**COURT OF APPEAL OF ALBERTA**

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| COURT OF APPEAL FILE NUMBER: | **1603-0026AC** |
| TRIAL COURT FILE NUMBER: | 1103 14112 |
| REGISTRY OFFICE: | Edmonton |
| | IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c. T-8 AS AMENDED, and<br><br>IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Trust"), |
| APPLICANT: | PUBLIC TRUSTEE OF ALBERTA |
| STATUS ON APPEAL: | Respondent |
| RESPONDENTS: | ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE and CLARA MIDBO, As Trustees for the 1985 Trust |
| STATUS ON APPEAL: | Respondents |
| RESPONDENT: | SAWRIDGE INDIAN BAND NO. 19, NOW KNOWN AS THE SAWRIDGE FIRST NATION |
| STATUS ON APPEAL: | Respondent |
| RESPONDENT: | CATHERINE TWINN, As a Trustee of the 1985 Trust |
| STATUS ON APPEAL: | Appellant |
| DOCUMENT: | **BOOK OF AUTHORITIES** |



Fast Track

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Appeal from the Decision of
The Honourable Mr. Justice D.R.G. Thomas
Dated the 17th day of December, 2015
Filed the 17th day of December, 2015

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# BOOK OF AUTHORITIES OF THE APPELLANT

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Registrar's Stamp

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## Table of Authorities

# Tab 1

## CHAPTER 27

An Act to amend the Indian Act

[*Assented to 28th June, 1985*]

R.S., c. I-6; c. 10 (2nd Supp.); 1974-75-76, c. 48; 1978-79, c. 11; 1980-81-82-83, cc. 47, 110; 1984, c. 4

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1. (1) The definitions "child", "elector" and "Registrar" in subsection 2(1) of the *Indian Act* are repealed and the following substituted therefor in alphabetical order within the subsection:

"child" «enfant»

" "child" includes a child born in or out of wedlock, a legally adopted child and a child adopted in accordance with Indian custom;

"elector" «électeur»

"elector" means a person who

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

(*b*) is of the full age of eighteen years, and

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

"Registrar" «registraire»

"Registrar" means the officer in the Department who is in charge of the Indian Register and the Band Lists maintained in the Department;"

(2) Subsection 2(1) of the said Act is further amended by adding thereto, in alphabetical order within the subsection, the following definitions:

"Band List" «liste...»

" "Band List" means a list of persons that is maintained under section 8 by a band or in the Department;



## CHAPITRE 27

Loi modifiant la Loi sur les Indiens

[*Sanctionnée le 28 juin 1985*]

S.R., c. I-6; ch. 10 (2e suppl.); 1974-75-76, ch. 48; 1978-79, ch. 11; 1980-81-82-83, ch. 47, 110; 1984, ch. 4

Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, décrète :

1. (1) Les définitions de «électeur», «enfant» et «registraire», au paragraphe 2(1) de la *Loi sur les Indiens*, sont abrogées et respectivement remplacées par ce qui suit :

«électeur» "elector"

«électeur» signifie une personne qui

*a*) est inscrite sur une liste de bande,

*b*) a dix-huit ans révolus, et

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

«enfant» "child"

«enfant» comprend un enfant né du mariage ou hors mariage, un enfant légalement adopté, ainsi qu'un enfant adopté selon la coutume indienne;«

«registraire» "Registrar"

«registraire» désigne le fonctionnaire du ministère responsable du registre des Indiens et des listes de bande tenus au ministère;»

(2) Le paragraphe 2(1) de la même loi est modifié par insertion, suivant l'ordre alphabétique, de ce qui suit :

«liste de bande» "Band List"

«liste de bande» signifie une liste de personnes tenue en vertu de l'article 8 par une bande ou au ministère;»

«registre des Indiens» "Indian Register"

«registre des Indiens» signifie le registre de personnes tenu en vertu de l'article 5;»

the name of a person from the Indian Register in the circumstances set out in paragraph 6(1)(*c*), (*d*) or (*e*) of the *Indian Act*.

relativement à l'omission ou au retranchement du nom d'une personne du registre des Indiens dans les circonstances prévues aux alinéas 6(1)*c*), *d*) ou *e*) de la *Loi sur les Indiens*.

Report of Minister to Parliament

**22.** (1) The Minister shall cause to be laid before each House of Parliament, not later than two years after this Act is assented to, a report on the implementation of the amendments to the *Indian Act*, as enacted by this Act, which report shall include detailed information on

(*a*) the number of people who have been registered under section 6 of the *Indian Act*, and the number entered on each Band List under subsection 11(1) of that Act, since April 17, 1985;

(*b*) the names and number of bands that have assumed control of their own membership under section 10 of the *Indian Act*; and

(*c*) the impact of the amendments on the lands and resources of Indian bands.

Rapport du Ministre au Parlement

**22.** (1) Au plus tard deux ans après la sanction royale de la présente loi, le Ministre fait déposer devant chaque chambre du Parlement un rapport sur l'application des modifications de la *Loi sur les Indiens* prévues dans la présente loi. Le rapport contient des renseignements détaillés sur :

*a*) le nombre de personnes inscrites en vertu de l'article 6 de la *Loi sur les Indiens* et le nombre de personnes dont le nom a été consigné dans une liste de bande en vertu du paragraphe 11(1) de cette loi, depuis le 17 avril 1985;

*b*) les noms et le nombre des bandes qui décident de l'appartenance à leurs effectifs en vertu de l'article 10 de la *Loi sur les Indiens*;

*c*) l'effet des modifications sur les terres et les ressources des bandes d'Indiens.

Review by Parliamentary committee

(2) Such committee of Parliament as may be designated or established for the purposes of this subsection shall, forthwith after the report of the Minister is tabled under subsection (1), review that report and may, in the course of that review, undertake a review of any provision of the *Indian Act* enacted by this Act.

Examen par un comité parlementaire

(2) Le Comité du Parlement que ce dernier peut désigner ou établir pour l'application du présent paragraphe doit examiner sans délai après son dépôt par le Ministre le rapport visé au paragraphe (1). Le comité peut, dans le cadre de cet examen, procéder à la révision de toute disposition de la *Loi sur les Indiens* prévue à la présente loi.

Commencement

**23.** (1) Subject to subsection (2), this Act shall come into force or be deemed to have come into force on April 17, 1985.

Entrée en vigueur

**23.** (1) Sous réserve du paragraphe (2), la présente loi entre en vigueur ou est réputée être entrée en vigueur le 17 avril 1985.

Idem

(2) Sections 17 and 18 shall come into force six months after this Act is assented to.

Idem

(2) Les articles 17 et 18 entrent en vigueur six mois après que la présente loi a reçu la sanction royale.

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OTTAWA, 1985

# Tab 2

2013 FC 509, 2013 CF 509
Federal Court

Stoney v. Sawridge First Nation

2013 CarswellNat 1434, 2013 CarswellNat 2006, 2013 FC 509,
2013 CF 509, 228 A.C.W.S. (3d) 605, 432 F.T.R. 253 (Eng.)

# Maurice Felix Stoney, Applicant and Sawridge First Nation, Respondent

Aline Elizabeth (McGillivray) Huzar and June Martha (McGillivray) Kolosky, Applicants and Sawridge First Nation, Respondent

R.L. Barnes J.

Heard: March 05, 2013
Judgment: May 15, 2013
Docket: T-923-12, T-922-12

Counsel: Priscilla Kennedy, for Applicants
Edward H. Molstad, for Respondent

Subject: Public

**Headnote**

**Aboriginal law --- Government of Aboriginal people — Membership**

Applicants were descendants of individuals who were at one time members of First Nation group, but who, either voluntarily or by operation of law, lost their band memberships — Applicants were excluded from membership in First Nation by chief and council — Appeal committee upheld chief and council's decision — Applicants brought application for judicial review — Application dismissed — Applicants did not qualify for automatic band membership — Applicants' only option was to apply for membership in accordance with membership rules promulgated by First Nation — Further, applicants were named as plaintiffs in previous action seeking mandatory relief requiring that their names be added to First Nation's membership list, and that action was struck out — Attempt by applicants to reargue question of their automatic right of membership in First Nation was barred by principle of issue estoppel — There was no evidence to make finding of institutional bias — There was no evidence to support finding of breach of s. 15 of Canadian Charter of Rights and Freedoms.

**Table of Authorities**

**Cases considered by *R.L. Barnes J.*:**

*Danyluk v. Ainsworth Technologies Inc.* (2001), 54 O.R. (3d) 214 (headnote only), 201 D.L.R. (4th) 193, 10 C.C.E.L. (3d) 1, 2001 C.L.L.C. 210-033, 272 N.R. 1, 149 O.A.C. 1, 7 C.P.C. (5th) 199, 34 Admin. L.R. (3d) 163, 2001 CarswellOnt 2434, 2001 CarswellOnt 2435, 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.) — referred to

*Huzar v. Canada* (2000), 2000 CarswellNat 5603, 258 N.R. 246, 2000 CarswellNat 1132 (Fed. C.A.) — referred to

*Lavallee v. Louison* (1999), 1999 CarswellNat 1771, 1999 CarswellNat 5553 (Fed. T.D.) — referred to

*Sawridge Band v. R.* (2003), 2003 FCT 347, 2003 CarswellNat 1212, 2003 CFPI 347, 2003 CarswellNat 2857, [2003] 3 C.N.L.R. 344, (sub nom. *Sawridge Indian Band v. Canada)* 232 F.T.R. 54, (sub nom. *Sawridge Band v. Canada)* [2003] 4 F.C. 748 (Fed. T.D.) — considered

*Sawridge Band v. R.* (2004), 2004 FCA 16, 2004 CarswellNat 130, (sub nom. *Sawridge Indian Band v. Canada)* 316 N.R. 332, 2004 CAF 16, 2004 CarswellNat 966, (sub nom. *Sawridge Indian Band v. Canada)* 247 F.T.R. 160 (note), [2004] 2 C.N.L.R. 316, (sub nom. *Sawridge Indian Band v. Canada)* [2004] 3 F.C.R. 274 (F.C.A.) — considered

*Sweetgrass First Nation v. Favel* (2007), 63 Admin. L.R. (4th) 207, 2007 CarswellNat 5180, 2007 CF 271, 2007 FC 271, 2007 CarswellNat 567 (F.C.) — referred to

**Statutes considered:**

*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
s. 15 — referred to

*Federal Courts Act*, R.S.C. 1985, c. F-7
s. 18.1 [en. 1990, c. 8, s. 5] — pursuant to

*Gender Equity in Indian Registration Act*, S.C. 2010, c. 18
Generally — referred to

*Indian Act*, R.S.C. 1927, c. 98
Generally — referred to

s. 6 — considered

s. 10(7) — considered

s. 114 — referred to

*Indian Act, Act to amend the*, S.C. 1985, c. 27
Generally — referred to

APPLICATION for judicial review of appeal committee's decision upholding chief and council's decision to exclude applicants from membership in First Nation.

***R.L. Barnes J.:***

1 This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7. The Applicants are all descendants of individuals who were at one time members of the Sawridge First Nation, but who, either voluntarily or by operation of the law at the time, lost their band memberships. As a result the Applicants were excluded from membership in the Sawridge First Nation. They now ask this Court to review the Sawridge First Nation Appeal Committee's decision to uphold the Sawridge Chief and Council's decision which denied their applications for membership.

2 The father of the Applicant Maurice Stoney was William J. Stoney. William Stoney was a member of the Sawridge First Nation but in April 1944 he applied to the Superintendent General of Indian Affairs to be enfranchised under section 114 of the *Indian Act*, c 98, RSC 1927. In consideration of payments totalling $871.35, William Stoney surrendered his Indian status

  

and his membership in the Sawridge First Nation. By operation of the legislation, William Stoney's wife, Margaret Stoney, and their two children, Alvin Stoney and Maurice Stoney, were similarly enfranchised thereby losing their Indian status and their membership in the Sawridge First Nation.

3 The Applicants Aline Huzar and June Kolosky are sisters and, like Mr. Stoney, they are the grandchildren of Johnny Stoney. The mother of Ms. Huzar and Ms. Kolosky was Johnny Stoney's daughter, Mary Stoney. Mary Stoney married Simon McGillivray in 1921. Because of her marriage Mary Stoney lost both her Indian status and her membership in Sawridge by operation of law. When Ms. Huzar and Ms. Kolosky were born in 1941 and 1937 respectively Mary Stoney was not a member of the Sawridge Band First Nation and she did not reacquire membership before her death in 1979.

4 In 1985, with the passing of Bill C-31, *An Act to amend the Indian Act*, 33 - 34 Eliz II c 27, and pursuant to section 10 of the *Indian Act*, the Sawridge First Nation delivered its membership rules, supporting documentation and bylaws to the Deputy Minister of Indian and Northern Affairs, who accepted them on behalf of the Minister. The Minister subsequently informed Sawridge that notice would be given pursuant to subsection 10(7) of the *Indian Act* that the Sawridge First Nation had control of its membership. From that point on, membership in the Sawridge First Nation was determined based on the Sawridge Membership Rules.

5 Ms. Kolosky submitted her application for membership with the Sawridge First Nation on February 26, 2010. Ms. Huzar submitted her application on June 21, 2010. Mr. Stoney submitted his application on August 30, 2011. In letters dated December 7, 2011, the Applicants were informed that their membership applications had been reviewed by the First Nation Council, and it had been determined that they did not have any specific "right" to have their names entered in the Sawridge Membership List. The Council further stated that it was not compelled to exercise its discretion to add the Applicants' names to the Membership list, as it did not feel that their admission would be in the best interests and welfare of Sawridge.

6 After this determination, "Membership Processing Forms" were prepared that set out a "Summary of First Nation Councils Judgement". These forms were provided to the Applicants and outlined their connection and commitment to Sawridge, their knowledge of the First Nation, their character and lifestyle, and other considerations. In particular, the forms noted that the Applicants had not had any family in the Sawridge First Nation for generations and did not have any current relationship with the Band. Reference was also made to their involvement in a legal action commenced against the Sawridge First Nation in 1995 in which they sought damages for lost benefits, economic losses, and the "arrogant and high-handed manner in which Walter Patrick Twinn and the Sawridge Band of Indians has deliberately, and without cause, denied the Plaintiffs reinstatement as Band Members...". The 1995 action was ultimately unsuccessful. Although the Applicants were ordered to pay costs to the First Nation, those costs remained unpaid.

7 In accordance with section 12 of the Sawridge Membership Rules, the Applicants appealed the Council's decision arguing that they had an automatic right to membership as a result of the enactment of Bill C-31. On April 21, 2012 their appeals were heard before 21 Electors of the Sawridge First Nation, who made up the Appeal Committee. Following written and oral submissions by the Applicants and questions and comments from members of the Appeal Committee, it was unanimously decided that there were no grounds to set aside the decision of the Chief and Council. It is from the Appeal Committee's decision that this application for judicial review stems.

8 The Applicants maintain that they each have an automatic right of membership in the Sawridge First Nation. Mr. Stoney states at para 8 of his affidavit of May 22, 2012 that this right arises from the provisions of Bill C-31. Ms. Huzar and Ms. Kolosky also argue that they "were persons with the right to have their names entered in the [Sawridge] Band List" by virtue of section 6 of the *Indian Act*.

9 I accept that, if the Applicants had such an acquired right of membership by virtue of their ancestry, Sawridge had no right to refuse their membership applications: see *Sawridge Band v. R.*, 2004 FCA 16 (F.C.A.) at para 26, [2004] F.C.J. No. 77 (F.C.A.).

10 Ms. Huzar and Ms. Kolosky rely on the decisions in *Sawridge Band v. R.*, 2003 FCT 347, [2003] 4 F.C. 748 (Fed. T.D.), and *Sawridge Band v. R.*, 2004 FCA 16, [2004] F.C.J. No. 77 (F.C.A.) in support of their claims to automatic Sawridge

  

membership. Those decisions, however, apply to women who had lost their Indian status and their band membership by virtue of marriages to non-Indian men and whose rights to reinstatement were clearly expressed in the amendments to the *Indian Act*, including Bill C-31. The question that remains is whether the descendants of Indian women who were also deprived of their right to band membership because of the inter-marriage of their mothers were intended to be protected by those same legislative amendments.

11 A plain reading of sections 6 and 7 of Bill C-31 indicates that Parliament intended only that persons who had their Indian status and band memberships directly removed by operation of law ought to have those memberships unconditionally restored. The only means by which the descendants of such persons could gain band membership (as distinct from regaining their Indian status) was to apply for it in accordance with a First Nation's approved membership rules. This distinction was, in fact, recognized by Justice James Hugessen in *Sawridge Band v. R.*, 2003 FCT 347 (Fed. T.D.) at paras 27 to 30, [2003] 4 F.C. 748 (Fed. T.D.):

> 27 Although it deals specifically with Band Lists maintained in the Department, section 11 clearly distinguishes between automatic, or unconditional, entitlement to membership and conditional entitlement to membership. Subsection 11(1) provides for automatic entitlement to certain individuals as of the date the amendments came into force. Subsection 11(2), on the other hand, potentially leaves to the band's discretion the admission of the descendants of women who "married out."
>
> 28 The debate in the House of Commons, prior to the enactment of the amendments, reveals Parliament's intention to create an automatic entitlement to women who had lost their status because they married non-Indian men. Minister Crombie stated as follows (*House of Commons Debates*, Vol. II, March 1, 1985, page 2644):
>
> > ... today, I am asking Hon. Members to consider legislation which will eliminate two historic wrongs in Canada's legislation regarding Indian people. These wrongs are discriminatory treatment based on sex and the control by Government of membership in Indian communities.
>
> 29 A little further, he spoke about the careful balancing between these rights in the Act. In this section, Minister Crombie referred to the difference between status and membership. He stated that, while those persons who lost their status and membership should have both restored, the descendants of those persons are only automatically entitled to status (*House of Commons Debates*, idem, at page 2645):
>
> > This legislation achieves balance and rests comfortably and fairly on the principle that those persons who lost status and membership should have their status and membership restored. [page766] While there are some who would draw the line there, in my view fairness also demands that the first generation descendants of those who were wronged by discriminatory legislation should have status under the Indian Act so that they will be eligible for individual benefits provided by the federal Government. However, their relationship with respect to membership and residency should be determined by the relationship with the Indian communities to which they belong.
>
> 30 Still further on, the Minister stated the fundamental purposes of amendments, and explained that, while those purposes may conflict, the fairest balance had been achieved (*House of Commons Debates*, idem, at page 2646):
>
> > ... I have to reassert what is unshakeable for this Government with respect to the Bill. First, it must include removal of discriminatory provisions in the Indian Act; second, it must include the restoration of status and membership to those who lost status and membership as a result of those discriminatory provisions; and third, it must ensure that the Indian First Nations who wish to do so can control their own membership. Those are the three principles which allow us to find balance and fairness and to proceed confidently in the face of any disappointment which may be expressed by persons or groups who were not able to accomplish 100 per cent of their own particular goals...
>
> [Emphasis added]

This decision was upheld on appeal in *Sawridge Band v. R.*, 2004 FCA 16, [2004] F.C.J. No. 77 (F.C.A.).

12 The legislative balance referred to by Justice Hugessen is also reflected in the 2010 Legislative Summary of Bill C-3 titled the *Gender Equity in Indian Registration Act*, SC 2010, c 18. There the intent of Bill C-31 is described as follows:

> Bill C-31 severed status and band membership for the first time and authorized bands to control their own membership and enact their own membership codes (section 10). For those not exercising that option, the Department of Indian Affairs would maintain "Band Lists" (section 11). Under the legislation's complex scheme some registrants were granted automatic band membership, while others obtained only conditional membership. The former group included women who had lost status by marrying out and were reinstated under paragraph 6(1)(c). The latter group included their children, who acquired status under subsection 6(2).
>
> [Emphasis added]

13 While Mary Stoney would have an acquired right to Sawridge membership had she been alive when Bill C-31 was enacted, the same right did not accrue to her children. Simply put neither Ms. Huzar or Ms. Kolosky qualified under section 11 of Bill C-31 for automatic band membership. Their only option was to apply for membership in accordance with the membership rules promulgated by Sawridge.

14 This second generation cut-off rule has continued to attract criticism as is reflected in the Legislative Summary at p 13, para 34:

> 34. The divisiveness has been exacerbated by the Act's provisions related to band membership, under which not all new or reinstated registrants have been entitled to automatic membership. As previously mentioned, under provisions in Bill C-31, women who had "married out" and were reinstated did automatically become band members, but their children registered under subsection 6(2) have been eligible for conditional membership only. In light of the high volume of new or returning "Bill C-31 Indians" and the scarcity of reserve land, automatic membership did not necessarily translate into a right to reside on-reserve, creating another source of internal conflict.

Notwithstanding the above-noted criticism, the legislation is clear in its intent and does not support a claim by Ms. Huzar and Ms. Kolosky to automatic band membership.

15 I also cannot identify anything in Bill C-31 that would extend an automatic right of membership in the Sawridge First Nation to William Stoney. He lost his right to membership when his father sought and obtained enfranchisement for the family. The legislative amendments in Bill C-31 do not apply to that situation.

16 Even if I am wrong in my interpretation of these legislative provisions, this application cannot be sustained at least in terms of the Applicants' claims to automatic band membership. All of the Applicants in this proceeding, among others, were named as Plaintiffs in an action filed in this Court on May 6, 1998 seeking mandatory relief requiring that their names be added to the Sawridge membership list. That action was struck out by the Federal Court of Appeal in a decision issued on June 13, 2000 for the following reasons:

> [4] It was conceded by counsel for the respondents that, without the proposed amending paragraphs, the unamended statement of claim discloses no reasonable cause of action in so far as it asserts or assumes that the respondents are entitled to Band membership without the consent of the Band.
>
> [5] It is clear that, until the Band's membership rules are found to be invalid, they govern membership of the Band and that the respondents have, at best, a right to apply to the Band for membership. Accordingly, the statement of claim against the appellants, Walter Patrick Twinn, as Chief of the Sawridge Indian Band, and the Sawridge Indian Band, will be struck as disclosing no reasonable cause of action.

See *Huzar v. Canada*, [2000] F.C.J. No. 873, 258 N.R. 246 (Fed. C.A.).

  

17 It is not open to a party to relitigate the same issue that was conclusively determined in an earlier proceeding. The attempt by these Applicants to reargue the question of their automatic right of membership in Sawridge is barred by the principle of issue estoppel: see *Danyluk v Ainsworth Technologies Inc.* 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.) .

18 The Applicants are, nevertheless, fully entitled to challenge the lawfulness of the appeal decision rejecting their membership applications.

19 The Applicants did not challenge the reasonableness of the appeal decision but only the fairness of the process that was followed. Their argument is one of institutional bias and it is set out with considerable brevity at para 35 of the Huzar and Kolosky Memorandum of Fact and Law:

> 35. It is submitted that the total membership of Sawridge First Nation is small being in the range of 50 members. Only three applicants have been admitted to membership since 1985 and these three are (were) the sisters of deceased Chief, Walter Twinn. The Appeal Committee consisted of 21 of the members of Sawridge and three of these 21 were the Chief, Roland Twinn and Councillors, Justin Twinn and Winona Twin, who made the original decision appealed from.

20 In the absence of any other relevant evidence, no inference can be drawn from the limited number of new memberships that have been granted by Sawridge since 1985. While the apparent involvement of the Chief and two members of the Band Council in the work of the Appeal Committee might give rise to an appearance of bias, there is no evidence in the record that would permit the Court to make a finding one way or the other or to ascertain whether this issue was waived by the Applicants' failure to raise a concern at the time.

21 Indeed, it is surprising that this issue was not fully briefed by the Applicants in their affidavits or in their written and oral arguments. It is of equal concern that no cross-examinations were carried out to provide an evidentiary foundation for this allegation of institutional bias. The issue of institutional bias in the context of small First Nations with numerous family connections is nuanced and the issue cannot be resolved on the record before me: see *Sweetgrass First Nation v. Favel*, 2007 FC 271 (F.C.) at para 19, [2007] F.C.J. No. 347 (F.C.), and *Lavallee v. Louison*, [1999] F.C.J. No. 1350 (Fed. T.D.) at paras 34-35, (1999), 91 A.C.W.S. (3d) 337 (Fed. T.D.).

22 The same concern arises in connection with the allegation of a section 15 Charter breach. There is nothing in the evidence to support such a finding and it was not advanced in any serious way in the written or oral submissions. The record is completely inadequate to support such a claim to relief. There is also nothing in the record to establish that the Crown was provided with any notice of what constitutes a constitutional challenge to the *Indian Act*. Accordingly, this claim to relief cannot be sustained.

23 For the foregoing reasons these applications are dismissed with costs payable to the Respondent.

**Judgment**

*THIS COURT'S JUDGMENT is that* these applications are dismissed with costs payable to the Respondent.

*Application dismissed.*

**End of Document**

# Tab 3

2012 ABQB 365
Alberta Court of Queen's Bench

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

2012 CarswellAlta 1042, 2012 ABQB 365, [2012] A.W.L.D. 3421, [2012] A.W.L.D. 3422, [2012] A.W.L.D. 3425, [2012] A.W.L.D. 3478, [2013] 3 C.N.L.R. 395, 217 A.C.W.S. (3d) 513, 543 A.R. 90, 75 Alta. L.R. (5th) 188

# 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 the Sawridge Indian Band, on April 15, 1985 (the "1985 Sawridge Trust")

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

D.R.G. Thomas J.

Heard: April 5, 2012
Judgment: June 12, 2012
Docket: Edmonton 1103-14112

Counsel: Ms Janet L. Hutchison for Public Trustee / Applicants
Ms Doris Bonora, Mr. Marco S. Poretti for Sawridge Trustees / Respondents
Mr. Edward H. Molstad, Q.C. for Sawridge Band / Respondents

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

**Headnote**

**Aboriginal law --- Practice and procedure — Parties — Miscellaneous**

As Indian Act was being amended, Band set up trust to hold Band property on behalf of its then-members, to avoid sharing assets with persons previously excluded from membership by gender rules — Trustees eventually accepted that definition of beneficiaries in trust was potentially discriminatory and sought to redefine class of beneficiaries — Trustees applied for advice and directions, and as question arose as to effect on entitlements of certain dependent children to share in trust assets, Public Trustee was notified of proceedings — Public Trustee applied to be appointed litigation representative of interested minors, on condition that costs of representation would be paid by trust and that it would be shielded from any costs liability — Application granted — Litigation representative was appropriate and necessary because of substantial monetary interests involved — While trustees planned to use trust to provide for various social and health benefits to beneficiaries and their children, proposed amendment did not require distribution in that manner and could exclude minors from assets — Given overlap between identities of trustees, band council, and beneficiaries, there was clear potential for conflict of interest contrary to long-standing rule requiring fiduciaries to avoid conflicts of interest — Trustees and adult members of Band were in structural conflict of interest, that, along with fact that proposed beneficiary definition would remove some minors' entitlements, was sufficient basis for appointing representative — Public Trustee should be appointed as litigation representative not only of minors who were children of current band members but also of minor children of applicants seeking band membership.

**Civil practice and procedure --- Actions involving parties under disability — Infants — Guardian ad litem, next friend or litigation guardian — Appointment — General principles**

As Indian Act was being amended, Band set up trust to hold Band property on behalf of its then-members, to avoid sharing assets with persons previously excluded from membership by gender rules — Trustees eventually accepted that definition of beneficiaries in trust was potentially discriminatory and sought to redefine class of beneficiaries — Trustees applied for advice and directions, and as question arose as to effect on entitlements of certain dependent children to share in trust assets, Public Trustee was notified of proceedings — Public Trustee applied to be appointed litigation representative of interested minors, on condition that costs of representation would be paid by trust and that it would be shielded from any costs liability — Application granted — Litigation representative was appropriate and necessary because of substantial monetary interests involved — While trustees planned to use trust to provide for various social and health benefits to beneficiaries and their children, proposed amendment did not require distribution in that manner and could exclude minors from assets — Given overlap between identities of trustees, band council, and beneficiaries, there was clear potential for conflict of interest contrary to long-standing rule requiring fiduciaries to avoid conflicts of interest — Trustees and adult members of Band were in structural conflict of interest, that, along with fact that proposed beneficiary definition would remove some minors' entitlements, was sufficient basis for appointing representative — Public Trustee should be appointed as litigation representative not only of minors who were children of current band members but also of minor children of applicants seeking band membership — Operationally, role of Public Trustee was of neutral agent or officer of court, and it should receive full and advance indemnification from trust for its participation.

**Estates and trusts --- Trustees — Powers and duties of trustees — Conflict of interest — Miscellaneous**

As Indian Act was being amended, Band set up trust to hold Band property on behalf of its then-members, to avoid sharing assets with persons previously excluded from membership by gender rules — Trustees eventually accepted that definition of beneficiaries in trust was potentially discriminatory and sought to redefine class of beneficiaries — Trustees applied for advice and directions, and as question arose as to effect on entitlements of certain dependent children to share in trust assets, Public Trustee was notified of proceedings — Public Trustee applied to be appointed litigation representative of interested minors, on condition that costs of representation would be paid by trust and that it would be shielded from any costs liability — Application granted — Litigation representative was appropriate and necessary because of substantial monetary interests involved — While trustees planned to use trust to provide for various social and health benefits to beneficiaries and their children, proposed amendment did not require distribution in that manner and could exclude minors from assets — Given overlap between identities of trustees, band council, and beneficiaries, there was clear potential for conflict of interest contrary to long-standing rule requiring fiduciaries to avoid conflicts of interest — Trustees and adult members of Band were in structural conflict of interest, that, along with fact that proposed beneficiary definition would remove some minors' entitlements, was sufficient basis for appointing representative — Public Trustee should be appointed as litigation representative not only of minors who were children of current band members but also of minor children of applicants seeking band membership — Public Trustee was entitled to investigate Band's membership rules and application processes to determine on behalf of potential minor claimants to trust whether beneficiary class could be ascertained.

**Aboriginal law --- Government of Aboriginal people — Membership**

As Indian Act was being amended, Band set up trust to hold Band property on behalf of its then-members, to avoid sharing assets with persons previously excluded from membership by gender rules — Trustees eventually accepted that definition of beneficiaries in trust was potentially discriminatory and sought to redefine class of beneficiaries — Trustees applied for advice and directions, and as question arose as to effect on entitlements of certain dependent children to share in trust assets, Public Trustee was notified of proceedings — Public Trustee applied to be appointed litigation representative of interested minors, on condition that costs of representation would be paid by trust and that it would be shielded from any costs liability — Application granted — Trustees and adult members of Band were in structural conflict of interest, that, along with fact that proposed beneficiary definition would remove some minors' entitlements, was sufficient basis for appointing representative — Public Trustee should be appointed as litigation representative not only of minors who were children of current band members but also of minor children of applicants seeking band membership — Operationally, role of Public Trustee was of neutral agent or officer of court, and it should receive full and advance indemnification from trust for its participation — Public Trustee was entitled to investigate Band's membership rules and application processes to determine on behalf of potential minor claimants to trust whether beneficiary class could be ascertained — Court had authority to

examine band membership processes and determine whether they were discriminatory, unreasonable or delayed, but only Federal Court had authority to order judicial review remedy on that basis.

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*Federal Courts Act*, R.S.C. 1985, c. F-7
s. 18 — referred to

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

s. 52 — considered

*Public Trustee Act*, S.A. 2004, c. P-44.1
s. 10 — referred to

s. 12(4) — referred to

s. 21 — considered

s. 22 — considered

s. 41 — referred to

s. 41(b) — referred to

*Tax Court of Canada Act*, R.S.C. 1985, c. T-2
s. 12 — considered

**Rules considered:**

*Alberta Rules of Court*, Alta. Reg. 124/2010
Generally — referred to

R. 2.11(a) — referred to

R. 2.15 — considered

R. 2.16 — referred to

APPLICATION by Public Trustee to be appointed litigation representative for interested minors, in trustees' application for advice and directions.

  

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

**I. Introduction**

1 On April 15, 1985 the Sawridge Indian Band, No. 19, now known as the Sawridge First Nation [the "Band" or "Sawridge Band"] set up the 1985 Sawridge Trust [sometimes referred to as the "Trust" or the "Sawridge Trust"] to hold some Band property on behalf of its then members. The 1985 Sawridge Trust and other related trusts were created in the expectation that persons who had 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*, R.S.C. 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*"].

2 The 1985 Sawridge Trust is administered by the Trustees named as Respondents in this application [the "Sawridge Trustees" or the "Trustees"] who now seek the advice and direction of this Court in respect to proposed amendments to the definition of the term "Beneficiaries" in the 1985 Sawridge Trust and confirmation of the transfer of assets into that Trust. One consequence of these proposed amendments to the 1985 Sawridge Trust would be that the entitlement of certain dependent children to share in Trust assets would be affected. 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 certain children who are 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 entitled to shares in the Trust, while other dependent children would be excluded.

3 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 variations to the 1985 Sawridge Trust were not represented by counsel. In my Order of August 31, 2011 [the "August 31 Order"] 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.

4 On February 14, 2012 the Public Trustee applied to be appointed as the litigation representative of minors interested in the proceedings, for the payment of advance costs on a solicitor and own client basis and exemption from liability for the costs of others. The Public Trustee also applied, for the purposes of questioning on affidavits which might be filed in this proceeding, for an advance ruling that information and evidence relating to the membership criteria and processes of the Sawridge Band is relevant material.

5 On April 5, 2012 I heard submissions on the application by the Public Trustee which was opposed by the Sawridge Trustees and the Chief and Council of the Sawridge Band. The Trustees and the Band, through their Chief and Council, argue that the guardians of the potentially affected children will serve as adequate representatives of the interests of any minors.

6 Ultimately in this application I conclude that it is appropriate that the Public Trustee represent potentially affected minors, that all costs of such representation be borne by the Sawridge Trust and that the Public Trustee may make inquiries into the membership and application processes and practices of the Sawridge Band.

**II. The History of the 1985 Sawridge Trust**

7 An overview of the history of the 1985 Sawridge Trust provides a context for examining the potential role of the Public Trustee in these proceedings. The relevant facts are not in dispute and are found primarily in the evidence contained in the affidavits of Paul Bujold (August 30, 2011, September 12, 2011, September 30, 2011), and of Elizabeth Poitras (December 7, 2011).

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. At the present time 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. R.*, 2009 FCA 123, 391 N.R. 375 (F.C.A.), leave denied [2009] S.C.C.A. No. 248 (S.C.C.). At least 11 women were ordered to be added as members of the Band as a consequence of this litigation: *Sawridge Band v. R.*, 2003 FCT 347, [2003] 4 F.C. 748 (Fed. T.D.), affirmed 2004 FCA 16, [2004] 3 F.C.R. 274 (F.C.A.). Other litigation continues to the present in relation to disputed Band memberships: *Sawridge Band v. Poitras*, 2012 FCA 47, 428 N.R. 282 (F.C.A.), leave sought [2012] S.C.C.A. No. 152 (S.C.C.).

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 seeks 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.

