COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER:	**1603-0029AC**
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 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")
APPLICANT:	PUBLIC TRUSTEE OF ALBERTA
STATUS ON APPEAL:	Appellant
STATUS ON APPLICATION:	Applicant
RESPONDENTS:	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust
STATUS ON APPEAL:	Respondents
STATUS ON APPLICATION:	Respondents
RESPONDENT:	SAWRIDGE INDIAN BAND NO. 19, NOW KNOWN AS THE SAWRDIGE FIRST NATION
STATUS ON APPEAL:	Respondent
STATUS ON APPLICATION:	Respondent
RESPONDENT:	CATHERINE TWINN, As a Trustee of the 1985 Trust

STATUS ON APPEAL:	Respondent
STATUS ON APPLICATION:	Respondent
DOCUMENT:	**MEMORANDUM OF ARGUMENT OF THE PUBLIC TRUSTEE OF ALBERTA**

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INDEX

I. STATEMENT OF FACTS

Introduction

1. The proceeding below ("the Action") deals with a Trust valued at over 70 million dollars, and its applications for approval of:

   i.) a proposed change to the Trust beneficiary definition;
   ii.) distribution or dissipation of trust funds; and
   iii.)approval of settlement of assets into the Trust

2. The outcome of the Action has the potential for life changing consequences for the recognized Minor Beneficiaries and the children of applicants seeking membership in Sawridge First Nation ("Candidate Children") (collectively "the Affected Minors").

3. The proposed definition change will result in any accepted member of Sawridge First Nation ("SFN") becoming a beneficiary of the Trust. The proposed change injects the SFN membership definition and process into a trust context and requires it be evaluated in that context, as recognized by the Court in the 2012 Court of Queen's Bench Decision ("Sawridge #1").[1]

4. In 2013 this Court ("Sawridge #2"), and the Court below in 2012 ("Sawridge #1"), recognized, *inter alia*, the potential conflicts of interest of the Applicant Trustees and the adult beneficiaries of the Trust. These conflict issues were the basis for the Courts' findings that the Affected Minors required independent representation.

5. The OPGT consented to take on the role of independent litigation representative on the basis of the capacity, the tasks and functions and terms of appointment established by the Court of Queen's Bench in Sawridge #1[2], and affirmed by the Court of Appeal in Sawridge #2.[3]

6. The December 17, 2015 Reasons for Judgment ("the Judgment Under Appeal") altered the OPGT's capacity, the tasks and functions it was assigned or the terms of its appointment without notice to the OPGT that such variations were being considered.

7. The Judgment Under Appeal significantly altered the OPGT's ability to act as an independent and effective litigation representative for the Affected Minors. The revised terms of appointment include:[4]

   i.) A complete removal of legal representation for a group of approximately 39-54 Candidate Children;[5]

   ii.) Prohibition from addressing the Trustee's conflicts of interests, even in relation to how that affects the proposed beneficiary definition change;[6]

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[1] *1985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2012 ABQB 365 (Q.B.) [Public Trustee's Authorities, Tab 3]
[2] *1985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2012 ABQB 365 (Q.B.) [Public Trustee's Authorities, Tab 3]
[3] *1985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2013 ABCA 226 (C.A.) [Public Trustee's Authorities, Tab 4]
[4] *1985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2015 ABQB 799 (Q.B.), at paras. 36-37, 48-49, 51-56, 69-71 [Public Trustee's Authorities, Tab 5]
[5] Affidavit of Roman Bombak, dated February 8, 2016, paras 10-12
[6] Affidavit of Roman Bombak, dated February 8, 2016, paras 15-17, Exhibit B

iii.) Prohibition from addressing whether the SFN membership process is discriminatory, biased, unreasonable, delayed without reason, or otherwise breaching Charter principles and the requirements of natural justice, regardless of whether that affects the validity of the proposed definition change, viewed from the lens of basic trust principles.[7]

8. These amendments were made without notice to the OPGT. The OPGT was not given an opportunity to make submissions, pursuant to s. 6(3) of the *Public Trustee Act*, regarding how the proposed changes would impact the interests of the Affected Minors and the OPGT's ability to act as an effective and independent litigation representative in the proceeding.

9. Without a stay, the Affected Minors will be required, through the OPGT, to take positions on key applications and issues under the terms of the Judgment Under Appeal, including production, questioning and a possible distribution or dissipation of funds from the Trust. This will occur while the OPGT is restricted in its ability to effectively represent all Affected Minors. Furthermore, some of the Affected Minors will no longer have any legal representation during those steps.[8]

Background Facts

10. The background history of the Action is set out in detail in the Affidavit of Roman Bombak.[9]

11. The capacity, the tasks and functions the OPGT was assigned and the terms of its appointment as litigation representative as set by Sawridge #1 and Sawridge #2 included :[10]

    i.) The OPGT was to act as the litigation representative for the Affected Minors, including an obligation to identify the Affected Minors it represented;[11]

    ii.) The conflicts of interest within SFN and the Trust required the OPGT to be an independent litigation representative.[12]

    iii.) The OPGT was to inquire into the process the SFN used to determine membership, specifically information that would assist the Court and the OPGT to evaluate, whether or not those processes are discriminatory, biased, unreasonable, delayed without reason, and otherwise in breach *Charter* principles and the requirements of natural justice.[13]

12. The OPGT relied on the Sawridge #1 and #2 terms of appointment to represent the Affected Minors on the questions of, *inter alia*, how the SFN membership process and Trustee conflicts of interest affected the validity of the proposed beneficiary definition amendment.[14]

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[7] Affidavit of Roman Bombak, dated February 8, 2016, paras 15-17
[8] Affidavit of Roman Bombak, dated February 8, 2016, paras 17-21
[9] Affidavit of Roman Bombak, dated February 8, 2016, paras 3-7
[10] *1985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2012 ABQB 365 (Q.B.) [Public Trustee's Authorities, Tab 3]; *1985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2013 ABCA 226 (C.A.) [Public Trustee's Authorities, Tab 4]; Affidavit of Roman Bombak, dated February 8, 2016, paras 5
[11] *1985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2012 ABQB 365 (Q.B.), at paras. 32 and 50 [Public Trustee's Authorities, Tab 3]
[12] *1985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2012 ABQB 365 (Q.B.), at paras. 22-29, 34-36, 39 and 42 [Public Trustee's Authorities, Tab 3]; *1985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2013 ABCA 226 (C.A.), at paras. 19, 21, and 25-28 [Public Trustee's Authorities, Tab 4]
[13] *1985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2012 ABQB 365 (Q.B.), at para. 54 [Public Trustee's Authorities, Tab 3]
[14] Affidavit of Roman Bombak, dated February 8, 2016, paras 7

13. The OPGT relied on Sawridge #1 and #2 to determine the groups of Affected Minors it represented, which included 45-60 Candidate Children.[15]

14. The Judgment Under Appeal removes or alters the OPGT's capacity, the tasks and functions it was assigned and the terms of its appointment as independent litigation representative in a manner that will cause irreparable harm to the interests of the Affected Minors and the public interest if the Judgment is not stayed pending appeal. The changes include:[16]

    i.) Removal of legal representation for the majority of the Candidate Children;

    ii.) Prohibition of questioning, production requests or submissions on the SFN membership process or the Trustee's conflicts of interest, even in relation to identification of Affected Minors, the validity of the proposed beneficiary definition or appropriateness of a distribution from the Trust;

    iii.) Removal or erosion of the protections that ensured the OPGT could function as an independent litigation representative.

15. These changes occurred without notice to the OPGT. The OPGT was not provided an opportunity to make submissions regarding how its restricted role would impact the interests of the Affected Minors. These changes occurred contrary to the requirements of s. 6 of the *Public Trustee Act*.

II. STATEMENT OF ISSUES

16. Are the requirements for a Stay met such that the December 17, 2015 judgment should be stayed pending the outcome of Appeal No. 1603-0029AC.

III. SUBMISSIONS OF THE LAW

17. The elements of the test for a stay are well known. The OPGT submits the Affected Minors meet all requirements for a stay pending appeal.[17]

A) Serious Issues

18. This element of the test requires that the appeal raise a serious issue that is not frivolous. The threshold for serious issue is a low one.[18] The OPGT was appointed to be an effective and independent litigation representative for the Affected Minors. The Judgment Under Appeal removes legal representation for the majority of Candidate Children and restricts the OPGT's terms of representation to such an extent that the OPGT will no longer be effective or have its independence fully protected.

19. These changes occurred without consideration for the requirements of Section 6 of the *Public Trustee Act*. The requirement of a serious issue is met.

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[15] Affidavit of Roman Bombak, dated February 8, 2016, paras 10-12

[16] *1985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2015 ABQB 799 (Q.B.), at paras. 36-37, 48-49, 51-56, 69-71 [Public Trustee's Authorities, Tab 5]; Affidavit of Roman Bombak, dated February 8, 2016, paras 10-21

[17] *RJR-MacDonald Inc.* v. *Canada (Attorney General)* [1994] S.C.J. No. 17 (S.C.C.) [Public Trustee's Authorities, Tab 10]

[18] *RJR-MacDonald Inc.* v. *Canada (Attorney General)* [1994] S.C.J. No. 17 (S.C.C.), para 44 and 49 [Public Trustee's Authorities, Tab 10]

B) Irreparable Harm

20. Being subject to the impacts of a decision that originates from a breach of natural justice is, in and of itself, irreparable harm.[19] The breach of s.6(3) of the *Public Trustee Act*, in this context, equates to irreparable harm.

21. The complete removal of legal representation for 39-54 Candidate Children for the steps contemplated by the Judgment Under Appeal is sufficient to prove irreparable harm, particularly as distribution or at least dissipation of funds from the Trust is contemplated.[20]

22. Irreparable harm is also established by:

    i) The restrictions placed on the OPGT's capacity, tasks and functions and terms of appointment are such that the OPGT will no longer be able to act as an effective or independent litigation representative in relation to the steps required under the Judgment Under Appeal.[21]

    ii) If the decision below is implemented prior to hearing of the appeal in this matter, a path will be set where critical matters are decided and significant expenditures will be approved from the Trust in a context where the Affected Minor's litigation representative cannot even make submissions on key issues that could affect the very validity of the proposed beneficiary definition change.[22]

23. The OPGT's independence was required for, *inter alia*, reasons of public policy, namely protection of minors and assurance there was no disincentive to the OPGT to act or to represent the interests of Affected Minors when there is a clear need for representation of minors' interests.[23]

24. Where the public interest is at stake, the requirement to prove irreparable harm is deemed to be met.[24] Further, where a statutory body is prevented from exercising a power or right granted by statute such as s.6 of the *Public Trustee Act*, that represents irreparable harm in itself.[25]

C) Balance of Convenience

25. Public interest considerations are also a compelling factor in the balance of convenience.

26. The decisions that will be made under the terms of the Judgment Under Appeal between now and the outcome of the appeal have the real potential to affect the rights of a group of Candidate Children who are no longer represented by the OGPT. Further, the limitations that have been

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[19] *Waldner* v. *Ponderosa Hutterian Brethren* [2003] A.J. No. 7 (Q.B.); [2003] A.J. No. 1503 (C.A.) [Public Trustee's Authorities, Tab 13]

[20] Affidavit of Roman Bombak, dated February 8, 2016, paras 17-21

[21] Affidavit of Roman Bombak, dated February 8, 2016, paras 13-21

[22] Affidavit of Roman Bombak, dated February 8, 2016, paras 15 and 17

[23] *L.C.* v. *Alberta (Métis Settlements Child & Family Services, Region 10)* [2011] A.J. No. 84 (Q.B.) para 29-30, 53-55 [Public Trustee's Authorities, Tab 7]; *Thomlinson* v. *Alberta (Child Services)* [2003] A.J. No. 716 (Q.B.) para 117-119 [Public Trustee's Authorities, Tab 11]

[24] *RJR-MacDonald Inc.* v. *Canada (Attorney General)* [1994] S.C.J. No. 17 (S.C.C.), para 71-72 [Public Trustee's Authorities, Tab 10]

[25] *RJR-MacDonald Inc.* v. *Canada (Attorney General)* [1994] S.C.J. No. 17 (S.C.C.), para 66 and 71-73 [Public Trustee's Authorities, Tab 10]; *David Hunt Farms Ltd.* v. *Canada (Minister of Agriculture)* (C.A.) [1994] 2 F.C. 625 (F.C.A.), para 19-21 [Public Trustee's Authorities, Tab 6]

placed on the OPGT regarding submissions on the proposed beneficiary definition change will prevent the OPGT from representing the best interests of the minor beneficiaries the 2015 decision permits it to continue to represent. The impacts on the Affected Minors are potentially of the magnitude of a million dollars or more per person. The potential for such life changing impacts weights the balance of convenience in favor of the Affected Minors.

27. This is also a case where the *parens patriae* jurisdiction of the Court affects the balance of convenience. Where there is a need to act to protect those who cannot protect themselves, this obligation of the Courts is invoked. When interests of minors are at stake, the Court must assume a more interventionist mode to ensure those interests are fully and adequately protected.[26]

28. The now excluded Candidate Children are in need of protection until the changes to their rights to representation are addressed with notice and with full opportunity for submissions, as required by s.6 of the *Public Trustee Act*.

29. The goal in a stay application is to ensure justice and equity. The Court should select the remedy that best fits the right sought to be protected. Given the impacts of the rights of Affected Minors, justice requires a stay. [27]

30. The stay preserves the status quo until the appeal is decided, which is a relevant factor when other factors in the analysis are relatively equal.

IV. REMEDY SOUGHT

1.) A stay of all steps and deadline established by the December 17, 2015 reasons;

2.) A stay of any variation of the OPGT's the capacity, its tasks and functions or its terms of appointment as litigation representative;

3.) Confirmation that the 2012 and 2013 terms regarding the OPGT's capacity, its tasks and functions or its terms of appointment as litigation representative remain operative pending appeal; and

4.) Such further and other relief as this Court may deem appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at the City of Edmonton, Province of Alberta, this 8th day of February, 2016.

HUTCHISON LAW

Per: _____
JANET L. HUTCHISON
Solicitors for the Public Trustee of Alberta

Estimation of time for Oral Argument: 15 minutes

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[26] *Tsaoussis (Litigation Guardian of)* v. *Baetz* [1998] O.J. No. 3516 (C.A.O.) [Public Trustee's Authorities, Tab 12]; *Nafie* v. *Badawy* [2015] A.J. No. 85 (C.A.) [Public Trustee's Authorities, Tab 8]

[27] *Potash Corp. of Saskatchewan Inc.* v. *Mosaic Potash Esterhazy Limited Partnership* [2011] S.J. No. 627 (C.A.) [Public Trustee's Authorities, Tab 9]

List of Authorities

1. *Alberta Rules of Court,* Alta Reg. 124/2010
2. *Public Trustee Act,* S.A. 2004, c. P-44.1
3. *1985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2012 ABQB 365 (Q.B.)
4. *1985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2013 ABCA 226 (C.A.)
5. *1985 Sawridge Trust* v. *Alberta (Public Trustee),* 2015 ABQB 799 (Q.B.)
6. *David Hunt Farms Ltd.* v. *Canada (Minister of Agriculture) (C.A.)* [1994] 2 F.C. 625 (C.A.)
7. *L.C.* v. *Alberta (Métis Settlements Child & Family Services, Region 10)* [2011] A.J. No. 84 (Q.B.)
8. *Nafie* v. *Badawy* [2015] A.J. No. 85 (C.A.)
9. *Potash Corp. of Saskatchewan Inc.* v. *Mosaic Potash Esterhazy Limited Partnership* [2011] S.J. No. 627 (C.A.)
10. *RJR-MacDonald Inc* v. *Canada (Attorney General)*, [1994] S.C.J. No. 17 (S.C.C.)
11. *Thomlinson* v. *Alberta (Child Services)* [2003] A.J. No. 716 (Q.B.)
12. *Tsaoussis (Litigation Guardian of)* v. *Baetz* [1998] O.J. No. 3516 (C.A.)
13. *Waldner* v. *Ponderosa Hutterian Brethren* [2003] A.J. No. 7 (Q.B.); aff'd in part [2003] A.J. No. 1503 (C.A.)

Current to December 31, 2015

Alta. Reg. 124/2010, r. 14.48

Judicature Act

ALBERTA RULES OF COURT

Alta. Reg. 124/2010

Part 14
Appeals

Division 4
Applications

Subdivision 3
Rules for Specific Applications

RULE 14.48

Stay pending appeal

14.48 An application to stay proceedings or enforcement of a decision pending appeal may be made

(a) to the judge who made that decision, or

(b) to a single appeal judge, whether or not the application was made to the judge who made the decision, and whether or not that application was granted or dismissed.

Alta. Reg. 41/2014 s4

Current to November 30, 2015

SA 2004, c. P-44.1, s. 6

[eff since January 1, 2005](Current Version)

PUBLIC TRUSTEE ACT

SA 2004, c. P-44.1

Part 1
Office of the Public Trustee

SECTION 6

Public Trustee not required to act

6(1) The Public Trustee is under no duty to act in a capacity, perform a task or function or accept an appointment by reason only of being empowered or authorized to do so.

(2) Subject to subsection (3), a court may appoint the Public Trustee to act in a capacity or to perform a task or function only if the Public Trustee consents to the appointment and to the terms of the appointment.

(3) If an Act expressly authorizes a court to direct the Public Trustee to act in a particular capacity or to perform a particular function, the court may appoint the Public Trustee to act in the capacity or to perform the task or function only if the Public Trustee has been given a reasonable opportunity to make representations regarding the proposed appointment.

(4) The Public Trustee may apply to have the court rescind or vary the terms of an appointment made contrary to subsection (2) or (3), and on the application the court may either rescind the appointment or vary its terms in a manner to which the Public Trustee consents.

SA 2004 cP-44.1 s6 effective January 1, 2005 (O.C. 502/2004)

Case Name:

1985 Sawridge Trust v. Alberta (Public Trustee)

IN THE MATTER OF the Trustee Act, R.S.A. 2000, c. T-8, as amended;
AND IN THE MATTER OF The Sawridge Band Inter Vivos Settlement Created by Chief Walter Patrick Twinn, of the Sawridge Indian Band, No. 19, now known as the Sawridge Indian Band, on April 15, 1985 (the "1985 Sawridge Trust")
Between
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

[2012] A.J. No. 621

2012 ABQB 365

217 A.C.W.S. (3d) 513

75 Alta. L.R. (5th) 188

543 A.R. 90

[2013] 3 C.N.L.R. 395

2012 CarswellAlta 1042

Docket: 1103 14112

Registry: Edmonton

Alberta Court of Queen's Bench
Judicial District of Edmonton

D.R.G. Thomas J.

Heard: April 5, 2012.
Judgment: June 12, 2012.

(56 paras.)

Aboriginal law -- Communities and governance -- Status of community -- Indian bands and First Nations -- Application by Public Trustee to be named litigation representative for minors whose interests were potentially affected by respondents' application, advance costs on solicitor and client basis, and ruling that information and evidence relating to membership criteria and processes of Band was relevant material allowed -- Respondent trustees had applied to vary definition of beneficiaries that could result in some minors being excluded -- Public Trustee appointed, considering monetary value at issue and respondents' potential conflict of interest -- Membership and application processes and practices of the Band were relevant to establish whether beneficiary class could and had been adequately defined.

Wills, estates and trusts law -- Trusts -- Express trusts -- Termination, revocation and variation -- Variation of trusts -- The beneficiary -- Application by Public Trustee to be named litigation representative for minors whose interests were potentially affected by respondents' application, advance costs on solicitor and client basis, and ruling that information and evidence relating to membership criteria and processes of Band was relevant material allowed -- Respondent trustees had applied to vary definition of beneficiaries that could result in some minors being excluded -- Public Trustee appointed, considering monetary value at issue and respondents' potential conflict of interest -- Membership and application processes and practices of the Band were relevant to establish whether beneficiary class could and had been adequately defined.

Application by the Public Trustee to be named as the litigation representative for minors whose interests were potentially affected by the application for advice and directions by the respondents, for advance costs on a solicitor an client basis, and a ruling that information and evidence relating to the membership criteria and processes of the Sawridge Band was relevant material. The Sawridge Band created a trust in 1985 to hold some Band property on behalf of its then members. The trust now held approximate $1.75 million shares. The trust was created in the expectation that persons who had been excluded from Band membership by gender would be entitled to join the Band as a consequence of legislative amendments. The trust was administered by the respondents. The respondents had applied to amend the definition of the term "beneficiaries" in the trust as the present members of the Band. The proposed amendments would result in certain children who were presently entitled to a share in the benefits of the trust being excluded.

HELD: Application allowed. The Public Trustee was appointed as a litigation representative. A litigation representative was appropriate and required because of the substantial monetary interests involved in this case and the potnetial for a conflict of interest. A decision on who fell inside or outside of the class of beneficiaries under the trust would significantly affect the potential share of those inside the trust. The key players in both the administration of the trust and of the Band overlapped and these persons were currently entitled to shares of the Trust property. There was thus a logical basis for a concern of a potential for an unfair distribution of the trust assets. The Public Trustee should be appointed as the litigation representative not only of minors who were children of current Band members, but also the children of applicants for Band membership who were also minors. In these circumstances, the Public Trustee should receive full and advance indemnification for its participation in the proceedings to make revisions to the trust and all costs of such representation

should be borne by the trust. The Public Trustee could make inquiries into the membership and application processes and practices of the Band. These issues were relevant to establish whether the beneficiary class could and had been adequately defined.

Statutes, Regulations and Rules Cited:

Alberta Rules of Court, Alta Reg. 124/2010, Rule 2.11(a), Rule 2.15

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B,

Indian Act, R.S.C. 1985, c. I-5,

Trustee Act, RSA 2000, c. T-8, s. 10, s. 12(4), s. 41

Counsel:

Ms. Janet L. Hutchison, for the Public Trustee/Applicants.

Ms. Doris Bonora, Mr. Marco S. Poretti, for the Sawridge Trustees/Respondents.

Mr. Edward H. Molstad, Q.C., for the Sawridge Band/Respondents.

Reasons for Judgment

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

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

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

12 The Sawridge Trustees have now concluded that the definition of "Beneficiaries" contained in the 1985 Sawridge Trust is "potentially discriminatory". They 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 (***E. v. Eve (Guardian Ad Litem)***, [1986] 2 S.C.R. 388, 31 D.L.R. (4th) 1) 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: ***R.W. v. Alberta (Child, Youth and Family Enhancement Act Director)***, 2010 ABCA 412 at para. 15, 44 Alta. L.R. (5th) 313. 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: ***R.B. v. Children's Aid Society of Metropolitan Toronto***, [1995] 1 S.C.R. 315 at 317-318, 122 D.L.R. (4th) 1. Ideally, a parent should act as a 'next friend' [now a 'litigation representative' under the new *Rules*]: ***V.B. v. Alberta (Minister of Children's Services)***, 2004 ABQB 788 at para. 19, 365 A.R. 179; ***C.H.S. v. Alberta (Director of Child Welfare)***, 2008 ABQB 620, 452 A.R. 98.

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 at para. 148, [2011] 2 S.C.R. 175. 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 at paras. 42-43, 261 D.L.R. (4th) 300, leave denied [2005] S.C.C.A. No. 555.

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; ***Blueberry Interim Trust (Re)***, 2012 BCSC 254.

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 and Art Emporium v. Canada (Commissioner of Customs and Revenue)***, 2007 SCC 2, [2007] 1 S.C.R. 38 ["***Little Sisters***"] and ***R. v. Caron***, 2011 SCC 5, [2011] 1 S.C.R. 78. 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*** 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. Ltd.*** (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, affirmed 2006 ABCA 293, 275 D.L.R. (4th) 489 .

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 en-

tity 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 Band of Ojibways*** (1997), 33 O.R. (3d) 782, 147 D.L.R. (4th) 61 (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, 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 ***Canada v. Addison & Leyen Ltd.***, 2007 SCC 33, 365 N.R. 62 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.

D.R.G. THOMAS J.

Case Name:

1985 Sawridge Trust v. Alberta (Public Trustee)

IN THE MATTER OF The Trustee Act, R.S.A. 2000, C. T-8, as amended
IN THE MATTER OF The Sawridge Band Inter Vivos Settlement Created By Chief Walter Patrick Twinn, of The Sawridge Indian Band, No. 19, now known as Sawridge First Nation, on April 15, 1985 (the "1985" Sawridge Trust)
Between
Roland Twinn, Catherine Twinn, Walter Felix Twinn, Bertha L'Hirondelle, and Clara Midbo, as Trustees for the 1985 Sawridge Trust, Appellants (Respondents), and
Public Trustee of Alberta, Respondent (Applicant), and
Sawridge First Nation, Minister of Indian Affairs and Northern Development, Aline Elizabeth Huzar, June Martha Kolosky and Maurice Stoney, Interested Parties

[2013] A.J. No. 640

2013 ABCA 226

[2013] 3 C.N.L.R. 411

230 A.C.W.S. (3d) 54

553 A.R. 324

85 Alta. L.R. (5th) 165

2013 CarswellAlta 1015

Docket: 1203-0230-AC

Registry: Edmonton

Alberta Court of Appeal
Edmonton, Alberta

P.T. Costigan, C.D. O'Brien, J.D.B. McDonald JJ.A.

Heard: June 5, 2013.
Judgment: June 19, 2013.

(32 paras.)

Aboriginal law -- Communities and governance -- Status of community -- Types -- Indian bands and First Nations -- Practice and procedure -- Costs -- Considerations -- Appeals and judicial review -- Appeal by Trustees of Sawridge Trust from aspects of order naming Public Trustee as litigation representative for potentially interested children dismissed -- Trustees appealed from award of advance costs to Public Trustee on solicitor and own client basis, to be paid for by Trust, and from exemption of Public Trustee from liability for any other costs -- Chambers judge did not err in awarding advance costs where he found children's interest required protection -- Chambers judge did not err in granting exemption from costs of other participants or in awarding solicitor and client costs.

Wills, estates and trusts law -- Trusts -- Express trusts -- Termination, revocation and variation -- Variation of trusts -- The beneficiary -- Appeal by Trustees of Sawridge Trust from aspects of order naming Public Trustee as litigation representative for potentially interested children dismissed -- Trustees appealed from award of advance costs to Public Trustee on solicitor and own client basis, to be paid for by Trust, and from exemption of Public Trustee from liability for any other costs -- Chambers judge did not err in awarding advance costs where he found children's interest required protection -- Chambers judge did not err in granting exemption from costs of other participants or in awarding solicitor and client costs.

Appeal by the Trustees of the Sawridge Trust (Trust) from aspects of an order naming the Public Trustee as the litigation representative for potentially interested children. The Trust wished to change the designation of "beneficiaries" under the Trust and sought advice and direction from the court. A chambers judge noted children who might have been affected by the change were not represented by counsel, and he ordered the Public Trustee be notified. The Public Trustee then applied to be named as litigation representative for the potentially interested children. The application 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 appealed the order, but only insofar as it related to costs and the exemption therefrom.

