Reynolds Mirth Richards & Farmer LLP
Suite 3200 Manulife Place
10180 - 101 Street
Edmonton, Alberta T5J 3W8

Attention: Marco Poretti

Dentons LLP
Suite 2900 Manulife Place
10180 – 101 Street
Edmonton, Alberta T5J 3W8

Attention: Doris Bonora

Parlee McLaws LLP
1500 Manulife Place
10180-101 Street
Edmonton, Alberta
T5J 4K1

Attention: Edward Molstad, Q.C.

McLennan Ross LLP
600 McLennan Ross Building
12220 Stony Plain Road
Edmonton, Alberta
T5N 3Y4

Attention: Karen Platten, Q.C. and Crista Osualdini

Dear Sirs and Mesdames:

Re: Sawridge Band Inter Vivos Settlement (1985 Sawridge Trust); QB Action No. 1103 14112

We are writing to provide the list of evidence, and copies of same, that will be referred to in the OPGT's written submissions regarding the Rule 5.13 applications on membership and assets, to be filed August 5, 2016, accordingly to the draft Litigation Plan.

#190 Broadway Business Square, 130 Broadway Boulevard, Sherwood Park, Alberta, T8H 2A3
Telephone: (780) 417-7871, Fax: (780) 417-7872
Email: jhutchison@jlhlaw.ca Website: www.jlhlaw.ca

Rule 5.13 Membership Application:

1.) Transcript of Questioning of Paul Bujold, on May 27 and 28, 2014;

2.) Affidavit of Paul Bujold, filed September 6, 2011;

3.) Affidavit of Paul Bujold, filed September 13, 2011;

4.) Supplemental Affidavit of Paul Bujold, dated September 30, 2011;

5.) Answers to Undertakings of Paul Bujold, particularly UT #19, 24, 28, 29, 31, 32, 33, 35, and 36;

6.) Catherine Twinn's Affidavit dated September 23, 2015, filed in this action on September 30, 2015. Our references will be limited, mainly to para 29. 29(h) will be referenced in relation to any costs applications made by the Respondents;

7.) Parlee McLaw's correspondence dated January 18, 2016; and

8.) Denton's email correspondence, and attached list, dated April 5, 2016;

Rule 5.13 Assets Application:

1.) Transcript of Questioning of Paul Bujold, on May 27 and 28, 2014;

2.) Affidavit of Paul Bujold, filed September 6, 2011;

3.) Affidavit of Paul Bujold, filed September 13, 2011;

4.) Answers to Undertakings of Paul Bujold, particularly UT#12, 13, 14, 15, 16, 17, 18, 38, 39 and 50;

5.) Catherine Twinn's Affidavit dated September 23, 2015, filed in this action on September 30, 2015. Our references will be limited, mainly to para 29. 29(h) will be referenced in relation to any costs applications made by the Respondents; and

6.) Denton's May 13, 2016 email correspondence, re: a proposed clarification re: assets.

We have attached electronic versions of Mr. Bujold's transcripts, Mr. Bujold's Answers to Undertakings, and Catherine Twinn's affidavit. As Mr. Bujold's Affidavits are all available on the Sawridge Trusts Website, as directed by the Court, we have provided hyperlinks to the documents. Please confirm this is sufficient to satisfy your request for copies of the relevant documents.

We note we look forward to the Trustee's response regarding why these three items that were not on the Sawridge Trust website are not yet posted. Our records indicated all of those items were filed with the Court prior to the September 2015 case management meetings.

We understand the once Sawridge First Nation has had an opportunity to review this list, it will advise as to whether it has any intention on examining on Mr. Bujold's or Ms. Twinn's affidavits. Until we have such a position, the OPGT will not expend unnecessary resources responding to the Trustee's questions as set out in the email correspondence from Denton's dated July 4, 2016 regarding SFN's ability to question on these affidavits. We would appreciate some clarification, however, as to why the Trustees are expending resources raising issues that affect the SFN's interests rather than the interests of the Trustees. We look forward to hearing from the Trustee's on that point in due course.

Thank you for your attention to this matter.

Yours truly,

HUTCHISON LAW

PER: JANET L. HUTCHISON
(Signed in the writer's absence to avoid delay)
JLH/mr

Enclosures

cc: Client

cc: E. Meehan, Q.C., Supreme Advocacy LLP

Tab 10

Clerk's Stamp:

COURT FILE NUMBER	1103 14112
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c T-8, AS AMENDED IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust (the "Sawridge Trustees")
DOCUMENT	**CONSENT ORDER**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	
Doris C.E. Bonora Dentons Canada LLP 2900 Manulife Place 10180 – 101 Street Edmonton, AB T5J 3V5 Ph. (780) 423-7188 Fx. (780) 423-7276 File No.: 551860-1	Marco Poretti Reynolds Mirth Richards & Farmer LLP 3200, 10180 – 101 Street Edmonton, AB T5J 3W8 Ph. (780) 425-9510 Fx: (780) 429-3044 File No. 108511-MSP

DATE ON WHICH ORDER WAS PRONOUNCED: _____, 2016

LOCATION WHERE ORDER WAS PRONOUNCED: Edmonton, AB

NAME OF JUSTICE WHO MADE THIS ORDER: Mr. Justice D.R.G. Thomas

CONSENT ORDER

UPON HEARING representations from counsel for the Sawridge Trustees that the Sawridge Trustees have exhausted all reasonable options to obtain a complete documentary record regarding the transfer of assets from the 1982 Trust to the 1985 Trust; AND that the parties to this Consent Order have been given access to all documents regarding the transfer of assets from the 1982 Trust to the 1985 Trust that the Trustees have reviewed; AND that the Trustees are not

seeking an accounting of the assets transferred into the 1982 Trust; AND that the Trustees are not seeking an accounting of the assets transferred into the 1985 Trust; AND UPON noting that assets from the 1982 Trust were transferred into the 1985 Trust; AND UPON noting that little information is available regarding the transfer of assets from the 1982 Trust to the 1985 Trust;

IT IS HEREBY ORDERED THAT:

1. The transfer of assets which occurred in 1985 from the Sawridge Band Trust ("1982 Trust") to the Sawridge Band Inter Vivos Settlement ("1985 Trust") is approved *nunc pro tunc*. The approval of the transfer shall not be deemed to be an accounting of the assets of the 1982 Trust that were transferred and shall not be deemed to be an accounting of the assets in the 1985 Trust that existed upon settlement of the 1985 Trust.

2. Without limiting the generality of the foregoing, the Trustees' application and this Consent Order cannot be relied upon by the Trustees in the future as a basis to oppose or prevent a beneficiary from seeking an accounting from the 1985 Trust, including an accounting to determine the assets that were transferred into the 1985 Trust from the 1982 Trust or an accounting of the assets transferred into the 1982 Trust.

The Honourable Mr. Justice D.R.G. Thomas

CONSENTED TO BY:

Dentons Canada LLP

Doris Bonora
Counsel for Sawridge Trustees

Reynolds Mirth Richards & Farmer LLP

Marco S. Poretti
Counsel for Sawridge Trustees

McLennan Ross LLP

Karen Platten, Q.C.
Counsel for Catherine Twinn as a Trustee of the 1985 Sawridge Trust

Hutchison Law

Janet Hutchison
Counsel for The Office of the Public Guardian and Trustee

Tab 11

Clerk's Stamp:	
COURT FILE NUMBER:	1103 14112
COURT OF QUEEN'S BENCH OF ALBERTA JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A 2000,C. T-8, AS AMENDED IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19, now known as SAWRIDGE FIRST NATION, ON APRIL 15, 1985 (the "1985" Sawridge Trust")
APPLICANTS	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust
DOCUMENT	**ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Chamberlain Hutchison #155, 10403 – 122 Street Edmonton, AB T5N 4C1 Attention: Janet Hutchison Telephone: (780) 423-3661 Fax: (780) 426-1293 File: 51433 JLH

Date on which Judgment Pronounced: June 12, 2012

Location of hearing or trial: Edmonton, Alberta

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

UPON the application of the Public Trustee; AND UPON review of the Affidavits filed in this proceeding; AND UPON review of the filed written submissions; AND UPON hearing the submissions of Counsel for the Public Trustee, Counsel for the Sawridge Trustees and Counsel for the Sawridge First Nation; IT IS HEREBY ORDERED AND DECLARED as follows:

1. The Public Trustee is appointed litigation representative for the 31 minors who are children of current Sawridge First Nation members as well as any minors who are children of applicants seeking to be admitted into membership of the Sawridge First Nation.

2. The Public Trustee shall receive full, and advance, indemnification for its costs for participation in the within proceedings, to be paid by the Sawridge Trust.

3. The Public Trustee will be exempted from any responsibility to pay the costs of the other parties in the within proceeding.

4. The Public Trustee may inquire, on questioning on affidavits, into the process the Sawridge Band uses to determine membership, the Sawridge Band membership definition and into the status and number of Band membership applications that are currently awaiting determination.

5. The Public Trustee is granted costs of this application to be calculated on a solicitor and its own client basis, to be paid by the Sawridge Trust.

6. This Order may be consented to in counterpart and by way of facsimile signature.

Mr. Justice D. R. H. Thomas

CONSENTED TO AS TO FORM AND CONTENT:

REYNOLDS MIRTH RICHARDS & FARMER LLP
Per:

Marco S. Poretti
Solicitors for the Trustees

CHAMBERLAIN HUTCHISON
Per:

Janet Hutchison
Solicitors for the Office of the Public Trustee of Alberta

PARLEE McLAWS LLP
Per:

Edward H. Molstad, Q.C.
Counsel for Sawridge First Nation

MYLES J. KIRVAN - DEPUTY ATTORNEY GENERAL OF CANADA
Per:

E. James Kindrake
Solicitors for the Minister of Indian Affairs and Northern Development

DAVIS LLP
Per:

Priscilla Kennedy
Solicitors for Aline Elizabeth Huzar, June Martha Kolosky and Maurice Stoney

1. The Public Trustee is appointed litigation representative for the 31 minors who are children of current Sawridge First Nation members as well as any minors who are children of applicants seeking to be admitted into membership of the Sawridge First Nation.

2. The Public Trustee shall receive full, and advance, indemnification for its costs for participation in the within proceedings, to be paid by the Sawridge Trust.

3. The Public Trustee will be exempted from any responsibility to pay the costs of the other parties in the within proceeding.

4. The Public Trustee may inquire, on questioning on affidavits, into the process the Sawridge Band uses to determine membership, the Sawridge Band membership definition and into the status and number of Band membership applications that are currently awaiting determination.

5. The Public Trustee is granted costs of this application to be calculated on a solicitor and its own client basis, to be paid by the Sawridge Trust.

6. This Order may be consented to in counterpart and by way of facsimile signature.

Mr. Justice D. R. G. Thomas

CONSENTED TO AS TO FORM AND CONTENT:

REYNOLDS MIRTH RICHARDS & FARMER LLP
Per:

Marco S. Poretti
Solicitors for the Trustees

CHAMBERLAIN HUTCHISON
Per:

Janet Hutchison
Solicitors for the Office of the Public Trustee of Alberta

PARLEE McLAWS LLP
Per:

Edward H. Molstad, Q.C.
Counsel for Sawridge First Nation

MYLES J. KIRVAN - DEPUTY ATTORNEY GENERAL OF CANADA
Per:

E. James Kindrake
Solicitors for the Minister of Indian Affairs and Northern Development

DAVIS LLP
Per:

Priscilla Kennedy
Solicitors for Aline Elizabeth Huzar, June Martha Kolosky and Maurice Stoney

1. The Public Trustee is appointed litigation representative for the 31 minors who are children of current Sawridge First Nation members as well as any minors who are children of applicants seeking to be admitted into membership of the Sawridge First Nation.

2. The Public Trustee shall receive full, and advance, indemnification for its costs for participation in the within proceedings, to be paid by the Sawridge Trust.

3. The Public Trustee will be exempted from any responsibility to pay the costs of the other parties in the within proceeding.

4. The Public Trustee may inquire, on questioning on affidavits, into the process the Sawridge Band uses to determine membership, the Sawridge Band membership definition and into the status and number of Band membership applications that are currently awaiting determination.

5. The Public Trustee is granted costs of this application to be calculated on a solicitor and its own client basis, to be paid by the Sawridge Trust.

6. This Order may be consented to in counterpart and by way of facsimile signature.

Mr. Justice D. R. G. Thomas

CONSENTED TO AS TO FORM AND CONTENT:

REYNOLDS MIRTH RICHARDS & FARMER LLP
Per:

Marco S. Poretti
Solicitors for the Trustees

CHAMBERLAIN HUTCHISON
Per:

Janet Hutchison
Solicitors for the Office of the Public Trustee of Alberta

PARLEE McLAWS LLP
Per:

Edward H. Molstad, Q.C.
Counsel for Sawridge First Nation

MYLES J. KIRVAN - DEPUTY ATTORNEY GENERAL OF CANADA
Per:

E. James Kindrake
Solicitors for the Minister of Indian Affairs and Northern Development

DAVIS LLP
Per:

Priscilla Kennedy
Solicitors for Aline Elizabeth Huzar, June Martha Kolosky and Maurice Stoney

1. The Public Trustee is appointed litigation representative for the 31 minors who are children of current Sawridge First Nation members as well as any minors who are children of applicants seeking to be admitted into membership of the Sawridge First Nation.

2. The Public Trustee shall receive full, and advance, indemnification for its costs for participation in the within proceedings, to be paid by the Sawridge Trust.

3. The Public Trustee will be exempted from any responsibility to pay the costs of the other parties in the within proceeding.

4. The Public Trustee may inquire, on questioning on affidavits, into the process the Sawridge Band uses to determine membership, the Sawridge Band membership definition and into the status and number of Band membership applications that are currently awaiting determination.

5. The Public Trustee is granted costs of this application to be calculated on a solicitor and its own client basis, to be paid by the Sawridge Trust.

6. This Order may be consented to in counterpart and by way of facsimile signature.

Mr. Justice D. R. G. Thomas

CONSENTED TO AS TO FORM AND CONTENT:

REYNOLDS MIRTH RICHARDS & FARMER LLP
Per:

Marco S. Poretti
Solicitors for the Trustees

CHAMBERLAIN HUTCHISON
Per:

Janet Hutchison
Solicitors for the Office of the Public Trustee of Alberta

PARLEE McLAWS LLP
Per:

Edward H. Molstad, Q.C.
Counsel for Sawridge First Nation

MYLES J. KIRVAN - DEPUTY ATTORNEY GENERAL OF CANADA
Per:

E. James Kindrake
Solicitors for the Minister of Indian Affairs and Northern Development

DAVIS LLP
Per:

Priscilla Kennedy
Solicitors for Aline Elizabeth Huzar, June Martha Kolosky and Maurice Stoney

Tab 12

2011 SCC 5
Supreme Court of Canada

R. c. Caron

2011 CarswellAlta 81, 2011 CarswellAlta 82, 2011 SCC 5, [2011] 1 S.C.R. 78, [2011] 4 W.W.R. 1, [2011] S.C.J. No. 5, 14 Admin. L.R. (5th) 30, 264 C.C.C. (3d) 320, 329 D.L.R. (4th) 50, 37 Alta. L.R. (5th) 19, 411 N.R. 89, 499 A.R. 309, 514 W.A.C. 309, 93 W.C.B. (2d) 265, 97 C.P.C. (6th) 205, J.E. 2011-232

Her Majesty The Queen in Right of the Province of Alberta (Appellant) and Gilles Caron (Respondent) and Commissioner of Official Languages for Canada, Canadian Civil Liberties Association, Council of Canadians with Disabilities, Charter Committee on Poverty Issues, Poverty and Human Rights Centre, Women's Legal Education and Action Fund, Association canadienne-française de l'Alberta and David Asper Centre for Constitutional Rights (Interveners)

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

Heard: April 13, 2010
Judgment: February 4, 2011
Docket: 33092

Proceedings: affirming *R. c. Caron* (2009), 1 Alta. L.R. (5th) 199, [2009] 6 W.W.R. 438, (sub nom. *R. v. Caron*) 446 A.R. 362, (sub nom. *R. v. Caron*) 442 W.A.C. 362, 71 C.P.C. (6th) 319, 2009 CarswellAlta 94, 2009 CarswellAlta 95, 2009 ABCA 34, (sub nom. *R. v. Caron*) 241 C.C.C. (3d) 296 (Alta. C.A.); affirming *R. c. Caron* (2007), 84 Alta. L.R. (4th) 146, 2007 CarswellAlta 1413, 2007 CarswellAlta 1414, 2007 ABQB 632, [2008] 3 W.W.R. 628, (sub nom. *R. v. Caron*) 424 A.R. 377 (Alta. Q.B.)

Counsel: Margaret Unsworth, Q.C., Teresa Haykowsky for Appellant
Rupert Baudais for Respondent
Amélie Lavictoire, Kevin Shaar for Intervener, Commissioner of Official Languages for Canada
Benjamin L. Berger for Intervener, Canadian Civil Liberties Association
Gwen Brodsky (written), Melina Buckley (written) for Interveners, Council of Canadians with Disabilities, Charter Committee on Poverty Issues, Poverty and Human Rights Centre, Women's Legal Education and Action Fund
Michel Doucet, Q.C. (written), Mark Power (written), François Larocque (written) for Intervener, Association canadienne-française de l'Alberta
Cheryl Milne (written), Lorne Sossin (written) for Intervener, David Asper Centre for Constitutional Rights

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

Headnote

Motor vehicles — Offences and penalties — Prosecutions — Miscellaneous

Interim costs — Accused was charged with regulatory offence of failure to make left turn in safety — Accused gave notice his defence had constitutional languages question — Accused ensured payment of his legal fees — On adjournment, accused made request of court program for additional funding, but program was abolished —

Accused was denied Legal Aid — Accused brought application for interim costs — Application was granted and $91,046.29 was ordered — It was very special quasi-criminal case that was sufficiently important to justify interim costs — Accused had canvassed all other funding possibilities — Question was one of legal interpretation of linguistic rights and it would be contrary to interests of justice if case was forfeited — Court of Queen's Bench had inherent jurisdiction regarding requests for interim costs to ensure proper administration of justice by rendering assistance to Provincial Court — Crown appealed — Appeal was dismissed — Order for costs was available with respect to quasi-criminal proceedings as real issue was not guilt or innocence but was constitutional question of public importance — Scope of superior court's inherent jurisdiction includes assisting trial in inferior court by awarding interim costs — Inherent jurisdiction to aid is procedural only, but as proceeding was quasi-criminal, it counted as procedural matter — Quasi-criminal cases are appropriate avenues for constitutional challenges — Accused was required to exhaustively seek other funding but was not required to check with every single potential entity — Crown appealed — Appeal dismissed — Superior courts do possess inherent jurisdiction to render assistance to inferior courts to help them more fairly, effectively and properly administer justice — Assistance is not limited to contempt proceedings or any particular categories and can be exercised in many different ways — Case was not ordinary regulatory proceeding as alleged by Crown — Superior court intervention was intended to protect efforts and resources that had already been spent and would have been wasted if matter was allowed to collapse — Supervisory jurisdiction of superior courts over provincial courts in Alberta includes power to order interim funding there in situations where it is essential to administration of justice — Accused had self-funded litigation and had aggressively sought additional funding — Accused had prima facie meritorious case on matter of public importance — If litigation was not funded, case would be lopsided and accused would likely abandon his defence, but that would not resolve issue.

Motor vehicles — Offences and penalties — Prosecutions — Jurisdiction of courts — Miscellaneous

Accused was charged with regulatory offence of failure to make left turn in safety — Accused gave notice his defence had constitutional languages question — Accused ensured payment of his legal fees — On adjournment, accused made request of court program for additional funding, but program was abolished — Accused was denied Legal Aid — Accused brought application for interim costs — Application was granted and $91,046.29 was ordered — It was very special quasi-criminal case that was sufficiently important to justify interim costs — Accused had canvassed all other funding possibilities — Question was one of legal interpretation of linguistic rights and it would be contrary to interests of justice if case was forfeited — Court of Queen's Bench had inherent jurisdiction regarding requests for interim costs to ensure proper administration of justice by rendering assistance to Provincial Court — Crown appealed — Appeal was dismissed — Order for costs was available with respect to quasi-criminal proceedings as real issue was not guilt or innocence but was constitutional question of public importance — Scope of superior court's inherent jurisdiction includes assisting trial in inferior court by awarding interim costs — Inherent jurisdiction to aid is procedural only, but as proceeding was quasi-criminal, it counted as procedural matter — Quasi-criminal cases are appropriate avenues for constitutional challenges — Accused was required to exhaustively seek other funding but was not required to check with every single potential entity — Crown appealed — Appeal dismissed — Superior courts do possess inherent jurisdiction to render assistance to inferior courts to help them more fairly, effectively and properly administer justice — Assistance is not limited to contempt proceedings or any particular categories and can be exercised in many different ways — Case was not ordinary regulatory proceeding as alleged by Crown — Superior court intervention was intended to protect efforts and resources that had already been spent and would have been wasted if matter was allowed to collapse — Supervisory jurisdiction of superior courts over provincial courts in Alberta includes power to order interim funding there in situations where it is essential to administration of justice — Accused had self-funded litigation and had aggressively sought additional funding — Accused had prima facie meritorious case on matter of public importance — If litigation was not funded, case would be lopsided and accused would likely abandon his defence, but that would not resolve issue.

Judges and courts --- Jurisdiction — Superior courts — Miscellaneous

Interim costs in provincial court — Accused was charged with regulatory offence of failure to make left turn in safety — Accused gave notice his defence had constitutional languages question — Accused ensured payment of his legal fees — On adjournment, accused made request of court program for additional funding, but program was abolished — Accused was denied Legal Aid — Accused brought application for interim costs — Application was granted and $91,046.29 was ordered — It was very special quasi-criminal case that was sufficiently important to justify interim costs — Accused had canvassed all other funding possibilities — Question was one of legal interpretation of linguistic rights and it would be contrary to interests of justice if case was forfeited — Court of Queen's Bench had inherent jurisdiction regarding requests for interim costs to ensure proper administration of justice by rendering assistance to Provincial Court — Crown appealed — Appeal was dismissed — Order for costs was available with respect to quasi-criminal proceedings as real issue was not guilt or innocence but was constitutional question of public importance — Scope of superior court's inherent jurisdiction includes assisting trial in inferior court by awarding interim costs — Inherent jurisdiction to aid is procedural only, but as proceeding was quasi-criminal, it counted as procedural matter — Quasi-criminal cases are appropriate avenues for constitutional challenges — Accused was required to exhaustively seek other funding but was not required to check with every single potential entity — Crown appealed — Appeal dismissed — Superior courts do possess inherent jurisdiction to render assistance to inferior courts to help them more fairly, effectively and properly administer justice — Assistance is not limited to contempt proceedings or any particular categories and can be exercised in many different ways — Case was not ordinary regulatory proceeding as alleged by Crown — Superior court intervention was intended to protect efforts and resources that had already been spent and would have been wasted if matter was allowed to collapse — Supervisory jurisdiction of superior courts over provincial courts in Alberta includes power to order interim funding there in situations where it is essential to administration of justice — Accused had self-funded litigation and had aggressively sought additional funding — Accused had prima facie meritorious case on matter of public importance — If litigation was not funded, case would be lopsided and accused would likely abandon his defence, but that would not resolve issue.

Véhicules à moteur --- Infractions et sanctions — Poursuites — Divers

Provision pour frais — Accusé a été inculpé d'avoir commis une infraction réglementaire en négligeant de faire un virage à gauche en toute sécurité — Accusé a avisé la Cour que sa défense soulevait une question constitutionnelle d'ordre linguistique — Accusé a pris les mesures nécessaires pour payer ses honoraires légaux — Lors d'un ajournement, l'accusé a demandé du financement supplémentaire dans le cadre d'un programme judiciaire mais le programme avait été aboli — Ses demandes d'aide juridique ont été rejetées — Accusé a déposé une demande de provision pour frais — Demande a été accordée et il a été ordonné qu'un montant de 91 046,29 $ soit payé — Cette affaire quasi-criminelle était très spéciale, suffisamment spéciale pour justifier qu'une ordonnance concernant la provision pour frais soit rendue — Accusé avait étudié toutes les possibilités de financement — Puisque la question avait trait à l'interprétation juridique de droits linguistiques, il serait contraire aux intérêts de la justice que le plaideur renonce à agir en justice — Cour du Banc de la Reine avait une compétence inhérente concernant les demandes de provision pour frais requise pour une saine administration de la justice lui permettant de prêter assistance à la Cour provinciale — Ministère public a interjeté appel — Appel a été rejeté — Il était possible d'ordonner la provision pour frais en regard d'une procédure quasi-criminelle puisque la véritable question n'était pas de déterminer la culpabilité ou l'innocence mais était une question constitionnelle revêtant une importance pour le public — Compétence inhérente de la cour supérieure englobait le pouvoir d'assister un tribunal d'une instance inférieure en accordant une provision pour frais — Compétence inhérente permettant de venir en aide est uniquement de nature procédurale, mais comme l'accusation était quasi-criminelle, elle devait être considérée comme une question de procédure — Contestations constitutionnelles peuvent être soulevées dans les affaires quasi-criminelles — On s'attendait à ce que l'accusé fasse une recherche rigoureuse pour trouver d'autres sources de financement mais on ne s'attendait pas à ce qu'il entre en communication avec toute entité potentielle — Ministère public a formé un pourvoi — Pourvoi rejeté — Cours supérieures ont effectivement le pouvoir inhérent de prêter assistance aux tribunaux d'instance inférieure afin qu'ils administrent la justice de façon plus équitable, plus efficace et plus adéquate — Assistance ne se limite pas aux procédures pour outrage au tribunal ou toutes autres catégories de procédure et peut être offerte de plusieurs

façons — Contrairement à ce qu'avançait le ministère public, il ne s'agissait pas ici d'une procédure relative à une infraction réglementaire banale — Intervention de la cour supérieure avait pour but de protéger les efforts et les ressources qui avaient déjà été engagés et qui seraient gaspillés si l'affaire devait être abandonnée — Pouvoir des cours supérieures de surveiller les cours provinciales en Alberta englobait le pouvoir d'ordonner une provision pour financement lorsque cela s'avérait essentiel pour l'administration de la justice — Accusé avait lui-même financé les procédures avec son argent et n'avait pas ménagé les efforts pour trouver du financement additionnel — Cause de l'accusé valait prima facie la peine d'être instruite compte tenu de son importance pour le public — Si on ne trouvait pas de financement dans le cadre des procédures, on se retrouverait devant une situation marquée par l'inégalité et l'accusé devrait probablement abandonner sa défense, mais cela ne règlerait pas la question.

Véhicules à moteur --- Infractions et sanctions — Poursuites — Compétence des tribunaux — Divers

Accusé a été inculpé d'avoir commis une infraction réglementaire en négligeant de faire un virage à gauche en toute sécurité — Accusé a avisé la Cour que sa défense soulevait une question constitutionnelle d'ordre linguistique — Accusé a pris les mesures nécessaires pour payer ses honoraires légaux — Lors d'un ajournement, l'accusé a demandé du financement supplémentaire dans le cadre d'un programme judiciaire mais le programme avait été aboli — Ses demandes d'aide juridique ont été rejetées — Accusé a déposé une demande de provision pour frais — Demande a été accordée et il a été ordonné qu'un montant de 91 046,29 $ soit payé — Cette affaire quasi-criminelle était très spéciale, suffisamment spéciale pour justifier qu'une ordonnance concernant la provision pour frais soit rendue — Accusé avait étudié toutes les possibilités de financement — Puisque la question avait trait à l'interprétation juridique de droits linguistiques, il serait contraire aux intérêts de la justice que le plaideur renonce à agir en justice — Cour du Banc de la Reine avait une compétence inhérente concernant les demandes de provision pour frais requise pour une saine administration de la justice lui permettant de prêter assistance à la Cour provinciale — Ministère public a interjeté appel — Appel a été rejeté — Il était possible d'ordonner la provision pour frais en regard d'une procédure quasi-criminelle puisque la véritable question n'était pas de déterminer la culpabilité ou l'innocence mais était une question constitionnelle revêtant une importance pour le public — Compétence inhérente de la cour supérieure englobait le pouvoir d'assister un tribunal d'une instance inférieure en accordant une provision pour frais — Compétence inhérente permettant de venir en aide est uniquement de nature procédurale, mais comme l'accusation était quasi-criminelle, elle devait être considérée comme une question de procédure — Contestations constitutionnelles peuvent être soulevées dans les affaires quasi-criminelles — On s'attendait à ce que l'accusé fasse une recherche rigoureuse pour trouver d'autres sources de financement mais on ne s'attendait pas à ce qu'il entre en communication avec toute entité potentielle — Ministère public a formé un pourvoi — Pourvoi rejeté — Cours supérieures ont effectivement le pouvoir inhérent de prêter assistance aux tribunaux d'instance inférieure afin qu'ils administrent la justice de façon plus équitable, plus efficace et plus adéquate — Assistance ne se limite pas aux procédures pour outrage au tribunal ou toutes autres catégories de procédure et peut être offerte de plusieurs façons — Contrairement à ce qu'avançait le ministère public, il ne s'agissait pas ici d'une procédure relative à une infraction réglementaire banale — Intervention de la cour supérieure avait pour but de protéger les efforts et les ressources qui avaient déjà été engagés et qui seraient gaspillés si l'affaire devait être abandonnée — Pouvoir des cours supérieures de surveiller les cours provinciales en Alberta englobait le pouvoir d'ordonner une provision pour financement lorsque cela s'avérait essentiel pour l'administration de la justice — Accusé avait lui-même financé les procédures avec son argent et n'avait pas ménagé les efforts pour trouver du financement additionnel — Cause de l'accusé valait prima facie la peine d'être instruite compte tenu de son importance pour le public — Si on ne trouvait pas de financement dans le cadre des procédures, on se retrouverait devant une situation marquée par l'inégalité et l'accusé devrait probablement abandonner sa défense, mais cela ne règlerait pas la question.

Juges et tribunaux --- Compétence — Cours supérieures — Divers

Provision pour frais devant une cour provinciale — Accusé a été inculpé d'avoir commis une infraction réglementaire en négligeant de faire un virage à gauche en toute sécurité — Accusé a avisé la Cour que sa défense soulevait une question constitutionnelle d'ordre linguistique — Accusé a pris les mesures nécessaires pour payer ses honoraires légaux — Lors d'un ajournement, l'accusé a demandé du financement supplémentaire dans le cadre d'un programme

judiciaire mais le programme avait été aboli — Ses demandes d'aide juridique ont été rejetées — Accusé a déposé une demande de provision pour frais — Demande a été accordée et il a été ordonné qu'un montant de 91 046,29 $ soit payé — Cette affaire quasi-criminelle était très spéciale, suffisamment spéciale pour justifier qu'une ordonnance concernant la provision pour frais soit rendue — Accusé avait étudié toutes les possibilités de financement — Puisque la question avait trait à l'interprétation juridique de droits linguistiques, il serait contraire aux intérêts de la justice que le plaideur renonce à agir en justice — Cour du Banc de la Reine avait une compétence inhérente concernant les demandes de provision pour frais requise pour une saine administration de la justice lui permettant de prêter assistance à la Cour provinciale — Ministère public a interjeté appel — Appel a été rejeté — Il était possible d'ordonner la provision pour frais en regard d'une procédure quasi-criminelle puisque la véritable question n'était pas de déterminer la culpabilité ou l'innocence mais était une question constitionnelle revêtant une importance pour le public — Compétence inhérente de la cour supérieure englobait le pouvoir d'assister un tribunal d'une instance inférieure en accordant une provision pour frais — Compétence inhérente permettant de venir en aide est uniquement de nature procédurale, mais comme l'accusation était quasi-criminelle, elle devait être considérée comme une question de procédure — Contestations constitutionnelles peuvent être soulevées dans les affaires quasi-criminelles — On s'attendait à ce que l'accusé fasse une recherche rigoureuse pour trouver d'autres sources de financement mais on ne s'attendait pas à ce qu'il entre en communication avec toute entité potentielle — Ministère public a formé un pourvoi — Pourvoi rejeté — Cours supérieures ont effectivement le pouvoir inhérent de prêter assistance aux tribunaux d'instance inférieure afin qu'ils administrent la justice de façon plus équitable, plus efficace et plus adéquate — Assistance ne se limite pas aux procédures pour outrage au tribunal ou toutes autres catégories de procédure et peut être offerte de plusieurs façons — Contrairement à ce qu'avançait le ministère public, il ne s'agissait pas ici d'une procédure relative à une infraction réglementaire banale — Intervention de la cour supérieure avait pour but de protéger les efforts et les ressources qui avaient déjà été engagés et qui seraient gaspillés si l'affaire devait être abandonnée — Pouvoir des cours supérieures de surveiller les cours provinciales en Alberta englobait le pouvoir d'ordonner une provision pour financement lorsque cela s'avérait essentiel pour l'administration de la justice — Accusé avait lui-même financé les procédures avec son argent et n'avait pas ménagé les efforts pour trouver du financement additionnel — Cause de l'accusé valait prima facie la peine d'être instruite compte tenu de son importance pour le public — Si on ne trouvait pas de financement dans le cadre des procédures, on se retrouverait devant une situation marquée par l'inégalité et l'accusé devrait probablement abandonner sa défense, mais cela ne règlerait pas la question.

The accused was charged with the regulatory offence of failure to make a left turn in safety. The accused gave notice to the Court that his defence consisted of a constitutional languages question as he was a Francophone and the materials were entirely in English. The accused ensured payment of his lawyer's fees for the anticipated trial but on adjournment the accused made a request of a court program for additional funding. The program was abolished before the additional funding could be granted. The accused was denied Legal Aid. An interim order provided that the Crown's expert fees be paid for continuation of the trial. The accused brought an application for interim costs in the Court of Queen's Bench. The application was granted and the amount of $91,046.29 was ordered to be paid to the accused as interim costs. The Court used its inherent jurisdiction to order costs as the case was a very special quasi-criminal matter that was sufficiently special to justify the order for interim costs. The accused had no realistic means of paying the litigation fees and he had exhausted all other possibilities for funding. The Court found that as the question was one of legal interpretation of linguistic rights, it was contrary to the interests of justice if the chance to pursue the case was forfeited due to a lack of means. The Crown appealed.

The appeal was dismissed and the Court of Appeal found that the trial judge made no error in ordering interim costs. The real issue was not the accused's guilt or innocence but was a constitutional question of public importance. The Court found that the scope of the superior court's inherent jurisdiction includes assisting a trial in an inferior court by awarding interim costs. The inherent jurisdiction to aid is procedural only, but as the proceeding was quasi-criminal, it counted as a procedural matter. The trial judge did not err in applying the test. The accused was required

to exhaustively seek other funding but was not required to check with absolutely every person, organization or institution that might be remotely interested in the question. The Crown appealed.

Held: The appeal was dismissed.

Per Binnie J. (McLachlin C.J.C., LeBel, Deschamps, Fish, Charron, Rothstein, Cromwell JJ. concurring): The Court of Appeal and the trial judge were correct in the application of the test for funding and their rulings on the appropriateness of the Court's use of its inherent jurisdiction. The question that was faced by the Court was a fundamental aspect of the rule of law in Alberta, and as the potential injustice flowed not only to the accused but also affected society at large, it was an appropriate exercise of its jurisdiction. The accused's success would have wide impact and require Alberta to re-enact most of its legislation, and that counted as sufficiently special. The inherent jurisdiction of the superior court includes making interim costs orders for a lower court. That assistance can be rendered in many different ways and is not limited to authorizations for a provincial court to award costs in legislation such as the Court of Queen's Bench Act, the Judicature Act, and the Alberta Rules of Court.

The Court was correct in awarding interim costs to the accused. The accused had funded litigation with his own money and had aggressively sought additional funding. The accused was not required to launch exhaustive fundraising appeal and it was not realistic given his trial schedule. The accused had a prima facie meritorious case on a matter of public importance. The issues related to the community and were not previously resolved. The abandonment of the case would be a waste of considerable already expended resources and in that situation it was appropriate for the Court to exercise its jurisdiction

Per Abella J. (concurring): The appeal should be dismissed. The unique circumstances of the case did appropriately attract the interim costs award. However, it is important that it be understood that there was no expansion of the common law authority of a superior court in the exercise of its inherent jurisdiction. That inherent jurisdiction is not a broad plenary power to assist but must be interpreted in light of evolving jurisprudence. Intervention must be limited to actions required by the superior court to avoid injustice and must acknowledge and reconcile existing powers of statutorily created tribunals.

L'accusé a été inculpé d'avoir commis une infraction réglementaire en négligeant de faire un virage à gauche en toute sécurité. L'accusé a avisé la Cour que sa défense consistait en une contestation constitutionnelle fondée sur ses droits linguistiques, puisqu'il était francophone et que les documents étaient entièrement rédigés en anglais. L'accusé a pris les mesures nécessaires pour payer les honoraires de son avocat en vue du procès mais, lors d'un ajournement, l'accusé a demandé du financement supplémentaire dans le cadre d'un programme judiciaire. Ce programme a été aboli avant que le financement supplémentaire puisse être accordé. Ses demandes d'aide juridique ont été rejetées. Une ordonnance a été rendue afin que ce soit le ministère public qui paie les honoraires d'experts pour la continuation du procès. L'accusé a déposé une demande de provision pour frais devant la Cour du Banc de la Reine. La demande a été accordée et il a été ordonné qu'un montant de 91 046,29 $ soit payé à l'accusé à titre de provision pour frais. La Cour a eu recours à sa compétence inhérente pour ordonner les frais étant donné que cette affaire quasi-criminelle était très spéciale, suffisamment spéciale pour justifier qu'une ordonnance concernant la provision pour frais soit rendue. L'accusé n'avait véritablement pas les moyens de payer les frais occasionnés par ce litige, et toutes autres possibilités de financement avaient été étudiées, mais en vain. Puisque la question avait trait à l'interprétation juridique de droits linguistiques, la Cour a conclu qu'il serait contraire aux intérêts de la justice que le plaideur renonce à agir en justice parce qu'il n'en avait pas les moyens. Le ministère public a interjeté appel.

L'appel a été rejeté, la Cour d'appel ayant conclu que le juge de première instance n'avait pas commis d'erreur en ordonnant la provision pour frais. La véritable question n'était pas de déterminer la culpabilité ou l'innocence de l'accusé mais soulevait une question constitionnelle revêtant une importance pour le public. La Cour a conclu que la compétence inhérente de la cour supérieure englobait le pouvoir d'assister un tribunal d'instance inférieure

en accordant une provision pour frais. La compétence inhérente permettant de venir en aide est uniquement de nature procédurale, mais comme l'accusation était quasi-criminelle, elle devait être considérée comme une question de procédure. Le juge de première instance n'a pas commis d'erreur en appliquant le test. On s'attendait à ce que l'accusé fasse une recherche rigoureuse pour trouver d'autres sources de financement mais on ne s'attendait pas à ce qu'il s'adresse à chaque personne, organisme ou institution susceptibles d'être le moindrement intéressés par la question. Le ministère public a formé un pourvoi.

Arrêt: Le pourvoi a été rejeté.

Binnie, J. (McLachlin, J.C.C., LeBel, Deschamps, Fish, Charron, Rothstein, Cromwell, JJ., souscrivant à son opinion) : La Cour d'appel et le juge de première instance ont à bon droit appliqué le critère relatif au financement et c'était également à bon droit qu'ils ont statué sur le caractère approprié du recours de la cour à sa compétence inhérente. La question soumise au tribunal concernait un aspect fondamental de la primauté du droit en Alberta et comme l'injustice potentielle affectait non seulement l'accusé mais la société en général, il s'agissait d'un exercice approprié de sa compétence. S'il fallait que l'accusé obtienne gain de cause, cela créerait un impact majeur et obligerait la province d'Alberta à adopter à nouveau la plupart de ses lois, ce qui était considéré comme étant suffisamment particulier. La compétence inhérente de la cour supérieure englobe le pouvoir de faire des ordonnances concernant la provision pour frais pour des instances devant une cour inférieure. Cette aide peut être rendue de plusieurs façons et n'est pas limitée aux autorisations permettant aux tribunaux provinciaux de rendre une ordonnance concernant les frais que l'on retrouve dans la législation, telle que la Court of Queen's Bench Act, la Judicature Act, et les Alberta Rules of Court.

La Cour a eu raison d'octroyer une provision pour frais en faveur de l'accusé. L'accusé avait lui-même financé les procédures avec son argent et n'avait pas ménagé les efforts pour trouver du financement additionnel. On ne s'attendait pas à ce que l'accusé mène une collecte de fonds d'envergure, ce qui n'était pas réaliste compte tenu de l'échéancier du procès. La cause de l'accusé valait prima facie la peine d'être instruite compte tenu de son importance pour le public. Les questions en litige se rapportaient à la communauté et n'avaient pas été réglées par le passé. Abandonner l'affaire serait une perte considérable de ressources déjà engagées, de sorte qu'il était approprié que la Cour exerce sa compétence.

Abella, J. (souscrivant à l'opinion des juges majoritaires) : Le pourvoi devrait être rejeté. Les circonstances particulières de cette affaire justifiaient qu'une provision pour frais soit octroyée. En revanche, il était important que l'on comprenne qu'on ne pouvait pas élargir la portée du pouvoir que la common law accorde à une cour supérieure dans l'exercice de sa compétence inhérente. Il ne faut pas voir cette compétence inhérente comme un plein pouvoir d'assistance mais il faut plutôt l'interpréter conformément à l'évolution de la jurisprudence. L'intervention doit être limitée aux actions requises de la cour supérieure pour éviter les injustices et doit prendre en considération et se conformer aux pouvoirs des tribunaux créés par la loi déjà en place.