**III. Application by the Public Trustee**

14 In its application the Public Trustee asks to be named as the litigation representative for minors whose interests are potentially affected by the application for advice and directions being made by the Sawridge Trustees. In summary, the Public Trustee asks the Court:

> 1. to determine which minors should be represented by it;
>
> 2. to order that the costs of legal representation by the Public Trustee be paid from the 1985 Sawridge Trust and that the Public Trustee be shielded from any liability for costs arising; and
>
> 3. to order that the Public Trustee be authorized to make inquiries through questioning into the Sawridge Band membership criteria and application processes.

The Public Trustee is firm in stating that it will only represent some or all of the potentially affected minors if the costs of its representation are paid from the 1985 Sawridge Trust and that it must be shielded from liability for any costs arising in this proceeding.

15 The Sawridge Trustees and the Band both argue that the Public Trustee is not a necessary or appropriate litigation representative for the minors, that the costs of the Public Trustee should not be paid by the Sawridge Trust and that the criteria and mechanisms by which the Sawridge Band identifies its members is not relevant and, in any event, the Court has no jurisdiction to make such determinations.

**IV. Should the Public Trustee be Appointed as a Litigation Representative?**

16 Persons under the age of 18 who reside in Alberta may only participate in a legal action via a litigation representative: *Alberta Rules of Court*, Alta Reg 124/2010, s. 2.11(a) [the "*Rules*", or individually a "*Rule*"]. The general authority for the Court to appoint a litigation representative is provided by *Rule*, 2.15. A litigation representative is also required where the membership of a trust class is unclear: *Rule*, 2.16. The common-law *parens patriae* role of the courts (*Eve, Re*, [1986] 2 S.C.R. 388, 31 D.L.R. (4th) 1 (S.C.C.)) allows for the appointment of a litigation representative when such action is in the best interests of a child. The *parens patriae* authority serves to supplement authority provided by statute: *W. (R.) v. Alberta (Director of Child Welfare)*, 2010 ABCA 412 (Alta. C.A.) at para. 15, (2010), 44 Alta. L.R. (5th) 313 (Alta. C.A.). In summary, I have the authority in these circumstances to appoint a litigation representative for minors potentially affected by the proposed changes to the 1985 Sawridge Trust definition of "Beneficiaries".

17 The Public Trustee takes the position that it would be an appropriate litigation representative for the minors who may be potentially affected in an adverse way by the proposed redefinition of the term "Beneficiaries" in the 1985 Sawridge Trust documentation and also in respect to the transfer of the assets of that Trust. The alternative of the Minister of Aboriginal Affairs and Northern Development applying to act in that role, as potentially authorized by the *Indian Act*, R.S.C. 1985, c. I-5, s. 52, has not occurred, although counsel for the Minister takes a watching role.

18 In any event, the Public Trustee argues that it is an appropriate litigation representative given the scope of its authorizing legislation. The Public Trustee is capable of being appointed to supervise trust entitlements of minors by a trust instrument (*Public Trustee Act*, S.A. 2004, c. P-44.1, s. 21) or by a court (*Public Trustee Act*, s. 22). These provisions apply to all minors in Alberta.

***A. Is a litigation representative necessary?***

19 Both The Sawridge Trustees and Sawridge Band argue that there is no need for a litigation representative to be appointed in these proceedings. They acknowledge that under the proposed change to the definition of the term "Beneficiaries" no minors could be part of the 1985 Sawridge Trust. However, that would not mean that this class of minors would lose access to any resources of the Sawridge Trust; rather it is said that these benefits can and will be funnelled to those minors through those of their parents who are beneficiaries of the Sawridge Trust, or minors will become full members of the Sawridge Trust when they turn 18 years of age.

20 In the meantime the interests of the affected children would be defended by their parents. The Sawridge Trustees argue that the Courts have long presumptively recognized that parents will act in the best interest of their children, and that no one else is better positioned to care for and make decisions that affect a child: *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 (S.C.C.), at 317-318, (1995), 122 D.L.R. (4th) 1 (S.C.C.). Ideally, a parent should act as a 'next friend' [now a 'litigation representative' under the new *Rules*]: *R. v. B. (V.)*, 2004 ABQB 788 at para. 19; (2004), 365 A.R. 179 (Alta. Q.B.); *S. (C.H.) v. Alberta (Director of Child Welfare)*, 2008 ABQB 620, 452 A.R. 98 (Alta. Q.B.).

21 The Sawridge Trustees take the position at para. 48 of its written brief that:

> [i]t is anachronistic to assume that the Public Trustee knows better than a First Nation parent what is best for the children of that parent.

The Sawridge Trustees observe that the parents have been notified of the plans of the Sawridge Trust, but none of them have commented, or asked for the Public Trustee to intervene on behalf of their children. They argue that the silence of the parents should be determinative.

22 The Sawridge Band argues further that no conflict of interest arises from the fact that certain Sawridge Trustees have served and continue to serve as members of the Sawridge Band Chief and Council. At para. 27 of its written brief, the Sawridge Band advances the following argument:

> ... there is no conflict of interest between the fiduciary duty of a Sawridge Trustee administering the 1985 Trust and the duty of impartiality for determining membership application for the Sawridge First Nation. The two roles are separate and have no interests that are incompatible. The Public Trustee has provided no explanation for why or how the two roles are in conflict. Indeed, the interests of the two roles are more likely complementary.

23 In response the Public Trustee notes the well established fiduciary obligation of a trustee in respect to trust property and beneficiaries: *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23 (S.C.C.) at para. 148, [2011] 2 S.C.R. 175 (S.C.C.). It observes that a trustee should avoid potential conflict scenarios or any circumstance that is "... ambiguous ... a situation where a conflict of interest and duty might occur ..." (citing D. W. M. Waters, M. Gillen and L. Smith, eds., *Waters' Law of Trusts in Canada*, 3rd. ed. (Toronto: Thomson Carswell, 2005), at p. 914 ["*Waters' Law of Trusts*"]. Here, the Sawridge Trustees are personally affected by the assignment of persons inside and outside of the Trust. However, they have not taken preemptive steps, for example, to appoint an independent person or entity to protect or oversee the interests of the 23 minors, each of whom the Sawridge Trustees acknowledge could lose their beneficial interest in approximately $1.1 million in assets of the Sawridge Trust.

24 In these circumstances I conclude that a litigation representative is appropriate and required because of the substantial monetary interests involved in this case. The Sawridge Trustees have indicated that their plan has two parts:

> firstly, to revise and clarify the definition of "Beneficiaries" under the 1985 Sawridge Trust; and
>
> secondly, then seek direction to distribute the assets of the 1985 Sawridge Trust with the new amended definition of beneficiary.

While I do not dispute that the Sawridge Trustees plan to use the Trust to provide for various social and health benefits to the beneficiaries of the Trust and their children, I observe that to date the proposed variation to the 1985 Sawridge Trust does not include a *requirement* that the Trust distribution occur in that manner. The Trustees could, instead, exercise their powers to liquidate the Sawridge Trust and distribute approximate $1.75 million shares to the 41 adult beneficiaries who are the present members of the Sawridge Band. That would, at a minimum, deny 23 of the minors their current share of approximately $1.1 million each.

25 It is obvious that very large sums of money are in play here. A decision on who falls inside or outside of the class of beneficiaries under the 1985 Sawridge Trust will significantly affect the potential share of those inside the Sawridge Trust. The key players in both the administration of the Sawridge Trust and of the Sawridge 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.

26 I reject the position of the Sawridge Band that there is no potential for a conflict of interest to arise in these circumstances. I also reject as being unhelpful the argument of the Sawridge Trustees that it is "anachronistic" to give oversight through a public body over the wisdom of a "First Nations parent". In Alberta, persons under the age of 18 are minors and their racial and cultural backgrounds are irrelevant when it comes to the question of protection of their interests by this Court.

27 The essence of the argument of the Sawridge Trustees is that there is no need to be concerned that the current and potential beneficiaries who are minors would be denied their share of the 1985 Sawridge Trust; that their parents, the Trustees, and the Chief and Council will only act in the best interests of those children. One, of course, hopes that that would be the case, however, only a somewhat naive person would deny that, at times, parents do not always act in the best interests of their children and that elected persons sometimes misuse their authority for personal benefit. That is why the rules requiring fiduciaries to avoid conflicts of interest is so strict. It is a rule of very longstanding and applies to all persons in a position of trust.

28 I conclude that the appointment of the Public Trustee as a litigation representative of the minors involved in this case is appropriate. No alternative representatives have come forward as a result of the giving of notice, nor have any been nominated by the Respondents. 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.

29 This is a 'structural' conflict which, along with the fact that the proposed beneficiary definition would remove the entitlement to some share in the assets of the Sawridge Trust for at least some of the children, is a sufficient basis to order that a litigation representative be appointed. As a consequence I have not considered the history of litigation that relates to Sawridge Band membership and the allegations that the membership application and admission process may be suspect. Those issues (if indeed they are issues) will be better reviewed and addressed in the substantive argument on the adoption of a new definition of "Beneficiaries" under the revised 1985 Sawridge Trust.

***B. Which minors should the Public Trustee represent?***

30 The second issue arising is who the Public Trustee ought to represent. Counsel for the Public Trustee notes that the Sawridge Trustees identify 31 children of current members of the Band. Some of these persons, according to the Sawridge Trustees, will lose their current entitlement to a share in the 1985 Sawridge Trust under the new definition of "Beneficiaries". Others may remain outside the beneficiary class.

31 There is no question that the 31 children who are potentially affected by this variation to the Sawridge Trust ought to be represented by the Public Trustee. There are also an unknown number of potentially affected minors, namely, the children of applicants seeking to be admitted into membership of the Sawridge Band. These candidate children, as I will call them, could, in theory, be represented by their parents. However, that potential representation by parents may encounter the same issue of conflict of interest which arises in respect to the 31 children of current Band members.

32 The Public Trustee can only identify these candidate children via inquiry into the outstanding membership applications of the Sawridge Band. The Sawridge Trustees and Band argue that this Court has no authority to investigate those applications and the application process. I will deal in more detail with that argument in Part VI of this decision.

33 The candidate children of applicants for membership in the Sawridge Band are clearly a group of persons who may be readily ascertained. I am concerned that their interest is also at risk. Therefore, I conclude that the Public Trustee should be appointed as the litigation representative not only of minors who are children of current Band members, but also the children of applicants for Band membership who are also minors.

**V. The Costs of the Public Trustee**

34 The Public Trustee is clear that it will only represent the minors involved here if:

> 1. advance costs determined on a solicitor and own client basis are paid to the Public Trustee by the Sawridge Trust; and
>
> 2. that the Public Trustee is exempted from liability for the costs of other litigation participants in this proceeding by an order of this Court.

35 The Public Trustee says that it has no budget for the costs of this type of proceedings, and that its enabling legislation specifically includes cost recovery provisions: *Public Trustee Act*, ss. 10, 12(4), 41. The Public Trustee is not often involved in litigation raising aboriginal issues. As a general principle, a trust should pay for legal costs to clarify the construction or administration of that trust: *Deans v. Thachuk*, 2005 ABCA 368 (Alta. C.A.) at paras. 42-43, (2005), 261 D.L.R. (4th) 300 (Alta. C.A.), leave denied (2006), [2005] S.C.C.A. No. 555 (S.C.C.).

36 Further, the Public Trustee observes that the Sawridge Trustees are, by virtue of their status as current beneficiaries of the Trust, in a conflict of interest. Their fiduciary obligations require independent representation of the potentially affected minors.

Any litigation representative appointed for those children would most probably require payment of legal costs. It is not fair, nor is it equitable, at this point for the Sawridge Trustees to shift the obligation of their failure to nominate an independent representative for the minors to the taxpayers of Alberta.

37 Aline Huzar, June Kolosky, and Maurice Stoney agree with the Public Trustee and observe that trusts have provided the funds for litigation representation in aboriginal disputes: *Horse Lake First Nation v. Horseman*, 2003 ABQB 114, 337 A.R. 22 (Alta. Q.B.); *Blueberry Interim Trust, Re*, 2012 BCSC 254 (B.C. S.C.).

38 The Sawridge Trustees argue that the Public Trustee should only receive advance costs on a full indemnity basis if it meets the strict criteria set out 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*"] and *R. c. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78 (S.C.C.). They say that in this instance the Public Trustee can afford to pay, the issues are not of public or general importance and the litigation will proceed without the participation of the Public Trustee.

39 Advance costs on a solicitor and own client basis are appropriate in this instance, as well as immunization against costs of other parties. The *Little Sisters Book & Art Emporium* criteria are intended for advance costs by a litigant with an independent interest in a proceeding. Operationally, the role of the Public Trustee in this litigation is as a neutral 'agent' or 'officer' of the court. The Public Trustee will hold that position only by appointment by this Court. In these circumstances, the Public Trustee operates in a manner similar to a court appointed receiver, as described by Dickson J.A. (as he then was) in *Braid Builders Supply & Fuel Ltd. v. Genevieve Mortgage Corp.* (1972), 29 D.L.R. (3d) 373, 17 C.B.R. (N.S.) 305 (Man. C.A.):

> In the performance of his duties the receiver is subject to the order and direction of the Court, not the parties. The parties do not control his acts nor his expenditures and cannot therefore in justice be accountable for his fees or for the reimbursement of his expenditures. It follows that the receiver's remuneration must come out of the assets under the control of the Court and not from the pocket of those who sought his appointment.

In this case, the property of the Sawridge Trust is the equivalent of the "assets under control of the Court" in an insolvency. Trustees in bankruptcy operate in a similar way and are generally indemnified for their reasonable costs: *Residential Warranty Co. of Canada Inc., Re*, 2006 ABQB 236, 393 A.R. 340 (Alta. Q.B.), affirmed 2006 ABCA 293, 275 D.L.R. (4th) 498 (Alta. C.A.)).

40 I have concluded that a litigation representative is appropriate in this instance. The Sawridge Trustees argue this litigation will proceed, irrespective of whether or not the potentially affected children are represented. That is not a basis to avoid the need and cost to represent these minors; the Sawridge Trustees cannot reasonably deny the requirement for independent representation of the affected minors. On that point, I note that the Sawridge Trustees did not propose an alternative entity or person to serve as an independent representative in the event this Court concluded the potentially affected minors required representation.

41 The Sawridge Band cites recent caselaw where costs were denied parties in estate matters. These authorities are not relevant to the present scenario. Those disputes involved alleged entitlement of a person to a disputed estate; the litigant had an interest in the result. That is different from a court-appointed independent representative. A homologous example to the Public Trustee's representation of the Sawridge Trust potential minor beneficiaries would be a dispute on costs where the Public Trustee had represented a minor in a dispute over a last will and testament. In such a case this Court has authority to direct that the costs of the Public Trustee become a charge to the estate: *Public Trustee Act*, s. 41(b).

42 The Public Trustee is a neutral and independent party which has agreed to represent the interests of minors who would otherwise remain unrepresented in proceedings that may affect their substantial monetary trust entitlements. 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. In these circumstances, I conclude that the Public Trustee should receive full and advance indemnification for its participation in the proceedings to make revisions to the 1985 Sawridge Trust.

**VI. Inquiries into the Sawridge Band Membership Scheme and Application Processes**

43 The Public Trustee seeks authorization to make inquiries, through questioning under the *Rules*, into how the Sawridge Band determines membership and the status and number of applications before the Band Council for membership. The Public Trustee observes that the application process and membership criteria as reported in the affidavit of Elizabeth Poitras appears to be highly discretionary, with the decision-making falling to the Sawridge Band Chief and Council. At paras. 25 - 29 of its written brief, The Public Trustee notes that several reported cases suggest that the membership application and review processes may be less than timely and may possibly involve irregularities.

44 The Band and Trustees argue that the Band membership rules and procedure should not be the subject of inquiry, because:

> A. those subjects are irrelevant to the application to revise certain aspects of the 1985 Sawridge Trust documentation; and
>
> B. this Court has no authority to review or challenge the membership definition and processes of the Band; as a federal tribunal decisions of a band council are subject to the exclusive jurisdiction of the Federal Court of Canada: *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.

***A. In this proceeding are the Band membership rules and application processes relevant?***

45 The Band Chief and Council argue that the rules of the Sawridge Band for membership and application for membership and the existence and status of any outstanding applications for such membership are irrelevant to this proceeding. They stress at para. 16 of their written brief that the "Advice and Direction Application" will not ask the Court to identify beneficiaries of the 1985 Sawridge Trust, and state further at para. 17 that "... the Sawridge First Nation is fully capable of determining its membership and identifying members of the Sawridge First Nation." They argue that any question of trust entitlement will be addressed by the Sawridge Trustees, in due course.

46 The Sawridge Trustees also argue that the question of yet to be resolved Band membership issues is irrelevant, simply because the Public Trustee has not shown that Band membership is a relevant consideration. At para. 108 of its written brief the Sawridge Trustees observe that the fact the Band membership was in flux several years ago, or that litigation had occurred on that topic, does not mean that Band membership remains unclear. However, I think that argument is premature. The Public Trustee seeks to investigate these issues not because it has *proven* Band membership is a point of uncertainty and dispute, but rather to reassure itself (and the Court) that the beneficiary class can and has been adequately defined.

47 The Public Trustee explains its interest in these questions on several bases. The first is simply a matter of logic. The terms of the 1985 Sawridge Trust link membership in the Band to an interest in the Trust property. The Public Trustee notes that one of the three 'certainties' of a valid trust is that the beneficiaries can be "ascertained", and that if identification of Band membership is difficult or impossible, then that uncertainty feeds through and could disrupt the "certainty of object": *Waters' Law of Trusts* at p. 156-157.

48 The Public Trustee notes that the historical litigation and the controversy around membership in the Sawridge Band suggests that the 'upstream' criteria for membership in the Sawridge Trust may be a subject of some dispute and disagreement. In any case, it occurs to me that it would be peculiar if, in varying the definition of "Beneficiaries" in the trust documents, that the Court did not make some sort inquiry as to the membership application process that the Trustees and the Chief and Council acknowledge is underway.

49 I agree with the Public Trustee. I note that the Sawridge Band Chief and Council argue that the Band membership issue is irrelevant and immaterial because Band membership will be clarified at the appropriate time, and the proper persons will then become beneficiaries of the 1985 Sawridge Trust. It contrasts the actions of the Sawridge Band and Trustees with the scenario reported in *Barry v. Garden River Ojibway Nation No. 14* (1997), 33 O.R. (3d) 782, 147 D.L.R. (4th) 615 (Ont. C.A.), where premature distribution of a trust had the effect of denying shares to potential beneficiaries whose claims, via band membership, had not yet crystalized. While the Band and Trustees stress their good intentions, this Court has an obligation to make inquiries as to the procedures 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". In coming to that conclusion, I also note that the Sawridge Trustees acknowledge that the proposed revised definition of "Beneficiaries" may exclude a significant number of the persons who are currently within that group.

***B. Exclusive jurisdiction of the Federal Court of Canada***

50 The Public Trustee emphasizes that its application is not to challenge the procedure, guidelines, or otherwise "interfere in the affairs of the First Nations membership application process". Rather, the Public Trustee says that the information which it seeks is relevant to evaluate and identify the beneficiaries of the 1985 Sawridge Trust. As such, it seeks information in respect to Band membership processes, but not to affect those processes. They say that this Court will not intrude into the jurisdiction of the Federal Court because that is not 'relief' against the Sawridge Band Chief and Council. Disclosure of information by a federal board, commission, or tribunal is not a kind of relief that falls into the exclusive jurisdiction of the Federal Courts, per *Federal Court Act*, s. 18.

51 As well, I note that the "exclusive jurisdiction" of statutory courts is not as strict as alleged by the Trustees and the Band Chief and Council. In *783783 Alberta Ltd. v. Canada (Attorney General)*, 2010 ABCA 226, 322 D.L.R. (4th) 56 (Alta. C.A.), the Alberta Court of Appeal commented on the jurisdiction of the Tax Court of Canada, which per *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, s. 12 has "exclusive original jurisdiction" to hear appeals of or references to interpret the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp). The Supreme Court of Canada in *Addison & Leyen Ltd. v. Canada*, 2007 SCC 33, 365 N.R. 62 (S.C.C.) indicated that interpretation of the *Income Tax Act* was the sole jurisdiction of the Tax Court of Canada (para. 7), and that (para. 11):

> ... The integrity and efficacy of the system of tax assessments and appeals should be preserved. Parliament has set up a complex structure to deal with a multitude of tax-related claims and this structure relies on an independent and specialized court, the Tax Court of Canada. Judicial review should not be used to develop a new form of incidental litigation designed to circumvent the system of tax appeals established by Parliament and the jurisdiction of the Tax Court. ...

52 The legal issue in *783783 Alberta Ltd. v. Canada (Attorney General)* was an unusual tort claim against the Government of Canada for what might be described as "negligent taxation" of a group of advertisers, with the alleged effect that one of two competing newspapers was disadvantaged. Whether the advertisers had or had not paid the correct income tax was a necessary fact to be proven at trial to establish that injury: paras. 24-25. The Alberta Court of Appeal concluded that the jurisdiction of a provincial superior court includes whatever statutory interpretation or application of fact to law that is necessary for a given issue, in that case a tort: para. 28. In that sense, the trial court was free to interpret and apply the *Income Tax Act*, provided in doing so it did not determine the income tax liability of a taxpayer: paras. 26-27.

53 I conclude that it is entirely within the jurisdiction of this Court to examine the Band's membership definition and application processes, provided that:

1. investigation and commentary is appropriate to evaluate the proposed amendments to the 1985 Sawridge Trust, and

2. the result of that investigation does not duplicate the exclusive jurisdiction of the Federal Court to order "relief" against the Sawridge Band Chief and Council.

54 Put another way, this Court has the authority to examine the band membership processes and evaluate, for example, whether or not those processes are discriminatory, biased, unreasonable, delayed without reason, and otherwise breach *Charter* principles and the requirements of natural justice. However, I do not have authority to order a judicial review remedy on that basis because that jurisdiction is assigned to the Federal Court of Canada.

55 In the result, I direct that the Public Trustee may pursue, through questioning, information relating to the Sawridge Band membership criteria and processes because such information may be relevant and material to determining issues arising on the advice and directions application.

## VII. Conclusion

56 The application of the Public Trustee is granted with all costs of this application to be calculated on a solicitor and its own client basis.

*Application granted.*

# Tab 4

2013 ABCA 226
Alberta Court of Appeal

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

2013 CarswellAlta 1015, 2013 ABCA 226, [2013] 3 C.N.L.R. 411, [2013] A.W.L.D. 2729, [2013] A.W.L.D. 2730, [2013] A.W.L.D. 2733, [2013] A.W.L.D. 2768, [2013] A.W.L.D. 2801, [2013] A.W.L.D. 2810, 230 A.C.W.S. (3d) 54, 553 A.R. 324, 583 W.A.C. 324, 85 Alta. L.R. (5th) 165

# 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)

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

Peter Costigan, Clifton O'Brien, J.D. Bruce McDonald JJ.A.

Heard: June 5, 2013
Judgment: June 19, 2013
Docket: Edmonton Appeal 1203-0230-AC

Proceedings: affirming *1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)* (2012), 2012 CarswellAlta 1042, 2012 ABQB 365, 75 Alta. L.R. (5th) 188 (Alta. Q.B.)

Counsel: F.S. Kozak, Q.C., M.S. Poretti for Appellants
J.L. Hutchison for Respondent

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

**Headnote**

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

Costs — Band set up trust to hold Band property on behalf of its members — Definition of beneficiaries in trust was potentially discriminatory and trustees sought to redefine class of beneficiaries — Trustees applied for advice and directions — Public Trustee brought successful application to be appointed litigation representative of interested minors, on condition that costs would be paid by trust and that it would be shielded from any costs liability — Trustees appealed order insofar as it related to costs and exemption therefrom — Appeal dismissed — Chambers judge did not err in awarding advance costs because he found that children's interest required protection and that it was necessary to secure costs to secure requisite independent representation of Public Trustee — Trustees' complaint that chambers judge erred by awarding advance costs without any restrictions or guidelines was premature — Exemption for costs, while unusual, was not unknown — Chambers judge did not err in awarding costs of application to Public Trustee.

**Civil practice and procedure --- Costs — Particular orders as to costs — Costs on solicitor and own client basis**

Band set up trust to hold Band property on behalf of its members — Definition of beneficiaries in trust was potentially discriminatory and trustees sought to redefine class of beneficiaries — Trustees applied for advice and directions — Public Trustee brought successful application to be appointed litigation representative of interested minors, on condition that costs would be paid by trust and that it would be shielded from any costs liability — Trustees appealed order insofar as it related

to costs and exemption therefrom — Appeal dismissed — Chambers judge did not err in awarding advance costs because he found that children's interest required protection and that it was necessary to secure costs to secure requisite independent representation of Public Trustee — Trustees' complaint that chambers judge erred by awarding advance costs without any restrictions or guidelines was premature — Exemption for costs, while unusual, was not unknown — Chambers judge did not err in awarding costs of application to Public Trustee.

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**Cases considered:**

*Alberta (Director, Child, Youth and Family Enhancement Act) v. L. (D.)* (2012), 2012 ABCA 275, 2012 CarswellAlta 1574, [2013] 4 W.W.R. 126, 536 A.R. 207, 559 W.A.C. 207, 77 Alta. L.R. (5th) 56, 354 D.L.R. (4th) 485 (Alta. C.A.) — considered

*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.) — distinguished

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*C. (L.) v. Alberta (Metis Settlements Child & Family Services, Region 10)* (2011), 2011 CarswellAlta 97, 2011 ABQB 42, (sub nom. *C. (L.) v. Alberta)* 509 A.R. 72 (Alta. Q.B.) — referred to

*Deans v. Thachuk* (2005), 48 C.C.P.B. 65, 52 Alta. L.R. (4th) 41, 23 C.P.C. (6th) 100, 376 A.R. 326, 360 W.A.C. 326, 261 D.L.R. (4th) 300, 2005 ABCA 368, 2005 CarswellAlta 1518, 2005 C.E.B. & P.G.R. 8177, 20 E.T.R. (3d) 19, [2006] 4 W.W.R. 698 (Alta. C.A.) — 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.) — distinguished

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*Thomlinson v. Alberta* (2003), 2003 ABQB 308, 335 A.R. 85, 2003 CarswellAlta 1926 (Alta. Q.B.) — referred to

**Statutes considered:**

*Indian Act*, R.S.C. 1985, c. I-5
Generally — referred to

*Public Trustee Act*, S.A. 2004, c. P-44.1

  

s. 41 — considered

*Trustee Act*, R.S.A. 2000, c. T-8
Generally — referred to

**Rules considered:**

*Alberta Rules of Court*, Alta. Reg. 124/2010
Generally — referred to

R. 2.21 — considered

APPEAL by trustees from judgment reported at *1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)* (2012), 2012 CarswellAlta 1042, 2012 ABQB 365, 75 Alta. L.R. (5th) 188 (Alta. Q.B.), awarding advance costs to Public Trustee and exempting Public Trustee from liability for any other costs of litigation.

***Per curiam*:**

**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 (Trustees of) v. Alberta (Public Trustee)*, 2012 ABQB 365 (Alta. Q.B.). 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 & Art Emporium v. Canada (Commissioner of Customs & Revenue Agency)*, 2007 SCC 2, [2007] 1 S.C.R. 38 (S.C.C.), 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 S.C.R. 371 (S.C.C.) 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 S.C.R. 371 (S.C.C.), at para 36; as subsequently applied in the "public interest cases" of *Little Sisters* at para 37 and in *R. c. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78 (S.C.C.) 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 (Alta. C.A.) at para 43, (2005), 261 D.L.R. (4th) 300 (Alta. C.A.):

> 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, Re* [[1907] 2 Ch. 406 (Eng. Ch. Div.)] 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 (Director, Child, Youth and Family Enhancement Act) v. L. (D.)*, 2012 ABCA 275, 536 A.R. 207 (Alta. C.A.), 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 childrenpotentially 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*, 2003 ABQB 308 (Alta. Q.B.) at paras 117-119, (2003), 335 A.R. 85 (Alta. Q.B.); and *C. (L.) v. Alberta (Metis Settlements Child & Family Services, Region 10)*, 2011 ABQB 42 (Alta. Q.B.) at paras 53-55, (2011), 509 A.R. 72 (Alta. Q.B.).

***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 dismissed.*

# Tab 5

2013 ABCA 346
Alberta Court of Appeal

Carbone v. Whidden

2013 CarswellAlta 1950, 2013 ABCA 346, [2013] A.W.L.D. 5184, 234 A.C.W.S. (3d) 542, 561 A.R. 158, 594 W.A.C. 158

# Angela Carbone, Applicant (Appellant) and Dr. Peter Whidden and Peter G. Whidden Professional Corporation, Respondents (Respondents)

Carole Conrad J.A.

Heard: September 10, 2013; September 13, 2013
Judgment: October 16, 2013
Docket: Calgary Appeal 1201-0274-AC

Counsel: Angela Carbone, Applicant, for herself
M.L. McMahon, J. Larter, for Respondents

Subject: Civil Practice and Procedure

**Headnote**

**Civil practice and procedure --- Practice on appeal — Abandonment of appeal**

Applicant brought medical negligence and battery action against respondent doctor — Applicant filed notice of ar from several orders of case management judge appointed to manage trial of action — Applicant did not file her factum by deadline and her appeal was struck from list — Applicant brought application to restore her appeal — Application dismissed — There had been ample time to order books in time to prepare factum — There was no reason why applicant could not have filed application for extension of time to file factum as soon as she realized she might not be ready to file on time — Even though applicant was self-represented, she was alive to deadline and could have dealt with this matter in timely fashion — Appeal related to marginal discovery issues that had very little, if any, merit.

**Table of Authorities**

**Cases considered by *Carole Conrad J.A.*:**

*Golden Estate v. Neilson* (2011), 2011 ABCA 338, 2011 CarswellAlta 2281, 519 A.R. 165, 539 W.A.C. 165, 23 C.P.C. (7th) 14, 65 Alta. L.R. (5th) 119 (Alta. C.A.) — referred to

*Muhtady v. Sarhan* (2013), 2013 ABCA 197, 2013 CarswellAlta 922 (Alta. C.A.) — considered

*Phillips v. 707739 Alberta Ltd.* (2001), 2001 ABCA 219, 286 A.R. 367, 253 W.A.C. 367, 2001 CarswellAlta 1692, 18 C.P.C. (5th) 299 (Alta. C.A. [In Chambers]) — referred to

**Rules considered:**

*Alberta Rules of Court*, Alta. Reg. 390/68
Generally — referred to

R. 505(1) — considered

APPLICATION to restore applicant's appeal.

***Carole Conrad J.A.*:**

1 The applicant seeks to restore her appeal in action 1201-0274-AC.

2 On October 24, 2012, the applicant filed a notice of appeal from several orders of a case management judge appointed to manage the trial of Ms Carbone's medical negligence and battery action against the respondent plastic surgeon, Dr Whidden. The grounds of this application can generally be described as relating to alleged errors by the chambers judge for failing to compel further answers on discovery, failing to order further production of documents and searching for further documents and making unreasonable scheduling decisions.

3 Rule 505(1) provides that an appeal can be made to this court from any order of a judge sitting in chambers. Part J of the Consolidated Practice Directions (CPD) applies to appeals from orders that do not finally determine all or some significant part of the substantive rights and issues: see CPD section 2(a)(i).

4 The grounds of appeal here all fall within Part J. The grounds of the appeal relating to errors of scheduling require leave to appeal pursuant to CPD section 3(a)(ii).

5 Following filing of the notice of appeal, this court's case management officer sent the applicant a letter, giving her notice that under Part J of the CPD she might require leave for some of the grounds of appeal pursuant to Part J. In addition, the letter advised Ms Carbone of filing deadlines for the appeal, including a filing deadline for the factum of December 12, 2012.

6 The appeal record for Appeal No 1201-0274-AC was due on December 3, 2012 and was extended one day by consent to December 4, 2012. The record was filed on that date.

7 Pursuant to section 7(e) of Part J, the applicant's deadline for filing her factum in this appeal should have been December 5, 2012, six weeks after the notice of appeal was filed. The court's case management officer's letter indicated a deadline of December 12, 2012 rather than December 5, 2012. Regardless of that, Ms Carbone did not file her factum by December 12, 2012 and her appeal was struck from the list on December 13, 2012. She filed a motion to restore the appeal in January 2013.

8 Negotiations between the parties took place as the appellant wanted to adjourn a summary judgment application that was set to proceed forthwith. This led to an agreement that resulted in the summary judgment application being adjourned to April, and the hearing of this motion to restore being adjourned to September, some eight plus months following the date it was struck from the list.

9 Prior to the hearing to restore the summary judgment applications and cross-applications were dismissed resulting in the scheduling issues raised in appeal 1201-0274-AC being moot. The remaining live issues relate to further discovery and disclosure issues.

10 The issue before me today is whether the appeal should be restored at this late date. Before turning to an examination of factors influencing the decision to restore, I must deal with the applicant's preliminary issue.

11 Ms Carbone argues that the application for leave to appeal and restore may not be required because it is likely that her appeal was struck in error. She claims that the appeal was struck in error because her factum, which remains unfiled, is not due until her application for leave to appeal was considered, as time does not start to run until after leave is granted.

12 I reject that argument. Such a position would defeat the very purpose of the time limits. The only issues requiring leave in her appeal related to the scheduling decisions. Leave was not required to appeal the orders refusing to order further discovery or production. This was understood by the appellant as her application for leave related only to the scheduling issues. She was

 

entitled to file an appeal from the orders refusing further discovery and production and she did. The fact that the appellant included grounds requiring leave does not affect the validity with respect to the time limits relating to grounds not requiring leave, and time limits that attach to this appeal on those grounds. Absent a court order extending time, the appellant was obliged to meet the Part J filing deadlines.

13 Moreover, I am satisfied that the appellant was alive to the deadlines. She had received the letter from the case management officer. She had also requested an extension of time for filing the appeal book which was granted. She also asked for an extension of time to file the factum which was not granted. I reject the applicant's argument that the deadline did not apply. If all a litigant has to do to avoid the time limits applicable to Part J appeals is to include grounds that require leave, without obtaining leave in her appeal, the usefulness of time limits would end. The factum was due, the appellant knew it was due, and the appeal was properly struck pursuant to the Part J guidelines.

14 The only question is whether I should exercise my discretion to restore the appeal. A justice of the Court of Appeal possesses a broad discretion to restore an appeal to the appellate list. In exercising that discretion the court examines such factors as the reasons for the delay, any prejudice that may arise, as well as the relative merits of the appeal. I also find that in appeals such as this, where the appeal is from a pre-trial order which does not end the trial, a judge should also look at the nature of the appeal and consider the effect of a successful appeal on the trial of the case as a whole.

15 Further, where an appeal is subject to the Part J appeal procedures of the CPD, the importance of early disposition should be considered and placed on the scale of factors. The procedures for Part J appeals are aimed at expediting trials.