HELD: Appeal dismissed. It was plain and obvious the interests of the affected children, potentially excluded or otherwise affected by changes proposed to the Trust, required protection that could be ensured only by means of independent representation. It could not be supposed the children's parents were necessarily motivated to obtain such representation. The chambers judge noted 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 the Band's membership. He concluded a litigation representative was necessary and the Public Trustee was the appropriate person to be appointed. The chambers judge did not err in awarding advance costs where he found the children's interest required protection, and it was necessary to secure the costs in such fashion to secure the requisite independent representation of the Public Trustee. The chambers judge did not

err in granting an exemption from the costs of other participants, as an independent litigation representative might be dissuaded from accepting an appointment if subject to liability for a costs award. The chambers judge's award of solicitor and client costs flowed from his consideration of whether the Public Trustee would be entitled to such an award if it were appointed as litigation representative. The parties understood their submissions during the application encompassed the costs for the application itself.

Statutes, Regulations and Rules Cited:

Alberta Rules of Court, Rule 2.21

Indian Act, R.S.C. 1985, c I-5,

Public Trustee Act, S.A. 2004, c P-44.1, s. 41

Appeal From:

Appeal from the Order by The Honourable Mr. Justice D.R.G. Thomas. Dated the 12th day of June, 2012. Filed on the 20th day of September, 2012 (Docket: 1103 14112).

Counsel:

F.S. Kozak, Q.C., M.S. Poretti, for the Appellants.

J.L. Hutchison, for the Respondent.

Memorandum of Judgment

The following judgment was delivered by

THE COURT:--

I. Introduction

1 The appellants are Trustees of the Sawridge Trust (Trust). They wish to change the designation of "beneficiaries" under the Trust and have sought advice and direction from the court. A chambers judge, dealing with preliminary matters, noted that children who might be affected by the change were not represented by counsel, and he ordered that the Public Trustee be notified. Subsequently, the Public Trustee applied to be named as litigation representative for the potentially interested children, and that appointment was opposed by the Trustees.

2 The judge granted the application. He also awarded advance costs to the Public Trustee on a solicitor and his own client basis, to be paid for by the Trust, and he exempted the Public Trustee from liability for any other costs of the litigation. The Trustees appeal the order, but only insofar as it relates to costs and the exemption therefrom. Leave to appeal was granted on consent.

II. Background

3 The detailed facts are set out in the Reasons for Judgment of the chambers judge: *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2012 ABQB 365. A short summary is provided for purposes of this decision.

4 On April 15, 1985 the Sawridge First Nation, then known as the Sawridge Indian Band No. 19 (Sawridge) set up the 1985 Sawridge Trust (Trust) to hold certain properties in trust for Sawridge members. The current value of those assets is approximately $70,000,000.

5 The Trust was created in anticipation of changes to the *Indian Act*, RSC 1985, c I-5, which would have opened up membership in Sawridge to native women who had previously lost their membership through marriage. The beneficiaries of the Trust were defined as "all persons who qualified as a member of the Sawridge First Nation pursuant to the provisions of the *Indian Act* as they existed on April 15, 1982."

6 The Trustees are now looking to distribute the assets of the Trust and recognize that the existing definition of "beneficiaries" is potentially discriminatory. They would like to redefine "beneficiaries" to mean the present members of Sawridge, and acknowledge that no children would be part of the Trust. The Trustees suggest that the benefit is that the children would be funnelled through parents who are beneficiaries, or children when then become members when they attain the age of 18 years.

7 Sawridge is currently composed of 41 adult members and 31 minors. Of the 31 minors, 23 currently qualify as beneficiaries under the Trust, and 8 do not. It is conceded that if the definition of beneficiaries is changed, as currently proposed, some children, formerly entitled to a share in the benefits of the trust, will be excluded, while other children who were formerly excluded will be included.

8 When Sawridge's application for advice and direction first came before the court, it was observed that there was no one representing the minors who might possibly be affected by the change in the definition of "beneficiaries." The judge ordered that the Public Trustee be notified of the proceedings and be invited to comment on whether it should act on behalf of the potentially affected minors.

9 The Public Trustee was duly notified and it brought an application asking that it be named as the litigation representative of the affected minors. It also asked the court to identify the minors it would represent, to award it advance costs to be paid for by the Trust, and to allow it to make inquiries through questioning about Sawridge's membership criteria and application processes. The Public Trustee made it clear to the court that it would only act for the affected minors if it received advanced costs from the Trust on a solicitor and his own client basis, and if it was exempted from liability for costs to the other participants in the litigation.

III. The Chambers Judgment

10 The chambers judge first considered whether it was necessary to appoint the Public Trustee to act for the potentially affected minors. The Trustees submitted that this was unnecessary because their intention was to use the trust to provide for certain social and health benefits for the beneficiaries of the trust and their children, with the result that the interests of the affected children would ultimately be defended by their parents. The Trustees also submitted that they were not in a conflict of interest, despite the fact that a number of them are also beneficiaries under the Trust.

11 The chambers judge concluded that it was appropriate to appoint the Public Trustee to act as litigation representative for the affected minors. He was concerned about the large amount of money at play, and the fact that the Trustees were not required to distribute the Trust assets in the manner currently proposed. He noted, that while desirable, parents do not always act in the best interests of their children. Furthermore, he found the Trustees and the adult members of the Band (including the Chief and Council) are in a potential conflict between their personal interests and their duties as fiduciaries.

12 The chambers judge determined that the group of minors potentially affected included the 31 current minors who were currently band members, as well as an unknown number of children of applicants for band membership. He also observed that there had been substantial litigation over many years relative to disputed Band membership, which litigation appears to be ongoing (para 9).

13 The judge rejected the submission of the Trustees that advance costs were only available if the strict criteria set out in *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 SCR 38, were met. He stated that the criteria set out in *Little Sisters* applied where a litigant has an independent interest in the proceeding. He viewed the role of the Public Trustee as being "neutral" and capable of providing independent advice regarding the interests of the affected minors which may not otherwise be forthcoming because of the Trustees' potential conflicts.

14 In result, the chambers judge appointed the Public Trustee as litigation representative of the minors, on the conditions that it would receive advance costs and be exempted from any liability for costs of other parties. He finished by ordering costs of the application to the Public Trustee on a solicitor and its own client basis.

IV. Grounds of Appeal

15 The appellants advance four grounds of appeal:

(a) The Chambers Judge erred in awarding the Respondent advance costs on a solicitor and his own client basis by concluding that the strict criteria set by the Supreme Court of Canada for the awarding of advance costs does not apply in these proceedings.
(b) In the alternative, the Chambers Judge erred in awarding advance costs without any restrictions or guidelines with respect to the amount of costs or the reasonableness of the same.
(c) The Chambers Judge erred in exempting the Respondent of any responsibility to pay costs of the other parties in the proceeding.
(d) The Chambers Judge erred in granting the Respondent costs of the application on a solicitor and his own client basis.

V. Standard of Review

16 A chambers judge ordering advance costs will be entitled to considerable deference unless he "has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts": *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 SCR 371 at paras 42-43.

VI. Analysis

A. Did the chambers judge err by failing to apply the *Little Sisters* criteria?

17 The Trustees argue that advanced interim costs can only be awarded if "the three criteria of impecuniosity, a meritorious case and special circumstances" are strictly established on the evidence before the court: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 SCR 371, at para 36; as subsequently applied in the "public interest cases" of *Little Sisters* at para 37 and in *R. v. Caron*, 2011 SCC 5, [2011] 1 SCR 78 at paras 36-39. They go on to submit that none of these requirements were met in the present case. We are not persuaded that the criteria set out in *Okanagan* and *Little Sisters* were intended to govern rigidly all awards of advance funding and, in particular, do not regard them as applicable to exclude such funding in the circumstances of this case. As will be discussed, a strict application is neither possible, nor serves the purpose of protecting the interests of the children potentially affected by the proposed changes to the Trust.

18 We start by noting that the rules described in *Okanagan* and *Little Sisters* apply in adversarial situations where an impecunious private party wants to sue another private party, or a public institution, and wants that party to pay its costs in advance. For one thing, the test obliges the applicant to show its suit has merit. In this case, however, the Public Trustee has not been appointed to sue anyone on behalf of the minors who may be affected by the proposed changes to the Trust. Its mandate is to ensure that the interests of the minor children are taken into account when the court hears the Trustees' application for advice and direction with respect to their proposal to vary the Trust. The minor children are not, as the chambers judge noted, "independent" litigants. They are simply potentially affected parties.

19 The Trustees submit the chambers judge erred by characterizing the role of the Public Trustee as neutral rather than adversarial. While we hesitate to characterize the role of the Public Trustee as "neutral", as it will be obliged, as litigation representative, to advocate for the best interests of the children, the litigation in issue cannot be characterized as adversarial in the usual sense of that term. This is an application for advice and direction regarding a proposed amendment to a Trust, and the merits of the application are not susceptible to determination, at least at this stage. Indeed, the issues remain to be defined, and their extent and complexity are not wholly ascertainable at this time; nor is the identity of all the persons affected presently known. However, what can be said with certainty at this time is that the interests of the children potentially affected by the changes require independent representation, and the Public Trustee is the appropriate person to provide that representation. No other litigation representative has been put forward, and the Public Trustee's acceptance of the appointment was conditional upon receiving advance costs and exemption.

20 There is a second feature of this litigation that distinguishes it from the situation in *Okanagan* and *Little Sisters*. Here the children being represented by the Public Trustee are potentially affected parties in the administration of a Trust. Unlike the applicants in *Okanagan* and *Little Sisters*, therefore, the Public Trustee already has a valid claim for costs given the nature of the application before the court. As this court observed in *Deans v. Thachuk*, 2005 ABCA 368 at para 43, 261 DLR (4th) 300:

> In *Buckton, Re*, [1907] 2 Ch. 406, *supra*, Kekewich J. identified three categories of cases involving costs in trust litigation. **The first are actions by trustees for guidance from the court as to the construction or the administration of a trust. In such cases, the costs of all parties necessarily incurred for the benefit of the estate will be paid from the fund.** The second are actions by others relating to some difficulty of construction or administration of a trust that would have justified an application by the trustees, where costs of all parties necessarily incurred for the benefit of the trust will also be paid from the fund. The third are actions by some beneficiaries making claims which are adverse or hostile to the interests of other beneficiaries. In those cases, the usual rule that the unsuccessful party bears the costs will apply. [emphasis added]

21 Moreover, the chambers judge observed that the Trustees had not taken any "pre-emptive steps" to provide independent representation of the minors to avoid potential conflict and conflicting duties (para 23). Their failure to have done so ought not now to be a reason to shift the obligation to others to bear the costs of this representation. The Public Trustee is prepared to provide the requisite independent representation, but is not obliged to do so. Having regard to the fact that the Trust has ample funds to meet the costs, as well as the litigation surrounding the issue of membership, it cannot be said that the conditions attached by the Public Trustee to its acceptance of the appointment are unreasonable or otherwise should be disregarded.

22 It should be noted, parenthetically, that the Trustees rely on *Deans* as authority for the proposition that the *Okanagan* criteria will apply in pension trust fund litigation, which they submit is analogous to the situation here. But it is clear that the decision to apply the *Okanagan* criteria in *Deans* was based on the nature of the litigation in that case. It was an action against a trust by certain beneficiaries, was adversarial and fit into the third category described in the passage from *Buckton* quote above.

23 In our view, there are several sources of jurisdiction for an order of advance costs in the case before us. One is section 41 of the *Public Trustee Act*, SA 2004, c P-44.1 which provides:

> 41 Unless otherwise provided by an enactment, where the Public Trustee is a party to or participates in any matter before a court,
>
> (a) the costs payable to the Public Trustee, and the client, party or other person by whom the costs are to be paid, are in the discretion of the court, and
> (b) the court may order that costs payable to the Public Trustee are to be paid out of and are a charge on an estate.

24 It is evident that the court is vested with a large discretion with respect to an award of costs under section 41. While not dealing specifically with an award of advance costs, this discretionary power encompasses such an award. Further, the court has broad powers to "impose terms and conditions" upon the appointment of a litigation representative pursuant to Rule 2.21, which states:

> 2.21 The Court may do one or more of the following:

(a) terminate the authority or appointment of a litigation representative;
(b) appoint a person as or replace a litigation representative;
(c) impose terms and conditions on, or on the appointment of, a litigation representative or cancel or vary the terms or conditions.

25 The chambers judge also invoked *parens patriae* jurisdiction as enabling him to award advance costs, in the best interests of the children, to obtain the independent representation of the Public Trustee on their behalf. To the extent that there is any gap in statutory authority for the exercise of this power, the *parens patriae* jurisdiction is available. As this Court commented in *Alberta (Child, Youth and Family Enhancement Act, Director) v. DL*, 2012 ABCA 275, 536 AR 207, in situations where there is a gap in the legislative scheme, the exercise of the inherent *parens patriae* jurisdiction "is warranted whenever the best interests of the child are engaged" (para 4).

26 In short, a wide discretion is conferred with respect to the granting of costs under the *Trustee Act*, the terms of the appointment of a litigation representative pursuant to the *Rules of Court*, and in the exercise of *parens patriae* jurisdiction for the necessary protection of children. In our view, the discretion is sufficiently broad to encompass an award of advanced costs in the situation at hand.

27 In this case, it is plain and obvious that the interests of the affected children, potentially excluded or otherwise affected by changes proposed to the Trust, require protection which can only be ensured by means of independent representation. It cannot be supposed that the parents of the children are necessarily motivated to obtain such representation. Indeed, it appears that all the children potentially affected by the proposed changes have not yet been identified, and it may be that children as yet unborn may be so affected.

28 The chambers judge noted that there were 31 children potentially affected by the proposed variation, as well as an "unknown number of potentially affected minors" - the children of applicants seeking to be admitted into membership of the Band (para 31). He concluded that a litigation representative was necessary and that the Public Trustee was the appropriate person to be appointed. No appeal is taken from this direction. In our view, the trial judge did not err in awarding advance costs in these circumstances where he found that the children's interest required protection, and that it was necessary to secure the costs in such fashion to secure the requisite independent representation of the Public Trustee.

B. Did the chambers judge err in failing to impose costs guidelines?

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

mechanism for obtaining payment and guidelines for oversight has yet to be addressed by the judge dealing with the application for advice and directions.

C. Did the chambers judge err in granting an exemption from the costs of other participants?

30 Much of the reasoning found above applies with respect to the appeal from the exemption from costs. An independent litigation representative may be dissuaded from accepting an appointment if subject to liability for a costs award. While the possibility of an award of costs against a party can be a deterrent to misconduct in the course of litigation, we are satisfied that the court has ample other means to control the conduct of the parties and the counsel before it. We also note that an exemption for costs, while unusual, is not unknown, as it has been granted in other appropriate circumstances involving litigation representatives: *Thomlinson v. Alberta (Child Services)*, 2003 ABQB 308 at paras 117-119, 335 AR 85; and *LC v. Alberta (Metis Settlements Child and Family Services)*, 2011 ABQB 42 at paras 53-55, 509 AR 72.

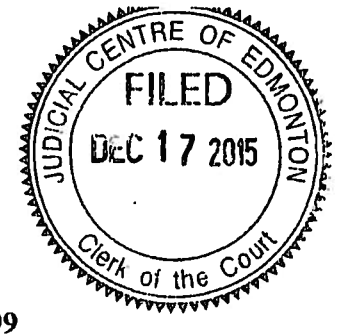
D. Did the chambers judge err in awarding costs of the application to the Public Trustee?

31 Finally, with respect to the appeal from the grant of solicitor and client costs on the application heard by the chambers judge, it appears to us that one of the subjects of the application was whether the Public Trustee would be entitled to such an award if it were appointed as litigation representative. The judge's award flowed from such finding. The appellant complains, however, that the judge proceeded to make the award without providing an opportunity to deal separately with the costs of the application itself. It does not appear, however, that any request was made to the judge to make any further representations on this point prior to the entry of his order. We infer that the parties understood that their submissions during the application encompassed the costs for the application itself, and that no further submission was thought to be necessary in that regard before the order was entered.

VII. Conclusion

32 The appeal is dismissed.

P.T. COSTIGAN J.A.
C.D. O'BRIEN J.A.
J.D.B. McDONALD J.A.



Court of Queen's Bench of Alberta

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

Date: 20151217
Docket: 1103 14112
Registry: Edmonton

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

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

Between:

Ronald Twinn, Catherine Twinn, Walter Felix Twin, Bertha L'Hoirondelle and Clara Midbo, As Trustees for the 1985 Sawridge Trust

Respondents

- and -

Public Trustee of Alberta

Applicant

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

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I Introduction

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

II. Background

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

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

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

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

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

February 14, 2012 - The Public Trustee applied:

1. to be appointed as the litigation representative of minors interested in this proceeding;
2. for the payment of advance costs on a solicitor and own client basis and exemption from liability for the costs of others; and
3. for an advance ruling that information and evidence relating to the membership criteria and processes of the Sawridge Band is relevant material.

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

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

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

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

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

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

- the Trustee's application to settle the Trust was adjourned;
- the Public Trustee file an amended application for production from the SFN with argument to be heard on September 2, 2015; and
- the Trustees identify issues concerning calculation and reimbursement of the accounts of the Public Trustee for legal services.

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

- within 60 days the Trustees prepare and serve an affidavit of records, per the *Alberta Rules of Court*, Alta Reg 124/2010 [the "*Rules*", or individually a "*Rule*"],
- the Trustees may withdraw their proposed settlement agreement and litigation plan, and

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

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

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

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

III. The 1985 Sawridge Trust

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

> [8] In 1982 various assets purchased with funds of the Sawridge Band were placed in a formal trust for the members of the Sawridge Band. In 1985 those assets were transferred into the 1985 Sawridge Trust. [In 2012] the value of assets held by the 1985 Sawridge Trust is approximately $70 million. As previously noted, the beneficiaries of the Sawridge Trust are restricted to persons who were members of the Band prior to the adoption by Parliament of the *Charter* compliant definition of Indian status.
>
> [9] In 1985 the Sawridge Band also took on the administration of its membership list. It then attempted (unsuccessfully) to deny membership to Indian women who married non-aboriginal persons: ***Sawridge Band v. Canada***, 2009 FCA 123, 391 N.R. 375, leave denied [2009] S.C.C.A. No. 248. At least 11 women were ordered to be added as members of the Band as a consequence of this litigation: ***Sawridge Band v. Canada***, 2003 FCT 347, 2003 FCT 347, [2003] 4 F.C. 748, affirmed 2004 FCA 16, [2004] 3 F.C.R. 274. Other litigation continues to the present in relation to disputed Band memberships: ***Poitras v. Sawridge Band***, 2012 FCA 47, 428 N.R. 282, leave sought [2012] S.C.C.A. No. 152.
>
> [10] At the time of argument in April 2012, the Band had 41 adult members, and 31 minors. The Sawridge Trustees report that 23 of those minors currently qualify as beneficiaries of the 1985 Sawridge Trust; the other eight minors do not.

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

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

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

IV. The Current Situation

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

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

1. membership in the SFN,
2. candidates who have or are seeking membership with the SFN,
3. the processes involved to determine whether individuals may become part of the SFN,
4. records of the application processes and certain associated litigation, and
5 how assets ended up in the 1985 Sawridge Trust.

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

V. Submissions and Argument

A. The Public Trustee

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

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

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

B. The SFN

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

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

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

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

[19] Privacy interests and privacy legislation are also factors: ***Royal Bank of Canada v Trang***, 2014 ONCA 883 at paras 97, 123 OR (3d) 401; *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5. The Public Trustee should not have access to this information

unless the SFN's application candidates consent. Much of the information in membership applications is personal and sensitive. Other items were received by the SFN during litigation under an implied undertaking of confidentiality: ***Juman v Doucette; Doucette (Litigation Guardian of) v Wee Watch Day Care Systems,*** 2008 SCC 8, [2008] 1 SCR 157. The cost to produce the materials is substantial.

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

C. The Sawridge Trustees

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

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

[23] They argue that the Public Trustee is attempting to attack a process that has already undergone judicial scrutiny. They note that the SFN's admission procedure was approved by the Minister of Indian and Northern Affairs, and the Federal Court concluded it was fair: ***Stoney v Sawridge First Nation***, 2013 FC 509, 432 FTR 253. Further, the membership criteria used by the SFN operate until they are found to be invalid: ***Huzar v Canada***, [2000] FCJ No 873 at para 5, 258 NR 246. Attempts to circumvent these findings in applications to the Canadian Human Rights Commission were rejected as a collateral attack, and the same should occur here.

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

[25] Additional submissions were made by two separate factions within the Trustees. Ronald Twinn, Walter Felix Twin, Bertha L'Hoirondelle and Clara Midbo argued that an unfiled affidavit made by Catherine Twinn was irrelevant to the Trustees' disclosure. Counsel for Catherine Twinn expressed concern in relation to the Trustee's activities being transparent and

that the ultimate recipients of the 1985 Sawridge Trust distribution be the appropriate beneficiaries.

VI. Analysis

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

A. Rule 5.13

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

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

> 5.13(1) On application, and after notice of the application is served on the person affected by it, the Court may order a person who is not a party to produce a record at a specified date, time and place if
>
> (a) the record is under the control of that person,
>
> (b) there is reason to believe that the record is relevant and material, and
>
> (c) the person who has control of the record might be required to produce it at trial.
>
> (2) The person requesting the record must pay the person producing the record an amount determined by the Court.

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

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

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

B. Refocussing the role of the Public Trustee

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

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

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

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

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

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

1. Representing the interests of minor beneficiaries and potential minor beneficiaries so that they receive fair treatment (either direct or indirect) in the distribution of the assets of the 1985 Sawridge Trust;
2. Examining on behalf of the minor beneficiaries the manner in which the property was placed/settled in the Trust; and
3. Identifying potential but not yet identified minors who are children of SFN members or membership candidates; these are potentially minor beneficiaries of the 1985 Sawridge Trust; and

4. Supervising the distribution process itself.

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

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

Task 1 - Arriving at a fair distribution scheme

[40] The first task for the 1985 Sawridge Trustees and the Public Trustee is to develop for my approval a proposed scheme for distribution of the 1985 Sawridge Trust that is fair in the manner in which it allocates trust assets between the potential beneficiaries, adults and children, previously vested or not. I believe this is a largely theoretical question and the exact numbers and personal characteristics of individuals in the various categories is generally irrelevant to the Sawridge Trustee's proposed scheme. What is critical is that the distribution plan can be critically tested by the Public Trustee to permit this Court to arrive at a fair outcome.

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

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

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

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

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

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

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

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

Task 3 - Identification of the pool of potential beneficiaries

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

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

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

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

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

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

children of persons who have, at a minimum, completed a Sawridge Band membership application.

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

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

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

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

1. Adult members of the SFN;
2. Minors who are children of members of the SFN;
3. Adults who have unresolved applications to join the SFN;
4. Children of adults who have unresolved applications to join the SFN;
5. Adults who have applied for membership in the SFN but have had that application rejected and are challenging that rejection by appeal or judicial review; and
6. Children of persons in category 5 above.

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

1. The names of individuals who have:
   a) made applications to join the SFN which are pending (category 3); and
   b) had applications to join the SFN rejected and are subject to challenge (category 5); and
2. The contact information for those individuals where available.

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

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

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

[59] This information should:

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

2. allow timely identification of:

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

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

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

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

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

Task 4 - General and residual distributions

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

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

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

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

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

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

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

1. be distributed to a successful applicant and/or child of the applicant as that result crystalizes; or
2. on a pro rata basis:

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

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

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

C. Disagreement among the Sawridge Trustees

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

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

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

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

D. Costs for the Public Trustee

[70] I believe that the instructions given here will refocus the process on Tasks 1 – 3 and will restrict the Public Trustee's activities to those which warrant full indemnity costs paid from the 1985 Sawridge Trust. While in ***Sawridge #1*** I had directed that the Public Trustee may inquire into SFN Membership processes at para 54 of that judgment, the need for that investigation is now declared to be over because of the decision in ***Stoney v Sawridge First Nation***. I repeat that

inquiries into the history and processes of the SFN membership are no longer necessary or relevant.

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

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

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

Appearances:

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Doris Bonora
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and
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(Reynolds Mirth Richards & Farmer)
for the 1985 Sawridge Trustees / Respondents

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

Karen Platten, Q.C.
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For Catherine Twinn

Indexed as:

David Hunt Farms Ltd. v. Canada (Minister of Agriculture) (C.A.)

David Hunt Farms Ltd. (Applicant) (Appellant)
v.
Minister of Agriculture (Respondent) (Respondent)

[1994] 2 F.C. 625

[1994] F.C.J. No. 164

Court File No. A-44-94

Federal Court of Canada - Court of Appeal

Stone, Robertson and McDonald JJ.A.

Heard: Ottawa, February 4, 1994.
Judgment: Vancouver, February 8, 1994.

Animals -- Appeal from denial of interlocutory injunction restraining destruction of cattle -- Subsequent to imposition of ban on importation of cattle from U.K. imported beef cow found to be diseased -- Severe economic repercussions if second reported case and all imported cattle not destroyed -- Given long incubation period of disease, Minister, under Health of Animals Act, ordering all cows imported from U.K. between first diagnosis in 1986 and imposition of ban in 1990 destroyed -- Appeal allowed -- Application of tripartite test in Turbo Resources Ltd. -- "Serious issue" test met by respondent's undertaking not to destroy imported cows pending disposition of application for judicial review in similar Nova Scotia case -- Irreparable harm as amount recoverable restricted by statute to less than loss -- Although Canadian Beef Breeders Council may supplement regulated maximum, no legal obligation to do so -- Appellant entitled to more than mere possibility of recovering over and above amount prescribed by Act -- No practical tort remedy against Minister if animals destroyed as Act, s. 50 prima facie limiting Minister's liability -- Irreparable harm to public interest if injunction issuing assumed -- Minister's willingness to permit short delay to allow similar case to be decided on merits establishing balance of convenience in favour of appellant although financial loss relatively minor.

Crown -- Torts -- Appeal from denial of interlocutory injunction preventing destruction of appellant's cattle pending disposition of application for judicial review -- Tripartite test in Turbo Resources Ltd. applied -- Minister submitting appellant not suffering irreparable harm notwithstand-

ing regulated maximum compensation less than value of animals to be destroyed as can sue in tort -- Health of Animals Act, s. 50 prima facie limiting Minister's liability -- No practical tort remedy -- Minister not undertaking s. 50 would not be raised as bar to action.

Judicial review -- Equitable remedies -- Injunctions -- Minister directing destruction of all cattle imported from U.K. between 1986 (outbreak of fatal cattle disease) and 1990 (imposition of ban on cattle imports from U.K.) -- Appellant seeking interlocutory injunction to prevent destruction of imported cattle pending disposition of judicial review application -- Application of tripartite test in Turbo Resources Ltd. -- When determining irreparable harm in context of public authority, issue not to be decided on basis of pecuniary considerations alone -- Inability of public authority to carry out legislated mandate in protecting public interest sufficient -- Balance of convenience paramount -- Respondent's duty to protect public interest of all Canadians -- Cannot ignore financial repercussions -- Minister's willingness to permit another case to be decided on merits after short delay before taking irreversible action tipping balance of convenience in favour of appellant -- Injunction issued subject to conditions.