Table of Authorities

Cases considered by *Binnie J.*:

Alberta v. Lefebvre (1993), 8 Alta. L.R. (3d) 37, (sub nom. *Lefebvre v. Alberta*) 135 A.R. 338, (sub nom. *Lefebvre v. Alberta*) 33 W.A.C. 338, [1993] 3 W.W.R. 436, (sub nom. *R. v. Lefebvre*) 100 D.L.R. (4th) 591, 1993 CarswellAlta 286 (Alta. C.A.) — referred to

Alberta v. Lefebvre (1993), [1993] 7 W.W.R. lxviii (note), 12 Alta. L.R. (3d) xli (note), (sub nom. *Lefebvre v. Alberta*) 164 N.R. 159 (note), 162 A.R. 157 (note), 83 W.A.C. 157 (note), (sub nom. *R. v. Lefebvre*) 105 D.L.R. (4th) vi (note), [1993] 3 S.C.R. vii (note) (S.C.C.) — referred to

Bilodeau v. Manitoba (Attorney General) (1986), (sub nom. *R. v. Bilodeau*) 205 C.C.C. (3d) 289, 67 N.R. 108, 27 D.L.R. (4th) 39, 1986 CarswellMan 312, 1986 CarswellMan 402, [1986] 1 S.C.R. 449, 42 Man. R. (2d) 242, [1986] 3 W.W.R. 673 (S.C.C.) — referred to

British Columbia (Minister of Forests) v. Okanagan Indian Band (2003), 43 C.P.C. (5th) 1, 114 C.R.R. (2d) 108, [2004] 2 W.W.R. 252, 313 N.R. 84, [2003] 3 S.C.R. 371, 2003 SCC 71, 2003 CarswellBC 3040, 2003 CarswellBC 3041, 233 D.L.R. (4th) 577, [2004] 1 C.N.L.R. 7, 189 B.C.A.C. 161, 309 W.A.C. 161, 21 B.C.L.R. (4th) 209 (S.C.C.) — followed

Canada (Human Rights Commission) v. Canadian Liberty Net (1998), 157 D.L.R. (4th) 385, 1998 CarswellNat 388, 224 N.R. 241, 31 C.H.R.R. D/433, 22 C.P.C. (4th) 1, 50 C.R.R. (2d) 189, [1998] 1 S.C.R. 626, 147 F.T.R. 305 (note), 1998 CarswellNat 387, 6 Admin. L.R. (3d) 1 (S.C.C.) — referred to

Cunningham v. Lilles (2010), (sub nom. *R. v. Cunningham*) [2010] 1 S.C.R. 331, 480 W.A.C. 280, 283 B.C.A.C. 280, (sub nom. *R. v. Cunningham*) 317 D.L.R. (4th) 1, (sub nom. *R. v. Cunningham*) 254 C.C.C. (3d) 1, 73 C.R. (6th) 1, 399 N.R. 326, 2010 CarswellYukon 21, 2010 CarswellYukon 22, 2010 SCC 10 (S.C.C.) — referred to

Forest v. Manitoba (Attorney General) (1979), [1979] 2 S.C.R. 1032, 101 D.L.R. (3d) 385, 30 N.R. 213, [1980] 2 W.W.R. 758, 2 Man. R. (2d) 109, 49 C.C.C. (2d) 353, 1979 CarswellMan 150, 2 Man. R. 109, 1979 CarswellMan 159 (S.C.C.) — considered

Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue Agency) (2007), 2007 SCC 2, 2007 CarswellBC 78, 2007 CarswellBC 79, 215 C.C.C. (3d) 449, 62 B.C.L.R. (4th) 40, 53 Admin. L.R. (4th) 153, 150 C.R.R. (2d) 189, 275 D.L.R. (4th) 1, (sub nom. *Little Sisters Book & Art Emporium v. Canada*) [2007] 1 S.C.R. 38, (sub nom. *Little Sisters Book & Art Emporium v. Minister of National Revenue*) 235 B.C.A.C. 1, (sub nom. *Little Sisters Book & Art Emporium v. Minister of National Revenue*) 388 W.A.C. 1, (sub nom. *Little Sisters Book and Art Emporium v. Minister of National Revenue*) 356 N.R. 83, 37 C.P.C. (6th) 1 (S.C.C.) — followed

MacDonald v. Montreal (City) (1986), [1986] 1 S.C.R. 460, 27 D.L.R. (4th) 321, (sub nom. *Montreal (City) v. MacDonald*) 67 N.R. 1, 25 C.C.C. (3d) 481, 1986 CarswellQue 110, 1986 CarswellQue 110F (S.C.C.) — referred to

MacMillan Bloedel Ltd. v. Simpson (1995), [1995] 4 S.C.R. 725, [1996] 2 W.W.R. 1, 14 B.C.L.R. (3d) 122, 44 C.R. (4th) 277, 130 D.L.R. (4th) 385, 103 C.C.C. (3d) 225, 191 N.R. 260, 33 C.R.R. (2d) 123, 68 B.C.A.C. 161, 112 W.A.C. 161, 1995 CarswellBC 974, 1995 CarswellBC 1153 (S.C.C.) — considered

Ordon Estate v. Grail (1998), (sub nom. *Ordon v. Grail*) 232 N.R. 201, 40 O.R. (3d) 639 (headnote only), [1998] 3 S.C.R. 437, 1998 CarswellOnt 4391, 1999 A.M.C. 994, 1998 CarswellOnt 4390, (sub nom. *Ordon v. Grail*) 115 O.A.C. 1, 166 D.L.R. (4th) 193 (S.C.C.) — referred to

Paquette v. Canada (1990), (sub nom. *R. v. Paquette*) 14 W.A.C. 388, (sub nom. *R. v. Paquette*) 125 A.R. 388, (sub nom. *R. v. Paquette*) 73 D.L.R. (4th) 575, (sub nom. *R. v. Paquette*) 59 C.C.C. (3d) 134, (sub nom. *R. v. Paquette*) [1990] 2 S.C.R. 1103, (sub nom. *R. v. Paquette*) [1990] 6 W.W.R. 577, (sub nom. *R. v. Paquette*) 137 N.R. 232, (sub nom. *R. v. Paquette*) 76 Alta. L.R. (2d) 194, 1990 CarswellAlta 160, 1990 CarswellAlta 659 (S.C.C.) — considered

R. c. Caron (2006), (sub nom. *R. v. Caron*) 416 A.R. 63, 2006 ABPC 278, 2006 CarswellAlta 2031 (Alta. Prov. Ct.) — referred to

R. c. Caron (2007), 413 A.R. 146, 2007 CarswellAlta 522, 2007 CarswellAlta 523, 2007 ABQB 262, 75 Alta. L.R. (4th) 287 (Alta. Q.B.) — referred to

R. c. Caron (2008), 2008 CarswellAlta 1046, 2008 ABPC 232, 95 Alta. L.R. (4th) 307, (sub nom. *R. v. Caron*) 450 A.R. 204, [2008] 12 W.W.R. 675 (Alta. Prov. Ct.) — referred to

R. c. Caron (2009), (sub nom. *R. v. Caron*) 476 A.R. 198, [2010] 8 W.W.R. 318, 2009 CarswellAlta 2188, 2009 CarswellAlta 2189, 2009 ABQB 745, 23 Alta. L.R. (5th) 321 (Alta. Q.B.) — considered

R. c. Caron (2010), 2010 ABCA 343, 2010 CarswellAlta 2206, 2010 CarswellAlta 2207 (Alta. C.A.) — referred to

R. v. Marshall (2005), 15 C.E.L.R. (3d) 163, 235 N.S.R. (2d) 151, 747 A.P.R. 151, [2005] 2 S.C.R. 220, (sub nom. *R. v. Bernard*) 255 D.L.R. (4th) 1, [2005] 3 C.N.L.R. 214, (sub nom. *R. v. Bernard*) 198 C.C.C. (3d) 29, 287 N.B.R. (2d) 206, 750 A.P.R. 206, 2005 CarswellNS 317, 2005 CarswellNS 318, 2005 SCC 43, 336 N.R. 22 (S.C.C.) — referred to

R. v. Mercure (1988), [1988] 1 S.C.R. 234, [1988] 2 W.W.R. 577, 48 D.L.R. (4th) 1, 83 N.R. 81, 65 Sask. R. 1, 39 C.C.C. (3d) 385, 1988 CarswellSask 251, 1988 CarswellSask 462 (S.C.C.) — considered

R. v. Peel Regional Police Service (2000), [2000] O.T.C. 821, 2000 CarswellOnt 4406, (sub nom. *R. v. Peel Regional Police Service, Chief of Police*) 149 C.C.C. (3d) 356 (Ont. S.C.J.) — considered

R. v. Rain (1998), 1998 CarswellAlta 889, 68 Alta. L.R. (3d) 371, [1999] 7 W.W.R. 652, 1998 ABCA 315, 130 C.C.C. (3d) 167, 223 A.R. 359, 183 W.A.C. 359, 56 C.R.R. (2d) 219 (Alta. C.A.) — referred to

R. c. Rémillard (2009), (sub nom. *R. v. Rémillard*) 478 W.A.C. 17, (sub nom. *R. v. Rémillard*) 202 C.R.R. (2d) 212, (sub nom. *R. v. Rémillard*) 251 Man. R. (2d) 17, 2009 CarswellMan 528, 2009 CarswellMan 529, 2009 MBCA 112, (sub nom. *R. v. Rémillard*) 312 D.L.R. (4th) 612, 63 M.P.L.R. (4th) 23, 87 M.V.R. (5th) 10, (sub nom. *R. v. Rémillard*) 249 C.C.C. (3d) 44, [2010] 2 W.W.R. 230 (Man. C.A.) — referred to

R. v. Rowbotham (1988), 25 O.A.C. 321, 35 C.R.R. 207, 1988 CarswellOnt 58, 41 C.C.C. (3d) 1, 63 C.R. (3d) 113 (Ont. C.A.) — referred to

Reference re Language Rights (1992), 1992 CarswellMan 219, [1992] 2 W.W.R. 385, [1992] 1 S.C.R. 212, (sub nom. *Manitoba Language Rights Reference (No. 2)*) 76 Man. R. (2d) 124, (sub nom. *Manitoba Language Rights Reference (No. 2)*) 10 W.A.C. 124, 88 D.L.R. (4th) 385, (sub nom. *Manitoba Language Rights Reference (No. 2)*) 133 N.R. 88, 1992 CarswellMan 96 (S.C.C.) — considered

Société des Acadiens & Acadiennes du Nouveau-Brunswick c. R. (2008), 60 M.V.R. (5th) 1, (sub nom. *Societe des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*) 372 N.R. 370, (sub nom. *Société des Acadiens & Acadiennes du Nouveau-Brunswick Inc. v. Canada*) 170 C.R.R. (2d) 114, 2008 CarswellNat 840, 2008 CarswellNat 841, 2008 SCC 15, (sub nom. *Société des Acadiens & Acadiennes du Nouveau-Brunswick Inc. v. Canada*) [2008] 1 S.C.R. 383, (sub nom. *Société des Acadiens & Acadiennes du Nouveau-Brunswick Inc. v. Canada*) 292 D.L.R. (4th) 217 (S.C.C.) — referred to

U.N.A. v. Alberta (Attorney General) (1992), [1992] 3 W.W.R. 481, 89 D.L.R. (4th) 609, 71 C.C.C. (3d) 225, 135 N.R. 321, 92 C.L.L.C. 14,023, 1 Alta. L.R. (3d) 129, 13 C.R. (4th) 1, 125 A.R. 241, 14 W.A.C. 241, [1992] 1 S.C.R. 901, 9 C.R.R. (2d) 29, [1992] Alta. L.R.B.R. 137, 1992 CarswellAlta 10, 1992 CarswellAlta 465 (S.C.C.) — considered

Cases considered by *Abella J.*:

ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board) (2006), 263 D.L.R. (4th) 193, 344 N.R. 293, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, 2006 CarswellAlta 139, 2006 CarswellAlta 140, 2006 SCC 4, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, [2006] 1 S.C.R. 140 (S.C.C.) — referred to

Bell Canada v. Canadian Radio-Television & Telecommunications Commission (1989), 38 Admin. L.R. 1, [1989] 1 S.C.R. 1722, 60 D.L.R. (4th) 682, 97 N.R. 15, 1989 CarswellNat 586, 1989 CarswellNat 697 (S.C.C.) — referred to

British Columbia (Minister of Forests) v. Okanagan Indian Band (2003), 43 C.P.C. (5th) 1, 114 C.R.R. (2d) 108, [2004] 2 W.W.R. 252, 313 N.R. 84, [2003] 3 S.C.R. 371, 2003 SCC 71, 2003 CarswellBC 3040, 2003 CarswellBC 3041, 233 D.L.R. (4th) 577, [2004] 1 C.N.L.R. 7, 189 B.C.A.C. 161, 309 W.A.C. 161, 21 B.C.L.R. (4th) 209 (S.C.C.) — considered

Canadian Broadcasting Corp. v. New Brunswick (Attorney General) (1996), 2 B.H.R.C. 210, 2 C.R. (5th) 1, 110 C.C.C. (3d) 193, [1996] 3 S.C.R. 480, 139 D.L.R. (4th) 385, 182 N.B.R. (2d) 81, 463 A.P.R. 81, 39 C.R.R. (2d) 189, 203 N.R. 169, 1996 CarswellNB 462, 1996 CarswellNB 463 (S.C.C.) — referred to

Canadian Broadcasting League v. Canadian Radio-Television & Telecommunications Commission (1982), 138 D.L.R. (3d) 512, 43 N.R. 77, [1983] 1 F.C. 182, 67 C.P.R. (2d) 49, 1982 CarswellNat 71F, 1982 CarswellNat 71 (Fed. C.A.) — referred to

Canadian Broadcasting League v. Canadian Radio-Television & Telecommunications Commission (1985), [1985] 1 S.C.R. 174, 57 N.R. 76, 1985 CarswellNat 671F, 1985 CarswellNat 671 (S.C.C.) — referred to

Children's Aid Society of Huron (County) v. P. (C.) (2002), 2002 CarswellOnt 162, [2002] O.T.C. 39 (Ont. S.C.J.) — referred to

Chrysler Canada Ltd. v. Canada (Competition Tribunal) (1992), 42 C.P.R. (3d) 353, 138 N.R. 321, 92 D.L.R. (4th) 609, [1992] 2 S.C.R. 394, 7 B.L.R. (2d) 1, 12 Admin. L.R. (2d) 1, 1992 CarswellNat 4, 1992 CarswellNat 657 (S.C.C.) — referred to

Cunningham v. Lilles (2010), (sub nom. *R. v. Cunningham*) [2010] 1 S.C.R. 331, 480 W.A.C. 280, 283 B.C.A.C. 280, (sub nom. *R. v. Cunningham*) 317 D.L.R. (4th) 1, (sub nom. *R. v. Cunningham*) 254 C.C.C. (3d) 1, 73 C.R. (6th) 1, 399 N.R. 326, 2010 CarswellYukon 21, 2010 CarswellYukon 22, 2010 SCC 10 (S.C.C.) — referred to

Dow Chemical Canada Inc. v. Union Gas Ltd. (1982), 1982 CarswellOnt 753, 141 D.L.R. (3d) 641 (Ont. Div. Ct.) — referred to

Dow Chemical Canada Inc. v. Union Gas Ltd. (1983), 3 Admin. L.R. 314, 150 D.L.R. (3d) 267, 42 O.R. (2d) 731, 1983 CarswellOnt 785 (Ont. C.A.) — referred to

Interprovincial Pipe Line Ltd. v. Canada (National Energy Board) (1977), 1977 CarswellNat 125, 78 D.L.R. (3d) 401, 17 N.R. 56, 1977 CarswellNat 125F, [1978] 1 F.C. 601 (Fed. C.A.) — referred to

Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue Agency) (2007), 2007 SCC 2, 2007 CarswellBC 78, 2007 CarswellBC 79, 215 C.C.C. (3d) 449, 62 B.C.L.R. (4th) 40, 53 Admin. L.R. (4th) 153, 150 C.R.R. (2d) 189, 275 D.L.R. (4th) 1, (sub nom. *Little Sisters Book & Art Emporium v. Canada)* [2007] 1 S.C.R. 38, (sub nom. *Little Sisters Book & Art Emporium v. Minister of National Revenue)* 235 B.C.A.C. 1, (sub nom. *Little Sisters Book & Art Emporium v. Minister of National Revenue)* 388 W.A.C. 1, (sub nom. *Little Sisters Book and Art Emporium v. Minister of National Revenue)* 356 N.R. 83, 37 C.P.C. (6th) 1 (S.C.C.) — considered

Martin v. Nova Scotia (Workers' Compensation Board) (2003), 2003 CarswellNS 360, 2003 CarswellNS 361, 2003 SCC 54, (sub nom. *Workers' Compensation Board (N.S.) v. Martin)* 217 N.S.R. (2d) 301, (sub nom. *Workers' Compensation Board (N.S.) v. Martin)* 683 A.P.R. 301, 310 N.R. 22, (sub nom. *Nova Scotia (Workers' Compensation Board) v. Martin)* [2003] 2 S.C.R. 504, 110 C.R.R. (2d) 233, (sub nom. *Nova Scotia (Workers' Compensation Board) v. Martin)* 231 D.L.R. (4th) 385, 28 C.C.E.L. (3d) 1, 4 Admin. L.R. (4th) 1 (S.C.C.) — referred to

New Brunswick Electric Power Commission v. Maritime Electric Co. (1985), [1985] 2 F.C. 13, 60 N.R. 203, 1985 CarswellNat 36F, 1985 CarswellNat 36 (Fed. C.A.) — referred to

Ontario v. 974649 Ontario Inc. (2001), (sub nom. *R. v. 974649 Ontario Inc.)* 2001 SCC 81, 2001 CarswellOnt 4251, 2001 CarswellOnt 4252, 47 C.R. (5th) 316, (sub nom. *R. v. 974649 Ontario Inc.)* 88 C.R.R. (2d) 189, (sub nom. *R. v. 974649 Ontario Inc.)* 159 C.C.C. (3d) 321, (sub nom. *R. v. 974649 Ontario Ltd.)* 56 O.R. (3d) 359 (headnote only), (sub nom. *R. v. 974649 Ontario Inc.)* 206 D.L.R. (4th) 444, (sub nom. *R. v. 974649 Ontario Inc.)* [2001] 3 S.C.R. 575, (sub nom. *R. v. 974649 Ontario Inc.)* 279 N.R. 345, (sub nom. *R. v. 974649 Ontario Inc.)* 154 O.A.C. 345 (S.C.C.) — considered

R. c. Caron (2007), 413 A.R. 146, 2007 CarswellAlta 522, 2007 CarswellAlta 523, 2007 ABQB 262, 75 Alta. L.R. (4th) 287 (Alta. Q.B.) — referred to

R. v. Conway (2010), 320 D.L.R. (4th) 25, 75 C.R. (6th) 201, 255 C.C.C. (3d) 506, [2010] 1 S.C.R. 765, 1 Admin. L.R. (5th) 163, 263 O.A.C. 61, 402 N.R. 255, 211 C.R.R. (2d) 326, 2010 CarswellOnt 3847, 2010 CarswellOnt 3848, 2010 SCC 22 (S.C.C.) — referred to

R. v. Jewitt (1985), 1985 CarswellBC 743, [1985] 2 S.C.R. 128, [1985] 6 W.W.R. 127, 20 D.L.R. (4th) 651, 61 N.R. 159, 21 C.C.C. (3d) 7, 47 C.R. (3d) 193, 1985 CarswellBC 813 (S.C.C.) — referred to

Toronto (City) v. C.U.P.E., Local 79 (2003), 232 D.L.R. (4th) 385, 9 Admin. L.R. (4th) 161, [2003] 3 S.C.R. 77, 17 C.R. (6th) 276, 2003 SCC 63, 2003 CarswellOnt 4328, 2003 CarswellOnt 4329, 311 N.R. 201, 2003 C.L.L.C. 220-071, 179 O.A.C. 291, 120 L.A.C. (4th) 225, 31 C.C.E.L. (3d) 216 (S.C.C.) — referred to

Statutes considered by *Binnie J.*:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 24(1) — referred to

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5
s. 133 — considered

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44
s. 45 — referred to

Court of Queen's Bench Act, R.S.A. 2000, c. C-31
s. 21 — referred to

Criminal Code, R.S.C. 1985, c. C-46
s. 809 — considered

s. 840 — considered

Judicature Act, R.S.A. 2000, c. J-2
s. 8 — referred to

Languages Act, R.S.A. 2000, c. L-6
Generally — referred to

Northwest Territories Act, R.S.C. 1886, c. 50
Generally — referred to

s. 110 [am. 1891, c. 22, s. 18] — considered

Provincial Offences Procedure Act, R.S.A. 2000, c. P-34
Generally — referred to

Royal Proclamation, 1869
Generally — referred to

Saskatchewan Act, S.C. 1905, c. 42, reprinted R.S.C. 1985, App. II, No. 21
s. 14 — referred to

s. 16(1) — referred to

Rules considered by *Binnie J.*:

Alberta Rules of Court, Alta. Reg. 390/68
R. 600 — referred to

R. 601 — referred to

Termes et locutions cités :

inherent jurisdiction of the provincial superior courts

The inherent jurisdiction of the provincial superior courts, is broadly defined as "a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so": I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Legal Probs.* 23, at p. 51. These powers are derived "not from any statute or rule of law, but from the very nature of the court as a superior court of law" (Jacob, at p. 27) to enable "the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner" (p. 28). In equally broad language Lamer C.J., citing the Jacob analysis with approval (*MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725 (S.C.C.), at paras. 29-30), referred to "those powers which are essential to the administration of justice and the maintenance of the rule of law", at para. 38. See also *Cunningham v. Lilles*, 2010 SCC 10, [2010] 1 S.C.R. 331 (S.C.C.), at para. 18 *per* Rothstein J., relying on the Jacob analysis, and *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626 (S.C.C.), at paras. 29-32.

compétence inhérente des cours supérieures provinciales

La compétence inhérente des cours supérieures provinciales est largement définie comme étant [traduction] « une source résiduelle de pouvoirs, à laquelle la Cour peut puiser au besoin lorsqu'il est juste ou équitable de le faire » : I. H. Jacob, « The Inherent Jurisdiction of the Court » (1970), 23 *Current legal Problems* 23, p. 51. Ces pouvoirs émanent [traduction] « non pas d'une loi ou d'une règle de droit, mais de la nature même de la cour en tant que cour supérieure de justice » (Jacob, p. 27) pour permettre « de maintenir, protéger et remplir leur fonction qui est de rendre justice, dans le respect de la loi, d'une manière régulière, ordonnée et efficace » (p. 28). S'exprimant en des termes tout aussi larges, le juge en chef Lamer qui se référait, en l'approuvant, à l'analyse de Jacob (par. 29-30), parle des « pouvoirs qui sont essentiels à l'administration de la justice et au maintien de la primauté du droit » : *MacMillan Bloedel Ltd. c. Simpson*, [1995] 4 R.C.S. 725 (C.S.C.), par. 38. Voir également *Cunningham c. Lilles*, 2010 CSC 10, [2010] 1 R.C.S. 331 (R.C.S.), le juge Rothstein, qui se réfère à l'analyse de Jacob, au par. 18, et *Canada (Commission des droits de la personne) c. Canadian Liberty Net*, [1998] 1 R.C.S. 626 (R.C.S.), aux par. 29 à 32.

APPEAL of judgment reported at *R. c. Caron* (2009), 1 Alta. L.R. (5th) 199, [2009] 6 W.W.R. 438, (sub nom. *R. v. Caron*) 446 A.R. 362, (sub nom. *R. v. Caron*) 442 W.A.C. 362, 71 C.P.C. (6th) 319, 2009 CarswellAlta 94, 2009 CarswellAlta 95, 2009 ABCA 34, (sub nom. *R. v. Caron*) 241 C.C.C. (3d) 296 (Alta. C.A.).

POURVOI d'un jugement publié à *R. c. Caron* (2009), 1 Alta. L.R. (5th) 199, [2009] 6 W.W.R. 438, (sub nom. *R. v. Caron*) 446 A.R. 362, (sub nom. *R. v. Caron*) 442 W.A.C. 362, 71 C.P.C. (6th) 319, 2009 CarswellAlta 94, 2009 CarswellAlta 95, 2009 ABCA 34, (sub nom. *R. v. Caron*) 241 C.C.C. (3d) 296 (Alta. C.A.).

***Binnie J.*:**

1 This appeal raises anew the difficult issue of whether and to what extent the courts can (or should) order funding by the state of what may broadly be described as public interest litigation. The novel twist in this case is that an interim costs order was made by the Alberta Court of Queen's Bench — a *superior* court — in favour of an accused defending a regulatory prosecution in the *provincial* court of Alberta. The appellant Crown says that the superior court had no jurisdiction to make such an interim costs order and that even if it did have such jurisdiction the interim costs order was improper in any event.

2 The context in which this appeal arises is as follows.

3 In the course of a routine prosecution for a minor traffic offence — a wrongful left turn — the accused, Mr. Caron, claimed the proceedings were a nullity because the court documents were uniquely in English. He insisted that he has the right to use French in "proceedings before the courts" of Alberta as guaranteed in 1886 by the *North-West Territories Act*, R.S.C. 1886, c. 50, and the *Royal Proclamation of 1869*. His position is that French language rights may not now be abrogated by the province, and that the Alberta *Languages Act*, R.S.A. 2000, c. L-6, which purported to do so, is therefore unconstitutional.

4 The only issue before our Court at this time is two orders for interim costs made by the Court of Queen's Bench. Mr. Caron's application came late in his trial before the provincial court when, after about 18 months of on-again-off-again hearings, the Crown filed in reply what Mr. Caron's counsel described as a mountain of historical evidence. Mr. Caron — having run out of money — established to the satisfaction of the provincial court that he was unable to finance the rebuttal evidence necessary to complete the trial unless he were provided with interim costs. The provincial court made such an order. The Alberta Court of Queen's Bench, setting aside the provincial court order as being made without jurisdiction, nevertheless held that it could (and did) make the interim costs orders itself. It is the validity of the Queen's Bench orders for interim funding of the provincial court defence that is now before us.

5 The Crown takes the view that even though the Alberta Court of Queen's Bench identified what it regarded as an unacceptable outcome facing the provincial court in a constitutional challenge of great public significance, the *superior* court was powerless to intervene with a funding order to keep the *provincial* court proceedings on the rails. I agree that such orders must be highly exceptional and made only where the absence of public funding would work a serious injustice to the *public* interest, but I disagree with the Crown's argument that faced with this exceptional situation the Court of Queen's Bench was powerless to invoke its inherent jurisdiction to right the injustice perceived by the courts below. As to whether that discretionary jurisdiction ought to have been exercised in favour of Mr. Caron on the facts of this case, I defer to the affirmative answer given by the Alberta Court of Queen's Bench and upheld by a unanimous Court of Appeal (2009 ABCA 34, 1 Alta. L.R. (5th) 199 (Alta. C.A.)). Those courts have primary responsibility for the administration of justice in the province and, in my view, made no legal error in the exercise of their jurisdiction. I would dismiss the appeal.

I. Overview

6 As a general rule, of course, it is for Parliament and the provincial legislatures to determine if and how public monies will be used to fund litigation against the Crown, but it has sometimes fallen to the courts to make such determinations. To promote trial fairness in criminal prosecutions, for instance, the courts have in narrow circumstances been prepared to order a stay of proceedings unless the Crown funded an accused in whole or in part: *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.); *R. v. Rain* (1998), 223 A.R. 359 (Alta. C.A.). In the civil context, *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371 (S.C.C.), extended the class of civil cases for which public funding on an interim basis could be ordered to include "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" (para. 36). *Okanagan* was based on the strong public interest in obtaining a ruling on a legal issue of exceptional importance that not only transcended the interest of the parties but also would, in the absence of public funding, have failed to proceed to a resolution, creating an injustice. In *Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue Agency)*, 2007 SCC 2, [2007] 1 S.C.R. 38 (S.C.C.) ("*Little Sisters (No. 2)*"), the majority affirmed that

> the injustice that would arise if the application is not granted must relate both to the individual applicant and to the public at large. This means that a litigant whose case, however compelling it may be, is of interest only to the litigant will be denied an advance costs award. It does not mean, however, that every case of interest to the public will satisfy the test. [para. 39]

Neither *Okanagan* nor *Little Sisters (No. 2)* concerned an interim funding order made in respect of matters proceeding in a lower court. Nevertheless, the Alberta courts were faced here with a constitutional challenge of great importance.

7 At issue was (and is) a fundamental aspect of the rule of law in Alberta. While the Crown argues that French language rights in that province were settled by this Court in *R. v. Mercure*, [1988] 1 S.C.R. 234 (S.C.C.), and *Paquette v. Canada*, [1990] 2 S.C.R. 1103 (S.C.C.), Mr. Caron was able to distinguish these cases to the satisfaction of the Alberta provincial court (see *R. c. Caron*, 2008 ABPC 232, 95 Alta. L.R. (4th) 307 (Alta. Prov. Ct.)). That decision on the merits was reversed by the Alberta Court of Queen's Bench in *R. c. Caron*, 2009 ABQB 745, 23 Alta. L.R. (5th) 321 (Alta. Q.B.), but even in upholding the Crown's position the Queen's Bench declared that "the Supreme Court's decision in *R.*

v. Mercure does not answer the issue raised at trial and in this appeal" (para. 143). Mr. Caron's application for leave to appeal on the merits was granted in part by the Alberta Court of Appeal (2010 ABCA 343 (Alta. C.A.)).

8 As stated, the Alberta *Languages Act* enacted following this Court's decision in *Mercure* purports to abolish minority French language rights in the province. The impact of Mr. Caron's challenge, if ultimately successful, could be widespread and severe and include, according to Mr. Caron, the requirement for Alberta to re-enact most if not all of its laws in both French and English. The case, in short, has the potential (if successful) to become an Alberta replay of the *Reference re Language Rights*, [1992] 1 S.C.R. 212 (S.C.C.). This is what makes the case "sufficiently special" in terms of *Okanagan/Little Sisters (No. 2)*.

9 The courts in Alberta saw sufficient merit in Mr. Caron's legal argument to necessitate its resolution in the broader public interest. This was an outcome beyond the financial capacity of Mr. Caron and the Alberta courts were not willing to allow the issue to go unresolved for want of a champion with "deep pockets". The exercise of the superior court's inherent jurisdiction to fashion an exceptional remedy to meet highly unusual circumstances must be seen in that light.

II. Facts

10 On December 4, 2003, Mr. Caron was charged with the regulatory offence of failure to make a left turn safely. If convicted, he faced a fine of $100. Five days later he gave notice to the provincial court that his defence would consist of a constitutional languages challenge. Indeed, Mr. Caron did not contest the facts of the offence and advised the Crown that he would be presenting evidence only on the languages question. In taking this position he followed in the well-trodden path of other minority language advocates including Georges Forest's English-only parking ticket in *Forest v. Manitoba (Attorney General)*, [1979] 2 S.C.R. 1032 (S.C.C.); the unilingual traffic summons of Roger Bilodeau in Manitoba (*Bilodeau v. Manitoba (Attorney General)*, [1986] 1 S.C.R. 449 (S.C.C.)) and Duncan Cross MacDonald in Quebec (*MacDonald v. Montreal (City)*, [1986] 1 S.C.R. 460 (S.C.C.)); the English-only trial of André Mercure in *Mercure* and the unilingual provision of police services available to Marie-Claire Paulin in *Société des Acadiens & Acadiennes du Nouveau-Brunswick c. R.*, 2008 SCC 15, [2008] 1 S.C.R. 383 (S.C.C.). See also *Alberta v. Lefebvre* (1993), 135 A.R. 338 (Alta. C.A.), leave to appeal refused, [1993] 3 S.C.R. vii (note) (S.C.C.), and *R. c. Rémillard*, 2009 MBCA 112, 249 C.C.C. (3d) 44 (Man. C.A.).

11 Mr. Caron took the necessary steps to ensure payment of his costs for what his lawyers (unrealistically, it might be said) indicated could be a two- to five-day affair. These steps included mobilizing his own limited funds, seeking funding from the Alberta francophone association (Association canadienne-française de l'Alberta) (although the Association refused to fund his case, he obtained two loans of $15,000 each from its supporters), and securing some additional donations and $70,000 from the federal Court Challenges Program (paid in increments as the trial lengthened from month to month). He also solicited support over the Internet. Legal Aid was not available.

12 Following presentation of the defence evidence in March 2006, the Crown requested an adjournment in order to prepare reply evidence from expert witnesses. Given the continuing length of the trial, Mr. Caron made a further request of the Court Challenges Program for additional funding, but the Program was abolished by the federal government on September 25, 2006, before additional funding could be considered. Subsequent requests for reconsideration by Legal Aid were also unsuccessful.

13 The trial resumed in October 2006 to hear the Crown's expert evidence. The scale of the battle of the experts became clear, and Mr. Caron's finances left the defence unable to proceed further. The provincial court judge had denied an *Okanagan* order (2006 ABPC 278, 416 A.R. 63 (Alta. Prov. Ct.), at para. 164), but later ordered the Crown to pay the fees of Mr. Caron's lawyer and his experts' fees from and after that date pursuant to s. 24(1) of the *Charter*. Subsequently, the Court of Queen's Bench quashed the trial judge's s. 24(1) order. However, the merits of the *Okanagan* application were not further dealt with on appeal because, in the view of the Queen's Bench judge, "the learned provincial court judge did not have jurisdiction to award *Okanagan* interim costs in any event" (*R. c. Caron*, 2007 ABQB 262, 75 Alta. L.R. (4th) 287 (Alta. Q.B.), at para. 131). No appeal was taken from the decision to quash (which is therefore not before us) because

on May 16, 2007, the superior court itself rendered an interim order that the expert fees be paid for the continuation of the trial anticipated to take place from May 22 to June 15, 2007. On October 19, 2007, it rendered an additional order requiring the Crown to pay Mr. Caron's costs for the surrebuttal component of the trial (2007 ABQB 632, 84 Alta. L.R. (4th) 146 (Alta. Q.B.), *per* Ouellette J.).

14 The Crown requested an adjournment, to a date after completion of the trial to argue the question of defence counsel's fees, on the agreed term that such delay would not prejudice the defence application.

15 The trial ended on June 15, 2007. The historical record was substantial. It included 12 witnesses, eight of whom were experts, 9,164 pages of transcripts and 93 exhibits (2008 ABPC 232 (Alta. Prov. Ct.), at paras. 14 and 16). As stated, the provincial court was persuaded by this record to declare the English-only prosecution a nullity.

16 The Crown now seeks to have set aside the interim funding orders made on May 16 and October 19, 2007. It also seeks an order requiring Mr. Caron to repay about $120,000 provided thereunder as fees and disbursements for lawyers and experts, presumably long since disbursed to the intended recipients.

III. Issues

17

1. Does the Court of Queen's Bench have inherent jurisdiction to grant an interim remedy in litigation taking place in the provincial court?

2. If so, were the criteria for an interim costs order met in this case?

IV. Analysis

18 The parties fundamentally disagree about what is at stake in this case. The Crown characterizes the dispute as a traffic offence which has a constitutional element, as have many criminal and quasi-criminal cases. In Mr. Caron's view the traffic offence is irrelevant except as a backdrop to his constitutional challenge. As such, he says, the ordinary rules governing costs in traffic court are irrelevant to the outcome of the appeal. The courts in Alberta essentially agreed with Mr. Caron on this point and I believe they were correct in that approach.

19 This being said, the history of this litigation — with its numerous adjournments, mutual recriminations about "trial by ambush" and periodic trips to the appellate courts — demonstrates once again that a prosecution in a provincial court does not generally provide, from a procedural point of view, an efficient institutional forum to resolve this sort of major constitutional litigation: *R. v. Marshall*, 2005 SCC 43, [2005] 2 S.C.R. 220 (S.C.C.), at paras. 142-44. There is no mutuality between the prosecution and the defence in the discovery of documents or pre-trial disclosure. The procedural powers of the provincial court are limited (although, as stated in para. 13, above, the quashing of the provincial court order for costs for want of jurisdiction was not appealed and we therefore refrain from expressing any opinion on its validity). Nevertheless, Mr. Caron's having announced his intention to use the prosecution as a springboard to launch his constitutional challenge to the validity of the Alberta *Languages Act*, the Crown persisted in the provincial court rather than seeking to have the constitutional question (as opposed to the minor driving infraction) brought before the superior court.

20 The Crown agrees that if the language issue had been litigated in the superior court (perhaps as a direct challenge to the Alberta *Languages Act*), that court would have had jurisdiction in relation to a case pending before it to make a costs order in the terms now complained of.

21 The provincial court was confronted with a potential failure of justice once the unexpected length of the trial had exhausted Mr. Caron's financial resources. By that time, substantial trial time and costs had already been expended, including the substantial public monies provided under the Court Challenges Program. In mid-trial the provincial court,

so to speak, had a tiger by the tail. The Crown insisted on pursuing the prosecution in provincial court; Mr. Caron insisted on his French language defence. Neither side expressed any interest in a stay of proceedings.

22 The courts in Alberta were clearly concerned lest the Crown achieve, by pressing on with the prosecution in the provincial court, an unfair advantage ("lopsided", Ritter J.A. called it) over the accused in the creation of the crucial factual record on which an important constitutional issue would be determined. A lopsided trial would not have put the languages issue to rest. Mr. Caron's challenge was considered by the courts below to have merit and in their view it was in the interest of all Albertans that the challenge be properly dealt with.

23 I should make it clear that the present decision does not constitute a general invitation for applications to fund the defence of ordinary criminal cases where constitutional (including *Charter*) issues happen to be raised. In those cases the gravamen is truly the criminal offence. Here the traffic court context is simply background to the constitutional fight. A more appropriate analogy, as will be discussed, is the *Okanagan/Little Sisters (No. 2)* paradigm for public interest funding in a civil case.

A. Does the Inherent Jurisdiction of the Alberta Court of Queen's Bench Extend to Making the Interim Costs Order in Respect of Proceedings in the Provincial Court?

24 The inherent jurisdiction of the provincial superior courts, is broadly defined as "a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so": I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Legal Probs.* 23, at p. 51. These powers are derived "not from any statute or rule of law, but from the very nature of the court as a superior court of law" (Jacob, at p. 27) to enable "the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner" (p. 28). In equally broad language Lamer C.J., citing the Jacob analysis with approval (*MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725 (S.C.C.), at paras. 29-30), referred to "those powers which are essential to the administration of justice and the maintenance of the rule of law", at para. 38. See also *Cunningham v. Lilles*, 2010 SCC 10, [2010] 1 S.C.R. 331 (S.C.C.), at para. 18 *per* Rothstein J., relying on the Jacob analysis, and *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626 (S.C.C.), at paras. 29-32.

25 One of the earliest manifestations of the superior court's inherent jurisdiction was the appointment of counsel to represent impecunious litigants *in forma pauperis* (W. S. Holdsworth, *A History of English Law*, vol. IV (3rd ed. 1945), at p. 538, and G. O. Morgan and H. Davey, *A Treatise on Costs in Chancery* (1865), at p. 268).

26 The Crown argues that whatever may be a superior court's inherent jurisdiction in relation to matters pending before it, such jurisdiction cannot extend to an order of interim funding of a litigant in a matter pending in the provincial court. However, as Jacob points out, superior courts *do* possess inherent jurisdiction "to render assistance to inferior courts to enable them to administer justice fully and effectively" (p. 48). For example, superior courts have long intervened in respect of contempt not committed "in the face of" the inferior court because "the inferior courts have not the power to protect themselves" (p. 48). See, e.g., *R. v. Peel Regional Police Service* (2000), 149 C.C.C. (3d) 356 (Ont. S.C.J.), and *U.N.A. v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901 (S.C.C.). In the same vein, Mr. Keith Mason, Q.C., a former President of the New South Wales Court of Appeal, has written in an article titled "*The Inherent Jurisdiction of the Court*" (1983), 57 *Aust. Law J.* 449, that

> [i]t is not surprising that a general concern with the "due administration of justice" has been invoked to justify the Supreme Court creating or enforcing procedural rights applicable to other courts and tribunals. Such helpful intervention has been offered where the other body has been considered powerless to act or where undue expense or delay might be caused if parties were forced to resort to it.
>
> . . . . .
>
> Many of the more recent developments of administrative law can be related to the assumption by superior courts of a general inherent jurisdiction to use their process in aid of the proper administration of justice.

[Emphasis added; p. 456.]

The Mason article was also cited with approval by Lamer C.J. in *MacMillan Bloedel* (para. 33).

27 Canadian courts have, from time to time, exercised their inherent jurisdiction to render assistance to inferior courts as circumstances required. Novelty has not been treated as a barrier to necessary action. In the *Peel Regional Police* case, the superior court cited the Regional Police Service and the Police Services Board for contempt based on repeated delays in transferring prisoners to court rooms for hearings. This caused days of court time to be lost and inconvenienced lawyers, witnesses, and members of the public (paras. 20-28). The delays were said to undermine the rule of law. Citing *MacMillan Bloedel*, the court explained the basis for its action:

> This court acted in order to terminate the systemic delays in the timely delivery of prisoners to courtrooms throughout the Peel Courthouse. The court was desirous of averting a multiplicity of coercive proceedings. As well, the superior court was conscious of its duty to assist provincially created courts to restore the paramountcy of the rule of law....
>
> [Emphasis added; para. 68.]

28 In *United Nurses of Alberta*, this Court upheld a criminal contempt order made by the superior court against a union that defied a ruling issued by the province's Labour Relations Board. The superior court relied on its inherent jurisdiction to come to the aid of the tribunal.

29 While contempt proceedings are the best known form of "assistance to inferior courts", the inherent jurisdiction of the superior court is not so limited. Other examples include "the issue of a subpoena to attend and give evidence; and to exercise general superintendence over the proceedings of inferior courts, *e.g.*, to admit to bail" (Jacob, at pp. 48-49). In summary, Jacob states, "The inherent jurisdiction of the court may be invoked *in an apparently inexhaustible variety of circumstances* and may be exercised in different ways" (p. 23 (emphasis added)). I agree with this analysis. A "categories" approach is not appropriate.

30 Of course the very plenitude of this inherent jurisdiction requires that it be exercised sparingly and with caution. In the case of inferior tribunals, the superior court may render "assistance" (not meddle), but only in circumstances where the inferior tribunals are powerless to act and it is essential to avoid an injustice that action be taken. This requirement is consistent with the "sufficiently special" circumstances required for interim costs orders by *Little Sisters (No. 2)*, at para. 37, as will be discussed.

31 Accordingly, I would not accept the argument that the apparent novelty of the interim costs order in this case is, on account of its novelty, beyond the inherent jurisdiction of the Court of Queen's Bench.

32 The Crown argues that even if the making of such an interim costs order could *in theory* fall within the inherent jurisdiction of the superior court, such jurisdiction has been taken away by statutory costs provisions. In this respect the Crown relies on the *Provincial Offences Procedure Act*, R.S.A. 2000, c. P-34, and the *Criminal Code*, R.S.C. 1985, c. C-46, ss. 809 and 840, which provides for example $4 a day for witnesses. The Crown argues that while not expressly limited, the inherent jurisdiction of the Court of Queen's Bench is *implicitly* ousted by these enactments. However on this point, as well, the Jacob analysis is helpful:

> ... the court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or by rule of court, so long as it can do so without contravening any statutory provision.
>
> [Emphasis added; p. 24.]

I agree with Jacob on this point as well.

33 The Crown's premise here and elsewhere in its argument is that this case is an ordinary "garden variety" regulatory proceeding of the sort to which these provincial court costs provisions were intended to apply, a premise which I cannot accept. The provincial court was confronted with language rights litigation of major significance that after months of trial had reached the point of collapse. The intervention of the superior court was not a matter of routine. It was part of a salvage operation to avoid months of effort, costs and judicial resources from being thrown away.