16 As noted, the decision to restore is highly discretionary; *Phillips v. 707739 Alberta Ltd.*, 2001 ABCA 219, 286 A.R. 367 (Alta. C.A. [In Chambers]) is an authority requiring only "a limited consideration of the merits of the appeal" and it has been suggested that an applicant need only show that her appeal is "reasonably arguable": see *Muhtady v. Sarhan*, 2013 ABCA 197 (Alta. C.A.) at para 6, (available on line).

17 I now turn to consideration of those factors. Dealing firstly with the reason for delay, Ms Carbone says she did not file within the deadline because she had to "wait on a transcript", and because on December 12, 2012 she lost some work at InSource in North Hill Centre. While lack of a transcript may constitute a reasonable excuse sometimes, I note that the transcript in issue here was from a hearing that was held in June 2012. There was no evidence as to when it was ordered. Transcripts from other hearings had certainly been obtained and were included within the appeal books filed earlier. The appellant says she asked the respondent for a two-day delay for filing. The respondent refused, arguing that there had been repeated delays already. The applicant could not advise as to when she expected the transcripts, nor was there evidence that she expected them within two days of the deadline, which raises the issue of whether it was really the transcripts that caused the delay. I do not put much weight on the excuse. There had been ample time to order the books in time to prepare a factum. Moreover, there is no reason she could not have filed an application for an extension of time to file the factum as soon as she realized she might not be ready to file on time. In my view, the excuses she refers to do not excuse her failure to apply for an extension of time, or seek restoration at an early date with factum in hand. She still did not have a factum prepared at the date of this application.

18 Ms Carbone argues that she was forced to delay this application until September 2012 in order to obtain an adjournment of the summary judgment application which she required. She said it was always her intention to go complete with this application. Unfortunately, I find that argument is just using the applicant's need for one delay to justify her other delay. Had she been prepared to proceed with the summary judgment when scheduled, all applications would have been heard by now and this matter would be on to trial.

19 While I appreciate that Ms Carbone is a self-represented litigant, I find her to be very competent and knowledgeable. I am certainly satisfied that she was alive to the deadline and could have dealt with this matter in a timely fashion.

20 As for prejudice, it appears that the adjournment to September was done at least with the respondent's consent, if not at his request, and so it is difficult for the respondent to argue serious prejudice. Nonetheless, this litigation has been ongoing for nearly ten years, and relates to a surgical procedure that was done over a decade ago. Time dulls memories, the respondent

  

is now retired and in his mid-seventies. Delay does run the usual risk of fading memories and lost witnesses. Restoring this appeal will continue to delay the trial date.

21 Finally, I turn to the merits of this appeal. I accept that the merits need not meet a high standard. Nevertheless, it is important to address this issue. When addressing the issue of merit, it is important to view the arguments through the proper standard of review. The applicant argues that all of the case management judge's orders must be viewed on the standard of correctness. The respondent argues that they are discretionary orders and therefore reasonableness is the appropriate standard.

22 In my view, there is no one standard for decisions of a case management judge — the standard depends upon the issue involved. For example, while interpretation of the *Rules of Court* may be reviewed for correctness, orders relating to the nature and scope of questioning fall within a judge's discretion and are entitled to considerable deference: see *Golden Estate v. Neilson*, 2011 ABCA 338 (Alta. C.A.) at para 12, (2011), 519 A.R. 165 (Alta. C.A.).

23 The appellant also argues that the case management judge failed to give reasons for his decision. I do not agree. The chambers judge dealt with all of the major issues in contention in this appeal and gave his reasons. While during a later hearing he occasionally said "denied", that was often preceded by a reference to the fact he had already dealt with this issue earlier.

24 In any event, I turn first to the issue of whether there is merit to the argument that the case management judge erred in refusing to order that Dr Whidden prepare a fourth curriculum vitae. The case management judge recognized that the various CVs may have been disorganized, but he was not satisfied that Ms Carbone had established any good reason to believe that any relevant information was missing. That is an assessment of the evidence which he is entitled to make and attracts a reasonableness standard of review. His finding was certainly reasonable in that regard.

25 Second, the case management judge refused to compel Dr Whidden to create a list of courses he might have taken decades ago for production. She had asked the doctor what courses he had taken in psychology or psychiatry and he advised that he took the courses at medical school, including spending some time at Ponoka but he could not remember them all. The case management judge refused to order the doctor to prepare a list of all courses he had taken, and again his decision is not unreasonable. Ms Carbone was entitled to question him on courses and she did. It was suggested during argument that there had been more than seven hours of questioning on dismorphic disorder. Once again, on this record, I do not believe that the appellant has any arguable grounds of appeal. She had the right to ask questions, she did ask questions and he does not have to create documents solely for the purpose of production.

26 Third, with regard to Ms Carbone's request that Dr Whidden be ordered to produce all BDD-related information (bodily dismorphic disorder), Justice Wilson was not persuaded that there was anything more to produce. Dr Whidden stated in his affidavit that he had produced everything he had on that topic. Justice Wilson accepted that statement. Part of the duty of the case management judge is to ensure that a case keeps on track and moves reasonably through the system. He has a discretion to make the decision that it was sufficient if Dr Whidden swore he had nothing further. He ordered him to provide such an affidavit, and later when he recognized he was being examined further he could swear to it on questioning. The judge's findings were reasonable in not ordering a further search for documents. Neither was he unreasonable in refusing to order further search and production just because the doctor discovered and produced a Wikipedia article at a later point of time. That production does not mean he was lying when he said that he had made full production; indeed, it is equally consistent with him ensuring that if he had missed anything he would produce it. Although Ms Carbone may truly believe that he was not producing documents, the case management order in this regard was certainly reasonable. Orders relating to the scope and nature of questioning are within a chambers judge's discretion and entitled to great deference.

27 Finally, the case management judge reviewed the questions the appellant wanted answered. He allowed two questions and noted the other questions were improper, as being not questions of fact or practice of the doctor, but the doctor's opinion going to the ultimate issue. In my view, he did not err in so ordering.

  

28 I am satisfied, on whatever standard of review there is little, if any, merit to this appeal. Even if I am wrong, I am satisfied that at most the result would be the production of marginally relevant or useful information. This case still has to go to trial. The appeal relates to marginal discovery issues and I find very little, if any, merit.

29 As mentioned earlier, a Part J is a procedure designed to expedite appeals. Where appeals are not from a final order determining some or all or some significant part of the substantive rights in an action, but merely appeals from pre-trial rulings, adherence to the time limits is even more important. The short times limits are designed to expedite appeals such as the one before the court, in order to avoid unduly prolonged trials. The time limits are short and in my view a delay such as the delay here is unacceptable. In summary, although merit may play less of a role in an appeal from a final judgment, I believe it should be considered when dealing with Part J timeliness. Moreover, the nature of the application, the fact that it is a pre-trial ruling should be placed on the scales along with other factors to be considered when exercising the jurisdiction to restore an appeal.

**Conclusion**

30 In conclusion, the simple issue is this: should Ms Carbone's appeal be restored so that she can challenge Justice Wilson's refusal to order the disclosure and answers she requests. Weighing all of the factors, including her reasons for missing the deadline, the prejudice considering this claim relates to events occurring over a decade ago, the fact that this is a Part J appeal from a pre-trial ruling and does not deprive her of the right to proceed to trial, and the relative lack of merit, and relative usefulness of any information that would be obtained if the appeal were successful, I am of the view that the application for restoral be denied. To grant this further delay on this record is not justified.

31 The application is denied.

32 Costs in any event of the cause.

*Application dismissed.*

**End of Document**

# Tab 6

1997 CarswellAlta 339, 146 W.A.C. 150, 200 A.R. 150, 70 A.C.W.S. (3d) 622



1997 CarswellAlta 339
Alberta Court of Appeal

Northland Bank v. Wettstein

1997 CarswellAlta 339, 146 W.A.C. 150, 200 A.R. 150, 70 A.C.W.S. (3d) 622

# Northland Bank and Deloitte & Touche Inc. as Liquidator of Northland Bank, Respondents (Plaintiffs) and Wieland Wettstein, Appellant (Defendant) and Robert A. Willson, William E. Neapole, Harold G. Green, Stephen J. Adams, Martin G. Fortier, Roland P. Guenette, George J. Bestianich, Eric R. Hayne, James A. Kellington, David Naylor, James I.M. Ross, William H. Simmons, H.B. McBain, Glen A. Simpson, Ronald G. Scott, Harold Walker, Walsten Management Ltd., Thomas C. Assaly, W. Gordon Barker, Monty C. Beber, Ronald M. Derrickson, R.A. Fabro, Thomas R. Goodson, John L. Gordon, Peter V. Gundy, Baldur R. Johnson, Lucille M. Johnstone, Erdman Klassen, Richey B. Love, Ralph B. MacMillan, Roy R. Naudie, Sidney M. Oland, Michael F. Peacock, Alan W. Scarth, Wayne Scott, Donald G. Skagen, V. Kenneth Travis, Leslie D. Warren, Jan J. Wieckowski, Hassan Barnieh, Barnieh Investments Ltd., DLN Holdings Ltd., Delina Holdings Ltd., 276271 Alberta Ltd., 285917 Alberta Ltd., 306766 Alberta Ltd., 319071 Alberta Ltd., Surrey Credit Union, Not Parties to this Appeal (Defendants)

Canada Deposit Insurance Corporation and Her Majesty the Queen in Right of Canada, as Represented by the Minister of Finance, Respondents (Plaintiffs) and Wieland Wettstein, Appellant (Defendant) and Walter A. Prisco, David R. Watson, Robert A. Willson, William E. Neapole, Harold G. Green, Stephen J. Adams, Martin G. Fortier, Roland P. Guenette, George J. Bestianich, Eric R. Hayne, James A. Kellington, David Naylor, James I.M. Ross, William H. Simmons, H. B. McBain, Glen A Simpson, Ronald G. Scott, Harold Walker, Walsten Management Ltd., Thomas C. Assaly, W. Gordon Barker, Monty C. Beber, Ronald M. Derrickson, R.A. Fabro, Thomas R. Goodson, John L. Gordon, Peter V. Gundy, Baldur R. Johnson, Lucille M. Johnstone, Erdman Klassen, Richey B. Love, Ralph B. MacMillan, Roy R. Naudie, John J. Niehenke, Sidney M. Oland, Michael F. Peacock, Donlad B. Rix, Alan W. Scarth, Wayne Scott, Donald G. Skagen, V. Kenneth Travis, Leslie D. Warren, Guenther Schmidt-Weyland, Jan J. Wieckowski, Hassan Barnieh, Barnieh Investments Ltd., DLN Holdings Ltd., Delina Holdings Ltd., 276271 Alberta Ltd., 285917 Alberta Ltd., 306766 Alberta Ltd., 319071 Alberta Ltd., Surrey Credit Union, Not Parties to this Appeal (Defendants)

Harradence, Russell, Picard JJ.A.

Judgment: April 18, 1997
Docket: Calgary Appeal CA01-16016, CA01-15749

Counsel: *F.R. Foran, Q.C.* and *G. Smyth*, for the Respondents (Plaintiffs).
*G.F. Dixon, Q.C.* and *T. Clarke*, for the Appellant (Defendant).

Subject: Civil Practice and Procedure

  

**Headnote**

**Practice --- Pleadings — Application to strike — General**

Appellant appealing Chambers Judge's refusal to strike statement of claim on basis of abuse of process by respondent's counsel during examinations for discovery — Respondent's counsel allegedly suggesting answers to witness and arguing with appellant — Counsel's conduct was in accordance with common practice and appellant acquiescing in conduct by examining on responses given on discovery — In absence of specific prejudice, appropriate relief was order for re-attendance of witness at own expense — Appeal dismissed where Chambers Judge's determination not unreasonable.

**Practice --- Discovery — Discovery of documents — General**

Appellant appealed dismissal by Chambers Judge of application for further and better production of documents — Appellant complained of having to search all non-privileged documents to determine relevance and complained Chambers Judge adopted too narrow test of relevance — Case management judge expressly approved method of production — Chambers Judge allowed admission of documents sought by appellant so that no prejudice suffered even if relevance test too narrow — Too costly to require respondent to provide general description of all documents in its possession — Appeal dismissed.

In proceedings resulting from the collapse of a bank, the appellant, who had been an officer of the respondent bank, had applied to strike the statement of claim on the basis of an alleged abuse of process by the respondent's counsel in his conduct during examinations for discovery. The appellant claimed that counsel had suggested answers to witnesses and had interrupted and argued with the appellant.

The appellant, who was given access to all of the original, non-privileged records of the bank in the possession of the liquidator, also complained that he had to suffer the hardship of having to search all the documents to determine whether there were any he considered relevant over those which the liquidator had already determined to be relevant. It was the appellant's position that the respondent ought to provide a general description of all the documents in its possession and he sought an order for further and better production of documents. The appellant was also of the opinion that the Chamber's Judge had adopted too narrow a test for relevance regarding the documents.

When the Chambers Judge dismissed both applications, the appellant appealed.

**Held:** The appeal was dismissed.

Respondent's counsel's conduct during the examinations for discovery was in accordance with common practice and, in any event, the appellant had acquiesced in the conduct by examining on the responses given. Furthermore, in the absence of specific prejudice, the appropriate relief in such circumstances was to obtain an order for the re-attendance of the witness at his own expense, and not an order to strike the statement of claim. Accordingly, the Chambers Judge had not acted unreasonably in dismissing the application to strike.

Regarding the application for further and better production of documents, the case management Judge had expressly approved the method of production whereby the appellant was to search the non-privileged documents to determine relevance. To require the respondent to provide a general description of all documents in its possession regardless of whether they were relevant or not would simply add unnecessary costs to the proceedings. Also, the allegation that the Chambers Judge had adopted too narrow a test for relevance was not relevant since all the documents in question had ultimately been produced so that the appellant had suffered no prejudice and therefore there was no basis for interfering with the decision.

**Table of Authorities**

**Cases considered:**

*Gainers Inc. v. Pocklington* (1995), 29 Alta. L.R. (3d) 323, 165 A.R. 274, 89 W.A.C. 274, [1995] 7 W.W.R. 413, 125 D.L.R. (4th) 50, 20 B.L.R. (2d) 289 (Alta. C.A.) — referred to

*MacDonald Estate v. Martin* (1990), [1991] 1 W.W.R. 705, 77 D.L.R. (4th) 249, 121 N.R. 1, [1990] 3 S.C.R. 1235, 48 C.P.C. (2d) 113 (S.C.C.) — referred to

**Rules considered:**

*Alberta Rules of Court*
R. 129 — referred to

APPEAL of order dismissing application to stike statement of claim and application for further and better production of documents.

**The Court:**

1 We dismissed this appeal from the bench, and promised these reasons.

2 This consolidated appeal concerns the dismissal of two interlocutory applications arising from the collapse of the Northern Bank. The first was an application to strike a statement of claim. The second was an application for further and better production of documents, and that the Respondent Liquidator's counsel cease to act due to a conflict of interest. The litigation is under the supervision of a case management judge.

3 The grounds of appeal are that the Chambers Judge erred in failing to find an abuse of process, irregularities in the production of documents, or a conflict of interest. The Appellant now asks this Court to strike out the claim or, in the alternative, order the production of the documents originally requested and a secondary discovery at the expense of the Respondents. He also seeks a declaration that the Liquidator's counsel cease to act.

4 The Appellant was a consultant and officer of the Respondent Bank. He is alleged, *inter alia*, to have conspired with officers of the Bank to lend funds which they knew, or ought to have known, would not be repaid in full, and that certain loan transactions were shams.

**The Application to Strike**

5 The application to strike the statement of claim heard on February 7, 1995, alleged an abuse of process by counsel, contrary to Rule 129 of the *Alberta Rules of Court*. The impugned conduct included providing personal undertakings on behalf of a witness during examinations for discovery, suggesting answers to that witness and giving evidence on his behalf, and interrupting and arguing with the Appellant. The Appellant contends that counsel became an active participant in the examination because the witness, who is an officer of the Respondent Bank, was not sufficiently familiar with the facts and documents or prepared for the examinations. Further, the Appellant says that the Respondent's counsel had denied that his client had possession of certain documents which were later found in the production of documents, but were not listed as relevant to the proceedings. Still further, the Appellant alleged that the Respondent was responsible for delays in the litigation.

6 No authority was cited for dismissing a statement of claim under rule 129 on the basis of such conduct of counsel. Authorities that were relied upon concern applications to dismiss for want of prosecution and delay, and, in our view, are not applicable. Other authorities cited only support the proposition that improper conduct may result in an order for re-attendance of a witness at his own expense.

  

7 In this case, the Respondent Liquidator has adopted both the undertakings and answers given by counsel. Since the Appellant has now examined on responses to those undertakings, he has acquiesced in the conduct of which he now complains. Even if counsel's conduct of the examinations had been inappropriate, in the absence of specific prejudice, the appropriate relief was to obtain an order for re-attendance of the witness athis own expense. As well, it is counsel's proper function to address improper, confusing, irrelevant or privileged questions. In these circumstances, we see nothing unreasonable in the conclusion that counsel's conduct was in accordance with common practice.

8 Nor do we see any error in the conclusion that the complaints were not sufficiently serious to warrant striking the statement of claim as a result of any misleading, defective or restricted approach to relevance with respect to the production of documents. The Chambers Judge held that there was no evidence of any deliberate intent to conceal any document from the Appellant and we would not interfere with that finding. We agree that these were all matters which could have been properly and adequately redressed by the case management judge. We endorse the function of case management, and strongly discourage any attempt to bypass that process.

9 Moreover, we are mindful of the standard of review in interlocutory matters. That standard is described by Kerans J.A. in *Standards of Review Employed by Appellate Courts* at pp. 146-47 as follows:

> The general rule about appeals on interlocutory matters is that the reviewing court must review on the concurrence standard any clear issue of law that can be isolated, but, to the extent that the task of the first court was to balance many competing factors, review is for reasonableness.
>
> Most interlocutory issues offer non-precedential examples of the balancing of case-specific facts, but also can present an opportunity to offer guidelines. Thus, while, in many cases, a reviewing court might overrule, that usually occurs in the course of a statement of a new "principle" or guideline. If no novel and directing point arises on the materials before the reviewing court will limit itself to saying, that the conclusion of the first tribunal is one to which a reasonable person might come.

**Production of Documents**

10 The Respondent Liquidator has provided particulars to the Appellant in respect of fifty-seven transactions which it claims were wrongfully made or managed. In addition, since November 1990, the Appellant has also been given access to all of the original, non-privileged records of the Bank in the possession of the Liquidator. The Affidavit of Production contains a complete inventory of those records. Volume I lists those documents which the Liquidator did not believe to be relevant to this action. Volumes II and III lists are those believed to be relevant. In reviewing those documents listed in Volume I, the Appellant found some which he considered relevant.

11 The essence of the Appellant's complaint is that despite the access provided to all non-privileged documents, he must suffer the hardship of having to search them all to discover whether there were other documents he considers relevant, in addition to those identified as relevant by the Respondent.

12 The initial Affidavit of Production was challenged before the Case Management Judge who expressly approved that method of production. He found no evidence that the Liquidator had intentionally failed to produce documents. That decision was not appealed. A supplemental Affidavit of Production included some of the documents the Appellant was seeking.

13 The application for the production of certain documents and to remove counsel for the alleged conflict of interest was heard on May 23, 1995. The Chambers Judge found that those documents were not relevant to the action, but he expressly held that finding would not restrict the Appellant from using them at trial. The Appellant argues that the effect is to shift the onus of producing the documents on to him He says that given the unreliability of the Respondents' determination of relevance, some general description must be given by the Respondents to enable the Appellant to decide whether he wishes to challenge the claim of irrelevance. He cites no authority for this proposition.

  

14 The Appellant contends that the Chambers Judge erred in law in adopting a too narrow test for relevance in concluding that the documents were irrelevant because they did not specifically relate to the transactions that are the subject of the Appellant's complaints. In applying that narrow test, it is argued that the Chambers Judge overlooked the possibility that these documents might have enabled the Appellant to advance his own case. But the Appellant has failed to establish how these documents would assist him. Moreover, since the Chambers Judge ultimately allowed the admission of these documents, the Appellant has suffered no prejudice as a result of that ruling. Thus, whether or not there was any error of law in the test for relevance, we see no basis for interfering with the result.

15 As for the inconvenience in having to search materials not identified as relevant, we note that the Appellant was more familiar with those materials than the Liquidator. Besides, the Appellant's assessment of what is relevant may differ from that of the Respondents. To require the Respondent to provide a general description of all documents in its possession, regardless of whether they are considered relevant, would add unnecessary costs. We cannot say that the conclusion of the Chambers Judge that the method of production in this case was appropriate, was unreasonable.

**Conflict of Interest**

16 Both applications were dismissed in relation to this allegation. The Appellant had argued that the documents by which he discovered that counsel had a conflict of interest were not produced by the Respondent. These documents were included in the files made available to the Appellant by the Liquidator. The Appellant contends that the Chambers Judge erred in law by applying a test of actual conflict rather than the correct test set out by Sopinka J. in *MacDonald Estate v. Martin* (1990), [1991] 1 W.W.R. 705 (S.C.C.) at 724. In the course of argument, the Appellant wisely indicated he was not pressing this issue.

17 The issue concerned a transaction relating to an individual named Terry O'Grady who, together with a numbered company, is named as an Accommodation Party. Documents relating to this transaction were not produced or described in the affidavit of production. The Liquidator's counsel acted for O'Grady and the limited company in respect to a transaction in which the Appellant is alleged to have conspired with another Accommodation Party.

18 Mr. O'Grady and the limited company are not parties to this action and have not asserted any conflict to this action. Thus, even if counsel did have confidential information, it could not have been used to the prejudice of O'Grady. Nor could it be used to the prejudice of the Appellant because he has not been represented by that counsel in any matter related to these proceedings. It is the client who must object to the retainer which gives rise to the alleged conflict: *Macdonald Estate v. Martin*; *Gainers Inc. v. Pocklington*, [1995] 7 W.W.R. 413 (Alta. C.A.) at 418.

19 The Chambers Judge found that the identity of counsel was not hidden in any way because the documents themselves disclose his identity and involvement. And since he also found that the documents were not relevant. There is no basis upon which the chambers judge could have reasonably concluded that the existence of the documents was concealed from the Appellant.

20 In the result, the appeal is dismissed.

*Appeal dismissed.*

# Tab 7

2000 ABCA 122
Alberta Court of Appeal

Decock v. Alberta

2000 CarswellAlta 384, 2000 ABCA 122, [2000] 7 W.W.R. 219, [2000] A.W.L.D. 422, [2000] A.J. No. 419, 186 D.L.R. (4th) 265, 220 W.A.C. 234, 255 A.R. 234, 79 Alta. L.R. (3d) 11, 96 A.C.W.S. (3d) 971

# Barbara Decock, Tara Leigh Decock, an infant by her Next Friend, Barbara Decock and Lindsey Allison Decock, an infant by her Next Friend, Barbara Decock, Appellants (Plaintiffs) and Her Majesty The Queen in Right of Alberta, The Honourable Ralph Klein, The Honourable Shirley McClellan, The Banff Mineral Springs Hospital, "John Does" 1-4 and "Jane Does" 1-4, Respondents (Defendants)

Kelly Schmitz and Kevin Schmitz, Appellants (Plaintiffs) and Her Majesty The Queen in Right of Alberta, The Honourable Ralph Klein, The Honourable Shirley McClellan, The Foothills Provincial General Hospital, "John Does" 1-4 and "Jane Does" 1-4, Respondents (Defendants)

Darin F. Banister, Sandra Banister and Ann Schierle, Appellants (Plaintiffs) and Her Majesty The Queen in Right of Alberta, The Honourable Ralph Klein, The Honourable Shirley McClellan, The Banff Mineral Springs Hospital, The Foothills Provincial General Hospital, "John Does" 1-4 and "Jane Does" 1-4, Respondents (Defendants)

Joel Scott, an infant by his Next Friend Martin Scott and Martin Scott, Appellants (Plaintiffs) and Her Majesty The Queen in Right of Alberta, The Honourable Ralph Klein, The Honourable Shirley McClellan, Jon Pascoe and Habiba Bhojani, Respondents (Defendants)

Irving, Russell, Sulatycky JJ.A.

Heard: January 12, 2000
Judgment: April 25, 2000
Docket: Calgary Appeal 97-17244, 97-17245, 97-17247, 97-17275

Counsel: *C.R. Suntjens*, for Appellants/Plaintiffs.
*D.W. Kinloch*, for Respondents/Defendants.

Subject: Public; Civil Practice and Procedure; Torts

**Headnote**

**Crown --- Practice and procedure involving Crown in right of province — Parties — Miscellaneous issues**

Plaintiffs brought actions for negligence against Crown in right of province and against Premier and Minister of Health — Chambers judge removed individual defendants as named defendants and deleted references to those defendants in statements of claim — Plaintiffs appealed — Appeal allowed — Liability in tort always falls firstly upon individual tortfeasor — Development of vicarious liability has not obviated this general rule — Naming official personally as defendant in negligence claim was not necessarily erroneous — Chambers judge erred in holding that defendants should not have been named personally as defendants and in removing them as parties — Chambers judge erred in finding that

all of claims against individual defendants were predicated upon vicarious liability and in striking out claims on that basis — It could not be said at this point that claims against individual defendants were scandalous, vexatious, embarrassing or abuse of process.

The plaintiffs brought four actions claiming damages resulting from alleged receipt of negligent medical care, attention and treatment. They named the Premier of Alberta and the Minister of Health as defendants. Those defendants brought a motion under R. 38 and 129 of the *Alberta Rules of Court* for an order removing them as named defendants and either striking the claims as against them or amending the claims to delete specified portions. The chambers judge allowed the applications, holding that all of the allegations against the Premier were predicated on vicarious liability and that the Premier, as an officer of the Crown, could not be held liable for the acts of his subordinates. In addition, he held that the Premier should not be named in his personal capacity and that the Premier of Alberta could not be substituted as a defendant as the office of the Premier is not a suable entity. He held that the Minister of Health, in her personal capacity, was not a proper party and should be described by her office. He ordered that the individual defendants be removed as defendants and further ordered that the statement of claim be amended by deleting all references to the individual defendants, all allegations of duty owed by them to the plaintiffs and all allegations of recklessness, negligence and/or breach of fiduciary duty by them. The plaintiffs appealed.

**Held:** The appeal was allowed.

Per Russell J.A. (Sulatycky J.A. concurring): It is a well-established principle of tort law that liability is, firstly, personal. Thus, in determining the liability of a Crown servant or officer, no distinction should be drawn between the individual's official versus unofficial actions. No matter what the role of the tortfeasor is, liability will always fall first and foremost personally upon that individual. The development of vicarious liability has not obviated this general rule. This principle of individual responsibility militates in favour of naming defendants personally. The chambers judge erred in his determination that the individual defendants should not have been named personally as defendants. The chambers judge did not err in holding that the Premier of Alberta is not a suable entity, as the office and role of the Premier is not recognized either by statute or common law. However, the Premier might properly be named as a defendant in his or her representative capacity. The plaintiffs' statements of claim should be amended to clarify that the individual defendants were also being named as defendants in their capacities as representatives of the Crown.

Per Irving J.A. (dissenting): The statements of claim were properly struck out against the individual defendants. The allegations made against those defendants were simply allegations of vicarious responsibility for the torts of others, and it was plain and obvious that the actions against those defendants must fail as disclosing no cause of action against either of them.

**Table of Authorities**

**Cases considered by *Russell J.A.* (*Sulatycky J.A* concurring):**

*Alexander v. Pacific Trans-Ocean Resources Ltd.* (1991), 115 A.R. 317 (Alta. Q.B.) — referred to

*B. (P.A.) v. Curry*, (sub nom. *B. v. Curry*) 99 C.L.L.C. 210-033, 43 C.C.E.L. (2d) 1, 62 B.C.L.R. (3d) 173, (sub nom. *P.A.B. v. Children's Foundation*) 124 B.C.A.C. 119, (sub nom. *P.A.B. v. Children's Foundation*) 203 W.A.C. 119, (sub nom. *P.A.B. v. Children's Foundation*) 241 N.R. 266, 174 D.L.R. (4th) 45, [1999] 8 W.W.R. 197, [1999] L.V.I. 3046-1, 46 C.C.L.T. (2d) 1, [1999] 2 S.C.R. 534 (S.C.C.) — referred to

*Blomme v. Herman* (1993), 145 A.R. 16, 55 W.A.C. 16 (Alta. C.A.) — referred to

*Boudreault v. Barrett* (1995), 33 Alta. L.R. (3d) 60, 39 C.P.C. (3d) 1, 174 A.R. 71, 102 W.A.C. 71 (Alta. C.A.) — referred to

*Brown v. Alberta* (1993), 19 C.P.C. (3d) 271, [1994] 2 W.W.R. 283, 146 A.R. 128, 14 Alta. L.R. (3d) 146 (Alta. Q.B.) — referred to

*Canada Deposit Insurance Corp. v. Prisco* (1994), 158 A.R. 305 (Alta. Q.B.) — referred to

*Carmacks Construction Ltd. v. Beaumont* (1981), 15 Alta. L.R. (2d) 367, 30 A.R. 328 (Alta. Master) — considered

*Cerny v. Canadian Industries Ltd.*, [1972] 6 W.W.R. 88, 30 D.L.R. (3d) 462 (Alta. C.A.) — referred to

*Crown Trust Co. v. Ontario* (1988), 64 O.R. (2d) 774 (Ont. H.C.) — referred to

*Fox-Hitchner v. Alberta* (1977), 2 Alta. L.R. (2d) 379, 3 C.P.C. 288, (sub nom. *Fox-Hitchner v. Alberta)* 6 A.R. 43 (Alta. T.D.) — considered

*Fullowka v. Royal Oak Mines Inc.* (1996), (sub nom. *Fullowka v. Whitford)* 147 D.L.R. (4th) 531, (sub nom. *Fullowka v. Whitford)* [1997] N.W.T.R. 1, (sub nom. *Fullowka v. Whitford)* 36 C.C.L.T. (2d) 58 (N.W.T. C.A.) — referred to

*Fullowka v. Royal Oak Mines Inc.* (1997), (sub nom. *Whitford v. Fullowka)* 222 N.R. 320 (note), 147 D.L.R. (4th) 531 (note) (S.C.C.) — referred to

*Galand Estate v. Stewart* (1992), 6 Alta. L.R. (3d) 399, 11 C.P.C. (3d) 381, [1993] 4 W.W.R. 205, 135 A.R. 129, 33 W.A.C. 129, 48 E.T.R. 228 (Alta. C.A.) — referred to

*Gauthier v. Alberta Recoveries & Rentals Ltd.* (1990), 34 C.C.E.L. 245, 110 A.R. 260, [1991] 1 W.W.R. 516, 77 Alta. L.R. (2d) 32 (Alta. Q.B.) — referred to

*George v. Harris* (March 3, 1999), Doc. 96-CU-99569 (Ont. Gen. Div.) — considered

*George v. Harris* (June 16, 1999), Doc. 155/99 (Ont. Div. Ct.) — referred to

*Gidley v. Palmerston (Lord)* (1822), 129 E.R. 1290, 3 Brod. & Bing. 275 (Eng. C.P.) — referred to

*Hamilton v. Alberta (Minister of Public Works, Supply & Services)*, 80 Alta. L.R. (2d) 169, [1991] 5 W.W.R. 232, 118 A.R. 267 (Alta. Q.B.) — referred to

*Hunt v. T & N plc*, 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105, 117 N.R. 321, 4 C.O.H.S.C. 173 (headnote only), (sub nom. *Hunt v. Carey Canada Inc.)* [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, (sub nom. *Hunt v. Carey Canada Inc.)* 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959 (S.C.C.) — referred to

*International Assn. of Science & Technology for Development v. Hamza*, 28 Alta. L.R. (3d) 125, 34 C.P.C. (3d) 210, 122 D.L.R. (4th) 92, 162 A.R. 349, 83 W.A.C. 349, [1995] 6 W.W.R. 75 (Alta. C.A.) — considered

*Inuit Tapirisat of Canada v. Canada (Attorney General)*, [1980] 2 S.C.R. 735, 115 D.L.R. (3d) 1, 33 N.R. 304 (S.C.C.) — referred to

*Just v. British Columbia*, 1 C.C.L.T. (2d) 1, [1989] 2 S.C.R. 1228, 18 M.V.R. (2d) 1, [1990] 1 W.W.R. 385, 41 B.C.L.R. (2d) 350, 103 N.R. 1, 64 D.L.R. (4th) 689, 41 Admin. L.R. 161, [1990] R.R.A. 140 (S.C.C.) — referred to

*Korte v. Deloitte, Haskins & Sells* (1993), 8 Alta. L.R. (3d) 337, 135 A.R. 389, 33 W.A.C. 389, 15 C.P.C. (3d) 109 (Alta. C.A.) — referred to

*Korte v. Deloitte, Haskins & Sells*, 18 C.P.C. (3d) 48 (note), 11 Alta. L.R. (3d) li (note), 160 N.R. 319 (note), 149 A.R. 159 (note), 63 W.A.C. 159 (note), [1993] 3 S.C.R. v (S.C.C.) — referred to

*Kresic v. Alberta (Securities Commission)* (1985), 37 Alta. L.R. (2d) 342, 29 B.L.R. 118 (Alta. Q.B.) — referred to

*Leeds v. Alberta (Minister of the Environment)*, 6 R.P.R. (2d) 152, 98 A.R. 178, 42 L.C.R. 114, 61 D.L.R. (4th) 672, (sub nom. *Leeds v. Alberta)* 68 Alta. L.R. (2d) 322, (sub nom. *Leeds v. Alberta)* [1989] 6 W.W.R. 559 (Alta. C.A.) — considered

*Murphy v. Kenting Drilling Co.* (1996), 3 C.P.C. (4th) 29, 190 A.R. 77 (Alta. Master) — referred to

*Paragon Controls Ltd. v. Valtek International* (January 19, 1998), Doc. Calgary Appeal 16316 (Alta. C.A.) — referred to

*Reference re Questions Concerning Amendment of the Constitution of Canada as set out in O.C. 1020/80*, (sub nom. *Reference re Amendment of Constitution of Canada (Nos. 1, 2, 3))* 125 D.L.R. (3d) 1, 39 N.R. 1, 11 Man. R. (2d) 1, 34 Nfld. & P.E.I.R. 1, [1981] 6 W.W.R. 1, (sub nom. *Manitoba (Attorney General) v. Canada (Attorney General))* [1981] 1 S.C.R. 753, 95 A.P.R. 1 (S.C.C.) — referred to

*Russell Food Equipment (Calgary) Ltd. v. Valleyfield Investments Ltd.* (1962), 40 W.W.R. 292 (Alta. S.C.) — referred to

*Such v. Alberta* (1991), 126 A.R. 16 (Alta. Q.B.) — considered

*T. (G.) v. Griffiths*, (sub nom. *J. v. Griffiths)* 99 C.L.L.C. 210-034, (sub nom. *G.T.-J. v. Griffiths)* 241 N.R. 201, 174 D.L.R. (4th) 71, 124 B.C.A.C. 161, 203 W.A.C. 161, 63 B.C.L.R. (3d) 1, [1999] L.V.I. 3046-2, [1999] 9 W.W.R. 1, 46 C.C.L.T. (2d) 49, 44 C.C.E.L. (2d) 169, [1999] 2 S.C.R. 570 (S.C.C.) — referred to

**Cases considered by *Irving J.A.* (dissenting):**

*Barr v. Matteo* (1959), 79 S. Ct. 1335, 73 L. Ed. 2d 349, 360 U.S. 564 (U.S. Dist. Col.) — referred to

*Clinton v. Jones* (1997), 520 U.S. 681, 117 S. Ct. 1636, 137 L. Ed. 2d 945, 65 U.S.L.W. 4372, 70 Empl. Prac. Dec. 44,646 (U.S. Ark.) — referred to

*Nixon v. Fitzgerald* (1982), 457 U.S. 731, 102 S. Ct. 2690, 73 L. Ed. 2d 349 (U.S. Dist. Col.) — referred to

**Statutes considered by *Russell J.A.* (*Sulatycky J.A.* concurring):**

*Alberta Act*, S.C. 1905, c. 3, reprinted R.S.C. 1985, App. II, No. 20
s. 8 — considered

*Alberta Economic Development Authority Act*, S.A. 1996, c. A-17.8
Generally — referred to

*Department of Health Act*, S.A. 1989, c. D-21.5
s. 2 — referred to

*Government Organization Act*, S.A. 1994, c. G-8.5
s. 2(1)(a) — referred to

s. 2(1)(c) — referred to

Sched. 7 — referred to

*Premier's Council on the Status of Persons with Disabilities Act*, S.A. 1988, c. P-14.5
Generally — referred to

*Premier's Council on Science and Technology Act*, S.A. 1990, c. P-14.2
Generally — referred to

*Proceedings Against the Crown Act*, R.S.A. 1980, c. P-18
s. 1(c) "officer" — considered

s. 5(1)(a) — considered

s. 5(2) — considered

s. 5(3) — considered

*Proceedings Against the Crown Act*, R.S.O. 1980, c. 393
s. 1 "servant" — referred to

**Statutes considered by *Irving J.A.* (dissenting):**

*Hospitals Act*, R.S.A. 1980, c. H-11
s. 27(1) [renumbered 1996, c. 22, s. 1(14)] — referred to

**Rules considered by *Russell J.A.* (*Sulatycky J.A.* concurring):**

*Alberta Rules of Court*, Alta. Reg. 390/68
R. 38 — considered

R. 38(1) — considered

R. 38(3) — considered

R. 38(7) — considered

R. 87(b) — considered

R. 129 — considered

R. 129(1) — considered

R. 129(1)(a) — considered

R. 129(1)(b)-129(1)(d) — considered

R. 129(2) — considered

R. 159 — referred to

R. 200 — referred to

**Rules considered by *Irving J.A.* (dissenting):**

*Alberta Rules of Court*, Alta. Reg. 390/68
R. 38 — considered

R. 38(3) — considered

R. 129 — considered

**Regulations considered by *Russell J.A.* (*Sulatycky J.A.* concurring):**

*Government Organization Act*, S.A. 1994, c. G-8.5
*Designation and Transfer of Responsibility Regulation*, Alta. Reg. 398/94

s. 1(9)

APPEAL from decision removing individual defendants as named defendants and striking out part of statements of claim.