This was an appeal from the Trial Judge's decision dismissing the appellant's application for an interlocutory injunction. A fatal neurological disorder, "Bovine Spongform Encephalopathy" (BSE) was first diagnosed and reported in 1986 in adult cattle in the U.K. Typically the diseased cow degenerates rapidly following a several-year incubation period, and the presence of the disease can only be verified by post-mortem examination of the brain tissue of the diseased animal. A ban on imports of cattle from the United Kingdom was imposed in 1990. In 1988 the appellant purchased and imported into Canada two Lincoln Red cattle from the U.K. In 1993 a beef cow imported into Canada from the U.K. in 1987 by an Albertan farmer was found to have the disease. After Canada reported the occurrence to an international health agency, several countries threatened to restrict Canada's access to the export market if it did not take appropriate measures to eliminate the risk of spread of this disease. Failure to promptly destroy all cattle imported from the U.K. and a second reported case of the disease would result in revocation by Canada's key trading partners of its recognition as being free of the disease, which would have severe financial repercussions. Of 11 U.K. herds from which cattle had been exported to Canada between 1982 and 1990, 8 had reported their first case of the disease within the preceding 24 months. The Minister directed that all cattle imported from the U.K. between 1986 and 1990 be destroyed. On January 10, 1994 a notice was issued under the Health of Animals Act requiring the appellant to deliver his cattle for destruction as they were suspected of either being contaminated or having been in contact with other diseased animals. The appellant maintained that there was no evidence that its cattle were diseased; that the cattle did not originate from any of the infected United Kingdom herds; and that the cattle's vendor confirmed that no animal in his herd had contracted the disease or been exposed to contaminated feed. The appellant also argued that the belief that the disease is contagious was unsupported. Finally, it alleged that the true reason for the Minister's decision to destroy cattle imported prior to 1990 was the threat of trade embargoes. If the Minister's concern was the spread of the disease, he had within his possession sufficient information as of 1990 to make the decision ultimately made in 1993.

Held, the appeal should be allowed.

The tripartite test in Turbo Resources Ltd. v. Petro Canada Inc. was applied. The Minister's undertaking in a similar case in Nova Scotia not to destroy the cattle until disposition of the application for judicial review was persuasive evidence that there was a serious issue to be tried.

The appellant will suffer irreparable harm if the injunction is refused. Under the Maximum Amounts for Destroyed Animals Regulations the Minister is required to pay a maximum of $2,000 per destroyed animal. Each of the animals in question is worth substantially more than this amount. Where the amount of the recoverable loss is restricted by statute, and that amount is significantly less than the actual loss to be incurred if the injunction does not issue, irreparable harm is established. It is the adequacy of compensation which is available under the Regulations which is in issue. Adequate compensation is to be measured in accordance with common law principles. Although the Canadian Beef Breeders Council has announced that it will supplement the regulated maximum to "approach the fair market value" of the cattle, no mechanism for providing additional compensation is yet in place. Moreover, the Council does not owe any legal obligation to the appellant by which the appellant could enforce payment of full compensation. The appellant was entitled to more than a mere possibility of recovering over and above the prescribed minimum compensation. Finally, the proposed scheme did not embrace an understanding that compensation would approximate that recoverable at common law.

Section 50 of the Act prima facie limited the Minister's liability. The appellant did not have a practical and viable tort remedy in the event that the animals were wrongfully slaughtered. The respondent would not concede that section 50 would not present a bar to such an action or that the issue would not be raised.

It was assumed for the purposes of this appeal that the public interest would be harmed if the interlocutory injunction issued. When determining irreparable harm in the context of a public authority, the issue is not to be decided on the basis of pecuniary considerations alone. The inability of a public authority to carry out its legislated mandate in protecting the public interest is sufficient.

The balance of convenience test is of paramount importance. It enables a court to consider diverse factors which cannot be quantified in monetary terms and which ensures flexibility in the application of equitable principles in diverse factual situations. The respondent had a duty to protect the public interest of all Canadians, not just those directly affected by notices issued under the Act. The substantial financial repercussions which could follow a second reported case could not be ignored. But the Minister's willingness to let another case, predicated on the same reasoning (that the public interest was best served by destroying all cows imported from the U.K. between 1986 and 1990 on the suspicion that they carried BSE), be decided on the merits, after a short delay, before taking the irreversible action contemplated in this case, tipped the balance of convenience in the appellant's favour. The evidence did not support the assertion that cattle from one part of the U.K. were more at risk than those from another. If the Minister's undertaking in the Nova Scotia case was based on this criterion, it conflicted with his decision not to treat the disease on a regional or individual basis in Canada because that solution would not address the demands of our international trade markets.

Statutes and Regulations Judicially Considered

Health of Animals Act, S.C. 1990, c. 21, ss. 48(1), 50(a).
Maximum Amounts for Destroyed Animals Regulations, SOR/91-222, s. 3(a) (as am. by SOR/93-491, s. 1).

Cases Judicially Considered

Applied:

Turbo Resources Ltd. v. Petro Canada Inc., [1989] 2 F.C. 451; (1989), 22 C.I.P.R. 172; 24 C.P.R. (3d) 1; 91 N.R. 341 (C.A.);
Attorney General of Canada v. Fishing Vessel Owners' Association of B.C., [1985] 1 F.C. 791; (1985), 61 N.R. 128 (C.A.); revg. Fishing Vessel Owners' Assn. of B.C. v. Canada (Attorney General), T-1356-84, Collier J., order dated 13/7/84, F.C.T.D., not reported;
Eng Mee Yong v. Letchumanan s/o Valayutham, [1980] A.C. 331 (P.C.).

Considered:

Macdonald v. Canada (Minister of Agriculture), T-3017-93, 7/3/94.

Referred to:

American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396 (H.L.);
Nintendo of America Inc. v. Canamerica Corp. (1991), 36 C.P.R. (3d) 352; 127 N.R. 232 (F.C.A.).

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APPEAL from the denial of an interlocutory injunction to prevent the destruction of cattle pending disposition of an application for judicial review. Appeal allowed.

Counsel:

Robert L. Armstrong for applicant (appellant).
John Vaissi Nagy and Neelam Jolly for respondent (respondent).

Solicitors:

Meighen, Demers, Toronto, for applicant (appellant).
Deputy Attorney General of Canada for respondent (respondent).

The following are the reasons for judgment rendered in English by

1 **ROBERTSON J.A.**:-- This is an expedited appeal from a decision of a Trial Judge rendered on January 27, 1994, dismissing the appellant's application for an interlocutory injunction. Given the urgency of the matter the initial application was heard by telephone conference. The Trial Judge did not offer written reasons and his oral reasons were not recorded. Consequently, we are obliged to assess, as a matter of first impression, whether the Trial Judge erred in law in applying the well-established tripartite test analyzed in Turbo Resources Ltd. v. Petro Canada Inc., [1989] 2 F.C. 451 (C.A.). Pending the disposition of this appeal the respondent agreed not to take the impugned

action which the injunction seeks to prohibit. The essence of the dispute may be summarized as follows.

2 In 1986, a fatal neurological disorder was diagnosed and reported in adult cattle in the United Kingdom. The disease, "Bovine Spongform Encephalopathy" (BSE) is more commonly known as "Mad Cow Disease". It is contracted through contaminated feed and has two distinct attributes. First, the affected animal degenerates rapidly after the first symptoms appear, typically following a several-year incubation period. Second, its presence can only be verified by post-mortem examination of the brain tissue of the deceased animal.

3 Since BSE was first reported, it has attained epidemic proportions: over 112,000 cases have been tallied in the United Kingdom alone, where approximately one-half of all dairy herds and one-tenth of all beef herds have been affected. In response to these realities, Agriculture Canada discontinued issuing import permits for cattle from the United Kingdom in 1990. It currently requires incidences of the disease to be reported and has instituted an "active surveillance network" to ensure that suspected cases are submitted to a laboratory for confirmation.

4 In 1988, two years prior to Agriculture Canada's ban on cattle imports, the appellant purchased and imported into Canada two Lincoln Red cattle from the United Kingdom. In November of 1993, a beef cow imported into Canada from the United Kingdom in 1987 by an Albertan farmer was slaughtered after exhibiting neurological symptoms of the kind associated with BSE. In December of 1993, laboratory testing confirmed the preliminary diagnosis of the presence of the disease. Agriculture Canada has subsequently learned that of the eleven United Kingdom herds from which cattle had been exported to Canada between 1982 and 1990, eight had reported their first case of BSE within the preceding twenty-four months.

5 In fulfilment of Canada's international obligations, Agriculture Canada notified the Office international des Épizooties, an international health agency, of the Alberta occurrence of BSE in December, 1993. That organization had established guidelines for the treatment, diagnosis, and reporting of the disease on a global basis. Agriculture Canada also alerted foreign governmental authorities of the incidence of BSE in Alberta. This information engendered an immediate and negative reaction. Several countries threatened to restrict Canada's access to the export market if it did not take appropriate measures to eliminate the risk of BSE spreading. It is maintained that the Canadian farm economy, both domestic and export, will sustain substantial damage unless all cattle imported from the United Kingdom since 1986 are promptly destroyed. Apparently a failure to take such action, compounded with a second reported incidence of BSE, will result in a revocation by Canada's key trading partners of its recognition as being free of this disease. Under these circumstances, the respondent Minister directed that all cattle imported from the United Kingdom between 1986 and 1990 be destroyed.

6 On January 10, 1994, a notice was issued under subsection 48(1) of the Health of Animals Act, S.C. 1990, c. 21 (the "Act"), compelling the appellant to deliver the cattle in question for destruction on January 31, 1994. The notice states that the cattle are suspected of either being contaminated by the disease or being in contact with other diseased animals. On January 26, 1994, the appellant initiated an application for judicial review and an interlocutory injunction. The appellant's attack on the validity of the notice hinges on three arguments.

7 First, the appellant maintains that there is no evidence that its cattle are diseased. It alleges that the cattle did not originate from any of the eleven infected United Kingdom herds and that the

agency which represents the interests of beef producers, intends somehow to supplement the regulated maximum to "approach the fair market value" of the cattle. There are obvious objections to this submission. No mechanism for providing additional compensation is yet in place. Moreover, there is no legal obligation which could be owed by the foregoing agency to the appellant and by which the appellant could enforce payment of full compensation. The appellant is entitled to more than a mere possibility of recovering over and above the prescribed minimum compensation. Finally, the proposed scheme does not embrace the understanding that compensation is intended to approximate those recoverable at common law.

15 The respondent's alternate submission on this issue is to the effect that if the appellant is not satisfied with the total amount of the compensation, it is free to sue the Minister in tort. This submission invokes section 50 of the Act, which prima facie limits the Minister's liability. That section provides:

> 50. Where a person must, by or under this Act or the regulations, do anything, including provide and maintain any area, office, laboratory or other facility under section 31, or permit an inspector or officer to do anything, Her Majesty is not liable
>
> (a) for any costs, loss or damage resulting from the compliance; or
> (b) to pay any fee, rent or other charge for what is done, provided, maintained or permitted.

16 Ironically, it is the respondent who argues that section 50 may be interpreted as limiting the liability of the Crown where the Minister acts pursuant to subsection 48(1) of the Act. While counsel's interpretation was interesting, I am not persuaded that the appellant has a practical and viable tort remedy in the event it is determined that the animals were wrongfully slaughtered. It is one matter for a party to be able to litigate the actual loss suffered and quite another to prevail in a contested argument that a statute does not immunize the other party (the Minister) from liability. In reaching this conclusion, I could not ignore the fact that the respondent was not able to concede that section 50 would not present a bar to such an action or indeed that the issue would not be raised. I am satisfied that the appellant will be exposed to irreparable harm if the injunction does not issue. This determination leaves us to consider the irreparable harm from the respondent's perspective.

17 It would be wrong in law to assume that the respondent cannot sustain irreparable harm. It is equally wrong to assume that a clear finding of irreparable harm to a defendant, such as the respondent Minister, is a condition precedent to deciding whether on a balance of convenience an injunction should issue. Both legal propositions are reflected in the jurisprudence of this Court to which I now turn.

18 The first proposition was firmly established by this Court in Attorney General of Canada v. Fishing Vessel Owners' Association of B.C., [1985] 1 F.C. 791 (C.A.). In that case, an interlocutory injunction had been granted to prevent the implementation of a government plan to extend the salmon fishing season for vessels using gill nets. Fishing vessels equipped with purse seine nets would have a shorter fishing season. The "seiners" sought an injunction arguing that the decision was discriminatory in that it was premised not on conservation objectives but rather on socio-economic considerations which promoted the interests of "gill netters" at the expense of "seiners".

19 The Trial Judge granted the injunction [T-1356-84, Collier J., order dated 13/7/84, F.C.T.D., not reported]. On appeal, this Court held that the Trial Judge erred in his assumption that the Attorney General would not suffer irreparable harm if an injunction were issued. Writing for this Court, Pratte J.A. concluded, in part, at page 795:

> [T]he Judge assumed that the grant of the injunction would not cause any damage to the [Attorney General]. This was wrong. When a public authority is prevented from exercising its statutory powers, it can be said, in a case like the present one, that the public interest, of which that authority is the guardian, suffers irreparable harm.

20 It is apparent from the above facts that had the injunction issued, two groups would have been exposed to irreparable harm: "gill netters" who would have been deprived of the opportunity to fish during the extended season and the public interest to the extent that the government plan furthered conservation objectives could not be implemented. I should point out that when determining irreparable harm in the context of a public authority, the issue is not to be decided on the basis of pecuniary considerations alone. The inability of a public authority to carry out its legislated mandate in protecting the public interest is sufficient. The question we must address is whether the public interest will suffer irreparable harm if the appellant is granted injunctive relief. The question is a difficult one.

21 I am in agreement with Professor Sharpe when he writes that "[i]t is exceptionally difficult to define irreparable harm precisely." (R. J. Sharpe, Injunctions and Specific Performance (2nd ed.) (Toronto: Canada Law Book, 1993) at page 2-24, paragraph 2.440). To this observation I would add that it is not always self-evident whether the public interest will suffer irreparable harm if injunctive relief is either granted or denied. I am prepared to assume for purposes of the appeal that the public interest will be harmed if the interlocutory injunction issues. In any event, such a finding is not a condition precedent to the application of the third prong of the tripartite test.

22 The significance of the balance of convenience component of that test was clearly enunciated in Eng Mee Yong v. Letchumanan s/o Valayutham, [1980] A.C. 331 (P.C.), per Lord Diplock, at page 337:

> The guiding principle in granting an interlocutory injunction is the balance of convenience; there is no requirement that before an interlocutory injunction is granted the plaintiff should satisfy the court that there is a "probability," a "prima facie case" or a "strong prima facie case" that if the action goes to trial he will succeed; but before any question of balance of convenience can arise the party seeking the injunction must satisfy the court that his claim is neither frivolous nor vexatious; in other words that the evidence before the court discloses that there is a serious question to be tried: American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396.

23 In Turbo Resources, supra, Stone J.A. emphasized the paramountcy of the balance of convenience test while cautioning decision-makers against a purely mechanical application of legal criteria. At pages 474-475 he observed:

Case Name:

L.C. v. Alberta (Metis Settlements Child & Family Services, Region 10)

Between
L.C., E.M.P. by Her Next Friend L.C., D.C. by His Next Friend L.C. and C.C. by Her Next Friend L.C., Plaintiff, and Her Majesty the Queen In Right of Alberta and Metis Settlements Child & Family Services, Region 10, Defendants, and D.L., Proposed Next Friend

[2011] A.J. No. 84

2011 ABQB 42

509 A.R. 72

197 A.C.W.S. (3d) 55

2011 CarswellAlta 97

Docket: 0703 10836

Registry: Edmonton

Alberta Court of Queen's Bench
Judicial District of Edmonton

R.A. Graesser J.

Heard: October 19-22, 2010.
Judgment: January 24, 2011.
Released: January 25, 2011.

(97 paras.)

Civil litigation -- Civil procedure -- Parties -- Representation of -- Children or incompetent persons -- Litigation guardian or next friend -- Class or representative actions -- Procedure -- Costs -- Particular orders -- Application by LC for appointment of next friend for her minor daughter EMP,

payment for next friend's services and advance costs allowed in part -- LC commenced action on her behalf and as next friend for EMP -- Proposed class action involved number of persons affected by invalid temporary care orders -- LC unable, for health or other reasons, to continue to actively participate in action -- Public Trustee should appoint next friend for EMP and pay costs -- Next friend should not be same lawyer representing LC due to potential conflict of interest -- Advanced costs justified for EMP but not for LC.

Application for the appointment of a next friend for EMP, the plaintiff LC's minor daughter, for payment for the next friend's services and for advance costs. The plaintiff LC commenced this lawsuit on her behalf and as next friend for her children as a result of EMP's apprehension by the Director pursuant to a temporary care order. The Director failed to file a service plan within 30 days rendering EMP's continued apprehension unlawful. This action was now the intended action to be a proposed class action for a number of persons affected by invalid temporary care orders. LC, for health or other reasons, was unwilling or unable to continue to instruct counsel and actively participate in the action. LC had granted a power of attorney to counsel who also agreed to represent EMP as next friend. LC intended to carry on the action by her attorney under a power of attorney. A lawyer unrelated to EMP had agreed to act as next friend for EMP but only if she was paid at her regular hourly rate and was exempted from liability for costs.

HELD: Application allowed in part. EMP was in need of a next friend for the purposes of this litigation, and LC was unable and unwilling to act. There were potential conflict issues between EMP and her mother which made it important that EMP had an independent next friend or litigation representative. The attorney for her mother should thus not also act as next pf friend to EMP in this action. The Public Trustee's office should be involved in the selection of a next friend as that office had considerable expertise and experience in such matters. It was appropriate to exempt EMP's next friend/ litigation representative from liability for costs in this action in relation to EMP's individual action. LC was unable to pay for the services of an independent next friend for EMP. It was appropriate that the Public Trustee pay for EMP's services as next friend at rates to be approved by the Public Trustee. LC had limited means and was unable to afford to pay for a lawyer for herself or for EMP. EMP's claim was prima facie meritorious and the issues in her claim transcended her individual interests. The conditions for advance costs had been satisfied. The court was not satisfied that the mother's claim was prima facie meritorious. Her application for advance costs was thus dismissed.

Statutes, Regulations and Rules Cited:

Rules of Court, Rule 2.17(1), Rule 2.17(2)

Counsel:

Robert P. Lee, for the Plaintiff.

Peter Barber and G. Allan Meikle, Q.C., Alberta Justice Civil Litigation, and, Ward K. Branch, Branch McMaster, for the Defendants.

Denise Lightning, Proposed Next Friend, for the Third Party.

Memorandum of Decision

R.A. GRAESSER J.:--

Nature of Application

1 This decision follows a case management conference from October 19 - 22, 2010 which dealt with a number of applications in this proposed class action. The relevant background to this application has been set out in ***L.C. v. Alberta (Metis Settlements Child & Family Services, Region 10)***, 2011 ABQB 12.

2 This decision will deal with the following:

1. Appointment of a next friend (litigation representative) for E.M.P. (L.C.'s daughter);
2. Appointment of a next friend (litigation representative) for L.C.;
3. Payment for next friend's services as next friend/litigation representative;
4. Relieving next friend from liability for costs; and
5. Payment of counsel for services relating to regularizing pleadings (mini-***Okanagan*** application).

Background

3 L.C. commenced this lawsuit on her behalf and as next friend for her children E.M.P., D.C. and C.C. E.M.P. remains a minor, and is in her mother's care. D.C. attained adulthood after this lawsuit was started, and died shortly thereafter. The status of his estate's continuing involvement in this lawsuit is uncertain. C.C. attained adulthood after this lawsuit was started. The status of her continuing involvement is unclear.

4 E.M.P. was apprehended by the Director of Child & Family Services under a Temporary Guardianship Order ("TGO"). It is alleged that the Director failed to file a service plan within the 30 days following the date of the TGO, rendering the TGO a nullity and her continued apprehension unlawful. L.C. claimed damages on her own behalf, as well as on behalf of E.M.P. and her other two children.

5 Through a series of events chronicled in my decision in this matter, 2011 ABQB 12, Mr. Lee advised that this action is now the intended action to be a proposed class action for a number of classes or subclasses of persons affected by invalid TGO's. Until shortly before the application in October, 2010, this action had been stayed as another lawsuit was being put forward as the proposed class action. When that other lawsuit fell away as the proposed class action, this action appeared to be the most appropriate, at least for the children who had been kept in government custody after their TGO's had become a nullity, and for the parents or guardians of such children.

6 The application in October, 2010, proceeded under the old Rules of Court; hence the use of the old "next friend" terminology.

7 This action has several impediments to proceeding:

1. L.C., for health or other reasons, is unwilling or unable to continue to act as next friend for her daughter E.M.P.;

20 Those matters have been dealt with in representations by her counsel, Mr. Lee, as well as in the affidavit of Denise Lightning filed with respect to her application to be appointed as next friend. The Crown cross-examined Ms. Lightning on her affidavit before the October, 2010 applications were heard. The Court also heard evidence from Les Block on the point of Ms. Lightning's difficulties in dealing with the litigation, although that evidence was not tested by cross-examination, nor were his or other medical records of L.C. produced to the Crown.

21 There is no requirement under old Rule 58 or new Rules 2.11(a) or 2.14(1) that the next friend be a parent or guardian of child. New Rule 2.14(1) dealing with litigation representatives speaks of an "interested person", although that term is not defined in the Rules of Court. It is a defined term in the new *Adult Guardianship and Trustee Act* (not necessarily a relative or friend) but I am not aware of any definition of an interested person as it relates to an infant. I see no reason, however, to interpret the words differently for the purposes of the Rules of Court than under the *Adult Guardianship and Trustee Act.* There was nothing in the old Rules of Court dealing with the resignation or replacement of an existing next friend or litigation representative.

22 It is unclear as to the status of the defendant in an action to object to someone's appointment or replacement as a next friend or litigation representative. Because the next friend/litigation representative is generally responsible for the costs of the action, a defendant might in appropriate circumstances seek security for costs. A defendant might object to the appointment of a next friend/litigation representative who has been declared to be a vexatious litigator under the *Judicature Act*, R.S.A. 2000, c. J-2, or where the next friend/litigation representative might be in a conflict of interest *vis-a-vis* the defendant. But otherwise, it is not clear to me that it is any of the defendant's business who the next friend is.

23 Where the next friend is not the parent or guardian of the child, the parent or guardian certainly has the status to object. In appropriate cases, the Public Trustee could step in (or be appointed by the Court), and as noted by Thomas J. in ***C.H.S.*** (*supra*) at para. 29, the Court's *parens patriae* power allows the Court to protect the interests of those who cannot protect themselves.

24 I do not read ***C.H.S.*** as requiring that there be a formal resignation signed by the existing next friend, or that the parent or guardian or existing next friend, before a new next friend can be appointed. There may be circumstances where the replacement of an existing next friend is sought, over the objections of the existing next friend. Or the existing next friend may have become disabled, or disappeared, or otherwise unable to carry on. That is the situation argued here.

25 What Thomas J. says in ***C.H.S.*** is that there needs to be a proper evidentiary foundation to make an order. This is an interlocutory order in the action, so hearsay is permissible. There does not appear to have been any evidence at all in ***C.H.S.*** as to her capacity or status.

26 I am satisfied that the representations of Mr. Lee are fully supported by the affidavit evidence of Ms. Lightning: that E.M.P. is in need of a next friend for the purposes of this litigation, and that L.C., for whatever reason, is unable and unwilling to act. Ms. Lightning does not need L.C.'s consent to act as next friend/litigation representative for E.M.P. In the absence of an objection from L.C., Ms. Lightning as an "interested person" can step forward. I did not consider the incomplete testimony of Mr. Block on this issue as it was not necessary to have medical evidence for the purpose of the application as it relates to E.M.P.

27 Of course, Ms. Lightning has not opted to self-appoint under old Rule 58 or new Rule 2.14, as she wants to be paid and she wants to be exempted from liability for costs. The only way those things can happen is if they are ordered by the Court.

28 In ***R. v. W.A.***, 2000 CanLII 28193 (ABQB), Ritter J. (as he then was) dealt with the background of the appointment of next friends. In that case, he concluded that the plaintiff needed a next friend, but determined that the proposed next friend was not appropriate. He ruled that either the Public Trustee could appoint an independent next friend, or he would select one from names provided to him.

29 Ritter J. subsequently ordered that the next friend appointed by him be relieved from liability of costs and that the next friend's fees be paid by the Defendant Government.

30 A similar order was made by Macklin J. in ***T.W. v. Her Majesty the Queen***, Alberta Queen's Bench Action Number 0203 19700.

31 In ***Thomlinson v. Alberta (Child Services)***, 2003 ABQB 308, Brooker J. held that the old rules permitted a stranger to be appointed as next friend for a child. After reviewing the history of the appointment of next friends, Brooker J. held at paras. 107 and 108 that where the parent or guardian does not consent to act as next friend, it is open for the court to appoint the Public Trustee. But where the Public Trustee declines to act (such as because of a conflict of interest), a willing stranger could be appointed. He stated at para. 109 that such an appointment would be appropriate in situations in which "an infant's interests might not otherwise be represented."

32 ***Thomlinson*** is also some authority that the Court has the power to relieve a next friend other than the Public Trustee from liability for costs (at para. 119) although Brooker J. declined to do so in that case.

33 In ***V.B. v. Alberta (Minister of Children's Services)***, 2004 ABQB 788, Slatter J. (as he then was) considered applications for the appointment of next friends for three child plaintiffs who were under PGOs. Slatter J. agreed that the children's mother could not commence the action as the Public Trustee is the children's sole trustee because of the PGOs.

34 In such circumstances, he held at para. 29:

> "In summary, the procedure to be followed in the case of a child in care who potentially has a cause of action against someone should be roughly as follows:
>
> (a) A person who discovers information suggesting that a child in care has a cause of action has a moral obligation, and in some cases a legal obligation, to bring that information to the attention of the Public Trustee and a director of Child Welfare.
> (b) If the information has an air of reality to it, the Public Trustee has an obligation under the Act to:
>
> (i) investigate the claim to see if it has sufficient merit, and is of sufficient value, to justify proceedings on behalf of the child, and
> (ii) ascertain whether the prosecution of the claim would be in the best interests of the child.

This inquiry could be made in consultation with the director, and might be done by the Public Trustee's office or outside counsel, as the circumstance require.

(c) If the action is found to be of merit, and its prosecution in the best interests of the child, then the Public Trustee has a duty to see that it is prosecuted in a reasonable way:

(i) in most cases the Public Trustee would commence proceedings himself, as the trustee of the child.

(ii) it is unclear whether in some cases the Public Trustee might seek and nominate a third party to sue as next friend of the child, for example where the Public Trustee thought that the action presented a conflict of interest that could not be handled adequately by internal controls. In such cases the Public Trustee would in any event continue to play a role in monitoring the litigation and the next friend.

(d) The Public Trustee as trustee, or the next friend, would then be required to retain and instruct counsel to prosecute the action.