34 The Crown also relies on various statutes dealing with costs in matters pending before the Court of Queen's Bench itself, including the *Court of Queen's Bench Act*, R.S.A. 2000, c. C-31, s. 21, the *Judicature Act*, R.S.A. 2000, c. J-2, s. 8, and the *Alberta Rules of Court*, Alta. Reg. 390/68, rr. 600 and 601. Certainly these enactments authorize the award of costs in various circumstances, but words of authorization in this connection should not be read as words limiting the court's inherent jurisdiction to do what is essential "to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner" (Jacob, at p. 28). It would be contrary to all authority to draw a negative inference against the inherent jurisdiction of the superior court based on "implication" and conjecture about legislative intent: *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437 (S.C.C.).

35 I am satisfied that the supervisory jurisdiction of the superior courts over the provincial courts in Alberta includes the power to order interim funding before an inferior tribunal where it is "*essential* to the administration of justice and the maintenance of the rule of law" (*MacMillan Bloedel*, at para. 38 (emphasis added)). It remains to determine, of course, the conditions under which such jurisdiction should be exercised in the present case. In my view, the *Okanagan*/*Little Sisters (No. 2)* criteria are helpful to this delineation.

B. Criteria for the Grant of a Public Interest Funding Order

36 Although Mr. Caron seeks what he calls an *Okanagan* order, the Crown points out that there are many distinctions between that case and the one before us. *Okanagan* was a civil case. The fight here arose in the context of a quasi-criminal proceeding and, generally speaking, as the Crown emphasizes, the costs regimes in civil and criminal cases are very different. Secondly, *Okanagan* did not involve the exercise of the court's inherent jurisdiction, but addressed the equitable exercise of a statutory costs authority. Thirdly, the original *Okanagan* order was made in relation to proceedings before the court that ordered the funding, namely the superior court of British Columbia. It dealt with an award of advance costs to a plaintiff, not an accused. The same distinctions apply to *Little Sisters (No. 2)*.

37 The Crown argues that the courts cannot create an alternative legal aid scheme by judicial fiat. Nor, says the Crown, can the courts judicially reinstate the Court Challenges Program. These points are valid so far as they go, but in my opinion they do not control the outcome of the appeal.

38 Clearly, this case is not *Okanagan* where the Court viewed the funding issue from the perspective of a proposed civil trial not yet commenced. We are presented with the issue of public interest funding in a different context. Nevertheless, *Okanagan*/*Little Sisters (No. 2)* provide important guidance to the general paradigm of public interest funding. In those cases, as earlier emphasized in the discussion of inherent jurisdiction, the fundamental purpose (and limit) on judicial intervention is to do only what is essential to avoid an injustice.

39 The *Okanagan* criteria governing the discretionary award of interim (or "advanced") costs are three in number, as formulated by LeBel J., at para. 40:

> 1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial — in short, the litigation would be unable to proceed if the order were not made.
>
> 2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.

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

Even where these criteria are met there is no "right" to a funding order. As stated by Bastarache and LeBel JJ. for the majority in *Little Sisters (No. 2)*:

> In analysing these requirements, the court must decide, with a view to all the circumstances, whether the case is sufficiently special that it would be contrary to the interests of justice to deny the advance costs application, or whether it should consider other methods to facilitate the hearing of the case. The discretion enjoyed by the court affords it an opportunity to consider all relevant factors that arise on the facts.
>
> [Emphasis added; para. 37.]

While these criteria were formulated in the very different circumstances of *Okanagan* and *Little Sisters (No. 2)*, in my opinion they apply as well to help determine whether the costs intervention of the Court of Queen's Bench was essential to enable the provincial court to "administer justice fully and effectively", and may therefore be said to fall within the superior court's inherent jurisdiction.

C. Application of the Public Funding Criteria to the Present Case

40 The courts below addressed each of the above criteria.

(1) Impecunious Litigant

41 As to Mr. Caron's financial circumstances, the superior court judge concluded that, while he was willing to expend (and had expended) his own and borrowed money (as well as funding from the Court Challenges Program) to the limit, Mr. Caron's resources had been exhausted by the time the applications for the orders in issue were made. He could not finance the last leg of his protracted trial. The Crown argues that Mr. Caron ought to have pursued a more aggressive fundraising campaign, particularly within Alberta's francophone community. The Queen's Bench judge, on the contrary, was impressed with the "responsible manner" in which Mr. Caron had pulled together finances for the anticipated length of trial and its unexpected continuances. However, as the scope of the expert evidence continued to expand, it was not "realistically possible" for him to launch a formal fundraising campaign given the trial schedule and its demands (2007 ABQB 632 (Alta. Q.B.), at para. 30). The Queen's Bench judge declared himself "satisfied that Mr. Caron has no realistic means of paying the fees resulting from this litigation, and that all other possibilities for funding have been canvassed, but in vain" (para. 31). The Crown's objection on this point was not accepted in the courts below and those courts made no palpable error in reaching the conclusion they did.

(2) Prima Facie Meritorious Case

42 The order for interim costs in this case did not prejudge the outcome. Mr. Caron, however, persuaded the Alberta courts that his challenge differs from *Mercure*, *Paquette*, and *Lefebvre*. In *Mercure*, it will be recalled, minority language rights on the prairies were addressed in terms of the *North-West Territories Act, 1875*, S.C. 1875 c. 49. The key provision, which is essentially the same as s. 133 of the *Constitution Act, 1867*, was reproduced in the 1886 consolidation as s. 110 (am. S.C. 1891, c. 22, s. 18):

> **110.** Either the English or the French language may be used by any person in the debates of the Legislative Assembly of the Territories and in the proceedings before the courts; and both those languages shall be used in the records and journals of such Assembly; and all ordinances made under this Act shall be printed in both those languages: Provided, however, that after the next general election of the Legislative Assembly, such Assembly may, by ordinance or otherwise, regulate its proceedings, and the manner of recording and publishing same; and the regulations so made shall be embodied in a proclamation which shall be forthwith made and published by the Lieutenant Governor in conformity with the law, and thereafter shall have full force and effect.

Mercure itself held that in Saskatchewan this provision was subject to repeal by virtue both of ss. 14 and 16(1) of the *Saskatchewan Act* and s. 45 of the *Constitution Act, 1982* (p. 271).

43 Mr. Caron's contention is that the *Mercure* case did not consider much of the relevant historical evidence including, in particular, the *Royal Proclamation* of December 6, 1869, annexing to Canada what was then the North-West Territories, whose effect was characterized by the provincial court judge as follows:

> [TRANSLATION] I therefore believe that the proclamation had to be constitutional to appease the Métis by giving them greater certainty. A political guarantee can be cancelled more easily than a constitutional guarantee.... In my opinion, in light of the historical context, the proclamation is a constitutional document. This means that "all your civil ... rights" mentioned in the proclamation are protected by the Constitution. As I held above, relying on the historical evidence, the expression "civil rights" was broad enough to include language rights, which means that the same protection applies to language rights.
>
> (2008 ABPC 232, at para. 561)

Whether or not this view of the 1869 Proclamation survives final appellate consideration is not, of course, the issue. All the courts below recognized that there was *prima facie* merit to Mr. Caron's claim (*R. c. Caron*, 2006 ABPC 278, 416 A.R. 63 (Alta. Prov. Ct.), at para. 149; 2007 ABQB 632 (Alta. Q.B.), at paras. 32-36 and 40; 2009 ABCA 34 (Alta. C.A.), at paras. 58-61). It would, in the words of *Okanagan*, be contrary to the interest of justice if the proper resolution of this case on the merits was forfeited just because Mr. Caron — the putative standard bearer for Franco-Albertans in this matter — lacked the financial means to complete what he started.

(3) Public Importance

44 The public importance aspect of the *Okanagan* test has three elements, namely that "[t]he issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases" (para. 40). Not every constitutional case meets these criteria, as it could not be said in each and every case that it is "sufficiently special that it would be contrary to the interests of justice to deny the advanced costs application" (*Little Sisters (No. 2)*, para. 37). What is "sufficiently special" about this case is that it constitutes an attack of *prima facie* merit (as that term is used in *Okanagan*) on the validity of the entire corpus of Alberta's unilingual statute books. The impact on Alberta legislation, if Mr. Caron were to succeed, could be extremely serious and the resulting problems ought, if it becomes necessary to do so, to be addressed as quickly as possible. A lopsided contest in which the challenger, by reason of impecuniosity, had to abandon his defence in the midstream of the trial would not lay the issue to rest. The result of Mr. Caron's collapse at the final stage of the trial would simply be that the costs and judicial resources already expended on resolving this issue by the public, as well as by Mr. Caron, would be thrown away.

45 The injury created by continuing uncertainty about French language rights in Alberta transcends Mr. Caron's particular situation and risks injury to the broader Alberta public interest. The Alberta courts have taken the view that the status and effect of the 1869 Proclamation was not fully dealt with in the previous litigation. It is in the public interest that it be dealt with now. This makes the case "sufficiently special" under the *Okanagan*/*Little Sisters (No. 2)* criteria, in my opinion.

D. The Exercise of the Superior Court's Inherent Jurisdiction

46 The proper perspective from which this case is to be viewed (and was viewed by the Court of Queen's Bench) is that of the provincial court judge who was on the last lap of a complex trial, with substantial costs incurred already, and months of court time under his belt, facing the prospect that all of this cost and effort would be wasted — despite its constitutional significance — because of Mr. Caron's impecuniosity. I believe that in these very unusual circumstances it was open to the Queen's Bench judge to determine, in the exercise of his discretion, whether or not to come to the assistance of the provincial court with the interim costs order, and that such an order was, in the words of *MacMillan*

Bloedel, "essential to the administration of justice and the maintenance of the rule of law" (para. 38). Although he did not use these words, they describe in my opinion the tenor of his judgment.

47 Such funding orders, if made, "should be carefully fashioned and reviewed over the course of the proceedings to ensure that concerns about access to justice are balanced against the need to encourage the reasonable and efficient conduct of litigation, which is also one of the purposes of costs awards" (*Okanagan*, at para. 41). In the present case, the judges were working within the confines of a trial in progress. Nevertheless, the order of Ouellette J. in the Court of Queen's Bench did put a cap on allowable hours for the expert witnesses, and disallowed a payment of $3,504.60 for a "temporary assistant". It seems that Judge Wenden in the provincial court was working with invoices not in the record before us. In his October 18, 2006 order (A.R., vol. 1, at pp. 2-13), Wenden Prov. Ct. J. clearly refused to make an *ex ante* blank cheque. On August 2, 2006, he ordered the Crown to pay Mr. Caron's already incurred (and therefore quantified) legal fees. All in all, I accept the conclusion of the Court of Appeal that the financial controls in place were adequate and met the *Okanagan* standard.

V. Conclusion

48 In my view, the Alberta Court of Queen's Bench possessed the inherent jurisdiction to make the funding order that it did in respect of proceedings in the provincial court. There was no error of principle in taking into consideration the *Okanagan/Little Sisters (No. 2)* criteria in the exercise of that inherent jurisdiction. On the merits, I defer to what seems to me to be the reasonable exercise of the discretion by the Queen's Bench judge. I would therefore affirm the decision of the Alberta Court of Appeal and dismiss the appeal.

49 Although costs are not generally available in quasi-criminal proceedings (absent special circumstances such as Crown misconduct of which there is none here), this case is more in the nature of regular constitutional litigation conducted (as discussed) by an impecunious plaintiff for the benefit of the Franco-Albertan community generally. In these unusual circumstances, Mr. Caron should have his costs on a party and party basis in this Court.

***Abella J.*:**

50 I agree with Binnie J. that the unique circumstances of this case appropriately attract the award of interim public interest funding based on the principles developed by this Court in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371 (S.C.C.), and *Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue Agency)*, 2007 SCC 2, [2007] 1 S.C.R. 38 (S.C.C.). I am concerned, however, that the reasons may be seen to unduly expand the scope of the common law authority of a superior court in the exercise of its inherent jurisdiction.

51 In particular, it is important that these reasons not be seen to encourage the undue expansion of a superior court's inherent jurisdiction into matters this Court has increasingly come to see as part of a statutory court's implied authority to do what is necessary, in the fulfilment of its mandate, to administer justice fully and effectively. (See *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 (S.C.C.), at para. 51; *Ontario v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575 (S.C.C.), at paras. 70 and 71 ("*Dunedin*"); *Cunningham v. Lilles*, 2010 SCC 10, [2010] 1 S.C.R. 331 (S.C.C.), at para. 19; *Bell Canada v. Canadian Radio-Television & Telecommunications Commission*, [1989] 1 S.C.R. 1722 (S.C.C.). See also *Interprovincial Pipe Line Ltd. v. Canada (National Energy Board)* (1977), [1978] 1 F.C. 601 (Fed. C.A.); *New Brunswick Electric Power Commission v. Maritime Electric Co.*, [1985] 2 F.C. 13 (Fed. C.A.); *Canadian Broadcasting League v. Canadian Radio-Television & Telecommunications Commission* (1982), [1983] 1 F.C. 182 (Fed. C.A.), aff'd [1985] 1 S.C.R. 174 (S.C.C.); *Dow Chemical Canada Inc. v. Union Gas Ltd.* (1982), 141 D.L.R. (3d) 641 (Ont. Div. Ct.), aff'd (1983), 42 O.R. (2d) 731 (Ont. C.A.); *Children's Aid Society of Huron (County) v. P. (C.)* [2002 CarswellOnt 162 (Ont. S.C.J.)], 2002 CanLII 45644; *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394 (S.C.C.); R.W. Macaulay and J. L. H. Sprague, *Practice and Procedure Before Administrative Tribunals* (loose-leaf), vol. 3, at p. 29-1; Ruth Sullivan, *Sullivan on the Construction of Statutes* (2008), at pp. 290-91).

52 The superior court's inherent jurisdiction, it seems to me, should not be seen as a broad plenary power to "assist", but should be interpreted consistently with this Court's evolving jurisprudence about the role, authority and mandate of statutory courts and tribunals. This includes an awareness of the need to avoid bifurcated proceedings in all but exceptional cases. (See *Martin v. Nova Scotia (Workers' Compensation Board)*, 2003 SCC 54, [2003] 2 S.C.R. 504 (S.C.C.), at para. 29; and, *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765 (S.C.C.), at para. 79.) The fundamental purpose of such intervention by the superior court must be limited, as Binnie J. points out, to "what is essential to avoid an injustice" (para. 38). For the first time, that inherent jurisdiction was, interpreted in this case to include the ability to make an interim costs award in a proceeding before a statutory court or tribunal.

53 It is worth remembering, as Binnie J. acknowledged, that this exercise of inherent jurisdiction was based on the premise that the provincial court lacked the jurisdiction to make the order. Regrettably that piece in the jurisdictional puzzle is not, strictly speaking, before us. Mr. Caron had made an unsuccessful application for *Okanagan* funding directly to the provincial court. The court concluded that while the *Okanagan* criteria were met, *Okanagan* costs could not be ordered by the provincial court. That decision was essentially undisturbed by the Court of Queen's Bench (2007), 75 Alta. L.R. (4th) 287 (Alta. Q.B.), *per* Marceau J. and was not appealed by Mr. Caron. He chose instead to seek his funding by way of a new claim to the Queen's Bench, seeking the exercise of its inherent jurisdiction as a superior court to make the order. As a result, the question of whether a statutory court or tribunal has jurisdiction to order *Okanagan* costs will have to be determined in a future case.

54 That leaves us in the problematic position of having to decide Mr. Caron's ability to obtain funding and continue with this litigation *as if* no other jurisdictional course were available to him. I therefore simply raise a cautionary note: this Court's evolutionary acknowledgment of the independence, integrity and expertise of statutory courts and tribunals may well be inconsistent with an approach that has the effect of expanding the reach of a superior court's common law inherent jurisdiction into matters of which a statutory court or tribunal is seized. When considering the proper limits of a superior court's inherent jurisdiction, any such inquiry should reconcile the common law scope of inherent jurisdiction *with* the implied legislative mandate of a statutory court or tribunal, to control its own process to the extent necessary to prevent an injustice and accomplish its statutory objectives. (See *Cunningham*, at para. 19; *ATCO*, at para. 51; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.), at para. 37; *R. v. Jewitt*, [1985] 2 S.C.R. 128 (S.C.C.); and, *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 (S.C.C.), at para. 35.) The inability to order funding in the very limited circumstances contemplated by *Okanagan* and *Little Sisters* could well frustrate the ability of the provincial courts and tribunals to continue to hear potentially meritorious cases of public importance. As McLachlin C.J. observed in *Dunedin*, costs awards are significant remedial tools and "integrally connected to the court's control of its trial process" (para. 81).

55 With the above caution in mind, therefore, in the exceptional circumstances of this case I agree with Binnie J. that the award of *Okanagan* costs should be upheld and the appeal dismissed.

Appeal dismissed.

Pourvoi rejeté.

Tab 13

In the Court of Appeal of Alberta

Citation: 1985 Sawridge Trust v Alberta (Public Trustee), 2013 ABCA 226

Date: 20130619
Docket: 1203-0230-AC
Registry: Edmonton

IN THE MATTER OF THE *TRUSTEE ACT*, R.S.A. 2000, C. T-8, AS AMENDED

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

Between:

Roland Twinn, Catherine Twinn, Walter Felix Twinn, Bertha L'Hirondelle, and Clara Midbo, as Trustees for the 1985 Sawridge Trust

Appellants (Respondents)

- and -

Public Trustee of Alberta

Respondent (Applicant)

- and -

**Sawridge First Nation,
Minister of Indian Affairs and Northern Development,
Aline Elizabeth Huzar, June Martha Kolosky and Maurice Stoney**

Interested Parties

The Court:

**The Honourable Mr. Justice Peter Costigan
The Honourable Mr. Justice Clifton O'Brien
The Honourable Mr. Justice J.D. Bruce McDonald**

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice D.R.G. Thomas
Dated the 12th day of June, 2012
Filed on the 20th day of September, 2012
(Docket: 1103 14112)

Memorandum of Judgment

The Court:

I. Introduction

[1] The appellants are Trustees of the Sawridge Trust (Trust). They wish to change the designation of "beneficiaries" under the Trust and have sought advice and direction from the court. A chambers judge, dealing with preliminary matters, noted that children who might be affected by the change were not represented by counsel, and he ordered that the Public Trustee be notified. Subsequently, the Public Trustee applied to be named as litigation representative for the potentially interested children, and that appointment was opposed by the Trustees.

[2] The judge granted the application. He also awarded advance costs to the Public Trustee on a solicitor and his own client basis, to be paid for by the Trust, and he exempted the Public Trustee from liability for any other costs of the litigation. The Trustees appeal the order, but only insofar as it relates to costs and the exemption therefrom. Leave to appeal was granted on consent.

II. Background

[3] The detailed facts are set out in the Reasons for Judgment of the chambers judge: *1985 Sawridge Trust v Alberta (Public Trustee)*, 2012 ABQB 365. A short summary is provided for purposes of this decision.

[4] On April 15, 1985 the Sawridge First Nation, then known as the Sawridge Indian Band No. 19 (Sawridge) set up the 1985 Sawridge Trust (Trust) to hold certain properties in trust for Sawridge members. The current value of those assets is approximately $70,000,000.

[5] The Trust was created in anticipation of changes to the *Indian Act*, RSC 1985, c I-5, which would have opened up membership in Sawridge to native women who had previously lost their membership through marriage. The beneficiaries of the Trust were defined as "all persons who qualified as a member of the Sawridge First Nation pursuant to the provisions of the *Indian Act* as they existed on April 15, 1982."

[6] The Trustees are now looking to distribute the assets of the Trust and recognize that the existing definition of "beneficiaries" is potentially discriminatory. They would like to redefine "beneficiaries" to mean the present members of Sawridge, and acknowledge that no children would be part of the Trust. The Trustees suggest that the benefit is that the children would be funnelled through parents who are beneficiaries, or children when then become members when they attain the age of 18 years.

[7] Sawridge is currently composed of 41 adult members and 31 minors. Of the 31 minors, 23 currently qualify as beneficiaries under the Trust, and 8 do not. It is conceded that if the definition of beneficiaries is changed, as currently proposed, some children, formerly entitled to a share in the benefits of the trust, will be excluded, while other children who were formerly excluded will be included.

[8] When Sawridge's application for advice and direction first came before the court, it was observed that there was no one representing the minors who might possibly be affected by the change in the definition of "beneficiaries." The judge ordered that the Public Trustee be notified of the proceedings and be invited to comment on whether it should act on behalf of the potentially affected minors.

[9] The Public Trustee was duly notified and it brought an application asking that it be named as the litigation representative of the affected minors. It also asked the court to identify the minors it would represent, to award it advance costs to be paid for by the Trust, and to allow it to make inquiries through questioning about Sawridge's membership criteria and application processes. The Public Trustee made it clear to the court that it would only act for the affected minors if it received advanced costs from the Trust on a solicitor and his own client basis, and if it was exempted from liability for costs to the other participants in the litigation.

III. The Chambers Judgment

[10] The chambers judge first considered whether it was necessary to appoint the Public Trustee to act for the potentially affected minors. The Trustees submitted that this was unnecessary because their intention was to use the trust to provide for certain social and health benefits for the beneficiaries of the trust and their children, with the result that the interests of the affected children would ultimately be defended by their parents. The Trustees also submitted that they were not in a conflict of interest, despite the fact that a number of them are also beneficiaries under the Trust.

[11] The chambers judge concluded that it was appropriate to appoint the Public Trustee to act as litigation representative for the affected minors. He was concerned about the large amount of money at play, and the fact that the Trustees were not required to distribute the Trust assets in the manner currently proposed. He noted, that while desirable, parents do not always act in the best interests of their children. Furthermore, he found the Trustees and the adult members of the Band (including the Chief and Council) are in a potential conflict between their personal interests and their duties as fiduciaries.

[12] The chambers judge determined that the group of minors potentially affected included the 31 current minors who were currently band members, as well as an unknown number of children of applicants for band membership. He also observed that there had been substantial litigation over many years relative to disputed Band membership, which litigation appears to be ongoing (para 9).

[13] The judge rejected the submission of the Trustees that advance costs were only available if the strict criteria set out in *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 SCR 38, were met. He stated that the criteria set out in *Little Sisters* applied where a litigant has an independent interest in the proceeding. He viewed the role of the Public Trustee as being "neutral" and capable of providing independent advice regarding the interests of the affected minors which may not otherwise be forthcoming because of the Trustees' potential conflicts.

[14] In result, the chambers judge appointed the Public Trustee as litigation representative of the minors, on the conditions that it would receive advance costs and be exempted from any liability for costs of other parties. He finished by ordering costs of the application to the Public Trustee on a solicitor and its own client basis.

IV. Grounds of Appeal

[15] The appellants advance four grounds of appeal:

> (a) The Chambers Judge erred in awarding the Respondent advance costs on a solicitor and his own client basis by concluding that the strict criteria set by the Supreme Court of Canada for the awarding of advance costs does not apply in these proceedings.
>
> (b) In the alternative, the Chambers Judge erred in awarding advance costs without any restrictions or guidelines with respect to the amount of costs or the reasonableness of the same.
>
> (c) The Chambers Judge erred in exempting the Respondent of any responsibility to pay costs of the other parties in the proceeding.
>
> (d) The Chambers Judge erred in granting the Respondent costs of the application on a solicitor and his own client basis.

V. Standard of Review

[16] A chambers judge ordering advance costs will be entitled to considerable deference unless he "has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts": *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71, [2003] 3 SCR 371 at paras 42-43.

VI. Analysis

A. Did the chambers judge err by failing to apply the *Little Sisters* criteria?

[17] The Trustees argue that advanced interim costs can only be awarded if "the three criteria of impecuniosity, a meritorious case and special circumstances" are strictly established on the evidence before the court: *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71, [2003] 3 SCR 371, at para 36; as subsequently applied in the "public interest cases" of *Little Sisters* at para 37 and in *R v Caron*, 2011 SCC 5, [2011] 1 SCR 78 at paras 36-39. They go on to submit that none of these requirements were met in the present case. We are not persuaded that the criteria set out in *Okanagan* and *Little Sisters* were intended to govern rigidly all awards of advance funding and, in particular, do not regard them as applicable to exclude such funding in the circumstances of this case. As will be discussed, a strict application is neither possible, nor serves the purpose of protecting the interests of the children potentially affected by the proposed changes to the Trust.

[18] We start by noting that the rules described in *Okanagan* and *Little Sisters* apply in adversarial situations where an impecunious private party wants to sue another private party, or a public institution, and wants that party to pay its costs in advance. For one thing, the test obliges the applicant to show its suit has merit. In this case, however, the Public Trustee has not been appointed to sue anyone on behalf of the minors who may be affected by the proposed changes to the Trust. Its mandate is to ensure that the interests of the minor children are taken into account when the court hears the Trustees' application for advice and direction with respect to their proposal to vary the Trust. The minor children are not, as the chambers judge noted, "independent" litigants. They are simply potentially affected parties.

[19] The Trustees submit the chambers judge erred by characterizing the role of the Public Trustee as neutral rather than adversarial. While we hesitate to characterize the role of the Public Trustee as "neutral", as it will be obliged, as litigation representative, to advocate for the best interests of the children, the litigation in issue cannot be characterized as adversarial in the usual sense of that term. This is an application for advice and direction regarding a proposed amendment to a Trust, and the merits of the application are not susceptible to determination, at least at this stage. Indeed, the issues remain to be defined, and their extent and complexity are not wholly ascertainable at this time; nor is the identity of all the persons affected presently known. However, what can be said with certainty at this time is that the interests of the children potentially affected by the changes require independent representation, and the Public Trustee is the appropriate person to provide that representation. No other litigation representative has been put forward, and the Public Trustee's acceptance of the appointment was conditional upon receiving advance costs and exemption.

[20] There is a second feature of this litigation that distinguishes it from the situation in *Okanagan* and *Little Sisters*. Here the children being represented by the Public Trustee are potentially affected parties in the administration of a Trust. Unlike the applicants in *Okanagan* and *Little Sisters*, therefore, the Public Trustee already has a valid claim for costs given the nature of the application

before the court. As this court observed in *Deans v Thachuk*, 2005 ABCA 368 at para 43, 261 DLR (4th) 300:

> 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. [emphasis added]

[21] Moreover, the chambers judge observed that the Trustees had not taken any "pre-emptive steps" to provide independent representation of the minors to avoid potential conflict and conflicting duties (para 23). Their failure to have done so ought not now to be a reason to shift the obligation to others to bear the costs of this representation. The Public Trustee is prepared to provide the requisite independent representation, but is not obliged to do so. Having regard to the fact that the Trust has ample funds to meet the costs, as well as the litigation surrounding the issue of membership, it cannot be said that the conditions attached by the Public Trustee to its acceptance of the appointment are unreasonable or otherwise should be disregarded.

[22] It should be noted, parenthetically, that the Trustees rely on *Deans* as authority for the proposition that the *Okanagan* criteria will apply in pension trust fund litigation, which they submit is analogous to the situation here. But it is clear that the decision to apply the *Okanagan* criteria in *Deans* was based on the nature of the litigation in that case. It was an action against a trust by certain beneficiaries, was adversarial and fit into the third category described in the passage from *Buckton* quote above.

[23] In our view, there are several sources of jurisdiction for an order of advance costs in the case before us. One is section 41 of the *Public Trustee Act*, SA 2004, c P-44.1 which provides:

> 41 Unless otherwise provided by an enactment, where the Public Trustee is a party to or participates in any matter before a court,

> (a) the costs payable to the Public Trustee, and the client, party or other person by whom the costs are to be paid, are in the discretion of the court, and
>
> (b) the court may order that costs payable to the Public Trustee are to be paid out of and are a charge on an estate.

[24] It is evident that the court is vested with a large discretion with respect to an award of costs under section 41. While not dealing specifically with an award of advance costs, this discretionary power encompasses such an award. Further, the court has broad powers to "impose terms and conditions" upon the appointment of a litigation representative pursuant to Rule 2.21, which states:

> 2.21 The Court may do one or more of the following:
>
> (a) terminate the authority or appointment of a litigation representative;
>
> (b) appoint a person as or replace a litigation representative;
>
> (c) impose terms and conditions on, or on the appointment of, a litigation representative or cancel or vary the terms or conditions.

[25] The chambers judge also invoked *parens patriae* jurisdiction as enabling him to award advance costs, in the best interests of the children, to obtain the independent representation of the Public Trustee on their behalf. To the extent that there is any gap in statutory authority for the exercise of this power, the *parens patriae* jurisdiction is available. As this Court commented in *Alberta (Child, Youth and Family Enhancement Act, Director) v DL*, 2012 ABCA 275, 536 AR 207, in situations where there is a gap in the legislative scheme, the exercise of the inherent *parens patriae* jurisdiction "is warranted whenever the best interests of the child are engaged" (para 4).

[26] In short, a wide discretion is conferred with respect to the granting of costs under the *Trustee Act*, the terms of the appointment of a litigation representative pursuant to the *Rules of Court*, and in the exercise of *parens patriae* jurisdiction for the necessary protection of children. In our view, the discretion is sufficiently broad to encompass an award of advanced costs in the situation at hand.

[27] In this case, it is plain and obvious that the interests of the affected children, potentially excluded or otherwise affected by changes proposed to the Trust, require protection which can only be ensured by means of independent representation. It cannot be supposed that the parents of the children are necessarily motivated to obtain such representation. Indeed, it appears that all the

children potentially affected by the proposed changes have not yet been identified, and it may be that children as yet unborn may be so affected.

[28] The chambers judge noted that there were 31 children potentially affected by the proposed variation, as well as an "unknown number of potentially affected minors" – the children of applicants seeking to be admitted into membership of the Band (para 31). He concluded that a litigation representative was necessary and that the Public Trustee was the appropriate person to be appointed. No appeal is taken from this direction. In our view, the trial judge did not err in awarding advance costs in these circumstances where he found that the children's interest required protection, and that it was necessary to secure the costs in such fashion to secure the requisite independent representation of the Public Trustee.

B. Did the chambers judge err in failing to impose costs guidelines?

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

C. Did the chambers judge err in granting an exemption from the costs of other participants?

[30] Much of the reasoning found above applies with respect to the appeal from the exemption from costs. An independent litigation representative may be dissuaded from accepting an appointment if subject to liability for a costs award. While the possibility of an award of costs against a party can be a deterrent to misconduct in the course of litigation, we are satisfied that the court has ample other means to control the conduct of the parties and the counsel before it. We also note that an exemption for costs, while unusual, is not unknown, as it has been granted in other appropriate circumstances involving litigation representatives: *Thomlinson v Alberta (Child Services)*, 2003 ABQB 308 at paras 117-119, 335 AR 85; and *LC v Alberta (Metis Settlements Child and Family Services)*, 2011 ABQB 42 at paras 53-55, 509 AR 72.

D. Did the chambers judge err in awarding costs of the application to the Public Trustee?

[31] Finally, with respect to the appeal from the grant of solicitor and client costs on the application heard by the chambers judge, it appears to us that one of the subjects of the application was whether the Public Trustee would be entitled to such an award if it were appointed as litigation representative. The judge's award flowed from such finding. The appellant complains, however, that the judge proceeded to make the award without providing an opportunity to deal separately with the costs of the application itself. It does not appear, however, that any request was made to the judge to make any further representations on this point prior to the entry of his order. We infer that the parties understood that their submissions during the application encompassed the costs for the application itself, and that no further submission was thought to be necessary in that regard before the order was entered.

VII. Conclusion

[32] The appeal is dismissed.

Appeal heard on June 5, 2013

Memorandum filed at Edmonton, Alberta
this 19th day of June, 2013

Authorized to sign for: Costigan J.A.

O'Brien J.A.

McDonald J.A.

Appearances:

F.S. Kozak, Q.C.
M.S. Poretti
for the Appellants

J.L. Hutchison
for the Respondent

Tab 14

Most Negative Treatment: Check subsequent history and related treatments.

2003 SCC 71, 2003 CSC 71
Supreme Court of Canada

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

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

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

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

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

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

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

Counsel: Patrick G. Foy, Q.C., Robert J.C. Deane for Appellant
Louise Mandell, Q.C., Michael Jackson, Q.C., Clarine Ostrove, Reidar Mogerman for Respondents
Cheryl J. Tobias, Brian McLaughlin for Intervener, Attorney General of Canada

Lori R. Sterling, Mark Crow for Intervener, Attorney General of Ontario
René Morin, Gilles Laporte, Brigitte Bussières for Intervener, Attorney General of Quebec
Gabriel Bourgeois, Q.C. for Intervener, Attorney General of New Brunswick
George H. Copley, Q.C. for Intervener, Attorney General of British Columbia
Margaret Unsworth for Intervener, Attorney General of Alberta
Robert J.M. Janes, Dominique Nouvet for Interveners, Songhees Indian Band
Joseph J. Arvay, Q.C., David M. Robbins for Intervener, Chief Roger William

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

Headnote

Aboriginal law — Practice and procedure — Miscellaneous issues

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

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

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

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

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

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

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

Droit autochtone — Procédure — Questions diverses

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

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

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

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

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

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

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

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

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

The Court of Appeal upheld the chambers judge's decision that the just determination of the issues required a trial. It agreed that the principle of access to justice did not oblige the government to fund litigants who could not afford

to pay for legal representation in a civil suit, and that s. 35 of the Constitution Act, 1982 did not obligate the government to provide funding for legal fees of an aboriginal band attempting to prove asserted aboriginal rights. However, the Court of Appeal held that the chambers judge placed too much emphasis on concerns about pre-judging the outcome, which were diminished in light of the special circumstances of the case and the public interest in a proper resolution of the issues. It held that the chambers judge had a discretionary power to order interim costs in favour of the Bands, and that such an order should have been made in the "exceptional" circumstances of this case. The Minister appealed.

Held: The appeal was dismissed.

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

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

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

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

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

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

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

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

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

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

Major J. (dissenting) (Iacobucci, Bastarache JJ. concurring): Traditionally, costs are awarded at the conclusion of the trial or appellate decision, and almost always to the successful party. In certain cases, interim costs may be awarded to a spouse suing for the division of property as a consequence of separation or divorce, but the ratio of the matrimonial cases makes it clear that such awards preserve the traditional indemnification purpose of costs. To award interim costs when liability remains undecided would be a dramatic extension of the precedent. Awarding costs in advance could be seen as prejudging the merits, as in the absence of compelling reasons, the objectivity of the court making such an order will almost automatically be questioned. Moreover, to do so in a case with serious constitutional considerations where the Crown is the defending party would be an unusual extension of highly exceptional private law precedent into an area fraught with other implications. While there may be public law questions where access to justice can be provided through the discretionary award of interim costs, such cases must lie closer to the heart of the interim costs case law. The development of the common law of costs should be initiated by trial courts properly exercising their discretionary power, not by appellate reversal of that discretion. In the

circumstances of this appeal, the awarding of interim costs was a form of judicially-imposed legal aid. Interim costs should not be expanded to engage the court in essentially funding litigation for impecunious parties and ensuring their access to court. That remedy lies with the legislature and law societies, not the judiciary.

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

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

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

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

although he had a limited discretion in appropriate circumstances to award interim costs, this case fell far outside that area.

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

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

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

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

Arrêt: Le pourvoi a été rejeté.

LeBel, J. (McLachlin, J.C.C., Gonthier, Binnie, Arbour, Deschamps, JJ., souscrivant à l'opinion de LeBel, J.): Les tribunaux ont un pouvoir discrétionnaire inhérent leur permettant d'accorder des dépens. L'octroi des dépens vise traditionnellement à indemniser la partie gagnante pour les dépenses qu'elle a encourues en se défendant à l'égard d'une action s'étant révélée sans fondement ou en faisant reconnaître un droit valide. Par ailleurs, les règles modernes en matière de frais tendent aussi à réaliser différents objectifs en plus de l'objectif traditionnel d'indemnisation. Même si le principe de l'indemnisation demeure la considération primordiale, l'octroi des dépens peut également servir à encourager un règlement, à dissuader les actions et les défenses frivoles ainsi qu'à décourager les démarches inutiles.

La règle traditionnelle d'adjudication des dépens est aussi dictée par le souci général d'assurer le fonctionnement équitable et efficace du système judiciaire. L'accès à la justice constitue une autre considération pertinente pour l'application des règles d'attribution des dépens. Dans des cas spéciaux où des parties aux ressources limitées cherchent à faire respecter leurs droits constitutionnels, les tribunaux exercent souvent leur pouvoir discrétionnaire d'adjudication des dépens de façon à ne pas les mettre dans une situation difficile que pourrait causer l'application des règles traditionnelles. Ils contribuent ainsi à aider les citoyens ordinaires à avoir accès au système juridique lorsqu'ils cherchent à régler des questions qui revêtent de l'importance pour l'ensemble de la collectivité.

Les préoccupations concernant l'accès à la justice et l'opportunité d'atténuer les grandes inégalités entre les parties au litige occupent également le premier plan dans les rares cas où des provisions pour frais sont accordées. L'octroi d'une telle provision permet d'éviter qu'une argumentation juridique fondée ne soit pas entendue parce qu'une des parties ne dispose pas des ressources financières nécessaires. Le pouvoir discrétionnaire d'accorder une provision pour frais se limite à des cas vraiment exceptionnels et doit être utilisé de façon restreinte. Bien que généralement exercé dans le cadre d'affaires matrimoniales ou familiales, il ne se limite cependant pas à ces seuls domaines. Une provision pour frais peut également être accordée dans certaines affaires en matière de fiducie, de faillite ou de sociétés, afin d'éviter une situation d'iniquité en permettant aux parties sans ressources de faire entendre des demandes fondées.

Le pouvoir d'accorder une provision pour frais est inhérent à la nature de la compétence en equity de statuer sur les dépens. Trois critères sont pertinents à l'exercice de ce pouvoir. Premièrement, la partie qui sollicite l'ordonnance doit être si dépourvue de ressources qu'elle serait incapable, sans l'ordonnance, de faire entendre sa cause. Deuxièmement, elle doit prouver de façon prima facie que sa cause possède un fondement suffisant. Finalement, il doit exister des circonstances suffisamment spéciales pour que le tribunal soit convaincu que la cause appartient à cette catégorie restreinte de causes justifiant l'exercice exceptionnel de ses pouvoirs. Si le tribunal décide d'accorder une provision pour frais dans de telles circonstances, il se trouvera en un sens à préjuger des questions qui peuvent faire l'objet d'un procès. Même si l'on se demande si cette situation pourrait affecter le pouvoir discrétionnaire du juge qui devra éventuellement se prononcer sur le bien-fondé de la cause, cela ne devrait toutefois pas empêcher l'octroi de provisions pour frais si les conditions pertinentes sont respectées.

Dans les causes d'intérêt public, les objectifs traditionnels de l'attribution des dépens sont généralement supplantés par d'autres objectifs de politique, dont, notamment celui de garantir que les citoyens ordinaires auront accès aux tribunaux afin de faire préciser leurs droits constitutionnels et de faire trancher d'autres questions sociales de portée générale. De plus, de par leur nature, les causes de ce genre soulèvent fréquemment des questions importantes non seulement pour les parties au litige mais aussi pour la collectivité en général. L'intérêt public est donc servi par le règlement adéquat de ces questions. Il incombe au tribunal de première instance de décider dans chaque cas si une affaire, qui peut être considérée comme étant « particulière » de par son caractère d'intérêt public, est suffisamment particulière pour s'élever au niveau des causes où l'allocation inhabituelle de dépens constituerait une mesure appropriée.

Par conséquent, le test à appliquer pour déterminer si une personne sans ressource invoquant un droit protégé par la Charte canadienne peut se voir accorder une provision pour frais est le suivant: i) la partie qui demande une provision pour frais n'a véritablement pas les moyens de payer les frais occasionnés par le litige et ne dispose réalistement d'aucune autre source de financement lui permettant de soumettre les questions au tribunal; ii) la demande paraît au moins suffisamment valable et, de ce fait, il serait contraire aux intérêts de la justice que le plaideur renonce à agir en justice parce qu'il n'en a pas les moyens financiers; iii) les questions soulevées dépassent le cadre des intérêts du plaideur, elles revêtent une importance pour le public et elles n'ont pas encore été tranchées. Si ces trois conditions sont remplies, les tribunaux disposent alors d'une compétence limitée pour ordonner que les dépenses de la partie sans ressources suffisantes soient payés préalablement. De telles ordonnances doivent être formulées avec soin et révisées en cours d'instance de façon à assurer l'équilibre entre les préoccupations concernant l'accès à la justice et la nécessité de favoriser le déroulement raisonnable et efficace de la poursuite.

Il ressortait clairement des motifs du juge en chambre que, s'il avait appliqué ces conditions, il aurait ordonné le paiement d'une provision pour frais en l'espèce. De fait, il a conclu que les bandes indiennes éprouvaient d'importantes difficultés financières et n'avaient pas les moyens d'être représentées par avocat. Leurs revendications concernant leur titre aborigène et d'autres droits ancestraux étaient à première vue plausibles et étaient étayées par une preuve documentaire abondante. L'affaire revêtait une très grande importance pour le public et elle soulevait des questions nouvelles et importantes ayant une importance cruciale pour la population de la Colombie-Britannique; une décision à leur égard constituerait un pas majeur vers le règlement des nombreux problèmes en suspens entre la Couronne et les Autochtones dans cette province. Les circonstances de l'espèce étaient effectivement particulières, voire même exceptionnelles. Les conditions d'attribution d'une provision de frais étaient donc remplies. Les conditions dont la Cour d'appel a assorti l'ordonnance garantissaient que les parties seraient encouragées à régler le litige par la négociation et que les bandes ne seraient pas tentées d'étirer le processus inutilement.

On a qualifié d'absolu et d'illimité le pouvoir discrétionnaire du tribunal de première instance de décider s'il y a lieu d'adjuger des dépens, sous la seule réserve des règles de pratique applicables et de la nécessité d'agir de façon judiciaire selon les faits de l'espèce. La décision du juge en chambre était fondée sur son expérience judiciaire, sa perception des exigences de la justice et son appréciation de la preuve; cette décision ne devait pas être modifiée à la légère. Une cour d'appel peut et doit cependant intervenir dans l'exercice d'un pouvoir discrétionnaire lorsqu'elle estime que le juge de première instance s'est fondé sur des considérations erronées en ce qui concerne le droit applicable ou a commis une erreur manifeste dans son appréciation des faits.

En l'espèce, deux erreurs viciaient la décision du juge en chambre et nécessitaient une intervention en appel. Premièrement, le juge a trop insisté sur l'importance d'éviter de rendre une ordonnance par laquelle on se trouverait à préjuger des questions en litige et il a commis une erreur lorsqu'il a conclu que son pouvoir discrétionnaire n'allait pas jusqu'à lui permettre de rendre l'ordonnance demandée. Deuxièmement, sa conclusion qu'une entente d'honoraires conditionnels serait peut-être une solution de rechange viable quant au financement du litige n'était étayée par aucun élément de preuve; la perspective que les bandes puissent retenir les services d'un avocat sur une base d'honoraires conditionnels semblait irréaliste.