***Russell J.A.* (*Sulatycky J.A.* concurring):**

**I. Introduction**

1 These appeals concern the decision of a chambers judge to: i) remove The Honourable Ralph Klein and The Honourable Shirley McClellan as named defendants in four separate Statements of Claim; and ii) delete all references to or allegations against The Honourable Ralph Klein and The Honourable Shirley McClellan from these claims. As the panel has now been advised that the claim in appeal number 97-17246 has been settled, this judgment will address the remaining four appeals only. For the reasons that follow, I would allow the appeals and reinstate Klein and McClellan as named defendants along with all claims against them. I would also grant leave to the appellants to amend their pleadings to include Klein and McClellan as defendants in their capacities as representatives of the Crown.

2 Numerous issues arise out of these appeals including the proper use and application of Rules 38 and 129 of the *Alberta Rules of Court*, the suability of public officials and the proper framing of claims against such officials. Essentially, however, the findings in this case can be summarized as follows. Pursuant to the principle of individual responsibility, liability in tort will always fall firstly upon the individual tortfeasor. The development of vicarious liability has not obviated this general rule. Thus, it is not necessarily an error to name an official personally as a defendant in a negligence claim. The chambers judge erred in holding that Klein and McClellan should not have been named personally as defendants and in removing them as parties on this basis.

3 The focus of the analysis then moves from the parties to the claims themselves. In this case, the chambers judge erred in finding that all of the claims against Klein are predicated upon vicarious liability and in striking the claims against him on this basis. It cannot be said, at this stage of the proceedings, that the pleadings clearly reveal no reasonable cause of action against Klein. And, without evidence on point, it cannot be said to be clear, on the face of the pleadings, that the claims against Klein are scandalous, frivolous, vexatious, embarrassing or an abuse of process.

4 With respect to the claims against McClellan, it was argued in chambers that the claims against her are scandalous, frivolous, vexatious, embarrassing or an abuse of process. However, no evidence was led in support of these arguments. Without such evidence, there is nothing on the face of the pleadings on which to base a finding to strike. Thus, the chambers judge erred in striking all claims against McClellan.

**II. Background**

5 The appellants filed four separate sets of pleadings each claiming damages suffered as the result of receiving negligent medical care, attention and treatment which resulted in injury and, in certain cases, death.

6 Each of the pleadings names "The Honourable Ralph Klein" and "The Honourable Shirley McClellan" *inter alia* as defendants. At the time the claims originated, Ralph Klein was the Premier of Alberta and Shirley McClellan was the Alberta Minister of Health. The appellants allege that Klein and McClellan had a duty to ensure that they were provided with reasonable and proper medical care, attention and treatment, which duty was breached.

7 Klein and McClellan applied pursuant to Rules 38 and 129 for an order removing them as named defendants in each of the above actions and either striking the claims as against them or amending the claims to delete specified portions. Counsel directed their submissions to the Decock action and agreed that any decision made concerning that claim would bind the remaining four actions.

8 The respondents raised the following arguments in support of their application: i) it is improper to sue officers of the Crown personally for things alleged to have been done or not done in their official capacities; ii) the Statement of Claim fails to disclose a cause of action against The Honourable Ralph Klein; and iii) the claims against The Honourable Ralph Klein and The Honourable Shirley McClellan are scandalous, frivolous, vexatious, embarrassing and an abuse of the process of the court. From the materials provided for our review, it does not appear that any affidavit evidence was filed in support of these arguments.

9 The chambers judge allowed the applications. He held that all of the allegations against Klein were predicated on vicarious liability and that Klein, as an officer of the Crown, could not be held liable for the acts of his subordinates. In addition, he held that Klein should not be named in his personal capacity and that the Premier of Alberta could not be substituted as a defendant as the office of Premier is not a suable entity. He concluded by finding that McClellan, in her personal capacity, was not a proper party to the action and should be described by office.

10 The chambers judge ordered that The Honourable Ralph Klein and The Honourable Shirley McClellan be removed as defendants in the Decock action. He further ordered that the Statement of Claim be amended by deleting all references to Ralph Klein and Shirley McClellan, all allegations of duty by them to the plaintiffs, and all allegations of recklessness, negligence and/or breach of fiduciary duty by them.

11 On appeal, the appellants submit that the chambers judge erred in striking The Honourable Ralph Klein and The Honourable Shirley McClellan as named defendants and in striking all claims against them. Specifically, they argue that the chambers judge erred in finding that: Klein and McClellan are not suable in their personal capacities; all claims against Klein are contingent upon vicarious liability; and the Premier of Alberta is not a suable entity. In addition, they submit that the chambers judge erred in his application of Rule 129.

12 The respondents submit that the only error the chambers judge made was in finding that "The Minister of Health" is a suable entity.

**III. The Standard of Review**

13 In examining these Rules and the submissions on appeal, it is essential to bear in mind the standard of review for appeals from the exercise of the power to remove a party pursuant to Rule 38(3) or to strike a claim under Rule 129 (sometimes referred to as a "discretion"). The scope for review of such decisions is limited to a determination of whether: (i) the decision was unreasonable because no weight or insufficient weight was given to relevant considerations; or (ii) the chambers judge erred in law: *Paragon Controls Ltd. v. Valtek International* (January 19, 1998), Doc. Calgary Appeal 16316 (Alta. C.A.) at para. 2; *Blomme v. Herman* (1993), 145 A.R. 16 (Alta. C.A.) at 17-18; and *Russell Food Equipment (Calgary) Ltd. v. Valleyfield Investments Ltd.* (1962), 40 W.W.R. 292 (Alta. S.C.) at 293-295.

14 For the purposes of these appeals, it is not necessary to determine whether Rules 38 and 129 qualify as true "discretionary" matters given that the appellants' submissions relate solely to whether the chambers judge committed an error of law.

**IV. Interpretation and Application of Rules 38 and 129 of the Alberta Rules of Court**

15 The respondents relied upon both Rules 38 and 129 of the *Alberta Rules of Court* in applying to remove The Honourable Ralph Klein and The Honourable Shirley McClellan as named defendants and strike all claims against them. The chambers judge did not specify how he applied each of these Rules in determining that he should allow the application. Although that lack of reasons does not constitute an error, this Court must consider the proper application of these Rules in determining whether the chambers judge may have erred in his findings.

16 The relevant portions of Rule 38 provide as follows:

> 38.(1) No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.
>
> . . . . .
>
> (3) The Court may, either upon or without the application of any party and with or without terms order that the name of any party improperly joined be struck out and that any person be added who ought to have been joined or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, or in order to protect the rights or interests of any person or class of persons interested under the plaintiff or defendant.
>
> . . . . .
>
> (7) An application to add, strike out or substitute a plaintiff or defendant may be made at any stage of the proceedings.

17 While Rule 38(3) is aimed at striking the names of parties who have been improperly joined in an action, the practical effect of the Rule is to strike the claims against these parties. Thus, some confusion has developed with respect to the function of this Rule and that of Rule 129 which governs the striking of a pleading.

18 Rule 129 provides:

> (1) The court may at any stage of the proceedings order to be struck out or amended any pleading in the action, on the ground that
>
> (a) it discloses no cause of action or defence, as the case may be, or
>
> (b) it is scandalous, frivolous or vexatious, or
>
> (c) it may prejudice, embarrass or delay the fair trial of the action, or
>
> (d) it is otherwise an abuse of the process of the court,

and may order the action to be stayed or dismissed or judgment to be entered accordingly.

(2) No evidence shall be admissible on an application under clause (a) of subrule (1).

19 One of the most comprehensive discussions of the proper use and application of Rules 38 and 129 is found in *Carmacks Construction Ltd. v. Beaumont* (1981), 30 A.R. 328 (Alta. Master) in which the Village of Beaumont applied to be struck as a defendant pursuant to Rule 38(3). In dismissing the application, Master Funduk held at 349-350:

> In my view, the history of both Rules 38 and 129 indicates completely different functions. It is, in my view, a questionable use of Rule 38 to in effect strike out an action against a defendant on the ground it discloses no cause of action. Sub-rule (3) envisages only the "name" of a party be struck out. I have difficulty in appreciating how this envisages deciding whether the plaintiff has a good cause of action against a defendant. In a sense no defendant is "improperly joined" if a claim is being made against him. If a defendant is joined for an improper purpose, such as discoveries or costs, Rule 38 could be utilized. If no claim is made against a defendant, Rule 38 could be utilized. If it is not necessary, for whatever reason, for a person to be a party in order for the court to effectually and completely adjudicate on the cause or matter, Rule 38 would be appropriate.

20 I agree with that analysis. Although Rules 38 and 129 appear to share an overlapping effect, the purpose of the Rules is very different. Rule 38 is designed to ensure that the proper parties are included within a claim, while Rule 129 is designed to ensure that the pleadings reveal a valid cause of action between those parties. Evidence is admissible on an application under either Rule with the stated exception of Rule 129(1)(a).

**V. Did the Chambers Judge Err in Removing the Honourable Ralph Klein and the Honourable Shirley McClellan as Named Defendants?**

21 The chambers judge ordered the removal of The Honourable Ralph Klein and The Honourable Shirley McClellan from the within claims on the basis that they should not have been named personally as defendants. In so doing, the chambers judge essentially held that Klein and McClellan were "improperly joined" in the claims within the meaning of Rule 38(3).

***Personal Liability***

22 It is a well-established principle of tort law that liability is, firstly, personal. As Ghislain Otis states in "*Personal Liability of Public Officials for Constitutional Wrongdoing: A Neglected Issue of Charter Application*" (1996) 24 Man. L.J. 23 at 26-27:

> Dicey has long ago demonstrated that the common law binds public officials *qua* individuals and not specifically as governmental actors. The central tort principle of individual responsibility dictates that an official's tort is first and foremost a private personal wrong. When a government official is found personally liable to pay damages at common law, it is normally because the court has identified a situation where the defendant has either breached a duty of care that was personally owed to the plaintiff or committed some other recognized tort governing relations between two individuals. The tort of misfeasance in a public office, which applies exclusively to defendants purporting to act in a public capacity, provides the only exception to this general rule. It is therefore not so illogical that Dicey should have understood this area of the law to be "all in terms of individuals". [Footnotes omitted.]

Thus, in determining the liability of a Crown servant or officer, no distinction should be drawn between the individual's "official" versus "unofficial" actions. No matter the role of the tortfeasor, liability will always fall "first and foremost" personally upon that individual. See also: *George v. Harris* (March 3, 1999), Doc. 96-CU-99569 (Ont. Gen. Div.) at para. 33, endorsed by the Ontario Supreme Court of Justice, Divisional Court at (June 16, 1999), Doc. 155/99 (Ont. Div. Ct.).

23 This same view is shared by Professor Hogg in *Liability of the Crown*, 2nd ed. (Toronto: Carswell, 1989) at 141-142 wherein he states:

# Tab 8

2010 ABCA 67
Alberta Court of Appeal

Bröeker v. Bennett Jones Law Firm

2010 CarswellAlta 1498, 2010 ABCA 67, [2010] A.W.L.D. 3545, [2010] A.W.L.D. 3600, [2010] A.W.L.D. 3601, [2010] A.W.L.D. 3630, [2010] A.J. No. 1081, 185 A.C.W.S. (3d) 564, 29 Alta. L.R. (5th) 167, 487 A.R. 111, 495 W.A.C. 111

# Cathyrene Bröeker (Appellant / Applicant) and Bennett Jones Law Firm and The Sheldon Mervin Chumir Estate (Respondents / Respondents)

Jean Côté, Constance Hunt, Keith Ritter JJ.A.

Heard: January 12, 2010
Judgment: February 26, 2010
Docket: Calgary Appeal 0901-0059-AC

Counsel: G.F. Scott, Q.C. for Respondent
Cathyrene Bröeker, Appellant for herself

Subject: Estates and Trusts; Civil Practice and Procedure; Public; Torts

**Headnote**

**Estates and trusts --- Estates — Passing of accounts — Miscellaneous issues**

C commenced civil action against respondent law firm in 2007 — Shortly after C filed application for formal passing of accounts on surrogate file that was created in 1992 and fully administered by 1996 — C also filed notice of motion in surrogate action, alleging claim against deceased's estate as unpaid claimant — Each document named law firm as respondent — C's actions related to alleged defamation by deceased, S, in 1990 and to alleged negligence and breach of fiduciary duty by law firm in acting on C's behalf — Alleged defamation occurred when deceased obtained restraining order against C, C sought legal advice and said that on basis of that advice did not take proceedings when restraining order was obtained — Case management judge concluded that C had no standing to ask estate to pass accounts as she had not proven her interest in estate — C appealed — Appeal dismissed — C argued, among other things, that case management judge erred in making her disposition in absence of notice of motion from law firm — Notice of law firm's intention to bring motion to have C's applications dismissed was provided in its case management agenda proposals — Moreover, when C raised issue of notice requirement with case management judge, judge indicated that she was bringing motion of her own accord — Case management judge had authority to bring motion of her own accord pursuant to Court of Queen's Bench Civil Practice Note No. 1 — Process is less formal once case management is in place, often parties will ask that certain issues be placed on agenda without formally filing written notice of motion, which was what happened in C's case.

**Estates and trusts --- Estates — Powers and duties of personal representatives — Payment of debts — Priorities of claims — General principles**

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proven her interest in estate — C appealed — Appeal dismissed — C argued, among other things, that case management judge erred in making her disposition in absence of notice of motion from law firm — Notice of law firm's intention to bring motion to have C's applications dismissed was provided in its case management agenda proposals — Moreover, when C raised issue of notice requirement with case management judge, judge indicated that she was bringing motion of her own accord — Case management judge had authority to bring motion of her own accord pursuant to Court of Queen's Bench Civil Practice Note No. 1 — Process is less formal once case management is in place, often parties will ask that certain issues be placed on agenda without formally filing written notice of motion, which was happened in C's case.

**Civil practice and procedure --- Practice on interlocutory motions and applications — Notice of motion or application — Service — Time for**

C commenced civil action against respondent law firm in 2007 — Shortly after C filed application for formal passing of accounts on surrogate file that was created in 1992 and fully administered by 1996 — C also filed notice of motion in surrogate action, alleging claim against deceased's estate as unpaid claimant — Each document named law firm as respondent — C's actions related to alleged defamation by deceased, S, in 1990 and to alleged negligence and breach of fiduciary duty by law firm in acting on C's behalf — Alleged defamation occurred when deceased obtained restraining order against C, C sought legal advice and said that on basis of that advice did not take proceedings when restraining order was obtained — Case management judge concluded that C had no standing to ask estate to pass accounts as she had not proven her interest in estate — C appealed — Appeal dismissed — C argued, among other things, that case management judge erred in making her disposition in absence of notice of motion from law firm — Notice of law firm's intention to bring motion to have C's applications dismissed was provided in its case management agenda proposals — Moreover, when C raised issue of notice requirement with case management judge, judge indicated that she was bringing motion of her own accord — Case management judge had authority to bring motion of her own accord pursuant to Court of Queen's Bench Civil Practice Note No. 1 — Process is less formal once case management is in place, often parties will ask that certain issues be placed on agenda without formally filing written notice of motion, which was happened in C's case.

**Professions and occupations --- Barristers and solicitors — Negligence — In conduct of action — Failure to pursue action with diligence**

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**Table of Authorities**

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*Cerny v. Canadian Industries Ltd.* (1972), [1972] 6 W.W.R. 88, 30 D.L.R. (3d) 462, 1972 CarswellAlta 77 (Alta. C.A.) — followed

*Dagenais v. Canadian Broadcasting Corp.* (1994), 1994 CarswellOnt 1168, 1994 SCC 102, 34 C.R. (4th) 269, 20 O.R. (3d) 816 (note), [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12, 175 N.R. 1, 94 C.C.C. (3d) 289, 76 O.A.C. 81, 25 C.R.R. (2d) 1, 1994 CarswellOnt 112 (S.C.C.) — referred to

*Decock v. Alberta* (2000), 255 A.R. 234, 220 W.A.C. 234, 2000 CarswellAlta 384, 79 Alta. L.R. (3d) 11, 186 D.L.R. (4th) 265, [2000] 7 W.W.R. 219, 2000 ABCA 122 (Alta. C.A.) — referred to

*First Mortgage Fund (V) Inc. (Receiver of) v. Boychuk* (2002), 8 Alta. L.R. (4th) 212, 2002 ABCA 194, 2002 CarswellAlta 997, 312 A.R. 1, 281 W.A.C. 1 (Alta. C.A.) — referred to

*Hover v. Metropolitan Life Insurance Co.* (1999), 1999 CarswellAlta 338, 1999 ABCA 123, 46 C.P.C. (4th) 213, 91 Alta. L.R. (3d) 226, (sub nom. *Metropolitan Life Insurance Co. v. Hover)* 237 A.R. 30, (sub nom. *Metropolitan Life Insurance Co. v. Hover)* 197 W.A.C. 30 (Alta. C.A.) — referred to

*Indian Residential Schools, Re* (2001), 2001 CarswellAlta 1150, 2001 ABCA 216, 286 A.R. 307, 253 W.A.C. 307, [2002] 1 W.W.R. 272, (sub nom. *Residential Schools, Re)* 204 D.L.R. (4th) 80, 12 C.P.C. (5th) 80, 96 Alta. L.R. (3d) 16 (Alta. C.A.) — referred to

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**Rules considered:**

*Alberta Rules of Court*, Alta. Reg. 390/68
Generally — referred to

R. 129 — considered

R. 384 — considered

R. 384(1) — considered

R. 384(2) — considered

Civil Practice Note 1, s. 12 — considered

*Surrogate Rules*, Alta. Reg. 130/95
R. 2(1) — referred to

R. 64(1) — referred to

R. 64(1)(b) — considered

APPEAL from decision finding that plaintiff had no standing to ask estate to pass accounts.

**Per curiam:**

**Background**

1 The appellant, Cathyrene Bröeker, commenced a civil action against the respondent, Bennett Jones Law Firm, in June 2007. In June 2008, the appellant's originating notice was converted to a statement of claim. Shortly thereafter, the appellant filed an application for the formal passing of accounts on a surrogate file that was created in January 1992 and fully administered by July 1996 (the "surrogate action"). She also filed a notice of motion (and affidavits in support) in the surrogate action, alleging a claim against the estate as an unpaid claimant. Each of these documents named Bennett Jones Law Firm as the respondent. The appellant's actions relate to alleged defamation by the deceased, Sheldon Chumir, in 1990 and to alleged negligence and breach of fiduciary duty by the respondent firm in acting on the appellant's behalf.

2 The defamation by the deceased allegedly occurred when he obtained a restraining order against the appellant and her mother, neither of whom appealed that order or otherwise took proceedings to have it set aside. The appellant sought legal advice after she became aware of the restraining order and says that on the basis of that advice did not take proceedings around the time the restraining order was obtained. At the hearing of this appeal, she stated that her complaint against the estate is that it never vacated the restraining order. The converted statement of claim does not mention this, nor does the appellant's motion for passing accounts or claim to be an unpaid estate claimant.

3 The civil action was assigned to a case management judge and, in a letter to the case management judge (copied to the appellant) dated September 17, 2008, the respondent proposed an agenda for the upcoming meeting on October 16, 2008. That letter indicated the respondent's intention to seek dismissal of the appellant's applications in the surrogate action on the basis that, in the context of the surrogate file, any purported claim against the respondent was improperly brought, and any purported relief against the respondent improperly sought.

4 The respondent's application to dismiss the appellant's applications in the surrogate action was not dealt with at the October 16th meeting because the surrogate matter had not been specifically assigned to case management and, on that basis, the appellant objected to her jurisdiction to make orders concerning surrogate matters. Nevertheless, the case management judge raised concerns with the appellant that the converted statement of claim disclosed no basis for any relief from the estate, as all allegations in it were directed at the respondent and not the estate. She indicated to the appellant that she would seek to be appointed case manager of the surrogate action and would then dismiss the claims. Later that month, the case management judge was assigned to manage the surrogate action as well.

5 On December 5, 2008, the appellant filed another notice of motion in the surrogate action, this time naming the following respondents: Sheldon Mervin Chumir Estate, Junius Investments Ltd., Sheldon Mervin Chumir Foundation and Trust, and John Armstrong c/o Bennett Jones LLP. By letter dated January 23, 2009, the respondent gave notice to the case management judge

and the appellant of matters to be addressed at the next case management meeting, including its repeated request to have the appellant's surrogate action applications dismissed.

6 During the January 27, 2009 case management meeting, the appellant claimed that the respondent's application to dismiss was improperly brought before the case management judge, as it should have been brought by way of notice of motion. The case management judge dismissed that suggestion. After seeking clarification from the appellant respecting the nature of her purported claim in the surrogate action, the case management judge summarized her understanding of the appellant's claim as follows:

> ... [Y]ou think someone should have brought an action on your behalf [...] some time before 1992 against Sheldon Chumir, and other people in his office, for defamation. And what you are saying is that did not happen and Bennett Jones was instructed to do that, and they did not do that, and therefore you have a good claim for defamation and they are liable in damages ... for failing to represent you in pursuing that action, and therefore they have to pay you out. [...] Bennett Jones is at fault for not pursuing your claim in defamation against Sheldon Chumir. That is your argument. [ARD, F75, ll. 13-25]

7 The appellant alleged she had an actual claim against the estate, but did not make clear what that claim was. There was no evidence that the appellant was ever a claimant when the surrogate action was being dealt with initially and if her allegation is that she should have been, the case management judge determined that was related to allegations against the respondent, not the estate.

8 Counsel for the respondent submitted that on the face of the documents filed in the surrogate matter, there was no action against the deceased or any of his employees for alleged defamation and therefore nothing to be pursued with respect to the estate. He argued that any allegation that a lawyer failed to properly represent the appellant as a claimant of the estate would result in an action against the lawyer and not the estate, leaving no basis for the estate to be involved.

9 The case management judge concluded that the appellant had no standing to ask the estate to pass accounts, as she had not proven her interest in the estate. She also confirmed that the appellant's actual claim is against the respondent for its alleged failure to pursue the appellant's claims, defamation or otherwise, against the deceased. Consequently, the case management judge was satisfied that the appellant had no basis for any claim against the estate, nor standing to make such a claim, and determined that any cause of action properly fell within the confines of the civil matter. The case management judge therefore set aside the appellant's application for formal passing of accounts and her claim as unpaid claimant, and prohibited her from filing further documents in the estate action.

10 The appellant appeals that order to this Court and also brought a number of applications, several of which are first instance applications regarding the conduct of the litigation at Queen's Bench. The appellant did not raise any of the latter applications in her oral argument and we will deal with them by considering the written materials only.

11 At the commencement of the appeal hearing, we dismissed the appellant's application to have an in-camera appeal, with reasons to follow. Those reasons are found at para. 25. The appellant also brought a fresh evidence application, which the panel asked the appellant to argue along with her argument on the main appeal.

**Issues and Standard of Review**

12 The appellant argues that the case management judge erred by:

> 1. Overreaching her jurisdiction in granting final relief for an uncontested estate and in splitting the claims, which were otherwise consolidated;
>
> 2. Misconstruing the fraud or undue influence evidenced in the surrogate file; and
>
> 3. Failing to uphold the appropriate standard by surprise arbitrary rulings and cancellations of scheduled summary judgment hearings that were to address both surrogate claims, pursuant to an existing order.

13 If a chambers judge or a case management judge fails to give sufficient weight to relevant considerations, proceeds arbitrarily, on wrong principles or on an erroneous view of the facts, or if there is likely to be a failure of justice, appellate interference is warranted: *Hover v. Metropolitan Life Insurance Co.*, 1999 ABCA 123, 237 A.R. 30 (Alta. C.A.) at para. 10, citing *Russell Food Equipment (Calgary) Ltd. v. Valleyfield Investments Ltd.* (1962), 40 W.W.R. 292, 1962 CarswellAlta 57 (Alta. S.C.) at para. 9. Questions of law engage the correctness standard: *Northland Bank v. Wettstein* (1997), 200 A.R. 150 (Alta. C.A.) at para. 9; *Decock v. Alberta*, 2000 ABCA 122, 255 A.R. 234 (Alta. C.A.). However, exercises of discretion will be reviewed on a reasonableness standard: *Decock* at para. 13; *Indian Residential Schools, Re* (sub nom. *Doe v. Canada*), 2001 ABCA 216, 286 A.R. 307 (Alta. C.A.) at para. 23.

14 The striking of a claim under Rule 129 of the *Alberta Rules of Court* is discretionary and therefore subject to the reasonableness standard absent an error of law: *Tottrup v. Alberta (Minister of Environment)*, 2000 ABCA 121, 255 A.R. 204 (Alta. C.A.) at para. 3; *First Mortgage Fund (V) Inc. (Receiver of) v. Boychuk*, 2002 ABCA 194, 312 A.R. 1 (Alta. C.A.) at para. 9, citing *Tanar Industries Ltd. v. American Home Assurance Co.* (1998), 223 A.R. 348 (Alta. C.A.), at 352 and *Decock*.

**Analysis**

15 The appellant argues that the case management judge erred in making her disposition in the absence of a notice of motion from the respondent and cites Rule 384. Rule 384 provides:

> (1) An application in an action or proceeding shall be made by motion and, unless the court otherwise orders, notice of the motion shall be given to all parties affected.
>
> (2) A Notice of Motion must
>
> (a) state the relief sought,
>
> (b) state briefly the grounds and material or evidence intended to be relied on, including any reference to any statutory provision or Rule sought to be invoked, and
>
> (c) specify any irregularities complained of or objection relied on.

16 Notice of the respondent's intention to bring a motion to have the appellant's applications in the surrogate action dismissed was provided in its case management agenda proposals of September 17, 2008 and January 23, 2009. Moreover, when the appellant raised the issue of the notice requirement with the case management judge, the case management judge indicated that she was bringing the motion of her own accord. Paragraph 12 of the Court of Queen's Bench Civil Practice Note No. 1 gives her the authority to do so. It provides:

> 12. Subject to section 13, the case management judge may, on application of any party to the action, or on his or her own initiative, make any order which the case management judge determines will likely promote the efficient resolution of the action.

17 The purpose of notice is to alert parties to what they will be facing when applications are brought by opposing parties. That process is less formal once case management is in place, as case management contemplates that there will be regular meetings before the same judge at which both process and substantive issues will be dealt with. Often the parties will ask that certain issues be placed on the agenda for a particular meeting without formally filing a written notice of motion. That is what was done in this case and, in fact, the appellant enjoyed a "dry run" when the issues dealt with in this appeal were addressed during the October 16, 2008 case management meeting. Counsel for the respondent asked, in writing, that the same issues be dealt with in January 2009 so the appellant could hardly have been surprised when the case management judge said she was going to consider whether the surrogate claim disclosed a cause of action against the estate. The process by which the motion came before the case management judge was not improper.

18 Rule 129 of the *Alberta Rules of Court* provides:

> 129(1) The court may at any stage of the proceedings order to be struck out or amended any pleading in the action, on the ground that
>
> (a) it discloses no cause of action or defence, as the case may be, or
>
> (b) it is scandalous, frivolous or vexatious, or
>
> (c) it may prejudice, embarrass or delay the fair trial of the action, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly.
>
> (2) No evidence shall be admissible on an application under clause (a) of subrule (1).
>
> (3) This Rule, so far as applicable, applies to an originating notice and a petition.

19 It is not clear whether Rule 129 applies to claims in surrogate matters initiated by notice of motion. This Court doubted, but did not decide, whether Rule 129 applies to judicial review matters commenced by originating notice, suggesting that motions to strike are usually found in lawsuits commenced by statement of claim: *C.U.P.E., Local 8 v. Health Region No. 4* (1997), 200 A.R. 175 (Alta. C.A.) at para. 15-16. The *Rules of Court* apply to surrogate matters if the matter is not otherwise dealt with under the *Surrogate Rules*: R. 2(1). *Surrogate Rule* 64(1)(b) permits the court to summarily dispose of issues arising out of applications. It is at least arguable that, in surrogate matters, R. 64(1) governs rather than R. 129.

20 Assuming without deciding that R. 129 applies in this case, the relevant test was set out by this Court in *Cerny v. Canadian Industries Ltd.*, [1972] 6 W.W.R. 88 (Alta. C.A.) at 95:

> It is clear from these decisions that a court should not strike out a pleading or part thereof as disclosing no cause of action or as being frivolous or vexatious or as being an abuse of the process of the court, which in most cases would have the effect of dismissing an action or denying a party a right to defend, unless the question is beyond doubt and there is no reasonable cause of action; ...
>
> (See also: *Boudreault v. Barrett* (1995), 174 A.R. 71, 33 Alta. L.R. (3d) 60 (Alta. C.A.).)

21 In making her determination, the case management judge reviewed the filed documents and canvassed the nature of the claim with the appellant. Having done so, she concluded that the allegations are not against the deceased's estate but against the respondent firm for its alleged failure to pursue a claim against the deceased. As no facts are alleged against the estate, there cannot be a reasonable cause of action against it: see *Tottrup v. Alberta (Minister of Environment)*, 2000 ABCA 121, 255 A.R. 204 (Alta. C.A.) at para. 7.

22 We can find no error in the case management judge's application of the law, nor any unreasonableness in the exercise of her discretion. In the circumstances, the question of whether the notice of motion discloses a cause of action is beyond doubt; they do not. The same result would obtain under R. 64(1)(b). We therefore dismiss this appeal.

23 With respect to the appellant's application for fresh evidence, this appeal proceeded on the basis that the evidence was admissible at this hearing (without deciding whether the evidence meets the test for admission on appeal). We have nevertheless dismissed the appeal and need not deal with the admissibility of the proffered fresh evidence.

24 With respect to the first instance applications regarding the Queen's Bench litigation, this Court usually declines to hear such applications. Simply put, it is not the function of an appeal court to deal with matters on a first instance basis. Appeal courts hear appeals. Such applications brought by the appellant are not appeals. Rather, they ask this Court to direct the case management judge to act or decline to act in a certain way should certain issues be raised before her. With respect to some of

the relief sought, the respondent notes that it has no intention of proceeding as the appellant suspects it might. We will not grant the relief sought but leave these matters to the trial court.

25 Finally, regarding the appellant's application to have the hearing of this appeal in camera, these are our reasons for dismissing that application. First, the media were not notified regarding this application. Court proceedings should be open to the media absent compelling grounds, and even then media must be given an opportunity to address the court with respect to rights surrounding dissemination of court proceedings: *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.), at 876-878. The grounds advanced by the appellant relate to her concern that a former partner of the respondent firm might somehow be implicated by these proceedings. Her concerns are largely speculative, as this appeal relates not to what the respondent or its partners did, but whether there is any cause of action advanced against the estate that would potentially give rise to a relief order against it.

26 This appeal is dismissed, as are all associated applications.

*Appeal dismissed.*

Footnotes

* Leave to appeal refused *Bröeker v. Bennett Jones Law Firm* (2010), 2010 CarswellAlta 1931, 2010 CarswellAlta 1932 (S.C.C.)

# Transmission Report

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March 16, 2016


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James H. Brown & Associates
2400 Sun Life Place
10123 - 99 Street
Edmonton, AB T5J 3H1

Attention: Michael N. Hoosein

Dear Sir:

**Re: Ashley Jackson v. Michael Stasishin and Nadia Stasishin**
**Action No. 1503 19277**

Further to my letter of February 19, 2016, I confirm that I have been retained to represent Michael and Nadia Stasishin with respect to this matter.