(e) At any stage of the proceedings the Public Trustee or the next friend could consult with the child and other family members, but the conduct of the litigation is not under the control of the child or the family.

(f) The Court retains a supervisory jurisdiction over the whole process. The Public Trustee or the next friend could apply for advice and directions where appropriate. Any interested person could apply to the Court for a review of decisions made during the conduct of the litigation, to ensure that the best interests of the child are paramount."

35 Here, there is no PGO and there is no trustee for E.M.P. Her mother, L.C. is her sole guardian. In this case, it is not necessary to involve the Public Trustee if someone else who is suitable is willing to act. That is especially important here as the Government (for whom the Public Trustee works) is the main defendant (similar to the situation in ***W.A.***)

36 I need not deal with the situation under the Rules of Court where an existing next friend wishes to withdraw and be replaced and there is another willing next friend ready to step up. That might well be done under the new Rules of Court without Court order, even as to the amendment of pleadings, so long as pleadings have not closed. Here, Ms. Lightning seeks her appointment by way of Court order, and on terms. When the application was made in October, such an appointment could have been made by Court order, following ***Thomlinson***. Starting November 1, 2010, under Rule 2.15, the Court clearly has the power to appoint a litigation representative in circumstances where there a party requiring a litigation representative does not have one.

37 In the result, the Court had the power to appoint a stranger as next friend for E.M.P. before November 1, 2010, and certainly has the power to do so thereafter.

2. Is Ms. Lightning a Suitable Next Friend for E.M.P.?

38 The Crown cited a number of cases in support of its arguments that Ms. Lighting should not be appointed next friend.

41 While the case is of limited relevance here, I note there is evidence (albeit hearsay) and representations from counsel that L.C. is unwilling to give instructions to counsel, effectively leaving E.M.P. with counsel but no way of instructing him. That cannot be in her best interests.

42 I do not read ***W.A.*** as holding that a next friend can only be a stranger where no family member is capable of being next friend. In any event, that is in my view only relevant where there is a conflict between competing candidates seeking to be appointed next friend. That is not the case here.

43 If Ms. Lightning had self-appointed under the old Rules of Court (if that could have been done without Court order in the face of an existing next friend), the Crown might only have been able to argue as to conflict of interest issues. But she did not self-appoint. Instead, she seeks payment as next friend/litigation representative and exemption from liability for costs. The Crown certainly has the status to respond to those issues, as it is the Crown from whom Ms. Lightning seeks payment, and it is the Crown that might be deprived of a cost remedy if the lawsuit is eventually unsuccessful against it.

3. Terms and Conditions on Appointment

44 The Crown also argue that there is no precedent for a next friend to be compensated by the opposing party, citing ***Crothers v. Simpson Sears Ltd.*** (1988), 59 Alta. L.R. (2d) 1 (C.A.) and ***Salamon v. Alberta (Minister of Education)***, [1991] A.J. No. 922, 1991 CarswellAlta 199.

45 This argument is contradicted by the orders of Ritter J. In ***W.A.*** and Macklin J. in ***T.W.*** referenced above.

46 Here, the Crown does not argue that Ms. Lightning is not a suitable person to be next friend. L.C. has raised no objections to Ms. Lightning acting in this capacity and of course has appointed Ms. Lightning to be her attorney under a power of attorney. But since Ms. Lightning has sought appointment by the Court (and seeks favourable terms from the Court), the Court must be satisfied that her appointment would be in E.M.P.'s best interests.

47 Ms. Lightning has no experience with class actions, although she does have experience with Child Welfare matters. Her experience with civil litigation and Charter litigation (which this action might best be described as) is unclear.

48 It appears clear that she is attorney for L.C. and as such owes a duty of loyalty to L.C. She is undoubtedly in a fiduciary relationship to L.C. L.C.'s interests and E.M.P.'s interests in the action and in the intended class action are not identical. E.M.P. is now being put forward as the potential representative plaintiff for the "failure to file" child plaintiffs. It is not clear to me that it is in E.M.P.'s best interests to head up a class action, or be involved in an action with her mother and potentially her siblings' claims, as opposed to having her own, stand-alone damage action, or being in a child-only class action.

49 There are potential conflict issues between E.M.P. and her mother which make it important that E.M.P. have an independent next friend or litigation representative. I realize that parents are often next friends for their children in actions where the parents may be plaintiffs in their own right. But those are situations where the parents will self-appoint and not look to the Courts to make the appointment. Where the Court is required to make the appointment, different considerations apply. Appointing a next friend or litigation representative who is already a parent's attorney under a pow-

er of attorney may put the next friend or litigation representative in an impossible position if there is a conflict between the parent's and the child's interests.

50 As a result, while I conclude that E.M.P. requires a next friend/litigation representative, that person should not be Ms. Lightning. This decision has nothing to do with Ms. Lightning; rather it is founded on concerns for potential conflicts between the mother's interests and the daughter's interests. The appointee should make decisions for E.M.P. based solely on E.M.P.'s interests without reference to L.C.'s or anyone else's interests.

3. Who should be E.M.P.'s next friend/litigation representative?

51 I do not see that the Crown should have a say or input into who should be appointed next friend or litigation representative for E.M.P., subject only to any concerns over possible conflicts of interest with the Crown. Following the logic in ***W.A.***, the next friend or litigation representative should be someone reasonably agreeable to both counsel for E.M.P., Mr. Lee, and the Public Trustee. Even though the Public Trustee is not E.M.P.'s trustee, I consider it appropriate that it be the Public Trustee's office that is involved in the selection of a next friend. That office has considerable expertise and experience in such matters.

52 If counsel are unable to agree on an appropriate next friend/litigation representative within 30 days from the date of this decision, each of Mr. Lee and the Public Trustee should submit the name of at least one candidate along with the information required by Rule 2.14(2)(a),(c),(d) and (e), together with a brief statement of the candidate's qualifications, and I will make an appointment so long as I find one of those candidates appropriate.

4. Exemption from liability for costs

53 Where the Court is of the opinion that a next friend/litigation representative is necessary for a child and the person appointed is essentially a stranger to the child and is in the nature of a professional advisor rather than being a parent or guardian, there is a strong case to be made for protecting the person from personal liability for costs.

54 In ***T.W.***, I was advised by counsel that an independent lawyer was appointed to act as next friend for the infant plaintiffs, and the next friend was indemnified against liability for costs by the Public Trustee. Here, it would be inappropriate to appoint the Public Trustee as next friend or litigation representative because the defendant is the Crown and there may be at least an appearance of a conflict of interest on the part of the Public Trustee in advising for or against suing the Crown.

55 Ritter J. and Brooker J. recognized the power of the Court to exempt a next friend from liability for costs in ***W.A.*** and ***Thomlinson***, respectively, and I consider that this is an appropriate case to grant such exemption for E.M.P.'s next friend/litigation representative. This is a highly unusual step, as it leaves the Defendants in this action without any effective cost remedy in the event they are successful in defending against E.M.P.'s claims.

56 In this case, however, I consider the fact that the Defendants are Alberta government entities. E.M.P. appears to have a *prima facie* case for liability on her existing statement of claim: she was apprehended by the Director; a TGO was granted in favour of the Director; the Director failed to file a care plan for E.M.P. within 30 days from the granting of the TGO; and E.M.P. remained in the Director's care despite the TGO becoming a nullity under ***T.S. v. Alberta (Director of Child Welfare)***, 2002 ABCA 46. The nature and extent of E.M.P.'s damages (if any) are unclear.

57 The Court of Appeal ruled in ***C.H.S. v. Alberta (Child, Youth and Family Enhancement Act, Director)***, 2010 ABCA 15, that there may also be *Charter* claims arising out of the Director's "failure to file" for affected children and their parents or guardians. Those claims have not yet been added to E.M.P.'s claim against the Defendants.

58 And having regard to the number of children and others affected by the Director's failure to file care plans and the other types of claims discussed in my decision at 2011 ABQB 12, a next friend or litigation representative will have to decide whether it is in E.M.P.'s best interests to convert her action into a proposed class action.

59 Considering these various matters, I am of the view that it is appropriate to exempt E.M.P.'s next friend/litigation representative from liability for costs in this action in relation to E.M.P.'s individual action. This exemption would not apply to liability for costs as a representative plaintiff or proposed representative plaintiff if the action is converted to a proposed class action and the next friend/litigation representative determines that it is in E.M.P.'s best interests to have him or her be put forward as representative plaintiff. It is premature to consider whether a next friend might be granted an exemption from liability for costs as a representative plaintiff in a class action.

5. Payment for the Next Friend/Litigation Representative

60 As determined in ***W.A.*** and ***Thomlinson***, and as has apparently been the case for T.W.'s children and one of M.B.'s grandchildren who have recently become permanent wards of the Director, the independent next friend was entitled to be paid for his or her services as next friend by the Public Trustee. The evidence before me satisfies me that L.C. is unable to pay for the services of an independent next friend or litigation representative for E.M.P. I consider it appropriate that the Public Trustee pay for E.M.P.'s services as next friend at rates to be approved by the Public Trustee.

61 New Rule 2.17(1) provides that the Court may require the defendant to pay the costs of a litigation representative for a child. I do not interpret that Rule as limiting the Court's ability to appoint someone other than the Public Trustee as a child's litigation representative, at the Public Trustee's cost, or to require the Public Trustee to pay the reasonable costs of a child's litigation representative where it is not appropriate for the Public Trustee to act as litigation representative.

6. Funding for Counsel for E.M.P.

62 This is the ***Okanagan*** aspect of the applications. It is interesting to note that new Rule 2.17(2) permits a court-appointed litigation representative to apply for advance costs.

63 The Public Trustee has retained counsel for T.W.'s children and M.B.'s grandson. It has been represented to me that counsel will be paid for advice, but if an action is to be actively pursued on their behalves, contingency arrangements would have to be made with counsel, as the Public Trustee does not generally fund litigation costs for plaintiff children.

64 Were E.M.P. to be under the care of the Director, the Public Trustee would be paying for her next friend and for her lawyer, to the point of pursing an action. Her claim arises out of her apprehension by the Director and his alleged failure to follow his statutory responsibilities, just like the claims of T.W.'s children and M.B.'s grandson. I do not see it as an unreasonable burden on the Crown to put E.M.P. in the same situation as other children who faced similar treatment by the Crown and who are now wards of the Crown. The evidence before me is that L.C. has limited means and is unable to afford to pay for a lawyer for herself or for E.M.P.

Case Name:

Nafie v. Badawy

Between
Ghada Hamdy Nafie, Respondent (Plaintiff), and
Wael Maged Badawy, Appellant (Defendant)

[2015] A.J. No. 85

2015 ABCA 36

249 A.C.W.S. (3d) 144

[2015] 4 W.W.R. 498

381 D.L.R. (4th) 208

2015 CarswellAlta 106

11 Alta. L.R. (6th) 1

56 R.F.L. (7th) 28

Dockets: 1301-0206-AC, 1301-0208-AC, 1301-0287-AC,

1301-0351-AC, 1401-0098-AC

Registry: Calgary

Alberta Court of Appeal

P.A. Rowbotham, B.K. O'Ferrall and B.L. Veldhuis JJ.A.

Heard: September 8, 2014.
Judgment: January 27, 2015.

(165 paras.)

Family law -- Separation and divorce -- Practice and procedure -- Courts -- Jurisdiction -- Ordinary residence -- Appeal by husband from decision that Alberta had jurisdiction over parties' di-

vorce allowed -- Parties married in Egypt in 2000 and then resided in Alberta -- In 2011 they moved to Saudi Arabia where husband obtained a one-year renewable teaching contract -- In June 2012, parties returned to Alberta for vacation -- Wife remained in Alberta -- She commenced divorce proceedings in July 2012 -- Wife was not ordinarily resident in Alberta in July 2012 -- Chambers judge erred in principle by over-emphasizing her after-the-fact intention about residency and by relying on affidavits that highly conflicted on material points.

Appeals by the husband from a decision of the case management judge finding that Alberta had jurisdiction over the parties' divorce and from other decisions made in the matrimonial action. The parties were married in a Muslim ceremony in Egypt in 2000. Both parties were residents of Albert before the marriage ceremony. The marriage was registered in Egypt. After their wedding, the parties returned to Canada. They resided in the United Arab Emirates for seven months beginning in 2006 and in Saudi Arabia from November 2011 to June 2012 where the husband had obtained a one-year renewable teaching contract. The parties leased the matrimonial home for a two-year period. They rented a residence, purchased furniture and other items. Between November 2011 and June 2012, the family's life was centered in Saudi Arabia. In June 2012 the parties returned for a vacation to Alberta. The wife remained in Alberta ever since. In July 2012 the wife commenced an action for a divorce and division of matrimonial property. She stated she intended to stay in Saudi Arabia only briefly and had planned all along to return in June 2012. Since separation, the parties' three children resided with the wife. The husband had not had meaningful contact with the children since 2012.

HELD: Appeals allowed. The wife was not ordinarily resident in Alberta when she filed her claim for divorce. In the interests of the children, the orders granting the wife custody, exclusive possession of the matrimonial home, child support and use of the parties' jointly owned car were preserved pursuant to the Court's jurisdiction to grant orders nunc pro tunc under its parens patriae jurisdiction. The orders preserved nunc pro tunc were interim pending judicial dispute resolution or a viva voce trial of collateral relief matters. All other orders were set aside. In finding that the wife was ordinarily resident in Alberta the chambers judge made errors in principle that necessitated appellate intervention. He overemphasized the wife's intention and erred in relying on affidavits that conflicted on almost all material points. The wife's after-the-fact intentions as expressed in her affidavits regarding the stay in Saudi Arabia should be viewed with skepticism. They reflected her intentions with hindsight of how the events in Saudi Arabia unfolded. The parties' time in Saudi Arabia was not casual, intermittent, special, occasional or exceptional, nor was it a stay or visit. The family established their ordinary mode of living with its accessories, relationships and conveniences in Saudi Arabia. They settled-in there and made their home there. On these facts, the wife's ties to Alberta were not sufficient to overcome the connection she had with Saudi Arabia. While events did not go as originally planned which led to her premature return to Calgary, the wife's after-the-fact intention that she planned to return in June in any event did not satisfy the legal requirements to establish ordinarily resident in Alberta.

Statutes, Regulations and Rules Cited:

Alberta Rules of Court, Alta Reg. 124/2010, Rule 1.3(1), Rule 1.3(2), Rule 14.73

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), s. 3(1), s. 22

Judicature Act, RSA 2000, c J-2, s. 1, s. 2(1), s. 3, s. 8

Appeal From:

On appeal from the Order by the Honourable Madam Justice S.M. Bensler, Dated the 8th day of July, 2013, Filed the 16th day of July, 2013 (Docket: 4801-153163).

On appeal from the Order by the Honourable Madam Justice C.S. Anderson, Dated the 18th day of April, 2013, Filed the 8th day of July, 2013 (Docket: 4801-153163).

On appeal from the Order by the Honourable Madam Justice C.S. Anderson, Dated: 20th day of September, 2013, Filed: 13th day of November, 2013 (Docket: 4801-153163).

On appeal from the Order by the Honourable Mr. Justice A.G. Park, Dated the 12th day of December, 2013, Filed the 12th day of December, 2013 (Docket: 4801-153163).

On appeal from the Decision of the Honourable Mr. Justice R.J. Hall, Dated the 2nd day of May, 2014, Filed on the 2nd day of May, 2014 (2014 ABQB 262, Docket: 4801-153163).

Counsel:

W. Igras, for the Respondent.

Appellant W.M. Badawy in Person.

[Editor's note: A corrigendum was released by the Court January 29, 2015; the corrections have been made to the text and the corrigendum is appended to this document.]

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O'Ferrall J.A. (dissenting in part):

Memorandum of Judgment

Reasons for judgment were delivered by P.A. Rowbotham and B.L. Veldhuis JJ.A. Separate dissenting reasons were delivered by B.K. O'Ferrall J.A.

P.A. ROWBOTHAM and B.L. VELDHUIS JJ.A.:--

I. Introduction

1 These consolidated reasons disposing of Appeal Nos 1401-0098-AC, 1301-0206-AC, 1301-0208-AC, 1301-0287-AC and 1301-0351-AC are in several parts. Part II is substantive: the jurisdiction of the Alberta courts to grant these parties a divorce. Part III discusses the remedies associated with our conclusion on jurisdiction and the impact on various interlocutory Queen's Bench orders. Part IV concerns the procedural issues that arose and the many difficulties that have plagued

this very high-conflict family law litigation. Part V sets out the disposition of the foregoing appeals, the impact on other extant appeals and costs.

2 Badawy's main appeal (1401-0098-AC) is from the decision of a chambers judge (also the second case management judge) who heard a "domestic special" based on extensive affidavit evidence and submissions by Nafie's counsel and Badawy (who was self-represented). The chambers judge concluded that Alberta courts had jurisdiction over the parties' divorce. He refused Nafie's application to sever her divorce action from corollary relief matters. (The severance matter has not been appealed).

3 The four other appeals by Badawy are from various orders granted by the original case management judge as well as various other chambers judges. Some, but not all, aspects of these orders have been rendered moot by the passage of time.

4 Appeal No 1301-0208-AC is from an April 2013 order which, among other things, directed the parties to apply for case management; directed Badawy to answer undertakings; permitted Nafie to file an application for interim child and spousal support and set various deadlines in that regard; stayed Badawy's civil action 1301-01707; prohibited Badawy from bringing additional claims against Nafie and her family; directed Badawy to execute a pre-authorized payment form for the secured joint line of credit; and ordered Badawy to pay costs. By its terms, this order ceased to have effect in late July 2013, when case management began.

5 Appeal No 1301-0206-AC is from the order granted in response to Nafie's without-notice application for exclusive possession of the parties' car. The order was granted July 8, 2013 and included various procedural directions.

6 Appeal No 1301-0287-AC is from the original case management judge's September 20, 2013 order imputing income and ordering support.

7 Appeal No 1301-0351-AC is from a chambers judge's December 2013 order granting Nafie's without-notice application for exclusive possession of the matrimonial home.

8 We allow all the appeals which hinge on the conclusion that when Nafie filed her Statement of Claim for Divorce and Division of Matrimonial Property she did not meet the "ordinarily resident" requirements of the *Divorce Act*, RSC 1985, c 3 (2nd Supp).

9 However, as discussed in Part III, "Remedies", it is necessary in the best interests of the children that we exercise our inherent *parens patriae* and *nunc pro tunc* jurisdiction to preserve the orders that granted Nafie custody (November 6, 2012 consent order), exclusive possession of the matrimonial home (December 13, 2013 order), child support (September 20, 2013 order) and use of the parties' jointly owned car (July 8, 2013 order). All other orders are set aside.

10 Not heard as part of this consolidated appeal are Badawy's other appeals (Appeal Nos 1401-0021-AC, 1401-0022-AC, 1401-0023-AC, 1401-0030-AC, 1401-0031-AC and 1401-0032-AC), which are from various chambers matters. Several of them are impacted by this decision and all are discussed in more detail in Part V, "Conclusion".

II. Jurisdiction to Hear the Divorce Proceeding

A. Facts

77 Applying the language of *Quigley,* the parties' time in Saudi Arabia was not casual, intermittent, special, occasional or exceptional, nor was it a stay or visit. The uncontroverted evidence was that their Calgary house was leased for a two-year period and they sold two of their three Calgary vehicles. They had a two-week vacation in the United States and when they returned to Calgary on June 26, they stayed with Nafie's parents.

78 The family established their "ordinary mode of living with its accessories, relationships and conveniences" (*Quigley* at para 21) in Saudi Arabia. They "settled-in" there. They rented a residence, purchased furniture and other items, leased two vehicles, employed a maid and a driver, opened a bank account, and enrolled their children in an American school (see Nafie's affidavit affirmed September 23, 2013). Between November 2011 and June 2012, the family's life was centered in Saudi Arabia. They made their home there.

79 That is not to say that their residence in Saudi Arabia was permanent. Badawy's contract was for a one-year renewable term, and the parties maintained strong ties to Calgary.

80 We have concluded that on these facts Nafie's ties to Alberta are not sufficient to overcome the connection she had with Saudi Arabia. While events unfortunately did not go as originally planned which led to her premature return to Calgary, Nafie's after-the-fact intention that she planned to return in June in any event does not satisfy the legal requirements to establish "ordinarily resident" in Alberta.

81 When evidence concerning "ordinarily resident" conflicts on material points, the matter should go to trial: *Fareed v Latif* (1991), 71 Man R (2d) 276, 31 RFL (3d) 354 (QB).

F. Conclusion on Ordinarily Resident

82 In our view the chambers judge erred in principle by over-emphasizing Nafie's after-the-fact intention about residency and by relying on affidavits that highly conflicted on material points.

83 As mentioned above, it appears that Nafie has been "ordinarily resident" in Alberta since June 2012. We have rejected Badawy's arguments that: (i) the marriage was invalid; (ii) he did not attorn to Alberta; and (iii) Alberta is a *forum non conveniens*. Consequently, the only remaining impediment is "ordinarily resident" for at least one year which has likely been overcome by the passage of time.

84 Had the chambers judge not refused Nafie's application to sever corollary relief from the divorce, issues such as habitual residence in the *Matrimonial Property Act* would have arisen. It is not necessary to comment about those issues given his decision.

85 The conclusion that Nafie was not ordinarily resident in Alberta for at least one year before she filed her Statement of Claim for Divorce and Division of Matrimonial Property is sufficient to dispose of all of the appeals heard as part of the consolidated appeal.

86 However, setting aside all of the interlocutory orders would not be in the best interests of the children of the parties.

III. Remedies

A. Introduction

87 In the ordinary course, setting aside the Statement of Claim for Divorce and Division of Matrimonial Property because Nafie was not ordinarily resident when she filed it would also lead to the setting aside of associated interlocutory orders.

88 Several of those interlocutory orders have a significant impact on the parties' three children, including the orders granting Nafie interim custody, interim exclusive possession of the matrimonial home and the vehicle and interim child support. Without the force of those orders, important aspects of the children's day-to-day lives--including where and with whom they live--would become uncertain given the acrimonious and litigation-focused problem-solving approach taken by the parties.

89 Accordingly, on these unique facts and especially given the parties' conduct to-date, we have taken the extraordinary approach of exercising our *parens patriae* and *nunc pro tunc* jurisdictions to give effect to a select number of the interlocutory orders as of the date they were made.

B. Parens Patriae Jurisdiction

90 In addition to the powers granted by statute, this Court has inherent *parens patriae* jurisdiction, which gives it the power to act in the best interests of children. The exercise of that jurisdiction was described by the Supreme Court in *E (Mrs.) v Eve*, [1986] 2 SCR 388 at 389-390, 31 DLR (4th) 1 [*Eve*] as follows:

> Its exercise is founded on necessity--the need to act for the protection of those who cannot care for themselves. The jurisdiction is broad. Its scope cannot be defined. It applies to many and varied situations, and a court can act not only if injury has occurred but also if it is apprehended. The jurisdiction is carefully guarded and the courts will not assume that it has been removed by legislation.
>
> While the scope of the *parens patriae* jurisdiction is unlimited, the jurisdiction must nonetheless be exercised in accordance with its underlying principle. The discretion given under this jurisdiction is to be exercised for the benefit of the person in need of protection and not for the benefit of others. It must at all times be exercised with great caution, a caution that must increase with the seriousness of the matter. This is particularly so in cases where a court might be tempted to act because failure to act would risk imposing an obviously heavy burden on another person.

91 *Parens patriae* jurisdiction is not dependent on whether or not there is a legislative gap. This Court has used the "legislative gap" approach (from *Beson v Director of Child Welfare (NFLD)*, [1982] 2 SCR 716 at 722, 142 DLR (3d) 20) in a reasons for judgment reserved decision to hold that the *parens patriae* jurisdiction may only be invoked in the absence of applicable legislation and in the best interests of the child: *C(ES) v P(DA)* (1997), 152 DLR (4th) 439 at 445, 206 AR 276 (CA). The Court allowed an appeal on the basis that the trial judge "had no jurisdiction to make the access order under the *Domestic Relations Act* or any other legislation, and no basis for doing so under the Court's inherent *parens patriae* jurisdiction": at 441.

92 However, in *Eve*, the Supreme Court held that, "even where there is legislation in the area, the courts will continue to use the *parens patriae* jurisdiction to deal with uncontemplated situations where it appears necessary to do so for the protection of those who fall within its ambit": at 411.

93 Here the day-to-day lives of the three children of the marriage would be significantly impacted if all the interlocutory orders were set aside. As discussed in "Procedural Issues" below, neither party's conduct to date gives us confidence that they would agree to preserve the *status quo* absent court order.

94 It must be stressed that we are not exercising our *parens patriae* jurisdiction for the benefit or convenience of Nafie; it is solely the interests of children which concern us and for whose benefit we are taking these steps. In our view it is necessary we do so.

C. Judicature Act, Alberta Rules of Court and Nunc Pro Tunc Orders

95 The following sections of the *Judicature* Act, RSA 2000, c J-2 [*Judicature Act*] provide guidance (emphasis added):

> 1 In this Act, except in Part 2.1, "Court" means ... on appeal, the Court of Appeal.
>
> 2(1) The Court has generally all the jurisdiction, powers and authority that before its organization were by any law, order or regulation vested in, or capable of being exercised within, Alberta by the Supreme Court of the North-West Territories.
>
> [...]
>
> 3 The Court of Appeal
>
> (a) has all the jurisdiction and powers possessed by the Supreme Court of the North-West Territories en banc immediately before the Court's organization...
>
> [...]
>
> 8 The Court in the exercise of its jurisdiction in every proceeding pending before it has power to grant and shall grant, either absolutely or on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to which any of the parties to the proceeding may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, so that as far as possible all matters in controversy between the parties can be completely determined and all multiplicity of legal proceedings concerning those matters avoided. [emphasis added]

96 The governing *Alberta Rules of Court,* Alta Reg 124/2010 [*Rules*] are as follows:

> 1.3(1) The Court may do either or both of the following:
>
> (a) give any relief or remedy described or referred to in the *Judicature Act*;
>
> (b) give any relief or remedy described or referred to in or under these rules or any enactment.

(2) A remedy may be granted by the Court whether or not it is claimed or sought in an action.

[...]

14.73 In addition to the powers provided for in other Parts of these rules, a ... panel of the Court of Appeal may...

(b) cure any contravention, non--compliance or irregularity in procedure, or permit or direct any amendment or any deviation from the requirements of these rules with respect to the form or filing of any document...

97 Additionally, although "[n]o rule expressly confers power to grant" *nunc pro tunc* orders, "courts have long been taken to possess this power, subject to statutory limitation, as a product not of express rule but of the inherent jurisdiction of the Court to control its own process": *Rimmer v Adshead*, 2002 SKCA 12 at para 52, [2002]4 WWR 119. A *nunc pro tunc* order grants something now but with earlier effect: *ibid* at para 40.

98 Jurisdiction to grant "all remedies whatsoever" is found in the *Judicature Act* and in the *Rules*.

D. Conclusion

99 This Court has jurisdiction to grant orders *nunc pro tunc* under its *parens patriae* jurisdiction to give effect to the orders which granted Nafie custody (consent order of November 6, 2012), exclusive use of a jointly-owned vehicle (order dated July 8, 2013), child support (clauses 2 and 10 of the order dated September 20, 2013), and exclusive possession of the matrimonial home (order dated December 12, 2013). They are bolded in the table below.