Major, J., dissident (Iacobucci, Bastarache, JJ., souscrivant à l'opinion de Major, J.): Les dépens sont traditionnellement attribués après que la décision finale a été rendue en première instance ou en appel et ils le sont presque toujours en faveur de la partie gagnante. Dans certains cas, une provision pour frais peut être accordée à un conjoint qui intente un procès au sujet du partage des biens, par suite d'une séparation ou d'un divorce; en droit matrimonial, la justification de telles provisions pour frais est par ailleurs claire, soit préserver le but traditionnel de l'adjudication des dépens que constitue l'indemnisation. Accorder une provision pour frais alors que la question de la responsabilité n'a pas encore été tranchée aurait pour effet d'étendre considérablement la portée de la jurisprudence. Octroyer des dépens avant l'instruction pourrait être perçu comme laissant préjuger de l'issue de la cause, étant donné que, en l'absence de motifs sérieux, l'objectivité du tribunal qui rend une telle ordonnance sera presque automatiquement remise en question. De plus, agir de la sorte dans une affaire qui présente des considérations constitutionnelles importantes et dans laquelle la Couronne est la partie défenderesse constituerait une transposition inhabituelle d'une jurisprudence de droit privé très exceptionnelle dans un domaine comportant de nombreuses autres facettes. Même s'il se peut que des questions de droit public justifient l'octroi discrétionnaire de provisions pour frais afin de permettre l'accès à la justice, de tels cas doivent être largement comparables à ceux que reconnaît la jurisprudence en matière d'attribution de provisions pour frais. L'évolution de la common law en matière de provision pour frais devrait être amorcée par les tribunaux de première instance dans l'exercice judicieux de leur pouvoir discrétionnaire et non par l'annulation en appel de leurs décisions à cet égard. En l'espèce, l'adjudication par la Cour d'appel d'une provision pour frais apparaissait comme une forme d'aide juridique imposée par le tribunal. La provision pour frais ne devrait pas être utilisée aux fins d'amener, essentiellement, le tribunal à financer le litige

pour les parties sans ressources suffisantes et à garantir leur accès aux tribunaux. La solution du problème relève du législateur et des ordres professionnels des avocats et non de la magistrature.

S'il est vrai que l'affaire doit être exceptionnelle pour ouvrir droit à une provision pour frais, la proposition que les causes où l'on invoque l'intérêt public font presque toujours intervenir des circonstances extraordinaires était forcément trop large pour satisfaire à l'exigence du caractère exceptionnel. Dire simplement que les questions soulevées dépassent le cadre des intérêts individuels en cause et qu'elles n'ont pas encore été tranchées n'aide pas le juge de première instance à décider de ce qui est « suffisamment spécial » et ne constitue pas une norme ou une directive identifiable. Même s'il serait contraire aux intérêts de la justice que le plaideur renonce à agir en justice parce qu'il n'en a pas les moyens financiers, rien ne distinguait les présentes revendications territoriales autochtones de toute autre revendication. Rien dans la preuve ne démontrait le caractère exceptionnel des présentes revendications territoriales ni ne permettait d'établir comment l'application des nouveaux critères varierait selon la partie autochtone sans ressources suffisantes dont il est question.

La jurisprudence relative à l'octroi des provisions pour frais propose des lignes directrices étroites. Des provisions pour frais ont été accordées dans des affaires de droit matrimonial où l'on a présumé une certaine responsabilité et où l'octroi des dépens répondait à l'objectif d'indemnisation; d'autres ont été accordées dans des affaires en matière de sociétés ou de fiducie où le tribunal a ordonné à la société ou à la fiducie pour laquelle l'action était intentée de payer la provision pour frais. Les caractéristiques juridiques qui expliquent pourquoi les affaires de droit matrimonial constituent une exception à la règle habituelle voulant que les dépens « suivent l'issue de la cause », constituent des lignes directrices pour l'exercice du pouvoir discrétionnaire. En common law, du fait que l'argent et les autres biens de la famille étaient légalement la propriété du mari, qui en assurait également la maîtrise, l'épouse n'avait souvent pas les ressources financières nécessaires pour faire valoir ses droits devant les tribunaux. Dans le présent appel, on reconnaissait que les bandes indiennes n'avaient aucun moyen financier. Si on généralise au-delà du contexte matrimonial, la relation entre les parties doit être telle que l'adjudication de dépens serait particulièrement appropriée. Dans les cas où aucun droit fondé sur l'art. 35 de la Loi constitutionnelle de 1982 n'est en cause et où l'affaire concerne la Couronne provinciale plutôt que la Couronne fédérale, cette relation spéciale ne peut être automatiquement présumée. Finalement, mais élément déterminant en l'espèce, il existe une présomption que le bien faisant l'objet du litige sera partagé d'une façon ou d'une autre. En un sens, le tribunal présume une certaine responsabilité; la seule chose à débattre, c'est l'étendue de cette responsabilité. La réticence du juge en chambre à préjuger de l'affaire quant au fond était justifiée, puisque l'on ne pouvait présumer que les bandes indiennes arriveraient à prouver l'existence, même partielle, d'un titre aborigène.

Pour que l'exception en common law soit justifiée quant à l'octroi discrétionnaire et extraordinaire de provisions pour frais, il faut satisfaire aux conditions suivantes: i) la partie qui demande une provision pour frais n'a pas les moyens d'agir en justice et ne dispose en réalité d'aucune autre source de financement; ii) il existe entre les parties une relation spéciale telle que l'octroi d'une provision pour frais ou d'un soutien serait particulièrement approprié; iii) on présume que la partie qui demande une provision pour frais obtiendra une certaine compensation de la part de l'autre partie. Dans le cadre d'affaires où l'on doit résoudre des questions d'intérêt public controversées, un tribunal doit se montrer particulièrement prudent dans l'exercice de son pouvoir inhérent d'adjudication des dépens. Non seulement un tel précédent n'était pas exigé par la common law, mais l'adoption d'une notion aussi nébuleuse, sans définition claire de ce que l'on entend par « circonstances spéciales », estompait la distinction entre l'objectif traditionnel de l'adjudication des dépens et les préoccupations quant à l'accès à la justice. La common law doit évoluer graduellement tout en respectant d'une manière générale les objets sous-jacents à ses règles. Les nouveaux critères approuvés par les juges majoritaires élargissaient le champ d'application des provisions pour frais dans une mesure qui n'était pas souhaitable et ils n'étaient pas étayés par la jurisprudence. Les règles de common law en matière de provisions pour frais ne devraient pas être modifiées par l'intervention d'une cour d'appel infirmant la décision que le juge de première instance a rendue en usant judicieusement de son pouvoir discrétionnaire. Une telle modification relève davantage du législateur.

Il faut faire preuve de grande déférence à l'égard du pouvoir discrétionnaire du juge de première instance d'accorder des provisions pour frais et n'intervenir que si le juge de première instance s'est fondé sur des considérations erronées en ce qui concerne le droit applicable ou a commis une erreur manifeste dans son appréciation des faits. Si la Cour suprême du Canada élargissait le champ d'application des provisions pour frais, il faudrait interpréter cela comme une nouvelle règle et non pas comme une adaptation des règles de droit existantes. Le juge en chambre a correctement exercé son pouvoir discrétionnaire en fonction des règles de droit qui existaient en matière de dépens à l'époque où la demande a été présentée. Il a eu raison de conclure que la question de la responsabilité demeurait entière en l'espèce et que, s'il ordonnait le paiement de provisions pour frais, il se trouverait à préjuger de façon inopportune de l'issue de l'affaire. Il a donc eu raison de conclure que bien qu'il possède un pouvoir discrétionnaire limité dans les circonstances appropriées d'accorder des provisions pour frais, la présente affaire relevait d'un tout autre domaine.

Comme le juge de première instance n'a pas commis d'« erreur manifeste » dans son appréciation des faits, il fallait s'en remettre à sa décision de ne pas exercer son pouvoir discrétionnaire pour accorder exceptionnellement des provisions pour frais. Chaque partie devait assumer ses propres dépens.

Table of Authorities

Cases considered by *LeBel J.*:

Amcan Industries Corp. v. Toronto Dominion Bank (1998), 1998 CarswellOnt 2936, 71 O.T.C. 131 (Ont. Gen. Div. [Commercial List]) — considered

B. (R.) v. Children's Aid Society of Metropolitan Toronto (February 10, 1989), Doc. York 9141, 9246 (Ont. Dist. Ct.) — considered

B. (R.) v. Children's Aid Society of Metropolitan Toronto (1992), 43 R.F.L. (3d) 36, 96 D.L.R. (4th) 45, 10 O.R. (3d) 321, (sub nom. *Sheena, Re*) 58 O.A.C. 93, 1992 CarswellOnt 301 (Ont. C.A.) — considered

B. (R.) v. Children's Aid Society of Metropolitan Toronto (1994), 9 R.F.L. (4th) 157, 21 O.R. (3d) 479 (note), 122 D.L.R. (4th) 1, [1995] 1 S.C.R. 315, 26 C.R.R. (2d) 202, (sub nom. *Sheena B., Re*) 176 N.R. 161, (sub nom. *Sheena B., Re*) 78 O.A.C. 1, 1995 CarswellOnt 105, 1995 CarswellOnt 515 (S.C.C.) — considered

Benson v. Benson (1994), 3 R.F.L. (4th) 291, 120 Sask. R. 17, 68 W.A.C. 17, 1994 CarswellSask 41 (Sask. C.A.) — referred to

Canadian Newspapers Co. v. Canada (Attorney General) (1986), 55 O.R. (2d) 737, 29 C.C.C. (3d) 109, 32 D.L.R. (4th) 292, (sub nom. *Canadian Newspapers Co. v. Canada*) 53 C.R. (3d) 203, 1986 CarswellOnt 127 (Ont. H.C.) — considered

Delgamuukw v. British Columbia (1997), 153 D.L.R. (4th) 193, 220 N.R. 161, 99 B.C.A.C. 161, 162 W.A.C. 161, [1997] 3 S.C.R. 1010, 1997 CarswellBC 2358, 1997 CarswellBC 2359, [1998] 1 C.N.L.R. 14, [1999] 10 W.W.R. 34, 66 B.C.L.R. (3d) 285 (S.C.C.) — referred to

Earl v. Wilhelm (2000), 2000 SKCA 68, 2000 CarswellSask 372, [2000] 9 W.W.R. 196, 34 E.T.R. (2d) 238, 199 Sask. R. 21, 232 W.A.C. 21 (Sask. C.A.) — considered

Fellowes, McNeil v. Kansa General International Insurance Co. (1997), 1997 CarswellOnt 5013, 37 O.R. (3d) 464, 17 C.P.C. (4th) 400 (Ont. Gen. Div.) — considered

Hamilton-Wentworth (Regional Municipality) v. Hamilton-Wentworth Save the Valley Committee Inc. (1985), 51 O.R. (2d) 23, 15 Admin. L.R. 86, 2 C.P.C. (2d) 117, 19 D.L.R. (4th) 356, 110 O.A.C. 8, 17 O.M.B.R. 411, 1985 CarswellOnt 386 (Ont. Div. Ct.) — considered

Jones v. Coxeter (1742), 26 E.R. 642, 2 Atk. 401 (Eng. Ch. Div.) — considered

Kendall v. Hunt (No. 2) (1979), 16 B.C.L.R. 295, 12 C.P.C. 264, 106 D.L.R. (3d) 277, 1979 CarswellBC 366 (B.C. C.A.) — referred to

Lavigne v. O.P.S.E.U. (1987), 87 C.L.L.C. 14,044, 60 O.R. (2d) 486, 41 D.L.R. (4th) 86, 1987 CarswellOnt 1074 (Ont. H.C.) — considered

Lavigne v. O.P.S.E.U. (1989), 89 C.L.L.C. 14,011, 56 D.L.R. (4th) 474, 31 O.A.C. 40, 37 C.R.R. 193, 67 O.R. (2d) 536 (Ont. C.A.) — referred to

Lavigne v. O.P.S.E.U. (1991), 91 C.L.L.C. 14,029, 48 O.A.C. 241, 4 C.R.R. (2d) 193, 126 N.R. 161, 81 D.L.R. (4th) 545, [1991] 2 S.C.R. 211, 1991 CarswellOnt 1038, 3 O.R. (3d) 511 (note), 1991 CarswellOnt 1038F (S.C.C.) — referred to

McDonald v. McDonald (1998), 163 D.L.R. (4th) 527, 1998 CarswellAlta 847, 223 A.R. 48, 183 W.A.C. 48, 41 R.F.L. (4th) 392, 68 Alta. L.R. (3d) 328, 1998 ABCA 241 (Alta. C.A. [In Chambers]) — considered

New Brunswick (Minister of Health & Community Services) v. G. (J.) (1995), 131 D.L.R. (4th) 273, 171 N.B.R. (2d) 185, 437 A.P.R. 185, 1995 CarswellNB 606, 1995 CarswellNB 607 (N.B. Q.B.) — not followed

New Brunswick (Minister of Health & Community Services) v. G. (J.) (1999), 1999 CarswellNB 305, 1999 CarswellNB 306, 26 C.R. (5th) 203, 244 N.R. 276, 177 D.L.R. (4th) 124, 50 R.F.L. (4th) 63, 66 C.R.R. (2d) 267, 216 N.B.R. (2d) 25, 552 A.P.R. 25, [1999] 3 S.C.R. 46, 7 B.H.R.C. 615 (S.C.C.) — referred to

Organ v. Barnett (1992), 11 O.R. (3d) 210, 1992 CarswellOnt 710 (Ont. Gen. Div.) — considered

Pelech v. Pelech (1987), [1987] 1 S.C.R. 801, [1987] 4 W.W.R. 481, 38 D.L.R. (4th) 641, 76 N.R. 81, 14 B.C.L.R. (2d) 145, 17 C.P.C. (2d) 1, 7 R.F.L. (3d) 225, 1987 CarswellBC 147, 1987 CarswellBC 703 (S.C.C.) — considered

R. v. Regan (2002), 2002 SCC 12, 2002 CarswellNS 61, 2002 CarswellNS 62, 161 C.C.C. (3d) 97, 209 D.L.R. (4th) 41, 282 N.R. 1, 49 C.R. (5th) 1, 201 N.S.R. (2d) 63, 629 A.P.R. 63, 91 C.R.R. (2d) 51, [2002] 1 S.C.R. 297 (S.C.C.) — considered

Roberts v. Aasen (1999), 1999 CarswellOnt 1674 (Ont. S.C.J.) — considered

Rogers v. Greater Sudbury (City) Administrator of Ontario Works (2001), 2001 CarswellOnt 2934, (sub nom. *Rogers v. Sudbury (Administrator of Ontario Works)*) 57 O.R. (3d) 467 (Ont. S.C.J.) — considered

Ryan v. McGregor (1926), 58 O.L.R. 213, [1926] 1 D.L.R. 476 (Ont. C.A.) — considered

Skidmore v. Blackmore (1995), 2 B.C.L.R. (3d) 201, [1995] 4 W.W.R. 524, 27 C.R.R. (2d) 77, 55 B.C.A.C. 191, 90 W.A.C. 191, 35 C.P.C. (3d) 28, 122 D.L.R. (4th) 330, 1995 CarswellBC 23 (B.C. C.A.) — considered

Turner v. Andrews (2001), 2001 BCCA 76, 2001 CarswellBC 224, 85 B.C.L.R. (3d) 53, [2001] 3 W.W.R. 620, 147 B.C.A.C. 305, 241 W.A.C. 305, (sub nom. *Turner v. Telecommunication Workers Pension Plan*) 197 D.L.R. (4th) 533, 38 E.T.R. (2d) 126, 26 C.C.P.B. 313, C.E.B. & P.G.R. 8424 (note) (B.C. C.A.) — considered

Woloschuk v. Von Amerongen (1999), 1999 ABQB 306, 1999 CarswellAlta 354 (Alta. Q.B. [In Chambers]) — considered

Cases considered by *Major J.*:

Delgamuukw v. British Columbia (1997), 153 D.L.R. (4th) 193, 220 N.R. 161, 99 B.C.A.C. 161, 162 W.A.C. 161, [1997] 3 S.C.R. 1010, 1997 CarswellBC 2358, 1997 CarswellBC 2359, [1998] 1 C.N.L.R. 14, [1999] 10 W.W.R. 34, 66 B.C.L.R. (3d) 285 (S.C.C.) — referred to

McDonald v. McDonald (1998), 163 D.L.R. (4th) 527, 1998 CarswellAlta 847, 223 A.R. 48, 183 W.A.C. 48, 41 R.F.L. (4th) 392, 68 Alta. L.R. (3d) 328, 1998 ABCA 241 (Alta. C.A. [In Chambers]) — considered

R. v. Salituro (1991), 9 C.R. (4th) 324, 8 C.R.R. (2d) 173, 50 O.A.C. 125, [1991] 3 S.C.R. 654, 131 N.R. 161, 68 C.C.C. (3d) 289, 1991 CarswellOnt 124, 1991 CarswellOnt 1031 (S.C.C.) — referred to

R. v. Vanderpeet (1996), 50 C.R. (4th) 1, (sub nom. *R. v. Van der Peet*) 137 D.L.R. (4th) 289, (sub nom. *R. v. Van der Peet*) 109 C.C.C. (3d) 1, (sub nom. *R. v. Van der Peet*) 200 N.R. 1, (sub nom. *R. v. Van der Peet*) 80 B.C.A.C. 81, (sub nom. *R. v. Van der Peet*) [1996] 2 S.C.R. 507, [1996] 9 W.W.R. 1, 23 B.C.L.R. (3d) 1, (sub nom. *R. v. Van der Peet*) [1996] 4 C.N.L.R. 177, (sub nom. *R. v. Van der Peet*) 130 W.A.C. 81, 1996 CarswellBC 2309, 1996 CarswellBC 2310 (S.C.C.) — referred to

Randle v. Randle (1999), 1999 CarswellAlta 1045, 3 R.F.L. (5th) 139, 254 A.R. 323, 1999 ABQB 954 (Alta. Q.B.) — considered

Roberts v. Aasen (1999), 1999 CarswellOnt 1674 (Ont. S.C.J.) — referred to

Watkins v. Olafson (1989), 50 C.C.L.T. 101, [1989] 2 S.C.R. 750, [1989] 6 W.W.R. 481, 61 D.L.R. (4th) 577, 100 N.R. 161, 39 B.C.L.R. (2d) 294, 61 Man. R. (2d) 81, 1989 CarswellMan 333, 1989 CarswellMan 1 (S.C.C.) — referred to

Winnipeg Child & Family Services (Northwest Area) v. G. (D.F.) (1997), 152 D.L.R. (4th) 193, 1997 CarswellMan 475, 1997 CarswellMan 476, 31 R.F.L. (4th) 165, (sub nom. *Child & Family Services of Winnipeg Northwest v. D.F.G.*) 219 N.R. 241, 121 Man. R. (2d) 241, 158 W.A.C. 241, [1998] 1 W.W.R. 1, 39 C.C.L.T. (2d) 203 (Fr.), [1997] 3 S.C.R. 925, 39 C.C.L.T. (2d) 155 (Eng.), 3 B.H.R.C. 611 (S.C.C.) — referred to

Statutes considered by *LeBel J.*:

Business Corporations Act, R.S.O. 1990, c. B.16
Generally — referred to

s. 248 — referred to

s. 249(4) — referred to

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
Generally — referred to

s. 15 — referred to

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44
s. 35 — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 131(1) — referred to

Forest Practices Code of British Columbia Act, R.S.B.C. 1996, c. 159
Generally — referred to

s. 96 — considered

s. 123 — considered

Statutes considered by *Major J.*:

Business Corporations Act, R.S.O. 1990, c. B.16
s. 249 — referred to

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
Generally — referred to

Company Act, R.S.B.C. 1996, c. 62
s. 201 — referred to

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44
s. 35 — referred to

Rules considered by *LeBel J.*:

Queen's Bench Rules, Man. Reg. 553/88
R. 49.10 — referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 49.10 — referred to

R. 57.01(1)(d) — referred to

R. 57.01(2) — referred to

Rules of Court, 1990, B.C. Reg. 221/90
Generally — referred to

R. 1(12) — considered

R. 37(23)-37(26) — referred to

R. 52(11)(d) — considered

R. 57(9) — considered

APPEALS by provincial Crown from judgment reported at *British Columbia (Minister of Forests) v. Okanagan Indian Band* (2001), 2001 BCCA 647, 2001 CarswellBC 2355, 95 B.C.L.R. (3d) 273, [2002] 1 C.N.L.R. 57, 208 D.L.R. (4th) 301, 161 B.C.A.C. 13, 263 W.A.C. 13, (sub nom. *British Columbia (Ministry of Forests) v. Jules*) 92 C.R.R. (2d) 319 (B.C. C.A.), allowing in part appeals by Indian Bands from order refusing to order that Crown pay Bands' costs of trial in advance.

POURVOIS de la Couronne provinciale à l'encontre de l'arrêt publié à *British Columbia (Minister of Forests) v. Okanagan Indian Band* (2001), 2001 BCCA 647, 2001 CarswellBC 2355, 95 B.C.L.R. (3d) 273, [2002] 1 C.N.L.R. 57, 208 D.L.R. (4th) 301, 161 B.C.A.C. 13, 263 W.A.C. 13, (sub nom. *British Columbia (Ministry of Forests) v. Jules*) 92 C.R.R. (2d) 319 (B.C. C.A.), qui a accueilli en partie les pourvois des bandes indiennes à l'encontre de l'ordonnance refusant d'ordonner à la Couronne de leur payer une provision pour frais.

LeBel J.:

I. Introduction

1 These two appeals concern the inherent jurisdiction of the courts to grant costs to a litigant, in rare and exceptional circumstances, prior to the final disposition of a case and in any event of the cause (I will refer to a cost award of this nature as "interim costs"). Such a jurisdiction exists in British Columbia. This discretionary power is subject to stringent conditions and to the observance of appropriate procedural controls. In this case, for the reasons which follow, I would uphold the granting of interim costs to the respondents by the British Columbia Court of Appeal, and I would hold that the Court of Appeal had sufficient grounds to review the exercise of discretion by the trial court.

II. Background

2 In the fall of 1999, members of the four respondent Indian bands (the "Bands") began logging on Crown land in British Columbia without authorization under the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159 (the "*Code*"). The Bands' respective tribal councils had purportedly authorized the harvesting of the timber, which was to be used to construct housing on the Bands' reserves. The appellant Minister of Forests served the Bands with stop-work orders under the *Code*, and commenced proceedings to enforce the orders. The Bands claimed that they had aboriginal title to the lands in question and were entitled to log them. They filed a notice of constitutional question challenging ss. 96 and 123 of the *Code* as conflicting with their constitutionally protected aboriginal rights.

3 The Minister then applied under Rule 52(11)(d) of the *Rules of Court* of the Supreme Court of British Columbia, B.C. Reg. 221/90, to have the proceedings remitted to the trial list instead of being dealt with in a summary manner. The respondents argued that the matter should not go to trial, because they lacked the financial resources to fund a protracted and expensive trial — which, given the evidentiary challenges of proving a claim of aboriginal title, this would almost undoubtedly be. In the alternative, they argued that the court, in the exercise of its powers to attach conditions to a discretionary order under Rule 52(11)(d) and to make orders as to costs pursuant to Rule 57(9), should order a trial only if it also ordered the Crown to pay their legal fees and disbursements in advance and in any event of the cause. In

support of this position, they raised constitutional arguments on three grounds: a general right of access to justice that is implicit in the *Charter* and flows from the primacy of the rule of law; the protection of aboriginal rights, as affirmed by s. 35 of the *Constitution Act, 1982*; and equality rights under s. 15 of the *Charter*.

4 The respondents filed affidavit and documentary evidence in support of their claims of aboriginal title and rights. They also submitted evidence demonstrating that it was impossible for them to fund the litigation themselves. The evidence indicated that the Bands were all in extremely difficult financial situations. The chiefs deposed that their communities face grave social problems, including high unemployment rates, lack of housing, inadequate infrastructure, and lack of access to education. Many members of the respondent Bands who live off-reserve would like to return to their communities, but are unable to do so because there are not enough jobs and homes even for those who live on the reserves now. The Bands have been forced to run deficits to finance their day-to-day operations. The chiefs of the Spallumcheen and Neskonlith Bands deposed that they are close to having outside management of their finances imposed by the Department of Indian and Northern Affairs because their working capital deficits are so high.

5 The Bands' counsel estimated that the cost of a full trial would be $814,010. The Bands say that they had no way to raise this much money; and that even if they did, there are many more pressing needs which would have to take priority over funding litigation. One of the most urgent needs is new housing — the very purpose for which, they say, they want to harvest timber from the land to which they claim title.

III. Relevant Legislative Provisions

6 Supreme Court of British Columbia *Rules of Court*, B.C. Reg. 221/90:

> 1(12) When making an order under these rules the court may impose terms and conditions and give directions as it thinks just.
>
> 52(11) On an application the court may
>
> > (d) order a trial of the proceeding, either generally or on an issue, and order pleadings to be filed, and may give directions for the conduct of the trial and of pre-trial proceedings, and for the disposition of the application.
>
> 57(9) ...costs of and incidental to a proceeding shall follow the event unless the court otherwise orders.

IV. Judicial History

A. British Columbia Supreme Court, [2000] B.C.J. No. 1536, 2000 BCSC 1135 (B.C. S.C.)

7 Sigurdson J. held that the case could not be decided on the basis of documentary and affidavit evidence alone, and should therefore be remitted to the trial list. The evidence submitted by the Bands of their historical connection to the land was not sufficient in itself to dispose of the issue. Proving the Bands' aboriginal rights claims, which were contested by the Crown, would require historical, anthropological and archaeological evidence to be given by live witnesses and subjected to the detailed and rigorous testing of the trial process. The just resolution of the dispute required a trial and pleadings.

8 Sigurdson J. went on to consider whether he should impose a condition that the Minister pay the Bands' legal fees and disbursements. He began with the question of whether the court retained a general jurisdiction to award interim costs in a proceeding. He noted that costs usually follow the event and are awarded at the conclusion of the proceedings. Referring to a line of Ontario cases where a narrow jurisdiction to award interim costs has been recognized, Sigurdson J. held that such a discretion also existed in British Columbia in exceptional circumstances. He noted that he was unaware of any cases where substantial amounts had been awarded prior to trial where a liability or right was seriously in issue.

9 Turning to the Bands' argument that constitutional norms applied to the exercise of his discretion over costs, Sigurdson J. held that those norms did not require an order of interim costs to be made in the Bands' favour. He

acknowledged that the Bands would need to retain experienced counsel and experts, and that a trial would be complex and expensive. He also recognized that the Bands' poverty would make it difficult for them to put their case forward. In his view, however, these obstacles resulted from the nature of the case and from the Bands' financial circumstances, not from any interference with their constitutional rights. The Bands' s. 35 argument failed, he held, because there were no specific circumstances giving rise to a fiduciary obligation on the part of the Crown to negotiate with the Bands or to fund the litigation of their land claim.

10 Sigurdson J. declined to order the Minister to pay the Bands' costs in advance of the trial. He found that his jurisdiction to make such an order was very narrow and was limited by the principle that he could not prejudge the outcome of the case. In this case, liability was still in issue, and Sigurdson J. held that ordering the payment of costs in advance would involve prejudging the case on the merits. For this reason, he was of the view that he was precluded from making such an order. Sigurdson J. added a recommendation that the federal and provincial Crown consider providing funding to ensure that the cases, which had elements of test cases, would be properly resolved at trial. He also suggested that the litigation might be able to proceed if the Bands could work out a contingent fee arrangement with counsel.

B. British Columbia Court of Appeal (2001), 95 B.C.L.R. (3d) 273, 2001 BCCA 647 (B.C. C.A.)

11 Newbury J.A., writing for a unanimous panel, allowed the Bands' appeal of Sigurdson J.'s decision.

12 At the outset, Newbury J.A. noted that the Bands' claims, if they went to trial, would be the first to try aboriginal claims to title and other rights in respect of logging in British Columbia. She also summarized some of the affidavit evidence setting out the dire financial circumstances of the Bands.

13 Newbury J.A. upheld the chambers judge's decision to remit the matter of the Bands' aboriginal rights or title to trial. She agreed with him that the just determination of these issues required a trial. This holding was not raised on appeal to this Court.

14 On the question of funding the litigation, Newbury J.A. distinguished between a constitutional right to full funding of legal fees and disbursements, on the one hand, and on the other, the court's discretion to make orders as to "costs" as that term is used in the rules of court and in general legal parlance — meaning a payment to offset legal expenses, usually in an amount set by statutory guidelines, rather than payment of the actual amount owed by the client to his or her solicitor.

15 As far as a constitutional right to funding of the Bands' legal expenditures was concerned, Newbury J.A. substantially agreed with the reasons of the chambers judge. She held that the principle of access to justice did not extend so far as to oblige the government to fund litigants who could not afford to pay for legal representation in a civil suit. She also agreed with Sigurdson J. that s. 35 of the *Constitution Act* did not place an affirmative obligation on the government to provide funding for legal fees of an aboriginal band attempting to prove asserted aboriginal rights. Nothing in the specific circumstances of this case gave rise to a fiduciary expectation on the Bands' part that their legal fees would be funded. (She did not address the Bands' s. 15 arguments, which were not raised on appeal.) Newbury J.A. concluded that the Bands did not have a constitutional right to legal fees funded by the provincial Crown.

16 Newbury J.A. came to a different conclusion, however, on the matter of the court's discretion to order interim costs in favour of the Bands. She agreed with Sigurdson J. that this discretion existed, and that it was narrow in scope and restricted to narrow and exceptional circumstances. In her view, however, the circumstances of this case were indeed exceptional. Newbury J.A. held that the chambers judge had placed too much emphasis on concerns about prejudging the outcome, which in her view were diminished in light of the special circumstances of the case and the public interest in a proper resolution of the issues. She held that constitutional principles and the unique nature of the relationship between the Crown and aboriginal peoples were background factors that should inform the exercise of the court's discretion to order costs. Newbury J.A. held that the chambers judge had erred in failing to recognize that the case involved exceptional and unique circumstances which outweighed concerns about prejudging the outcome of the case.

17 Newbury J.A. held that, although the court had no discretion to order full funding of the Bands' case by the Crown, the chambers judge did have a discretionary power to order interim costs. She held that such an order should be made with conditions designed to provide concrete assistance to the Bands without exposing the Minister to unreasonable or excessive costs. She ordered the Crown to pay such legal costs of the Bands as ordered by the chambers judge from time to time, subject to detailed terms that she imposed so as to encourage the parties to minimize unnecessary steps in the dispute and to resolve as many issues as possible by negotiation. These terms, as found in the Court of Appeal Order dated November 5, 2001, are best stated in full:

> AND THIS COURT FURTHER ORDERS that the Crown, in any event of the cause, pay such legal costs of the Bands, as that term is used and as the Chambers judge orders from time to time in accordance with the following:
>
> (a) Costs, as is referenced in paragraph [10] of the *Reasons for Judgment*;
>
> (b) Unless the Chambers judge concludes that special costs are warranted in this case, costs are to be calculated on the appropriate scale in light of the complexity and difficulty of the litigation;
>
> (c) Counsel are to consider whether costs could be saved by trying one of the four cases rather than all four at the same time. If counsel are unable to agree on that issue, they should seek directions from the Chambers judge. Counsel are also to use all other reasonable measures to minimize costs, and the Chambers judge may impose restrictions for this purpose;
>
> (d) The Province and the Bands are to attempt to agree on a procedure whereby the Bands upon incurring taxable costs and disbursements from time to time up to the end of the trial, will so advise the respondent, and provide such other 'backup' material as the Chambers judge may order. Such costs would be paid by the respondent within a given time-frame, unless the Province objects, in which case it shall refer the matter to the Chambers judge, who may order the taxation of the bill in the ordinary way;
>
> (e) If counsel are unable to agree on such procedures, the matter shall be taken back to the Chambers judge, who shall make directions in accordance with the spirit of these *Reasons*.

V. Issues

18 This case raises two issues: first, the nature of the court's jurisdiction in British Columbia to grant costs on an interim basis and the principles that govern its exercise; and second, appellate review of the trial court's discretion as to costs. The issue of a constitutional right to funding does not arise, as it was not relied on by the respondents in this appeal.

VI. Analysis

A. The Court's Discretionary Power to Grant Interim Costs

(1) Traditional Costs Principles — Indemnifying the Successful Party

19 The jurisdiction of courts to order costs of a proceeding is a venerable one. The English common law courts did not have inherent jurisdiction over costs, but beginning in the late 13th century they were given the power by statute to order costs in favour of a successful party. Courts of equity had an entirely discretionary jurisdiction to order costs according to the dictates of conscience (see M.M. Orkin, *The Law of Costs* (2nd ed. (loose-leaf)), at p. 1-1). In the modern Canadian legal system, this equitable and discretionary power survives, and is recognized by the various provincial statutes and rules of civil procedure which make costs a matter for the court's discretion.

20 In the usual case, costs are awarded to the prevailing party after judgment has been given. The standard characteristics of costs awards were summarized by the Divisional Court of the Ontario High Court of Justice in

Hamilton-Wentworth (Regional Municipality) v. Hamilton-Wentworth Save the Valley Committee Inc. (1985), 51 O.R. (2d) 23 (Ont. Div. Ct.), at p. 32, as follows:

> (1) They are an award to be made in favour of a successful or deserving litigant, payable by the loser.
>
> (2) Of necessity, the award must await the conclusion of the proceeding, as success or entitlement cannot be determined before that time.
>
> (3) They are payable by way of indemnity for allowable expenses and services incurred relevant to the case or proceeding.
>
> (4) They are *not* payable for the purpose of assuring participation in the proceedings.

21 The characteristics listed by the court reflect the traditional purpose of an award of costs: to indemnify the successful party in respect of the expenses sustained either defending a claim that in the end proved unfounded (if the successful party was the defendant), or in pursuing a valid legal right (if the plaintiff prevailed). Costs awards were described in *Ryan v. McGregor* (1926), 58 O.L.R. 213 (Ont. C.A.), at p. 216, as being "in the nature of damages awarded to the successful litigant against the unsuccessful, and by way of compensation for the expense to which he has been put by the suit improperly brought".

(2) Costs as an Instrument of Policy

22 These background principles continue to govern the law of costs in cases where there are no special factors that would warrant a departure from them. The power to order costs is discretionary, but it is a discretion that must be exercised judicially, and accordingly the ordinary rules of costs should be followed unless the circumstances justify a different approach. For some time, however, courts have recognized that indemnity to the successful party is not the sole purpose, and in some cases not even the primary purpose, of a costs award. Orkin, *supra*, at p. 2-24.2, has remarked that:

> The principle of indemnification, while paramount, is not the only consideration when the court is called on to make an order of costs; indeed, the principle has been called "outdated" since other functions may be served by a costs order, for example to encourage settlement, to prevent frivolous or vexations [*sic*] litigation and to discourage unnecessary steps.

23 The indemnification principle was referred to as "outdated" in *Fellowes, McNeil v. Kansa General International Insurance Co.* (1997), 37 O.R. (3d) 464 (Ont. Gen. Div.), at p. 475. In this case the successful party was a law firm, one of whose partners had acted on its behalf. Traditionally, courts applying the principle of indemnification would allow an unrepresented litigant to tax disbursements only and not counsel fees, because the litigant could not be indemnified for counsel fees it had not paid. Macdonald J. held that the principle of indemnity remained a paramount consideration in costs matters generally, but was "outdated" in its application to a case of this nature. The court should also use costs awards so as to encourage settlement, to deter frivolous actions and defences, and to discourage unnecessary steps in the litigation. These purposes could be served by ordering costs in favour of a litigant who might not be entitled to them on the view that costs should be awarded purely for indemnification of the successful party.

24 Similarly, in *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201 (B.C. C.A.), the British Columbia Court of Appeal stated at para. 28 that "the view that costs are awarded solely to indemnify the successful litigant for legal fees and disbursements incurred is now outdated". The court held that self-represented lay litigants should be allowed to tax legal fees, overruling its earlier decision in *Kendall v. Hunt (No. 2)* (1979), 16 B.C.L.R. 295 (B.C. C.A.). This change in the common law was described by the court as an incremental one "when viewed in the larger context of the trend towards awarding costs to encourage or deter certain types of conduct, and not merely to indemnify the successful litigant" (para. 44).

25 As the *Fellowes* and *Skidmore* cases illustrate, modern costs rules accomplish various purposes in addition to the traditional objective of indemnification. An order as to costs may be designed to penalize a party who has refused a reasonable settlement offer; this policy has been codified in the rules of court of many provinces (see, e.g., Supreme Court of British Columbia *Rules of Court*, Rule 37(23-26); Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 49.10; Manitoba *Queen's Bench Rules*, Man. Reg. 553/88, Rule 49.10). Costs can also be used to sanction behaviour that increases the duration and expense of litigation, or is otherwise unreasonable or vexatious. In short, it has become a routine matter for courts to employ the power to order costs as a tool in the furtherance of the efficient and orderly administration of justice.

26 Indeed, the traditional approach to costs can also be viewed as being animated by the broad concern to ensure that the justice system works fairly and efficiently. Because costs awards transfer some of the winner's litigation expenses to the loser rather than leaving each party's expenses where they fall (as is done in jurisdictions without costs rules), they act as a disincentive to those who might be tempted to harass others with meritless claims. And because they offset to some extent the outlays incurred by the winner, they make the legal system more accessible to litigants who seek to vindicate a legally sound position. These effects of the traditional rules can be connected to the court's concern with overseeing its own process and ensuring that litigation is conducted in an efficient and just manner. In this sense it is a natural evolution in the law to recognize the related policy objectives that are served by the modern approach to costs.

(3) Public Interest Litigation and Access to Justice

27 Another consideration relevant to the application of costs rules is access to justice. This factor has increased in importance as litigation over matters of public interest has become more common, especially since the advent of the *Charter*. In special cases where individual litigants of limited means seek to enforce their constitutional rights, courts often exercise their discretion on costs so as to avoid the harshness that might result from adherence to the traditional principles. This helps to ensure that ordinary citizens have access to the justice system when they seek to resolve matters of consequence to the community as a whole.

28 Courts have referred to the importance of this objective on numerous occasions. In *Canadian Newspapers Co. v. Canada (Attorney General)* (1986), 32 D.L.R. (4th) 292 (Ont. H.C.), Osler J. opined that "it is desirable that *bona fide* challenge is not to be discouraged by the necessity for the applicant to bear the entire burden" (pp. 305-6), while at the same time cautioning that "the Crown should not be treated as an unlimited source of funds with the result that marginal applications would be encouraged" (p. 306). In *Lavigne v. O.P.S.E.U.* (1987), 60 O.R. (2d) 486 (Ont. H.C.), White J. held that "it is desirable that *Charter* litigation not be beyond the reach of the citizen of ordinary means" (p. 526). He awarded costs to the successful *Charter* applicant in spite of the fact that his representation had been paid for by a third-party organization (so that he would not, on the traditional approach, have been entitled to any indemnity). This case was overturned on the merits on appeal (*Lavigne v. O.P.S.E.U.* (1989), 67 O.R. (2d) 536 (Ont. C.A.); aff'd [1991] 2 S.C.R. 211 (S.C.C.)), but neither the Ontario Court of Appeal nor this Court expressed any disapproval of White J.'s remarks on costs. Referring to both *Canadian Newspapers Co.* and *Lavigne* in *Rogers v. Greater Sudbury (City) Administrator of Ontario Works* (2001), 57 O.R. (3d) 467 (Ont. S.C.J.), Epstein J. concluded at para. 19 that "costs can be used as an instrument of policy and ... making *Charter* litigation accessible to ordinary citizens is recognized as a legitimate and important policy objective".

29 In *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 (S.C.C.), the applicants, who were Jehovah's Witnesses, unsuccessfully argued that their *Charter* rights had been violated when a blood transfusion was administered to their baby daughter over their objections. Instead of granting costs in the cause, the District Court judge directed the intervening Attorney General to pay the applicants' costs. Whealy D.C.J. cited Osler J.'s statement in *Canadian Newspapers Co.*, *supra*, that *bona fide* challenges should not be deterred, and observed that the case before him was an unusual one involving a matter of province-wide importance (see (Ont. Dist. Ct.)). His costs order, although unconventional, was upheld on appeal by the Ontario Court of Appeal, and subsequently by this Court. At the Court of Appeal, Tarnopolsky J.A. noted that this case, in which "the parents rose up against state power because of their religious

beliefs," was one of national, even international significance ((1992), 10 O.R. (3d) 321 (Ont. C.A.), at pp. 354-55). La Forest J. stated at para. 122 of this Court's judgment that the costs award against the Attorney General was "highly unusual" and something that should be permitted "only in very rare cases," but that the case "raised special and peculiar problems". He allowed Whealy D.C.J.'s order to stand.

30 The *B. (R.)* case illustrates that in highly exceptional cases involving matters of public importance the individual litigant who loses on the merits may not only be relieved of the harsh consequence of paying the other side's costs, but may actually have its own costs ordered to be paid by a successful intervenor or party. It should be noted that Whealy D.C.J. applied Rule 57.01(2), a provision of Ontario's *Rules of Civil Procedure* that expressly authorized the court to award costs against a successful litigant and specified that the importance of the issues was a factor to be considered (see Rule 57.01(1)(d)). Although these principles are not spelled out in the Supreme Court of British Columbia *Rules of Court*, in my view they are generally relevant in guiding the exercise of a court's discretion as to costs. They form part of the background against which a British Columbia court exercises its inherent equitable jurisdiction, confirmed by Rule 57(9), to depart from the usual rule that costs follow the event.

(4) Interim Costs

31 Concerns about access to justice and the desirability of mitigating severe inequality between litigants also feature prominently in the rare cases where interim costs are awarded. An award of costs of this nature forestalls the danger that a meritorious legal argument will be prevented from going forward merely because a party lacks the financial resources to proceed. That costs orders can be used in this way in a narrow class of exceptional cases was recognized early on by the English courts. In *Jones v. Coxeter* (1742), 2 Atk. 401, 26 Eng. Rep. 642 (Eng. Ch. Div.), the Lord Chancellor found that "the poverty of the person will not allow her to carry on the cause, unless the court will direct the defendant to pay something to the plaintiff in the mean time." Invoking the "intirely discretionary" equitable jurisdiction to order costs, he ordered costs to be paid to the plaintiff "to empower her to go on with the cause" (p. 642).