In reviewing the documentation that you have provided to my client, I note that, while you have provided multiple bundles of documentation from the Northeast Community Health Centre with respect to Ms. Jackson's chart and file, it does not appear that we have a complete copy of that chart and file. In particular, I note Dr. David Ross's letter to your firm of October 15, 2015, which suggest that he attached "all relevant information" and that he has removed any "third party identifying information". I also note that, while it appears that your client saw doctors at the Northeast Community Health Centre in April 2015 for referral back to physiotherapy, in March 2015 for referral for left knee x-ray, and in July 2015 for an ultrasound of her right shoulder, there are no corresponding chart entries in the records from Northeast Community Health Centre reflecting these visits.



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Abbreviations:

| | | | | |
|---|---|---|---|---|
| HS: Host send | PL: Polled local | MP: Mailbox print | CP: Completed | TS: Terminated by system |
| HR: Host receive | PR: Polled remote | RP: Report | FA: Fail | G3: Group 3 |
| WS: Waiting send | MS: Mailbox save | FF: Fax Forward | TU: Terminated by user | EC: Error Correct |

# Tab 9

Province of Alberta

JUDICATURE ACT

# ALBERTA RULES OF COURT

**Alberta Regulation 124/2010**

With amendments up to and including Alberta Regulation 128/2015

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proceeding is made under section 2(2) of the *Class Proceedings Act*.

**Appointment of case management judge**

**4.13** The Chief Justice may order that an action be subject to case management and appoint a judge as the case management judge for the action for one or more of the following reasons:

(a) to encourage the parties to participate in a dispute resolution process;

(b) to promote and ensure the fair and efficient conduct and resolution of the action;

(c) to keep the parties on schedule;

(d) to facilitate preparation for trial and the scheduling of a trial date.

**Authority of case management judge**

**4.14(1)** A case management judge, or if the circumstances require, any other judge, may

(a) order that steps be taken by the parties to identify, simplify or clarify the real issues in dispute,

(b) establish, substitute or amend a complex case litigation plan and order the parties to comply with it,

(c) make an order to facilitate an application, proceeding, questioning or pre-trial proceeding,

(d) make an order to promote the fair and efficient resolution of the action by trial,

(e) facilitate efforts the parties may be willing to take towards the efficient resolution of the action or any issue in the action through negotiation or a dispute resolution process other than trial, or

(f) make any procedural order that the judge considers necessary.

**(2)** Unless the Chief Justice or the case management judge otherwise directs, or these rules otherwise provide, the case management judge must hear every application filed with respect to the action for which the case management judge is appointed.

# Tab 10

1993 CarswellOnt 473
Ontario Court of Justice (General Division) [Divisional Court]

Essa (Township) v. Guergis

1993 CarswellOnt 473, [1993] O.J. No. 2581, 15 O.R. (3d) 573,
22 C.P.C. (3d) 63, 4 W.D.C.P. (2d) 578, 52 C.P.R. (3d) 372

# CORPORATION OF THE TOWNSHIP OF ESSA and BRENDA SIGOUIN (plaintiffs (defendants-by-counterclaim) appellants) v. GEORGE GUERGIS and ROBERT O'BRIEN (defendants (plaintiffs-by-counterclaim) respondents)

EDWARD MEMBERY (plaintiff (defendant-by-counterclaim) appellant) v. WALTER THOMAS HILL and MARITA ANDREA HILL (defendants (plaintiffs-by-counterclaim) respondents); ADVOCATES' SOCIETY and LAW SOCIETY OF UPPER CANADA (intervenors)

Heck v. Royal Bank

O'Brien, MacFarland, Smith JJ.

Heard: September 20, 1993
Judgment: October 27, 1993
Docket: Docs. 27703/93; 28667/93

Counsel: *E.M. Green*, for appellants (plaintiffs and defendants-by-counterclaim) Township of Essa and Edward Membery.
*M. Scharf*, for respondents (defendants and plaintiffs-by-counterclaim) George Guergis, Robert O'Brien and Walter and Andrea Hill.
*Neil Finkelstein*, for intervenor The Advocates' Society.
*Gavin MacKenzie*, for intervenor Law Society of Upper Canada.

Subject: Intellectual Property; Civil Practice and Procedure; Property

**Headnote**

Barristers and solicitors — Relationship with client — Counsel as witness — Counsel appearing on motions relying on affidavit evidence filed by co-counsel — Counsel at trial not permitted to call any present or former member of firm as witness at trial — Appeal allowed from order requiring counsel to withdraw and from order prohibiting all members of solicitor's firm from appearing as counsel at trial — Law Society of Upper Canada Rules of Professional Conduct not requiring counsel to withdraw if partner or associate having filed affidavit in support of motion — Variety of factors to be considered before requiring removal of firm.

**Barristers and Solicitors --- Relationship with client — Counsel as witness**

**Practice --- Judgments and orders — General**

Pre-trial procedures — Pre-trial conference — Appeal allowed from order by pre-trial judge relating to significant, substantive issues where no formal notice of motion or material filed in support of motion — Ontario, Rules of Civil Procedure, r. 50.01, 50.02.

In the first action, the plaintiff alleged that the defendants were in breach of an interim injunction and moved to have the defendants found in contempt. Co-counsel for the plaintiff filed affidavits in support of the contempt proceedings. The defendants moved to strike the contempt proceedings on the basis that plaintiff's counsel was relying on the affidavits of co-counsel in support of the motion. The judge ordered that the plaintiff file new affidavits or retain new counsel. The plaintiff appealed.

In the second action, a pre-trial conference was held and the defendants' solicitors filed pre-trial memos indicating they intended to call three lawyers from the law firm representing the plaintiff as witnesses at the trial. The defendants' memo also indicated that they would seek an order removing the plaintiff's solicitors from the litigation on the basis that a partner or associate of the plaintiff's counsel might be called as a witness for the defence. No formal notice of motion or supporting affidavit material was served. At the pre-trial hearing, the judge ordered that no member of the law firm then acting for the plaintiff could appear as counsel at trial. The plaintiff appealed.

**Held:**

The appeals were allowed.

The Rules of Professional Conduct adopted by the Law Society of Upper Canada ("LSUC") permitted counsel to rely on the affidavits of their partners and associates in support of a motion. While this practice was prohibited by the Canadian Bar Association's Code of Professional Conduct ("CBA"), lawyers in Ontario were required to abide by the LSUC Rules and were not required to abide by the CBA Code. The judge's order to remove the solicitors of record was set aside and the matter directed to proceed on the affidavits filed by co-counsel.

A law firm should not automatically be prevented from acting in a lawsuit when a lawyer from that firm was called as a witness for the opposing side. The requirement to give evidence which would assist the opposing side did not, in all cases, give rise to a conflict of interest requiring removal of the solicitors of record. As issues were developed or resolved during trial, the lawyer's evidence might not be required. A trial judge would be in a much better position to determine if the lawyer's firm should be disqualified. The order removing the plaintiff's solicitors at pre-trial was premature and was reversed.

Where an application was made to remove the law firm on the basis that one of the lawyers from the firm would be called as a witness at trial, the court should adopt a flexible approach and consider each case on its own merits. A variety of factors should be considered, including: (a) the stage of the proceedings; (b) the likelihood the witness will be called; (c) the good faith of the party making the application; (d) the significance of the evidence to be led; (e) the impact on the party's right to be represented by counsel of choice; (f) whether the trial was by judge or jury; (g) the likelihood of a real conflict arising or that the evidence will be "tainted"; (h) who would call the witness; and (i) the relationship between counsel, the prospective witness and the parties to the litigation.

As a general rule, pre-trial judges should not make significant, contentious rulings at pre-trial hearings in the absence of clear notice and an opportunity to meet and respond to the ruling sought. Although the purpose of pre-trials was to facilitate settlement and expedite trials, the judge's concern for the multiplicity and expense of interim applications and motions was required to be balanced with the necessity of giving a fair opportunity to meet and deal with serious issues. The application to remove solicitors should not have been dealt with at the pre-trial on the basis of the information available.

**Table of Authorities**

**Cases considered:**

*Bilson v. University of Saskatchewan*, [1984] 4 W.W.R. 238, (sub nom. *Re Bazant; Bilson v. University of Saskatchewan)* 33 Sask. R. 1 (C.A.) — *distinguished*

*Carlson v. Loraas Disposal Services Ltd.* (1988), 30 C.P.C. (2d) 181, 70 Sask. R. 161 (Q.B.) — *applied*

*Heck v. Royal Bank*, White J. (Ont. Gen. Div.) [unreported] — *referred to*

*Imperial Oil Ltd. v. Grabarchuk* (1974), 3 O.R. (2d) 783 (C.A.) — *referred to*

*Kitzerman v. Kitzerman* (January 25, 1993), Doc. 72584/91Q, Master Donkin (Ont. Master), 4 W.D.C.P. (2d) 43 — *not followed*

*MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, 48 C.P.C. (2d) 113, [1991] 1 W.W.R. 705, 121 N.R. 1, 77 D.L.R. (4th) 249, 70 Man. R. (2d) 241 *distinguished*

*Membery v. Hill*, Taliano J. (Ont. Gen. Div.) [unreported] — *referred to*

*Planned Insurance Portfolios Co. v. Crown Life Insurance Co.* (1989), 36 C.P.C. (2d) 218, 68 O.R. (2d) 271, 58 D.L.R. (4th) 106 (H.C.) — *considered*

*Shell Canada Products Ltd. v. Barrie (City) Chief Building Official* (1992), 13 M.P.L.R. (2d) 279 (Ont. Gen. Div.) — *referred to*

**Statutes considered:**

Law Society Act, R.S.O. 1990, c. L.8 —

s. 63

s. 63(4)

**Rules considered:**

Ontario, Rules of Civil Procedure —

r. 15.02

r. 50.01

r. 50.02

r. 59.06

**Regulations considered:**

Law Society Act, R.S.O. 1990, c. L.8 —

R.R.O. 1990, Reg. 708, s. 20(1)

Appeal by plaintiff from order of Weekes J. requiring removal of plaintiff's solicitors of record; Appeal by plaintiff from order of Ferguson J. dated January 28, 1993, reported (1993), 15 C.P.C. (3d) 173, 12 O.R. (3d) 111 (Gen. Div.), additional reasons at (1993), 15 O.R. (3d) 127 (Gen. Div.), requiring removal of plaintiff's solicitors of record.

**The judgment of the court was delivered by *O'Brien J.*:**

1 These two appeals were heard together as there were overlapping issues. The issues on the appeals were:

1) Should there be a judicial policy prohibiting counsel from appearing on an application where a member, or associate, of the same firm provides affidavit evidence?

2) Should there be a judicial policy prohibiting trial counsel from appearing on an application where a member, or associate, of the same firm is, or is likely to be, a trial witness?

3) Should a pre-trial judge make an order relating to significant, substantive issues at pre-trial where there is no formal notice of motion, nor material filed in support of the motion?

2 The Law Society of Upper Canada and the Advocates' Society were granted intervenor status and made submissions on the first two issues only. That intervention was most helpful.

3 The appeal involving the Township of Essa (Essa) primarily concerned the first issue; the appeal of Edward Membery concerned the second and third issues.

4 I will briefly outline the factual backgrounds of each appeal.

**Essa Township Appeal**

5 Essa commenced proceedings alleging the defendants Guergis and O'Brien were using property they owned contrary to Essa zoning by-laws. An interim injunction was granted on consent restricting the defendants' use of that property. Essa subsequently commenced contempt proceedings alleging a breach of the interim injunction.

6 Affidavits were filed in support of the contempt proceeding. There was extensive cross-examination, undertakings were given and there were subsequent motions dealing with procedural matters arising therefrom.

7 The affidavit filed in support of the contempt application was sworn by a township official. Subsequent motions involving an application to receive oral evidence on the return of the contempt motion, and to amend the contempt application were brought on Essa's behalf.

8 In support of the subsidiary motions, Peter Thompson, a counsel for the firm representing Essa, swore affidavits. Mr. Thompson described himself as "co-counsel" in those affidavits. He was familiar with the matters and had conducted some of the cross-examinations and followed up on undertakings given. It was not intended that he would argue the contempt motion. His position appears to be that frequently referred to as "junior counsel". The use of the phrase "co-counsel"seems to have created many of the problems which subsequently arose.

9 On the return of the contempt motion, the defendants brought motions seeking to strike the contempt proceedings for failure to answer undertakings and also on the basis Mr. Thompson would act as counsel, or would assist senior counsel, and argument on the contempt motion would rely to some extent, on Mr. Thompson's affidavits.

10 Weekes J. presided on the return of the motions. He ruled plaintiff's counsel was not entitled to argue the motions relying on Mr. Thompson's affidavits and adjourned the motions to permit filing of new affidavits, or to permit Essa to retain new counsel. Leave to appeal that decision was granted.

**Edward Membery Appeal**

11 This matter involved a real estate transaction. Edward Membery (Membery), the plaintiff purchaser, refused to complete the transaction and sued for the return of his deposit. Walter and Marita Hill, the defendant vendors, counterclaimed for specific performance.

12 Membery is 81 years old. It is alleged he suffers from a manic/depressive syndrome, normally controlled by medication. It is alleged at the time of entering into the transaction he was having problems with his medication and was suffering dramatic mood swings. The pleadings allege he was incapable of entering into the transaction because of his mental condition. In the alternative, it is claimed the defendants, aware of his condition and his age, exerted undue influence in persuading him to enter into the transaction.

13 Membery is represented in this litigation by the law firm of Graham, Wilson and Green. He consulted a member of that firm before entering into the transaction. A member of the firm apparently drafted the purchase agreement. After the agreement was executed Membery again consulted that law firm, consulted two other lawyers in that firm, and then refused to complete the transaction.

14 Counsel proposing to conduct Membery's case at trial is one of the two lawyers consulted prior to the refusal to close.

15 After the action was commenced, defence counsel served a demand on plaintiff's counsel pursuant to r. 15.02 requiring plaintiff's counsel to make a declaration of his authority to commence proceedings. In his written response Mr. Green, plaintiff's counsel, stated he had authorization, that he had met with Membery prior to the date for closing the transaction, and prior to commencement of the lawsuit. Counsel stated he had assessed Membery's state of mind and satisfied himself as to Membery's ability to give instructions. It is anticipated Mr. Green will be plaintiff's counsel at trial.

16 A pre-trial conference was held after examinations for discovery were completed and a trial date scheduled. The positions of both sides were outlined as above, in pre-trial memos filed by both sides.

17 The memo filed on behalf of the defendants indicated the defendants intended to call all three lawyers Membery had consulted at the Graham, Wilson firm and would question them as to Membery's com petency. The defence claimed in that memo such evidence would not be subject to solicitor and client privilege. The defendants' memo also indicated defence counsel at the pre-trial hearing would seek an order removing the plaintiff's solicitors from the litigation because of the difficulties posed by having counsel testify. No formal notice of motion or other supporting affidavit material was served, plaintiff's counsel did not respond to that issue in the plaintiff's pre-trial memo.

18 D.S. Ferguson J. conducted the pre-trial hearing. He ordered no present or former members of the law firm then acting for the plaintiff could appear as counsel at trial. That decision was subsequently reported [*Heck v. Royal Bank*] (1993), 12 O.R. (3d) 111 (Gen. Div.). D.S. Ferguson J. subsequently amended his reasons [reported (1993), 15 O.R. (3d) 127 (Gen. Div.)]. He deleted statements suggesting counsel could not argue a motion where he had given *any* earlier evidence. D.S. Ferguson J. then limited his prohibition to counsel not appearing on a motion or at trial relying on counsel's own evidence.

19 These amended reasons were delivered 8 months after the initial decision on D.S. Ferguson J.'s own initiative. Leave to appeal the original decision had been granted 4 1/2 months before the amended reasons were issued.

***Issue 1 — Counsel Appearing on Motions relying on Affidavit Evidence from Members of Counsel's Firm***

20 Counsel all agree that it is improper for the deponent of an affidavit to act as counsel and rely on that affidavit. This has clearly been the law in this province for many years and is succinctly stated in *Imperial Oil Ltd. v. Grabarchuk* (1947), 3 O.R. (2d) 783 (C.A.). That point was not in issue in this appeal.

21 To a large extent the problem issue on this point stems from differences between the rules and commentary of professional conduct of the Law Society of Upper Canada (LSUC) and the rules and commentary of the professional conduct code adopted by the Canadian Bar Association (CBA). The essential difference relates to counsel using an affidavit of his partners or associates. The CBA code prohibits it, the LSUC rules do not mention it.

22 The relevant sections, both headed "The Lawyer as Advocate" are as follows:

**Law society of upper Canada code**

**Rule 10**

When acting as an advocate the lawyer, while treating the tribunal with courtesy and respect, must represent the client resolutely and honourably within the limits of the law.

.....

**Commentary**

***The Lawyer as Witness***

16.(a) The lawyer who appears as advocate should not submit the lawyer's own affidavit to the tribunal.

(b) The lawyer who appears as advocate should not testify before the tribunal save as may be permitted by the Rules of Civil Procedure or as to purely formal or uncontroverted matters. Nor should the lawyer express personal opinions or beliefs, or assert as a fact anything that is properly subject to legal proof, cross-examination or challenge. The lawyer must not in effect appear as an unsworn witness or put the lawyer's own credibility in issue. The lawyer who is a necessary witness should testify and entrust the conduct of the case to another lawyer. The lawyer who was a witness in the proceedings should not appear as advocate in any appeal from the decision in those proceedings. There are no restrictions on the advocate's right to cross-examine another lawyer, however, and the lawyer who does appear as a witness should not expect to receive special treatment because of professional status.

(c) The requirements of this paragraph are at all times subject to any contrary provisions of the law or the discretion of the tribunal before which the lawyer is appearing.

**Canadian bar association code, chapter IX**

**Rule**

When acting as an advocate, the lawyer must treat the tribunal with courtesy and respect and must represent the client resolutely, honourably and within the limits of the law.

.....

**Commentary**

***The Lawyer as Witness***

5. The lawyer who appears as an advocate should not submit the lawyer's own affidavit to or testify before a tribunal save as permitted by local rule or practice, or as to purely formal or uncontroverted matters. This also applies to the lawyer's partners and associates; generally speaking, they should not testify in such proceedings except as to merely formal matters. The lawyer should not express personal opinions or beliefs, or assert as fact anything that is properly subject to legal

> proof, cross-examination or challenge. The lawyer must not in effect become an unsworn witness or put the lawyer's own credibility in issue. The lawyer who is a necessary witness should testify and entrust the conduct of the case to someone else. Similarly, the lawyer who was a witness in the proceedings should not appear as advocate in any appeal from the decision in those proceedings. There are no restrictions upon the advocate's right to cross-examine another lawyer, and the lawyer who does appear as a witness should not expect to receive special treatment by reason of professional status.

23 The LSUC rules are enacted by the Society pursuant to s. 20(1) of Regulation 708 under *The Law Society Act*, R.S.O. 1990, c. L.8. These are as follows:

> 63. Subject to the approval of the Lieutenant Governor in Council, Convocation may make regulations respecting any matter that is outside the scope of the rule-making powers specified in section 62 and, without limiting the generality of the foregoing,
>
> .....
>
> 4. authorizing and providing for the preparation, publication and distribution of a code of professional conduct and ethics;

24 In his decision Weekes J. noted the differences between the LSUC rules and the CBA code and followed a decision of the Saskatchewan Court of Appeal, applying the CBA code. That decision was *Bilson v. University of Saskatchewan*, [1984] 4 W.W.R. 238.

25 In *Planned Insurance Portfolios Co. v. Crown Life Insurance Co.* (1989), 68 O.R. (2d) 271 (H.C.) (Rosenberg J.), there are statements conflicting with those in the *Bilson* decision. Rosenberg J. at p. 273, noted the differences between the LSUC rules and the CBA code and suggested LSUC rules appeared to deliberately delete the reference to the lawyer's partners.

26 Counsel for the LSUC on this appeal produced material indicating this was in fact so. He produced an extract from a report from the committee established by the LSUC to consider the matter which expressed concerns about the CBA code on that point. The CBA code was adopted in 1974. The LSUC adopted but amended the code in 1976.

27 In *Planned Insurance* (supra) Rosenberg J. noted at p. 274:

> All counsel acknowledge that the local practice in Ontario is that lawyers frequently appear on motions where their partners have filed affidavits even when the matters are extremely controversial and where there has been long and contentious cross-examination on the affidavits.

28 The CBA code commentary specifically provides local rules of practice take precedence over the code.

29 The CBA code has been adopted by some provinces. Saskatchewan is one of those. The court in *Bilson* was thus following a code which had been specifically adopted by the Law Society in that province.

30 In Ontario, lawyers are not required to abide by the CBA code but are required to abide by the LSUC rules. They are at risk of being reprimanded, suspended or disbarred (depending on the nature of the infraction) if they breach those rules.

31 I accept the submissions of LSUC counsel that courts should be reluctant to adopt the CBA code in preference to the LSUC rules in such circumstances.

**Conclusion**

32 As it appears Mr. Thompson did not intend to act as counsel on this matter, I conclude the order of Weekes J. should be set aside and the matter directed to proceed on the affidavits filed.

33 As a matter of interest I note that counsel for the defendants in this matter relied on affidavits sworn by secretaries in the office of that defence counsel. Those affidavits contained statements of information and belief based on what the secretaries

had been told by defence counsel who was appearing on this motion. Some of that informationand belief went to the root of the contempt matters.

34 The issue of that counsel appearing on the contempt motion was not raised on this appeal and I therefore do not deal with that point specifically. I understand the problem frequently arises in the offices of counsel practising alone. I suggest, however, the use of such affidavitsshould be avoided.

***Issue 2 — Trial Counsel Acting where Firm Member or Associate is, or is likely to be, a Trial Witness***

35 There is some overlap of this issue with the discussion above. The point arises directly from the Membery appeal.

36 The arguments raised in favour of removing the law firm representing Membery include a possible appearance of impropriety, or, that counsel calling, or questioning his own partner is representing in more than the usual way, that the evidence is true.

37 There is also an argument that a conflict of interest occurs when such a witness is called by the other side. The argument is that the witness will be called to assist the party against whom his firm is acting. As a firm member the witness has an interest in seeing the plaintiff succeeds. If called as a defence witness, he must testify honestly even if that will assist the defendants. It is argued this may result in a conflict of interest.

38 This latter argument was accepted in *Kitzerman v. Kitzerman* (January 25, 1993), unreported decision of Master Donkin, (Ont. Master), Action No. 72584/91Q at Toronto.

39 In argument in this case, defence counsel argued there would be an appearance of impropriety if the Graham, Wilson Green firm was not removed and relied heavily on statements made in *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, at p. 1263, Sopinka J.

40 In that decision Sopinka J. noted the importance of public confidence in the integrity of the legal profession and the administration of justice.

41 The facts in this case are significantly different from those in MacDonald. There, the issue involved the removal of a firm of solicitors where a junior lawyer changed firms. While with one firm the lawyer assisted counsel acting for one side of the litigation, the firm the lawyer joined subsequently acted for the opposing side. The Supreme Court upheld the disqualification of the second firm.

42 Many of the issues in that case do not arise in this appeal. In particular there is no reasonable apprehension in the mind of a client that confidential information given to one law firm would be disclosed to the opposite party.

43 I believe courts should be reluctant to make what may be premature orders preventing solicitors from continuing to act. In view of the expense of litigation and the enormous waste of time and money and the substantial delay which can result from an order removing solicitors, courts should do so only in clear cases. I adopt the approach taken on this point in *Carlson v. Loraas Disposal Services Ltd.* (1988), 30 C.P.C. (2d) 181 (Sask. Q.B.), at p. 188.

44 As discussed in the *Carlson* decision, an application to remove counsel can be made to the trial judge when it is certain there *is* a problem. In this case Mr. Green may, or may not be, subpoenaed to testify. Concessions or admissions may be made which will obviate the need to call him as a witness. The evidence he could give may be readily obtainable from other witnesses. As issues are developed, or resolved during trial, his evidence may not be required at all. A trial judge will be in a much better position to determine if his firm should be disqualified.

45 I do not accept the argument that when a lawyer is compelled to testify against the "other" side in a lawsuit the lawyer's firm must always be prevented from acting in the lawsuit. There are a variety of scenarios which might develop at, or during, trial. The possible conflict as discussed in the *Kitzerman* decision (supra) should not automatically result in a law firm's removal. In the course of litigation an honest witness is often compelled to give evidence which will assist a party that witness feels is

"opposite". I do not agree that such a possible conflict requires removal in all cases. There may be some where it does. I am not persuaded that decision should be made at this pre-trial stage of the proceedings in this case.

46 It should also be borne in mind that all applications to remove solicitors from the record are not brought with the purest of motives. The expense and delay involved in retaining new counsel may work to the substantial benefit of an opposing party in some cases.

47 Courts should also carefully consider the right of a client to be represented by counsel of choice.

48 I accept submissions made by counsel for the Advocates' Society that in these applications a court should approach the matter by following a flexible approach and consider each case on its own merits. A variety of factors should be considered. These will include:

— the stage of the proceedings;

— the likelihood that the witness will be called;

— the good faith (or otherwise) of the party making the application;

— the significance of the evidence to be led;

— the impact of removing counsel on the party's right to be represented by counsel of choice;

— whether trial is by judge or jury;

— the likelihood of a real conflict arising or that the evidence will be "tainted";

— who will call the witness if, for example, there is a probability counsel will be in a position to cross-examine a favourable witness, a trial judge may rule to prevent that unfair advantage arising;

— the connection or relationship between counsel, the prospective witness and the parties involved in the litigation.

**Conclusion**

49 Applying that approach to this case it is my view the order removing the Graham, Wilson and Green firm was prematurely made in this case and should be reversed.

***Issue No. 3 — Orders to be made by a Pre-trial Judge***

50 Rules 50.01 and 50.02 are relevant. They are as follows:

50.01 In an action or application, a judge may, at the request of a party or on his or her own initiative, direct the solicitors for the parties, either with or without the parties, and any party not represented by a solicitor, to appear before a judge or officer for a pre-trial conference to consider,

(*a*) the possibility of settlement of any or all of the issues in the proceeding;

(*b*) the simplification of the issues;

(*c*) the possibility of obtaining admissions that may facilitate the hearing;

(*d*) the question of liability;

(*e*) the amount of damages, where damages are claimed;

(*f*) the estimated duration of the hearing;

(*g*) the advisability of having the court appoint an expert;

(*h*) the advisability of fixing a date for the hearing;

(*i*) the advisability of directing a reference; and

(*j*) any other matter that may assist in the just, most expeditious and least expensive disposition of the proceeding.

50.02 (1) At the conclusion of the conference,

(*a*) counsel may sign a memorandum setting out the results of the conference; and

(*b*) where the conference is conducted by a judge, the judge may make such order as he or she considers necessary or advisable with respect to the conduct of the proceeding.

and the memorandum or order binds the parties unless the judge or officer presiding at the hearing of the proceeding orders otherwise to prevent injustices.

(2) A copy of a memorandum or order under subrule (1) shall be placed with the trial or application record.

51 As a general rule it is my view that pre-trial judges should not make significant, contentious rulings at pre-trial hearings. In the absence of clear notice and opportunity to meet, and respond to, the ruling sought. The obvious purpose of pre-trials is to facilitate settlement and expedite trials where there is no settlement. This will obviously include consideration of issues and removing those which are not genuine issues for trial.

52 On one hand, many judges are concerned by the multiplicity and expense of interim applications and motions which, in some cases, seem tactically motivated to harass and delay.

53 This must be balanced with the necessity of giving a fair opportunity to meet, and deal with, serious issues.

54 In this case I conclude the application to remove solicitors should not have been dealt with at pre-trial on the basis of the information available.

**Summary**

55 In *Essa v. Guergis and O'Brien*: order to go reversing order of Weekes J. and directing motions proceed on the basis of material filed.

56 In *Membery v. Hill*: order to go reversing order of D.S. Ferguson J. removing firm of Graham, Wilson and Green. Such order is without prejudice to the defendant's right to make further application to the trial judge.

57 There will clearly be cases in which trial or motion judges will be requested to amend judgments or reasons, as, for example, *Shell Canada Products Ltd. v. Barrie (City) Chief Building Official* (1992), 13 M.P.L.R. (2d) 279 (Ont. Gen. Div.). Rule59.06 specifically provides for this in some cases. This will normally be on motion with supporting material.

58 On the facts of this matter, however, I believe D.S. Ferguson J. should not have delivered amended reasons on his own initiative after the original decision had been appealed.

**Costs**

59 Costs to solicitors for Essa and Membery fixed on a party-and-party basis at $3,500 in each case, such costs to include disbursements.

60 I note that leave to appeal was resisted in *Membery*. In my view, it should not have been and that resulted in unnecessary expense. Leave had been granted earlier in the decision of *Heck v. Royal Bank* by White J. That decision was a companion decision to *Membery*, made by D.S. Ferguson J. and the issue identical. In granting leave in *Membery*, Taliano J. noted leave had already been granted in *Heck v. Royal Bank.*

61 Counsel for the Advocates Society and the LSUC did not re quest costs and, properly, took the position they should not be liable for costs. The intervention of those groups was most useful to the court and is an excellent example of the benefits from intervention in proper cases.

*Appeals allowed.*

# Tab 11

**Date: 20070227**

**Docket: IMM-1984-06**

**Citation: 2007 FC 212**

**Ottawa, Ontario, February 27, 2007**

**PRESENT: The Honourable Mr. Justice Shore**

**BETWEEN:**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
**THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

**Applicants**

**and**

**GREGORY GEORGE ISHMAEL**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

## OVERVIEW

[1] Section 71 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), requires that, for the Panel to have the jurisdiction to re-open an appeal, there must be a failure to observe a principle of natural justice for which the Immigration Appeal Division (IAD), itself, is

responsible. The breach must be the fault of the IAD, not due to the wilful choice (or deemed wilful choice) of the person concerned.



[2] If any breach of natural justice occurred due to the Respondent's wilful choice (or deemed wilful choice) to miss the hearing, then, to allow the request to re-open, on the basis of that wilful choice (or deemed wilful choice) of the Respondent to miss the hearing, would be to disregard the purpose for which the right to re-open exists.

**INTRODUCTION**

[3] The Applicant asserts that its application for judicial review of the IAD decision to re-open the Respondent's appeal must be allowed, given the errors of law committed by the Panel:

- assessing whether the principles of natural justice had been infringed;
- understanding its jurisdiction when assessing a motion to re-open under s. 71 of the IRPA;
- in drawing a finding that has absurd consequences; and
- applying the jurisprudence relevant to its determination.

**BACKGROUND**

[4] The Respondent, Mr. Gregory George Ishmael, entered Canada as a permanent resident on January 23, 1991. He is married and has eight children in Canada, all of whom are Canadian citizens. He resides with his wife and four children in Scarborough.

[5] Mr. Ishmael, was found inadmissible under three provisions of the former *Immigration Act*, R.S.C. 1985, c. I-2, and a deportation order was issued against him. He appealed the deportation order to the IAD, where he sought a stay of the order for four years based on all the circumstances of his case. In June 2001, the IAD granted Mr. Ishmael a four year stay of the removal order, on some eight terms and conditions. (Caracciolo Affidavit, Exhibit "A", pp. 1-2 and 14-16; Applicant's Application Record, pp. 15-16 and 28-30).



[6] On May 19, 2005, the IAD advised the parties that it intended to conduct, a four year review of Mr. Ishmael's stay, in chambers. On June 3, 2005, the Applicant invited Mr. Ishmael to submit information concerning his adherence to the terms and conditions imposed on his stay. This invitation was sent to Mr. Ishmael's home at 59 McKnight Drive, Scarborough, Ontario. (Caracciolo Affidavit, Exhibits "B" and "C"; Applicant's Application Record, pp. 31-32).

[7] On June 9, 2005, the Applicant requested that the IAD conduct an oral review of Mr. Ishmael's stay of removal. This request was copied to Mr. Ishmael at his home at 59 McKnight Drive, Scarborough, Ontario. (Caracciolo Affidavit, Exhibit "D"; Applicant's Application Record, pp. 33-44).

[8] On June 14, 2005, the Applicant wrote the IAD advising of its position on how Mr. Ishmael failed to meet the terms and conditions of his stay. The evidence adduced by the Applicant arose out of a meeting with Mr. Ishmael. The meeting stemmed from the June 3, 2005, Call-in-Notice that was sent to Mr. Ishmael's home at 59 McKnight Drive, Scarborough, Ontario. The Applicant's

June 3, 2005, letter did reach Mr. Ishmael when it was sent to 59 McKnight Drive, Scarborough, Ontario. (Caracciolo Affidavit, Exhibit "E"; Applicant's Application Record, pp. 45-51).



[9] Mr. Ishmael was advised by telephone that the hearing on his appeal would occur on November 30, 2005. He was also sent a written Notice to Appear on June 27, 2005, advising him of the November 30, 2005, hearing, to his home address – 59 McKnight Drive, Scarborough, Ontario. The hearing into Mr. Ishmael's stay was held on November 30, 2005; however, Mr. Ishmael did not attend. The IAD declared Mr. Ishmael's appeal abandoned due to this failure to attend the hearing. Caracciolo Affidavit, Exhibits "F" and "G"; Applicant's Application Record, pp. 52-55).

[10] On February 3, 2006, Mr. Ishmael filed a motion to re-open his appeal. The motion was based on the understanding that the IAD sent the Notice to Appear for the November 30, 2005, hearing to the wrong address (59 McKnight Drive, **Scarborough**, Ontario) as opposed to Mr. Ishmael's correct address (59 McKnight Drive, **Toronto**, Ontario). Mr. Ishmael also acknowledged that he received correspondence in the past from the Immigration and Refugee Board (IRB) and the Canadian Border Services Agency (CBSA) that had been directed to him at the **Scarborough** address. Mr. Ishmael never stated that he did not receive the June 27 Notice to Appear. He submitted, however, that the appeal should be re-opened as the Panel breached the principles of natural justice by not providing him with adequate notice of the hearing date. (Caracciolo Affidavit, Exhibit "H", pp. 4-5, 16-22; Applicant's Application Record, pp. 56-77).

[11] The Applicant relied on the following evidence to oppose the motion:

- The Respondent received a letter sent to him at 59 McKnight Drive, **Scarborough**, Ontario;
- Information from the Canada Post website indicating that the Respondent's correct mailing address was 59 McKnight Drive, **Scarborough**, Ontario;
- A copy of the Respondent's T4 indicating that he resided at 59 McKnight Drive, **Scarborough**, Ontario;
- A copy of a Citizenship and Immigration Canada (CIC) "Reporting Form" that the Respondent completed on December 2004, wherein he indicated that he resided at 59 McKnight Drive, Scarborough, Ontario; and
- A copy of an IRB Statement of Service indicating that the June 27, 2005, Notice to Appear was sent to the Respondent at his home address of 59 McKnight Drive, **Scarborough**, Ontario.

(Caracciolo Affidavit, Exhibit "I"; Exhibits "A", "B", "C", "D", "E" to the Foreman affidavit; Applicant's Application Record, pp. 90-92-94-96-99 and 100).