100 All other interlocutory orders, including all but clauses 2 and 10 of the September 20, 2013 order, are set aside.

101 To ensure there is no ambiguity, all orders granted in Action 4801-153163 are listed in the table below. In bold are those orders which continue to have effect. The "Brief Description" is not intended to be an exhaustive list of the contents of the order, but merely a means of identifying it.

Case Name:

Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Limited Partnership

Between
Mosaic Potash Esterhazy Limited Partnership, Appellant,
(Defendant, Plaintiff by Counterclaim), and
Potash Corporation of Saskatchewan Inc., Respondent,
(Plaintiff, Defendant by Counterclaim),

[2011] S.J. No. 627

2011 SKCA 120

377 Sask.R. 78

341 D.L.R. (4th) 407

208 A.C.W.S. (3d) 184

[2012] 2 W.W.R. 659

2011 CarswellSask 678

Docket: CACV2137

Saskatchewan Court of Appeal

R.G. Richards, G.A. Smith and M.J. Herauf JJ.A.

Heard: September 16, 2011.
Judgment: October 24, 2011.
Written Reasons: October 24, 2011.

(115 paras.)

Civil litigation -- Civil procedure -- Injunctions -- Circumstances when granted -- Considerations affecting grant -- Balance of convenience -- Irreparable injury -- Preservation of status quo -- Serious issue to be tried or strong prima facie case -- Interlocutory or interim injunctions -- Mandatory injunctions -- To enforce contractual rights -- Appeal by defendant from interim interlocutory

injunction dismissed -- Defendant mined plaintiff's potash reserves and delivered processed product pursuant to 1978 agreement -- Dispute arose over methodology for calculating termination date -- Plaintiff commenced action to determine product owed under agreement -- Defendant advised it had calculated termination date prior to trial -- Plaintiff obtained injunction prohibiting termination or interruption of supply pending trial -- Chambers judge did not err in general approach to relief sought -- Despite misstatement of standard for irreparable harm, standard employed was not impermissibly low -- No error in assessment of balance of convenience.

Contracts -- Proceedings in contract -- Practice and procedure -- Injunctions -- Appeal by defendant from interim interlocutory injunction dismissed -- Defendant mined plaintiff's potash reserves and delivered processed product pursuant to 1978 agreement -- Dispute arose over methodology for calculating termination date -- Plaintiff commenced action to determine product owed under agreement -- Defendant advised it had calculated termination date prior to trial -- Plaintiff obtained injunction prohibiting termination or interruption of supply pending trial -- Chambers judge did not err in general approach to relief sought -- Despite misstatement of standard for irreparable harm, standard employed was not impermissibly low -- No error in assessment of balance of convenience.

Natural resources law -- Mines and minerals -- Contracts -- Remedies -- Injunctions -- Appeal by defendant from interim interlocutory injunction dismissed -- Defendant mined plaintiff's potash reserves and delivered processed product pursuant to 1978 agreement -- Dispute arose over methodology for calculating termination date -- Plaintiff commenced action to determine product owed under agreement -- Defendant advised it had calculated termination date prior to trial -- Plaintiff obtained injunction prohibiting termination or interruption of supply pending trial -- Chambers judge did not err in general approach to relief sought -- Despite misstatement of standard for irreparable harm, standard employed was not impermissibly low -- No error in assessment of balance of convenience.

Appeal by the defendant, Mosaic Potash Esterhazy Limited Partnership, from an interim interlocutory injunction granted in favour of the plaintiff, Potash Corporation of Saskatchewan ("PCS"). Mosaic owned and operated a large potash mine. A 1978 agreement with Mosaic's predecessor provided for Mosaic to mine PCS' potash reserves and deliver processed product in amounts annually nominated by PCS. A dispute arose as to when Mosaic's obligations would come to an end based on differences of opinion regarding the methodology used to calculate the amount of finished product delivered under the parties' agreement. The agreement contained no formula or prescribed methodology. In 2009, PCS commenced an action to determine the amount of product yet to be delivered. Mosaic assessed the matter and advised PCS that it intended to stop provision of product as of July 2011. Trial was scheduled to commence in January 2012. PCS obtained an order restraining Mosaic from termination of the agreement or interruption of supply under the agreement pending the commencement of trial. The chambers judge concluded that the potential shortfall in supply to PCS and its corresponding inability to honour delivery commitments constituted irreparable harm incapable of monetary relief. Mosaic appealed, seeking to set aside the injunction. Mosaic submitted that the judge treated the requirements for injunctive relief as guidelines rather than prerequisites, failed to require PCS to prove the merits of its claim to the threshold of a strong prima facie case, erred in finding PCS would suffer irreparable harm in the absence of injunctive relief, and improperly concluded that the balance of convenience favoured PCS.

HELD: Appeal dismissed. The chambers judge did not err in the basic approach to granting interlocutory relief. Regardless of whether the strength of the case, irreparable harm, and balance of convenience were treated as guidelines or hurdles, the chambers judge found that all three factors warranted injunctive relief. The parties proceeded on the basis that each of the three considerations had to be satisfied. The standard of a serious issue to be tried was applicable and correctly employed. Although the chambers judge identified the wrong standard of proof in relation to irreparable harm, he did not employ an improperly low standard, as interlocutory injunctive relief required establishment of a meaningful risk of irreparable harm, and PCS established risk to that standard. The chambers judge incorrectly dealt with the issue of PCS' relationship with its distributor, but did not misapprehend or overlook material evidence in finding a risk of irreparable harm had been demonstrated in relation to the prospect of possible supply shortages. No error was made in the assessment of PCS' duty to mitigate its losses. The chambers judge did not err in concluding that the balance of convenience strongly favoured an injunction. The chambers judge was entitled to consider the procedural context in weighing the equities in favour of the relief sought.

Court Summary:

Disposition: Appeal dismissed.

Appeal From:

On appeal from 2011 SKQB 283.

Counsel:

Douglas Hodson, Q.C., David Haigh, Q.C. and Ryan Lepage, for the Appellant.

Gordon Kuski, Q.C., Kent Thomson and Maureen Armstrong, for the Respondent.

The judgment of the Court was delivered by

R.G. RICHARDS J.A.:--

I. Introduction

1 Mosaic Potash Esterhazy Limited Partnership ("Mosaic") and Potash Corporation of Saskatchewan Inc. ("PCS") are potash producers. They are parties to an agreement whereby Mosaic mines certain of PCS's reserves and delivers processed product to PCS in amounts nominated by PCS.

2 A dispute arose as to when Mosaic's obligations under the agreement would come to an end. Mosaic and PCS were unable to resolve their differences in this regard and PCS sued Mosaic for the purpose of having the Court of Queen's Bench determine the amount of product yet to be delivered to it. Case management efforts were undertaken and the trial was scheduled for January of 2012.

3 Then, acting on its own assessment of the matter, Mosaic advised PCS in May of 2011 that it would stop providing product as of July 1, 2011. This in turn led PCS to apply to the case manage-

> tion of doctrinal analysis rather than that of judicial decision-making and I simply propose to give a bare outline of the three main tests currently applied.
>
> The first test is a preliminary and tentative assessment of the merits of the case, but there is more than one way to describe this first test. ...
>
> ...
>
> The second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm, that is harm not susceptible or difficult to be compensated in damages. ...
>
> The third test, called the balance of convenience and which ought perhaps to be called more appropriately the balance of inconvenience, is a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits.

25 The point raised by Mosaic's argument concerns how independently the tests or considerations referred to in *Metropolitan Stores*stand from each other and, as well, how they operate in relation to each other. These questions are not answered, or at least not answered with great clarity, by either the *Metropolitan Stores* decision itself or the Supreme Court's subsequent ruling in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

26 For the moment, let me observe that the strength of case, irreparable harm and balance of convenience considerations, although prescribed and necessary parts of the analysis mandated by the Supreme Court, are nonetheless not usefully seen as an inflexible straightjacket. Instead, they should be regarded as the framework in which a court will assess whether an injunction is warranted in any particular case. The ultimate focus of the court must always be on the justice and equity of the situation in issue. As will be seen, there are important and considerable interconnections between the three tests. They are not watertight compartments.

27 Mosaic says this Court's decision in *101109718 Saskatchewan Ltd. v. Agrikalium Potash Corp.*, 2011 SKCA 82 is inconsistent with the view I have just expressed. In pressing this point, it relies on one of the opening paragraphs of that decision:

> [10] Neither side disputes that the Chambers judge correctly identified *RJR-MacDonald* as outlining the applicable law in this matter or that the Appellants must satisfy all three stages of the test set out in that case for the granting of interlocutory injunctive relief. As noted, the Chambers judge determined the Appellants had not satisfied *any* of the stages of that test. The Appellants submitted the Chambers judge erred in this finding because he acted on wrong principles of law, took irrelevant factors into consideration and overlooked or misapprehended material evidence. However, to succeed in their appeal, the Appellants must identify a reversible error made by the Chambers judge under *each* stage of the *RJR-MacDonald* test.

28 Two things about this passage warrant noting. First, it does not involve an adjudication of the point raised in this case by Mosaic. Rather, both parties simply proceeded on the basis that each

always easy to chart and a competent wordsmith can often succeed in dressing up a mandatory-type order in a prohibitory-type costume. As a result, much time and energy can be consumed by the challenge of working through the sometimes cloudy question of whether an injunction is, in fact, prohibitory or mandatory in effect. This is a case in point. PCS says the injunction is prohibitory because it prevents Mosaic from acting unilaterally to determine the effect of the Mining Agreement. Mosaic says the injunction is mandatory because it requires Mosaic to continue delivering potash.

44 There is another consideration as well. The substantive differences between the impact of mandatory and prohibitory injunctions can be easily overstated. This is because a prohibitory order can often have the effect of forcing the enjoined party to take considerable positive actions. For example, as Robert Sharpe points out in *Injunctions and Specific Performance, supra*, at para. 1.540, "a negative injunction restraining the continuation of a nuisance in effect usually requires the defendant to take positive steps to correct a situation and these steps may be extremely costly." All of this means that it is more useful for a judge to focus on the practical effects of the injunction than to get bogged down in attempting to make formalistic "all or nothing" distinctions between what is prohibitory and what is mandatory.

45 This said, I hasten to add that a change of approach in favour of the use of the serious issue to be tried standard should not shift the legal landscape. This is because the meaningful difference between prohibitory and mandatory injunctions in the present context is that mandatory-type injunctions, generally speaking, go beyond maintaining the *status quo*, are more intrusive and have a larger potential to create losses that will be left uncompensated after trial if the plaintiff's claim be unsuccessful. Thus, the real question at play in this regard should be one of how best to account for these realities when deciding whether to grant an interlocutory injunction. My point here is that the business of accounting for the effects of mandatory-type injunctions on defendants does not have to involve the use of a demanding standard in relation to the strength of the plaintiff's case. Indeed, that approach involves the classic "blunt instrument." A more effective and more nuanced way to proceed is to consider the likely effect of a proposed mandatory order on a case-by-case basis and in the context of the balance of convenience analysis.

46 In other words, taking the position that the serious issue to be tried approach should be used in connection with applications for mandatory-type injunctions does not mean such injunctions will be easier to obtain than they have been historically. It means only that the analysis of the relevant risks and equities should not end, and the matter be resolved against the plaintiff, if the plaintiff can do no more than make out a serious issue to be tried. The potential burdens of the mandatory injunction on the defendant will, and must be, carefully weighed in the course of the balance of convenience analysis.

47 As a result, I conclude that the serious issue to be tried standard was applicable here. The Chambers judge acted correctly in employing it. Relatedly, I find the Chambers judge made no error in concluding the standard had been satisfied. Clearly it was and Mosaic, quite properly, does not contend otherwise.

48 Before leaving this point, let me also say that in endorsing the general use of the serious issue to be tried standard, I do not mean to foreclose the possibility of there being some limited exceptions to its overall applicability. The Supreme Court expressly recognized, in *RJR-MacDonald*, that significant attention to the merits of the plaintiff's case is required (a) where the interlocutory relief will in effect amount to a final determination of the action such as, for example, in an applica-

tion to enjoin picketing, and (b) where the plaintiff's case presents itself as a simple question of law. There might arguably be other limited circumstances where a higher threshold is still appropriate. Obviously, it would not be wise to attempt to identify or analyze them in the abstract.

C. Irreparable Harm

49 The Chambers judge, relying on this Court's decision in *101109718 Saskatchewan Ltd. v. Agrikalium Potash Corp, supra*, concluded that, in order to be granted the injunction, PCS had an obligation to establish "something more than a mere possibility of irreparable harm." He then proceeded to analyze the affidavit material before him, particularly the affidavit of Garth Moore, the President of PCS Potash. The Chambers judge concluded that PCS would experience a shortfall in supply and be unable to honour its delivery commitments if it did not continue to receive finished product from Mosaic. He saw this as causing losses incapable of calculation in monetary terms (*i.e.*, irreparable harm). Finally, the Chambers judge rejected Mosaic's argument that PCS would suffer no irreparable harm because Mosaic was prepared to continue delivering potash on new terms. The judge said a litigant seeking an interlocutory injunction to enforce a contract did not have to accept a change in the terms of the contract in order to obtain the injunction.

50 Mosaic submits the Chambers judge made three main errors in all of this. First, he employed an improperly low standard of proof with respect to irreparable harm. Second, and regardless of the proper standard of proof, he erred in finding that irreparable harm had been demonstrated on the facts. Third, he should have found that PCS had a duty to "mitigate" the risk of suffering irreparable harm. I will address these three issues in turn.

1. Standard of Proof

51 Beginning with the issue concerning the proper standard of proof, it is readily apparent that Canadian courts have no fixed view of how this matter should be approached. I will not refer to the full range of authorities on point beyond noting that they span a wide spectrum. On one extreme, the New Brunswick Court of Appeal has said that irreparable harm is not a condition precedent to granting injunctive relief and, as a result, it is unnecessary to identify any required standard of proof in relation to it. See: *Imperial Sheet Metal Ltd. v. Landry*, 2007 NBCA 51, 315 N.B.R. (2d) 328. McLachlin J.A. (as she then was) described the appropriate test as follows in *B.C. (A.G.) v. Wale*, [1987] 2 W.W.R. 331 (B.C. C.A.) at p. 345:

> It is important to note that clear proof of irreparable harm is not required. Doubt as to the adequacy of damages as a remedy may support an injunction.

Moving further down the spectrum, Ritter J.A., of the Alberta Court of Appeal, has said "[t]he proper approach is to assess whether or not it is probable that irreparable harm will be suffered." See: *Wang v. Luo*, 2002 ABCA 224 at para. 17. At the far end of the range, there are decisions of the Federal Court of Appeal indicating that "evidence as to irreparable harm must be clear and not speculative." See, for example: *Syntex Inc. v. Novopharm Ltd.* (1991), 126 N.R. 114 (F.C.A.) at para. 15.

52 The leading Supreme Court of Canada decisions do not serve to clarify the situation. In *Metropolitan Stores*, at p. 128, and in discussing the general approach to irreparable harm, Beetz J. said, "[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction *would*, unless the injunction is granted, suffer irreparable harm... (emphasis added)." However,

in applying the test, he appears to have taken a much more accommodating approach. At p. 151, Beetz J. concluded that irreparable harm had been shown because imposing a first collective agreement (the applicant sought to enjoin labour board proceedings which might have resulted in such an agreement being imposed) "may" have given the union a semblance of bargaining strength it did not have and "may" have permitted the union to benefit from a contract it might otherwise not have negotiated. Similarly, in *RJR-MacDonald*, the Court said, at p. 348, that "...the applicant *must convince* the court that it will suffer irreparable harm if the relief is not granted (emphasis added)." But, it had earlier found, at p. 342, that irreparable harm would be suffered by the employer seeking the injunction in that case because "[i]n light of the uncertain state of the law regarding the award of damages for a *Charter* breach, it will in most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial." In the result, the two Supreme Court cases on point appear to send somewhat mixed signals on this issue.

53 With that background, I return to the approach taken by the Chambers judge in this case. As noted, he relied on a recent decision of this Court, *101109718 Saskatchewan Ltd. v. Agrikalium Potash Corp.*, for the proposition that the appropriate standard is "something more than a mere possibility of irreparable harm." This is not a proper reading of the *Agrikalium* decision.

54 *Agrikalium* concerned a dispute over, among other things, certain potash dispositions owned by a Mr. Medge and a Mr. Mann. An application was made for an injunction to restrain them from selling those properties. According to the Chambers judge, [2011] S.J. No. 106, the applicants filed affidavit evidence saying they "may" wish to develop a potash mine, "may" determine that the Mann and Medge deposits were the best for that purpose, and "may" not be able to build a mine on the best property if Mann and Medge were allowed to sell it. The Chambers judge concluded, in effect, that the applicants had failed to establish irreparable harm with sufficient certainty. At para. 37 of his judgment, he stated: "The claims by the applicants that harm may result is not sufficient. They have not convinced the Court that harm will result (emphasis in original)."

55 On appeal to this Court, it was argued by the applicants that the Chambers judge had applied an overly demanding standard of proof with respect to irreparable harm. In rejecting their argument, the Court said:

> [21] As to the point of law, I am not persuaded that the Chambers judge erred. In *RJR-MacDonald*, when first discussing the irreparable harm stage of the test, the Supreme Court of Canada wrote (at para. 58):
>
> > ... the only issue to be decided is whether a refusal to grant relief *could* so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application. [Emphasis added.]
>
> However, when the Court later summarized the factors required for an interlocutory injunction, it held (at para. 79):
>
> > At the second stage the applicant must *convince* the court that it *will* suffer irreparable harm if the relief is not granted. [Emphasis added.]

> On this basis, the Chambers judge did not err in law by concluding the Appellants had to establish something more than the mere *possibility* of irreparable harm.
> [emphasis added]

56 In approaching the matter as it did, the Court did not purport to prescribe the precise standard of proof applicable in relation to claims of irreparable harm. Rather, it effectively said the applicants had done no more than establish the "mere possibility" of such harm and that, as a result, the Chambers judge had not erred by concluding this was not enough. The Court said the applicants had to establish something *more* than the mere possibility of irreparable harm should the injunction be denied but it deliberately did not say how *much more* than a mere possibility they had to establish.

57 What then is the proper approach to this issue? In my view, the answer to that question flows directly from the nature of the problem which confronts a judge considering whether to grant or deny an application for an interlocutory injunction. That problem is all about balancing. It is explained as follows by Robert Sharpe in *Injunctions and Specific Performance, supra*, at paras. 2.90 and 2.100:

> The problem posed by interlocutory injunction applications may, it is submitted, best be understood in terms of balancing the relative risks of granting or withholding the remedy. These risks may be simply stated as follows. The plaintiff must show a threat to his or her rights produced by the combination of the defendant's conduct and the delay until trial. The risk to the plaintiff in such cases is that, if an immediate remedy is withheld, his or her rights will be so impaired by the time of trial and final judgment that it will be too late to afford complete relief.
>
> Against this risk to the plaintiff must be balanced the risk of harm to the defendant, should the injunction be granted. This risk is inherent in that the court, on an interlocutory application, can only guess what the result at trial will be. It may well transpire that, although the plaintiff now appears to have a reasonable prospect of success, the plaintiff will fail in the end. ... Although it may now seem that the plaintiff will win, in the end the defendant may well prevail. Accordingly, inherent in the exercise lies a risk of harming the defendant by enjoining a course of conduct which may ultimately be shown to be rightful.
> [emphasis added]

58 This exercise involves, and must involve, a weighing of *risks* rather than a weighing of *certainties*. See: Norman Siebrasse, "Interlocutory Injunctions and Irreparable Harm in the Federal Courts" (2009) 88 Can. Bar Rev. 515 at p. 525. At the preliminary stage of the proceedings when interlocutory matters are resolved, it cannot always be known how strong a plaintiff's case might prove to be. As a result, the court must evaluate the limited materials before it with a view to assessing the *likely* merits of the plaintiff's position. It can often do no more. The same applies to the possibility of harm being suffered by one or both parties if the injunction is granted or denied. The overall exercise is one involving probabilities and possibilities.

59 Given this underlying reality, it seems wrong to demand that a plaintiff seeking an injunction must prove to a high degree of certainty that he or she will suffer irreparable harm if the injunction is not granted. In many situations, this approach would self-evidently frustrate the balancing exercise which a court should be undertaking in deciding if interlocutory relief is warranted. For example, assume that failure to grant a plaintiff an injunction involves only a medium probability that the plaintiff will suffer irreparable harm. But, assume as well that, if such harm is incurred, it will be catastrophic. If the analysis ends at the point of the plaintiff being unable to establish the prospect of irreparable harm to a high level of certainty, a full balancing of the risks concerning the relevant non-compensable damages will not be possible. In other words, the true overall risk of irreparable harm will always be a function of *both* the likelihood of the harm occurring and its size or significance should it occur. A sound analytical approach should take this into account.

60 In short, the same basic logic which recommends the serious issue to be tried standard in relation to the strength of the plaintiff's case consideration also recommends against requiring the plaintiff to prove to a high level of certainty that irreparable harm will result if the injunction is denied. The purpose sought to be achieved by giving a judge the discretion to grant interlocutory relief will be "stultified," to use Lord Diplock's term, if he or she could consider in the balance of convenience only such irreparable harm as is certain or highly likely to occur.

61 Therefore, in the end, it is sufficient that, as a general rule, a plaintiff seeking interlocutory injunctive relief be required to establish a meaningful risk of irreparable harm or, to put it another way, a meaningful doubt as to the adequacy of damages if the injunction is not granted. This is a relatively low standard which will serve to fairly easily move the analysis into the balance of convenience stage of the decision-making. It is there that all of the relevant considerations can be weighed and considered with as much subtlety as the circumstances require. This said, I should add once again that I do not mean to deny any possibility of there being exceptions to this rule. The approach being endorsed here is one of general, but not necessarily universal, practice.

62 This line of thinking is consistent with *American Cyanamid* itself. In the key paragraph of his decision, Lord Diplock wrote as follows, at pp. 510-511:

> ... If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. ...
>
> It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises.
> [emphasis added]

Case Name:

RJR-MacDonald Inc. v. Canada (Attorney General)

RJR-MacDonald Inc., Applicant;
v.
The Attorney General of Canada, Respondent, and
The Attorney General of Quebec, Mis-en-cause, and
The Heart and Stroke Foundation of Canada, Interveners on the
the Canadian Cancer Society, application for the Canadian
Council on Smoking and Health, and interlocutory relief
Physicians for a Smoke-Free Canada
And between
Imperial Tobacco Ltd., Applicant;
v.
The Attorney General of Canada, Respondent, and
The Attorney General of Quebec, Mis-en-cause, and
The Heart and Stroke Foundation of Canada, Interveners on the
the Canadian Cancer Society, application for the Canadian
Council on Smoking and Health, and interlocutory relief
Physicians for a Smoke-Free Canada

[1994] S.C.J. No. 17

[1994] A.C.S. no 17

[1994] 1 S.C.R. 311

[1994] 1 R.C.S. 311

111 D.L.R. (4th) 385

164 N.R. 1

J.E. 94-423

60 Q.A.C. 241

54 C.P.R. (3d) 114

1994 CanLII 117

46 A.C.W.S. (3d) 40

1994 CarswellQue 120

File Nos.: 23460, 23490.

Supreme Court of Canada

1993: October 4 / 1994: March 3.

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

APPLICATIONS FOR INTERLOCUTORY RELIEF

Practice -- Interlocutory motions to stay implementation of regulations pending final decision on appeals and to delay implementation if appeals dismissed -- Leave to appeal granted shortly after applications to stay heard -- Whether the applications for relief from compliance with regulations should be granted -- Tobacco Products Control Act, S.C. 1988, c. 20, ss. 3, 4 to 8, 9, 11 to 16, 17(f), 18. -- Tobacco Products Control Regulations, amendment, SOR/93-389 -- Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 24(1) - - Rules of the Supreme Court of Canada, SOR/83-74, s. 27 -- Supreme Court Act, R.S.C., 1985, c. S-26, s. 65.1.

The Tobacco Products Control Act regulates the advertisement of tobacco products and the health warnings which must be placed upon those products. Both applicants successfully challenged the Act's constitutional validity in the Quebec Superior Court on the grounds that it was ultra vires Parliament and that it violates the right to freedom of expression in s. 2(b) of the Canadian Charter of Rights and Freedoms. The Court of Appeal ordered the suspension of enforcement until judgment was rendered on the Act's validity but declined to order a stay of the coming into effect of the Act until 60 days following a judgment validating the Act. The majority ultimately found the legislation constitutional.

The Tobacco Products Control Regulations, amendment, would cause the applicants to incur major expense in altering their packaging and these expenses would be irrecoverable should the legislation be found unconstitutional. Before a decision on applicants' leave applications to this Court in the main actions had been made, the applicants brought these motions for stay pursuant to s. 65.1 of the Supreme Court Act, or, in the event that leave was granted, pursuant to r. 27 of the Rules of the Supreme Court of Canada. In effect, the applicants sought to be released from any obligation to comply with the new packaging requirements until the disposition of the main actions. They also requested that the stays be granted for a period of 12 months from the dismissal of the leave applications or from a decision of this Court confirming the validity of Tobacco Products Control Act.

This Court heard applicants' motions on October 4 and granted leave to appeal the main action on October 14. At issue here was whether the applications for relief from compliance with the Tobacco Products Control Regulations, amendment should be granted. A preliminary question was raised as to this Court's jurisdiction to grant the relief requested by the applicants.

Held: The applications should be dismissed.

The powers of the Supreme Court of Canada to grant relief in this kind of proceeding are contained in s. 65.1 of the Supreme Court of Canada Act and r. 27 of the Rules of the Supreme Court of Canada.

The words "other relief" in r. 27 of the Supreme Court Rules are broad enough to permit the Court to defer enforcement of regulations that were not in existence when the appeal judgment was rendered. It can apply even though leave to appeal may not yet be granted. In interpreting the language of the rule, regard should be had to its purpose: to facilitate the "bringing of cases" before the Court "for the effectual execution and working of this Act". To achieve its purpose the rule can neither be limited to cases in which leave to appeal has already been granted nor be interpreted narrowly to apply only to an order stopping or arresting execution of the Court's process by a third party or freezing the judicial proceeding which is the subject matter of the judgment in appeal.

Section 65.1 of the Supreme Court Act was adopted not to limit the Court's powers under r. 27 but to enable a single judge to exercise the jurisdiction to grant stays in circumstances in which, before the amendment, a stay could be granted by the Court. It should be interpreted as conferring the same broad powers as are included in r. 27. The Court, pursuant to both s. 65.1 and r. 27, can not only grant a stay of execution and of proceedings in the traditional sense but also make any order that preserves matters between the parties in a state that will, as far as possible, prevent prejudice pending resolution by the Court of the controversy, so as to enable the Court to render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. The Court therefore must have jurisdiction to enjoin conduct on the part of a party acting in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court.