32 The discretionary power to award interim costs in appropriate cases has also been recognized in Canada. An extensive discussion of this power is found in *Organ v. Barnett* (1992), 11 O.R. (3d) 210 (Ont. Gen. Div.). Macdonald J. reviewed the authorities, including *Jones*, *supra*, and concluded that "the court *does* have a general jurisdiction to award interim costs in a proceeding" (p. 215 (emphasis in original)). She also found that that jurisdiction was "limited to very exceptional cases and ought to be narrowly applied, especially when the court is being asked to essentially pre-determine an issue" (p. 215).

33 As Macdonald J. recognized in *Organ*, *supra*, at p. 215, the power to order interim costs is perhaps most typically exercised in, but is not limited to, matrimonial or family cases. In *McDonald v. McDonald* (1998), 163 D.L.R. (4th) 527 (Alta. C.A. [In Chambers]), Russell J.A. observed that the wife in divorce proceedings could traditionally obtain "anticipatory costs" to enable her to present her position (para. 18). This was because husbands usually controlled all the matrimonial property. Since the wife had "no means to pay lawyers, her side of the litigation would not be advanced, and this position was patently unfair" (para. 20). Interim costs will still be granted in family cases where one party is at a severe financial disadvantage that may prevent his or her case from being put forward. See, e.g., *Woloschuk v. Von Amerongen*, [1999] A.J. No. 463 , 1999 ABQB 306 (Alta. Q.B. [In Chambers]), where the Alberta Court of Queen's Bench ordered a lump sum payment of $10,000 to the mother in a custody action by way of interim costs, finding that the father's financial position was "significantly better than that of the [mother] in terms of funding this protracted lawsuit" (para. 16); and *Roberts v. Aasen*, [1999] O.J. No. 1969 (Ont. S.C.J.), also a custody case, where the court held that the father was unlikely to succeed at trial and that the mother lacked the resources to pay her legal fees and disbursements, and ordered the father to pay $15,000 as interim costs. Orkin observes that in the modern context "the *raison d'tre* [*sic*] of such awards is to assist the financially needy party pending the trial; they are made where the spouse is without resources and would otherwise be unable to obtain relief in court" (*supra*, at p. 2-23 (citations omitted)).

34 Interim costs are also potentially available in certain trust, bankruptcy and corporate cases, where they are awarded for essentially the same reason — to avoid unfairness by enabling impecunious litigants to pursue meritorious claims with

which they would not otherwise be able to proceed. *Organ*, *supra*, was a corporate case involving, among other causes of action, an action under the oppression remedy set out in s. 248 of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16. The statute also provided in s. 249(4) that interim costs could be awarded in an oppression case. Macdonald J. held that, in addition to this express statutory power, the court also had an inherent jurisdiction to award interim costs. In the particular circumstances of this case, however, she held that the order should not be granted, because by their own admission the plaintiffs were not impecunious and would be able to proceed to trial without it. In *Amcan Industries Corp. v. Toronto Dominion Bank*, [1998] O.J. No. 3014 (Ont. Gen. Div. [Commercial List]), a bankruptcy case, Macdonald J. acknowledged "the inherent unfairness that arises in choking a plaintiff's action if access to funds is not permitted" (para. 39); in this case, again, interim costs were not awarded because impecuniosity was not established. In *Turner v. Andrews* (2001), 197 D.L.R. (4th) 533, 2001 BCCA 76 (B.C. C.A.), an action for breach of fiduciary duty in respect of a pension fund, the British Columbia Court of Appeal recognized that the court had the power to award interim costs, but held that the interests of justice did not require it to do so on the facts of the case. Newbury J.A. noted that the financial position or impecuniosity of a party is not in itself reason enough to depart from the usual rules as to costs (para. 18).

35 Based on the foregoing overview of the case law, the following general observations can be made. The power to order interim costs is inherent in the nature of the equitable jurisdiction as to costs, in the exercise of which the court may determine at its discretion when and by whom costs are to be paid. This broad discretion may be expressly referred to in a statute, as in s. 131(1) of the Ontario *Courts of Justice Act*, R.S.O. 1990, c. C.43, which provides that costs "are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid". Indeed, the power to order interim costs may be specifically stipulated, as in the Ontario *Business Corporations Act* or similar legislation in other jurisdictions. Even absent explicit statutory authorization, however, the power to award interim costs is implicit in courts' jurisdiction over costs as it is set out in statutes such as the Supreme Court of British Columbia *Rules of Court*, which provides that the court may make orders varying from the usual rule that costs follow the event.

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

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

order costs contrary to the cause is always implicit in the court's discretionary jurisdiction as to costs, as is the power to order interim costs.

(5) Interim Costs in Public Interest Litigation

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

39 One factor to be borne in mind by the court in making this determination is that in a public law case costs will not always be awarded to the successful party if, for example, that party is the government and the opposing party is an individual *Charter* claimant of limited means. Indeed, as the *B. (R.)* case demonstrates, it is possible (although still unusual) for costs to be awarded in favour of the *unsuccessful* party if the court considers that this is necessary to ensure that ordinary citizens will not be deterred from bringing important constitutional arguments before the courts. Concerns about prejudging the issues are therefore attenuated in this context since costs, even if awarded at the end of the proceedings, will not necessarily reflect the outcome on the merits. Another factor to be considered is the extent to which the issues raised are of public importance, and the public interest in bringing those issues before a court.

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

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

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

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

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

B. Appellate Review of Discretionary Decisions

42 The discretion of a trial court to decide whether or not to award costs has been described as unfettered and untrammelled, subject only to any applicable rules of court and to the need to act judicially on the facts of the case (*Earl v. Wilhelm* (2000), 199 Sask. R. 21, 2000 SKCA 68 (Sask. C.A.), at para. 7, citing *Benson v. Benson* (1994), 120 Sask. R. 17 (Sask. C.A.)). Sigurdson J.'s decision in the present case was based on his judicial experience, his view of what justice required, and his assessment of the evidence; it is not to be interfered with lightly.

43 As I observed in *R. v. Regan* (2002), 161 C.C.C. (3d) 97, 2002 SCC 12 (S.C.C.), however, discretionary decisions are not completely insulated from review (para. 118). An appellate court may and should intervene where it finds that the trial judge has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts. As this Court held in *Pelech v. Pelech*, [1987] 1 S.C.R. 801 (S.C.C.), at p. 814-5, the 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.

44 Two errors in particular vitiate the chambers judge's decision and call for appellate intervention. First, he overemphasized the importance of avoiding any order that involved prejudging the issues. In a case of this kind, as I have indicated, this consideration is of less weight than in the ordinary case; in fact, the allocation of the costs burden may, in certain cases, be determined independently of the outcome on the merits. Sigurdson J. erred when he concluded that his discretion did not extend so far as to empower him to make the order requested. Secondly, Sigurdson J.'s finding that a contingent fee arrangement might be a viable alternative for funding the litigation does not appear to be supported by any evidence, and I agree with Newbury J.A. that the prospect of the Bands' hiring counsel on a contingency basis seems unrealistic in the particular circumstances of this case.

C. Application to the Facts of this Case

45 It is unnecessary to send this case back to the chambers judge to apply the criteria set out here, because it is apparent from his reasons that, had he done so, he would have ordered interim costs in favour of the respondents. Sigurdson J. found as a fact that the Bands were in extremely difficult financial circumstances and could not afford to pay for legal representation. The only alternative which he suggested might be available for funding the litigation was a contingent fee arrangement, which, as I have stated, was not feasible. He found the Bands' claims of aboriginal title and rights to be *prima facie* plausible and supported by extensive documentary evidence; although the claim was not so clearly valid that there was no need for it to be tested through the trial process, it was certainly strong enough to warrant pursuit. Finally, Sigurdson J. found the case to be one of great public importance, raising novel and significant issues resolution of which through the trial process was very much in the interests of justice. He even went so far as to urge the executive branches of the federal and provincial governments to provide funding so that the respondents' claims could be addressed.

46 Applying the criteria I have set out to the evidence in this case as assessed by the chambers judge, it is my view that each of them is met. The respondents are impecunious and cannot proceed to trial without an order for interim costs. The case is of sufficient merit that it should go forward. The issues sought to be raised at trial are of profound importance to the people of British Columbia, both aboriginal and non-aboriginal, and their determination would be a major step towards settling the many unresolved problems in the Crown-aboriginal relationship in that province. In short, the circumstances of this case are indeed special, even extreme.

47 The conditions attached to the costs order by Newbury J.A. ensure that the parties will be encouraged to resolve the matter through negotiation, which remains the ultimate route to achieving reconciliation between aboriginal societies and the Crown (see *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.), at para. 186), and also that there will be no temptation for the Bands to drag out the process unnecessarily and to throw away costs paid by the appellant. I would uphold her disposition of the case.

VII. Disposition

48 The appeal is dismissed with costs to the respondents.

Major J.:

49 At issue in this appeal is how trial courts should be guided in their award of interim costs. When are these advance costs appropriate? How much deference should appellate courts give to the trial judge's discretion in the matter?

50 Four Indian bands are suing the Crown in right of British Columbia, to establish aboriginal title over land they wish to log. Because this litigation will be expensive, they seek interim costs — that is, advance costs awarded whether or not they are successful at trial. By any standard, this is an extraordinary remedy.

51 The chambers judge could not find a supporting precedent and in the exercise of his discretion he chose not to grant interim costs. The British Columbia Court of Appeal, and now my colleague LeBel J., reversed the chambers judge on what appears to be a new rule for interim costs. With respect for the contrary view, I conclude that Sigurdson J. interpreted the applicable principles correctly and can find no basis for reversing his discretion. I would therefore allow the appeal.

52 The appeal raises difficult questions. In particular, how may impoverished parties sue to establish what is submitted to be constitutionally supported rights? Constitutional issues, however, were not pursued in this appeal. The respondents rely solely on the common law rules on costs.

53 Traditionally, costs — usually party and party costs — are awarded after the ultimate trial or appellate decision and almost always to the successful party. Party and party costs in all Canadian jurisdictions are only partial indemnification of the litigants' legal costs. In certain cases, interim costs may be awarded to a spouse suing for the division of property as a consequence of separation or divorce. The ratio of the matrimonial cases is clear: a spouse usually owns or is entitled to part of the matrimonial property; some success on the merits is practically assured. Thus, the traditional purpose of costs — indemnification of the prevailing party — is preserved.

54 But to award interim costs when liability remains undecided would be a dramatic extension of the precedent. Furthermore, to do so in a case with serious constitutional considerations where the Crown is the defending party would be an unusual extension of highly exceptional private law precedent into an area fraught with other implications.

55 The common law is said to evolve to adapt prevailing principles to modern circumstances. But the common law of costs should develop through the discretion of trial judges. This equitable trial-level discretion, developed over centuries, is essential to the primary traditional use of the discretionary costs power by courts: to manage litigation and case loads. It may be that there are public law questions where access to justice can be provided through the discretionary award of interim costs. Even so, such cases must lie closer to the heart of the interim costs case law. Such developments should be initiated by trial courts properly exercising their discretionary power, not the appellate *reversal* of that discretion.

I. Background

56 My colleague has fairly characterized the facts of this litigation. However, some highlighting of those facts may be useful.

57 In 1999, the four respondent Indian bands (the "Bands") began logging Crown land. Funds from that activity were to be used for housing and other desperately needed social services. The British Columbia Minister of Forests served the Bands with stop-work orders and commenced proceedings to prevent further logging. The Bands challenged the orders and claimed aboriginal title to the lands.

58 At the British Columbia Supreme Court, Sigurdson J. ruled that the question of aboriginal title was sufficiently complex that a trial was necessary. The Bands stated that they could not afford to litigate and even if they could, they would have preferred to use such funds to provide social services. The Bands claimed that they had been unable to find

any governmental or *pro bono* sources of aid. They therefore petitioned for interim costs — costs in advance of trial. The Bands' motions were originally grounded in the constitutional question of title. They now seek interim costs on the basis of the trial court's inherent and statutory cost power.

59 The chambers judge conducted a thorough examination of the case law on interim costs and, in the exercise of his discretion, concluded at para. 129:

> I find that the respondents' argument that its trial costs be paid in advance must fail. The issue of liability is very much in dispute and the trial costs are substantial. To order the payment of trial costs would require prejudging the case on the merits which, of course, I cannot do. Although I have a limited discretion in appropriate circumstances to award interim costs this case falls far outside that area. I recognize that these respondents are in a difficult position. However, counsel may be prepared to represent them on a contingency basis and, if successful, the respondents will undoubtedly receive significant indemnity for their costs. I recommend, however, that the Federal and Provincial Crown consider providing some funding so that these disputes, which have some elements of test cases, if they cannot be settled, can be properly resolved at trial.

II. Analysis

A. The Law of Costs

60 The standard rule on party and party costs is that they are generally awarded to the successful litigant at the end of litigation. These costs are a contribution to the successful party's actual expense. Full indemnification by way of solicitor-client costs is infrequently ordered in Canada. Such costs require unusual and egregious conduct by the losing party. On rare occasions the court may award solicitor-client costs where equity is met by doing so.

61 My colleague points to what he describes as a modern trend in the law on costs — its use as an instrument to encourage litigation in the public interest. With respect, I think this proposition mistakes public funding to pursue *Charter* claims as an exercise in awarding costs. It is a separate function. Although the trial judge retains a discretion on the question of costs in such cases, they have always been awarded at the conclusion of the litigation.

B. The Law of Interim Costs

62 As a matter of public policy as reflected in federal and provincial rules of court, costs are usually awarded at the conclusion of trial as a contribution to the successful party's legal expenses. However, the common law on interim costs — costs in advance of trial — has been more confined and almost exclusively restricted to family law litigation to allow the impecunious spouse and children access to the court. The reason for such restrictive use is apparent since awarding costs in advance could be seen as prejudging the merits. While there is limited jurisdiction to award interim costs, it is logical that the party who must pay them and informed members of society might, in the absence of compelling reasons, have a reasonable apprehension of bias in favour of the recipient. The objectivity of the court making such an order will almost automatically be questioned.

63 The award of costs before trial is a more potent incentive to litigation than the possibility of costs after the trial. The awarding of interim costs in the circumstances of this appeal appears as a form of judicially imposed legal aid. Interim costs are useful in family law, but should not be expanded to engage the court in essentially funding litigation for impecunious parties and ensuring their access to court. As laudable as that objective may be, the remedy lies with the legislature and law societies, not the judiciary.

64 LeBel J. concludes from his review of the case law on interim costs that they may be granted when (i) the party seeking the costs would be unable to pursue the litigation otherwise; (ii) there is a *prima facie* case of sufficient merit; and (iii) there are present "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" (para. 36). He finds that such special circumstances may exist if the case is in the public interest and is a test case. With respect, I come to a different result.

65 I agree that the case must be exceptional in order to attract interim costs. Of necessity, the proposition that extraordinary circumstances practically always exist where the public interest is invoked is too broad to meet the exceptional requirement. LeBel J. accepts that most public interest cases would satisfy this criterion (para. 38). This is why he leaves to the discretion of the trial judge the decision as to whether the case is "special enough" to warrant an order. The difficulty for the trial judge is that this does not provide any ascertainable standard or direction. To say simply that the issues transcend the individual interests in the case and have not yet been resolved (para. 40) does not assist the trial judge in deciding what is "special enough". An examination of past *Charter* cases will demonstrate that dilemma.

66 Test cases are referred to by LeBel J. and involve situations where important precedents are sought. In my view, the proposition that "it [would be] contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means" (para. 40), without more, is not sufficient. A trial judge can draw no direction from this proposal.

67 But even if such special circumstances were to be considered, there is nothing to distinguish the present aboriginal land claims from any other. On the contrary, the litigation here is likely to involve the application of principles enunciated by this Court in cases such as *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.), and *R. v. Vanderpeet* (1996), 50 C.R. (4th) 1 (S.C.C.). There is no evidence to establish that these land claims should be considered exceptional. Nor is there anything to establish how the new criteria would apply in a different way between one impecunious aboriginal party and another.

68 It is worth noting that the honour of the Crown is not at stake in this appeal and that there is no reason to distinguish the aboriginal claimants from any other impecunious persons claiming rights under the Constitution with regard to the availability of costs. The new definition of extraordinary circumstances must therefore apply generally and its impact measured accordingly. There is no doubt that the conclusions of LeBel J. will result in an increase of interim costs applications while offering little in the way of guidance to trial judges.

69 The interim costs case law suggests narrow guidelines. Interim costs have been awarded in two circumstances: (i) in marital cases where some liability is presumed and the indemnificatory purpose of the costs power is fulfilled; and (ii) in corporate and trust cases where the court grants advanced costs to be paid by the corporation or trust for whose benefit the action is brought. In those cases it is still necessary that the party seeking advanced costs show that they would otherwise be unable to proceed with litigation.

70 The matrimonial cases involving the division of assets upon divorce comprise the oldest line of interim costs jurisprudence. At common law, a wife could be awarded interim costs to help her maintain her divorce action. This rule has been generally recognized in statute and Canadian case law. See *McDonald v. McDonald* (1998), 163 D.L.R. (4th) 527 (Alta. C.A. [In Chambers]). See also *Randle v. Randle* (1999), 254 A.R. 323, 1999 ABQB 954 (Alta. Q.B.), where interim costs were granted in an action concerning the division of property between common law spouses.

71 There are three legal characteristics that explain why the post-marital contest serves as the exception to the standard rule that costs "follow the event". These three characteristics are guidelines for the exercise of discretion in the award of interim costs.

72 First, at common law, husbands usually had control and legal ownership of the marital purse and property, ensuring in most cases that wives did not have the financial resources to pursue litigation. See *McDonald*, *supra*, at para. 20. Therefore, the first required element of an interim cost award is that the party seeking the award is impoverished, and would not be able to pursue the litigation without such an award. It is acknowledged in this appeal that each of the bands are without funds.

73 Second, the marital relationship is perhaps unique in the mutual support owed between spouses. Thus, generalizing beyond the marital context, there must be a special relationship between the parties such that the cost award would be particularly appropriate. Where, as in this appeal, no right under s. 35 of the *Constitution Act, 1982* is implicated and

the matter involves the provincial Crown rather than the federal Crown, this special relationship cannot automatically be presumed.

74 But third, and dispositive to this appeal, in the marital cases *there is a presumption that the property that is the subject of the dispute is to be shared in some way*. See *Randle*, *supra*, at para. 22. Generally, it is the *distribution* of assets and *extent* of support that are at issue in a divorce action, not whether such a division and such support are owed. In a sense, *some liability is assumed*; all that is to be litigated is the *extent* of the liability. LeBel J. blunts the bite of this element, reducing it to the modest requirement that "[t]he claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means" (para. 40). The traditional roots of the costs power require more than *prima facie* merit. The costs power originally provided indemnification — the prevailing party won costs. In a divorce action, however, it was assumed that the spouse, usually the wife, would be awarded something; the question was how much.

75 The matrimonial cases can therefore be seen as exceptional not because they dispensed with the rule that the prevailing party won costs (and the related principle that judges not predetermine the merits of the case), but because they dispensed with the need to wait for the end of trial to decide which party prevailed, for some liability was presumed.

76 In this appeal, Sigurdson J.'s reluctance to "prejudg[e] the case on the merits" was appropriate. Unlike the divorce cases, one may not presume that the Bands will establish even partial aboriginal title in the cases under appeal.

77 In summary, in my opinion the ratio of the common law dictates the following three guidelines for the discretionary, extraordinary award of interim costs:

1. The party seeking the interim costs cannot afford to fund the litigation, and has no other realistic manner of proceeding with the case.

2. There is a special relationship between the parties such that an award of interim costs or support would be particularly appropriate.

3. It is presumed that the party seeking interim costs will win some award from the other party.

78 In my view, a court should be particularly careful in the exercise of its inherent powers on costs in cases involving the resolution of controversial public questions. Not only was such precedent not required at common law, but by incorporating such an amorphous concept without clearly defining what constitutes "special circumstances", the distinction between the traditional purpose of awarding costs and concerns over access to justice has been blurred.

79 As noted earlier, certain corporate and trust actions form another line of interim costs cases with a different ratio. In those cases, a litigant sues on behalf of a corporation or trust, and seeks interim costs. Such cases are an exception to the general rule on costs because the court makes the costs order on behalf of the corporation or trust. For example, where a shareholder sues directors on behalf of the corporation, it is presumed that the corporation, which in many ways is owned by the shareholders, although under the control of the directors, consents to the paying of the interim costs. It is important to note that in the corporate context, interim costs are specifically addressed by legislation. See British Columbia *Company Act*, R.S.B.C. 1996, c. 62, s. 201; Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 249.

80 Courts may also award interim costs in child custody cases. See *Roberts v. Aasen*, [1999] O.J. No. 1969 (Ont. S.C.J.). Child custody litigation focuses on the best interests of the child for whose welfare both parents are responsible. The purpose of the interim costs award is not merely to aid one side or the other in funding their litigation but, commensurate with the parents' duty, to help the court find the result most beneficial to the child.

81 The value in considering the derivative and related child custody cases is simply to concede that there are circumstances beyond the matrimonial cases in which interim costs may be appropriate. The cases on appeal do not fit these exceptions.

C. The Trial Judge's Discretion

82 I agree with LeBel J. that a trial judge's discretionary decision on interim costs is owed great deference, and should be disturbed only if "the trial judge has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts" (para. 43). I also agree that a misapplication of the criteria relevant to an exercise of discretion constitutes an error of law.

83 LeBel J. concludes that because Sigurdson J. failed to apply the newly enunciated criteria of impecuniosity, *prima facie* merit, and public importance, an error of law was (understandably) committed. LeBel J. saw no need to return the case to the chambers judge, and held that Sigurdson J. would have exercised his discretion to grant the award had he the benefit of what is described as new criteria.

84 If this Court enlarges the scope for interim costs it should be seen as a new rule and not an adaption of existing law. On the basis of the law on costs at the time of this application the chambers judge properly exercised his discretion.

85 Sigurdson J. was correct in his assessment that liability remains an open question in this appeal and that ordering interim costs would inappropriately require prejudging the case. Accordingly, he was justified in concluding that "[a]lthough [he had] a limited discretion in appropriate circumstances to award interim costs this case falls far outside that area" ([2000] B.C.J. No. 1536 (QL), 2000 BCSC 1135, at para. 129).

III. Conclusion

86 The common law is to advance by increments while generally staying true to the purposes behind its rules. The new criteria endorsed by my colleague broaden the scope of interim costs to an undesirable extent and are not supported in the case law. In my view, the common law rules on interim costs should not be advanced through an appellate court ignoring and overturning the trial judge's correctly guided discretion. This is more appropriately a question for the legislature. See *Watkins v. Olafson*, [1989] 2 S.C.R. 750 (S.C.C.); *R. v. Salituro*, [1991] 3 S.C.R. 654 (S.C.C.)]; and *Winnipeg Child & Family Services (Northwest Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925 (S.C.C.).

87 Since Sigurdson J. committed no error of law and did not commit a "palpable error" in his assessment of the facts, I would defer to his decision not to exercise his discretion to make the extraordinary grant of interim costs.

88 I would allow the appeal, with each side to bear its own costs.

Appeal dismissed.

Pourvoi rejeté.

Tab 15

2004 CarswellOnt 390
Ontario Court of Justice

Children's Aid Society of St. Thomas (City) & Elgin (County) v. S. (L.)

2004 CarswellOnt 390, [2004] O.J. No. 289, 128 A.C.W.S. (3d) 888, 46 R.F.L. (5th) 330

CHILDREN'S AID SOCIETY OF THE CITY OF ST. THOMAS AND COUNTY OF ELGIN (Applicant) and LYNDSAY S., RYAN D., SERGIO D. and LORRAINE CAROLL ANN T.-D. (Respondents)

Schnall J.

Judgment: January 16, 2004
Docket: St. Thomas C236/01

Proceedings: additional reasons to *Children's Aid Society of St. Thomas (City) & Elgin (County) v. S. (L.)* (2003), 2003 CarswellOnt 5518 (Ont. C.J.)

Counsel: Margaret A. McSorley for Applicant Society
Keli D. Mersereau for Respondent Mother, Lyndsay S.
Respondent Father, Ryan D. for himself
David R.S. Pentz for Respondent Grandparents, Sergio D. and Lorraine Caroll Ann T.-D.
Catherine G. Bellinger for Child

Subject: Family

Headnote

Family law — Costs — Children in need of protection

Child was apprehended within hours of birth and placed in foster home — Children's Aid Society, parents and grandparents signed consent resolving all issues prior to commencement of hearing — Office of Children's Lawyer, representing child, did not consent or approve of settlement — Hearing lasted six days — At end of hearing, order was almost identical to consent — Society, parents and grandparents brought motion for costs against Office of Children's Lawyer — Motion granted — Office of Children's Lawyer was ordered to pay costs on full recovery basis to parents and grandparents for entire hearing and to Society for 5 $^{1}/_{2}$ days of hearing — Position of child's counsel was lacking in common sense, internally contradictory and could not be reconciled — Child's counsel's handling of case forced parties into litigation that they had legitimately attempted to avoid — Family Law Rules attempt to encourage settlement and discourage unnecessary or prolonged litigation and unreasonable behaviour on part of litigants and their counsel that is wasteful of time and money — Presumption in R. 24(1) in favour of successful litigant does not apply in child protection case or to government agency that is party — Absence of operation of presumption was not equivalent to absolute bar or preclusion to award of costs — All relevant evidence could have been heard and considered in one-half day — Child was not party to proceedings — Party status was not determinative factor in entitlement to costs — With non-instructing client, child's counsel had total control and decision making powers on how to conduct case and had to be held accountable if conduct fell below reasonable standard.

Civil practice and procedure — Costs — Persons entitled to or liable for costs — Miscellaneous issues

Child was apprehended within hours of birth and placed in foster home — Children's Aid Society, parents and grandparents signed consent resolving all issues prior to commencement of hearing — Office of Children's Lawyer,

representing child, did not consent or approve of settlement — Hearing lasted six days — At end of hearing, order was almost identical to consent — Society, parents and grandparents brought motion for costs against Office of Children's Lawyer — Motion granted — Office of Children's Lawyer was ordered to pay costs on full recovery basis to parents and grandparents for entire hearing and to Society for 5 $^{1}/_{2}$ days of hearing — Position of child's counsel was lacking in common sense, internally contradictory and could not be reconciled — Child's counsel's handling of case forced parties into litigation that they had legitimately attempted to avoid — Family Law Rules attempt to encourage settlement and discourage unnecessary or prolonged litigation and unreasonable behaviour on part of litigants and their counsel that is wasteful of time and money — Presumption in R. 24(1) in favour of successful litigant does not apply in child protection case or to government agency that is party — Absence of operation of presumption was not equivalent to absolute bar or preclusion to award of costs — All relevant evidence could have been heard and considered in one-half day — Child was not party to proceedings — Party status was not determinative factor in entitlement to costs — With non-instructing client, child's counsel had total control and decision making powers on how to conduct case and had to be held accountable if conduct fell below reasonable standard.

Annotation

Schnall J.'s reasons for judgment in *Children's Aid Society of St. Thomas (City) & Elgin (County) v. S. (L.)* raise the issues of the role of the Office of the Children's Lawyer ("OCL") in family law litigation and whether the OCL should have exposure for costs for its handling of a case. Schnall J. ordered costs on a full-recovery basis against the OCL in favour of the Children's Aid Society ("CAS") and the other parties to the litigation, primarily because the OCL had persisted in fruitless litigation. Although this was a protection proceeding, the same principles should apply where the OCL decides to become involved in custody proceedings. In reaching her conclusion, Schnall J. rejected the OCL's allegation that the court had limited authority to order costs against the OCL, in the absence of bad faith, since it was acting under a statutory mandate and neither the OCL nor the child it represented was a party to the proceeding. The competing arguments and the result in the case go to the role of the OCL as much as its exposure for costs in the particular case.

Legal representation had been ordered in the protection proceeding for the child, who had been apprehended at birth and placed with foster parents. Child representation in protection proceedings in Ontario is provided through the OCL, which was represented in this case by a panel lawyer. The protection application sought Crown wardship without access. However, over the 18 months during which the case progressed towards trial, the parents and paternal grandparents developed a positive relationship with the child, prompting the CAS to propose placement with the grandparents, subject to supervision for 12 months and restricted, supervised access for the parents. This arrangement was satisfactory to everyone except the foster parents and the child's lawyer. The foster parents applied for but were denied party status, which was necessary to enable them to put forth their own plan of care. The child's counsel refused to accept the settlement and appeared to support placement with the foster parents, even though they were not parties, and no one, including the judge, could order the CAS to place the children with the foster parents if a Crown wardship order was made.

Schnall J. described the position adopted by the child's counsel as confused and confusing, lacking in common sense, internally inconsistent, and not reflecting the statutory framework. The order that was made essentially reflected the parties' consent. As a result, Schnall J. concluded that the bulk of the trial was unnecessary, wasting valuable court time at a significant expense to all of the parties and the administration of justice.

In family litigation other than protection proceedings, the *Family Law Rules* provide that as a general rule a successful party is entitled to his or her costs, including increased costs if the unsuccessful party rejected an offer to settle that ended up reflecting the final result. However, this rule does not apply to protection proceedings because of the special nature of the proceeding. The CAS is under a statutory mandate to protect children and should not have

its role impeded by fear of costs. Similarly, parents should not feel intimidated by costs in trying to maintain the integrity of their family against the state. As a general rule, courts will not order costs against the CAS or a parent involved in protection proceedings unless one of the parties acted in bad faith or had been patently unreasonable in its litigation conduct.

This appears to be the first case where the OCL's exposure for costs in protection proceedings has been expressly addressed. Schnall J. was satisfied that although the child's counsel did not act in bad faith, the position she adopted was patently unreasonable. However, the OCL alleged that it had no exposure for costs in the absence of bad faith or egregious behaviour because neither it nor the child it represented was a party to the proceedings. The OCL went on to argue that an order for costs against it was essentially an order against the child or the child's counsel personally, which should be even more rare than an order for costs against a party in protection proceedings. Schnall J. rejected both arguments and pointed out that she was doing no more than crafting a costs order that reflected the primary objective under R. 2 of the *Family Law Rules*, which direct judges to ensure that cases are dealt with justly and expeditiously insofar as practicable.

That the presumption a successful party was entitled to its costs did not apply in protection proceedings or where a party was a government agency did not mean that a court could not order costs in such circumstances, merely that different considerations applied. These factors could include bad faith on the part of a party or counsel, or less egregious conduct that nevertheless offended the primary objective. Schnall J.'s decision to interpret R. 24 of the *Family Law Rules* and order costs to reflect the primary objective is reasonable and reflects the weight of current authority on point. Rule 2 of the Rules requires courts to take a more active role in managing proceedings than was previously the case. This includes discouraging litigation, controlling trial process and, where appropriate, ordering costs against a litigant whose conduct unreasonably extends proceedings.

In child protection proceedings, unlike custody proceedings, the OCL has no discretion to decline to represent the child once a court orders legal representation for a child pursuant to s. 38 of the *Child and Family Services Act*. By ordering legal representation, a judge gives the child the equivalent of party status under s. 39(6) of the Act, even if the child is non-verbal and non-instructive, as in this case. Where this happens, the OCL, or the panel lawyer appointed, has more control over the litigation than any of the parties' lawyers, who have to act according to client's instructions. The OCL effectively has carte blanche on what position to adopt and how to present the child's case.

According to the OCL's Policy Statement, it is the duty of the child's counsel to advocate a position for the child client. Child's counsel does not represent the "best interests" of the child, which is an issue to be represented by the court. Counsel is the legal representative of the child and not its litigation guardian or an amicus curiae. It follows that where a child is old enough to instruct counsel, counsel must follow the client's instructions and should not be allowed to advocate a position contrary to the client's instructions. In this case, since the child was non-instructive, the only limit on the child's counsel's conduct of the litigation was what she or the OCL imposed.

The obvious question is why would a judge appoint counsel for a non-verbal, non-instructive infant client, as in this case? It is clear that protection proceedings are all but impossible to process within the statutory time lines. Why then would a court feel obligated to add another active litigant to the process? Why add another person to call witnesses, cross-examine other witnesses, and make submissions? Unfortunately, Schnall J. did not comment on the current practice of many judges to routinely appoint counsel in protection proceedings, regardless of the age of the child. Arguably, a court should appoint counsel for a non-instructive child only if it is concerned that all relevant evidence touching on the child's circumstances may not be raised by one of the parties. Given the patent conflict between most parents' attitude to CAS intervention, this should not often be the case. The fact that the foster parents were denied party status suggests that there were no such concerns in this case.

As Schnall J. pointed out, there is nothing inherently wrong with the child's counsel's adopting a different position from any of the other parties, and forcing the matter to trial, so long as that position can be justified on the objective facts. A court is never bound by a consent, even if signed by all of the parties. If the child's counsel does not support

the parties' consent resolution and intends to lead evidence to explain why, the court must conduct a trial. The onus remains on the CAS to prove that grounds exist to make a protection finding and that the resolution proposed is in the child's best interests. The onus does not shift to the child's counsel because he or she forced the matter on to trial.

Schnall J. stated that the CAS could have presented its case in support of the consent resolution in half a day if the child's counsel had not objected. As it was, the child's counsel's position was sufficiently unfocussed that the CAS and the parents had to "cover all of the bases" and call oral evidence on all issues. Child's counsel was no more precise than to say that she supported the foster parents and objected to the grandparents being the primary caregivers. As Schnall J. pointed out, the child's counsel had not even signed a partial consent to make clear she supported the making of a protection finding and was contesting only the disposition.

While the child was not a party to the proceeding, once counsel was appointed, the child had the same rights to participate in the proceeding as if he or she had been a party. The OCL as the child's legal representative had power to present and examine witnesses, cross-examine witnesses, and make submissions to the court. The simple issue in the case was whether the OCL should be liable for its handling of a protection case. As Schnall J. pointed out, the OCL had on occasion claimed costs against other litigants in protection proceedings where it considered a litigant's conduct sufficiently unreasonable to justify doing so. A litigant who claims costs should not be surprised if another litigant claims costs against it for similar litigation conduct.

While Schnall J. was not prepared to give the OCL immunity from costs because it was performing an important social function in representing children in protection proceedings, she accepted that its exposure for costs should be limited in much the same way as the that of the CAS. Either may be liable in costs if it performs below a reasonable level with respect to its mandated responsibilities. Neither should be rewarded or punished by costs, but both should be accountable in costs for how they perform their mandated duties.

In the circumstances, Schnall J. held that the OCL should not expect immunity from costs for pursuing litigation that had no focus and no evidentiary basis. The OCL was accountable for wasting the other litigants' time and money and subject to a costs order indemnifying them from the financial consequences of its actions. With a non-instructing client, the child's counsel had total control of her case and was accountable for litigation conduct falling below a reasonable standard. That the litigation was conducted by a panel lawyer and not the Children's Lawyer herself or a staff lawyer did not change the financial reality facing the other litigants as a result of the panel lawyer's actions.

The OCL has a duty to ensure the competence of lawyers on its panel and to monitor their actions. The obligation to represent the child in protection proceedings belongs to the OCL and it cannot abdicate responsibility. If the Children's Lawyer chooses to use a non-staff lawyer in a proceeding, it should keep track of the litigation and the lawyer's conduct. Arguably, the trial could have been avoided or substantially shortened if the Children's Lawyer had contacted the CAS lawyer to clarify the society's position. Both are mandated to act in a child's interests, albeit from different perspectives.

Schnall J. rejected the suggestion that an order for costs against the OCL was tantamount to an order for costs payable personally against the panel lawyer, which should be awarded only where the lawyer's conduct was in bad faith or egregious. While this may be an accurate statement of the courts' inherent jurisdiction to order costs to protect the integrity of its process, the threshold is different where a court orders costs pursuant to the Rules as the case law authorities cited noted. Schnall J. went further and held that ordering costs against the OCL was different in kind from ordering costs personally against a lawyer.

In private litigation, an order for costs against a lawyer personally means that he or she cannot charge the costs he or she has been ordered to pay to the client and in some cases may not be able to bill the client for work done. In child protection cases, the child is the client. The child does not pay either the lawyer representing him or her in the proceeding or the OCL. The lawyer is paid by Legal Aid or the OCL. By analogy, an order for costs personally against the lawyer would require direct payment of costs to the other parties and/or an inability to be paid for services

rendered. In this case, the child's counsel was not required to pay anything. Rather the OCL was accountable for its failure to monitor the lawyer's actions and for its agent's actions. The OCL's liability for the child's counsel's actions rests on nothing more complicated than basic agency principles.

Schnall J. also rejected the OCL's argument that ordering costs against it amounted to an order for costs against a non-party. While technically neither the child nor the OCL was a party to the proceeding, the child has all the rights of a party to the litigation and the OCL was in total control of the child's case. With a non-instructive client, it is not stretching matters to suggest that a child's lawyer is pursuing either a personal agenda or the OCL's agenda in the conduct of its case. In the former case, the OCL is liable on agency principles for the lawyer's actions or for failure to monitor the lawyer's actions. In the latter case, the OCL is liable if its agenda is patently unreasonable.

The OCL argued that since it did not seek costs in protection cases, except in cases involving bad faith or egregious behaviour, it should not be liable for costs in the absence of the same. As Schnall J. pointed out, "seeking" costs does not affect entitlement to or exposure for costs. However, it is interesting to note that in *Catholic Children's Aid Society of Toronto v. F. (V.)*, 2003 CarswellOnt 5204 (Ont. C.J.), the OCL sought and was awarded costs from the CAS using the same arguments raised by the CAS and other litigants in *Children's Aid Society of St. Thomas (City) & Elgin (County) v. S. (L.)*. See also *Children's Aid Society of Niagara Region v. D. (W.)*, 2004 CarswellOnt 562 (Ont. S.C.J.) (bad faith not only type of behaviour that will attract costs against CAS on full-recovery basis; conduct that is grossly indefensible will suffice).

The OCL has not only accepted costs but also sought costs against other litigants in a number of child protection cases. There is no indication that the OCL turned those costs over to the child or the lawyer representing the child in a case. If the OCL considers itself entitled to costs as compensation in whole or in part for expenses it is put through by another litigants' unreasonable conduct, it cannot complain if it is held liable in costs to other litigants for its unreasonable conduct.

The reasonableness of a litigant's conduct should be judged in part at least against the primary objective under the *Family Law Rules*. Schnall J. reviewed the child's lawyer's conduct of the case and concluded that it was unfocussed and unproductive and unnecessarily extended the litigation at great cost to the other litigants and the administration of justice generally. An order for costs on a full-recovery basis would address the former. Although there is no direct way to compensate for the wasted judicial time and related resource costs, forcing the OCL to maintain more direct involvement with cases where it represents children should go some way to preventing similar occurrences in the future.

In this case, the child's lawyer seemed unclear about her role as child's counsel in protection proceedings and the OCL did not appear to maintain any control over her conduct of the case. Alternatively, the OCL assumed that its role was to act as the watchdog of the CAS and to put it to the strict proof on all issues even if there was no reason for doing so.

Part of the problem in the case arises from uncertainty and confusion about the role of the OCL in custody and protection cases in Ontario. In *Reid, Re*, 1975 CarswellOnt 262, 25 R.F.L. 209 (Ont. Div. Ct.), the court held that it could appoint the Official Guardian (the predecessor of the OCL) to act as a child's litigation guardian in custody cases. Before that, the Official Guardian's role was restricted to protecting infants' financial interests in estates, trusts, and civil litigation. Although the role of the Official Guardian, and later the OCL, was institutionalized by legislation, the enabling legislation was unclear on the precise nature of the OCL's role in the litigation. Subsequent case law developed along two distinct and contradictory lines. One line of authority held that the OCL stood in the same role to its client as any other lawyer to its client in the proceeding. The other line of authority suggested that the OCL had an overarching obligation to pursue and promote the best interests of the child, regardless of a child's instructions.

Although a child is not a party in custody or protection proceedings, once counsel is appointed the child has all the rights of a party, except the right to testify. This limitation caused some initial concern as to whether the OCL could simply state the child's wishes and preferences along with the expressed reasons. In *Strobridge v. Strobridge*, 1994 CarswellOnt 400, 4 R.F.L. (4th) 169 (Ont. C.A.), the Ontario Court of Appeal held that the OCL could not do so in custody proceedings unless the other litigants agreed. Thereafter, the OCL made parental consent a precondition of its willingness to represent a child in a particular case or arranged to have a social worker give hearsay evidence on point, as to which practice see *Zelinka v. Zelinka* (October 24, 1995), Doc. 318/95 (Ont. Gen. Div.). See also *Punzo v. Punzo*, 1996 CarswellOnt 663, 21 R.F.L. (4th) 7 (Ont. C.A.), where the Court of Appeal allowed the child's counsel to state the child's wishes and preferences where no one objected.

Most courts now accept that once the OCL undertakes to represent a child as counsel, it must act in the same way as other lawyers in the proceeding. However, there is some continuing uncertainty whether the OCL can advance a case contrary to its client's instructions where the child is mature enough to instruct counsel. Contrast *Children's Aid Society of Metropolitan Toronto v. D. (J.)* (March 22, 1993), Doc. C1108/91 (Ont. Prov. Ct.) (counsel to simply advocate for child's views) and *Boukema v. Boukema*, 1997 CarswellOnt 3115, 31 R.F.L. (4th) 329 (Ont. Gen. Div.) (counsel entitled to advocate best interests of child, not simply views of child). On balance, allowing the OCL to do so undermines the integrity of the lawyer-client relationship and ultimately the ability of the OCL to represent older children. Certainly, the Law Society of Upper Canada's *Rules of Professional Conduct* seem to support the conclusion that the OCL stands in a lawyer-client relationship with the child, as does the Divisional Court's recent decision in *Children's Lawyer for Ontario v. Goodis*, 2003 CarswellOnt 3426, 45 R.F.L. (5th) 285 (Ont. Div. Ct.), where the OCL was ordered to turn its file over to a former child client who complained about the representation provided.

In *Children's Aid Society of St. Thomas (City) & Elgin (County) v. S. (L.)*, the child's counsel seemed to consider herself the child's litigation guardian, appointed to represent what she considered the child's best interests even if she could not get an order forcing the society to do what she wanted done. While this may have been the original basis for intervention in *Reid*, it is generally accepted that this is not an acceptable role for the OCL to adopt in custody or child protection cases. While the OCL's role as litigation guardian is preserved in s. 89(3) of the *Courts of Justice Act* where a child is a party to proceedings, s. 89(3.1) provides that at the request of a court, the Children's Lawyer may act as the legal representative of a minor or other person who is not a party to a proceeding. See also Rule 7 of the *Rules of Civil Procedure* and Rule 4(7) of the *Family Law Rules*. Similarly, s. 38(2) of the *Child and Family Services Act* authorizes a court to order child representation through the OCL in protection proceedings. Unfortunately, none of the legislative provisions define the role of the child's counsel in the proceeding. Schnall J. seemed to accept that the OCL had no general overarching role to ensure that the society did its role. Since the child was non-instructive, the child's lawyer controlled the conduct of case and was answerable for its unreasonable conduct. The more interesting question is whether the OCL should be answerable for maintaining litigation as directed by an instructing client.