The Applicant argued that Mr. Ishmael's appeal could not be re-opened because there was no evidence that he failed to receive the June 27, 2005, Notice to Appear. The Applicant argued that Mr. Ishmael did not show that there had been a breach of natural justice that would justify re-opening the appeal. (Caracciolo Affidavit, Exhibit "I"; Applicant's Application Record, pp. 80-85).

[12] The IAD allowed the motion to re-open. The Panel determined that it was not credible that Mr. Ishmael did not receive the June 27, 2006, Notice to Appear and that Mr. Ishmael was aware that a hearing of his stay would be held on November 30, 2005, that he was aware of this, as of June 22, 2005, and as well that Mr. Ishmael likely received the Notice to Appear. The Panel concluded that the IRB dispensed with its obligation to inform Mr. Ishmael of the time and place of his hearing and that it was Mr. Ishmael who was accountable for his failure to attend the hearing; however, the Panel granted the motion to re-open on the basis that it would not be fair for Mr. Ishmael's case to be dismissed without giving him an opportunity to explain why he did not attend the hearing and why his appeal should not be declared abandoned. (Reasons for decision, pp. 3-6; Application record, pp. 7-10).



[13] In paragraph 3 of his affidavit, Mr. Ishmael asserts that he never received a Notice to Appear for the November 30, 2005, hearing; however, this assertion sharply contrasts with what the Panel found – Mr. Ishmael knew in June 2005 that a hearing into his appeal would be held on November 30, 2005; furthermore, the real question is whether Mr. Ishmael received adequate notice of the November 30, 2005, hearing. Mr. Ishmael admits that he knew of the November 30, 2005, hearing in June 2005 when he was informed by the Board that a hearing would take place on November 30, 2005. As such, even if Mr. Ishmael did not receive a Notice to Appear for the November 30, 2005, hearing – contrary to the finding of the Panel – this does not signify that he was denied adequate notice of the hearing to attend it and present his position. (Applicant's application record, p. 8, para. 12; Affidavit of Respondent, paras. 3 and 5 (Respondent's Application Record, p. 1).

**ISSUE**

[14] Did the Panel err in ordering the appeal re-opened?



**STANDARD OF REVIEW**

[15] With respect to questions of law, the standard of review is that of correctness, the Court may intervene where it is demonstrated that an error in law occurred. (*Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] S.C.R. 539).

**ANALYSIS**

**Did the Panel err in ordering the appeal re-opened?**

[16] Section 71 of the IRPA only permits the IAD to re-open an appeal where it failed to observe a principle of natural justice.

| | |
|---|---|
| **71.** The Immigration Appeal Division, on application by a foreign national who has not left Canada under a removal order, may reopen an appeal if it is satisfied that it failed to observe a principle of natural justice. | **71.** L'étranger qui n'a pas quitté le Canada à la suite de la mesure de renvoi peut demander la réouverture de l'appel sur preuve de manquement à un principe de justice naturelle. |

[17] Mr. Ishmael based his motion to re-open on his failure to receive the Notice of Application for the November 30, 2005, hearing. He asserted that the lack of notice deprived him of the right to be heard. (Caracciolo affidavit, Exhibit "H", pp. 15-20; Applicant's Application Record, pp. 70-75).

[18] The requirement of adequate notice is designed to ensure basic natural justice guarantees – knowledge that a hearing will be held: to ensure an opportunity to attend the hearing and make submissions.



[19] The Panel found that Mr. Ishmael was aware of the November 30 hearing:

> [12] If is true that the applicant never directly says in his statutory declaration that he was unaware of his November 30, 2005 hearing but rather states that he did not receive a Notice to Appear for his oral review. But there is a clear inference made by the applicant, in the panel's opinion, that in not receiving his Notice to Appear, he was unaware that he had a hearing on November 30, 2005. But there is evidence that at least in June 2005, he was aware of a hearing date scheduled for November 30, 2005. Based on the information before it, the panel is prepared to find that, on a balance of probabilities, the appellant did know of his hearing in June 2005 and did receive the Notice to Appear as it was sent to an address that has been effectively used as his home address.
>
> ...
>
> [15] The issue for the panel to ultimately decide in an application for reopening under section 71 of *IRPA* is whether there was a failure to observe a principle of natural justice. The panel is satisfied the IAD dispensed its initial responsibility to duly notify the applicant of the time and place of his hearing before the IAD on November 30, 2005. It did so in writing to an address that the panel finds to be a reasonable and indeed reliable version of his home address and it communicated the same information orally to the applicant. The panel is satisfied that the applicant was aware of the time and place of his scheduled hearing. The fact that the applicant failed to appear is hardly the fault of the IAD; it is the applicant who is accountable for failing to appear on November 30, 2005, as required. **The panel is of the opinion that this failure to appear is likely an oversight of some kind, not a deliberate effort to avoid appearing before the IAD**. (Emphasis of the Court.)

[20] In finding that Mr. Ishmael has received notice of the November 30 hearing, the Panel, in effect, found that Mr. Ishmael was afforded the natural justice guarantee of adequate notice: knowledge of a hearing to be held concerning his interests and an opportunity to attend and make submissions in his case.

[21] The test for re-opening required the IAD to be satisfied that it breached a principle of natural justice. In the case at bar, on the allegation of a natural justice breach advanced by Mr. Ishmael, the implications of the Panel's determination is that no natural justice breach could have occurred. It was, therefore, not open to the Panel to find a breach of natural justice – vis-à-vis Mr. Ishmael's opportunity to attend the hearing and state his case that would have warranted re-opening the appeal.



[22] The Panel's decision to re-open simply ignores its own assessment of the evidence and, therefore, falls outside of its jurisdiction to re-open an appeal. (If the Panel ignored IAD errors in this file, that is another matter, then, there may have been a breach of a principle of natural justice; it is just that the Panel cannot have it both ways: re-open the Appeal, if it did not breach natural justice; and not agree to re-open the appeal, if it did breach natural justice).

[23] Mr. Ishmael asserts that the Panel was correct in re-opening his appeal on the basis of a breach of natural justice as (according to *Beals v. Saldanha*, [2003] 3 S.C.R. 416) natural justice required that he be afforded the right to a notice of the hearing as well as an adequate opportunity to state his case; however, there are, at least, three reasons why this argument does not succeed under the present reasoning of the Panel:

a) *Beals* is a conflict of law decision, discussing the breach of natural justice exemption to the enforcement of foreign judgments. It is doubtful that the passage quoted by Mr. Ishmael makes any holding about the minimum standards of procedural fairness

owed by the IAD. In this context, it exceeds the access to the opportunity to make submissions.

b) Even assuming that *Beals* did provide guidance as to what natural justice requires in the administrative law context, Mr. Ishmael was afforded the same. In the process by which his claim was declared abandoned, he was given both adequate notice of his hearing as well as adequate opportunity to state his position – adequate notice, in that, he was told of the hearing date in June 2005 and the opportunity to state his position on the ultimate decision of his appeal at the November 30, 2005, hearing. Mr. Ishmael had only to attend and make submissions. Thus, even under the rule in *Beals*, Mr. Ishmael was given that which natural justice required.

c) Mr. Ishmael proposes that the adequate notice requirement of natural justice only be met when the person affected actually attends the hearing and makes submissions. Not only would this be an incorrect expansion of the adequate notice requirement, it would bring the administrative decision-making process to a standstill, no decision could be made until the person concerned chose to attend and argue his case. In addition, it would effectively negate s. 71 of the IRPA – that a tribunal may have to declare an appeal abandoned when the person concerned chooses not to attend their hearing.



**JURISDICTION TO RE-OPEN BASED ON PURPORTED NATURAL JUSTICE BREACH**

[24] Section 71 of the IRPA, requires that, for the Panel to have the jurisdiction to re-open an appeal, there must be a failure to observe a principle of natural justice for which the IAD itself, is

responsible. The breach must be the fault of the IAD, not of the wilful choice (or deemed wilful choice) of the person concerned.



[25] If any breach of natural justice occurred from Mr. Ishmael's wilful choice (or deemed wilful choice) to miss the hearing, then, to allow the request to re-open on the basis, of that wilful choice (or deemed wilful choice) of Mr. Ishmael to miss the hearing, would be to disregard the purpose for which the right to re-open exists.

**WRONG UNDERSTANDING OF WHAT IS A BREACH OF NATURAL JUSTICE**

[26] The Panel granted the motion to re-open on the following basis:

> [16] The panel is of the opinion that the principle of natural justice should consider the broader issues of procedural fairness in this case, that is to consider more than the question of whether the IAD duly served notice to the applicant of his oral review. Should the applicant, who did appear before the IAD as required in 2001 for his appeal hearing, who has demonstrated a significant degree of compliance with the conditions of his stay, who has worked cooperatively with CBSA, who at the end of his four years stay, is potentially in a position to have his appeal allowed, who duly pursued an application to re-opening in a timely fashion, be subject to removal from Canada for having failed to appear at a scheduled oral review, without any opportunity to explain why he failed to appear and to show cause why his appeal should not be abandoned. The panel is of the opinion that it is within the purview of the IAD to re-open the applicant's appeal on the basis that, given the particular facts of this case, not to do so would be a breach of procedural fairness and natural justice.

[27] In making this finding, the Panel erred in understanding its role in assessing if the principles of natural justice had been infringed. Natural justice is a general concept that guarantees a process by which a person is afforded minimum fairness requirements. This entails a specific fairness assessment of that which is warranted in the circumstances. It is an assessment of what procedural

fairness entitlements – right to notice, right to counsel, right to confront adverse evidence, etc. – are required in a given context. A procedural fairness assessment consists of the setting of a fair procedure; while natural justice is the overall barometer reading to determine whether the person was afforded minimum fairness requirements. That can be illustrated using the case at bar. Ensuring that the substantive and procedural rights of Mr. Ishmael were respected constitutes the procedural fairness guarantee, embodied in the concept of natural justice.



[28] The task for the Panel deciding the motion to re-open was to assess whether the IAD gave Mr. Ishmael adequate notice of his November 30, 2005, hearing to enable him to attend the hearing and make submissions in his case.

**RATIONALE PRODUCES ABSURDITIES**

[29] The rationale of the Panel's decision to re-open the appeal produces the absurdities of rendering ss. 168(1) of the IRPA useless and would result in the situation that an appellant could ignore a direction to attend without consequence until it becomes beneficial for him so to do.

[30] Subsection 168(1) of the IRPA permits a Division of the IRB to declare a proceeding abandoned, if it is of the opinion that the person concerned is in default of the proceeding, including, the grounds that the person failed to appear for a hearing; however, if the IAD Panel is correct, and an appellant before the Appeal Division must be given an opportunity to explain why a case should not be declared abandoned; then, it would not be possible for a Division to declare a claim, abandoned, on the basis of the failure of the person concerned to attend the hearing. Not only is the

Panel's interpretation inconsistent with the intent of Parliament in ss. 168(1) of the Act, it also poses the difficulty, outlined in *Ye v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 964, [2004] F.C.J. No. 1185 (QL).



[31] In *Ye*, Justice Michael Kelen explained that the new rule in s. 71, allows a re-opening on the basis of a breach of natural justice to prevent abuses of the IAD:

> [18] ...Without limiting the right of the IAD to reopen an appeal, the IAD immigration process becomes a merry-go-round. In my view, Parliament has limited the right of the IAD to reopen an appeal to only cases involving breaches of the rules of natural justice. For these reasons, this application for judicial review will be dismissed.

[32] A similar "merry-go-round" situation could arise in the case at bar. The appellant could continually ignore Notices to Appear, but not face any consequences until attending a hearing to decide whether the appeal should be declared, abandoned. Such a situation would only further risk the misuse of the Appeal Division's process, and put the appellant in the position of directing the appeal.

[33] The points of distinction, argued by Mr. Ishmael in respect of the *Ye* decision, are not relevant for the following reasons:

- The issue in *Ye* is relevant to the case at bar, in respect to the scope of the Appeal Division's jurisdiction to re-open an appeal under s. 71 of the IRPA. The factual differences between *Ye* and this case – as they do not detract from the applicability of the principles enunciated in *Ye* – cannot be used to argue that *Ye* does not apply.

- The Panel's finding that the person must be allowed to explain why the case should not be declared abandoned after failure to appear at the hearing would produce absurdities. Mr. Ishmael's arguments for distinguishing *Ye* do not alter the fact that the Panel's decision produces absurdities;
- The fact that *Ye* sought judicial review of the decision to dismiss the original appeal does not bar its application to this case. Mr. Ishmael, having obtained (in part) the relief that he sought from the Appeal Division – a stay of his removal – had no need to seek judicial review of a negative decision as did Ms. Ye.
- Mr. Ishmael points to the fact that Ms. Ye enjoyed a full hearing before the Appeal Division but, then, so did he enjoy the same in 2001 – when his appeal resulted in the stay of his removal order – and on November 30, 2005, when he had the opportunity to attend the hearing to make submissions on that point.
- One should also consider the ultimate result in *Ye*. *Ye* sought a re-opening based on the purported incompetence of her counsel, which the Appeal Division did not accept. This finding was implicitly accepted by the Federal Court which found no reviewable error in the decision, not to re-open. As such, the Federal Court's decision in *Ye*, in clarifying the standard application in s. 71, and in applying the standard, must be read as a pronouncement on the test for re-opening in s. 71, not just a specific case-limited consideration of the provision.
- Finally, *Ye* has been universally followed by the Federal Court as a pronouncement on how s. 71 of the IRPA should operate. It cannot be a decision of limited application as Mr. Ishmael suggests. (*Griffiths v. Canada (Minister of Citizenship*

*and Immigration)*, 2005 FC 971, [2005] F.C.J. No. 1194 (QL); *Nazifpour v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1694, [2005] F.C.J. No. 2097 (QL); *Baldeo v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 79 [2006] F.C.J. No. 100 (QL)).



**ERRONEOUS INTERPRETATION OF THE JURISPRUDENCE**

[34] In deciding the motion to re-open, the Panel considered the *Hung v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 966, [2004] F.C.J. No. 1237 (QL) and *Dubrézil v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 142, [2006] F.C.J. No. 154 (QL) cases; however, the Panel erred in interpreting *Hung* and failed to appreciate the applicability of *Dubrézil*.

**Erroneous interpretation of *Hung***

[35] The Panel interpreted *Hung*, above, as holding that natural justice requires that the appellant be given the opportunity to address the IAD on the merits of declaring an appeal abandoned before the appeal is declared abandoned.

[36] In *Hung*, the appellant agreed that his counsel would represent him at the scheduling conference. On the date of the scheduling conference, counsel was unable to attend due to a medical ailment. The Appeal Division dismissed the appeal due to the appellant's failure to attend the scheduling conference.

[37] *Hung* should not govern the re-opening motion in this case. To begin with, there are important factual distinctions. The hearing, in *Hung*, was a scheduling conference, while the hearing that Mr. Ishmael failed to attend was a hearing on the merits of the appeal; furthermore, *Hung* had a valid reason for not attending the hearing – counsel stated that he would attend for the appellant but later could not attend due to illness. In contrast, the Panel, in the case at bar, determined that Mr. Ishmael was aware of the hearing date but failed to attend. (Reasons, p. 5, para. 15; Application Record, p. 9). The reason for the failure to attend in *Hung* – a medical ailment – is unintentional and not the result of the person concerned's own conduct. Absence was due to a medical ailment that culminated in a lack of representation. That gave rise to the breach of natural justice, and not the failure to attend itself. Thus, given the different facts, the Panel should not have applied *Hung* to Mr. Ishmael's case.

[38] The IAD Panel erred in determining the legal finding to be drawn from *Hung*. Justice François Lemieux overturned the decision to dismiss the motion to re-open, explaining that:

> [10] In my view, the panel erred fundamentally in finding that it had not failed to observe a principle of natural justice when on December 13, 2004, the member declared that the appeal had been abandoned.
>
> ...
>
> [12] In my opinion, in declaring the appeal abandoned without giving the applicant or his counsel the opportunity to explain why they were absent, the member failed to observe the principles of natural justice, in the circumstances of this case.

[39] Justice Lemieux did not find, as a general principle, that the Appeal Division must invite an appellant to explain why his case should not be declared abandoned in every situation where the appellant failed to attend a hearing. In contrast, Justice Lemieux found that natural justice required that *Hung* be given an opportunity because of the unique circumstances of his case: the illness of counsel denied the person concerned his right to attend the hearing; and, thus, have someone represent his interests. The Panel could not have interpreted *Hung* as requiring Mr. Ishmael be given an automatic opportunity to explain why his appeal should not be declared abandoned, and consequently, the Panel could not determine that Mr. Ishmael was denied natural justice by the IAD because he was not afforded such an opportunity.

[40] Finally, the wide interpretation that the Panel, in the case at bar, gave to *Hung*, could lead to illogical results. It would ignore the clear intention of Justice Lemieux to limit his findings on natural justice to the specific and unique circumstances of the case. The result, that a decision to declare the claim abandoned, could not be made, in each and every case, until counsel or the person concerned had the opportunity to explain their absence which would create a "merry-go-round" situation.

[41] The Panel is in error in the manner it determined that i) *Hung* governed the situation in the case at bar; and ii) that *Hung* set out a rule for determining a motion to re-open in every case.

**Impact of *Dubrézil***

[42] The Panel noted that the *Dubrézil* case involved a fact pattern similar to the case at bar, but chose not to apply it. In so doing, the Panel breached the principle of *stare decisis*.



[43] *Stare decisis* requires that lower judicial bodies follow the decisions of higher judicial bodies on cases involving legal issues and sufficiently similar facts. Under the principle, the IAD Panel is required to follow a Federal Court decision in a motion to re-open involving similar facts.

[44] *Dubrézil* was summoned to appear at an IAD hearing; however, because he did not advise the Board of a change in his address, he did not receive the notice of the hearing and consequently did not attend. His appeal was declared abandoned pursuant to ss. 168(1) of the IRPA. *Dubrézil* made a motion to re-open his claim, citing his failure to receive the notice as grounds for the re-opening. The motion to re-open was dismissed. On judicial review, the Federal Court dismissed the application, finding that there could be no basis for-re-opening the appeal on natural justice grounds as any failure of *Dubrézil* to receive the notice was not the fault of the IRB, but of *Dubrézil* for failing to update his address with the Board.

[45] The determination in *Dubrézil* does apply to the case at bar. As in *Dubrézil*, Mr. Ishmael indicated to the Board that his address was 59 McKnight Drive, Scarborough, Ontario. If the June 27, 2005, Notice to Appear did not reach Mr. Ishmael, it is his fault, and not of the Board. Thus, the Panel, in the present case, unless the Panel could have shown a distinguishing feature, should have followed *Dubrézil* to find that there is no breach of natural justice in the circumstances

of this case that would warrant re-opening the appeal. The Panel erred in law by not appreciating that *Dubrézil* was binding, and by failing to explain why it did not apply *Dubrézil*.



[46] Furthermore, the Court in *Dubrézil* determined that *Hung* did not apply in cases such as the case at bar.

> [7] ...In that matter, it should be stressed that the applicant did not show up at the scheduling conference on his counsel's advice, and not based on his own lack of diligence. Also, his counsel fell ill the day before the scheduling conference and it was for that reason that he was unable to attend his hearing.
>
> In this case, the facts are different. The IAD heard the applicant on the reasons justifying his failure to attend, but it did not consider the applicant credible. It considered all of the relevant facts, including the fact that the applicant had been duly advised by the notice that was given to him on October 31, 2003, that he had to inform the IAD of his change of address, which he never did. ...
>
> ...
>
> [10] Furthermore, giving the person who fails to appear the opportunity to explain the reasons for his default in all cases would render subsection 168(1) IRPA meaningless. ...
>
> ...
>
> [12] If the applicant's reasoning were followed, it would imply that each time a person is absent, lacks diligence or acts in such a way that clearly suggests that the appeal has been abandoned, the IAD would be bound to investigate to find those persons, to remind them of their obligations and to summon them to a new hearing before deciding that the proceedings are abandoned. I cannot accept such an interpretation, especially because in this case the applicant did not advise the IAD of the change in his contact information, so that in any event the IAD would not have been able to contact him to summon him to a new hearing if it had had such an obligation. The IAD was not bound to act as the applicant's legal counsel, or to remind him of the seriousness of the proceedings in which he was involved, or to ensure that he properly understood that he had to show up at his scheduling conference or that he was bound to advise the IAD of his change of address. The

> applicant did have the opportunity to argue his grounds at a full hearing before the IAD, but the IAD did not find that these grounds were sufficient to justify reopening the appeal.

[47] The Panel did not appreciate this determination or ignore it, but rather assumed that *Hung* applied. While it may have been open to the Panel to find that *Hung* did apply, the Panel was obliged to consider the comments about the applicability of *Hung* and explain why the circumstances warranted a departure from the Federal Court's assessment of *Hung* in *Dubrézil*. This is especially true, as the Panel, in this case, as in *Dubrézil*, rejected the Respondent's explanation of why he did not attend his hearing. In not considering the holding in *Dubrézil*, regarding the determination in *Hung*, and, thus, in deciding to apply *Hung*, the Panel committed a reviewable error.



**PROBLEMS IN ABANDONMENT DECISION NOT RELEVANT**

[48] Mr. Ishmael noted alleged errors in the IRB documents on the decision to declare his claim abandoned. The Respondent's concerns should be raised before the IAD as grounds for the re-opening when the motion to re-open is returned to the Immigration Appeal Division for redetermination. (Respondent's Application Record, p. 2, para. 14).

[49] Mr. Ishmael also suggests that the Appeal Division's decision to declare the claim abandoned was taken without jurisdiction as it was made under the former Act which had been repealed when the abandonment decision was made; however, Mr. Ishmael's assertion is incorrect as i) the abandonment decision was taken under the correct regime; and ii) allowing the latter decision to stand on that basis, without further explanation, leads to illogical consequences:

- Decision taken under the correct regime: there are two Notices of Decision declaring the claim abandoned. The December 12, 2005, Notice is issued pursuant to ss. 168(1) of the IRPA. While the December 12 Notice may not bear the correct name of the Respondent, it correctly identifies him by the IAD File number and his FOSS number. The December 21, 2005, Notice declaring the claim abandoned under s. 76 of the former Act, bears the correct name, IAD File number and FOSS Number of the Respondent; however, the December 21 Notice is issued in response to the Respondent's information that the earlier Notice bears the wrong name. As of December 12, 2005, the Panel hearing the case declared the appeal abandoned under the proper provisions of the IRPA, even though it may have attached the wrong name on the Notice to Appear. As such, the IAD declared the claim abandoned under the correct statutory regime, and committed no reviewable error;
- Illogical consequences: Allowing the decision on the motion to re-open to stand on the basis of the errors in the previous decision to declare the claim abandoned, in light of the errors in determining the motion to re-open, would lead to illogical consequences: i) it would be contrary to the principle that administrative decisions, once accepted by the persons affected by them, should not be subject to collateral attack; ii) it would ignore the basis of this application for leave – the Panel's errors of law and jurisdiction in assessing the motion to re-open – and offers no remedy for the errors; iii) it would imply that a latter error can correct a previous error, which cannot be the case for errors of jurisdiction as either the decision is within the decision-maker's jurisdiction or it is not and this implication cannot stand; and iv)

the proper manner to deal with the Respondent's arguments on the jurisdiction of the decision to declare the appeal abandoned would be to have those concerns assessed by the Panel that determines the motion to re-open.



**ORAL REVIEW**

[50] Mr. Ishmael argues that the decision to re-open is correct as it would afford him an oral review on the merits of the continuation of his appeal. The right to such an oral interview – determined by the Panel in its reasons to be an entitlement required by natural justice in the circumstances – was afforded to Mr. Ishmael at the November 30, 2005, hearing, but he was deemed to have chosen, not to attend, despite having been given five months notice of the hearing date. The review could only occur if Mr. Ishmael is still interested in an appeal. Mr. Ishmael, in failing to attend, appeared to indicate that he was not interested in his appeal. Furthermore, such a proposition is affected by the same errors identified in *Dubrézil* – rendering ss. 168(1) of the IRPA inoperative, and putting the Appeal Division in a position akin to acting as counsel for the person. In any event, the assessment of the merits, due to the errors, if any, committed, should be reserved for the Panel hearing the continuance of the stay if the appeal is re-opened; that is, if a determination is made by the Panel that the decision to declare it abandoned is tainted by a breach of natural justice, stemming from the IAD, itself.

**CONCLUSION**

[51] Based on all of the above, the application for judicial review is allowed and the matter is remitted for redetermination by a differently constituted panel of the Immigration Appeal Division.

## JUDGMENT

**THIS COURT ORDERS that**

1. The application for judicial review be allowed and the matter be remitted for redetermination by a differently constituted Panel of the Immigration Appeal Division;
2. No serious question of general importance be certified.



**Obiter**

The judgment is largely based on the interpretation of the specific sections of the legislation in question; and, thus, the general principles that flow therefrom and apply therein.

That, having been said, in this specific case, unto itself (cas d'espèce), with its particular fact pattern, not only was the Panel mistaken in its interpretation of the current legislation, but, it also misunderstood distinctions, drawn in respect of the previous legislation.

Additionally, it is important to ascertain and ensure that the factual errors, committed by the Panel in respect of the individual circumstances of the Respondent, not be repeated.

Therefore, it is incumbent on the newly designated Panel to ensure a complete redetermination of the matter.

"Michel M.J. Shore"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | IMM-1984-06 |
| **STYLE OF CAUSE:** | THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | February 14, 2007 |
| **REASONS FOR JUDGMENT:** | SHORE J. |
| **DATED:** | February 27, 2007 |

**APPEARANCES:**

| | |
|---|---|
| Mr. Martin Anderson | FOR THE APPLICANTS |
| Ms. Mary Lam | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| JOHN H. SIMS, Q.C.<br>Deputy Attorney General of Canada | FOR THE APPLICANTS |
| MARY LAM<br>Barrister and Solicitor<br>Toronto, Ontario | FOR THE RESPONDENT |

# Tab 12

2014 ABCA 33, 2014 CarswellAlta 111, [2014] A.W.L.D. 940, 236 A.C.W.S. (3d) 1011

2014 ABCA 33
Alberta Court of Appeal

Watts v. Canadian Lawyers Insurance Assn.

2014 CarswellAlta 111, 2014 ABCA 33, [2014] A.W.L.D. 940, 236 A.C.W.S. (3d) 1011

# Rose Marie Watts, Contact Tourism Services Ltd. and Contact Canada Tours Ltd., Appellants (Plaintiffs) and The Canadian Lawyers Insurance Association, through its agent the Alberta Lawyers Insurance Association, Respondent (Defendant)

Constance Hunt J.A., Clifton O'Brien J.A., J.D. Bruce McDonald J.A.

Heard: January 16, 2014
Judgment: January 28, 2014
Docket: Calgary Appeal 1301-0055-AC

Counsel: Rose Marie Watts, Appellant, for herself
H. Currie, for Respondent

Subject: Civil Practice and Procedure

**Headnote**

**Civil practice and procedure --- Judgments and orders — General principles**

Appellants commenced series of lawsuits — Three of lawsuits went to trial and judge ruled in favour of defendants and awarded costs of $200,000 against appellants — Appellants' attempt to appeal decision that included costs order failed — Respondent was assigned benefits of costs order and when it was approaching its tenth anniversary it applied to renew it — Master granted order — Appellants applied for leave to appeal master's order but leave was refused — Appellants appealed dismissal of application for leave to appeal and terms of order — Appeal allowed in part — There were no breaches of fairness or natural justice before master — Appellants failed to show cause why costs order should not be renewed — There were no breaches of fairness in leave to appeal application — Appellants were not disadvantaged by decision of Chief Justice to recuse himself and assign matter to another judge — There were no breaches of Rules of Court — However, order went further than it should have — Queen's Bench judge should not have strayed from confines of application before her without giving notice to appellants — Paragraph was deleted from order.

**Table of Authorities**

**Cases considered:**

*Watts v. Wakerich* (2004), 2004 ABCA 245, 2004 CarswellAlta 935 (Alta. C.A.) — referred to

**Rules considered:**

*Alberta Rules of Court*, Alta. Reg. 124/2010
Generally — referred to

R. 1.5 — referred to

R. 3.13 — referred to

R. 4.13-4.14 — referred to

R. 6.6-6.8 — referred to

R. 6.14 — referred to

R. 9.3-9.4 — referred to

R. 9.21 — referred to

R. 9.21(2) — considered

R. 13.18 — referred to

R. 13.25 — referred to

APPEAL by appellants from judgment dismissing their application for leave to appeal and terms of order.

**Per curiam:**

**Introduction**

1 More than two decades ago the appellants commenced a series of lawsuits. After three of the suits went to trial, a judge ruled in favour of the defendants and awarded costs of $200,000 against the appellants ("Costs Order"). The appellants' attempt to appeal the decision that included the Costs Order failed: (*Watts v. Wakerich*, 2004 ABCA 245 (Alta. C.A.)).

2 When the Costs Order was approaching its tenth anniversary, the respondent (having been assigned the benefits of it) applied to renew it. A Master granted the order. For reasons explained below, the appellants applied to the Court of Queen's Bench for leave to appeal the Master's order. They appeal the dismissal of that application and the terms of the order that was granted.

3 The appeal is allowed in part because the Queen's Bench order was overly broad.

**Facts**

4 The background to this litigation is complex and largely irrelevant to the appeal. The appellants were plaintiffs in other lawsuits in addition to the three (Action No. 8801-16001, 9201-08317, 9301-08516) that resulted in the Costs Order. In October 2003 a Court of Queen's Bench judge ordered that the appellant Watts (who is also the principal of the other two appellants) obtain the approval of the Associate Chief Justice before filing "any further documents, materials, applications or proceedings of any kind relating to any of" the six lawsuits, which included the three central to this appeal ("first 2003 order"). Another Court of Queen's Bench judge gave the appellants leave to appeal that order, at the same time mentioning additional suits ("second 2003 order"). Collectively these two orders are referred to as the "2003 Orders". No appeals were taken from the 2003 Orders.

5 There were two appearances before the Master on the Costs Order renewal application. At the first, the Master offered to adjourn the application if the appellants required more time. The appellants indicated they wished to proceed: Record of Appeal Book (AB), F7/26-34; F17/14.

6 During the first appearance the Master determined that the applicant's affidavit was deficient because the affiant failed to say that her review of records caused her to conclude that the Costs Order had never been paid: AB F17. The Master adjourned the application to permit the filing of a better affidavit.

7 The application continued one week later. The Master concluded that the appellants had failed to show they had made payments on the Costs Order and granted the renewal application: AB F41.

8 The appellants then wrote the Chief Justice requesting him to hear their application for leave to appeal the Master's order. In reply, noting he was a named defendant in one of the cases, he delegated another Court of Queen's Bench judge to case manage and hear the appellant's application for leave to appeal the Master's order.

9 At that hearing, the appellants agreed they were there to obtain leave to appeal the Master's order. They were invited to explain their grounds for appealing the Master's order. The appellants contended that the affidavit supporting renewal of the Costs Order was deficient (AB F54) and the proceedings prejudicial because the Master permitted the respondent to file a supplementary affidavit: AB F57. They also submitted they had been prejudiced by a lack of time: AB F57.

10 The Queen's Bench judge inquired whether the appellants had any evidence of having paid the Costs Order: AB F58. They argued they could use costs ordered in their favour by the Court of Appeal in other cases to set-off the Costs Order. However, the Court of Appeal decision to which they refer pre-dated the Costs Order by about four years: AB F61. The Queen's Bench judge suggested that a number of the appellants' other points were not relevant (AB F81), and explained that she could not amend the Costs Order: AB F87.

11 She ruled that there were no grounds for appealing the Master's order: AB F92. Shortly before and immediately after she gave her reasons, the appellants complained that they had inadequate time to prepare for the Master's hearing and no chance to examine the affiant: AB F91, 93.

12 The Queen's Bench judge's refusal to grant leave to appeal the Master's costs renewal order, and other terms of her order, are the subjects of this appeal.

13 The order under appeal references six Queen's Bench files, not just the three that resulted in the Master's order (and formed part of the Costs Order). It denies leave to appeal the Master's renewal order (para 1), confirms the 2003 Orders (para 2) and requires the appellants to obtain the case management judge's approval before filing further material in the three suits (para 3).

**Analysis**

14 The appellants' grounds of appeal have been restated and combined in what follows.

***1. There were breaches of fairness and natural justice in the proceedings before the Master***

15 Among the appellants' complaints are that the affidavit supporting the application to renew the Costs Order was deficient; the Master should not have allowed the respondent to file a supplementary affidavit; and the Master should have asked the appellants if they wished to examine the affiant.

16 We are not persuaded that there were breaches of fairness or natural justice before the Master, who was within her authority to permit a better affidavit to be filed. There is nothing to indicate the appellants took steps or requested the opportunity to examine the affiant. This point was raised for the first time near the end of the hearing in the Court of Queen's Bench.

17 Indeed, as mentioned above, the appellants declined the Master's offer to adjourn the hearing when the parties first appeared before her. She was not required to do more.

18 In any event, Rule 9.21(2) of the *Alberta Rules of Court* (which the respondent referenced in its materials commencing the costs renewal application) required the appellants to show cause why the Costs Order should not be renewed. This they failed to do.

***2. There were breaches of fairness when the leave to appeal application was heard before the Queen's Bench judge***

19 The appellants argue that due to his conflict of interest the Chief Justice should not have made any order or appointed the case management judge; he should not have appointed the case management judge to hear the application just before she was appointed to the Court of Appeal; the appellants should have been given a chance to review the proposed form of order;

they had inadequate notice of the leave application hearing; and the order erroneously mentioned three suits unconnected to the costs renewal order and inappropriately renewed the 2003 Orders.

20 The Chief Justice dealt with the matter appropriately. The appellants were not disadvantaged by his decision to recuse himself and assign the matter to another judge. In fact, it is hard to see what else he could have done to ensure that someone heard the appellants' leave application.

21 It is irrelevant that the case management judge was appointed to the Court of Appeal shortly after she decided this matter. Such a pending appointment is not generally known until it is made and, meanwhile and in any event, a Queen's Bench judge continues to sit as part of his or her ongoing responsibilities.

22 The respondent takes the position that the proposed order was indeed put to the appellants. In any event, the order was signed by the Queen's Bench judge who made it, rendering unnecessary the appellants' direct involvement.

23 As for the matter of inadequate notice of the hearing, the appellants made no such complaint during the hearing itself until after the Queen's Bench judge gave her decision: AB F95. At the beginning of the hearing she invited them to make their arguments and they did so over a period of about an hour and a half: AB F94. The appellants have made allegations about the circumstances under which the hearing was scheduled but there is neither substantiating evidence nor an application to adduce fresh evidence on this point.

24 We agree with the appellants that the order went further than it should have. The respondent applied to renew the Costs Order which pertained to three actions and the appellants sought leave to appeal that renewal. Although as a case management judge the Queen's Bench judge had broad authority, she should not have strayed from the confines of the application before her without notice to the appellants.

25 Accordingly, paragraph 2 should be deleted from the order, along with any reference in the style of cause to Action Nos. 9201-11182, 9001-03102 and 9101-13203. The words "In addition to the provisions of the 2003 Orders" at the beginning of paragraph 3 should also be deleted.