Jurisdiction to grant the relief requested by the applicants exists even if the applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd. which established that the distinction between "suspension" and "exemption" cases is made only after jurisdiction has been otherwise established. If jurisdiction under s. 65.1 of the Act and r. 27 were wanting, jurisdiction would be found in s. 24(1) of the Canadian Charter of Rights and Freedoms. A Charter remedy should not be defeated because of a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.

The three-part American Cyanamid test (adopted in Canada in Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.) should be applied to applications for interlocutory injunctions and as well for stays in both private law and Charter cases.

At the first stage, an applicant for interlocutory relief in a Charter case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation into the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous

or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the Metropolitan Stores test.

At the second stage the applicant is required to demonstrate that irreparable harm will result if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In Charter cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

The third branch of the test, requiring an assessment of the balance of inconvenience to the parties, will normally determine the result in applications involving Charter rights. A consideration of the public interest must be taken into account in assessing the inconvenience which it is alleged will be suffered by both parties. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation has in fact this effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

As a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

Here, the application of these principles to the facts required that the applications for stay be dismissed.

The observation of the Quebec Court of Appeal that the case raised serious constitutional issues and this Court's decision to grant leave to appeal clearly indicated that these cases raise serious questions of law.

Although compliance with the regulations would require a significant expenditure and, in the event of their being found unconstitutional, reversion to the original packaging would require another significant outlay, monetary loss of this nature will not usually amount to irreparable harm in private law cases. However, where the government is the unsuccessful party in a constitutional claim, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies. Although the required expenditure would impose economic hardship on the companies, the economic loss or inconvenience can be avoided by passing it on to purchasers of tobacco products. Further, the applications, since they were brought by two of the three companies controlling the Canadian tobacco industry, were in actual fact for a suspension of the legislation, rather than for an exemption from its operation. The public interest normally carries greater weight in favour of compliance with existing legislation. The

weight given is in part a function of the nature of the legislation and in part a function of the purposes of the legislation under attack. The government passed these regulations with the intention of protecting public health and furthering the public good. When the government declares that it is passing legislation in order to protect and promote public health and it is shown that the restraints which it seeks to place upon an industry are of the same nature as those which in the past have had positive public benefits, it is not for a court on an interlocutory motion to assess the actual benefits which will result from the specific terms of the legislation. The applicants, rather, must offset these public interest considerations by demonstrating a more compelling public interest in suspending the application of the legislation. The only possible public interest in the continued application of the current packaging requirements, however, was that the price of cigarettes for smokers would not increase. Any such increase would not be excessive and cannot carry much weight when balanced against the undeniable importance of the public interest in health and in the prevention of the widespread and serious medical problems directly attributable to smoking.

Cases Cited

Applied: Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., [1987] 1 S.C.R. 110; considered: Labatt Breweries of Canada Ltd. v. Attorney General of Canada, [1980] 1 S.C.R. 594; American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396; referred to: R. v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401; Keable v. Attorney General (Can.), [1978] 2 S.C.R. 135; Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co. (1924), 55 O.L.R. 127; Laboratoire Pentagone Ltée v. Parke, Davis & Co., [1968] S.C.R. 269; Adrian Messenger Services v. The Jockey Club Ltd. (No. 2) (1972), 2 O.R. 619; Bear Island Foundation v. Ontario (1989), 70 O.R. (2d) 574; N.W.L. Ltd. v. Woods, [1979] 1 W.L.R. 1294; Trieger v. Canadian Broadcasting Corp. (1988), 54 D.L.R. (4th) 143; Tremblay v. Daigle, [1989] 2 S.C.R. 530; Dialadex Communications Inc. v. Crammond (1987), 34 D.L.R. (4th) 392; R.L. Crain Inc. v. Hendry (1988), 48 D.L.R. (4th) 228; MacMillan Bloedel Ltd. v. Mullin, [1985] 3 W.W.R. 577; Hubbard v. Pitt, [1976] Q.B. 142; Mills v. The Queen, [1986] 1 S.C.R. 863; Nelles v. Ontario, [1989] 2 S.C.R. 170; Ainsley Financial Corp. v. Ontario Securities Commission (1993), 14 O.R. (3d) 280; Morgentaler v. Ackroyd (1983), 150 D.L.R. (3d) 59; Attorney General of Canada v. Fishing Vessel Owners' Association of B.C., [1985] 1 F.C. 791; Esquimalt Anglers' Association v. Canada (Minister of Fisheries and Oceans) (1988), 21 F.T.R. 304; Island Telephone Co., Re (1987), 67 Nfld. & P.E.I.R. 158; Black v. Law Society of Alberta (1983), 144 D.L.R. (3d) 439; Vancouver General Hospital v. Stoffman (1985), 23 D.L.R. (4th) 146; Rio Hotel Ltd. v. Commission des licences et permis d'alcool, [1986] 2 S.C.R. ix; Ontario Jockey Club v. Smith (1922), 22 O.W.N. 373; R. v. Oakes, [1986] 1 S.C.R. 103.

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Constitution Act, 1867, s. 91.
Fisheries Act, R.S.C. 1970 c. F-14.
Rules of the Supreme Court of Canada, 1888, General Order No. 85(17).
Rules of the Supreme Court of Canada, SOR/83-74, s. 27.
Supreme Court Act, R.S.C., 1985, c. S-26, ss. 65.1 [ad. S.C. 1990, c. 8, s. 40], 97(1)(a).
Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, ss. 3, 4 to 8, 9, 11 to 16, 17(f), 18.

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Cassels, Jamie. "An Inconvenient Balance: The Injunction as a Charter Remedy". In Jeffrey Berryman, ed. Remedies: Issues and Perspectives. Scarborough, Ont.: Carswell, 1991, 271.
Sharpe, Robert J. Injunctions and Specific Performance, 2nd ed. Aurora, Ont.: Canada Law Book, 1992 (loose-leaf).

APPLICATIONS for interlocutory relief ancillary to constitutional challenge of enabling legislation following judgment of the Quebec Court of Appeal, [1993] R.J.Q. 375, 53 Q.A.C. 79, 102 D.L.R. (4th) 289, 48 C.P.R. (3d) 417, allowing an appeal from a judgment of Chabot J., [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, 37 C.P.R. (3d) 193, granting the application. Applications dismissed.

Colin K. Irving, for the applicant RJR-MacDonald Inc.
Simon V. Potter, for the applicant Imperial Tobacco Inc.
Claude Joyal and Yves Leboeuf, for the respondent.
W. Ian C. Binnie, Q.C., and Colin Baxter, for the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada.

Solicitors for the applicant RJR-MacDonald Inc.: Mackenzie, Gervais, Montreal.
Solicitors for the applicant Imperial Tobacco Inc.: Ogilvy, Renault, Montreal.
Solicitors for the respondent: Côté & Ouellet, Montreal.
Solicitors for the interveners on the application for interlocutory relief Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada: McCarthy, Tétrault, Toronto.

The judgment of the Court on the applications for interlocutory relief was delivered by

SOPINKA AND CORY JJ.:--

I. Factual Background

1 These applications for relief from compliance with certain Tobacco Products Control Regulations, amendment, SOR/93-389 as interlocutory relief are ancillary to a larger challenge to regulatory legislation which will soon be heard by this Court.

2 The Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, came into force on January 1, 1989. The purpose of the Act is to regulate the advertisement of tobacco products and the health warnings which must be placed upon tobacco products.

3 The first part of the Tobacco Products Control Act, particularly ss. 4 to 8, prohibits the advertisement of tobacco products and any other form of activity designed to encourage their sale. Section 9 regulates the labelling of tobacco products, and provides that health messages must be carried on all tobacco packages in accordance with the regulations passed pursuant to the Act.

4 Sections 11 to 16 of the Act deal with enforcement and provide for the designation of tobacco product inspectors who are granted search and seizure powers. Section 17 authorizes the Governor in Council to make regulations under the Act. Section 17(f) authorizes the Governor in Council to adopt regulations prescribing "the content, position, configuration, size and prominence" of the mandatory health messages. Section 18(1)(b) of the Act indicates that infringements may be prosecuted by indictment, and upon conviction provides for a penalty by way of a fine not to exceed $100,000, imprisonment for up to one year, or both.

5 Each of the applicants challenged the constitutional validity of the Tobacco Products Control Act on the grounds that it is ultra vires the Parliament of Canada and invalid as it violates s. 2(b) of the Canadian Charter of Rights and Freedoms. The two cases were heard together and decided on common evidence.

6 On July 26, 1991, Chabot J. of the Quebec Superior Court granted the applicants' motions, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, finding that the Act was ultra vires the Parliament of Canada and that it contravened the Charter. The respondent appealed to the Quebec Court of Appeal. Before the Court of Appeal rendered judgment, the applicants applied to this court for interlocutory relief in the form of an order that they would not have to comply with certain provisions of the Act for a period of 60 days following judgment in the Court of Appeal.

7 Up to that point, the applicants had complied with all provisions in the Tobacco Products Control Act. However, under the Act, the complete prohibition on all point of sale advertising was not due to come into force until December 31, 1992. The applicants estimated that it would take them approximately 60 days to dismantle all of their advertising displays in stores. They argued that, with the benefit of a Superior Court judgment declaring the Act unconstitutional, they should not be required to take any steps to dismantle their displays until such time as the Court of Appeal might eventually hold the legislation to be valid. On the motion the Court of Appeal held that the penalties for non-compliance with the ban on point of sale advertising could not be enforced against the applicants until such time as the Court of Appeal had released its decision on the merits. The court refused, however, to stay the enforcement of the provisions for a period of 60 days following a judgment validating the Act.

8 On January 15, 1993, the Court of Appeal for Quebec, [1993] R.J.Q. 375, 102 D.L.R. (4th) 289, allowed the respondent's appeal, Brossard J.A. dissenting in part. The Court unanimously held that the Act was not ultra vires the government of Canada. The Court of Appeal accepted that the Act infringed s. 2(b) of the Charter but found, Brossard J.A. dissenting on this aspect, that it was justified under s. 1 of the Charter. Brossard J.A. agreed with the majority with respect to the requirement of unattributed package warnings (that is to say the warning was not to be attributed to the Federal Government) but found that the ban on advertising was not justified under s. 1 of the Charter. The applicants filed an application for leave to appeal the judgment of the Quebec Court of Appeal to this Court.

9 On August 11, 1993, the Governor in Council published amendments to the regulations dated July 21, 1993, under the Act: Tobacco Products Control Regulations, amendment, SOR/93-389. The

the enabling legislation and, if this Court restores the judgment of the Superior Court, will incur the same expenses a second time should they wish to restore their packages to the present design.

4. The tests for granting of a stay are met in this case:

(i) There is a serious constitutional issue to be determined.
(ii) Compliance with the new regulations will cause irreparable harm.
(iii) The balance of convenience, taking into account the public interest, favours retaining the status quo until this court has disposed of the legal issues.

VI. Analysis

36 The primary issue to be decided on these motions is whether the applicants should be granted the interlocutory relief they seek. The applicants are only entitled to this relief if they can satisfy the test laid down in Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., supra. If not, the applicants will have to comply with the new regulations, at least until such time as a decision is rendered in the main actions.

A. Interlocutory Injunctions, Stays of Proceedings and the Charter

37 The applicants ask this Court to delay the legal effect of regulations which have already been enacted and to prevent public authorities from enforcing them. They further seek to be protected from enforcement of the regulations for a 12-month period even if the enabling legislation is eventually found to be constitutionally valid. The relief sought is significant and its effects far reaching. A careful balancing process must be undertaken.

38 On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.

39 On the other hand, the Charter charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of Charter rights. Such a practice would undermine the spirit and purpose of the Charter and might encourage a government to prolong unduly final resolution of the dispute.

40 Are there, then, special considerations or tests which must be applied by the courts when Charter violations are alleged and the interim relief which is sought involves the execution and enforceability of legislation?

41 Generally, the same principles should be applied by a court whether the remedy sought is an injunction or a stay. In Metropolitan Stores, at p. 127, Beetz J. expressed the position in these words:

> A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions.

42 We would add only that here the applicants are requesting both interlocutory (pending disposition of the appeal) and interim (for a period of one year following such disposition) relief. We will use the broader term "interlocutory relief" to describe the hybrid nature of the relief sought. The same principles apply to both forms of relief.

43 Metropolitan Stores adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

B. The Strength of the Plaintiff's Case

44 Prior to the decision of the House of Lords in American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396, an applicant for interlocutory relief was required to demonstrate a "strong prima facie case" on the merits in order to satisfy the first test. In American Cyanamid, however, Lord Diplock stated that an applicant need no longer demonstrate a strong prima facie case. Rather it would suffice if he or she could satisfy the court that "the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried". The American Cyanamid standard is now generally accepted by the Canadian courts, subject to the occasional reversion to a stricter standard: see Robert J. Sharpe, Injunctions and Specific Performance (2nd ed. 1992), at pp. 2-13 to 2-20.

45 In Metropolitan Stores, Beetz J. advanced several reasons why the American Cyanamid test rather than any more stringent review of the merits is appropriate in Charter cases. These included the difficulties involved in deciding complex factual and legal issues based upon the limited evidence available in an interlocutory proceeding, the impracticality of undertaking a s. 1 analysis at that stage, and the risk that a tentative determination on the merits would be made in the absence of complete pleadings or prior to the notification of any Attorneys General.

46 The respondent here raised the possibility that the current status of the main action required the applicants to demonstrate something more than "a serious question to be tried." The respondent relied upon the following dicta of this Court in Laboratoire Pentagone Ltée v. Parke, Davis & Co., [1968] S.C.R. 269, at p. 272:

> The burden upon the appellant is much greater than it would be if the injunction were interlocutory. In such a case the Court must consider the balance of convenience as between the parties, because the matter has not yet come to trial. In the present case we are being asked to suspend the operation of a judgment of the Court of Appeal, delivered after full consideration of the merits. It is not sufficient to justify such an order being made to urge that the impact of the injunction upon the appellant would be greater than the impact of its suspension upon the respondent.

To the same effect were the comments of Kelly J.A. in Adrian Messenger Services v. The Jockey Club Ltd. (No. 2) (1972), 2 O.R. 619 (C.A.), at p. 620:

> Unlike the situation prevailing before trial, where the competing allegations of the parties are unresolved, on an application for an interim injunction pending an appeal from the dismissal of the action the defendant has a judgment of the Court in its favour. Even conceding the ever-present possibility of the reversal of that judgment on appeal, it will in my view be in a comparatively rare case that the Court will interfere to confer upon a plaintiff, even on an interim basis, the very right to which the trial Court has held he is not entitled.

And, most recently, of Philp J. in Bear Island Foundation v. Ontario (1989), 70 O.R. (2d) 574 (H.C.), at p. 576:

> While I accept that the issue of title to these lands is a serious issue, it has been resolved by trial and by appeal. The reason for the Supreme Court of Canada granting leave is unknown and will not be known until they hear the appeal and render judgment. There is not before me at this time, therefore, a serious or substantial issue to be tried. It has already been tried and appealed. No attempt to stop harvesting was made by the present plaintiffs before trial, nor before the appeal before the Court of Appeal of Ontario. The issue is no longer an issue at trial.

47 According to the respondent, such statements suggest that once a decision has been rendered on the merits at trial, either the burden upon an applicant for interlocutory relief increases, or the applicant can no longer obtain such relief. While it might be possible to distinguish the above authorities on the basis that in the present case the trial judge agreed with the applicant's position, it is not necessary to do so. Whether or not these statements reflect the state of the law in private applications for interlocutory relief, which may well be open to question, they have no application in Charter cases.

48 The Charter protects fundamental rights and freedoms. The importance of the interests which, the applicants allege, have been adversely affected require every court faced with an alleged Charter violation to review the matter carefully. This is so even when other courts have concluded that no Charter breach has occurred. Furthermore, the complex nature of most constitutional rights means that a motions court will rarely have the time to engage in the requisite extensive analysis of the merits of the applicant's claim. This is true of any application for interlocutory relief whether or not a trial has been conducted. It follows that we are in complete agreement with the conclusion of Beetz J. in Metropolitan Stores, at p. 128, that "the American Cyanamid 'serious question' formulation is sufficient in a constitutional case where, as indicated below in these reasons, the public interest is taken into consideration in the balance of convenience."

49 What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. The decision of a lower court judge on the merits of the Charter claim is a relevant but not necessarily conclusive indication that the issues raised in an appeal are serious: see Metropolitan Stores, supra, at p. 150. Similarly, a decision by an appellate court to grant leave on the merits indicates that serious questions are raised, but a refusal of leave in a case which raises the same issues cannot automatically be taken as an indication of the lack of strength of the merits.

50 Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

51 Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial. Indeed Lord Diplock modified the American Cyanamid principle in such a situation in N.W.L. Ltd. v. Woods, [1979] 1 W.L.R. 1294, at p. 1307:

> Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.

Cases in which the applicant seeks to restrain picketing may well fall within the scope of this exception. Several cases indicate that this exception is already applied to some extent in Canada.

52 In Trieger v. Canadian Broadcasting Corp. (1988), 54 D.L.R. (4th) 143 (Ont. H.C.), the leader of the Green Party applied for an interlocutory mandatory injunction allowing him to participate in a party leaders' debate to be televised within a few days of the hearing. The applicant's only real interest was in being permitted to participate in the debate, not in any subsequent declaration of his rights. Campbell J. refused the application, stating at p. 152:

> This is not the sort of relief that should be granted on an interlocutory application of this kind. The legal issues involved are complex and I am not satisfied that the applicant has demonstrated there is a serious issue to be tried in the sense of a case with enough legal merit to justify the extraordinary intervention of this court in making the order sought without any trial at all. [Emphasis added.]

53 In Tremblay v. Daigle, [1989] 2 S.C.R. 530, the appellant Daigle was appealing an interlocutory injunction granted by the Quebec Superior Court enjoining her from having an abortion. In view of the advanced state of the appellant's pregnancy, this Court went beyond the issue of whether or not the interlocutory injunction should be discharged and immediately rendered a decision on the merits of the case.

54 The circumstances in which this exception will apply are rare. When it does, a more extensive review of the merits of the case must be undertaken. Then when the second and third stages of the test are considered and applied the anticipated result on the merits should be borne in mind.

55 The second exception to the American Cyanamid prohibition on an extensive review of the merits arises when the question of constitutionality presents itself as a simple question of law alone. This was recognized by Beetz J. in Metropolitan Stores, at p. 133:

> There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(a) of the Canadian Charter of Rights and Freedoms, could not possibly be saved under s. 1 of the Charter and might perhaps be struck down right away; see Attorney General of Quebec v. Quebec Association of Protestant School Boards, [1984] 2 S.C.R. 66, at p. 88. It is trite to say that these cases are exceptional.

A judge faced with an application which falls within the extremely narrow confines of this second exception need not consider the second or third tests since the existence of irreparable harm or the location of the balance of convenience are irrelevant inasmuch as the constitutional issue is finally determined and a stay is unnecessary.

56 The suggestion has been made in the private law context that a third exception to the American Cyanamid "serious question to be tried" standard should be recognized in cases where the factual record is largely settled prior to the application being made. Thus in Dialadex Communications Inc. v. Crammond (1987), 34 D.L.R. (4th) 392 (Ont. H.C.), at p. 396, it was held that:

> Where the facts are not substantially in dispute, the plaintiffs must be able to establish a strong prima facie case and must show that they will suffer irreparable harm if the injunction is not granted. If there are facts in dispute, a lesser standard must be met. In that case, the plaintiffs must show that their case is not a frivolous one and there is a substantial question to be tried, and that, on the balance of convenience, an injunction should be granted.

To the extent that this exception exists at all, it should not be applied in Charter cases. Even if the facts upon which the Charter breach is alleged are not in dispute, all of the evidence upon which the s. 1 issue must be decided may not be before the motions court. Furthermore, at this stage an appellate court will not normally have the time to consider even a complete factual record properly. It follows that a motions court should not attempt to undertake the careful analysis required for a consideration of s. 1 in an interlocutory proceeding.

C. Irreparable Harm

57 Beetz J. determined in Metropolitan Stores, at p. 128, that "[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm". The harm which might be suffered by the respondent, should the relief sought be granted, has been considered by some courts at this stage. We are of the opinion that this is more appropriately dealt with in the third part of the analysis. Any alleged harm to the public interest should also be considered at that stage.

58 At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

59 "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (R.L. Crain Inc. v. Hendry (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (American Cyanamid, supra); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (MacMillan Bloedel Ltd. v. Mullin, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (Hubbard v. Pitt, [1976] Q.B. 142 (C.A.)).

60 The assessment of irreparable harm in interlocutory applications involving Charter rights is a task which will often be more difficult than a comparable assessment in a private law application. One reason for this is that the notion of irreparable harm is closely tied to the remedy of damages, but damages are not the primary remedy in Charter cases.

61 This Court has on several occasions accepted the principle that damages may be awarded for a breach of Charter rights: (see, for example, Mills v. The Queen, [1986] 1 S.C.R. 863, at pp. 883, 886, 943 and 971; Nelles v. Ontario, [1989] 2 S.C.R. 170, at p. 196). However, no body of jurisprudence has yet developed in respect of the principles which might govern the award of damages under s. 24(1) of the Charter. In light of the uncertain state of the law regarding the award of damages for a Charter breach, it will in most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial. Therefore, until the law in this area has developed further, it is appropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though capable of quantification, constitutes irreparable harm.

D. The Balance of Inconvenience and Public Interest Considerations

62 The third test to be applied in an application for interlocutory relief was described by Beetz J. in Metropolitan Stores at p. 129 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in Charter cases, many interlocutory proceedings will be determined at this stage.

63 The factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. In American Cyanamid, Lord Diplock cautioned, at p. 408, that:

> [i]t would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

He added, at p. 409, that "there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."

64 The decision in Metropolitan Stores, at p. 149, made clear that in all constitutional cases the public interest is a 'special factor' which must be considered in assessing where the balance of convenience lies and which must be "given the weight it should carry." This was the approach properly followed by Blair J. of the General Division of the Ontario Court in Ainsley Financial Corp. v. Ontario Securities Commission (1993), 14 O.R. (3d) 280, at pp. 303-4:

> Interlocutory injunctions involving a challenge to the constitutional validity of legislation or to the authority of a law enforcement agency stand on a different footing than ordinary cases involving claims for such relief as between private litigants. The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants.

1. The Public Interest

65 Some general guidelines as to the methods to be used in assessing the balance of inconvenience were elaborated by Beetz J. in Metropolitan Stores. A few additional points may be made. It is the "polycentric" nature of the Charter which requires a consideration of the public interest in determining the balance of convenience: see Jamie Cassels, "An Inconvenient Balance: The Injunction as a Charter Remedy", in J. Berryman, ed., Remedies: Issues and Perspectives, 1991, 271, at pp. 301-5. However, the government does not have a monopoly on the public interest. As Cassels points out at p. 303:

> While it is of utmost importance to consider the public interest in the balance of convenience, the public interest in Charter litigation is not unequivocal or asymmetrical in the way suggested in Metropolitan Stores. The Attorney General is not the exclusive representative of a monolithic "public" in Charter disputes, nor does the applicant always represent only an individualized claim. Most often, the applicant can also claim to represent one vision of the "public interest". Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.

66 It is, we think, appropriate that it be open to both parties in an interlocutory Charter proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.

67 We would therefore reject an approach which excludes consideration of any harm not directly suffered by a party to the application. Such was the position taken by the trial judge in Morgentaler v. Ackroyd (1983), 150 D.L.R. (3d) 59 (Ont. H.C.), per Linden J., at p. 66.

> The applicants rested their argument mainly on the irreparable loss to their potential women patients, who would be unable to secure abortions if the clinic is not allowed to perform them. Even if it were established that these women would suffer irreparable harm, such evidence would not indicate any irreparable harm to these applicants, which would warrant this court issuing an injunction at their behest. [Emphasis in original.]

68 When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the court of the public interest benefits which will flow from the granting of the relief sought.

69 Courts have addressed the issue of the harm to the public interest which can be relied upon by a public authority in different ways. On the one hand is the view expressed by the Federal Court of Appeal in Attorney General of Canada v. Fishing Vessel Owners' Association of B.C., [1985] 1 F.C. 791, which overturned the trial judge's issuance of an injunction restraining Fisheries Officers from implementing a fishing plan adopted under the Fisheries Act, R.S.C. 1970, c. F-14, for several reasons, including, at p. 795:

> (b) the Judge assumed that the grant of the injunction would not cause any damage to the appellants. This was wrong. When a public authority is prevented from exercising its statutory powers, it can be said, in a case like the present one, that the public interest, of which that authority is the guardian, suffers irreparable harm.

This dictum received the guarded approval of Beetz J. in Metropolitan Stores at p. 139. It was applied by the Trial Division of the Federal Court in Esquimalt Anglers' Association v. Canada (Minister of Fisheries and Oceans) (1988), 21 F.T.R. 304.

70 A contrary view was expressed by McQuaid J.A. of the P.E.I. Court of Appeal in Island Telephone Co. Re, (1987), 67 Nfld. & P.E.I.R. 158, who, in granting a stay of an order of the Public Utilities Commission pending appeal, stated at p. 164:

> I can see no circumstances whatsoever under which the Commission itself could be inconvenienced by a stay pending appeal. As a regulatory body, it has no vested interest, as such, in the outcome of the appeal. In fact, it is not inconceivable that it should welcome any appeal which goes especially to its jurisdiction, for thereby it is provided with clear guidelines for the future, in situations where doubt may have therefore existed. The public interest is equally well served, in the same sense, by any appeal. . . .

71 In our view, the concept of inconvenience should be widely construed in Charter cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in

most cases assume that irreparable harm to the public interest would result from the restraint of that action.

72 A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The Charter does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.

73 Consideration of the public interest may also be influenced by other factors. In Metropolitan Stores, it was observed that public interest considerations will weigh more heavily in a "suspension" case than in an "exemption" case. The reason for this is that the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of a law than when the application of certain provisions of a law than when the application of the law is suspended entirely. See Black v. Law Society of Alberta (1983), 144 D.L.R. (3d) 439; Vancouver General Hospital v. Stoffman (1985), 23 D.L.R. (4th) 146; Rio Hotel Ltd. v. Commission des licences et permis d'alcool, [1986] 2 S.C.R. ix.

74 Similarly, even in suspension cases, a court may be able to provide some relief if it can sufficiently limit the scope of the applicant's request for relief so that the general public interest in the continued application of the law is not affected. Thus in Ontario Jockey Club v. Smith (1922), 22 O.W.N. 373 (H.C.), the court restrained the enforcement of an impugned taxation statute against the applicant but ordered him to pay an amount equivalent to the tax into court pending the disposition of the main action.

2. The Status Quo

75 In the course of discussing the balance of convenience in American Cyanamid, Lord Diplock stated at p. 408 that when everything else is equal, "it is a counsel of prudence to ... preserve the status quo." This approach would seem to be of limited value in private law cases, and, although there may be exceptions, as a general rule it has no merit as such in the face of the alleged violation of fundamental rights. One of the functions of the Charter is to provide individuals with a tool to challenge the existing order of things or status quo. The issues have to be balanced in the manner described in these reasons.