While Schnall J.'s reasons deal with the role of the OCL in child protection cases involving a non-instructing client, her general comments on accountability apply mutatis mutandis to protection cases where the child has the ability to instruct counsel and to custody cases where the OCL agreed to become involved by providing legal representation for a child. In *Takis v. Takis*, 38 R.F.L. (5th) 422 (Ont. S.C.J.), the court held that different rules applied where the OCL became involved only to the extent of arranging a social worker investigation and report to assist the court in deciding what was in the best interests of a child.

James G. McLeod

Table of Authorities

Cases considered by *Schnall J.*:

Belanger v. McGrade Estate (2003), (sub nom. *McGrade Estate, Re*) 65 O.R. (3d) 829, 2003 CarswellOnt 2682 (Ont. S.C.J.) — referred to

Children's Aid Society of Algoma v. M. (R.) (2001), 2001 CarswellOnt 2204, 18 R.F.L. (5th) 36 (Ont. C.J.) — followed

Children's Aid Society of Huron (County) v. V. (T.) (2002), 2002 CarswellOnt 2765, 16 O.F.L.R. 76 (Ont. C.J.) — considered

Children's Lawyer for Ontario v. Goodis (2003), 231 D.L.R. (4th) 727, 177 O.A.C. 1, (sub nom. *Ontario (Children's Lawyer) v. Ontario (Information & Privacy Commissioner)*) 66 O.R. (3d) 692, 45 R.F.L. (5th) 285, 2003 CarswellOnt 3426 (Ont. Div. Ct.) — considered

L. (R.) v. Children's Aid Society of Ottawa-Carleton (1999), 1999 CarswellOnt 2781 (Ont. S.C.J.) — referred to

M. (M.), Re (February 11, 1983), Doc. Toronto C5954/80 (Ont. Prov. Ct.) — referred to

Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham (1998), 1998 CarswellOnt 546, 16 C.P.C. (4th) 201, 51 O.T.C. 321 (Ont. Gen. Div.) — followed

Takis v. Takis (2003), 2003 CarswellOnt 2358, 38 R.F.L. (5th) 422 (Ont. S.C.J.) — referred to

Young v. Young (1993), [1993] 8 W.W.R. 513, 108 D.L.R. (4th) 193, 18 C.R.R. (2d) 41, [1993] 4 S.C.R. 3, 84 B.C.L.R. (2d) 1, 160 N.R. 1, 49 R.F.L. (3d) 117, 34 B.C.A.C. 161, 56 W.A.C. 161, [1993] R.D.F. 703, 1993 CarswellBC 264, 1993 CarswellBC 1269 (S.C.C.) — distinguished

Statutes considered:

Child and Family Services Act, R.S.O. 1990, c. C.11
Generally — referred to

s. 39(1) — referred to

s. 39(6) — considered

Child Welfare Act, R.S.O. 1980, c. 66
Generally — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 131(1) — considered

Solicitors Act, R.S.O. 1990, c. S.15
Generally — referred to

Rules considered:

Family Law Rules, O. Reg. 114/99

Generally — referred to

R. 2 — referred to

R. 2(2) — considered

R. 2(3) — considered

R. 2(4) — considered

R. 24 — referred to

R. 24(1) — considered

R. 24(2) — considered

R. 24(3) — considered

R. 24(4) — considered

R. 24(5) — considered

R. 24(8) — considered

R. 24(9) — considered

Rules of Court, 1990, B.C. Reg. 221/90
R. 57(30) — referred to

Words and phrases considered

presumption

A presumption is a set of facts that, if accepted, are sufficient to support a certain conclusion. A presumption can be rebutted by a contradictory fact or facts.

MOTION by Children's Aid Society, parents and grandparents of child for costs against Office of Children's Lawyer in relation to judgment reported at *Children's Aid Society of St. Thomas (City) & Elgin (County) v. S. (L.)* (2003), 2003 CarswellOnt 5518 (Ont. C.J.).

***Schnall J.*:**

1: INTRODUCTION

1 In this child protection case, legal representation had been ordered for the child Jessica A.D., who had been apprehended at birth on 20 September 2001.

2 Prior to the commencement of the hearing, the parties had signed a consent resolving all issues. The Office of the Children's Lawyer, representing the child, did not sign the consent, nor approve of the settlement. The hearing lasted six days. At the end, the final order was almost identical to the consent, and even somewhat less restrictive. I refer to the parties as being the children's aid society, the parents and the grandparents.

3 Counsel for the applicant Children's Aid Society of the City of St. Thomas and County of Elgin (the "society"), counsel for the paternal grandparents and counsel for the mother indicated that they would all be seeking their costs of the six-day hearing against the Office of the Children's Lawyer (the "OCL").

4 The biological father was the only self-represented party at the hearing. He had indicated that his position was identical to that of the mother, his parents and the society. He was not present at the end to express his claim for costs, but I intend to consider him in the same manner as the other parties on the issue of entitlement to costs.

5 Throughout this case, to the conclusion of the hearing, the OCL was represented by a local lawyer (to whom I shall refer as child's counsel), appointed from the OCL panel. The entitlement to costs issue was argued by an "in-house" lawyer with the OCL, (to whom I shall refer as OCL counsel, for the sake of ease of reference).

2: IS THIS AN APPROPRIATE CASE TO AWARD COSTS?

6 The position of the parties was that a six-day hearing was unnecessary and that child's counsel put all parties to great expense and wasted much valuable court time. Further, society counsel, supported by other parties' counsel, argued that the presentation of the case by child's counsel fell well below a standard of competence and understanding of evidence and knowledge of the law and lacked a theory and analysis of the case, that the OCL should be held accountable to the court process and to the parties and their counsel for an egregious waste of time and money.

3: CIRCUMSTANCES OF THIS CASE

7 I reviewed the evidence in detail in written reasons released on 29 October 2003. [See *Children's Aid Society of St. Thomas (City) & Elgin (County) v. S. (L.)*, [2003] O.J. No. 5523 (Ont. C.J.).] I do not propose to do so again except to give context to the costs issue. The child was apprehended within hours of her birth and placed in a foster home where she remained throughout the proceedings.

3.1: The Society Position at the Hearing

8 The protection application sought Crown wardship with no access. Over the ensuing 18 months, however, the parents and paternal grandparents developed a bonded, positive relationship with the child, prompting the society to consider supervised placement with grandparents with restricted access to the parents. The society position changed again to Crown wardship when inconsistencies, or inaccuracies, were discovered in the information provided by the grandparents in the society home study.

9 The misinformation was eventually cleared up by the grandparents. The child's counsel spent much effort in investigating information about the grandparents that was now about 35 to 40 years old. The society considered this historical information and weighed the significance of the grandparents' lack of total honesty in the home study report and decided to proceed with the resolution now set out in the consent.

3.2: The Position of the Other Parties at the Hearing

10 The society, the mother, the father and the grandparents all signed a consent that a protection finding be made and that disposition be ordered in accordance with the society position:

- placement with the grandparents, subject to society supervision for 12 months, with terms;
- the parents were to have restricted, supervised access and to attend for programmes, as set out.

3.3: The Position of Child's Counsel at the Hearing

11 The child's counsel did not support the parties' settlement. She appeared to support the foster parents, despite the fact that rulings made prior to the hearing denied the foster parents' motion for party status so that they could put forth their own plan.

12 The child's counsel's position was confused and confusing. She indicated:

- that the child ought not to be raised by the grandparents because of their duplicity on the home study information and their health concerns, as she alleged;
- that, if the child were to be placed with the grandparents, the parents were to have no access at all;
- that if, however, Crown wardship were ordered, the child should be placed with the foster parents and the grandparents could have unsupervised access one weekend per month, with the parents' participating.

13 The child's counsel's position was lacking in common sense, internally self-contradictory and could not be reconciled.

14 In advocating a position of no access to the parents, the child's counsel appeared to ignore the bond that had formed between the child and her parents and the reality of the fact that the father was residing next door to the grandparents' home, where the child would be living.

15 In advocating for placement with the foster parents, child's counsel appeared to overlook the statutory mandate of the society to consider the viability of placement with family members, before considering Crown wardship. Placement with the parents had never been an option; only the grandparents were a viable family placement consideration.

16 She further misconstrued the provisions of the Act by being critical of the society position that could conceivably "leave the door open" for the father to be considered as a placement in the future, after a status review.

17 Even more disconcerting to me was the fact that the child's counsel did not comprehend that, once the court makes a Crown wardship order, it has no jurisdiction to determine the specific "placement" of the child, as child's counsel advocated for the foster parents.

18 Moreover, child's counsel did not appear to appreciate the situation of the limbo that she would be creating for the child in advocating for a disposition of Crown wardship, with access, thereby precluding permanency placement of the child for the purpose of adoption. The child's future would thus remain uncertain and in limbo.

3.4: The Order that Was Made

19 I found the child to be in need of protection, the finding being made against the mother and the father. The child was placed with her grandparents subject to supervision by the society for twelve months. The parents were granted supervised access and certain expectations were articulated as to what was expected of them.

3.5: The End Result

20 The parties obtained the order for which they had hoped in their consent. The terms of supervision of the placement were intended to assist in monitoring the situation and in the child's development and to give assistance and support to the grandparents in this parenting role. The terms of access for the parents were less restrictive than what the parties had been willing to accept by their consent.

21 The six-day hearing was unnecessary. The child's counsel's handling of the case forced the parties into litigation that they had legitimately attempted to avoid by having negotiated a reasonable disposition for the benefit of the child.

22 As I indicated in my brief oral decision, the case as presented by child's counsel and the concerns that she attempted to raise resulted in:

> causing the court to be tilting at windmills. Throughout the hearing, [she] presented no evidence that would support her position and, at its highest, only minimal evidence to attempt to demonstrate to the court that the society position was not appropriate. Instead of hard facts and reliable evidence, what she presented was a setup of men of straw; conclusions without evidentiary foundation. These were men of straw that the slightest evidentiary wind easily toppled.

23 There were hours and days of questions posed by child's counsel on cross-examination of witnesses and parties, punctuated by frequent, successful objections by other counsel on procedural and evidentiary points.

24 These cross-examinations elicited no new information, admissions or revelations that had not already been presented by the society at the hearing and considered by the society prior to the hearing. The cross-examination yielded no fruit to support the child's counsel position, nor did it undermine or detract from the appropriateness of the society position.

4: OVERVIEW OF THE ISSUE OF COSTS

25 Costs are in the discretion of the trial judge.

26 Section 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, provides (emphasis mine):

> **131.** — Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine ***by whom*** and to what extent the costs shall be paid.

The emphasized words indicate that costs can be ordered against any person, not just a party.

27 Since the proclamation of the *Family Law Rules*, O. Reg. 114/99, on 19 September 1999, costs consequences have been intended to be more stringent and more predictable.

28 I agree with OCL counsel that, in the past, courts were loath to order costs in proceedings involving children, such as in child protection proceedings, and especially against the Official Guardian (as the OCL was then known). She cited the decision of Provincial Judge A. Peter Nasmith under *The Child Welfare Act*, R.S.O. 1980, c. 66, in *M. (M.), Re* (1983), 18 A.C.W.S. (2d) 451, [1983] W.D.F.L. 478, [1983] O.J. No. 636 (Ont. Prov. Ct.). Judge Nasmith declined to order costs against the Official Guardian (O.G.) because the conduct of the O.G. did not place the case into the "exceptional" category and the O.G. had acted in the child's best interests in bringing a motion, although without legal merit.

29 He suggested, in *obiter*, that such a request was anomalous because the costs order would be made against a small child who could not pay. Further, if costs were awarded directly against the O.G., it would be analogous to an award of costs against counsel, which although possible, should only be made in exceptional cases.

30 I do not adopt these *obiter* remarks, as I discuss below.

5: THE FAMILY LAW RULES

31 The tenor of the current *Family Law Rules* recognizes the increasing demand on limited court and judicial resources and the increasing costs of litigation. The rules therefore attempt to encourage settlement and discourage unnecessary or prolonged litigation and unreasonable behaviour on the part of litigants and their counsel that is wasteful of time and money.

5.1: Rule 2

32 Subrules 2(2), (3) and (4) set out the primary objective of the rules and the obligations of parties and their lawyers to assist the court in meeting its obligations to abide by the primary objective. They are as follows:

(2) *Primary objective.* — The primary objective of these rules is to enable the court to deal with cases justly.

(3) *Dealing with cases justly.* — Dealing with a case justly includes,

(*a*) ensuring that the procedure is fair to all parties;

(*b*) saving expense and time;

(*c*) dealing with the case in ways that are appropriate to its importance and complexity; and

(*d*) giving appropriate court resources to the case while taking account of the need to give resources to other cases.

(4) *Duty to promote primary objective.* — The court is required to apply these rules to promote the primary objective, and parties and their lawyers are required to help the court to promote the primary objective.

5.2: Rule 24

33 Rule 24 deals with costs generally, although other subrules refer to costs as well. The focus of the rules is on efficiency, efforts at settlement and not acting unreasonably. A presumption therefore exists, found in subrule 24(1), in favour of a successful litigant. The presumption, however, does not apply in a child protection case or to a government agency that is a party.

34 The relevant provisions of rule 24 are reproduced here:

24. Successful party presumed entitled to costs. — (1) There is a presumption that a successful party is entitled to the costs of a motion, enforcement, case or appeal.

(2) *No presumption in child protection case or if party is government agency.* — The presumption does not apply in a child protection case or to a party that is a government agency.

(3) *Court's discretion — Costs for or against government agency.* — The court has discretion to award costs to or against a party that is a government agency, whether it is successful or unsuccessful.

(4) *Successful party who has behaved unreasonably.* — Despite subrule (1), a successful party who has behaved unreasonably during a case may be deprived of all or part of the party's own costs or ordered to pay all or part of the unsuccessful party's costs.

(5) *Decision on reasonableness.* — In deciding whether a party has behaved reasonably or unreasonably, the court shall examine,

(*a*) the party's behaviour in relation to the issues from the time they arose, including whether the party made an offer to settle;

(*b*) the reasonableness of any offer the party made; and

(*c*) any offer the party withdrew or failed to accept.

. . .

(8) *Bad faith.* — If a party has acted in bad faith, the court shall decide costs on a full recovery basis and shall order the party to pay them immediately.

(9) *Costs caused by fault of lawyer or agent.* — If a party's lawyer or agent has run up costs without reasonable cause or has wasted costs, the court may, on motion or on its own initiative, after giving the lawyer or agent an opportunity to be heard,

(*a*) order that the lawyer or agent shall not charge the client fees or disbursements for work specified in the order, and order the lawyer or agent to repay money that the client has already paid toward costs;

(*b*) order the lawyer or agent to repay the client any costs that the client has been ordered to pay another party;

(*c*) order the lawyer or agent personally to pay the costs of any party; and

(*d*) order that a copy of an order under this subrule be given to the client.

35 A presumption is a set of facts that, if accepted, are sufficient to support a certain conclusion. A presumption can be rebutted by a contradictory fact or facts. A presumption in favour of a successful party may still not result in an award of costs if other factors exist that would discourage such an award.

36 The absence of the operation of a presumption, however, is not equivalent to an absolute bar or preclusion of an award of costs. The fact that the presumption in favour of a successful party does not apply to child protection cases and to cases where a party is a government agency simply means that other factors have to be considered, in addition to success, or other than success, in determining whether costs should be granted. These factors could include bad faith on the part of a party or counsel, or less egregious conduct that nevertheless flies in the face of the primary objective.

6: ROLE OF THE OFFICE OF THE CHILDREN'S LAWYER:

37 The following is derived from the *Policy Statement of the Office of the Children's Lawyer — Role of Child's Counsel*, April-May, 2003, as circulated by the OCL. (I have not included material that does not pertain to this case, such as the child's views and preferences, since this child is a non-verbal, non-instructing infant client).

In child protection proceedings, unlike custody/access cases, the OCL has no discretion to decline to represent the child once a court orders that legal representation be appointed for a child, under section 38 of the *Child and Family Services Act*. The authority for child's counsel to act, and the powers and 'tools' for so doing, are derived from the Order requesting the legal representation.

It is the duty of child's counsel to advocate a position for the child client. Child's counsel does not represent the "best interests" of the child, that being an issue to be decided by the court. Child's counsel is the "legal representative" of the child and is not a "litigation guardian" or *amicus curiae*.

Unlike in custody-access proceedings, child's counsel in child protection proceedings may take a different position than the parties, even where the parties all agree upon a position [as in the case before me]. If a matter proceeds to a determination that must be made by the court as to outstanding disputed issues, child's counsel is to advocate a position of behalf of the child and ensure that all relevant evidence about the child's interests is before the court.

7: THE SUBMISSIONS OF THE OCL COUNSEL IN RESISTING THE CLAIM FOR COSTS AGAINST THE OCL

7.1: The Significance of the Signed Consent.

38 A consent, even of all the parties, is not binding on the court. The court is mandated to consider the best interests of the child. Where the child's counsel indicates that she does not support the consent resolution and intends to lead evidence why, the court is obliged to conduct a hearing.

39 In an uncontested hearing, the onus is on the applicant society to satisfy the court that grounds exist for making a protection finding and that the disposition proposed is in the child's best interests.

40 In this jurisdiction, the society can proceed in one of several ways: present and file a statement of agreed facts, signed by all participating parties, a plan of care, and a signed consent as to the finding and the disposition; or, have the evidence presented orally through the testimony of the society case worker, and present a signed consent, if there is one. A signed consent is but one piece of the evidence to be considered.

41 In a contested hearing, which the child's counsel generated, the burden is still on the society. It does not shift to the child's counsel, even where the parties all adopt the society position. It is still incumbent on the society to satisfy the court of its position and its appropriateness for the child. Given the development of this case, with the changes in the society position, the society might have quite correctly chosen to present its evidence through the case worker and then to file the consent of the parties. All the evidence, including reasons for changing its plan, the inconsistencies of the grandparents' information and how they were corrected, the consideration and weight that the society gave to the information found by the child's counsel, could have been presented through the case worker. No more than a half day would have been required. A statement of agreed facts would not have been necessary.

7.2: Significance of the Absence of a Statement of Agreed Facts.

42 The OCL counsel argued that part of the time required for the hearing was caused by the absence of a statement of agreed facts. I am not persuaded by this submission, for the reason I set out above. I accept the society submission that it had to "cover the bases" and to call oral evidence, since it was not clear what evidence the child's counsel would challenge or attempt to contradict at the hearing.

7.3: Significance of the Timing of when the Protection Finding was Articulated

43 The OCL counsel submits that part of the reason that the hearing lasted as long as it did was that the protection finding was not made until the third day. I reject that argument.

44 At the commencement of the hearing, society counsel indicated that the protection finding was not in issue. I find that there was no reason, except perhaps some policy reason that she did not articulate, for the child's counsel not to sign a partial consent to make it clear that she supported the making of the finding, even if she did not support the disposition proposed. Even if child's counsel were not inclined to sign a partial consent, it was made clear by society counsel that the evidence would focus on disposition. This was because the child was apprehended within hours of her birth, there was no evidence relating to the grandparents, the finding against the father was based on his lack of experience in parenting and the finding against the mother was based on her early history of not being able to parent a child when she was 15 years old.

45 Where the child's counsel was supporting a Crown wardship order, as here, it was obvious that no one was objecting to the making of a protection finding. Although child protection hearings are to be bifurcated in nature, there was no prejudice to anyone that the articulation of the protection finding was not made until several days into the hearing, more as a matter of technical house-keeping at that time, since the parties had consented to a finding from the start and the child's counsel's focus was on disposition.

7.4: Is the Child a Party in These Proceedings?

46 The OCL counsel submits that an award of costs against the OCL would be an award against the child — and the child is not a party and thus costs ought not to be awarded.

47 I agree that the child is not a party in child protection proceedings. In that regard, I disagree with the comment by Professor James G. McLeod, in his "Annotation" to *Takis v. Takis* (2003), 38 R.F.L. (5th) 422 (Ont. S.C.J.), where he said at page 424 [R.F.L.] that, once the child has legal representation, under the *Child and Family Services Act*, R.S.O. 1990, c. C-11, the child is a party.

48 Subsection 39(1) of the Act lists those who are parties to a proceeding; children are not included in that list.

49 Subsection 39(6) deals with participation by children, as follows (emphasis mine):

> A child who is the applicant under section 64(4) (status review), receives notice of a proceeding under this Part, or has legal representation in a proceeding, is entitled to participate in the proceeding and to appeal under section 69, ***as if he or she were a party***.

Had the legislators intended for children to be parties to child protection proceedings, the subsections could have been easily and clearly worded to that effect.

50 The OCL, as legal representative for the child involved in litigation, has powers to present and examine witnesses, cross-examine witnesses, engage in the discovery process, make arguments and submissions to the court. The OCL can make a claim for costs as against other litigants and, in a number of cases referred to by Justice Donald J. Gordon in *Takis v. Takis* (2003), 38 R.F.L. (5th) 422, [2003] O.J. No. 2658, 2003 CarswellOnt 2358 (Ont. S.C.J.), has been successful in child protection cases.

51 A litigant who is entitled to claim costs against a party or parties should expect to be responsible for and be exposed to a claim for costs by others, in an appropriate case.

52 I refer to the decision of Justice John Kukurin in *Children's Aid Society of Algoma v. M. (R.)* (2001), 18 R.F.L. (5th) 36, [2001] O.J. No. 2441, 2001 CarswellOnt 2204 (Ont. C.J.), where he ordered the society to pay costs, saying, at paragraphs [106] to [108]:

> **[106]** . . . The society may not have been grossly negligent but it performed below a reasonable level with respect to its mandated responsibilities. It also made a choice that prolonged the litigation. . . .
>
> **[107]** In summary, the society is historically treated differently than other litigants. However, that treatment can be different where the society steps beyond its usual boundaries or where it conducts itself in some indefensible way, or in a way where it would be perceived by ordinary persons as having acted unfairly. It is not immune from the consequence of litigation and it is not necessary that the society must have acted in bad faith.
>
> **[108]** A society should neither be rewarded or punished by costs but should be held accountable. That accountability is in the manner in which a society investigates its case and presents it to the court and these are to be measured against the background of the statutory requirements of the *Child and Family Services Act*. That accountability can be expressed in an award of costs.

I would readily substitute the "Office of the Children's Lawyer" for the words "the society" in the above passage, as the analysis set out by Justice Kukurin fits both identically.

53 A sense of immunity from costs may blind or desensitize a party or non-party litigant to the fact that other litigants are incurring costs and expenses to be involved in the court process. Immunity from costs could result in lack of accountability to the court process.

54 No participant in litigation should have *carte blanche* to pursue litigation that has no focus and no evidentiary basis, without running the risk of being held accountable for wasting time and money and an order to pay compensatory costs to indemnify the other litigants.

7.5: An Award of Costs against the OCL Would be Tantamount to an Order of Costs Payable Personally against a Lawyer.

55 Ms. Bellinger suggests that, unless the conduct of child's counsel at the hearing was "in bad faith" or egregious, costs ought not to be awarded against the OCL. She refers to the often-quoted passage of Justice (now Chief Justice) Beverley

McLachlin in the Supreme Court of Canada decision in *Young v. Young*, [1993] 4 S.C.R. 3, 160 N.R. 1, 34 B.C.A.C. 161, 84 B.C.L.R. (2d) 1, 56 W.A.C. 161, [1993] 8 W.W.R. 513, 108 D.L.R. (4th) 193, 18 C.R.R. (2d) 41, 49 R.F.L. (3d) 117, [1993] S.C.J. No. 112, 1993 CarswellBC 264 (S.C.C.), at page 163 [R.F.L.] where Justice McLachlin said:

> Moreover, courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling.

I agree with the intent of the passage. I do not agree that it applies to the case before me.

56 I adopt the view of Justice B. Thomas Granger when he held, in *Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham* (1998), 1998 CarswellOnt 546, 16 C.P.C. (4th) 201, 51 O.T.C. 321 (Ont. Gen. Div.), that *Young v. Young* does not stand for the proposition that costs against a solicitor can only be ordered where there is bad faith. He also held that when Justice McLachlin was referring to costs consequences against a lawyer, the threshold for the lawyer's misconduct that would attract costs consequences is one that is based on bad faith. In his analysis, however, he opined that Justice McLachlin was referring to the court's inherent jurisdiction to order costs for contempt of court, as opposed to costs referred to in the rules of court, which refer to a much lower threshold. Neither the rules in the Superior Court (subrule 57(30) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194), nor the current *Family Law Rules* in effect for the Ontario Court of Justice refer to "bad faith" as a pre-requisite for the awarding of costs. Subrule 24(8) of the *Family Law Rules*, as reproduced above, provides that, where there has been bad faith, the court shall order costs on a full indemnity basis. This does not mean that, in the absence of bad faith, the court could not order full indemnity for costs in an appropriate case.

57 See also *Belanger v. McGrade Estate* (2003), 65 O.R. (3d) 829, [2003] O.J. No. 2853, 2003 CarswellOnt 2682 (Ont. S.C.J.), which, although not a child protection case, held that "bad faith" is not necessary to be present for a court to order costs payable by a lawyer personally.

58 The case before me is also distinguishable from *Young v. Young* upon which OCL counsel relies — child's counsel was not concerned with protecting confidentiality of her client, as the child Jessica A.D. was too young to speak. In the absence of instructions from her client, child's counsel was completely independent in how she ran the litigation and what position she took. As noted in *Takis v. Takis*, above, the litigant who has conduct of his or her case must be accountable to the other litigants and parties.

59 In the case before me, with a non-instructing client, the child's counsel had total control and decision-making powers on how to conduct her case and has to be held accountable if the conduct falls below a reasonable standard.

60 Nor do I accept OCL counsel's submission that an award of costs against OCL in this case would be an order for costs to be paid personally by a lawyer. An order for costs to be paid personally by child's counsel would be such an order. An order against the OCL is not.

61 The relationship between the lawyer appointed to represent the child and the child is a solicitor-and-client relationship. Costs payable personally by counsel means, in part, that the costs of other litigants that the lawyer has been ordered to pay cannot be charged as part of the lawyer's bill to her own client and, in some cases, the lawyer cannot bill her client for the work that was done or must return funds paid to the lawyer for work done.

62 In child protection cases, the client is the child. The child does not pay the lawyer Counsel is paid by Legal Aid Ontario or, for in-house counsel, by the OCL. Costs to be paid personally by child's counsel might take the form of an order prohibiting child's counsel from submitting her bill for services and being paid by Legal Aid Ontario.

7.6: Can Costs Be Awarded against a Non-Party?

63 OCL counsel argues that, because the OCL is a non-party, costs cannot be awarded against it. She refers again to the decision in *Young v. Young*, where the Jehovah's Witnesses Society was a non-party and the trial judge's order for costs against the Jehovah's Witnesses Society was overturned. The grounds for overturning the order were held to be appropriate because the Jehovah's Witnesses Society was simply acting as a support to the father and was not pursuing its own case, or pursuing litigation in its own interests. The Jehovah's Witnesses Society had no control of the litigation.

64 Our case is distinguishable, because child's counsel very avidly pursued the litigation, to pursue her position that the child should be with the foster parents. It was the child's counsel's position that forced the parties into an unnecessary six-day hearing.

65 Party status is not a determinative factor in entitlement to costs. The wording of subrule 24(2) simply means that the presumption in favour of a successful party does not apply in a case where the government agency is a party.

66 The OCL counsel argues that the OCL rarely seeks costs. The "seeking of costs" is irrelevant to party status and entitlement. "Seeking costs" neither confers nor augments entitlement to costs.

67 The OCL counsel referred to the case of *L. (R.) v. Children's Aid Society of Ottawa-Carleton* (1999), 90 A.C.W.S. (3d) 898, [1999] O.J. No. 3211, 1999 CarswellOnt 2781 (Ont. S.C.J.), where the OCL was entitled to costs simply because it had been put to considerable time and expense in responding to a motion with no merit. Why then, should the OCL not be treated in the same fashion when it puts other litigants to the expense of litigation with no merit?

68 The lawyer representing the child through the OCL has to be kept to the same standard as other counsel in not wasting time and incurring unnecessary expenses.

69 The case of *Children's Lawyer for Ontario v. Goodis* (2003), 231 D.L.R. (4th) 727, [2003] O.J. No. 3522, 2003 CarswellOnt 3426 (Ont. Div. Ct.), is of some assistance to me in my analysis, in spite of the fact that it is not a child protection case. In that case, a former client of the OCL, who was a minor involved in motor vehicle legislation, sought to have her files turned over to her by the OCL once she was an adult, because she was not pleased with the representation provided to her by the OCL. The OCL held back large portions of her file, claiming those portions were exempt from disclosure under provincial freedom of information legislation, because they had been prepared for or by Crown counsel for certain purposes and that the lawyers at the OCL were Crown counsel.

70 In ruling against the OCL on the issue of statutory exemption, the Divisional Court held that the OCL is not Crown counsel for the purposes set out in the freedom of information legislation and that, even though the OCL does have some quasi-public aspects to its duties, the major part of the duties of the Office of the Children's Lawyer involves actual litigation in which she acts in the same manner that a member of the private bar is obliged to act.

71 The Divisional Court further held that the request for the file ought to have been treated as a request by a client for information about her own case from her own lawyer and that such requests are common and are governed by the *Solicitors Act*, R.S.O. 1990, c. S-15, and the *Rules of Professional Conduct of the Law Society*.

72 If the OCL acts in the same manner as a member of the private bar toward her own client, it is a reasonable conclusion that she must act as a member of the private bar toward other lawyers in the case and toward the court. The child's counsel should be expected to meet the same standards as other counsel in terms of competency, understanding of the law, understanding of the rules of evidence and proficiency in the courtroom.

73 Counsel who engage in litigation must be able to analyze the case, formulate a theory of their own case and organize the presentation of their evidence in a cogent and coherent manner. The child's counsel here did not do so. Her case was unfocused and her presentation served to complicate a simple case and obfuscate the real issues. Her position had no merit and, if it did, her presentation fell short of identifying it.

74 In the case of the *Children's Aid Society of Huron (County) v. V. (T.)* (2002), 2002 CarswellOnt 2765, 16 O.F.L.R. 76 (Ont. C.J.), Justice Gregory A. Pockele stressed the importance of counsel's being mindful of the primary objective of the *Family Law Rules*. He awarded costs to the society, to be paid personally by counsel for the father who insisted on pursuing a motion devoid of merit, where the court had no jurisdiction to grant the relief claimed and the lawyer usurped more than his share of time allotted, while pursuing an argument that was ill-conceived, ill-prepared and unfocused.

8: THE CONDUCT OF THE HEARING BY THE CHILD'S COUNSEL

75 Child's counsel cross-examined all witnesses and the parties who testified, to no effect. Her cross-examinations were ineffective, wasteful, time-consuming and unproductive. Many of the questions she posed were in the nature of a fishing expedition, an unsuccessful one, as it turns out.

76 The appalling waste of time created by the child's counsel was most obvious in and exemplified by her dealing with the witness, Dr. Coscius, the grandparents' and father's family doctor. He had prepared a written report. He had a written report from a specialist as to the father's situation.

77 These documents were in the hands of all counsel well before the hearing. It should have been unnecessary for Dr. Coscius to attend. The society counsel called him out of an abundance of caution, given the child's counsel's resistance to the disposition proposed.

78 His evidence should have taken twenty minutes, at the most. The child's counsel protracted his evidence into most of the day. She cross-examined him on the minutiae of the parties' files, relying on documents that she had not disclosed to other counsel and eliciting absolutely nothing of relevance.

79 The child's counsel had no new or independent evidence to present that would assist me in determining the issues, to ascertain the appropriateness of the disposition proposed by the society and other parties.

80 The witnesses whom she had proposed calling turned out to have information that was not relevant or was inadmissible as being hearsay. The evidence that she proposed to call through the foster mother would be redundant and unnecessary, as all parties agreed that the child was healthy, well looked after and had formed an attachment with the foster parents and foster siblings. I was prepared to make those findings of fact, as they were conceded by all parties.

81 Child's counsel did not articulate any other reason to call the foster mother and the focus of that proposed evidence appeared to me to be another attempt at promoting child's counsel's opinion that the child be placed with the foster parents.

82 I ruled against the calling of the foster parents and the other witnesses whom she proposed to call for the reasons to which I referred above.

9: WAS THE OCL JUSTIFIED IN PURSUING THIS LENGTHY LITIGATION?

83 Ms. Bellinger submits that the child's counsel was justified in pursuing the litigation because credibility of the parties was an issue, especially that of the grandparents.

84 Credibility was not a triable issue. The court's comment that the grandparents were believable was not made in the context of ruling on the grandparents' credibility because it was not necessary to do so, there being no evidence raised by child's counsel to contradict them in their evidence. The great concern of child's counsel was to focus on the grandparents' "duplicity". As I indicated in my written decision, the grandparents were not perfect and their "duplicity" had to be considered in context. The child's counsel was ill-advised to obsess about it and appeared to do so only to discredit the grandparents as compared to the foster parents. The grandparents demonstrated no duplicity at trial and readily admitted to their past faults. All of that could have been dealt with in an unconstested hearing, lasting a half day.

85 The purpose of my comment and observation as to "being believable" was to reassure the grandparents and provide them with a measure of support and encouragement as they embark upon their parental role with this child, after they had been dragged through the painful litigation process by the child's lawyer. The approach that child's counsel took to this case and, in particular, to the grandparents gained no advantage to the child's counsel's position and caused personal, emotional pain to the grandmother, in particular. It was unnecessary.

10: CONCLUSION

86 The child's counsel failed to assist the court in determining the issues. At the same time, child's counsel was remiss in not being mindful of her obligation to assist the court in fulfilling the primary objective; she wasted valuable court time and resources.

87 All of the relevant evidence could have been heard and considered in a half a day. None of what was raised by child's counsel in the other remaining four and a half days of evidence was helpful or material.

88 This was a simple case that devoured six of the ten days available to hear family and child protection cases in that sitting, with only twenty days available throughout the year (two sittings). As a result, other cases could not be heard.

11: IS THERE A 'CHILLING' MESSAGE TO BE SENT?

89 The OCL counsel argues that awarding costs against the OCL will send a chilling message that will discourage the OCL from pursuing litigation in other child protection cases and affect the manner in which these cases are handled. If the message that is taken from this decision is that the OCL might monitor more closely how individual cases are handled by panel lawyers and whether those child protection cases being litigated by OCL counsel are meritorious, then the message is not a "chilling one", but an instructive one.

90 The message can also be that, when the OCL engages in litigation as legal representative of the child, the OCL is subject to the same rules of competency, knowledge of the law and of the rules of evidence as all other lawyers and has the same obligations under subrule 2(2).

12: ORDER TO GO

91 The court orders as follows:

1. The society is entitled to its costs to be paid by the OCL on a "full recovery" basis, for five and a half days of the hearing.

2. the grandparents, the mother and father are entitled to their costs on a "full recovery" basis for the entire hearing.

3. the parties shall bear their own costs relating to the motion for costs.

4. the father and counsel for all other parties shall prepare and file their bills of costs, respectively. If they are unable to agree with the OCL as to quantum, the matter can come back before me on a date to be set by the trial co-ordinator, for the costs to be fixed by the court.

The counsel for the grandparents is requested to inform the father of his right to prepare and file a bill of costs

ADDENDUM REGARDING THE ADJOURNMENT ISSUE

92 The argument on the issue of entitlement to costs was adjourned following my oral decision, pending the release of my written reasons for judgment and to enable OCL counsel, Ms. Bellinger, to prepare for the costs argument. On the date set for argument, Ms. Bellinger sought and was denied an adjournment. I gave very brief oral reasons, and anticipated written reasons for the denial in these reasons on costs.

93 The submissions were not completed on the set date, the matter was adjourned for written submissions and these were ultimately received. It had been agreed that the OCL counsel would complete her submissions in writing and that the counsel for the society would make reply submissions in writing, on behalf of the society and the other counsel.

94 As all of that was done, the reason for the requested adjournment and for its denial is therefore now moot.

Motion granted.

Tab 16

Province of Alberta

JUDICATURE ACT

ALBERTA RULES OF COURT

Alberta Regulation 124/2010

With amendments up to and including Alberta Regulation 85/2016

Office Consolidation

Queen's Printer Bookstore
7th Floor, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

Note

All persons making use of this consolidation are reminded that it has no legislative sanction, that amendments have been embodied for convenience of reference only. The official Statutes and Regulations should be consulted for all purposes of interpreting and applying the law.

(a) the Court of Queen's Bench of Alberta, and

(b) the Court of Appeal of Alberta.

(2) These rules also govern all persons who come to the Court for resolution of a claim, whether the person is a self-represented litigant or is represented by a lawyer.

Purpose and intention of these rules

1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.

(2) In particular, these rules are intended to be used

(a) to identify the real issues in dispute,

(b) to facilitate the quickest means of resolving a claim at the least expense,

(c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable,

(d) to oblige the parties to communicate honestly, openly and in a timely way, and

(e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments.

(3) To achieve the purpose and intention of these rules the parties must, jointly and individually during an action,

(a) identify or make an application to identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense,

(b) periodically evaluate dispute resolution process alternatives to a full trial, with or without assistance from the Court,

(c) refrain from filing applications or taking proceedings that do not further the purpose and intention of these rules, and

(d) when using publicly funded Court resources, use them effectively.

(4) The intention of these rules is that the Court, when exercising a discretion to grant a remedy or impose a sanction, will grant or

impose a remedy or sanction proportional to the reason for granting or imposing it.

Division 2
Authority of the Court

General authority of the Court to provide remedies

1.3(1) The Court may do either or both of the following:

(a) give any relief or remedy described or referred to in the *Judicature Act*;

(b) give any relief or remedy described or referred to in or under these rules or any enactment.

(2) A remedy may be granted by the Court whether or not it is claimed or sought in an action.

Procedural orders

1.4(1) To implement and advance the purpose and intention of these rules described in rule 1.2 the Court may, subject to any specific provision of these rules, make any order with respect to practice or procedure, or both, in an action, application or proceeding before the Court.

(2) Without limiting subrule (1), and in addition to any specific authority the Court has under these rules, the Court may, unless specifically limited by these rules, do one or more of the following:

(a) grant, refuse or dismiss an application or proceeding;

(b) set aside any process exercised or purportedly exercised under these rules that is

(i) contrary to law,

(ii) an abuse of process, or

(iii) for an improper purpose;

(c) give orders or directions or make a ruling with respect to an action, application or proceeding, or a related matter;

(d) make a ruling with respect to how or if these rules apply in particular circumstances or to the operation, practice or procedure under these rules;

(e) impose terms, conditions and time limits;

(f) give consent, permission or approval;

(g) give advice, including making proposals, providing guidance, making suggestions and making recommendations;

(h) adjourn or stay all or any part of an action, application or proceeding, extend the time for doing anything in the proceeding, or stay the effect of a judgment or order;

(i) determine whether a judge is or is not seized with an action, application or proceeding;

(j) include any information in a judgment or order that the Court considers necessary.

(3) A decision of the Court affecting practice or procedure in an action, application or proceeding that is not a written order, direction or ruling must be

(a) recorded in the court file of the action by the court clerk, or

(b) endorsed by the court clerk on a commencement document, filed pleading or filed document or on a document to be filed.

Rule contravention, non-compliance and irregularities

1.5(1) If a person contravenes or does not comply with any procedural requirement, or if there is an irregularity in a commencement document, pleading, document, affidavit or prescribed form, a party may apply to the Court

(a) to cure the contravention, non-compliance or irregularity, or

(b) to set aside an act, application, proceeding or other thing because of prejudice to that party arising from the contravention, non-compliance or irregularity.

(2) An application under this rule must be filed within a reasonable time after the applicant becomes aware of the contravention, non-compliance or irregularity.

(3) An application under this rule may not be filed by a party who alleges prejudice as a result of the contravention, non-compliance or irregularity if that party has taken a further step in the action knowing of the prejudice.

Subdivision 1
Application Process Generally

Applications generally

6.3(1) Unless these rules or an enactment otherwise provides or the Court otherwise permits, an application may only be filed during an action or after judgment is entered.

(2) Unless the Court otherwise permits, an application to the Court must

(a) be in the appropriate form set out in Schedule A, Division 1 to these rules,

(b) state briefly the grounds for filing the application,

(c) identify the material or evidence intended to be relied on,

(d) refer to any provision of an enactment or rule relied on,

(e) specify any irregularity complained of or objection relied on,

(f) state the remedy claimed or sought, and

(g) state how the application is proposed to be heard or considered under these rules.

(3) Unless an enactment, the Court or these rules otherwise provide, the applicant must file and serve on all parties and every other person affected by the application, 5 days or more before the application is scheduled to be heard or considered,

(a) notice of the application, and

(b) any affidavit or other evidence in support of the application.

Applications without notice

6.4 Despite any other rule to the contrary, notice of an application is not required to be served on a party if an enactment so provides or permits or the Court is satisfied that

(a) no notice is necessary, or

(b) serving notice of the application might cause undue prejudice to the applicant.

(c) any further written argument.

(5) The respondent to the appeal must, within 10 days after service of the notice of appeal, file and serve on the appellant any written argument the respondent wishes to make.

Decision of judge

10.27(1) After hearing an appeal from a review officer's decision, the judge may, by order, do one or more of the following:

(a) confirm, vary or revoke the decision;

(b) revoke the decision and substitute a decision;

(c) revoke all or part of the decision and refer the matter back to the review officer or to another review officer;

(d) make any other order the judge considers appropriate.

(2) If the amount of lawyer's charges payable pursuant to the decision of the review officer has been paid and, after payment, is reduced on appeal, the lawyer may be ordered to return the excess and, if the lawyer fails to do so, the lawyer, in addition to being liable for that amount, may be found guilty of a civil contempt.

AR 124/2010 s10.27;163/2010

Division 2
Recoverable Costs of Litigation

Subdivision 1
General Rule, Considerations and Court Authority

Definition of "party"

10.28 In this Division, "party" includes a person filing or participating in an application or proceeding who is or may be entitled to or subject to a costs award.

General rule for payment of litigation costs

10.29(1) A successful party to an application, a proceeding or an action is entitled to a costs award against the unsuccessful party, and the unsuccessful party must pay the costs forthwith, notwithstanding the final determination of the application, proceeding or action, subject to

(a) the Court's general discretion under rule 10.31,

(b) the assessment officer's discretion under rule 10.41,

(d) one party to pay to another a percentage of assessed costs, or assessed costs up to or from a particular point in an action.