***3. The Queen's Bench judge erred in finding that the proposed appeal lacked merit***

26 Among the arguments are that the respondent's application before the Master was deficient and costs should not have been awarded against the appellants. The appellants also assert that many of the *Alberta Rules of Court* were breached, including rr 6.6-6.8, 9.21, 13.18, 13.25, 3.13, 1.5, 6.14, 4.13-4.14, 9.3- 9.4, and 56.

27 We are not persuaded that there were breaches of the relevant *Rules* or that the appellants have any arguable grounds for appealing the Master's order. As already stated, they failed to show cause why the Costs Order should not be renewed because they failed to produce any evidence that they had paid the Costs Order.

28 Given all the circumstances, the costs order made against them by the Queen's Bench judge was also appropriate.

***4. Other grounds of appeal***

29 The main other grounds of appeal raise issues about past proceedings and decisions that are beyond the scope of this appeal. Some examples follow.

30 The appellants say that there was an improper disregard of an earlier Court of Appeal decision. However, that decision does not bear on whether leave should have been granted to appeal the Master's decision.

31 They complain that files from the Court of Queen's Bench and the Court of Appeal are no longer available. But we do not think any such files are relevant to the present matters.

32 There is also an unclear complaint about the need for leave to appeal. However, the 2003 Orders were never appealed.

33 The appellants claim they can set off costs earlier ordered in their favour by the Court of Appeal. If such rights exist it is unlikely they are curtailed by the costs renewal order.

**Costs of the Appeal and Preparation of the Order**

34 The parties made oral submissions about costs, in the event that the appeal was partially successful. We are of the view that no costs should be ordered.

35 The respondent's counsel is directed to prepare a form of order which will be signed in due course by any member of the panel.

**Conclusion**

36 The appeal is allowed in part. Action Nos 9201-11182, 9001-03102 and 9101-13203 shall be removed from the style of cause; paragraph 2 shall be deleted; and the phrase "In addition to the provisions of the 2003 Orders," shall be removed from the beginning of paragraph 3.

*Appeal allowed in part.*

# Tab 13

2000 ABCA 328
Alberta Court of Appeal

Deiure v. Deiure

2000 CarswellAlta 1497, 2000 ABCA 328, 11 R.F.L. (5th) 295, 248 W.A.C. 146, 281 A.R. 146

# Leanne Susan Deiure (Appellant / Plaintiff) and Frederick James Deiure (Respondent / Defendant)

Conrad, McFadyen, O'Leary JJ.A.

Judgment: December 8, 2000
Written reasons: December 20, 2000
Docket: Calgary Appeal 19100

Counsel: F.J. Deiure for himself
*D.P. Castle*, for Appellant

Subject: Family

**Headnote**

**Family law --- Custody and access — Access — Variation of order — General**

Order was made denying access until bilateral assessment and risk assessment were made — Case management judge made order varying terms of access — Case management judge made order without any notice to mother and without any affidavit or other evidence — Mother appealed — Appeal allowed — Order set aside without comment on merits — Case management judge erred in making order without proper notice to mother and without supporting application with evidence.

APPEAL by mother from order made by case management judge varying terms of access in earlier order.

**Memorandum of judgment delivered from the bench.** ***Conrad J.A.*****:**

1 We are in a position to give our judgment and that unanimous judgment will be delivered by Mr. Justice O'Leary.

***O'Leary J.A.*** **(for the Court):**

2 This is an appeal from an order made by a case management judge varying the terms of access contained in an earlier order. The earlier order denied access until such time as a bilateral assessment and risk assessment were made. The order under appeal was made without formal, or any, notice to the appellant, and without any affidavit or other evidence.

3 In our view, it was an error on the part of the case management judge to make an order in these circumstances without proper notice to the appellant and without supporting the application with evidence. That is especially so here where the order appealed varied the terms of an order made several months earlier denying access.

4 We set aside the order appealed without comment on its merits. The respondent is, of course, at liberty to make an application for the relief granted in the appealed order at any time upon proper notice to the appellant and upon appropriate supporting evidence.

***Conrad J.A.*****:**

5 Costs follow the event. The only thing that we would add is that we strongly encourage both parties to try to resolve these differences because otherwise it is going to be a continuous return to the courts on matters involving children. We are anxious to see it resolved, particularly where the issue of supervised access is recognized as one. I would say while they no longer have an appeal here, we would be prepared to offer judicial dispute resolution to the parties if you felt this was an avenue you would like to proceed with. You can contact me through Ileen Moore.

*Appeal allowed.*

# Tab 14

1997 CarswellOnt 1812
Ontario Court of Appeal

Barry v. Garden River Ojibway Nation No. 14

1997 CarswellOnt 1812, [1997] 4 C.N.L.R. 28, [1997] O.J. No. 2109, 100 O.A.C. 201, 147 D.L.R. (4th) 615, 33 O.R. (3d) 782, 71 A.C.W.S. (3d) 800

**Caroline Barry, Patricia Lariviere, Arlene Barry, Valerie Boissoneau, Rita Tice and Carolyn Musgrove each suing on behalf of herself and on behalf of all the women reinstated to and entitled to be reinstated to membership in the Garden River Ojibway Nation #14 [also known as the Garden River Band of Ojibways]; and, Natalie Barry, a minor, and Christian Barry, a minor, and Kari Barry, a minor, by their litigation guardian, Caroline Barry; Lee Ann Barry, a minor, and Charla Barry, a minor, by their litigation guardian, Arlene Barry; Daniel Tice, a minor, and Deanna Tice, a minor, by their litigation guardian, Rita Tice; Kelly Musgrove, a minor, Melanie Musgrove, a minor, and Stacey Musgrove, a minor, by their litigation guardian, Carolyn Musgrove, each minor plaintiff suing on behalf of himself or herself and on behalf of all the other children and lawful wards of all the women reinstated to and entitled to be reinstated to membership in the said Band, Plaintiffs, Appellants and The Chief and Council of The Garden River Band of Ojibways [also known as the Garden River Ojibway Nation #14] including, before the election of 14 October 1988, Ron Boissoneau (Chief), Morley Pine, Ronald Thibault, Daniel L. Pine, Darrell Boissoneau, Willard Pine, Chris Belleau, Arnold Solomon and Terry J. Belleau, Councillors, and, after the said election, Dennis Jones (Chief), Morley Pine, Ronald Thibault, Willard Pine, Chris Belleau, Arnold Solomon, Terry J. Belleau, Muriel Lesage, Gordon Boissoneau and Ted Nolan, Councillors, Defendants, Respondents**

Finlayson, Charron and Rosenberg JJ.A.

Heard: April 17, 1997
Judgment: May 27, 1997
Docket: CA C14296

Counsel: *Michael F.W. Bennett*, for the appellants.
*Robert MacRae*, for the respondents.

Subject: Public

**Headnote**

**Native law --- Bands and band government — Miscellaneous issues**

Plaintiff female members of band had Indian status restored — Plaintiff children were offspring of said female members and were born before restoration of mothers' status — Band resolved to make per capita distribution of moneys received from land claim settlement — Children were excluded from distribution, and mothers' shares were reduced — Plaintiffs brought action for payment of per capita share of distribution — Action was dismissed, and plaintiffs appealed — Resolution to distribute created trust by band was subject to trust principles — Duty to ascertain beneficiaries and duty of impartiality arose — All plaintiffs were entitled to full per capita share, and appeal was allowed — Indian Act, R.S.C. 1970, c. I-6.

An Indian band received certain moneys from the federal government as part of a land claim settlement agreement. Following a consultation with the band members regarding disposition of the funds in the band's revenue account, it was resolved that $1 million would be divided equally among the members of the band on certain specified dates.

The plaintiffs were female members of the band who had previously lost their Indian status, but whose status had been reinstated as a result of amendments to the *Indian Act*. The plaintiff children were all born before the amendment reinstating their mothers' Indian status. They were still required to complete an application process set out in the band's membership rules. The band passed a resolution granting membership to children born after the reinstatement date if one parent was an original member. In effect, the plaintiff children were denied membership based on their mothers' lost status. That discrimination was eliminated by a band council resolution admitting all children of restored and original band members; however, the resolution occurred after the date of distribution.

The trial judge found that the plaintiff children could not claim membership on the date of the distribution, and therefore could not share in the distribution. The trial judge also upheld the band's decision to deduct, from the moneys paid to the adult plaintiffs, moneys paid to them at the time the said plaintiffs lost their status. The plaintiffs appealed.

**Held:** The appeal was allowed.

When the band resolved to make the distribution, a trust was created, and the band thereby had a duty to observe trust principles in making the distribution. One of the primary duties of a trustee is to treat all beneficiaries impartially. The band resolution provided for a per capita distribution. Accordingly, the band had an obligation to treat all members equally. The reinstated women were entitled to equal treatment, and entitled to receive full shares, as were all other members. In addition, the band council knew that the children would finally become members. The distribution date, which was highly arbitrary, could not have the effect of eliminating the children from participating. The self-imposed deadline placed the band in a situation of having to distribute the funds before it could, as trustee, ascertain the identity of the beneficiaries. Before a trustee can begin administering a trust, he or she must ensure that there is certainty of intention, subject matter, and objects. The object of the distribution was the membership of the band. Before a distribution is made, the trustee has a duty to make reasonable efforts to identify and locate the members of the class of beneficiaries. The duty arose, on the date of the resolution, to make a per capita distribution. The band council was aware of the inability of some children to complete their applications within the time frame set for distribution. Accordingly, the band breached its duties. The plaintiffs were entitled to a declaration that they were each entitled to the payment of an equal distributive share of the fund without deduction of any kind.

**Table of Authorities**

**Cases considered:**

*Atlantic Trust Co. v. McGrath* (1969), 1 N.S.R. (2d) 103, 8 D.L.R. (3d) 225 (N.S. C.A.) — considered

*Benoit v. Tisdale* (1925), 28 O.W.N. 477 (Ont. H.C.) — referred to

*Fales v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302, [1976] 6 W.W.R. 10, 11 N.R. 487, (sub nom. *Wohlleben v. Canada Permanent Trust Co.*) 70 D.L.R. (3d) 257 (S.C.C.) — considered

*Learoyd v. Whiteley* (1887), 12 App. Cas. 727, 36 W.R. 721, 3 T.L.R. 813 (U.K. H.L.) — considered

*McClintock, Re* (1976), 12 O.R. (2d) 741, 70 D.L.R. (3d) 175 (Ont. Div. Ct.) — referred to

*Merrill Petroleums Ltd. v. Seaboard Oil Co.* (1957), 22 W.W.R. 529 (Alta. T.D.) — referred to

*Merrill Petroleums Ltd. v. Seaboard Oil Co.* (1958), 25 W.W.R. 236 (Alta. C.A.) — referred to

**Statutes considered:**

*Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11
s. 15 — referred to

*Constitution Act, 1982*, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11
Generally — referred to

*Indian Act*, R.S.C. 1970, c. I-6
Generally — referred to

s. 5 — considered

s. 10 [rep. & sub. 1985, c. 32 (1st Supp.), s. 4] — considered

s. 10(1) [en. 1985, c. 32 (1st Supp.), s. 4] — referred to

s. 10(2) [en. 1985, c. 32 (1st Supp.), s. 4] — referred to

s. 10(3) [en. 1985, c. 32 (1st Supp.), s. 4] — referred to

s. 12(1)(b) — considered

s. 64.1 [en. 1985, c. 32 (1st Supp.), s. 11] — considered

s. 64.1(2) [en. 1985, c. 32 (1st Supp.), s. 11] — considered

s. 69(1) — referred to

s. 81(1)(p.4) [en. 1985, c. 32 (1st Supp.), s. 15] — referred to

*Indian Act, Act to amend the*, R.S.C. 1985, c. 32 (1st Supp.)
Generally — considered

**Regulations considered:**

*Indian Act*, R.S.C. 1970, c. I-6
*Indian Bands Revenue Moneys Regulations*, C.R.C. 1978, c. 953

Generally

APPEAL from dismissal of action for payment of per capita share in distribution of native claim fund.

***Per curiam*:**

1 The adult appellants are female members of the Garden River First Nation of Ojibways who were reinstated to Indian status and to membership in the Garden River Band of Ojibways ("Band") on or before December 17, 1987 as a result of amendments, introduced in Bill C-31, *infra*, to the *Indian Act*, R.S.C. 1970, c. I-6, as amended. The minor appellants are their children. The respondents are the Chief and Council of the Band at the material times.

2 The appellants appeal from the judgment of the Honourable Mr. Justice Noble of the Ontario Court of Justice (General Division), wherein the action of the appellants for an equal *per capita* distributive share of land claim settlement moneys was dismissed. When the moneys were distributed to the members of the Garden River Band, the adult appellants' shares were reduced by amounts of Band moneys that they had previously received when they were deemed to have left the Band and became "enfranchised" by reason of marriage to a man who was not a status Indian. The appellant children were denied shares on the ground that they were not members of the Band at the date of distribution.

**The proceedings**

3 This is an action for an accounting and payment to the appellants of their *per capita* distributive share in what they maintain is a trust fund received by the Garden River Band in settlement of an outstanding claim of the Band against the Government of Canada. The adult appellants claimed a distributive share for themselves and on behalf of all other women reinstated to membership in the Band. The minor appellants claimed a distributive share for themselves and on behalf of all other children of reinstated women who are or shall be known to the respondents. They also sought:

> (a) A temporary injunction restraining the Chief and Council, from time to time, of the Band from distributing or disposing of any part of or of the whole of the balance of the funds from the Squirrel Island Settlement Trust monies remaining in its account until the trial of this action and, in the event there is an insufficient balance of such funds to satisfy the claims of the plaintiffs, then an order that the defendants account to the plaintiffs and trace the said funds.
>
> (b) A declaration that the defendants' failure to distribute the plaintiffs' share of the said Band's Squirrel Island Settlement Trust monies is contrary to s.15 of the *Canadian Charter of Rights and Freedoms* ("*Charter*").
>
> (c) A claim for pre-judgment and post-judgment interest and costs on a solicitor client basis.

4 On the face of it, this would appear to be a straightforward case involving the *per capita* distribution of a finite sum of money. Unfortunately, at the Band Council stage, the distribution of these moneys was caught up in a larger and more contentious issue relating to the reinstatement of these adult appellants and their children to the Garden River Band as a result of the passage by the Parliament of Canada of certain amendments to the *Indian Act*, those amendments being commonly referred to as Bill C-31. We propose to deal with the factual aspects of the Settlement Agreement separate from our analysis of the effect, if any, of Bill C-31 on the contemplated distribution.

**Facts**

***(1) The Squirrel Island Land Claim***

5 The Band had an outstanding claim against the Government of Canada that related to the sale of land on Squirrel Island in the middle of the St. Mary's River. The Band contended that Squirrel Island was part of the Band Reservation set aside by the Robinson Huron Treaty of 1850. The moneys in issue are part of the Garden River Land Settlement Agreement ("Settlement Agreement") dated March 30, 1987, wherein the Crown, as represented by the Minister of Indian Affairs and Northern Development, agreed with the Chief and Council of the Band to pay in settlement of the claim the sum of $2,530,000.000 made up as follows:

> (a) the offsetting of $154,600.00 as full payment for advances and loans provided by the Crown for researching, preparing and negotiating the agreement;

(b) $1,036,250.00 to be paid into an interest bearing trust account, to be held by the Band in trust exclusively for the repurchase of Squirrel Island;

(c) $1,339,150.00 to be paid into the Band's revenue account, an account set up under the provisions of the *Indian Act*.

6 Section 69.(1) of the *Indian Act* provides:

The Governor in Council may by order permit a band to control, manage and expend in whole or in part its revenue moneys and may amend or revoke such order.

7 The *Indian Bands Revenue Moneys Regulations*, C.R.C. 1978, c. 953, as amended, names the Garden River Band of Indians as a Band. As we read the Regulation, this Band may, subject to the Regulations, control, manage and expend in whole or part its revenue moneys. The Regulations relate to the establishment of a bank account, the selection of signing officers, the appointment of auditors and the publication of an annual auditor's report.

8 At trial, a councillor of the Band testified that the Band Council considered it necessary to consult the Band members and obtain a consensus regarding disposition of the settlement funds in the Revenue Account. Accordingly, a questionnaire was circulated to individual members, asking whether it was agreed "to divide equally amongst the members of the Garden River Band the one million dollars from the trust account [sic]". The questionnaire further asked whether, if the member agreed with the distribution, the distributive share of an enfranchised person now reinstated pursuant to Bill C-31 should be reduced by the aggregate amount of Band moneys paid out to the person when he or she left the Band. The tabulated results of the questionnaire demonstrated that almost everyone who completed a questionnaire was in favour of the distribution. By a small majority, members were also in favour of making deductions from the shares of the enfranchised women in the amount that they had received upon leaving the Band. It is interesting to note that, at a later date, the Chief and Council agreed that no deductions would be made from any members who owed debts to the Band for other reasons, such as water use charges.

9 Accordingly, on September 28, 1987, the Band Council passed a Band Council Resolution ("BCR") which stated:

As we the Garden River Band operate under section 69 of the Indian Act, do hereby request that the sum of one million dollars from our Revenue Account be made available and payable to the Garden River Band. These monies are required for per capita distribution to the Garden River Band Members.

1. The Garden River Band will arrange for an audit report to be completed by June 30, 1988. Our auditor is Dunwoody and Company.

2. The Band will submit expenditure reports.

3. The Band will use the funds provided for distribution only.

4. The Band will maintain financial records in accordance with generally accepted accounting principles and practices.

10 It would appear from the above that the sum of $1,000,000.00, being part of the $1,339,150.00 paid under the Settlement Agreement, is not strictly a trust fund because it was to be paid into the Revenue Account of the Band where it could be used for the purposes of the Band generally, subject only to the Regulations which set out accountability requirements. There was no requirement in the Settlement Agreement that the fund was to be distributed to the members of the Band and certainly there was no requirement that it be distributed by a certain date. At some later time, the Band decided on December 17 and 18, 1987 as the dates for the *per capita* distribution. There was no clear evidence presented at trial explaining why these dates were selected. Accordingly, while the funds were not the subject matter of a trust when they were delivered to the Band Council, when the Band Council resolved to make a *per capita* distribution, and to set aside $1,000,000.00 for that purpose, in our view a trust was created. The Band Council was then under a duty to ensure that the distribution was carried out in accordance with trust principles.

*(2) Band Membership and the Bill C-31 issue*

11 Prior to April 1985, pursuant to s. 5 of the *Indian Act*, the Department of Indian Affairs and Northern Development ("Department") was responsible for maintaining a list, known as the Indian Register, of all aboriginals with Indian status. The Department also maintained the lists of all the Indians who were members of the individual bands ("Band Lists") and did so on the basis of the names in the Indian Register. At that time, subject to s. 12(1)(b) of the *Indian Act*, an aboriginal woman with Indian status was no longer entitled to be included in the Indian Register if she married a man who was not a status Indian. As a consequence of losing her eligibility to be registered, she not only lost her status as an Indian under the *Indian Act*, she lost her eligibility to remain on the Band List of the Band in which she had previously enjoyed membership and with it her status as a member of the Band. As a further consequence, children of such a union were also deprived of the opportunity of achieving status as an Indian, both on the Register maintained by the Department and as a member in the Indian Band. This process leading to a lack of status was known as enfranchisement because when it was first enacted in 1869, the woman became eligible to vote in Canadian elections, a right she had not previously held as a status Indian under the *Indian Act*.

12 On the other hand, if a man with Indian status married a non-status woman, he did not lose his status but rather his wife gained his status. With the advent of the *Constitution Act, 1982* and the *Canadian Charter of Rights and Freedoms* ("*Charter*"), this obvious inequality could no longer be tolerated. Parliament passed Bill C-31, *An Act to Amend the Indian Act*, R.S.C. 1985, c. 32 (1st Supp.). It received Royal Assent on June 28, 1985 but was made effective retroactively to April 17, 1985. It removed the discriminatory provisions and permitted the re-registration of enfranchised Indian women and their children. It also permitted each band to assume control over its membership list. Thus, the Department continued to register aboriginals who had status or who were reinstated to status, but once a band gained control of its membership list, the Department relinquished responsibility for that list to the Band. Two separate lists, one maintained by the Department and one maintained by the band, would come into existence.

13 In order to assume control of its membership list, a Band was required to create a code setting out the rules by which membership was to be determined, and submit it for approval to the Department before June 28, 1987. These provisions are found in s. 10 of Bill C-31, as follows:

> 10.(1) A band may assume control of its own membership if it establishes membership rules for itself in writing in accordance with this section and if, after the band has given appropriate notice of its intention to assume control of its own membership, a majority of the electors of the band gives its consent to the band's control of its own membership.
>
> (2) A band may, pursuant to the consent of a majority of the electors of the band,
>
> (a) after it has given appropriate notice of its intention to do so, establish membership rules for itself; and
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> (b) provide for a mechanism for reviewing decisions on membership.
>
> (3) Where the council of a band makes a by-law under paragraph 81 (p.4) bringing this subsection into effect in respect of the band, the consents required under subsections (1) and (2) shall be given by a majority of the members of the band who are of the full age of eighteen years.

14 To bring this section into effect, it is necessary to invoke s. 81(1)(p.4) of the *Indian Act* which states:

> 81.(1) The council of a band may make by-laws not inconsistent with this Act or with any regulations made by the Governor in Council or the Minister, for any or all of the following purposes, namely:
>
> (p.4) to bring subsection 10(3) or 64.1(2) into effect in respect of the band;

15 On June 19, 1987, the Garden River Band complied with the procedural requirements of s.10 and submitted its membership rules, called Citizenship Registry Regulations, to the Minister. They were accepted by the Minister by letter dated September 25, 1987 and the membership rules were effective retroactively to June 25, 1987. Part IX provided:

**Non-Discrimination**

This Code shall be administered and all powers, duties and functions hereunder shall be exercised or performed without discrimination based on sex, affiliation to First Nations or Indian Bands, creeds or religion.

16 The Garden River Band membership rules created four categories of members: Original Members, Restored Members, Accepted Members and Members by Birth. " Original Members" were those who were entitled to be entered on the band list immediately prior to April 17, 1985 and also any child born after April 17, 1985, if the child's natural parents were both original members. The " Restored Members" category applied to those persons, including the adult appellants, who were entitled to rejoin the band pursuant to Bill C-31. The "Accepted Members" category encompassed all members who had applied for membership and whose applications had been accepted and confirmed. The children of reinstated women, including the appellant children, would belong in this category. The final category was created to provide greater certainty for children born after April 17, 1985 and whose natural parents are or were both members of the Garden River Band at the time of the child's birth. At the time that the Band was drafting the membership rules, the Department was having difficulty managing a large, unexpected backlog of applications for reinstatement to Indian status. The Department was also waiting for the bands to complete the process of assuming control over their membership. As a result, births after April 17, 1985 were not being registered by the Department, with the exception of those children born to parents who were both original members. This time was referred to as an abeyance period. There was concern that a child might be denied membership in the Band, and so this section provided for automatic membership for the child.

17 If a person had only one parent who was a member of the Band, that person was required to apply for membership, and thus would become an Accepted Member. The rules further provided for the application process. This is the route by which the appellant children could obtain Band membership. It should be noted that after the rules became effective on June 25, 1987, application for membership was necessary whether the parent-member was the father or the mother of the child. It should be further noted that the application process required the person to first obtain Indian status with the Department prior to applying for membership in the Band. Due to the Department backlog, this requirement created problems in some cases.

18 It was the testimony of the adult appellants that although they frequently and regularly inquired at Band Council meetings regarding the membership application process for their children, the Chief and Councillors did not provide satisfactory answers. The reinstated women were reassured that there was no deadline for applications. Minutes of the Band Council Meeting of February 8, 1988 indicate that application forms were still not available at that time, long after the date of distribution of the settlement moneys. At the time of the distribution, the appellant children were not members of the Band, although in most cases, they had achieved Indian status by directly applying to the Department.

***(3) Enfranchisement payments***

19 Bill C-31 also dealt with payments that had been made to enfranchised women or other aboriginal persons who became enfranchised or otherwise ceased to be a member of a band. On leaving, these persons were entitled to receive one *per capita* share of money held in the band's capital fund, one *per capita* share of money held in the revenue fund, and if they were in a treaty area, 20 years treaty annuity. Each of the adult appellants had received an aggregate sum of less than one thousand dollars at the time she lost status. A band was allowed a strictly limited right of recovery of these sums by s.64.1(2) of the *Indian Act*. The provision permits recovery of money paid out on enfranchisement in excess of one thousand dollars. Section 64.1 of the *Indian Act* was never resorted to by the Garden River Band. Even if the Band had invoked s.64.1, it would have had no application in this case, because individually each adult appellant received an enfranchisement payment that was less than $1,000.

***(4) The distribution procedure***

20 As noted above, on September 28, 1987, the Band passed a resolution to make a *per capita* distribution of $1,000,000.00 from the revenue account to all members of the Band. The minutes of a special meeting of the Band Council held on December 3, 1987, indicate that it was agreed to make the disbursements two weeks later on December 17 and 18, 1987. These minutes further note that it was decided to give each member the sum of $1,000.00 and that no deductions would be made from the

shares of members with outstanding debts to the Band. There is no indication in the minutes of the reason for choosing this date for distribution.

21 One week before the dates set for distribution, on December 11, 1987, the Band Council held a "Working Meeting". Several issues related to the disbursement of the funds were discussed. Decisions were finalized regarding the distribution procedure. It is recorded in the minutes that the reinstated women who had applied for reinstatement before June 15, 1987 would qualify for a share, but that a reduction would be applied in the amount of money received at the time of enfranchisement, rounded off to the nearest $100.00.

22 Another issue raised was the question of entitlement of certain children to a share in the settlement funds. There was no provision in the *Indian Act* as amended by Bill C-31, or in the Band's own membership rules, which automatically bestowed membership to children born after April 17, 1985 to parents, only one of whom was a member of the Band. Due to the Department's abeyance period for registering births, these children were in an uncertain situation. The minutes note:

> *STATUS CHILDREN* - Children birn [sic] to one parent original band members born after April 17, 1985 and before June 15, 1987, should they get a share? Noted that all birth registrations were suspended for band membership during that time, except where two parents were band members. Noted that membership code came into effect June 15, 1987.
>
> Decision was made to make Status children Garden River Band members under both of the following categories:
>
> 1 - Born between April 17, 1985 and December 16, 1987.
>
> 2 - Born to one parent original Garden River Band member.

23 All in agreement.

24 At trial, considerable time was spent in interpreting this decision. It was established by witnesses for both sides that it should be read conjunctively, such that a person was required to satisfy both conditions in order to achieve membership in the Band. Therefore, any child born after the effective date of Bill C-31, who had at least one parent who was a member in the Garden River Band, would be entitled to membership in the Band without having to fulfil the procedural requirements set out in the Band's recently enacted membership rules.

25 The decision was implemented by passing Band Council Resolution number 90, dated December 11, 1987, listing forty-nine individuals by name who met both of these requirements, and admitting them to Band membership. People on the list had either a mother or a father who was a member of the Garden River Band. This decision remedied the problem created by the delays in the membership process which existed because the Department had suspended the registration of births and because the Band had not yet instituted its application process. At trial, it was established that persons who obtained membership as a result of this resolution were allowed to collect full shares of the settlement money on December 17 and 18, 1987.

26 The December 11, 1987 decision did not address the concerns of the appellants regarding the position of their children, who were all born before April 17, 1985. These children were still required to complete the application process set out in the membership rules. Thus, the discrimination which Bill C-31 attempted to remedy was perpetuated. Children born *before* April 17, 1985 to a father with Indian status who had married a non-status woman could become members of the Band, since both parents were entitled to Indian status and Band membership according to the *Indian Act* prior to the Bill C-31 amendments. Children born *before* April 17, 1985 to unmarried mothers who were Band members could obtain membership, since their mothers never lost status or membership. Children born *after* April 17, 1985 to fathers or to mothers whose spouses were without status, gained membership as a result of the December 11, 1987 resolution. However, the children of the reinstated women continued to be denied membership. In effect, this denial was based on their mothers' lost status. A woman's loss of status due to marriage of a non-status man had been recognized and rejected as discriminatory action by Parliament. Thus, the denial of membership to the appellant children, while granting membership to other children in a similar position, was a breach of the non-discriminatory clause in the Band's membership rules.

27 This issue of discrimination directed towards children of enfranchised woman was finally eliminated on February 13, 1989. A Band Council Resolution passed on that date reflects the following decision:

> THAT *ALL* Children of restored and original Band Members who have attained Indian Band status designated as First Generation be accepted by the Garden River Band with no exceptions or reservations to any individual.

28 The rapidity of the meetings and decision-making must be noted. The Settlement Agreement was made on March 30, 1987. The dates for distribution of the funds were accepted on December 3rd, of that year, the procedures were discussed one week later on December 11th, and the actual disbursements were made on December 17th and 18th. It is also noted that during the same time period, Band members continued to raise concerns regarding who would share and to what extent, as evidenced by the minutes of the meeting and the testimony at trial.

**The trial judge's disposition**

29 The trial judge determined this case based upon his analysis of what he regarded as the two issues before the court. The first issue was whether the first generation children of women formerly deprived of Indian status, and to whom Indian status has now been restored by Bill C-31, were entitled to membership in the Band as of the date for distribution of the $1,000,000 from the Settlement Agreement. The second issue was whether it was appropriate to deduct from Indian women re-admitted under Bill C-31 those amounts which had been advanced to them individually by the Government of Canada when their Indian status, and therefore Band membership, had been lost.

30 The trial judge found that on the date of distribution, the appellant children could not claim membership based on any of the enumerated classes found within the Band's membership rules. He stated that he was unable to find that " in its application of its Citizenship Regulations or in the distribution of the Squirrel Island Settlement Trust Money, that the band acting through its Council, did so contrary to law". He also found:

> There was nothing sinister or deliberate in the sense of lacking fairness or was there anything legally improper in the decision to make distribution on December 17 and 18, 1987 to those persons who were, at that time, recorded in the records of the Garden River Band of Ojibways as members in the Band.

Therefore, he held that the appellant children were not entitled to a share.

31 Regarding the second issue, he stated:

> In my opinion, what the Band Council did was fair and equitable and restored the financial interests of the restored C-31 Indian women to equal that of their Indian sisters who had not been deprived of their status and who had not received earlier distribution.

Having decided both issues in the negative, the trial judge dismissed the action.

**Analysis**

32 In our opinion, the essential error of the trial judge was in not recognizing that the Band in this case was attempting to deal with two unrelated matters at the same time. In the result, he dealt with the two issues in the manner in which they were presented to him and later to this court. They are:

> (1) should the appellant children have received a full share as members of the Band?
>
> (2) were the deductions from the adult appellants appropriate?

With respect, we are of the view that the trial judge erred in his conclusions on both issues.

33 The Band Council Resolution stated that $1,000,000.00 of the settlement moneys was required for *per capita* distribution to the Garden River Band members. *Black's Law Dictionary* (6th ed.) at p. 1136, provides the following definition of *per capita*:

> By the heads or polls; according to the number of individuals; share and share alike. This term, derived from the civil law, is much used in the law of descent and distribution, and denotes that method of dividing an intestate estate by which an equal share is given to each of a number of persons, all of whom stand in equal degree to the decedent, without reference to their stocks or the right of representation.

*Webster's Ninth New Collegiate Dictionary*, at p. 872 defines *per capita* as meaning "equally to each individual".

34 In order to comply with its own Resolution to make a *per capita* distribution to band members, the Band Council would have to give an equal share to all band members. In effect, it constituted itself a trustee for this purpose. The Band itself appears to have recognized this, given the language of its questionnaire relating to distribution. The trial judge also appears to have proceeded on the basis that from at least the date of the resolution to make a *per capita* distribution, the Band Council was dealing with trust moneys. As D.W.M. Waters, *Law of Trusts in Canada*, 2nd ed. (1984) explains at p. 111, "whether a trust has been created is simply a matter of construction". In our view, the proper construction of the September 28, 1987 Band Council Resolution is that an express trust was created with the Garden River Band as both settlor and trustee of the $1,000,000.00, being the moneys necessary to make a *per capita* distribution, and the Garden River Band Members as beneficiaries.

35 One of the primary duties of a trustee is to treat all beneficiaries impartially: *Benoit v. Tisdale* (1925), 28 O.W.N. 477 (Ont. H.C.) (Weekly Court); *McClintock, Re* (1976), 70 D.L.R. (3d) 175 (Ont. Div. Ct.) at 180. Waters, *Law of Trusts in Canada, supra*, describes this duty as follows at p. 787:

> It is a primary duty upon trustees that in all their dealings with trust affairs they act in such a way that, if there are two or more beneficiaries, each beneficiary receives exactly what the terms of the trust confer upon him and otherwise receives no advantage and suffers no burden which other beneficiaries do not share. In this way the trustees act impartially; they hold an even hand. The settlor or testator may choose to give disproportionate interests to various beneficiaries, and he very often does so in practice, but that is his privilege. *It is still the duty of the trustees to carry out the terms of the trust as they find them, and to ensure that in the administration of the trust they do not give advantage or impose burden when that advantage or burden is not to be found in the terms of the trust.* [emphasis added].

36 The duty to act impartially would require the trustee to treat equally all members of a class of beneficiaries. We think this basic principle is dispositive of the appeal as it relates to the adult appellants. Once the decision was made by the Band Council that there should be a *per capita* distribution of the sum in issue, then it is apparent that the Band Council had an obligation to treat all members of the Band equally. There could be no suggestion of set off with respect to so-called Band indebtedness unless all Band indebtedness was subject to the set off. The evidence at trial established that a decision was made to deduct sums only from the appellant women. Members of the Band who owed sums for such items as water use charges were able to collect full shares. The reinstated women were entitled to be treated equally to all other beneficiaries. Since all other beneficiaries received full shares, the Band should have advanced full shares to the adult appellants.

37 In any event, such a set off could not be employed to recover from formerly enfranchised women sums relating to re-instatement under Bill C-31. There was a special provision in Bill C-31 relating to that and it is reproduced in s.64.1(2) of the *Indian Act*. This provision limits recovery to sums paid in excess of one thousand dollars. The appellant women had all received sums less than this amount. The trial judge erred in permitting this deduction from the *per capita* distributive share of each of the adult appellants.

38 The minor appellants, being the first generation children of formerly enfranchised women present a different problem, but it is a problem that disappears when one ignores the self-imposed time limit for the distribution. When the Band Council Resolution in question was passed, it is common ground that the identity of all the first generation children were known. The only live issue for a time was whether a distinction would be drawn between children born after April 17, 1985 with only one parent who was a Band member and children born before April 17, 1985 with similar parentage. The latter group was

comprised of the minor appellants whose applications for membership in the Band were being held in abeyance because of matters over which they had no control. Leaving apart the highly valid point that such a distinction could not be made between the two classes of children without violence to the self-imposed non-discrimination provisions of the Band's membership rules, the Band Council knew that these children would ultimately become members, as in fact they did, but well after the date for distribution. The cut off date, being highly arbitrary, could not have the effect of eliminating these children from participation in the *per capita* distribution. Alternatively, if the deadline was of some significance to the Band Council, it would have been a simple thing to have made the distribution to the members whose credentials were certain, after withholding for the time being an amount sufficient to cover the interests of those minor appellants whose applications had not yet been accepted.