E. Summary

76 It may be helpful at this stage to review the factors to be considered on an application for interlocutory relief in a Charter case.

77 As indicated in Metropolitan Stores, the three-part American Cyanamid test should be applied to applications for interlocutory injunctions and as well for stays in both private law and Charter cases.

78 At the first stage, an applicant for interlocutory relief in a Charter case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is neces-

Case Name:

Thomlinson v. Alberta (Child Services)

Between
Ray Thomlinson and Robert P. Lee, applicants, and Her Majesty the Queen in Right of Alberta, Iris Evans, Minister of Child Services, the Public Trustee and Her Majesty the Queen in Right of the Province of Alberta on behalf of the respondents 439 John Does being minors, respondents

[2003] A.J. No. 716

2003 ABQB 308

335 A.R. 85

Action No. 0201-06274

Alberta Court of Queen's Bench
Judicial District of Calgary

Brooker J.

Heard: August 1, 2002.
Judgment: April 10, 2003.
Filed: April 11, 2003.

(153 paras.)

Practice -- Pleadings -- Striking out pleadings -- Declaratory actions -- Grounds, lack of jurisdiction (incl. alternative remedy) -- Applications and motions -- Applications -- Originating applications, form -- Disposition, application to proceed as action -- Dismissal of, grounds.

Application by Child Services to strike the originating notice of Lee and Thomlinson on the basis that the Court lacked jurisdiction to deal with the issues. Lee's application alleged that 439 unidentified minors were mistreated while in the protective care of Child Services and sought, among other things, a declaration that the minors were entitled to legal representation, an appointment allowing him to represent them, an order directing the Government of Alberta to pay all legal fees and expenses incurred in bringing the application, an order for production of material arising from the al-

leged mistreatment, and advice and direction relating to his compensation. Lee stated that he had contacted the Public Trustee but had declined to act on behalf of the minors on the basis that it would create a conflict of interest.

HELD: Application dismissed. Although the court did not have jurisdiction to grant the relief requested under Rule 410(e), there was jurisdiction to make the orders requested under parens patriae jurisdiction. There was no evidence yet presented upon which to determine whether the Court would exercise its discretion to engage that jurisdiction. In an action brought by way of statement of claim, the Court had the jurisdiction to control its own process, to appoint or permit a next friend who was a stranger in the case, to relieve him of the responsibility for costs, to order production of documents, and to direct that the Government be liable for the costs of the action in the appropriate circumstances. It was appropriate to continue Lee and Thomlinson's claims as a statement of claim, in which case the Court had jurisdiction to grant the types of relief claimed. Lee and Thomlinson were to draft an appropriate statement of claim and apply for interim relief and directions thereunder.

Statutes, Regulations and Rules Cited:

Alberta Rules of Court, Rules 58, 60, 129, 129(1), 129(1)(a), 129(1)(b), 129(1)(d), 129(2), 129(3), 267, 409, 410, 410(e), 560, 600(3).

Child Welfare Act, ss. 2, 2(a), 2(b), 2(c), 3(3), 3(3)(b), 3(3)(c), 128, 128(1)(a).

Freedom of Information and Protection of Privacy Act, s. 3.

Judicature Act, s. 8.

Counsel:

Virgins M. May, Q.C., for the applicants.
Sheila C. McNaughtan, for the respondents.

REASONS FOR JUDGMENT

BROOKER J.:--

INTRODUCTION

1 The Applicant, Robert Lee, has commenced an action by way of Originating Notice. He alleges that 439 unidentified minors ("the minors") were maltreated while in the protective care of Child Services. He is seeking, among other things: a declaration that these minors are entitled to legal representation; an appointment allowing him to represent them as next friend; an order directing the Respondent Government of Alberta ("the Government") to pay all legal fees and expenses incurred in bringing the application and all other actions taken in relation to this litigation; a production order relating to all relevant material arising from the alleged maltreatment; and advice and direction relating to the compensation of the Applicant as next friend. The Applicant takes the posi-

however, demonstrate that it is not necessary for the litigant to have a relationship with the proposed next friend.

107 Ideally a parent or guardian would consent to act as next friend. Where a parent is not interested in acting as next friend or does not have the financial resources to act in the capacity of next friend, it is open to the court to appoint the Public Trustee: Salomon v. Alberta (Minister of Education) (1991), 120 A.R. 298 (C.A.) application for leave to appeal to S.C.C. dismissed without reasons [1991] S.C.C.A. No. 535. Here, however, the Public Trustee has declined to act. Neither of the parties has presented any authority to the effect that the court has the jurisdiction to compel the Public Trustee to act as next friend where there is a good reason for it having declined to do so. In this regard also see: Starkman v. Starkman, [1964] 2 O.R. 99 (H. C.). In my view the obvious conflict of interest that arises here provides such a reason.

108 There is nothing in Rule 58 which precludes the court from appointing a willing stranger as a next friend. Further, the authorities demonstrate that appointing a next friend to represent the interests of an infant unknown to him or her would not be inconsistent with the history of the office of next friend. Nor is the infant's consent to the appointment required.

109 Finally, the fact that an appointment does not appear to have been made previously in circumstances where the plaintiff's identity is unknown, does not militate against making such an order for the first time. That being said, I agree with the Respondent's that the role of a next friend is not generally to decide if she should bring an action on behalf of an infant that is a stranger to her. However, I cannot agree that there may not be circumstances wherein such an order may be appropriate.

110 In light of the above factors, together with the fact that no authority was presented tome indicating that this court lacked the authority to make such an order, I find that this Court does have the jurisdiction to appoint a willing stranger as next friend to an unknown plaintiff in the appropriate circumstances. Although I would not presume to enumerate a list of the circumstances wherein an appointment of a willing stranger may be appropriate, I would suggest that situations in which an infant's interests might not otherwise be represented may well qualify.

111 I would note that where the circumstances permit and a willing stranger is appointed as next friend, the parents, guardians or any other interested adult could later apply to be substituted as the next friend.

(ii) Next Friend not Responsible for Costs

Position of the Parties

112 The Respondents point out, on the authority of Salomon, that the primary functions of a next friend include ensuring that the action is in the best interests of the child and to pledge her liability to the costs of the action.

Analysis

113 One of the primary functions of a next friend is to answer for costs: Crothers v. Simpson Sears Ltd. (1988), 59 Alta. L.R. (2d) 1 (C.A.).

114 In Salamon the plaintiffs were infants and the next friend was their father. The father, although not a lawyer, also purported to act as the children's counsel. The Court noted that it is trite that in superior court a party may either represent themselves or be represented by a member of the

Law Society. The father did not object to another next friend being appointed who could, in turn, appoint counsel. The father was unable to appoint counsel due to his impecunious circumstances.

115 The Court noted that one of the functions of a next friend is to pledge his costs in the cause. As the mother had an income, she was appointed next friend in substitution of the father. The Court directed that the Public Trustee assume the role of next friend if the mother failed to act.

116 In Saccon (Litigation Guardian of) v. Sisson (1992), 9 C.P.C. (3d) 383 (Ont. Ct. G.D.) a mother brought an action in her own name and as the litigation guardian on behalf of her children. The mother failed to comply with an order requiring her to post costs. The Court substituted the Official Guardian as the litigation guardian.

117 Where a statutory body is compelled to act as next friend it is doubtful that it would be responsible for costs. In White v. Rutter and Pacific Press Limited (1988), 28 B.C.L.R. (2d) 385, the British Columbia Court of Appeal stated, at 389:

> In my opinion, if the Public Trustee was exposed to costs in all cases where actions brought by him failed to succeed, he might well be deterred from carrying out his statutory duty on behalf of the patient [under the Patient's Property Act] For example, in the case on appeal, while the action was brought in good faith and was not frivolous, if the Public Trustee had known that he would be exposed to payment of costs, he might well have decided not to bring the action. In my view it cannot be in the public interest to deter a statutory agent from carrying on his duties by exposing him to an order for costs.

118 Thus, it appears that there are circumstances in which a next friend, albeit a statutory body acting involuntary, will not be responsible for costs.

119 The next friend's responsibility for costs appears to have developed as a matter of policy, namely that the defendant should have someone to look to for costs. Where that policy is not viable, as in the case of statutory bodies, one may deviate from the practice. As there are no Rules preventing the court from making a direction to the effect that a next friend not be personally responsible for costs, and as costs are a matter within the court's discretion, I cannot see any reason why the court would be precluded from making such an order, in the right circumstances. As I am not concerned here with the merits of the substantive application, but only with whether the court possesses the jurisdiction to make an order of this nature, I will not comment on whether such an order would be appropriate in these circumstances. I am satisfied, however, that this Court does have the jurisdiction to make such an order.

(iii) Interim, Full Indemnity Costs Against the Government

Position of the Parties

120 The Applicant argues that the Court has the jurisdiction to award pre-litigation costs pursuant to Rule 600(3) and that this may be done on a full indemnity basis on the basis set out in Jackson v. Trimac Industries Ltd. (1993), 8 Alta. L.R. (3d) 403 (Q.B.), varied (1994), 20 Alta. L.R. (3d) 117 (C.A.).

121 He also points out that, s. 128 of the Act states:

128(1) The minister shall pay

(a) The costs incurred for the care and maintenance of a child who is in the custody of a director or under the guardianship of a director.

The Applicant argues that this provision must include the pursuit of the child's legal rights and the fact that the Government may be the focus of the claim by the child cannot allow the Government to avoid this responsibility

122 The Respondents argue that there is no jurisdiction to award costs for an intended claim, which they submit this is. They also state that the process of investigating allegations in order to assess if a claim should be brought, does not constitute a "proceeding" for the purposes of the Rules relevant to cost awards. They submit that this is tantamount to asking the Government to set up a government funded, private inquiry into Alberta Children's Services and that it is not the role of this Court to assist in such an undertaking.

123 They argue further that costs are best addressed at the end of a proceeding, particularly where full indemnity costs are sought. Awarding costs at the close of the proceedings, the Respondents argue, allows the court to assess the facts of the case in order to determine if full-indemnity costs are appropriate. They also point out that awarding either interim or full indemnity costs are very rare events, particularly in cases where the court is being asked to pre-determine an issue: Organ v. Barnett (1992), 11 O.R. (3d) 210 (Gen Div.). They also cite Bullions v. Christensen Estate, [1999] A.J. No. 770 (Q.B.) for the proposition that in exercising discretion to award interim costs, the court will consider whether it is clear that there is a case of sufficient merit to warrant pursuit and whether the plaintiff is in such financial circumstances that she will be unable to pursue the claim unless interim costs are awarded.

124 Finally, the Respondents remind the Court that having a party pay for its own legal costs ensures that the party will conduct the litigation in a reasonable manner: Herman v. Delong, (1999), 253 A.R. 9 (Q.B.); and R.H.J. (Re) (1998), 235 A.R. 358 (Q.B.)

Analysis

125 Rule 600(3) gives the Court the jurisdiction to award costs at any stage of the proceedings.

126 In Organ the plaintiffs brought a motion for an order for interim costs in a fixed amount, representing legal and other professional fees incurred up to the date of trial, in addition to the estimated cost of funding the litigation at trial. In that case E. MacDonald J. stated at p. 215:

> . . . I am satisfied that the court does have a general jurisdiction to award interim costs in a proceeding, and that such a jurisdiction is not limited exclusively to matrimonial cases. In my view, however, such an exercise of jurisdiction is limited to very exceptional cases and ought to be narrowly applied, especially when the court is being asked to essentially pre-determine an issue, in addition to being asked to provide funding for anticipated legal costs to the end of the trial.

127 There the Court declined to award interim costs on the basis that the plaintiffs admitted that they were not impecunious.

128 Similarly, the Court in Bullions found that it had the requisite jurisdiction to award interim costs under Rule 600(3). As to when the discretion to award such costs ought to be exercised the

Tsaoussis, by her Litigation Guardian, The Children's Lawyer et al. v. Baetz*
Tsaoussis, by her Litigation Guardian, Metcalf v. Baetz
[Indexed as: Tsaoussis (Litigation Guardian of) v. Baetz]

41 O.R. (3d) 257

[1998] O.J. No. 3516

Docket No. C27319

Court of Appeal for Ontario

Doherty, Abella and Charron JJ.A.

September 2, 1998

*An application for leave to appeal to the Supreme Court of Canada was dismissed with costs January 28, 1999 (Lamer C.J. and McLachlin and Iacobucci JJ.). S.C.C. File No. 26945. S.C.C. Bulletin, 1999, p. 152.

Judgments and orders -- Setting aside -- Infant settlements -- Settlement of claim by minor plaintiff in personal injury action approved by court in 1992 and judgment granted accordingly -- Judgment set aside in 1997 on ground that medical evidence developed after judgment indicated that plaintiff significantly undercompensated as she had sustained serious brain damage which was unsuspected at time of settlement -- Motions judge erring in finding that plaintiff's best interests sole factor for consideration in deciding whether to set aside judgment -- Judgment approving settlement of minor's personal injury claim that has not been appealed final and should be given same force and effect as any other final judgment -- Parens patriae jurisdiction not enabling court to create different compensation regime for minor plaintiffs involving periodic reviews of adequacy of compensation -- Plaintiff failing to show that evidence developed after 1992 judgment could not have been available by exerc ise of reasonable diligence prior to judgment -- Defendant's appeal allowed.

In 1992, counsel for the minor plaintiff brought an application seeking court approval of the settlement of the plaintiff's claim for damages arising out of a motor vehicle accident. On the basis of evidence which indicated that the plaintiff had suffered a skull fracture in the accident but that she should make a complete recovery, the settlement was approved and judgment was granted accordingly. Assessments done after the 1992 judgment revealed that the plaintiff had numerous ongoing medical and developmental problems, some of which were attributed to the head injury suffered in

the car accident. In 1994, a new action was commenced claiming that the defendant's negligence had caused injuries to the plaintiff resulting in damages of some $2.2 million. In her defence, the defendant pleaded that the claim had been settled by the 1992 judgment, leaving the plaintiff with no cause of action against her. In 1996, counsel brought a motion in the 1994 action to set aside the 1992 judgment on the basis of the medical evidence which had come into existence since that judgment. In granting the motion and setting aside the 1992 judgment, the motions judge made it clear that she had considered only the best interests of the plaintiff. In her view, the criteria generally applied on a motion to set aside a final judgment did not apply on a motion to set aside a judgment approving an infant settlement. She specifically held that prejudice to the defendant was irrelevant. The defendant appealed.

Held, the appeal should be allowed.

The motions judge erred in holding that the best interests of the plaintiff governed whether the 1992 judgment should be set aside. A judgment approving the settlement of a minor's personal injury claim that has been signed, entered and not appealed is final, and must be given the same force and effect as any other final judgment. A motion to set aside that judgment should be tested according to the same criteria used on motions to set aside other final judgments.

Because damages are assessed on a once and for all basis and a single lump sum amount is awarded, judges must determine what constitutes full and fair compensation on the basis of information available at the time the adjudication is made. It is almost inevitable, particularly where future damages are involved, that the amount awarded will in time prove to provide over- or under-compensation. However, one time lump sum awards are seen as having sufficient advantages over other proposed forms of compensation to justify the inaccuracy inherent in those awards. Paramount among those advantages is finality. Attempts to re-open matters which are the subject of a final judgment must be carefully scrutinized. It cannot be enough in personal injury litigation to simply say that something has occurred or has been discovered after the judgment became final which shows that the judgment awards too much or too little. On that approach, finality would be an illusion.

A minor plaintiff, like any other plaintiff, is entitled to full but fair compensation if the minor establishes a personal injury claim. The court's parens patriae jurisdiction does not expand that entitlement. A minor, like any other plaintiff, is entitled to have the compensation assessment made on a once and for all basis and to be paid that compensation in a single lump sum. The parens patriae jurisdiction does not enable the court to create a different compensation regime for minor plaintiffs involving periodic reviews of the adequacy of the compensation provided to the minor. The court must protect the minor's best interests, but it must do so within the established structure for the compensation of personal injury claims. The risk of under-compensation in minors' personal injury claims, especially those involving very young children with head injuries, is very real. That risk demands that the court vigorously exercise its parens patriae jurisdiction when asked to approve a settlement. Once the settlement is approved, however, and the judgment is final and not appealed, the parens patriae jurisdiction is spent. It can only be re-asserted if there is a valid basis for setting aside the final judgment.

The motions judge erred in equating her position on a motion to set aside a final judgment with that of an appellate court asked to admit evidence of events which occurred between the judgment and the appeal. While finality concerns are relevant in both situations, they must carry a great deal more

weight where the judgment is final and the proceedings which culminated in that judgment have long since ended.

In deciding whether to set aside a judgment based on evidence said to be discovered after judgment, the court must first decide whether that evidence could have been tendered before judgment. Evidence which could reasonably have been tendered prior to judgment cannot be used to afford a party a second opportunity to re-litigate the same issue. If that hurdle is cleared, the court will go on to evaluate other factors such as the cogency of the new evidence, any delay in moving to set aside the previous judgment, any difficulty in re-litigating the issues and any prejudice to other parties or persons who may have acted in reliance on the judgment. The onus will be on the moving party to show that all of the circumstances are such as to justify making an exception to the fundamental rule that final judgments are final. In a personal injury case, new evidence demonstrating that the plaintiff was inadequately compensated cannot, standing alone, meet that onus. In this case, the plaintiff failed to show that the evidence developed after the 1992 judgment could not have been available by the exercise of reasonable diligence prior to obtaining that judgment. The order of the motions judge should be set aside and the 1994 action should be dismissed.

Makowka v. Anderson (1990), 45 B.C.L.R. (2d) 136, 67 D.L.R. (4th) 751 (C.A.), distd

Other cases referred to

Andrews v. Grand & Toy Alberta Ltd., [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452, 19 N.R. 50, 8 A.R. 182, 3 C.C.L.T. 225, [1978] 1 W.W.R. 577; Braithwaite v. Haugh (1978), 19 O.R. (2d) 288, 84 D.L.R. (3d) 590 (Co. Ct.); Carter v. Junkin (1984), 47 O.R. (2d) 427, 6 O.A.C. 310, 11 D.L.R. (4th) 545, [1984] I.L.R. ô1-1815 (Div. Ct.); Castlerigg Investments Inc. v. Lam (1991), 2 O.R. (3d) 216, 47 C.P.C. (2d) 270 (Gen. Div.); Eve (Re), [1986] 2 S.C.R. 388, 61 Nfld. & P.E.I.R. 273, 31 D.L.R. (4th) 1, 71 N.R. 1, 185 A.P.R. 273, 13 C.P.C. (2d) 6; Glatt v. Glatt, [1937] S.C.R. 347, [1937] 1 D.L.R. 794, 19 C.B.R. 14, affg [1936] O.R. 75, [1936] 1 D.L.R. 387, 17 C.B.R. 219 (C.A.); Grandview (Town) v. Doering, [1976] 2 S.C.R. 621, 61 D.L.R. (3d) 455, 7 N.R. 299, [1976] 1 W.W.R. 388; Hennig v. Northern Heights (Sault) Ltd. (1980), 30 O.R. (2d) 346, 116 D.L.R. (3d) 496, 17 C.P.C. 173 (C.A.); Kendall v. Kindl Estate (1992), 10 C.P.C. (3d) 24 (Ont. Gen. Div.); L.M. Rosen Realty Ltd. v. D'Amore (1988), 29 C.P.C. (2d) 106 (Ont. H.C.J.); McCann v. Shepherd, [1973] 2 All E.R. 885, [1973] 1 W.L.R. 540, 117 Sol. Jo. 323 (C.A.); McGuire v. Naugh, [1934] O.R. 9 (C.A.); Mercer v. Sijan (1976), 14 O.R. (2d) 12 (C.A.); Poulin v. Nadon, [1950] O.R. 219, [1950] 2 D.L.R. 303 (C.A.); Phosphate Sewage Co. v. Molleson (1879), 4 App. Cas. 801 (H.L.); Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721, 35 Man. R. (2d) 83, 19 D.L.R. (4th) 1, 59 N.R. 321, [1985] 4 W.W.R. 385, 3 C.R.R. D-1; R. v. Sarson, [1996] 2 S.C.R. 223, 135 D.L.R. (4th) 402, 197 N.R. 125, 36 C.R.R. (2d) 1, 107 C.C.C. (3d) 21, 49 C.R. (4th) 75; R. v. Thomas, [1990] 1 S.C.R. 713, 108 N.R. 147, 75 C.R. (3d) 352; Russell v. Brown, [1948] O.R. 835 (C.A.); Sengmueller v. Sengmueller (1994), 17 O.R. (3d) 208, 111 D.L.R. (4th) 19, 1 L.W.R. 46, 25 C.P.C. (3d) 61, 2 R.F.L. (4th) 232 (C.A @.); Steeves v. Fitzsimmons (1975), 11 O.R. (2d) 387, 66 D.L.R. (3d) 230 (H.C.J.); Tepperman v. Rosenberg (1985), 48 C.P.C. 317 (Ont. H.C.J.); Tiwana v. Popove (1988), 23 B.C.L.R. (2d) 392 (S.C.); Toronto General Trusts Corp. v. Roman, [1963] 1 O.R. 312, 37 D.L.R. (2d) 16 (C.A.), affd [1963] S.C.R. vi, 41 D.L.R. (2d) 290; Watkins v. Olafson, [1989] 2 S.C.R. 750, 39 B.C.L.R. (2d) 294, 61 Man. R. (2d) 81, 61 D.L.R. (4th) 577, 100 N.R. 161, [1989] 6 W.W.R. 481, 50 C.C.L.T. 101 (sub nom. Watkins v. Manitoba); Whitehall Development Corp. v. Walker (1977), 17 O.R. (2d) 241, 4 C.P.C. 97 (C.A.)

Statutes referred to

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 116 Family Law Act, R.S.O. 1990, c. F.3

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rules 7, 59.06

Authorities referred to

Jacob, The Fabric of English Civil Justice, Hamlyn Lectures, 1987, pp. 23-24
Report on Compensation for Personal Injuries and Death, Ontario Law Reform Commission (1987), chap. 5
Waddams, The Law of Damages (looseleaf ed.), pp. 3.10-3.260

APPEAL from an order of Leitch J. (1997), 33 O.R. (3d) 679, 13 C.P.C. (4th) 136 (Gen. Div.) setting aside a judgment approving an infant settlement.

Sheldon A. Gilbert, Q.C., for appellant.
André I.G. Michael, for respondents.

The judgment of the court was delivered by

DOHERTY J.A.: --

The Issue

Should a judgment approving a settlement made on behalf of a minor plaintiff in a personal injury case be set aside some four and one-half years later if, based on medical assessments done after the settlement, it appears that the minor was significantly under-compensated by the terms of the settlement?

I.

In April 1990, the respondent, Lorrie Tsaoussis (Lorrie), aged three, was struck by a car driven by the appellant, Juanita Baetz. Lorrie was hospitalized for three days and subsequently seen by her family doctor and paediatrician. Her mother, Carol Metcalf, retained counsel who, within a month of the accident, notified the appellant of Lorrie's claim against her. After negotiations between Lorrie's former counsel and counsel for the appellant's insurer, the parties reached a settlement. As the settlement involved a minor plaintiff, it had to be approved by the court.

Early in 1992, former counsel for Lorrie brought an application under rule 7.08 seeking court approval of the settlement of Lorrie's claim against the appellant arising out of the accident. In compliance with rule 7.08(4), counsel filed his affidavit and the affidavit of Carol Metcalf, Lorrie's mother and litigation guardian. Counsel also attached the hospital records and reports from Lorrie's family doctor and her paediatrician to his affidavit. According to that material, Lorrie had suffered a skull fracture in the accident. Although she had some medical problems in the weeks following the

accident, they seemed relatively minor. Assessments done in the six months following the accident indicated that Lorrie was essentially "normal". Nearly a year after the accident her family doctor said:

> It is my impression that she should have a complete recovery without any significant sequela anticipated.

In Ms. Metcalf's affidavit, she indicated that the information supplied on the medical records was correct, and that based on counsel's advice, she had accepted the terms of the settlement on behalf of Lorrie.

On February 7, 1992, Scott J. of the Ontario Court (General Division) approved the settlement and granted judgment (the 1992 judgment). Under the terms of the settlement and judgment, $5,420 was paid into court for the benefit of Lorrie and $1,250 was paid by the appellant in full satisfaction of costs. After the funds were paid into court, counsel for Ms. Baetz wrote to Lorrie's counsel confirming that "this resolves all claims arising out of this accident".

Ms. Metcalf remained concerned about her daughter's health. Lorrie had headaches, did not sleep through the night, seemed easily distracted and had become increasingly clumsy. With the help of a social worker, Lorrie's mother arranged to have Lorrie seen by a paediatric neurologist at Children's Hospital in London, Ontario. Assessments done between the summer of 1992 and the fall of 1994 revealed that Lorrie had numerous ongoing medical and developmental problems, some of which were attributed to the head injury she had suffered in the car accident in 1990. By February 1996, Lorrie's doctor opined that Lorrie's "attention and concentration problems are attributable to the motor vehicle accident". Her doctor also felt that the full extent of those problems could not be determined for another year or two.

At some point, Lorrie's mother retained new counsel on behalf of Lorrie. In the fall of 1994, that counsel commenced a new action (the 1994 action) claiming that the appellant's negligence had caused injuries to Lorrie resulting in damages of some $2.2 million. Counsel also claimed damages under the Family Law Act, R.S.O. 1990, c. F.3 on behalf of Lorrie's mother and sister. In her defence, Ms. Baetz pleaded that the claim had been settled by the 1992 judgment leaving Lorrie with no cause for action against her. Ms. Baetz also denied any liability for the accident.

In the fall of 1996, counsel brought a motion in the 1994 action to set aside the 1992 judgment.[1 at end of document.] Although counsel argued that Scott J. should not have approved the settlement in 1992, the affidavits filed on the motion make it clear that medical evidence developed after the 1992 judgment provided the sole basis for setting aside that judgment. The final paragraph of counsel's affidavit filed on the motion summarizes his position:

> There is no doubt in my mind that the present medical evidence now clearly establishes that the court approved settlement was not in the best interests of either Lorrie or her mother. The medical tests and assessments which have been performed since the time of the court approval have clearly provided new evidence of the extent and effect of the brain damage sustained by Lorrie which was not available to Madam Justice Scott. It is my opinion that the interests of justice require that the judgment of Madam Justice Scott be set aside.

Leitch J., for reasons reported at (1997), 33 O.R. (3d) 679, granted the motion, set aside the 1992 judgment and directed that the 1994 action should proceed.[2] at end of document.] In doing so, she did not purport to review the correctness of the judgment as of the date it was made. Instead, Leitch J. held that she was obliged to consider the medical evidence developed after the 1992 judgment and decide whether in the light of that evidence the 1992 judgment could be said to be in the best interests of Lorrie. She said, at p. 688:

> I find it necessary to consider evidence that was not before the judge who approved the settlement in 1992 not to show that the assessment of the previously existing evidence was incorrect but to allow this court to assess whether Lorrie's best interests have been met.