(4) The Court may adjust the amount payable by way of deduction or set-off if the party that is liable to pay a costs award is also entitled to receive an amount under a costs award.

(5) In appropriate circumstances, the Court may order, in a costs award, payment to a self-represented litigant of an amount or part of an amount equivalent to the fees specified in Schedule C.

(6) The Court's discretion under this rule is subject to any specific requirement of these rules about who is to pay costs and what costs are to be paid.

Costs in class proceeding

10.32 In a proceeding under the *Class Proceedings Act* or in a representative action, the Court, in determining whether a costs award should be made against the unsuccessful representative party, may take into account one or more of the following factors, in addition to any other factors the Court considers appropriate:

(a) the public interest;

(b) whether the action involved a novel point of law;

(c) whether the proceeding or action was a test case;

(d) access to justice considerations.

Court considerations in making costs award

10.33(1) In making a costs award, the Court may consider all or any of the following:

(a) the result of the action and the degree of success of each party;

(b) the amount claimed and the amount recovered;

(c) the importance of the issues;

(d) the complexity of the action;

(e) the apportionment of liability;

(f) the conduct of a party that tended to shorten the action;

(g) any other matter related to the question of reasonable and proper costs that the Court considers appropriate.

(2) In deciding whether to impose, deny or vary an amount in a costs award, the Court may consider all or any of the following:

(a) the conduct of a party that was unnecessary or that unnecessarily lengthened or delayed the action or any stage or step of the action;

(b) a party's denial of or refusal to admit anything that should have been admitted;

(c) whether a party started separate actions for claims that should have been filed in one action or whether a party unnecessarily separated that party's defence from that of another party;

(d) whether any application, proceeding or step in an action was unnecessary, improper or a mistake;

(e) an irregularity in a commencement document, pleading, affidavit, notice, prescribed form or document;

(f) a contravention of or non-compliance with these rules or an order;

(g) whether a party has engaged in misconduct.

Court-ordered assessment of costs

10.34(1) The Court may order an assessment of costs by an assessment officer and may give directions to the assessment officer about the assessment.

(2) The Court must keep a record on the court file of a direction

(a) given to an assessment officer,

(b) requested by a party and refused by the Court, or

(c) requested by a party that the Court declines to make but leaves to an assessment officer's discretion.

Subdivision 2
Assessment of Costs by Assessment Officer

Preparation of bill of costs

10.35(1) A party entitled to payment of costs must prepare a bill of costs in Form 44

(a) if that party wishes or is required to have the costs assessed by an assessment officer, or

Tab 17

2006 CarswellOnt 6508
Ontario Superior Court of Justice

Manning v. Epp

2006 CarswellOnt 6508, [2006] O.J. No. 4239, 152 A.C.W.S. (3d) 376

MORRIS MANNING, MORRIS MANNING Q.C. PROFESSIONAL CORPORATION, (PLAINTIFFS / RESPONDING PARTIES) V. HERB EPP, IAN MCLEAN, JOHN DOE, JANE DOE, JULIE FINLEY, SIMON FARBROTHER, THE RECORD, BRIAN CALDWELL, PHILIP JALSEVAC, J.FRED KUNTZ, LYNN HADDRALL, DON MCCURDY, WATERLOO CHRONICLE, BOB VRBANAC, ROB LEUSCHNER, ANDRES BAILEY, CKCO T.V., CTV INC., CITYMEDIA GROUP, CITYMEDIA GROUP INC., GRAND RIVER VALLEY NEWSPAPERS, FAIRWAY GROUP, TORSTAR CORP., TORSTAR CORPORATION, KEY RADIO LIMITED, TDNG INC., SOUTHERN ONTARIO COMMUNITY NEWSPAPER GROUP ULC (DEFENDANTS / MOVING PARTIES)

Lax J.

Heard:
Judgment: October 23, 2006
Docket: 05-CV-295656P03

Proceedings: additional reasons to *Manning v. Epp* (2006), 2006 CarswellOnt 4377 (Ont. S.C.J.)

Counsel: Morris Manning, Q.C., Frederick Shuh for Plaintiffs / Responding Parties
John F. Rook, Q.C., Fraser Hughes for Defendants / Moving Parties, Epp, McLean, Finley & Farbrother
Paul Monahan for Non-Party, City of Waterloo

Subject: Civil Practice and Procedure; Public

Headnote

Civil practice and procedure — Costs — Particular orders as to costs — Costs on solicitor and client basis — Grounds for awarding — Unfounded allegations

Solicitor was retained by municipality to represent it in litigation — Council passed resolution terminating retainer and hiring other firm — Solicitor alleged improper conduct by mayor, councillor, and municipal officials in inducing termination and in commenting on it — Solicitor brought action for damages under numerous causes of action — Defendants brought motion to strike out statement of claim — Motion granted — Parties made submissions regarding costs — Defendants entitled to costs on substantial indemnity basis, totalling $89,681.47 — Claim involved unsubstantiated allegations of illegal conduct — Statement of claim was prolix and difficult to follow — Defendants obtained excellent result — Multiplying partial indemnity fees by 1.5 did not result in reasonable amount.

Civil practice and procedure — Costs — Persons entitled to or liable for costs — Non-party

Table of Authorities

Cases considered by *Lax J.*:

Andersen v. St. Jude Medical Inc. (2006), 264 D.L.R. (4th) 557, 208 O.A.C. 10, 2006 CarswellOnt 710 (Ont. Div. Ct.) — followed

Andersen v. St. Jude Medical Inc. (May 12, 2006), Doc. M333540 (Ont. C.A.) — referred to

Bargman v. Rooney (1998), 1998 CarswellOnt 5113, 8 C.B.R. (4th) 190, 30 C.P.C. (4th) 259 (Ont. Gen. Div. [Commercial List]) — considered

Beaver Lumber Co. v. 222044 Ontario Ltd. (1996), 1996 CarswellOnt 3570, 5 C.P.C. (4th) 253 (Ont. Gen. Div.) — considered

Dyer v. Mekinda Snyder Partnership Inc. (1998), 1998 CarswellOnt 2283, 40 O.R. (3d) 180 (Ont. Gen. Div.) — considered

Friction Division Products Inc. v. E.I. Du Pont de Nemours & Co. (1985), 51 O.R. (2d) 244, 6 C.P.R. (3d) 66, 1985 CarswellOnt 1091 (Ont. H.C.) — considered

Gulf Canada Resources Ltd. v. Merlac Marine Inc. (1994), 18 O.R. (3d) 239, 1994 CarswellOnt 2191 (Ont. Gen. Div.) — considered

Murano v. Bank of Montreal (1998), 163 D.L.R. (4th) 21, 22 C.P.C. (4th) 235, 1998 CarswellOnt 2841, 111 O.A.C. 242, 5 C.B.R. (4th) 57, 41 O.R. (3d) 222, 41 B.L.R. (2d) 10 (Ont. C.A.) — considered

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 131 — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
Generally — considered

R. 1.03 — considered

R. 21.01(1)(b) — pursuant to

R. 25.11 — pursuant to

R. 57.01 — considered

R. 57.01(1) — referred to

R. 57.01(1)(0.a) [en. O. Reg. 627/98] — considered

R. 57.01(4) — considered

R. 57.01(4)(c) — considered

R. 57.01(4)(d) — considered

R. 57.03(1) — referred to

Tariffs considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
Tariff A, Pt. I — considered

ADDITIONAL REASONS to judgment reported at *Manning v. Epp* (2006), 2006 CarswellOnt 4377 (Ont. S.C.J.), respecting costs.

Lax J.:

1 This was a motion brought by the four remaining defendants ("Epp defendants") to strike the Statement of Claim under Rules 21.01(1)(b) and 25.11 of the *Rules of Civil Procedure*. The Epp defendants were the Mayor of the City of Waterloo, his Administrative Assistant, a City Councillor, and Waterloo's Chief Administrative Officer. The causes of action pleaded against them included breach of fiduciary duty, breach of duty to act in good faith, breach of duty of fairness, malicious falsehood, injurious falsehood, malice, breach of statutory duty, abuse of public office, bad faith decision-making, misfeasance in public office, deceit, defamation and intimidation. I struck all but one of 17 causes of action in the Statement of Claim pursuant to Rule 21.01(1)(b) and concluded that large portions of the Statement of Claim disclosed privileged and confidential information that should be struck, and that after striking, the Statement of Claim disclosed no reasonable cause of action.

2 I granted the City of Waterloo, a non-party, the right to appear on the motion and to bring its own motion to strike and expunge portions of the Statement of Claim. I granted its motion and concluded that the pleading should be expunged as an abuse of process. I am now asked to fix the costs of the motions.

Costs of Moving Parties

Scale

3 The Epp defendants seek an award of costs on a full indemnity scale or in the alternative, on a substantial indemnity scale. They were entirely successful on the motion and are entitled to an award of costs in their favour. The issues to be resolved are scale and quantum.

4 The moving parties appear to take the position that under the "new Rules" (referring, I believe, to the amendments that came into effect on July 1, 2005), substantial indemnity and full indemnity costs awards are one and the same. While the 2005 amendments to Rule 57.01(4) make clear that the court may award costs in an amount that represents full indemnity (rule 57.01(4)(d)), there continues to be a distinction between full and substantial indemnity costs (see, rule 57.01(4)(c)). The choice of the term "substantial indemnity" reinforces this distinction.

5 As between litigants, there are two scales of costs — partial indemnity and substantial indemnity. These terms were introduced in 2001 and correspond to the former scales of "party-and-party" and "solicitor and client" costs. Before their introduction, a costs award that provided complete indemnity was referred to as "costs as between the client and its own solicitor". An award on this scale was rare, except in estate matters and in some commercial matters, such as mortgage actions.

6 Historically, solicitor and client costs approached full indemnity and depending on a solicitor's actual billing rate, they may still coincide. As billing rates to clients have increased and risen to hourly rates in excess of $600.00, the gap between an award of costs that provides full indemnity and one that provides substantial indemnity has widened. In this case, the difference in fees is roughly $40,000. I was not provided with any authority for awarding the costs of this motion

in an amount that would fully indemnify the successful parties and in my view, there is no basis for such an award. I believe that the choice here is between partial indemnity costs and substantial indemnity costs.

7 Costs on the higher scale can be awarded as a form of chastisement and as a mark of the court's disapproval of a litigant's conduct. This is intended to punish as well as to deter others from engaging in similar conduct. Unproved allegations of fraud frequently attract awards on the higher scale. Unproved allegations of breach of trust, conspiracy, misrepresentation, breach of fiduciary duty, and the like, may also attract this kind of award: *Beaver Lumber Co. v. 222044 Ontario Ltd.* (1996), 5 C.P.C. (4th) 253 (Ont. Gen. Div.) at p. 256.

8 Cost sanctions are imposed for these kinds of unproved allegations because they are rooted in assertions of dishonesty and deceit and go to the heart of a person's integrity: *Bargman v. Rooney* (1998), 30 C.P.C. (4th) 259 (Ont. Gen. Div. [Commercial List]), at pp. 268-269; *Dyer v. Mekinda Snyder Partnership Inc.* (1998), 40 O.R. (3d) 180 (Ont. Gen. Div.) and see cases referred to at pp.184-185. Where serious allegations of dishonest or illegal acts are made, but are so inadequately pleaded that they are not permitted to go forward, costs consequences should likewise follow. These allegations have stood in the public record and over the heads of the defendants. The plaintiffs admitted that the allegations were akin to or as serious as fraud. The allegations were made against public officials in the course of carrying out their public duties. To strike recklessly at the integrity of a person occupying a position of public trust is a serious matter.

9 The task for the court is to punish and deter unwarranted allegations and egregious conduct, but without discouraging the tenacious pursuit and advancement of serious claims of impropriety in a proper case. This was not a serious claim of impropriety. Essentially, the plaintiffs sought to recover damages in respect of a solicitor's retainer in which they had no prospective economic interest and made unsupported allegations of illegal conduct on the part of the Mayor and his co-defendants. The allegations were designed to harm and embarrass. It is appropriate to award costs to the Epp defendants on a substantial indemnity scale.

Quantum

10 The costs grid has been revoked, but a factor to be considered in fixing costs is the principle of indemnity, including the experience of the lawyer, the rates charged and the hours spent: Rule 57.01(1)(O.a). The Costs Subcommittee of the Civil Rules Committee has published Information to the Profession with hourly maximum rates based on experience. It replicates the former costs grid for partial indemnity costs. Under Rule 1.03, "partial indemnity costs" means costs awarded under Part 1 of Tariff A and "substantial indemnity costs" means costs awarded in an amount that is 1.5 times higher what would otherwise be awarded in accordance with Part 1 of Tariff A. The Tariff provides only that the fees and the counsel fee shall be determined in accordance with section 131 of the *Courts of Justice Act* and the factors set out in subrule 57.01(1).

11 The Costs Outline of the Epp defendants shows that three lawyers devoted total time of 261.6 hours to research and drafting materials and includes the time of senior and junior counsel for preparation and attendance on the motion. There is also student time of 108.5 hours. Two senior lawyers, Mr. Rook (who appeared as counsel) and Mr. Peltomaa, claim the maximum hourly rate of $350.00. Mr. Hughes, a 6-year lawyer who appeared as junior counsel, claims the maximum hourly rate of $225.00 for a lawyer with less than 10 years experience. The total amount claimed on a substantial indemnity scale is $152,299.20, broken down as follows:

For fees ($92,347.50 × 1.5):	$138,521.25
GST (@7%)	9,696.48
Disbursements (with GST)	4,081.47

12 The plaintiffs submit that it was reasonable for the successful Epp defendants to have incurred costs in the range of $60,000, but do not indicate whether this is on a partial or substantial indemnity scale. I am satisfied that they could

have reasonably expected to pay costs on a substantial indemnity scale if they were unsuccessful and their Costs Outline shows that, if they had been successful, they would have claimed fees on this scale in the approximate amount of $70,000.

13 The Statement of Claim was 111 pages in length and very difficult to follow. It failed to appropriately set out the 17 causes of action and made claims that did not relate to legitimate causes of action. The plaintiffs delivered eight volumes of case briefs, citing 133 authorities, although only a small fraction were referred to in their submissions. The moving parties obtained an excellent result. These are factors that commend a higher award. However, there were no cross-examinations and only one scheduling attendance prior to the motion. The motion was argued over two days.

14 The motion was important and was made more complex by the unnecessarily prolix pleading, the research required to properly analyze 17 causes of action, and the sheer volume of the material, but it has been said more than once that "maximum rates are reserved for maximum cases". More appropriate rates for this motion on a partial indemnity scale are $300.00 for senior counsel and $175.00 for junior counsel.

15 I am satisfied that there was duplication of time and the amount of time that was spent in preparation, strikes me as very high. The Epp defendants claim a total of 370.1 hours of lawyer and student time - or 46 eight-hour days - for the preparation and conduct of a two-day pleadings motion. The unsuccessful party could have reasonably expected to pay a substantial award of costs, but roughly 10 weeks of preparation for this motion is not a reasonable amount of time for a losing party to pay, notwithstanding the relative importance and complexity of the motion and that it resulted in the termination of the action at an early stage, thus avoiding a lengthy and costly proceeding.

16 Having regard to the relevant factors in Rule 57.01, an appropriate amount for fees for the motion on a partial indemnity scale is in the range of $65,000. Applying the multiplier of 1.5, the fees on a substantial indemnity scale would be in the range of $100,000. In my view, an award in this amount does not satisfy the principles of reasonableness or proportionality, although the mechanical application of the multiplier produces this number. The revocation of the costs grid and the amendments to Rule 57.01 send a clear message that it is these principles rather than a mechanical application that should inform an award of costs. The principles are reviewed in *Andersen v. St. Jude Medical Inc.*, 264 D.L.R. (4th) 557 (Ont. Div. Ct.), leave to appeal refused (May 12, 2006), Doc. M333540 (Ont. C.A.).

17 Notwithstanding the amendments to the Rules, the court retains an overriding discretion in the matter of costs to award an amount that it considers fair and reasonable. A motion judge is not equipped nor expected to conduct a line by line assessment, but should attempt to achieve procedural and substantive justice between the parties: *Murano v. Bank of Montreal* (1998), 41 O.R. (3d) 222 (Ont. C.A.). Precision is impossible, but when I balance all of the relevant factors, I am satisfied that an award of costs that achieves this and that satisfies the punitive and deterrent aspects of a costs award on a substantial indemnity scale is in the amount of $89,681.47, broken down as follows:

For fees:	$80,000
GST on fees:	5,600
Disbursements (with GST):	4,081.47

Costs of the Non-party

18 The broad language of section 131 does not limit the award of costs to the parties to a proceeding. The cases involving non-parties mainly address the question of whether costs can be awarded against them: see, *Gulf Canada Resources Ltd. v. Merlac Marine Inc.* (1994), 18 O.R. (3d) 239 (Ont. Gen. Div.). There does not appear to be a case where costs have been awarded in favour of a non-party, although this was implicitly recognized in *Friction Division Products Inc. v. E.I. Du Pont de Nemours & Co.* (1985), 51 O.R. (2d) 244 (Ont. H.C.).

19 The City of Waterloo sought the right to appear on the motion and to bring its own motion in response to the position taken by the plaintiffs in the Statement of Claim and the Factum that they delivered in response to the motion to strike the pleading. They asserted that the Epp defendants could not raise the issue of privilege as any privilege could

only be claimed by Waterloo. Having taken this position, it is fair to say that the plaintiffs invited Waterloo's motion in order to avoid the risk of being later said to have waived privilege. When Waterloo appeared, the plaintiffs disputed its right to do so.

20 The plaintiffs take no position on Waterloo's entitlement to costs and, in their written submissions, address only the issue of quantum. The motion was necessary to protect Waterloo's claim for privilege and ensured that the privilege issue, which was important, was before the court. It was successful in obtaining an order to expunge the pleading. It is appropriate to award Waterloo its costs, but on a partial indemnity scale.

21 Waterloo claims costs on a partial indemnity scale in the amount of $19,770.93 and disbursements of $607.77, inclusive of GST. Four lawyers spent 62.4 hours and maximum rates are claimed. For reasons already given, maximum rates are not appropriate, but I find the time to be reasonable. Waterloo had the benefit of the analysis of the pleading performed by the Epp defendants and relied on this in its Factum. Its brief of law was not extensive. A fair and reasonable award of costs on a partial indemnity scale is $16,657.77, broken down as follows:

Fees:	$15,000
GST on fees:	1,050
Disbursements with GST:	607.77

Summary of Awards

22 I award costs to the Epp defendants on a substantial indemnity scale in the total amount of $89,681.47. I award costs to Waterloo on a partial indemnity scale in the total amount of $16,657.77. In accordance with Rule 57.03(1), the costs are to be paid within 30 days.

Order accordingly.

Tab 18

1994 CarswellBC 741
British Columbia Supreme Court

Francescutto (Guardian ad litem of) v. Strata Plan K227

1994 CarswellBC 741, [1994] B.C.W.L.D. 2526, 30 C.P.C. (3d) 317, 50 A.C.W.S. (3d) 384

SANTINA ARLENE FRANCESCUTTO, an infant, and ANDREW CAESAR FRANCESCUTTO, an infant by his Guardian Ad Litem, CAESAR AUGUSTO FRANCESCUTTO and the said CAESAR AUGUSTO FRANCESCUTTO, ARLENE MARGARET FRANCESCUTTO and DONALD OLE MOEN v. THE OWNERS, STRATA PLAN K227

Hunter J. [in Chambers]

Heard: January 28, 1994

Subject: Civil Practice and Procedure; Property; Contracts

Headnote

Practice — Costs — Scale and quantum of costs — Quantum of costs — Allowance of increased costs

Sale of Land — Condominiums — Common elements — General

Relevant factors including "hard nosed and burdensome" conduct of petitioners in advancing claim knowing likelihood of success to be minimal at best, modest amount involved, and significant legal costs of respondents in defending petition.

Following the dismissal of the petitioners' application challenging the respondents' restrictive resolution, the respondents applied for increased costs.

Held:

The application was granted.

An award of increased costs at 50 per cent of special costs was justified. Costs assessed under Scale 3 amounted to $2,160 or 26 per cent of what counsel actually billed the respondents ($8,177.50). The petitioners used "hard nosed and burdensome tactics" in advancing litigation in the face of clear evidence that at all relevant times, the plaintiffs knew they were not entitled to use the lakefront storage shed by reason of the impugned resolution. The plaintiffs knew that the likelihood of success would be minimal at best. The amount involved was modest. The respondents incurred significant legal costs in defending the petition.

Table of Authorities

Cases considered:

Bradshaw Construction Ltd. v. Bank of Nova Scotia (1991), 48 C.P.C. (2d) 74, 54 B.C.L.R. (2d) 309 (S.C.) [varied (1992), 73 B.C.L.R. (2d) 212, [1993] 1 W.W.R. 596, 16 B.C.A.C. 62, 28 W.A.C. 62 (C.A.), affirmed on appeal as to costs only (1992), 8 C.P.C. (3d) 20, 73 B.C.L.R. (2d) 212 at 232, [1993] 1 W.W.R. 596 at 616, 16 B.C.A.C.

62 at 78, 28 W.A.C. 62 at 78 (C.A.) , additional reasons at (sub nom. *Bradshaw Construction Ltd. v. Bank of Nova Scotia (No.2)*) (1992), 19 B.C.A.C. 186, 34 W.A.C. 186 (C.A.)] — *applied*

Just v. British Columbia (1992), 9 C.P.C. (3d) 302 (B.C. S.C.) — *applied*

Statutes considered:

Land Title Act, R.S.B.C. 1979, c. 219.

Words and phrases considered:

hard nosed and burdensome tactics — "... I am concerned about 'the conduct and the nature of the proceedings' of the petitioners ... the unsuccessful petitioners were aware of the confining nature of the initial resolution, that is, that the storage shed on this Strata Corporation lakefront property was not available to them. I mean that they knew this before they purchased these Strata lots. Despite this knowledge, at the time of the purchase, they pursued this litigation. That, in my opinion, is tantamount to 'hard nosed and burdensome tactics', the phrase used by Donald J., as he then was, in *Just v. British Columbia* (1992), 9 C.P.C. (3d) 302 (B.C. S.C.) [at p. 308]."

Adjudication on costs.

Tariffs considered:

British Columbia, Rules of Court (1990) —

Appendix B, Party and Party Costs,

s. 7

***Hunter J.* [In Chambers] (Addendum to judgment):**

1 This matter came before me in chambers on January 28th, 1994. Written judgment was filed on February 10th, 1994. The petitioners' application was dismissed and the respondents now seek increased costs under s. 7 of Appendix B of the rules.

2 On p. 6 of my judgment I declined the respondents' claim for special costs. This proposition was advanced by counsel for the respondents at the hearing in the event that I should rule against the petitioners on the main issues.

3 I recall, however, and my notes confirm this, that counsel did not argue the issue of costs and particularly that counsel for the respondents — due to the lateness of the hour — asked to make written submissions on costs. In the circumstances it is appropriate for me to receive submissions on costs. Counsel have made those submissions at some length, in writing.

4 A number of cases have been referred to by counsel. On a careful review of them, I have concluded that increased costs are appropriate. Costs assessed under Scale 3 apparently amount to $2,160, or 26 per cent of what counsel actually billed the respondents ($8,177.50). In addition, I am concerned about "the conduct and the nature of the proceedings" of the petitioners, to use the words of Bouck J. in *Bradshaw Construction Ltd. v. Bank of Nova Scotia* (1991), 54 B.C.L.R. (2d) 309 (S.C.) . Clearly, the unsuccessful petitioners were aware of the confining nature of the initial resolution, that is, that the storage shed on this Strata Corporation lakefront property was not available to them. I mean that they knew this before they purchased these Strata lots. Despite this knowledge, at the time of purchase, they pursued this litigation. That, in my opinion, is tantamount to "hard nosed and burdensome tactics", the phrase used by Donald J., as he then was, in *Just v. British Columbia* (1992), 9 C.P.C. (3d) 302 (B.C. S.C.) [at p. 308].

5 As I said in the judgment filed February 10th, 1994, the petitioners first took the position that the resolution passed on September 1, 1978 did not qualify as a "special resolution," and thus, should not have been registered in the Land Title Office. In the circumstances, this seems a highly technical position. Alternately, the petitioners said, they were registered as owners under the *Land Title Act* before the "notification" (that is, the special resolution) was registered. The evidence was clear, however, that the petitioners had actual notice before purchase that use of the storage shed was limited to Strata lots 1 to 6, that is, Strata lots other than those purchased by the petitioners.

6 The petitioners, by advancing this litigation in face of clear evidence that at all relevant times they knew they were not entitled to use of the storage shed, have done so, it must be said, knowing the likelihood of success would be minimal at best. I am mindful also of the modest value of what was in issue and the apparent significant legal costs to the respondents in defending against this petition.

7 In reaching this conclusion, I want to be clear that it is based on the conduct of the petitioners. It is not a criticism of counsel.

8 Accordingly, I make an award of "increased costs" at 50 per cent of special costs, to be assessed.

Increased costs awarded.

End of Document

Tab 19

Court of Queen's Bench of Alberta

Citation: Edwards v Resort Villa Management Ltd, 2015 ABQB 424

Date: 20150702
Docket: 1303 08538
Registry: Edmonton

Between:

Charles Edwards, Marlene Edwards, Bruce D. Hirsche, Dianne Hirsche, Darryl Ackroyd and Karen Ackroyd

Plaintiffs

- and -

Resort Villa Management Ltd. and Northmont Resort Properties Ltd.

Defendants

Memorandum of Decision
of the
Honourable Madam Justice M.T. Moreau

I. Introduction

[1] I dismissed an application by former counsel for all of the Plaintiffs on May 29, 2015 for an adjournment of the trial of this action. The trial was set to proceed for five days starting on June 1, 2015. The Plaintiffs then discharged their counsel. Their new counsel applied for an adjournment on June 1, 2015, which I also dismissed. The Plaintiffs then abandoned all their claims against the Defendants and their defence to the Defendants' Counterclaim. Their new counsel reserved the ability to argue interest and costs.

[2] The Defendants established through the testimony of their officer, Mr. Kirk Wankel, a chartered accountant, that the Plaintiffs were invoiced for the amounts claimed in the Counterclaim. The amounts set out in paragraph 16 of the Counterclaim remain due and owing. Judgment was granted as follows:

- As against the Plaintiffs, Charles Edwards and Marlene Edward ("the Edwards Plaintiffs"), the amount of $4,772.45;
- As against the Plaintiffs, Darryl Ackroyd and Karen Ackroyd ("the Ackroyd Plaintiffs"), the amount of $4,242.35; and
- As against the Plaintiffs, Bruce D. Hirsche and Dianne Hirsche ("the Hirsche Plaintiffs"), the amount of $16,779.76.

[3] I granted the request of new counsel for the Plaintiffs to submit written argument on the issues of interest and costs. As the parties were able to agree on the interest payable to the Defendants, I direct that interest be paid by the Plaintiffs in the amount of $4,500.

[4] The Defendants claim $302,738.50 in full indemnity costs plus disbursements from the commencement of the proceeding. Their Schedule C costs in Column 1 for the entire proceeding are $13,400.00 plus disbursements in the amount of $6,592.92.

II. Summary of Background Facts

[5] Fairmont Resort Properties Ltd. constructed, developed and marketed a vacation resort ("the Resort") in Fairmont, British Columbia, in the early 1990s. As a result of a Vesting Order granted in proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, Fairmont's interest in the Resort was foreclosed and ultimately transferred to the Defendant Northmont Resort Properties Ltd. ("Northmont") in 2010.

[6] The Ackroyd Plaintiffs purchased a leasehold interest in a single lock-off residential unit within the Resort in or about 1990. The Hirsche Plaintiffs purchased leasehold interests in four lock-off residential units in July 2010.The Edwards Plaintiffs entered into a Vacation Internal Agreement ("VIA") with Northmont for the purchase of a fee simple co-ownership interest in the Resort in September 2010.

[7] The Defendant Resort Villa Management Ltd. provides management services for Northmont at the Resort. Northmont issued an assessment for an additional maintenance fee which it described as a Renovation Project Maintenance Fee ("the Disputed Assessment") for each vacation unit in the amount of $4,000.00 in April 2013.

[8] The Plaintiffs refused to pay the Disputed Assessment. They alleged Northmont failed to properly maintain, repair or refurbish the buildings within the Resort and failed to account for the operation and maintenance fees assessed and paid since the inception of the Resort. The Plaintiffs commenced an action in June 2013. Each sought damages in the sum of $10,000.00, interim injunctions restraining the Defendants from interfering with the Plaintiffs' rights to occupy their respective vacation units, and interim injunctions restraining the Defendants from cancelling their respective interests in the Resort.

[9] In their Statement of Defence, the Defendants referred to their offer to all timeshare owners and leaseholders in April 2013 to pay their proportionate share of the Disputed Assessment or enter into a cancellation agreement that would permit them to terminate their VIA's and avoid future liability in exchange for the payment of a fee. This option had not been

exercised by any of the Plaintiffs. The Defendants alleged that the Plaintiffs were in default of their VIA's for non-payment of the Disputed Assessment, denied that they had any obligation to account to the Plaintiffs for all operating and maintenance fees assessed since the inception of the Resort and denied that they had breached the VIA's. Northmont also sought indemnification for all costs incurred in defending the Edwards claim pursuant to an indemnification provision of the Edwards Plaintiffs' VIA.

[10] The Defendants also counterclaimed for the amounts of the Disputed Assessment along with the 2014 maintenance fees. They alleged that, pursuant to the terms of the VIA's, the Plaintiffs were liable to pay their proportionate share of all administration, maintenance, repair and replacement costs, which included the Disputed Assessment and all annual maintenance fees.

III. Steps Taken in this Proceeding

[11] The Defendants' brief sets out in detail the steps previously taken in this action (paras 11 to 27; see also the Plaintiffs' brief at paras 22-29). These include the interim injunction application of the Ackroyd Plaintiffs which resulted in an order permitting them to use their unit in the Resort during the summer of 2014 despite the Disputed Assessment. Costs of that application were ordered to be in the cause. A consent order in relation to the use of the Resort by other Plaintiffs was granted later in the summer of 2014 on the basis that a Litigation Plan would be filed. The Litigation Plan was filed by consent on July 30, 2014.

[12] Affidavits of Records were produced involving a substantial number of Plaintiffs' documents. Questioning of each of the six Plaintiffs proceeded along with questioning of an officer of the Defendants over several days. Questioning was completed within 10 weeks of document production. On January 23, 2015, the Defendants filed a Request to Schedule a Trial Date to which counsel for the Plaintiffs consented.

[13] On January 27, 2015, a video conference was held ("the Super Conference") pursuant to the direction of Rooke ACJ. The Super Conference involved himself, Loo J of the Supreme Court of British Columbia, Young ACJ of the Alberta Provincial Court, Small Claims Division, Webb J of the Provincial Court of British Columbia, former counsel for the Plaintiffs in this action, counsel for Northmont, current counsel for the Plaintiffs, and four other counsel. According to the hearing transcript, by the time of the Super Conference, 1391 actions had been commenced in the Provincial Court of Alberta, 259 actions had been commenced in the Provincial Court of British Columbia and 851 actions had been commenced in the Supreme Court of British Columbia to recover unpaid fees charged to VIA holders at the Resort. An action had also been commenced in the Supreme Court of British Columbia by a VIA owner, JEKE Holdings, against Northmont ("the JEKE action"). The JEKE action raised many issues similar to those arising in the multitude of other proceedings. It was expected that 1,000 more claims were to be shortly filed in both provinces against VIA holders for payment of maintenance fees and renovation fees. Loo J referred to the purpose of the conference:

> [H]ow can we – that is, the courts and counsel – in the public interest and not contrary to the real interests of any litigants, best set procedures [to] economically, timely, and justly resolve litigation on some or similar issues involving (INDISCERNIBLE) in four separate courts in two separate provinces? (p 7)

[14] Former counsel for the Plaintiffs in this proceeding confirmed that, subject to completion of responses to undertakings from questioning and perhaps some "minor amendments to the pleadings", the matter was ready for trial (p 7-8). Counsel for the Defendants in this action (who is also counsel for Northmont in the JEKE action) advised that the three main issues before the Court in this proceeding related to the validity and effect of the Vesting Order, the liability of Northmont for actions of the previous resort owner after the date of the Vesting Order and whether Northmont committed any breaches of the Vesting Order, and Northmont's contractual ability to levy the Disputed Assessment (which the Plaintiffs in this proceeding alleged had already been paid; (p 9-10). Former counsel for the Plaintiffs agreed with this summary of the main issues in this proceeding, but emphasized that he only represented three vacation interval owners (p 11).

[15] Counsel for Northmont indicated that he did not see the JEKE action or this proceeding answering all of the issues raised in all of the actions (p 14). He stated, however with respect to this proceeding:

> We believe that Edwards should proceed because it is an Alberta action from the Alberta Supreme Court that will be helpful for the Alberta Provincial Court to have as a precedent. We also believe that the Edwards action should proceed because it is ready to proceed, and could proceed as early as June. Further, we see that it addresses three – but certainly two of the most critical issues, first being the effect of the vesting order, and second being the validity of the renovation project fee...So we would agree to a stay of the Alberta Provincial Court proceedings until Edwards is resolved or until further order of the Court (p 37).

[16] He added that the JEKE action should proceed apace. Rooke ACJ commented: "it seems to me in the public interest" to set down an expedited trial for June 2015 (p 41).

[17] Following the Super Conference, the trial date was set by consent on February 23, 2015 for June 1, 2015. The Court confirmed that date on March 5, 2015. Pursuant to Form 37 signed by both former counsel for the Plaintiffs and counsel for the Defendants, the Plaintiffs had until April 15, 2015 to amend their claim. The Plaintiffs made no applications to do so.

IV. The Issues

[18] The issues in relation to costs are as follows:

> 1. Whether the Defendants are entitled to costs on a full-indemnification basis of this entire proceeding, or alternatively, of this proceeding since the Super Conference, or, alternatively, to a combination of solicitor-client costs and Special Costs for some or all of this proceeding; and
>
> 2. Whether the Defendants are entitled to be indemnified for all their costs in relation to the Edwards Plaintiffs' claim pursuant to the indemnification provision of the Edwards Plaintiffs' VIA.

of North America v Beasse, 124 AR 161, 7 CLR (2d) 194. The Plaintiffs maintain that the costs claimed on an indemnity basis by the Defendants are not reasonable, having regard to the amount of the claim or the Counterclaim.

VII. Discussion

The Defendants' entitlement to costs on an indemnity basis or to Special Costs

[63] Rules 10.31 and 10.33 of the *Rules of Court* relating to costs are set out at Appendix "A". I note in particular for the purposes of this action that, apart from the degree of success of each party, the amount claimed and the amount recovered are to be considered by the Court in assessing costs, along with the importance of the issues, the complexity of the action and whether a party has engaged in misconduct or conduct that unnecessarily lengthened or delayed the action.

[64] In ***British Columbia (Minister of Forests) v Okanagan Indian Band***, 2003 SCC 71 at para 21, [2003] 3 SCR 371 [***BC (Minister of Forests)***], Lebel J, for the majority of the Court, adopted the description of costs awards in ***Ryan v McGregor*** (1926), 58 OLR 213 (CA) at 216, 1925 CarswellOnt 162. In that case, costs were described as being "in the nature of damages awarded to the successful litigant against the unsuccessful, and by way of compensation for the expense to which he has been put by the suit improperly brought." Lebel J pointed out that, while the power to order costs is discretionary, it is a discretion that must be exercised judicially. The ordinary rules of costs should be followed unless the circumstances justify a different approach (paras 22 and 23). Lebel J recognized that indemnity to the successful party is not the sole purpose of costs. Costs serve other functions, such as encouraging settlement, preventing frivolous or vexatious litigation, and discouraging the taking of unnecessary steps. "These purposes could be served by ordering costs in favour of a litigant who might not be entitled to them" on a pure 'indemnification of the successful party' approach. Lebel J also noted that, because costs offset to some extent the outlays incurred by the winner, "they make the legal system more accessible to litigants who seek to vindicate a legally sound position" (para 26).

[65] Full indemnification by way of solicitor-client costs is infrequently ordered in Canada and requires "unusual and egregious conduct by the losing party. On rare occasions the court may award solicitor-client costs where equity is met by doing so" (***BC (Minister of Forests)*** at para 60).

[66] As noted by Hutchinson J in ***Jackson***, it is the conduct of the action and not the conduct of the party that gives rise to the action that determines whether an award of solicitor-client costs is called for (paras 38-39). The facts of each case must be carefully considered before determining whether to grant such costs.

[67] In ***Brown***, the defendant had to make several applications to compel document production. Orders were required compelling the plaintiff to attend discoveries, answer undertakings, produce a statement of assets, prepare an Affidavit of Records, and even to produce his written argument following the hearing of the evidence at trial. Moen J characterized the plaintiff's conduct as "deliberate obstructionism" (para 65).

[68] In ***Enoch***, costs were granted on a full-indemnity basis where the plaintiff lied to the court to avoid disclosure requirements, blatantly ignored court orders, and the costs award arose out of contempt proceedings.

[69] There was, by contrast, substantial cooperation in this proceeding up to and including the point of setting the action for trial. Up to that point and indeed, prior to the first application to adjourn the trial, there was nothing significant done by the Plaintiffs to hinder, delay or confuse the litigation, nor anything egregious or reprehensible about their conduct. While counsel for the Defendants had to serve Notices to Attend Questioning, questioning was not significantly delayed. The Plaintiffs' pleadings did not raise allegations of fraudulent or deceptive conduct on the part of the Defendants.

[70] However, it is necessary to carefully consider the impact of the Super Conference held in January 2015 in addressing the Defendants' entitlement to indemnity costs or special costs.

[71] Former counsel for the Plaintiffs stated at the Super Conference that the Plaintiffs were ready for trial. He had been informed that dates for a three-day trial were available in November or December 2015, but he and Defendants' counsel were amenable to the matter proceeding to trial as early as June 2015. He was present when counsel for the Defendants outlined the issues for trial and expressly acknowledged that counsel for the Defendants had "fairly set out the issues" (Super Conference transcript at 11). However, he did point out that he represented only three vacation interval owners with outstanding fees of $24,000.00 and that his retainer took into consideration the amount of the claim against them.

[72] Having regard to counsel for the Defendants' description of the issues in this proceeding and the description of the issues in the JEKE proceeding given at the Super Conference by the Plaintiffs' new counsel (who also represents a number of VIA holders in British Columbia), there is indeed some overlap in the issues in both actions (p 11-12). However, based on the comments of counsel for the Defendants, neither the JEKE action nor this proceeding would answer all issues raised in all actions, nor would any one action resolve all issues, having regard to the large number of versions of the VIA's sued on (p 14). However, I find, based on the submissions of counsel for the Defendants at the Super Conference, that the JEKE action and this proceeding were expected to provide guidance on issues common to all actions, among them, the validity of the Disputed Assessment, the legal effect of the Vesting Order on the obligations of Northmont, and whether Northmont's actions were in breach of the Vesting Order.

[73] Counsel for a number of defendants in the Alberta Small Claims proceedings confirmed that 1,391 actions had been commenced to that point in Alberta and many more were expected to be filed in relation to the Defendants' claims for the 2015 maintenance fee (p 17).

[74] Loo J recognized that the JEKE action in British Columbia was supported by hundreds of owners, whereas this proceeding only involved three couples and a $24,000.00 counterclaim (p 22). New counsel for the Plaintiffs voiced concerns as to how an analysis of a $50 million renovation project could be accomplished in a three-day trial (p 26). He stated that it would be very likely that he would need to become involved in this proceeding on behalf of the VIA holders he already represented in British Columbia in order to avoid adverse rulings being made to their claims. Rooke ACJ observed:

> So I am hearing you say, Mr. Alexander, without any criticism, that you don't think your clients would want to feel bound by three couples taking on Northmont in Alberta without you being there, and I take it Mr. McFadyen wants to represent his three couples and get whatever justice they can get and not be bound by 3,000 following him and dragging him down and taking his time (p 27).

[75] Counsel for the Defendants expressed the view that, this proceeding being "almost ready to go...[t]he decision will be helpful, maybe, for some issues and maybe not helpful for others" and that the JEKE action should continue in B.C. (p29). New counsel for the Plaintiffs reiterated his concerns about the precedential value of a ruling in this proceeding absent legal challenges on all issues (at 34). He acknowledged that the Plaintiffs in this action risked being drawn into a much longer trial.

[76] Counsel for the Defendants submitted that this action should proceed to trial. No objection was voiced by former counsel for the Plaintiffs (p 37).

[77] Rooke ACJ undertook to obtain a June 2015 trial date in this action, and discussions ensued regarding a stay of the large number of small claims pending the completion of the trial in this proceeding (p 41).

[78] I note that the Plaintiffs made no application following the Super Conference to amend their pleadings despite Form 37 (Request to schedule a trial date) permitting an amendment application by April 15, 2015. Nor did any parties to the British Columbia litigation seek intervenor or party status in this proceeding.

[79] It is clear from the submissions of Mr. Alexander (now new counsel for the Plaintiffs) at the Super Conference that he did not wish this proceeding to go to trial first and decide issues of importance in the JEKE action. This was also evident from the comment of former counsel for the Plaintiffs at the first adjournment application that he had concerns that the outcome of the trial would be setting a precedent for a large number of BC actions. He also advised that his clients "will join the B.C. group". I also find that the Plaintiffs were neither content nor comfortable with mounting complex legal arguments in the context of their respective $10,000.00 claims and the $24,000.00 counterclaim.

[80] I find that the purpose of the two adjournment applications was to avoid any precedent being set in this proceeding on common issues between it and the JEKE action and, from the perspective of the Plaintiffs, to avoid carriage of a claim and counterclaim that had become much more complex than anticipated when they commenced this proceeding. I am not of the view that the Defendants should be penalized for opposing the adjournment requests, the Plaintiffs having expressed through their counsel their readiness to proceed to trial months earlier.

[81] The Plaintiffs' approach evolved from the first adjournment application to the second from one of staving off the trial of this proceeding in favour of a determination of common issues in the JEKE action, to one of bringing this proceeding to a state mirroring the JEKE action so as to become a fulsome precedent in Alberta. A local agent for new counsel for the Plaintiffs referred to future applications being contemplated in this proceeding to amend pleadings to mirror the JEKE action and become a "full spectrum analysis". He emphasized that the interests of all parties would be best served by the conduct of a full trial on the merits in the "relatively mature" JEKE action, set for trial in January 2016, than the "less mature" action in Alberta absent amendments to the pleadings.