39 However, on the evidence, the date for distribution was not chosen for any particular reason. Despite notice of concerns regarding individual entitlement to participate in the distribution of the moneys, the Chief and Council appeared determined to distribute the entire $1,000,000.00 at one time. In fairness to the Band Council, last minute attempts were made to remedy entitlement problems. The December 11th resolution addressed the question of entitlement for some individuals. At trial, witnesses testified that even on the date of distribution, children were brought to the Band Office, produced birth documentation, were accepted as members, and were given their shares. It is also noted that on October 13, 1988, many months after the self-imposed deadline, a Band Council Resolution similar to the December 11, 1987 resolution was passed. As a result, seven more children were entered onto the membership list and advanced shares in the settlement funds.

40 In setting the arbitrary deadline, the Band compromised its ability to fulfil its duties with respect to the distribution of funds. The Band placed itself in the position of having to disburse the funds before it could, as trustee, definitively ascertain the identity of all beneficiaries. This was not only a breach of the Band's duty to act impartially, but it was a breach of its specific duty to determine and ascertain the class that was to benefit from the distribution and to identify and locate the members of that class.

41 It is basic to all trust concepts that for a trust to come into existence, it must have three essential characteristics. Before a trustee can begin the administration of a trust, he or she must be satisfied that the trust satisfies the following three requirements: a) certainty of intention; b) certainty of subject-matter; and, c) certainty of objects.

42 It is the third requirement which is relevant to the discussion of the entitlement of the minor appellants. The need for certainty of objects means that a fixed trust will fail unless it is possible to say whether any person is a member of the class and unless all the possible members of the class are known or ascertainable: Waters, *Law of Trusts in Canada, supra* at p. 80. In determining whether the trust satisfies the requirement of certainty of objects, the trustee will effectively be determining what classes are entitled to benefit from the trust fund. This is because the question whether it is possible to say that any person is a member of the class and the question whether all possible members of the class are known or ascertainable assumes that the class has been determined. In the case under appeal, there is no issue that the object of the distribution was the membership of the Band; the question that arose was whether the Band could pick the date that it did to ascertain the membership of the Band.

43 We think that it could not. A trustee's first duty is to follow implicitly the terms of the trust instrument: *Merrill Petroleums Ltd. v. Seaboard Oil Co.* (1957), 22 W.W.R. 529 (Alta. T.D.) at 557; affirmed (1958), 25 W.W.R. 236 (Alta. C.A.), noted in Waters, *Law of Trusts in Canada, supra* at 695. As a logical extension of this duty, we think that before a distribution is made, a trustee has a duty to make reasonable efforts to identify and locate the members of a class of beneficiaries. If a trust dictates that the trustee should distribute trust funds to a certain class of beneficiaries, the trustee can only comply with this requirement by first identifying and determining the members of the class.

44 The case of *Atlantic Trust Co. v. McGrath* (1969), 8 D.L.R. (3d) 225 (N.S. C.A.) stands for the proposition that an administrator of an estate has a duty to make reasonable inquiries as to the existence of beneficiaries of the estate. In that case, the administrator had the final accounts passed and the estate distributed after sending out the usual notices for persons having claims against the estate. After the distribution had been completed, the widow of a son of the deceased came forward claiming that she had been excluded from the distribution. At the time of the distribution, the administrator did not know about the deceased's son but he did have reasonable grounds for believing that such a son existed and was last thought to be in the north-eastern United States. Notwithstanding such reasonable grounds, he made no effort to locate the son. The trial judge held that the administrator had a duty to make inquiries as to the existence of the son (quoted at p. 228):

> ... I am of the opinion from all the evidence on the point that Howard McGrath [the administrator] had reasonable grounds for supposing there might well be a son of Harvey McGrath's [the deceased] residing somewhere in the eastern American States. He should have advertised at least in Massachusetts for the next of kin.

The Nova Scotia Court of Appeal agreed that a duty to make such inquiries existed (at p. 238):

> Here the evidence which I have mentioned and which was accepted by the trial Judge indicates a very definite warning that further inquiries and investigations should have been made.

See also: M.V. Ellis, *Fiduciary Duties in Canada*, (1993), at 4.6.

45 Accordingly, there was an affirmative and readily performable duty on the Band Council to ascertain and identify the membership of the Band. That duty came into existence on September 28, 1987 when the decision was made to make a *per capita* distribution. That Band Council Resolution did not fix a date for distribution or set special guidelines for those entitled to a distributive share: it referred only to "Garden River Band Members". Its only time limit on that date was that it would produce an audited report by June 30, 1988. During that period, the Band Council was made aware of the inability of some children who were clearly eligible for Band membership to complete their applications for membership within the time frame set by the Band Council.

46 The trial judge was in error in determining this issue in favour of the Band Council by holding that there was nothing sinister or deliberately unfair in the decision to fix the date for distribution for December 17th and 18th of 1987. That is not the test in scrutinizing the performance of a trustee. The issue of whether a trustee can set an arbitrary time limit for identifying and locating the members of the class is to be resolved by a standard of care analysis. In other words, would a trustee be reasonably fulfilling his or her duty to identify and locate the members of the beneficiary class if he or she operated on a self-i[illegible]d deadline?

47 In *Learoyd v. Whiteley* (1887), 12 App. Cas. 727 (U.K. H.L.), Lord Watson set out the standard of care expected of a trustee in carrying out his or her duties. He stated at p. 733 that

> the law requires of a trustee no higher degree of diligence in the execution of his office than a man of ordinary prudence would exercise in the management of his own affairs.

Waters defined the standard as follows at p. 750, *supra*:

> the trustee must show ordinary care, skill, and prudence, he must act as the prudent man of discretion and intelligence would act in his own affairs.

In *Fales v. Canada Permanent Trust Co.* (1976), [1977] 2 S.C.R. 302 (S.C.C.) at 318, Dickson J. stated that the trustee must show "vigilance, prudence and sagacity".

48 In our opinion, the Band Council did not show ordinary care, skill and prudence in carrying out its duties as trustee with respect to the minor appellants and the class they represent.

**Disposition**

49 We are of the opinion that this case can be decided on the basis of well recognized principles relating to the fiduciary obligations of any person who undertakes to make a *per capita* distribution of a fund of money entrusted to that persons' care. Accordingly, we find it unnecessary to address the appellants' submissions regarding s. 15 of the *Charter of Rights and Freedoms*.

50 For the reasons given, we are allowing the appeal and setting aside the judgment below. The appellants and all those they represent are entitled to a declaration that they are each entitled to the payment of an equal distributive share of the $1,000,000

 

fund from the Settlement Agreement without deduction of any kind. They are also entitled to pre-judgment interest from the distribution date until the date of the trial judgment below and post-judgment interest thereafter until payment. In order to give effect to this declaration, the matter is remitted to the trial judge or a judge of concurrent jurisdiction for an accounting and judgment with respect to the individual appellants and members of the class they represent.

51 Since the appellants are beneficiaries of a trust who were obliged to sue their trustees, they should receive costs on a solicitor and client basis here and below.

*Appeal allowed.*

# Tab 15

# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Louie v. Louie,*
2015 BCCA 247

Date: 20150603
Docket: CA41622

Between:

**Wayne Louie on his own behalf and in his individual capacity as a member of the Lower Kootenay Indian Band**

Appellant
(Plaintiff)

And

**M. Jason Louie in his individual capacity and in his representative capacity as Chief of the Lower Kootenay Indian Band, and in his former representative capacity as Councillor of the Lower Kootenay Indian Band, and**
**Mary Basil in her individual capacity and in her representative capacity as Councillor of the Lower Kootenay Indian Band,**
**Sandra Luke in her individual capacity and in her representative capacity as Councillor of the Lower Kootenay Indian Band and**
**The Council of the Lower Kootenay Indian Band**

Respondents
(Defendants)

And

**Chris Luke Sr. in his individual capacity and in his former representative capacity as Chief of the Lower Kootenay Indian Band**

Respondent
(Defendant)

And

**Carol Louie in her individual capacity and her former representative capacity as Councillor of the Lower Kootenay Indian Band**

Respondent
(Defendant)

Corrected Judgment: Page 2 of the judgment was corrected on June 8, 2015

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Frankel
The Honourable Mr. Justice Groberman

On appeal from: An order of the Supreme Court of British Columbia, dated January 28, 2014 (*Louie v. Louie*, 2014 BCSC 133, Vancouver Docket No. S134867).

| | |
|---|---|
| Counsel for the Appellant: | M.L. Macaulay |
| Counsel for the Respondents: | D. Moonje |
| Counsel appearing on behalf of Ron Jackman, applicant for Intervenor status | Troy Hunter |
| Place and Date of Hearing: | Vancouver, British Columbia<br>April 14, 2015 |
| Written Submissions Received: | April 24 and May 6, 2015 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>June 3, 2015 |

**Written Reasons by:**
The Honourable Madam Justice Newbury

**Concurred in by:**
The Honourable Mr. Justice Frankel
The Honourable Mr. Justice Groberman

***Summary:***

*In 2009, the Lower Kootenay Indian Band received a payment of $125,000 from the local regional district for the use of a road across the reserve. At an in camera meeting, the five personal defendants, members of the Band Council, decided to pay themselves $5,000 each from these funds as payment for past services. In 2011, the plaintiff, a member of the Band, learned of the payments and sued the defendants for breach of fiduciary duty. Chambers judge below dismissed the claim, holding that the defendants had complied with their duty to act in the Band's best interests and that the payments had not been to the Band's detriment.*

*Held: Appeal allowed. The fiduciary position of the defendants required that they not place themselves in a position where their personal interests conflicted with the interests of the Band unless otherwise expressly authorized to do so. In making the payments, the defendants did not comply with the requirement in s. 2(3) of the Indian Act, which requires the consent of the majority of the Band in order to exercise such a power. The defendants profited personally from their position as councillors without express authority to do so. The payments were to the detriment of the Band since the Band was otherwise entitled to the funds. Thus the defendants acted in violation of their fiduciary duties and the Band was entitled to disgorgement of the funds.*

**Reasons for Judgment of the Honourable Madam Justice Newbury:**

[1] In early September 2009, the Lower Kootenay Indian Band received $125,000 from the Regional District of Central Kootenay as compensation for the District's use of a road that crosses one of the Band's reserves. The funds were deposited into the Band's general operating account. A few days later, the Band Council held a meeting which was attended by the five personal defendants, who were elected councillors. Part of the meeting took part *in camera*. During the *in camera* session, they decided to pay themselves $5,000 each as a "retroactive honorarium" for their work as members of the Council. The following day, five cheques for $5,000 were duly issued, one to each of the five defendants, who took the precaution of signing each other's cheques.

[2] The plaintiff Mr. Louie evidently became aware of the payments in late 2011. In July 2012, acting for himself and on behalf of the Band, he filed a Notice of Civil Claim against the defendants, alleging that the payments had been made in breach of their fiduciary duties and "without lawful authority or without juristic reason". He also alleged that the defendants had "conspired together" by acting in bad faith in exercising their powers for an improper purpose and keeping the payments secret for over two years, and that they had failed to make proper disclosure and to follow "financial procedures pursuant to the *Indian Act*." He sought a declaration that each of the defendants was guilty of breach of fiduciary duty and an order that each was individually liable to return $5,000 to the Band. Last, he sought punitive damages.

[3] In their response, the defendants denied that the payments had been made secretly or that any fiduciary duty arose in respect of them. They asserted that their decision was "within the scope of the Council's duties, done in accordance with the Handbook and the customs, procedures and/or obligations of LKB governance, and was in the best interests of the Band." In summary, they denied breaching any legal or equitable duty.

[4] For reasons indexed as 2014 BCSC 133, the summary trial judge below found that the claim of breach of fiduciary duty had not been proven, and dismissed the action. The plaintiff appeals.

### *The Trial Judge's Reasons*

[5] The Band is a small Band of approximately 220 members, only 100 of whom live on the reserve, near Creston. Although there was evidence that the Band had a "draft" financial administration bylaw that "serves as a guide for the Band Council in dealing with Band Money," the trial judge found that the Band did not have a constitution or a financial administration bylaw at the material time. Instead, he said, the Council acted in accordance with the custom and practices of prior Band Councils. The defendant Jason Louie deposed that:

> Honorariums, travel expenses, possible catch up payments have been discussed several times in the past at Council level. There has never been advance consultation with band members before any such discussions or before any acceptance or denial of any increase in payment to Council members.
>
> I have always considered the election to Council or (for myself) as Chief to be a mandate to ensure Council is paid for its work. There is a longstanding Council custom to approve pay to council members. The rate was $50 at one point, and has been raised over time. [Emphasis added.]

[6] The trial judge noted that there was "some uncertainty" in the evidence as to the circumstances surrounding the decision to make the payments. He described the conflicting evidence:

> The defendants say they believed that the Band Administrator was going to draft a Band Council Resolution dealing with these "catch up" payments and to post a bulletin at the Band office notifying Band members of the decision. Unfortunately, as I will discuss further below, the Council's recordkeeping procedures were at the time somewhat lax and no evidence of a Resolution, minutes from the meeting, or any other form of notice has been produced. It appears that if there was any paperwork documenting the decision, it has since has been lost. The named defendants cannot now recall whether they signed a Band Council Resolution or if a bulletin was posted at the Band offices, and the Band Administrator who was present at the meeting passed away in the spring of 2013 and so did not provide evidence. However, the defendants all say that they had no intention of keeping the payments secret and that they believed they were following their own rules of governance in making the decision.

> The plaintiff on the other hand says that the five payments were made in secret and remained concealed for two years, until a Band meeting held in September 2011 where he says that the defendant Mary Basil inadvertently revealed the existence of the payments. Mary Basil agrees that she mentioned the payments at the meeting but says she did so believing that the Band members, including the plaintiff, were aware of the honorariums.
>
> In December 2011 M. Jason Louie, then the Chief of the Band, wrote a letter to Band members addressing what he called an "accusation against Council member Mary Basil & myself ... stealing $5,000 from the Lower Kootenay Band" and explaining that $5,000 had been awarded to each of the five defendants in recognition of their services on Council. The letter does not identify the source of the accusation. The plaintiff says that this was the first time that the Band Council officially informed the Band membership of the payments. [At paras. 8-10; emphasis added.]



Evidently, councillors were receiving honoraria of $360 per month at the time of the impugned payments. This amount was regarded as inadequate, but any discussions of an increase had been met by the advice of the Band Administrator that Band funds did not permit an increase. (Para. 33.)

[7] When the $125,000 was received by the Band, the Council felt able to "address the issue of the honorarium" and with the concurrence of the Band Administrator, "voted to retroactively address the past low honorarium through a one-time payment." Each councillor received $5,000 even though some had been councillors longer than others. There is no indication that any councillor abstained from voting, although as noted, councillors did not sign their own cheques. The trial judge found that:

> The Band Administrator advised the Band Council that a Band Council Resolution was required; that he would prepare it, and that a public notice would be posted. As noted the councillors do not recall signing such a Band Council Resolution. The plaintiff alleges that the payments were clothed in secrecy. At some point prior to this trial, a water leak in a storage shed caused significant damage to the Band Council records from the period in question; as a result of rot and their mouldy condition they were burned. It is not clear when that occurred. No Band Council Resolution has been located and indeed, no file dealing with the Regional District of Central Kootenay negotiations has been found. It is not known if notice of the retroactive increase was posted at the Band office.
>
> However, although the records have been lost, the payments to the Band councillors were recorded in the Band's financial statements for 2009. Those statements, prepared by Gadicke, Minichiello and Carr, Chartered Accountants, contain extracts from the Band Council minutes for the period in

> question. The extracts indicate that the $125,000 cheque was received and that the "money can go towards anything." The general ledger for 2009 includes a typewritten note that says "As per minutes the council gave themselves a bonus of $5000 each in relation to the landfill settlement with RDCK." [At paras. 35-36; emphasis added.]



[8] Although it is not completely clear, the summary trial judge seemed to conclude that the lost minutes of the meeting must have referred to the $5,000 payments. This and the fact the payments were reflected in the Band's financial statements for the years 2008, 2009 and 2010 led him to reject the plaintiff's assertion that the payments had been made in secret and had remained "concealed" for two years until the defendant Ms. Basil inadvertently revealed their existence at a meeting. (Para. 9.) Whether they were secret or not, however, the plaintiff argued that the defendants had acted in a position of conflict of interest and thus breached their fiduciary duties to the Band.

[9] Before addressing this claim, the trial judge dealt with some ancillary issues raised on the facts. First was the matter of the classification of the $125,000 received by the Band for purposes of the *Indian Act*. Section 2 defines "Indian moneys" to mean "all moneys collected, received or held by Her Majesty for the use and benefit of Indians or bands." Section 69 authorizes the Governor in Council by order to permit a band to "control, manage and expend" its "revenue moneys". Such an order was made in respect of the Lower Kootenay Band.

[10] The plaintiff had pleaded that the Council failed to follow the applicable requirements of the *Indian Act* with respect to the Band's receipt of the funds. Initially, he argued that the $125,000 paid by the Regional District had been received by the Band pursuant to s. 35 of the Act (which deals with lands compulsorily taken), and were therefore "Indian moneys" to be held by Her Majesty for the benefit of the Band. The trial judge did not agree; at least for purposes of this proceeding, he found that the funds were "clearly received directly by the Band as its 'own source revenues'" and were therefore funds over which the Band had been granted control under s. 69(1) with the approval of the membership of the Band as a whole. Neither

the *Act* nor any government policy manuals, he noted, imposed any specific restrictions on the Band's use of "own source revenue" funds. (Para. 25.)

[11] The trial judge also accepted the defendants' assertion that in any event, the characterization of the $125,000 for purposes of the *Indian Act* was not relevant to the issues before the Court. Rather the question to be determined related to the use of the funds by the Band Council once the funds had been received. (Para. 22.)

[12] This brought the trial judge to the matter of governance of the Band. The parties are agreed that the Lower Kootenay Indian band is a creation of the *Indian Act,* and that the authority of the Band Council derives from that statute. The words of the Alberta Court of Appeal in *Paul Band v. The Queen* [1984] 2 W.W.R. 540 are therefore apposite:

> Band councils are created under the *Indian Act* and derive their authority to operate *qua* Band councils exclusively from that Act. In the exercise of their powers they are concerned with the administration of Band affairs on their respective reserves whether under direct authority of Parliament or as administrative arms of the Minister. They have no other source of power. [At para. 20.]

[13] Section 2(3) of the *Act* states that unless otherwise required:

> (*a*) a power conferred on a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the electors of the band; and
>
> (*b*) a power conferred on the council of a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the councillors of the band present at a meeting of the council duly convened.

Section 83(1) provides that subject to the Minister's approval, a band council may make bylaws for various purposes, including (b) the appropriation and expenditure of moneys of the band to defray expenses, and (c) the "appointment of officials to conduct the business of the council, prescribing their duties and providing for their remuneration out of any moneys raised pursuant to para. (a)"– i.e., by taxation. It is common ground that no such bylaws have been adopted by the Council. Nor is there

evidence of the Council's having received the (express) consent of a majority of the Band to fix the remuneration of Council members.

[14] In the absence of a constitution or a bylaw dealing with the administration of Band finances, the trial judge observed that:

> ... The governance practices were governed by custom: the Band Council relied on its own past practices and on occasion referenced some non-binding governmental publications. The Band Council dealt with matters such as honorariums, acceptable travel expenses and the like and the Band Administration was consulted. It was not irregular for compensation issues to be discussed *in camera*.
>
> As such, the scrutiny of the Band's administration of own source revenue brings into play these past practices and procedures. The Band Council's governance of financial matters under the *Act* is supplemented by such practices and procedures and it is in that context that their actions are examined. [At paras. 26-27; emphasis added.]

Thus, he said, the plaintiff's claim fell to be determined "through application of the law of fiduciary duty as informed by the customary governance practices of the Band." (Para. 28.) The phrase "customary governance" was not a reference to the traditional practices of the First Nation, but to the Band Council's practices over the last few decades.

*Fiduciary Duty*

[15] The trial judge began his analysis of the question of fiduciary duty with the proposition that since there was "no evidence" the Band Council could not make decisions regarding pay increases, the Band was bound by the Council's decision (to pay $5,000 to each councillor) "unless they acted in bad faith." (Para. 42.) (This appears to have been adopted from para. 30 of *Assu v. Chickite* [1991] 1 C.N.L.R. 14 (B.C.S.C.), where the Court was discussing the scope of powers that had been conferred by a band on its council.)

[16] The judge then went on to discuss various circumstances that seemed to weigh in his analysis against a finding of breach of duty:

- The disclosure of the "one-year increase in the honorarium paid" in the Band's financial statements was "inconsistent with the allegations of secrecy made by the plaintiff". (Para. 38);

- All the defendants had deposed that the payments were not a secret, and an outside consultant to the Band, Mr. Wullum, had been aware of the retroactive honorarium. (Para. 39);

- The defendants all believed that remunerating themselves was a "permissible use of own source funds" and there was no evidence of a policy, bylaw or direction to the contrary. (Para. 40);

- The defendants took "the precaution of not signing their own cheques". (Para. 43);

- The amount of $5,000 was small compared to the amounts of honoraria discussed in other cases. (Para. 46);

- The honoraria were not unrelated to Band Council services and did not carry the "stench of dishonesty." (Para. 46);

- The payments did not constitute "egregious personal benefits unrelated to decisions within the scope of a Band Council's authority", as had occurred in *Annapolis Valley First Nations Band v. Toney* 2004 FC 1728, *Gilbert v. Abbey* [1992] 4 C.N.L.R. 21 (B.C.S.C.) or *Louie v. Derrickson* [1993] B.C.J. No. 1338 (S.C.). In those cases, the band councils had not followed their own "accepted governance practices. That is not the case here". (Para. 44).

[17] Referring more directly to conflict of interest, the trial judge again emphasized at para. 45 the small size of the Band and the fact that many members of the Band and Council are related, meaning "it would be impossible for a Band Council to operate if courts applied strict rules regarding conflict of interest". He cited the decision of Mr. Justice Romilly in *Assu v. Chickite*, *supra,* which concerned in part a band council resolution fixing the salary of an employee of the council who was later

dismissed. One of the plaintiff's arguments was that many members of the band were related to each other and to members of the council and that accordingly, some of the decisions of the council were "biased". Romilly J. did not find this argument persuasive, and quoted from the judgment of Rothstein J., then of the Federal Court Trial Division, in *Sparvier v. Cowesses Indian Band Number 73* [1994] 1 C.N.L.R. 182. There Rothstein J. had stated:

> ... it does not appear to me to be realistic to expect members of the Appeal Tribunal, if they are residents of the reservation, to be completely without social, family or business contacts with a candidate in an election ...
>
> If a rigorous test for reasonable apprehension of bias were applied, the membership of decision-making bodies such as the Appeal Tribunal, in bands of small populations, would constantly be challenged on grounds of bias stemming from a connection that a member of the decision-making body had with one or another of the potential candidates. Such a rigorous application of principles relating to the apprehension of bias could potentially lead to situations where the election process would be frustrated under the weight of these assertions. Such procedural frustration could, as stated by counsel for the respondents, be a danger to the process of autonomous elections of band governments. [At 198-9; emphasis added.]

[18] At the same time, Romilly J. distinguished cases such as *Gilbert v. Abbey*, *supra*, and *Leonard v. Gottfriedson* (1980) 21 B.C.L.R. 326 (S.C.) in which direct personal benefits had been received by persons voting as council members. In the Court's analysis, these cases were distinguishable because there was no indication in *Assu* that any of the defendant councillors who voted to hire and pay the ex-employee "received any direct personal benefit thereby." (Para. 57; my emphasis.) Council members in the case at bar, of course, did receive a direct personal benefit from the passing of their resolution, if such it was.

[19] In addition to the summary trial judge's emphasis on the impracticality of rigorous procedural rules, he also placed considerable weight on his finding that the plaintiff had not shown Council's decision was in fact "to the detriment of the Band". In his concluding paragraphs, he stated:

> ... Past discussions on council had established that the low rate of the honorarium at the time was a problem that needed to be addressed; however, prior to the $125,000 payment, they had been unable to do so due

> to a paucity of funds. The honorarium has since been increased and there is no allegation that the increases are a detriment to the Band.
>
> I find that the claim of breach of fiduciary duty has not been proven. It has not been established that the defendants were not acting in the best interests of the Band. The plaintiff has failed to establish that it is more probable than not that the conduct of the Band Council amounts to a breach of their fiduciary duty. [At paras. 48-9; emphasis added.]

The Court did not find it necessary to address the issue of whether the Council or the plaintiff had lacked "clean hands". Mr. Louie's petition was dismissed.

***On Appeal***

[20] The plaintiff appeals on the grounds that the summary trial judge erred:

> 1. in finding that the onus of proof is on the [plaintiff] to prove on a balance of probabilities that the [defendants] discharged their fiduciary duty to him.
>
> 2. in finding that the [plaintiff] failed to establish that it is more probable than not that the conduct of the [defendants] amounts to a breach of their fiduciary duty on the basis of the following errors:
>
> a) finding that s. 2(3) of the *Indian Act* does not restrict the Band Council's powers over funds received as s. 69 own source revenue;
>
> b) finding the Band Council could act without proof that the decision was authorized by Band Council Resolution;
>
> c) finding that the [defendants] were not in a conflict of interest in making the decision to award themselves $5,000; and
>
> d) finding that the [defendants] disclosed the $5,000 payments to the Band membership.

[21] The first ground seems, with respect, misconceived: the onus was on the plaintiff to prove that the defendants had not discharged their duty to the Band. The Court found this onus had not been met. I do not regard onus of proof as particularly significant in this case, but there is clear authority to the effect that once a *prima facie* case of conflict of interest has been shown, the onus generally shifts to the defendant to show that he or she was acting in the best interests of the plaintiff (in this case, the Band.) See James I. Reynolds, *A Breach of Duty: Fiduciary Obligations and Aboriginal Peoples* at 196-7; *Toronto Party for a Better City v.*

*Toronto (City)* 2013 ONCA 327 at para. 58; *Roberts v. Canada* [1995] F.C.J. No. 1202 at para. 492 (*aff'd* [1999] F.C.J. No. 1529, *aff'd* 2002 SCC 79.

[22] I propose to address the questions of law raised by the second ground of appeal, i.e., paras. (a),( b) and (c) thereof, together. The fourth sub-ground relates to a question of fact which I do not find it necessary to address.



*Fiduciary Duty*

[23] I start with the two most fundamental and long standing obligations of fiduciaries – the "no conflict" rule and the "no profit" rule. These have been stated on many occasions over several centuries, but this passage from the judgment of the High Court of Australia in *Chan v. Zacharia* (1984) 154 C.L.R. 178, summarizes the historic approach succinctly:

> The first is that which appropriates for the benefit of the person to whom the fiduciary is owed any benefit or gain obtained or received by the fiduciary in circumstances where there existed a conflict of personal interest and fiduciary duty or a significant possibility of such conflict: the objective is to preclude the fiduciary from being swayed by considerations of personal interest. The second is that which requires the fiduciary to account for any benefit or gain obtained or received by reason of or by use of his fiduciary position or of opportunity or knowledge resulting from it: the objective is to preclude the fiduciary from actually misusing his position for his personal advantage. ... [T]he two themes, while overlapping, are distinct. Neither theme fully comprehends the other and a formulation of the principle by reference to one only of them will be incomplete. [At 198-9.]

(Quoted with approval by the majority in *Strother v. 3464920 Canada Inc.* 2007 SCC 24 at para. 75; see also the discussion in L.I. Rotman, *Fiduciary Law* (2005) at ch. 6.) An even more succinct statement may be found in the words of Lord Herschell in *Bray v. Ford* [1896] AC 44 (H.L.): "It is an inflexible rule of a Court of Equity that a person in a fiduciary position ... is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict." (At 51.)

[24] I emphasize the words "unless otherwise expressly provided", since they create the exception under which trustees, corporate directors, band councillors,

municipal councillors, and other persons entrusted with the funds or property of others are empowered to make decisions regarding their own remuneration that would otherwise be regarded as breach of the 'no profit' rule. (Indeed, before such powers became commonplace, trustees were required to act without pay: see *Waters' Law of Trusts in Canada* (3rd ed., 2005) at 888-90.) Such trust clauses, bylaws or rules are generally required to be strictly complied with and often require publication of the bylaw or resolution to the members of the group (here, the Band) or to the public.



[25] In this case, the trial judge assumed that authority of this kind had been granted by virtue of past practice; but as earlier noted, there was in fact no evidence that s. 2(3) of the *Indian Act* had been complied with – i.e., that the consent of the majority of the Band had been obtained for the exercise of such power by the Council. While I agree that it is unrealistic to expect a band to comply strictly with all the rules and regulations of a sophisticated corporation or council, I see no basis on which this very fundamental statutory provision could be effectively ignored. (See *Lac la Ronge Indian Band v. Canada* 1999 SKQB 218 at para. 194.) For this reason alone, it seems to me that the Council's resolution could not be said to have been expressly authorized as required by s. 2(3) of the *Act*. Further, even if there were evidence that the Council may act by virtue of a kind of ostensible authority (see *Clayton v. Lower Nicola Indian Band* 2013 BCSC 162 at paras. 62-3) there is no evidence that the Band by its custom or practice, represented or held out that Council members could depart from a previously-set honorarium to grant themselves a significant "bonus" from Band revenues.

[26] As far as the "no conflict" rule is concerned, I have noted the "prophylactic" approach enunciated in cases such as *Bray v. Ford* and *Phipps v. Boardman* [1967] 2 A.C. 46 (H.L.). Under this rule, the subjective motivations of the fiduciary, the absence of actual harm to the beneficiary, and even whether the fiduciary in fact profited, are irrelevant. As Rotman, *supra*, states:

> [The] objective standard of assessment does not concern itself with matters such as fiduciaries' subjective motivations for their actions, whether they have acted in good or bad faith, if beneficiaries have suffered harm or loss, or

> whether the beneficiaries have earned profit from the actions in question. Fiduciaries' subjective motivations may only come into play in determining appropriate measures of relief for breaches of fiduciary duty. [At 303.]

This approach has been applied by Canadian courts: see, e.g., the Court's endorsement of the "strict ethic" in *Canadian Aero Service Ltd. v. O'Malley* [1974] S.C.R. 592 at 607, *per* Laskin J., as he then was; see also *Cdn. Metals Exploration Ltd. v. Wiese* 2007 BCCA 318 at para. 20.

[27] If this approach applies, it seems clear that the trial judge's suggestion that the defendants did not act "to the detriment" of the Band or that there was no "stench of dishonesty" was, with respect, not relevant. As Waters writes, the strict rule against conflicts exists so that there will be no ambiguity about the fiduciary's motivation; he must act only in the beneficiary's best interests. (At 914.)

[28] At the same time, I note a somewhat different approach which Waters detects in some Canadian cases, including *Tornroos v. Crocker* [1957] S.C.R. 151, *Peso Silver Mines Ltd. v. Cropper* [1966] S.C.R. 673, and *Hawrelak v. Edmonton (City)* [1976] 1 S.C.R. 387. The text describes this approach as follows:

> The second theory, suggested by some of the more recent cases, tends to merge the two levels of protection. Rather than finding a strict prohibition against conflicts of interest and duty, this approach may look directly to the underlying fiduciary duty, the duty to act in the best interests of the beneficiary. On this approach, if the trustee did so act, there may be no reason to require the disgorgement of a gain, even though a conflict of interest may have been apparent on the surface. If he did not actually compromise the beneficiary, why penalize him? This is why, on this approach, a court may be willing to consider such issues as whether the trustee was in good faith, and whether the gain (which the beneficiary now seeks) was one which could not possibly have accrued to the beneficiary. A number of Canadian cases seem to adopt this more relaxed attitude.
>
> The difference between the prophylactic theory and the alternative theory, which would look at and weigh all the facts in order to determine whether a profit has to be surrendered, is really one of approach. "Rules of Equity", said Lord Upjohn [in *Boardman v. Phipps, supra*] "have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the exact circumstances of each case". In the process of application, what may strike one member of the court as calling, perhaps to his regret, for an injunction or a restitutionary order in the cause of maintaining high standards of conduct, may strike another as calling for a reasonable and equitable attitude towards the

> particular defendant. Canadian law could therefore benefit from a clearer commitment to one approach or the other. [At 915.]

The authors do not exhibit any particular enthusiasm for the alternative approach and indeed suggest that the choice between a rule that favours the beneficiary "who may well start with the real informational disadvantage vis-à-vis his trustee" and a rule that permits a trustee to "argue his way out of a *prima facie* situation of conflict when he might have avoided the whole difficulty by gaining an informed consent or court approval before he entered into the situation", "surely cannot be hard to make." (At 917.)



[29] Even if we were to adopt the more "flexible" approach, however, it simply cannot be said that the defendants did not act to the detriment of the Band in deciding to pay themselves $5,000 each out of Band revenues. This is not a case in which the benefit that accrued to the defendants "could not possibly have accrued to the beneficiary," nor one in which the advantages gained by the fiduciaries were paltry. As we have seen, members of the Council in the past had been receiving $360 per month. The removal of $25,000 from Band funds and the payment of $5,000 to each of the defendants was a clear and significant personal benefit to them, and them only. As a one-time payment, it did not benefit future members of Council or of the Band. Rather, it was a detriment to the Band. The conclusion seems to me inescapable that this was a breach of fiduciary duty, even in the context of a relatively informal and custom-based governance structure. In my view, such a structure should not deprive members of the Band of the protection of the fiduciary principle. They were entitled to hold the defendants to the high standard to which other fiduciaries are held in this country.

[30] I would allow the appeal, grant Mr. Louie a declaration that the five personal defendants acted in breach of their fiduciary duties to the Band in purporting to

remunerate themselves to the extent of $5,000, and order that each is liable to disgorge the amount of $5,000 to the Band. If the plaintiff wishes to pursue his claim for punitive damages, he may return to the court below.

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Frankel"

I AGREE:

"The Honourable Mr. Justice Groberman"

# Tab 16

Province of Alberta

# TRUSTEE ACT

## Revised Statutes of Alberta 2000
## Chapter T-8

Current as of December 17, 2014

Office Consolidation



Alberta Queen's Printer
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

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

RSA 1980 cT-10 s40

**Personal liability**

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

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

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

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

RSA 1980 cT-10 s41

## Variation of Trusts

**Variation of trusts**

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

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

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

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

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

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

(iii) is to be made by instalments, or

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

and

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

(i) by merger, however occurring;

(ii) by consent of all the beneficiaries;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Application to court for advice**

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

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

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

RSA 1980 cT-10 s43