[82] I find that, following the Super Conference, the Defendants were highly motivated to proceed to trial in order to secure a precedent in respect of those legal issues that might overlap with a great number of small claims actions being held in abeyance and some guidance in the JEKE action in British Columbia. However, I reject the Plaintiffs' argument that the Defendants were "grinding" the Plaintiffs. The evidence to support this allegation is lacking. The Plaintiffs

submitted no evidence of offers of settlement they may have made to the Defendants. The Defendants contended that the Plaintiffs made but one offer, one week prior to the date set for trial.

[83] The Plaintiffs had the ability, and the responsibility, to alert the Defendants to an adjournment application well ahead of the Defendants' final preparations for trial. Firing counsel at the eleventh hour and tossing in the towel on the claim and Defence to Counterclaim clearly prevented all hope of this proceeding having any precedential effect for the multitude of small claims currently on hold. The Plaintiffs were or should have been aware of the precedential impact of a trial in this proceeding, their counsel having attended the Super Conference. I agree with counsel for the Defendants that Schedule C, Column 1 does not adequately reflect the significance of this proceeding and of the Plaintiffs' conduct in instructing a last-minute series of manoeuvers to stave off the trial.

[84] Having said this, I agree with the position taken by the Plaintiffs that, given their small numbers compared to the number of affected VIA holders in the JEKE action and in the small claims, it was open to them at an early stage, prior to signing Form 37, to decide that they did not wish to become a test case and to abandon their claims and defences to the Counterclaim. While this would not advance matters for the large number of small claims held in abeyance in this province, it was not the responsibility of the Plaintiffs to do so. The prejudice in this case, however, arose from the Plaintiffs' last-minute withdrawal from this proceeding after special arrangements had been made by the Associate Chief Justice to expedite the trial. The Plaintiffs offered no satisfactory explanation for why the decision to request an adjournment was so significantly delayed after the January 27, 2015 Super Conference. The Plaintiffs inaction wasted valuable court time and judicial resources, currently in extremely high demand in this province, which, with proper notice, could have been redeployed to other matters.

[85] A reasonably timed adjournment application or withdrawal would also have avoided counsel for the Defendants needlessly preparing for trial in the days and weeks prior to June 1, 2015. The conduct of the Plaintiffs in delaying the adjournment application and their withdrawal from the proceeding in my view was serious enough to warrant a departure from the usual costs tariff, having regard to the representation of their former counsel at the much earlier Super Conference that they were ready for trial and his knowledge when he signed Form 37 that the trial would be used as a precedent or at least for guidance in the multitude of small claims held in abeyance.

[86] I am not satisfied that the conduct of the Plaintiffs prior to setting the matter for trial warrants an award of full indemnity or special costs for that portion of the proceeding. While six of the twelve original Plaintiffs withdrew from the proceeding, the Plaintiffs were entitled to maintain their action. There was no suggestion that it was frivolous or vexatious. Indeed, counsel for the Defendants in their brief acknowledged that the Plaintiffs' claims could not be characterized as "entirely baseless" (para 68). I also note that document production through the filing of Affidavit of Records along with questioning preceded the Super Conference when the precedential import of this proceeding would have been made fully clear to the Plaintiffs. For that reason, I reject the submission of the Defendants that these are compensable as thrown-away costs or on a solicitor-client scale. I find that Schedule C costs in Column 1 are appropriate for all steps prior to May 29, 2015. I reject the Defendants' suggestion that for these prior steps costs should be multiplied given that the monetary amount of the Counterclaim against each group of Plaintiffs differed. No evidence was adduced by the Defendants to justify a multiplier other than

the pleadings themselves and judgment was awarded in the amounts pleaded in the Counterclaim (less any credited payments).

[87] I accept the submission of counsel for the Plaintiffs that the fact that two of the Plaintiffs are senior members of the legal profession is not such as to justify full indemnity costs in this case, at least in regard to their participation in this proceeding. These Plaintiffs never represented themselves at any point. Counsel for the Defendants referred to the lack of respect for the Court's processes demonstrated by the Plaintiffs' non-appearance on the first day of trial. I find that their non-appearance, while of concern to me at the time, was explained by their abandonment of their claims and defences to the Counterclaim which new counsel for the Plaintiffs indicated would be the very likely result of my refusal to grant the second application for an adjournment of the trial.

[88] While members of the Law Society of Alberta are obliged to "encourage public respect for and try to improve the administration of justice" they, like other litigants, are also entitled to determine whether they wish to proceed with or defend a claim (Law Society of Alberta, *Code of Conduct* Calgary: LSA, 2015, ch 4.06(1)). Their conduct, along with that of the other Plaintiffs, I consider serious enough in the circumstances to warrant a departure from the usual Schedule C costs, having regard to their readiness for trial expressed by their counsel at the Super Conference and their awareness of the guidance expected from this proceeding being litigated on an expedited basis. However, I do not characterize their conduct as having descended to the level of "egregious" or "reprehensible" conduct. I also find that the Plaintiffs did not attempt, through their former or new counsel, to deceive the Court in their representations regarding their reasons for their adjournment requests.

[89] Nor do I accept the Defendants' submission that solicitor-client costs in the range of over $300,000.00 is a proportionate response to the actions of the Plaintiffs in seeking the adjournment of the trial and their abandonment of their claims and defence to the Counterclaim. The reality is that the JEKE action, now set for trial in January 2016 with its expanded pleadings, will likely have an impact (although not technically binding) on the resolution of Small Claims in both provinces. The extent of the clarity a decision in this proceeding would have provided is not entirely clear as counsel for the Defendants acknowledged at the Super Conference. Had this case been adjourned at an earlier date to allow the JEKE action to proceed to trial, or pleadings been amended to mirror the JEKE pleadings, this case would likely not have been heard before the January 2016 JEKE trial. Most importantly, counsel for the Defendants, who is counsel for the Northmont in the JEKE action, is not left entirely empty-handed from a precedential perspective as a result of the Plaintiffs' actions.

[90] I accept the Defendants' submission that the Plaintiffs' pleadings raised broad and complex issues relating to the legal implications of the Vesting Order and the Defendants' liability for actions of its predecessor in title and raised issue relating to the Defendants' management However, I reject the Defendants' suggestion that the Plaintiffs never truly intended to take this matter to trial. I find that the complexity and import of the issues in this proceeding increased significantly as the JEKE action moved forward, something that the Plaintiffs could likely not have predicted when they initially filed their claim. In fact, former counsel for the Plaintiffs and counsel for the Defendants were planning for a three-day, not a five-day trial prior to the Super Conference.

[91] The Defendants' preparation for trial is not a lost litre. The claims of the Defendants against each Plaintiff had been quantified in the Counterclaim (para 16) and judgment in those amounts plus interest was entered without opposition from the Plaintiffs. No extra work was involved in calculating their claims except in regards to placing the amounts before the Court in a summary fashion through the Defendants' officer. Counsel for the Defendants in this action is also counsel for Northmont in the JEKE action. The preparation for a precedential case was no doubt extensive, as reflected in that item at $103,356.00 in the Defendants' solicitor-client bill of costs. That the Defendants elected to prepare to such an extent that the preparation exceeded the expected judgment by five times leaves no doubt that they were treating this proceeding as a "test case".

[92] Had the trial proceeded, the Defendants would, in the usual course, have expected to have been compensated (subject to their indemnification claim against the Edwards Plaintiffs) in accordance with the applicable column of Schedule C. Costs on an elevated scale (higher column of costs or multiples of ordinary Schedule C costs) are the exception and not the rule (***Schwartz Estate v Kwinter***, 2013 ABQB 147 at para 111, 558 AR 236 [***Kwinter***]). As noted by Graesser J in ***Kwinter*** "clients are free to choose lawyers who work for $150.00 per hour" or a team of lawyers working collectively for $2,000.00 per hour (para 146). It may be that a matter is so important to a client that they are prepared to have more than one lawyer working on their case. However, when the client hopes that someone else will pay the bill, the "client should not expect the court, in fixing costs, to require the losing party to pay for over-preparation" (para 149, citing ***Moon v Sher***, 2004 CanLII 39005 at para 33, 246 DLR (4th) 440 (ONCA)).

[93] In this case, the Defendants' preparation for trial was not solely focused on succeeding on its $24,000.00 Counterclaim. It was also focused on creating a precedent for thousands of other claims they (and not the Plaintiffs) are litigating in Alberta and B.C. It would not be reasonable in my view to expect the Plaintiffs in this case to shoulder the increased costs of preparation that will ultimately serve the Defendants in the JEKE action. As noted by Graesser J in ***Kwinter***:

> Countenancing disproportionate responses to claims rewards uncontrolled litigation and puts the courts in the position of being an "enabler". For me to award solicitor and client costs here, I would have to be satisfied as to the appropriateness of the various activities on the file, and the appropriateness of the time spent on each activity (para 230).

[94] As Wittmann ACJ noted in ***D'Amico***, "an award for thrown away costs includes only disbursements and reasonable fees for work that has been rendered useless as a result of [an] adjournment" (para 32). Thrown-away costs do "not include costs for steps which may yet be profitably employed in a later trial or the ultimate resolution of the dispute" (citing ***Lynch v Checker Cabs Ltd***, 1999 ABQB 514 at para 65, 245 AR 182.)

[95] In ***Koppe***, thrown-away costs were sought against a self-represented litigant on his application to open up the summary dismissal of his action. Slatter J (as he then was), commented that thrown-away costs generally arise where there is a procedural misstep by the applicant party, such as a faulty drafting of a pleading, a failure to attend court or a missed deadline, requiring the responding party to take some step (para 8). When the applicant later attempts to correct its misstep, the action taken by the respondent becomes wasted or thrown away. Slatter J noted that these situations should be limited to what has actually been lost (para 14.)

[96] I am of the view that the Defendants should be appropriately compensated for the inaction of the Plaintiffs in relation to the adjournment application until the last possible moment, having regard to the considerable pains taken by the Court to accommodate an expedited trial and the Plaintiffs' knowledge of the implications of the trial for other cases being held in abeyance. I am of the view that enhanced costs are appropriate for the two adjournments applications and set them at $1,500.00 for each adjournment application.

[97] Having regard to the expense and time the Defendants invested in order to prepare for trial, I find that a small portion of their trial preparation should be compensable as thrown-away costs. As earlier noted, it is not appropriate for the Plaintiffs to shoulder the hefty amount of preparation costs for a "test case", having found that the Defendants see it as such. Nor is it appropriate for the same reason to require the Plaintiffs, for whom this is not a test case, to pay second counsel fees given the amount of the claim and Counterclaim. Based on the provisions of Rule 10.33, and in order to avoid protraction of the costs proceedings, I would set thrown-away costs at $10,000.00 or in that range (approximately $500 per hour for about 20 hours of preparation time). However, unlike the usual situation in which a court grants thrown-away costs, such as where the Court sets aside a default judgment or grants an adjournment, in this case the action has been resolved with a judgment in the amounts claimed in the Counterclaim plus interest. Accordingly, I am of the view that it is appropriate to reduce the costs award for trial preparation to $6,000.00 to reflect the fact that no further steps are required in this proceeding. A trial attendance would have been necessary in any event to prove the Counterclaim. Accordingly, I award costs in Schedule C, Column 1 for that item, limited to the one-half day spent in trial.

[98] As for the written argument on the issue of costs presented at the request of new counsel for the Plaintiffs, there has been mixed success on the application for costs, as the Defendants were not successful in seeking full-indemnity costs, nor were the Plaintiffs successful in seeking to avoid costs entirely. However, additional work was occasioned to counsel for the Defendants by new B.C. counsel for the Plaintiffs' request to submit written argument. I direct that the Defendants recover costs in the total amount of $2,000.00 for the Defendants' costs briefs based on the Schedule C, Column 1 tariff for "application where written brief is required or allowed by the Court" with a multiplier of two.

The Defendants' entitlement to costs on an indemnity basis from the Edwards Plaintiffs

[99] I reject the Defendants' argument that by abandoning their defence to the Counterclaim, the Edwards Plaintiffs are thereby disentitled to argue against the Defendants' claim for indemnification for costs based on the terms of the VIA. New counsel for the Plaintiff reserved his ability to fully argue the issue of costs when he advised the Court of the abandonment by the Plaintiffs of their claims and their defence to the Counterclaim. Having regard to the reservation of that right, the Plaintiffs cannot now be said to have accepted the indemnification provision or the Defendants' right to rely on it.

[100] This is not a question of placing the Plaintiffs in a more favourable position than had they proceeded to trial. The Defendants were not prevented from fully arguing their entitlement to contractual costs on an indemnification basis at the costs stage of this proceeding.

[101] While the language of the indemnity provision of the VIA is broad and refers to the recovery of expenses in the event of breach, there is no direct reference to the legal costs of

suing on or enforcing the indemnity. While parties to a contract can agree to the level of costs (***0856464*** at para 20), one would expect it to be reasonably contemplated that the extent of recovery of legal costs would be governed by the *Rules of Court*. If the intention of the parties is otherwise this could and should have been clearly expressed.

[102] The Edwards VIA defined "claims" as including "cause of action, proceeding or other claim". The indemnification provision is referred to at para 8.4 of the Statement of Defence:

> 8.4 Section 39 provides that the Edwards are liable to indemnify and save harmless Northmont from any and all actions, suits, claims, liabilities, damages, costs, losses and expenses incurred or sustained by Northmont arising from or connected with any breach of [or] non-performance of the VIA and "any other act or omission of the Buyer".

[103] The indemnification provision is also pled at para 17.1 of the Counterclaim.

[104] As the VIA did not specifically refer to legal fees, I find that the Edwards Plaintiffs are not contractually bound to pay the Defendants' legal costs on an indemnity basis. While no magic words are required, there still should be clarity as to the level of costs payable.

[105] As to the disbursements claimed by the Defendants at Tab B of their Brief, I disallow hotel and mileage costs if they relate to the costs incurred by out-of-town counsel. The Plaintiffs should not be responsible for paying for the Defendants' election not to be represented by local counsel. If the hotel and mileage and meal cost refers to the costs of the Defendants' officer who testified on Day 2 of the scheduled trial, then his taxed transportation, hotel and meal costs (if any) are chargeable for two days' attendance in Court as the adjournment of the trial from Day 1 to Day 2 was at the request of the Plaintiffs.

VIII. Conclusion

[106] For the reasons given, costs are awarded to the Defendants as follows:

(a) Costs in Schedule C, Column 1 for all steps from the commencement of the proceeding until May 29, 2015;

(b) Total costs in the amount of $3,000.00 for the two unsuccessful adjournment applications of May 29, 2015 and June 1, 2015;

(c) Thrown-away costs in the amount of $6,000.00 for preparation for trial;

(d) Costs in the amount of $2,000.00 for the preparation of briefs on the issue of costs;

(e) Costs in Schedule C, Column 1 for one-half day of trial;

(f) Disbursements as set out in Tab B of the Defendants' brief less items disallowed in para 105 of these reasons.

Heard on the 2nd day of June, 2015.
Dated at the City of Edmonton, Alberta 2nd day of July, 2015.

M.T. Moreau
J.C.Q.B.A.

Appearances:

L.J. Alexander
for the Plaintiff (Defendants by Counterclaim) Charles Edwards, Marlene Edwards, Bruce D. Hirsche, Dianne Hirsche, Darryl Ackroyd and Karen Ackroyd

J.E. Virtue and P.D. Manning
for the Defendants (Plaintiffs by Counterclaim) Resort Villa Management Ltd. and Northmont Resort Properties Ltd.

Tab 20

Court of Queen's Bench of Alberta

Citation: Kent v Law Society of Alberta, 2015 ABQB 432

Date: 20150707
Docket: 1501 02087
Registry: Calgary

Between:

Arthur Kent

Applicant

- and -

The Law Society of Alberta, Don Thompson, QC as Executive Director of the Law Society of Alberta and Katherine Whitburn as Complaints Manager of the Law Society of Alberta

Respondents

Reasons for Decision of the Honourable Mr. Justice Sterling M. Sanderman

---

[1] Mr. Kent is an intelligent, industrious self-represented litigant who with some legal advice has brought two major actions in the Judicial District of Calgary. One is set for a civil jury trial this fall. In it, Mr. Kent has commenced an action against a journalist, his publisher and others allegedly connected to defamatory statements made against Mr. Kent.

[2] In his other action, he sues his former lawyer and a law firm for failing to advance his claim against the journalist and publisher with the vigor and professional expertise expected of them. Both cases are under case management and Mr. Kent has brought numerous motions and has been called upon to defend many as the actions proceed. He is no stranger to the litigation process and has had successes when the motions have been heard.

[3] As Mr. Kent pursues his actions, he has had dealings with many lawyers and has reported five members to the Law Society of Alberta for perceived wrongdoings. One lawyer has been disciplined and suspended. One has had the complaint brought dismissed. The appeal process set out in the *Legal Profession Act* has run its course with Mr. Kent being invited to return with a new complaint if new evidence arises. Two other members of the Law Society are still being investigated by the Law Society. It has yet to be determined whether the complaints will be dismissed at the preliminary stage or sent on to a committee hearing. One other member has had his complaint dismissed subsequent to the filing of this application, but the appeal process has yet to run its course. As Mr. Kent was only informed of this dismissal on June 15, 2015, he has yet to appeal the preliminary decision.

[4] On August 2, 2013, I heard an application brought by Mr. Kent. At that time, he sought judicial intervention in relation to the complaints against two members of the Law Society of Alberta. I found against Mr. Kent at that time on the basis that he had no standing. I found that his application was premature and that the court should not be involved in telling the Law Society of Alberta how to run its investigation when no decisions had yet been made by it. In addition to finding that the application was premature, I found that there was no evidentiary basis upon which I could grant Mr. Kent the relief he sought. David Jones, Q.C. acted for the Law Society on that application. Oral reasons were given by me on the afternoon of August 2, 2013. Mr. Kent obtained a copy of the transcript of that hearing. He included it in his materials on this application.

[5] In June of 2015, Mr. Kent brought a similar application back before me. He sought judicial intervention in relation to the Law Society's investigation of one of the lawyers who was the subject matter of the August 2013 application and the investigation in relation to Mr. Jones. Mr. Kent reported Mr. Jones to the Law Society on the basis that he misled Mr. Kent and the court by failing to reveal prominent clients of his that were related in some fashion to Mr. Jones accepting the brief from the Law Society of Alberta.

[6] Neither of the lawyers are party to the action brought by Mr. Kent. The named parties are Don Thompson, Q.C., as Executive Director of the Law Society of Alberta and Katherine Whitburn as Complaints Manager of the Law Society of Alberta. These are two individuals who hold important positions with the Law Society of Alberta and have been charged with the responsibility of properly processing Mr. Kent's complaints.

[7] On June 25, 2015, in oral reasons, I decided against Mr. Kent on the same basis as the August 2013 application. The law is settled in this area. Mr. Kent has no standing to bring this type of motion. In addition to lacking standing, the application is premature and there was no evidentiary basis provided to the court upon which the application could be supported.

[8] Mr. Kent claims that Mr. Jones misled him and the court by not revealing who he acted for in other matters that might have had some bearing on how he approached Mr. Kent's quarrel with the Law Society. I found that Mr. Jones had no obligation to reveal who he acted for on any other matter. The suggestion that he did was unfounded in law.

[9] Secondly, I found that a review of the transcript of the August 2, 2013 application revealed no instance of Mr. Jones misstating any fact or legal concept that might have misled the court. Mr. Jones fairly and accurately delineated the issues before the court and provided binding authorities that directed the actions of the court.

[10] At the conclusion of the June 25, 2015 hearing, counsel for the Law Society asked for complete indemnity or enhanced costs to deter Mr. Kent from abusing the court's process. Mr. McKenzie submits that Mr. Kent should be cut no slack because he represents himself without the assistance of counsel. Mr. McKenzie argues that he is not your normal self-represented litigant. Mr. McKenzie submits that enhanced costs are in order for the following reasons.

[11] Mr. McKenzie states that the 2013 decision made it abundantly clear to anyone that the type of argument put forward at that time would fail. This decision clearly delineated the law in this area to Mr. Kent. He does not get to redo something that has failed in all aspects in the past.

[12] Secondly, the two individuals named as defendants have had to bear the stigma of alleged improper actions without an evidentiary basis. Mr. McKenzie wonders why they were named as Mr. Kent has no cause of action against them and asked for no relief against them. One is only entitled to bring an action if there is a personal interest in play between the parties. In this case, there is no such connection.

[13] Mr. Kent maintained his allegations of dishonesty in relation to the named parties even after a written brief had been filed by the Respondents clearly taking issue with these allegations. In oral argument, Mr. Kent did not resile from his initial suggestions.

[14] Mr. McKenzie submitted that the amount of time he had to spend preparing for this matter was extreme. The reason for this is directly related to Mr. Kent's insistence that the court review a number of lengthy irrelevant affidavits that had been filed in his actions and in the application for relief in August of 2013. Mr. McKenzie conceded that a lot of this material was irrelevant to the matter that had to be decided in June of 2015, but it was still necessary for him to review all of this documentation to make that determination. This type of preparation should not have been mandated by Mr. Kent.

[15] Mr. McKenzie does not quarrel with the fact that Mr. Kent has a right to access the court and the litigation process. He also has a right to be treated with respect and dignity. He does not have a right to have his actions excused just because he chooses to represent himself when he comes to court.

[16] Mr. Kent took issue with Mr. McKenzie's submissions. He maintains that he has sought to co-operate with the Law Society at each and every step. He indicated in court that he bears no malice towards Ms. Whitburn or Mr. Thompson. He has never taken a confrontational position with them but has tried to be accommodating and continues to this very day to express hope for a resolution in his various complaints. Mr. Kent suggests a different course of action. Mr. Kent undertakes to be genuinely cooperative with Mrs. Whitburn and any other representative of the Law Society in relation to his complaints. He suggests that the Law Society has not been candid and open with him in their communications. He feels that he is being stonewalled by them to a certain extent even though the Law Society transferred the investigation of Mr. Jones to senior counsel in the province of British Columbia. He feels that that individual and Mr. Jones have been dismissive and mocking towards him in relation to his communications with them. Mr. Kent takes the position that he only wants to work in a cooperative manner with the Law Society and that the costs sought by Mr. McKenzie are truly punitive. They can have no purpose other than to inflict pain upon him. He suggests that the request for such costs is mean-spirited.

[17] After Mr. McKenzie and Mr. Kent made their submissions, I indicated to them that I wanted to think about the matter of costs for a few days.

[18] Costs are within the discretion of the court. Any determination that the court makes must be determined in a judicial fashion. Costs are not to be decided capriciously or whimsically. Full indemnity costs are only to be awarded in the most egregious circumstances. They are a rarity. Enhanced costs are not. They can be awarded in those circumstances where the conduct of one of the participants falls far short of what is expected from a responsible litigant.

[19] In this case, I find that Mr. McKenzie has made out a case for enhanced costs. He casts Mr. Kent as an experienced litigator who has exceeded the bounds of what is generally accepted. He is correct in that proposition. Mr. Kent is an intelligent man with good communication skills. He writes well. He argues well on his feet. He has many of the skills that are required to be a successful litigator. If he had chosen the profession of law as his vocation, one could see that he would have had success. Unfortunately, in this matter, he has lacked restraint, another important attribute of a successful litigator. Successful litigators know when there is no case to advance and do not tilt at windmills for tactical reasons when it causes pain to innocent parties.

[20] For the reasons advanced by Mr. McKenzie, enhanced costs in the sum of $6,500.00 are ordered. They are to be paid by September 30, 2015.

Heard on the 25th day of June, 2015.
Dated at the City of Calgary, Alberta this 7th day of July, 2015.

Sterling M. Sanderman
J.C.Q.B.A.

Appearances:

Arthur Kent,
on his own behalf

Gordon R. McKenzie QC, Bishop & McKenzie LLP
for the Respondents

Tab 21

In the Court of Appeal of Alberta

Citation: Hill v Hill, 2013 ABCA 313

Date: 20130927
Docket: 1201-0333-AC
Registry: Calgary

Between:

Daniel Walter Hill

Appellant/Cross-Respondent
(Plaintiff)

- and -

Paul James Hill, Richard P. Rendek, Rand Flynn, Famhill Investments Limited and Harvard Developments Inc.

Respondents/Cross-Appellants
(Defendants)

The Court:

The Honourable Mr. Justice Jean Côté
The Honourable Mr. Justice Peter Costigan
The Honourable Madam Justice Elizabeth Hughes

Memorandum of Judgment Regarding Costs

Appeal from the Judgment by
The Honourable Mr. Justice E.C. Wilson
Dated the 7th day of November, 2012
Filed the 4th day of December, 2012
(2012 ABQB 694, Docket: 0501-00476)

Memorandum of Judgment Regarding Costs

The Court:

A. Introduction

[1] This is an appeal and a cross-appeal from a costs decision given after a long trial. The trial judge's decision on the merits is 2012 ABQB 256, and his decision on costs is 2012 ABQB 694. They set out the facts in great detail, but these brief details will introduce the basic situation, and state a few facts in general terms.

[2] The appellant's late father built up a very successful valuable set of businesses. Ownership depended upon a discretionary trust made long ago, partly for tax reasons. The appellant (who later became legally trained) had little to do with the business. His brother did, and ultimately the trustees appointed him as beneficiary. The appellant formed the fixed belief that years before, four of the children had been appointed, and so the appellant (as one of them) had a 1/4 interest in the business. The trial judge found that that was not so.

[3] The appellant was the plaintiff, and his statement of claim raised many other causes of action and allegations. It also sought disgorgement of profits on a host of grounds. The appellant alleged that almost everyone on the other side had been guilty of a variety of types and instances of fraud, dishonesty, and other misconduct.

[4] The trial judge gave two separate sets of costs, one to the corporate defendants and one to the individual defendants. They had been separately represented for some years before the trial. They are the respondents.

[5] The judge gave the respondent defendants costs calculated on 4 times column 5 of Schedule C up to the close of the appellant plaintiff's case at trial, and on single column 5 thereafter.

[6] The appellant plaintiff has appealed costs (separately from his unsuccessful appeal on the merits of the lawsuit). The respondent defendants cross-appeal the restriction of costs to single column 5 for the last part of the trial.

[7] There is an outstanding motion to fix certain aspects of the costs of the main appeal, but we have been asked not to decide that until this trial costs appeal is decided.

[8] We will discuss the main appeal first, then the cross-appeal.

B. Exceeding Column Five

[9] On the main appeal, the appellant first objects to any fees which exceed single column 5 of Schedule C.

[10] His ground for this first objection alleges that some of the matters which the trial judge considered are entirely irrelevant to costs.

[11] The first matter said to be irrelevant is how much the winning parties' legal fees were. But party-party costs are not plucked out of the ether; they are designed to be somewhere around half a reasonable legal bill, or a little under. And Schedule C does not bind a judge in any respect, and is not even presumed correct. See R 10.31(3)(a) and Part D below. So actual legal bills are relevant. That the actual bills might be too high goes to weight, not to relevance. And the appellant never argued that the respondents' legal bills were too high, says the trial judge. The respondents say that the appellant did not object to looking at these bills at any time in the Court of Queen's Bench. And the amount of actual legal bills is only one of many factors. This factor is a useful cross-check: ***Caterpillar Tractor v Ed Miller Sales***, 1998 ABCA 118, 216 AR 304, [1998] 10 WWR 736 (paras 8, 9).

[12] The second objection in the appellant's list is not really relevance. It is that someone else paid some of the legal bills. But the legal test to recover party-party costs is not what has been paid; it is whether the party was liable to pay his lawyer. The respondents were liable. Payment of fees by an insurer, relative, or friend is not a bar to recovering costs: ***Jacobi v Aqueduct Roman Catholic Separate School District*** (1994) 153 AR 241, 246-47 (paras 17-24); ***Armand v Carr*** [1927] SCR 348, [1927] 2 DLR 720.

[13] In any event, this question is academic here. No one else paid the legal bills; there was simply an unequal distribution from a purely discretionary trust. Nor was this objection ever made to the trial judge. The appellant's suggestion that his father used money that had been held back for this suit is not founded in the evidence.

[14] The third factor to whose relevance the appellant objects is that the appellant had brought many wasteful motions. This cannot be irrelevant, in light of R 10.33, paras (1)(d), (f) and (2)(a), (d). The appellant and his ever-evolving claims were moving targets throughout, and he was so ingenious, persistent, technical and unpredictable, that the respondents needed the utmost care. That topic of prolonged interlocutory warfare cannot possibly be irrelevant. Rule 10.33(2)(a) expressly makes relevant unnecessary conduct or conduct lengthening or delaying the action or steps in it. There was a plethora of that. As for the size of the evidence, the number of witnesses is not the only measure. Five hundred and ninety records, totalling over 6500 pages, were marked as exhibits.

[15] The appellant now suggests that looking at the numerous motions in the suit is double counting. But it is not; the trial judge considered the motions from the point of view of complexity. This lawsuit was complex from any point of view. The trial judge was entitled to take notice of the contents of the court file, and did not need evidence of such motions made before he performed duties in this suit.

[16] The fourth irrelevant factor which the appellant suggests the trial judge relied on was the previous similar lawsuits. That situation is rare in ordinary litigation. It adds complexity, adds

volume to the relevant paperwork, and adds issues of *res judicata*; so we have trouble in seeing that that is irrelevant to costs. In any event, the trial judge expressly did **not** weigh this independently (para 19). He merely mentioned it in his preliminary survey of the background (para 16). So this is academic too.

[17] The fifth irrelevant factor allegedly relied on was the appellant's unshakeable belief in a valid trust in his favor. But the trial judge's point was not the appellant's motivation; it was his extraordinary persistence, and continual searching for new reasons to reach the same old conclusion. The courts' experience with many indefatigable litigants shows how much that multiplies litigation expenses for opponents. Whatever the appellant's actual motivation or beliefs, his conduct had a certain manner. A reasonable bystander (or opponent) would have concluded that as a result, caution and sufficient resources were called for. See the trial judge's Reasons on costs, para 17, and note the past tense at the end. The test was not subjective.

[18] The appellant also complains that two parts of the trial got a different costs scale (some column 5, some four times that). But that is the obverse side of the cross-appeal. We will discuss that below, under Part D.

[19] The sixth factor which the appellant calls irrelevant was accusing the respondents of serious impropriety, with little or no evidence to support those accusations. The appellant's pleadings and arguments at every step were studded with examples of that. One could cite a dozen modern Alberta cases (some in the Court of Appeal) increasing costs for that reason. See also the ***Caterpillar*** case, *supra*, at para 12. Recent high authority is ***Hamilton v Open Window Bakery***, 2004 SCC 9, [2004] 1 SCR 303, 316 NR 265 (para 26). We are aware of no Canadian authority questioning the relevance of that factor. Indeed it is mandated by R 10.33(2)(a), (d), (e). The fact that the appellant withdrew many of these allegations halfway through trial is a repeat of the issues on the cross-appeal. Again, see Part D for a discussion.

[20] There is no validity to any of the first ground of appeal. And even if one were to ignore the standard of review, single column 5 would have been patently insufficient. That is explained in Part D below.

C. Separate Sets of Costs

[21] The respondents say that this objection by the appellant is new in the Court of Appeal, and was not made in the Court of Queen's Bench, as was pointed out there to the trial judge. The topic is not discussed in the trial judge's reserved written costs Reasons.

[22] The appellant now argues that the two groups of defendants, separately represented, should share a single set of costs. This overlaps with the earlier appeal on the merits, which we decided. There the appellant argued that for the same reasons, the Court of Appeal should not hear separate counsel. The Court of Appeal rejected that argument.

[23] One test may be "whether a party unnecessarily separated that party's defence from that of another party": R 10.33(2)(c).

[24] Obviously there is some overlap in the various defendants' interests, but the issue is slightly different: whether separate counsel or defences were necessary, or reasonably appeared to be needed. The test is not how the suit turned out; it is what was possible a long time before trial: ***Lamport v Thompson***, *infra*. If the identity of the various parties' interests and positions did not apply all across the board, then obviously separate counsel were needed. The central and original contest was over who in effect owned one of the companies. How could the individuals who were the rival owners have identical positions to the companies owned? The companies were accused of oppression and of knowing breaches of trust because of matters of which the companies and their officers had no personal knowledge, and did not believe had happened. Knowledge is relevant, so the companies had a defence not open to the family members.

[25] The fact that the appellant kept alleging misconduct by certain parties, and changing his grounds of suit, made separate counsel even more important.

[26] In any event, a party accused of individual bad and dishonest conduct such as fraud, is entitled to his or her own counsel: ***Keystone Shingles & Lumber v Royal Plate Glass etc Insurance*** (1955) 15 WWR 283, 285 (BC); ***Valley Salvage v Molson Brewery*** [1976] 3 WWR 673 (BC); ***Lamport v Thompson*** [1942] 2 DLR 65, 69 (Ont).

[27] The appellant kept adding to his list of alleged instances and types of misconduct. The allegations were usually against one or two individuals, and usually not all parties were alleged guilty of a single accusation. That alone shows diversity of interest. Nor were the respondent defendants obliged to laugh off the allegations in this suit by a persistent litigant involving both huge sums of money, and the reputations of many, including a lawyer and a chartered accountant.

[28] There is some resemblance to the separate-costs awards in ***599291 Alta (Three River Rentals) v Luff***, 2008 ABCA 57, 429 AR 215.

[29] The appellant alone had three trial counsel.

[30] No unnecessary duplication of work is alleged between the two sets of counsel for the respondent defendants. Obviously the trial judge thought there was no significant unnecessary duplication. The only example of the respondents' allegedly unnecessary duplication mentioned in the appellant's factum on costs is some portions of their statements of defence. The same factum mentions adoption of certain arguments of the co-defendants. That is the opposite of duplication of work.

[31] The Court should be slow to second-guess counsel's decision as to when interests conflict: ***Kurian v Administrator of Motor Vehicle Accident etc Act (#2)***, 2004 ABCA 217, Edm. 0203-0078-AC, [2004] AUD 2039 (June 28, with corrigenda) (para 10).

[32] This second ground of appeal must fail.

D. Cross-Appeal as to Scale of Costs for Latter Part of Trial

[33] The respondents cross-appeal. The trial judge gave them quadruple column 5 only up to the close of the appellant plaintiff's case. The respondents say that they should not have been restricted to single column 5 after the close of the appellant's case. That reduction extends over 29 half-days of oral proceedings, which is much longer than most whole trials. The judge said that he lowered the scale of costs after that point for one reason only: because the appellant then dropped one of his claims (after some cajoling). The parties could not know then that the trial judge would dismiss the entire suit.

[34] However, the appellant dropped no factual allegations; the allegations all remained as the foundation for other causes of action. The only change was that the facts were no longer said to lead to oppression. For example, the head of the company was still accused of breach of trust, and the company still accused of knowing assistance, in respect of the same transactions which had been the foundation for the oppression claims dropped at the end of the plaintiff's case. Claims to repay salary were dropped against the company's head, but not claims to reimburse 22 transactions in that office. And at the same time as oppression was withdrawn, read-ins about the other transactions were entered as exhibits. The respondents led evidence to rebut that, and were cross-examined on that by the appellant.

[35] Only once during the case of the respondent defendants did the appellant object to an item of their evidence on grounds of irrelevance. The appellant's challenge to the 1995 conveyance which gave the head of the company his ownership was **not** withdrawn at the close of the plaintiff's case; it persisted until final oral argument.

[36] That the appellant plaintiff called only two live witnesses may sound relevant, but it leaves a mistaken impression, because most of the evidence went in by admissions, read-ins, and cross-examination. Indeed, since much of the evidence was never given out loud, length of oral proceedings is misleading.

[37] The pleas of misconduct were never formally withdrawn by amendment, discontinuance, or otherwise. The respondents (appellants by cross-appeal) and the trial judge both point that out. The closing argument of the appellant at trial repeated an allegation of dishonesty, and more surfaced on appeal.

[38] We must keep in mind that Schedule C is a purely-optional rubber stamp for a judge, who may use it or not, or amend it, as he or she sees fit. See ***Caterpillar v Ed Miller***, *supra* (paras 6, 8), and R 10.31(3)(a).

[39] One must note the huge sums of money in issue: capital of one quarter of $70,000,000 assets (according to trial evidence), plus disgorgement of profits or income for over 30 years. So the amounts in issue were far higher than column 5 involves. That column is for suits over $1.5 million. Alberta courts routinely multiply it several fold.

[40] On top of that, Schedule C's amounts did not change with the new Rules. It was drafted by an *ad hoc* committee about 16 years ago.

[41] One might wonder whether the standard of review on appeal bars the Court of Appeal from interfering with this reduction of column. There were some palpable factual and legal errors by the trial judge on this point. We itemize some below.

[42] One error is simple. The trial judge calculated the period of lower costs during the respondents' case as including five one-half days of oral argument. But that argument covered the appellant plaintiff's case too; it included his evidence which was all given before he withdrew any allegation. The trial judge overlooked that point, and his Reasons do not contain anything which would justify reducing the costs for that step. Costs for those five half days must be put back up to quadruple column 5.

[43] As for the other 22 days of trial and after the plaintiff's case closed, it is true that the trial judge had some discretion, and that the Court of Appeal owes him deference. He reduced costs for one sole unusual and very discrete reason, which he described. The entire discussion is in para 29 of his Reasons:

> I agree with the plaintiff that regard must be had to the fact that even a late narrowing of the issues, thereby reducing the length of a trial should be encouraged. Awarding enhanced costs for trial time thereafter would serve to discourage counsel from continuously reassessing their case during a trial. Counsel fairly observes that awarding enhanced costs in such a circumstance would mean there is no incentive for litigants to have regard to the principles enunciated in Rule 1.2.

[44] The trial judge cannot have meant that there would have been no incentive if any costs were above Schedule C after a claim was withdrawn. That would make no sense. The trial judge must have meant that the same full multiple of Schedule C after the withdrawal as before, would offer no incentive.

[45] But reducing the last part of the trial from 4 times column 5 to single column 5 is a 75% discount in the fee part of costs, estimated to be $400,000. Even after putting argument costs back up to quadruple (about 1/6 of that) it will still be a huge discount off quadruple column 5. No one suggests that this particular incentive to drop claims should or could have any effect on costs before claims are dropped. (To do that would produce backwards incentives.)

[46] The trial judge's discretion to give some reduction after withdrawing a claim as an incentive, should be respected on appeal. But can a 3/4 (or 2/3) reduction be justified? (It is about 2/3 after putting argument back to 4 times column 5.) Is the reduction proportional to the size of incentive necessary? The Reasons do not reveal that the trial judge considered this aspect, let alone calculated it.

[47] Four aspects of holding fees to single column 5 for the respondent defendants' part of the trial are disturbing.

[48] First, the appellant (respondent by cross-appeal) does not point to any evidence which the respondent defendants led at trial which they should not have, or was unnecessary. (Only one bit was objected to at trial as irrelevant.)

[49] Even more striking, the trial judge's Reasons on the merits show that the respondent defendants won the trial largely because of witnesses whom they called. A striking example is that of the surviving tax lawyer involved in the supposed 1976 appointment of beneficiaries. And some of the respondent defendants testified on those topics. Indeed another of the respondents' witnesses not only gave important eyewitness evidence, but prepared spreadsheets which the trial judge found "particularly useful".

[50] The second aspect is amount in issue. We have noted above the reasons why single column 5 would be clearly inadequate for any suit over assets and income of this size, even if it ran smoothly and without misconduct, and were not of unusual complexity.

[51] That factor got no weight whatever, as the trial judge put costs down to single column 5 (at the end of the trial) without any misconduct by the respondent defendants, nor any divided success.

[52] Third, we have noted above the undoubted incessant misconduct by the appellant plaintiff: a host of grave but unfounded allegations of misconduct. Similarly that got no weight at all during the second part of the trial when the defendants defended themselves against those allegations. That is baffling.

[53] Fourth, the trial judge noted the great complexity of the suit. Similarly it got no weight at all for the second part of the trial.

[54] For over 70 years, Courts of Appeal have had and used the power to interfere with discretionary decisions (such as costs) where improper weights are given (or not given) to irrelevant (or relevant) factors.

[55] The seminal case is ***Evans v Bartlam*** [1937] AC 473, [1937] 2 All ER 646 (HL(E)). The power of an appeal court to interfere was held to cover a case where not nearly enough weight had been given to an important factor, in ***Charles Osenton & Co v Johnston*** [1942] AC 130, [1941] 2 All ER 245, 250, 253, 256, 261 (HL(E)). That was approved in ***Friends of the Oldman River Society v R*** [1992] 1 SCR 3, 132 NR 321, [1992] 2 WWR 193, 246-47 (paras 104-05). It overturned a discretionary decision on grounds that it had given insufficient weight to an important question: p 249 (WWR (para 108)). See also ***Dufault v Stevens*** (1978) 86 DLR (3d) 671, 678 (BC CA), and ***Campbell v Campbell*** (1955) 14 WWR 690 (BC CA).

[56] A discretionary costs order was upset on appeal for giving no weight to two important factors, in ***Minister of National Health v Apotex*** (2000) 194 DLR (4th) 483, 265 NR 90, 94-95 (FCA).

[57] One must be careful; that is not a license to reweigh afresh on appeal every weight given by a trial judge to every factor. The precise limits of the power to upset on grounds of weight need not be settled here.

[58] But when a factor to weigh is clearly relevant, clearly exists, is clearly important, and gets no weight whatever (has no effect on the result), then the Court of Appeal should look closely at the matter. Here the trial judge's Reasons clearly show that four undoubted and important factors got no weight at all. That allows us to intervene.

[59] If the disputed part of the costs were a few thousand dollars, or a few per cent, probably we would not tinker. But where it is well over $300,000 and is 65 to 75% of the fees for half the trial, we must intervene.

[60] We increase the fee costs for the latter part of the trial where the defendants led evidence, from single column 5 to treble column 5. (That includes any trial time consumed by rebuttal evidence by the appellant.) That leaves a drop in scale from quadruple to treble (i.e. a discount of single column 5) to respect the trial judge's decision to give an incentive for withdrawing claims, and to respect his choice of the type of incentive to give.

E. Conclusion

[61] The appeal is dismissed, the cross-appeal allowed, costs for the five half days of argument are restored to quadruple column 5, and the column of Schedule C after the close of the plaintiff's case is increased to 3 times column 5.

[62] We award each set of respondents costs of this costs appeal fixed at $68,000, plus disbursements fixed at $600.

Appeal heard on September 11, 2013

Memorandum filed at Calgary, Alberta
this 27th day of September, 2013

Côté J.A.

Authorized to sign for: Costigan J.A.

Hughes J.

Appearances:

C.J. Popowich
K. Reiffenstein
for the Appellant/Cross-Respondent Daniel Walter Hill

M.O. Laprairie, Q.C.
J.R. Wildeman
for the Respondents/Cross-Appellants Paul James Hill, Richard P. Rendek and Rand Flynn

F.R. Foran, Q.C.
J.G. Hopkins
for the Respondents/Cross-Appellants Farnhill Investments Limited and Harvard Developments Inc.