After a careful review of the new medical evidence, Leitch J. concluded that as the 1992 judgment had been premised on medical information indicating that Lorrie's injury was relatively minor and would cause no long-term effects, it could not be said to meet Lorrie's best interests in the face of medical evidence indicating a much more serious injury with significant long-term effects. Leitch J. made it clear that in setting aside the 1992 judgment she had considered only the best interests of Lorrie. In her view, the criteria generally applied on a motion to set aside a final judgment did not apply on a motion to set aside a judgment approving an infant settlement. She specifically held that prejudice to the appellant was irrelevant.

I think Leitch J. properly characterized her function on the motion to set aside the 1992 judgment. She was not, and indeed could not, sit on appeal from the decision of Scott J. Arguments as to whether Scott J. should have approved the settlement based on the information placed before her could only be properly made by way of a direct appeal from that judgment and no such appeal was ever taken.

Leitch J. also properly avoided any consideration of the adequacy of former counsel's representation of Lorrie in making her determination that the 1992 judgment should be set aside. Former counsel is not a party to these proceedings, and it would be inappropriate to take anything said by Leitch J. or by me as a comment on the adequacy of his representation. If Lorrie wishes to take issue with that representation, she can do so in separate proceedings instituted against the former counsel for that express purpose.[1] at end of document.]

II.

If, as Leitch J. held, the best interests of Lorrie is the only factor to consider in deciding whether to set aside the 1992 judgment, her decision is unassailable. The medical evidence gathered after the 1992 judgment strongly suggests that if the appellant is responsible for Lorrie's injuries, Lorrie was significantly under-compensated by the terms of the 1992 judgment. I cannot agree, however, that the best interests of Lorrie govern the decision whether the 1992 judgment should be set aside. In my view, a judgment approving the settlement of a minor's personal injury claim that has been signed, entered and not appealed is final, and must be given the same force and effect as any other final judgment. A motion to set aside that judgment should be tested according to the same criteria used on motions to set aside other final judgments. Applying those criteria, I would hold that the 1992 judgment should not have been set aside.

III.

A person who is injured as a result of the negligence of another is entitled to full but fair compensation for those injuries: Watkins v. Olafson, [1989] 2 S.C.R. 750 at p. 757, 61 D.L.R. (4th) 577 at p. 581. Under our system of adjudication of personal injury cases, full but fair compensation is determined at a specific point in time on a once and for all basis, and awarded in the form of a single lump sum payment. Absent statutory authority, a court cannot provide for periodic payments to a plaintiff in a personal injury case, or periodically review damages based on developments subsequent to the initial assessment: Watkins v. Olafson, supra, at pp. 756-64 S.C.R., pp. 580-86 D.L.R. Because we assess damages on a once and for all basis and award a single lump sum amount, judges must determine what constitutes full but fair compensation on the basis of information available at the time the adjudication is made. Judges must also factor future costs and future losses into that assessment in many personal injury cases. It is almost inevitable, particularly where future damages are involved, that the amount awarded will in time prove to provide over- or under-compensation. Despite the likelihood of inaccuracy which has spawned strong judicial and academic criticism of one time lump sum awards,[4] at end of document.] this province maintains that approach in personal injury cases in all but very limited circumstances.[5] at end of document.] One time lump sum awards are seen as having sufficient advantages over other proposed forms of compensation to justify the inaccuracy inherent in those words.[6] at end of document.]

Paramount among those advantages is finality. Finality is an important feature of our justice system, both to the parties involved in any specific litigation and on an institutional level to the community at large. For the parties, it is an economic and psychological necessity. For the community, it places some limitation on the economic burden each legal dispute imposes on the system and it gives decisions produced by the system an authority which they could not hope to have if they were subject to constant reassessment and variation: J.I. Jacob, The Fabric of English Civil Justice, Hamlyn Lectures 1987, at pp. 23-24.

The parties and the community require that there be a definite and discernible end to legal disputes. There must be a point at which the parties can proceed on the basis that the matter has been decided and their respective rights and obligations have been finally determined. Without a discernible end point, the parties cannot get on with the rest of their lives secure in the knowledge that the issue has finally been determined, but must suffer the considerable economic and psychological burden of indeterminate proceedings in which their respective rights and obligations are revisited and reviewed as circumstances change. Under our system for the adjudication of personal injury claims, that end point occurs when a final judgment has been entered and has either not been appealed, or all appeals have been exhausted.

Finality is important in all areas of the law, but is stressed more in some than in others. Its significance in tort law was highlighted by McLachlin J. in Watkins v. Olafson, supra, at p. 763 S.C.R., p. 585 D.L.R., where in the course of discussing problems associated with a scheme of compensation based on reviewable periodic payments, she said:

> Yet another factor meriting examination is the lack of finality of periodic payments and the effect this might have on the lives of plaintiff and defendant. Unlike persons who join voluntarily in marriage or contract -- areas where the law recognizes periodic payments -- the tortfeasor and his or her victim are brought together by a momentary lapse of attention. A scheme of reviewable periodic payments would bind them in an uneasy and unterminated relationship for as long as the plaintiff lives.

The importance attached to finality is reflected in the doctrine of res judicata. That doctrine prohibits the re-litigation of matters that have been decided and requires that parties put forward their entire case in a single action. Litigation by instalment is not tolerated: Toronto General Trusts Corp. v. Roman, [1963] 1 O.R. 312, 37 D.L.R. (2d) 16 (C.A.), affirmed [1963] S.C.R. vi, 41 D.L.R. (2d) 290. Finality is so highly valued that it can be given priority over the justice of an individual case even where fundamental liberty interests and other constitutional values are involved: R. v. Thomas, [1990] 1 S.C.R. 713, 75 C.R. (3d) 352; R. v. Sarson, [1996] 2 S.C.R. 223, 107 C.C.C. (3d) 21; Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721 at p. 757, 19 D.L.R. (4th) 1.

That is not to say that finality interests always win out over other interests once final judgment is signed and entered. Sometimes the rigor of the res judicata doctrine will be relaxed: Grandview (Town) v. Doering, [1976] 2 S.C.R. 621 at p. 638, 61 D.L.R. (3d) 455; Hennig v. Northern Heights (Sault) Ltd. (1980), 30 O.R. (2d) 346, 116 D.L.R. (3d) 496 (C.A.). The court also has the power to set aside final judgments: Glatt v. Glatt, [1937] S.C.R. 347, [1937] 1 D.L.R. 794, affirming [1936] O.R. 75, [1936] 1 D.L.R. 387 (C.A.); Whitehall Development Corp. v. Walker (1977), 17 O.R. (2d) 241, 4 C.P.C. 97 (C.A.). The limitations on the res judicata doctrine and the power to set aside previous judgments are, however, exceptions to the general rule that final judgments mark the end of litigation. Those exceptions recognize that despite the value placed on finality, there will be situations in which other legitimate interests clearly outweigh finality conce rns. The power to set aside a final judgment obtained by fraud is the most obvious example. As important as finality is, it must give way when the preservation of the very integrity of the judgment process is at stake.

Attempts, whatever their form, to re-open matters which are the subject of a final judgment must be carefully scrutinized. It cannot be enough in personal injury litigation to simply say that something has occurred or has been discovered after the judgment became final which shows that the judgment awards too much or too little. On that approach, finality would become an illusion. The applicant must demonstrate circumstances which warrant deviation from the fundamental principle that a final judgment, unless appealed, marks the end of the litigation line. I think Anderson J. struck the proper judicial tone on applications to re-open final judgments in L.M. Rosen Realty Ltd. v. D'Amore (1988), 29 C.P.C. (2d) 106 (Ont. H.C.J.). He was asked to set aside a judgment and vary the rate of post-judgment interest granted because subsequent events showed that the rate was much too high. He said, at p. 109:

> Even if I thought I had the discretion, I would be reluctant to intervene because I feel it would be offensive to the basic proposition that there should be finality in litigation. Adjusting the result after judgment, save in response to unusual circumstances, would be a conspicuous and dangerous meddling with that proposition.

I am not aware of any personal injury case in which a final judgment has been set aside, other than on appeal, because evidence developed after the judgment indicated that the award was much too high or much too low.[7] at end of document.] I would be surprised to find such a case as it would be entirely inconsistent with our system of one time lump sum awards for personal injuries. As assessments which ultimately prove to be inaccurate are inherent in that scheme, I do not see how the demonstration of that inaccuracy in a particular case could, standing alone, justify departure from the finality principle.

IV.

The approach taken by Leitch J. constitutes a departure from the traditional approach taken to final judgments in personal injury litigation. She discounts finality concerns entirely. If she is correct, no judgment approving an infant settlement is final. Instead, all carry the unwritten caveat -- subject to being set aside if subsequent events reveal that the plaintiff may have been under-compensated.[8 at end of document.] Nor, in my view, would it be an unusual case in which this caveat would come into play. Medical assessments change, unanticipated losses arise and estimates of anticipated costs prove inaccurate. In all such situations where the change was significant, minor plaintiffs would be entitled to set aside a judgment approving a settlement and re-litigate their claim based on the latest information available as to the extent of the damage suffered by them.

In addition to discounting finality concerns, Leitch J. has, in effect, introduced a scheme of compensation by reviewable periodic payments in personal injury cases involving minor plaintiffs. Amounts awarded pursuant to settlements approved by the court would become periodic payments if, before the minor reached majority, circumstances revealed that the amount awarded did not provide full compensation. This is the sort of drastic innovation in our tort compensation scheme which the court in Watkins v. Olafson, supra, instructed should be left to the legislature.

The respondent contends that the court's obligation to ensure that the best interests of Lorrie were met trumped all other concerns. There can be no doubt that a court is obliged to look to and protect the best interests of minors who are parties to legal proceedings.[9 at end of document.] This obligation, sometimes referred to as the court's parens patriae jurisdiction, requires that the court abandon its normal umpire-like role and assume a more interventionist mode. For example, the court must decide who will act on behalf of the minor (rules 7.03-7.06) and the court must take control of any proceeds paid to the benefit of the minor (rule 7.09). The supervisory powers of the court are most clearly evinced by the requirement that the court approve any consent judgment to which a minor is a party and the closely aligned requirement that the court approve any settlement of a minor's claim before that settlement will bind the minor (rule 7.08). The duty on the court when a motion for approval of a settlement is made wa s authoritatively described by Robertson C.J.O. in Poulin v. Nadon, [1950] O.R. 219 at p. 225, [1950] 2 D.L.R. 303:

> If, upon proper inquiry, the judge shall be of the opinion that the settlement is one that, in the interests of the infant, should be approved, he may give the required approval. If, on the other hand, the judge is not of the opinion that the settlement is one that should be approved, he may give such direction as to the trial of the action as may be proper.

The inquiry described by Robertson C.J.O. requires that the court make its own determination whether the proposed settlement is in the minor's best interests. Rule 7.08(4) demands that the parties place sufficient material before the court to allow it to make that determination.

As important and far reaching as the parens patriae jurisdiction is, it does not exist in a vacuum, but must be exercised in the context of the substantive and adjectival law governing the proceedings. The parens patriae jurisdiction is essentially protective. It neither creates substantive rights nor changes the means by which claims are determined.

The proper limits of the parens patriae jurisdiction were drawn in Carter v. Junkin (1984), 47 O.R. (2d) 427, 11 D.L.R. (4th) 545 (Div. Ct.). The defendant insurance company proposed to make an advance payment to a minor under the provisions of the Insurance Act. The defendant applied for an order approving the advance payment, but the motion judge refused to make that order unless the insurer agreed to a term which would protect the minor's claim to pre-judgment interest. The de-

fendant refused to make the payment on that term and appealed. The Divisional Court held, at p. 430:

> The court has no jurisdiction to compel an insurer to pay money into court under s. 224 [the Insurance Act], and to make good the interest differential. But that is not what was done here. The learned motions court judge did not require the insurer to pay money into court. He simply granted leave to the insurer to do so, if the insurer was willing to agree to give the undertaking as to the interest differential. The insurer can still decline to make the payment, in which event the infant plaintiff will recover at trial the full amount of prejudgment interest to which he is entitled.

The court properly drew a distinction between a court imposed term on a voluntary payment as a condition to court approval of that payment and the court requiring that the defendant make a payment. The former protected the minor's best interests under the scheme of voluntary payments established under the Insurance Act and was a proper exercise of the parens patriae jurisdiction. A forced payment would, however, have gone beyond the limits of the statute and given the minor rights which he did not have under that statute. While a forced advance payment may have been in the minor's best interests, it was not within the scope of the parens patriae jurisdiction as it was not contemplated under the statutory scheme.

A minor plaintiff, like any other plaintiff, is entitled to full but fair compensation if the minor establishes a personal injury claim. The parens patriae jurisdiction does not expand that entitlement. For example, a minor plaintiff who cannot establish that the defendant's negligence caused the injury, cannot succeed on the basis that, despite that failure, compensation is in the minor's best interests. Similarly, a minor, like any other plaintiff, is entitled to have the compensation assessment made on a once and for all basis and to be paid that compensation in a single lump sum. The parens patriae jurisdiction does not enable the court to create a different compensation regime for minor plaintiffs involving periodic reviews of the adequacy of the compensation provided to the minor. The court must protect the minor's best interests, but it must do so within the established structure for the compensation of personal injury claims: Kendall v. Kindl Estate (1992), 10 C.P.C. (3d) 24 (Ont. Gen. Div.).

Finality is as important in cases involving minor plaintiffs as it is in cases involving adult plaintiffs. The need for finality must temper the goal of meeting the minor's best interests just as it must temper the desire to provide every plaintiff with full but fair compensation. Proposed settlements of minors' personal injury claims, especially those involving very young children with head injuries, raise real concerns about the adequacy of compensation provided by those settlements. The risk of under-compensation in those cases is very real.[10] at end of document.] That risk demands that the court vigorously exercise its parens patriae jurisdiction when asked to approve a settlement. Once the settlement is approved, however, and the judgment is final and not appealed, the parens patriae jurisdiction is spent. It can only be re-asserted if there is a valid basis for setting aside the final judgment.

In arriving at the conclusion that the best interests of the minor justified setting aside the previous final judgment, Leitch J. relied exclusively on the decision of the British Columbia Court of Appeal in Makowka v. Anderson (1990), 67 D.L.R. (4th) 751, 45 B.C.L.R. (2d) 136. In Makowka, a motion judge was asked to approve an infant settlement. He did so over the objections of the Public Trustee acting on behalf of the infant. The Public Trustee argued that more time was needed to assess the

extent of the minor's head injury and the cause of her various medical problems. The Public Trustee appealed the judgment approving the settlement and sought to introduce evidence on appeal of medical assessments done between the judgment approving the settlement and the hearing of the appeal. Those assessments confirmed the Public Trustee's concerns and indicated that the minor's injuries were serious and that in all likelihood she would suffer significant long-term disabilities.

On a motion to admit the fresh evidence heard before the actual appeal, Lambert J.A., for the court, while accepting the importance of finality, even in litigation involving minors, acknowledged that the appeal court could receive evidence of matters arising after the judgment appealed from. He stressed that the evidence proffered by the Public Trustee was not directed to a purely factual question, but rather to the assessment of the minor's best interests. The reasons of Lambert J.A. admitting the evidence are referred to in the reasons disposing of the appeal. He said, at p. 758:

> So the purpose of the introduction of fresh evidence in this appeal is not to show that a factual assessment of the previously existing evidence was incorrect, but it is to show that the best interests of the infant may not in fact have been carried through in the way that the chambers judge thought he was carrying them through.

Accordingly, the factors are quite different in this case. Having regard to the crucial ones, which are the best interests of the child and the good administration of justice, it would, in my opinion, in the words of the cases, be an affront to justice to insist on imposing this settlement on this infant if it was, when it was agreed upon, an unjust settlement.

The court hearing the appeal described its task in words that were adopted by Leitch J. (at p. 758):

> So we are entitled to look at the new evidence, which includes subsequent medical reports, for the purpose of determining whether the settlement originally placed before the court seems a just one today. We are not limited to considering the strengths and weaknesses of Meghan's [the minor] case as they appeared from the material placed before the judge below.

Not surprisingly, the court went on to conclude that the amount provided for in the settlement was totally inadequate and set aside the order approving the settlement.

The facts in Makowka are quite similar to our facts. The proceedings were, however, fundamentally different. Makowka was a direct appeal from the judgment approving the settlement. When the fresh evidence was tendered the matter was still in the litigation system and the rights and obligations of the parties were subject to appellate review, the purpose of which was to determine the correctness of the order approving the settlement. The defendant in Makowka had no reason to think the end of the litigation line had been reached. The Public Trustee continued to maintain that the settlement should not have been approved and the new evidence went directly to the central issue both on the motion and on the appeal.

On this motion, Leitch J. was not asked to, and could not, review the correctness of the order of Scott J. Instead, she was asked to allow Lorrie to begin her claim afresh and to re-litigate a claim which, in the eyes of the law and the mind of Ms. Baetz, had ceased to exist when it became the subject of final judgment in 1992. In my opinion, there is an important difference between allowing a party to supplement a record at the appellate stage of an ongoing proceeding and allowing a party

to resurrect a claim which is the subject of a final judgment. That distinction has been recognized by appellate courts faced with applications to admit fresh evidence concerning events which occurred between the judgment and the appeal. In McCann v. Shepherd, [1973] 2 All E.R. 881 at p. 885 (C.A.), Lord Denning M.R., said:

> The general rule in accident cases is that the sum of damages falls to be assessed once and for all at the time of the hearing; and this court will be slow to admit evidence of subsequent events to vary it. It will not normally do so after the time for appeal has expired without an appeal being entered -- because the proceedings are then at an end. They have reached finality. But if notice of appeal has been entered in time -- and pending the appeal, a supervening event occurs such as to falsify the previous assessment -- then the court will be more ready to admit fresh evidence -- because until the appeal is heard and determined, the proceedings are still pending. Finality has not been reached.

Admitting fresh evidence on appeal of events which occurred between the judgment and the appeal raises finality concerns for the reasons set out by Lord Denning, however, those concerns are moderated, first by the fact that the proceeding is still underway and second because the parties know that their rights remain undetermined until appellate remedies have been exhausted. Even in those circumstances, evidence is only admitted where it would be "an affront to common sense" to refuse to admit the evidence on appeal: Mercer v. Sijan (1976), 14 O.R. (2d) 12 at p. 17 (C.A.); Sengmueller v. Sengmueller (1994), 17 O.R. (3d) 208 at p. 211 (C.A.). This was the test applied in Makowka.

Leitch J. erred in equating her position on a motion to set aside a final judgment with that of an appellate court asked to admit evidence of events which occurred between the judgment and the appeal." at end of document.] While finality concerns are relevant in both situations, they must carry a great deal more weight where the judgment is final and the proceedings which culminated in that judgment have long since ended. The court in Makowka did not have to address the threshold issue raised on this motion -- should a litigant, based on evidence developed after final judgment and after proceedings have ended, be allowed to start the litigation process all over again? That issue could not be resolved by reliance on the parens patriae jurisdiction.

V.

A party who would otherwise be bound by a previous judgment can bring an action to set aside that judgment. Fraud in the obtaining of the initial judgment is the most common ground relied on in such actions: McGuire v. Naugh, [1934] O.R. 9 at pp. 11-13 (C.A.); Russell v. Brown, [1948] O.R. 835 at pp. 846-48 (C.A.), per Hogg J.A. (concurring); Glatt v. Glatt, supra, at p. 79 (C.A.). Rule 59.06 allows that kind of relief to be claimed by way of a motion in the original proceedings. The rule does not, however, confer the power to set aside a previous judgment, nor does it articulate a test to be applied in deciding whether a previous judgment should be set aside. The rule merely provides a more expeditious procedure for seeking that remedy: Glatt v. Glatt, supra; Braithwaite v. Haugh (1978), 19 O.R. (2d) 288 at p. 289, 84 D.L.R. (3d) 590 (Co. Ct.). The language of Rule 59.06 does, however, provide insight into the varied factual circumstances which may give rise to motions to set aside a judgment.

For present purposes, I am concerned with Rule 59.06(2)(a) and particularly, the part of the rule which refers to motions to set aside orders "on the ground . . . of facts arising or discovered after it

[the order] was made". The rule draws a distinction between facts which come into existence after the judgment was made and facts which, while existing when the judgment was made, were discovered after judgment. In this case, the facts relied on to set aside the previous judgment concerned the exact nature of Lorrie's head injury and, more importantly, its potential impact on her physical, intellectual and cognitive development. That injury and those potential effects existed at the time of the judgment.

In deciding whether to set aside a judgment based on evidence said to be discovered after judgment, the court must first decide whether that evidence could have been tendered before judgment. Evidence which could reasonably have been tendered prior to judgment cannot be used to afford a party a second opportunity to re-litigate the same issue. In Glatt v. Glatt, supra, the appellant moved to set aside a judgment partly on the basis of evidence discovered after the judgment. Duff C.J.C., for a unanimous court, rejected the claim stating, at p. 350:

> It is well established law that a judgment cannot be set aside on such a ground unless it is proved that the evidence relied upon could not have been discovered by the party complaining by the exercise of due diligence. The importance of this rule is obvious and it is equally obvious that the finality of judgments generally would be gravely imperilled unless the rule were applied with the utmost strictness.

That same view prevailed in the majority judgment in Grandview v. Doering, supra, some 40 years later. Mr. Doering sued the Town of Grandview alleging that it was responsible for the flooding of his land. The suit was dismissed. A few months later he commenced a second action, again claiming damages for the flooding of his land. The second claim referred to different years than the first claim and alleged a different means by which the flooding occurred. An expert consulted by Mr. Doering after the first trial had developed a new theory explaining how the flooding had occurred. The Town moved to have the second action stayed on the basis that it was res judicata. A closely divided Supreme Court of Canada sided with the Town and stayed Mr. Doering's claim. The minority were of the view that the two actions did not raise the same issue. The majority took the position that the two actions were sufficiently similar to warrant the application of res judicata. Ritchie J., for the majority, went on to consider whether the new theory as to the cause of the flooding could provide a basis for re-litigating the Town's liability. He cited with approval, at p. 636, the judgment of Lord Cairns in Phosphate Sewage Co. v. Molleson (1879), 4 App. Cas. 801 at pp. 814-15 (H.L.), where His Lordship said:

> As I understand the law with regard to res judicata, it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. My Lords, the only way in which that could possibly be admitted would be if the litigant were prepared to say, I will shew you that this is a fact which entirely changes the aspect of the case, and I will shew you further that it was not, and could not by reasonable diligence have been, ascertained by me before.

(Emphasis added)

Ritchie J., at p. 638, observed that Mr. Doering had not alleged, much less proved, that the expert evidence advancing the new theory concerning the flooding could not have been available by the exercise of reasonable diligence at the first trial. Consequently, Mr. Doering had not cleared the first hurdle required to allow him to re-litigate a claim which was res judicata.

These and numerous other authorities (e.g., Whitehall Development Corp. v. Walker, supra, at p. 98) recognize that the finality principle must not yield unless the moving party can show that the new evidence could not have been put forward by the exercise of reasonable diligence at the proceedings which led to the judgment the moving party seeks to set aside. If that hurdle is cleared, the court will go on to evaluate other factors such as the cogency of the new evidence, any delay in moving to set aside the previous judgment, any difficulty in re-litigating the issues and any prejudice to other parties or persons who may have acted in reliance on the judgment. The onus will be on the moving party to show that all of the circumstances are such as to justify making an exception to the fundamental rule that final judgments are exactly that, final. In a personal injury case, new evidence demonstrating that the plaintiff was inadequately compensated cannot, standing alone, meet that onus.

Lorrie cannot show that the evidence developed after the 1992 judgment could not have been available by the exercise of reasonable diligence prior to obtaining that judgment. Ms. Metcalf testified that she told Lorrie's former lawyer that Lorrie was having problems sleeping and walking before the 1992 judgment. According to Ms. Metcalf, the former counsel was aware that arrangements had already been made to have Lorrie seen at the Brain Injury Clinic in London when the settlement was made in February 1992. Documentation produced by Lorrie's present counsel in response to undertakings given during Ms. Metcalf's cross-examination indicates that the arrangements were actually made shortly after the 1992 judgment. The fact remains, however, that according to Ms. Metcalf, she and Lorrie's former counsel were aware of Lorrie's ongoing problems and Ms. Metcalf's desire to have a further medical assessment done. Ms. Metcalf testified that Lorrie's former counsel did not suggest that the settlement be delayed pendin g further assessment and Ms. Metcalf did not request that the settlement be delayed for that purpose.

The reasons no further assessments were made prior to proceeding with the settlement and judgment are irrelevant in this proceeding. Certainly, there is no suggestion that Ms. Baetz or her insurers were aware that further assessments were needed or even contemplated. Those acting on behalf of Lorrie chose to proceed with the settlement without further medical assessments. It cannot now be said that the evidence eventually generated by further assessments could not have been available by the exercise of reasonable diligence prior to the judgment approving the settlement.

I would allow the appeal, set aside the order of Leitch J., and in its place make an order dismissing the 1994 action. Ms. Baetz is entitled to her costs both here and in the court below.

Appeal allowed.

Notes

Note 1: Under the terms of Rule 59.06(2), the motion should have been brought in the 1992 proceedings, but it would appear that nothing turns on this procedural irregularity.

Note 2: Justice Leitch also directed that the payment pursuant to the 1992 judgment should be treated as an advance payment to Lorrie under the terms of the Insurance Act. She further dismissed a motion brought by Ms. Baetz for summary judgment on the derivative action brought by Lorrie's mother, Carol Metcalf, under the Family Law Act. Given my disposition of the appeal from the order setting aside the 1992 judgment, I need not consider the correctness of either of these orders.

Note 3: In the cross-examination of Ms. Metcalf on her affidavit, counsel for Lorrie indicated that the former solicitor had been put on notice of a possible claim against him based on the 1992 settlement. That lawsuit is being held in abeyance pending the result of this appeal.

Note 4: E.g. see the comments of Dickson J. in Andrews v. Grand & Toy Alberta, [1978] 2 S.C.R. 229 at 236, 83 D.L.R. (3d) 452.

Note 5: Section 116 of the Courts of Justice Act, R.S.O. 1990, c. 43, provides for periodic payment and review of damages on consent of the parties and in one other very limited circumstance.

Note 6: The arguments for and against one time lump sum payments are set out in Waddams, The Law of Damages (looseleaf edition) 3.10-3.260, and in the Report on Compensation for Personal Injuries and Death, Ontario Law Reform Commission (1987), chap. 5. The majority of the Commission did not favour a periodic payment scheme.

Note 7: In Tiwana v. Popove (1988), 23 B.C.L.R. (2d) 392 (S.C.), the court re-opened the trial after it had delivered its reasons for judgment, set aside its reasons and allowed the plaintiff to call further evidence concerning certain medical evidence which had developed after the trial had ended. In that case, however, formal judgment had not been entered when the plaintiff moved to set aside the reasons and call further evidence. A trial judge has a wide discretion to permit the reopening of a case prior to the entering of judgment: Castlerigg Investments Inc. v. Lam (1991), 2 O.R. (3d) 216, 47 C.P.C. (2d) 270 Div.).

Note 8: Leitch J. was concerned with a judgment approving a settlement, however, if she is correct in holding that the best interests of the child are paramount, I see no reason why a judgment following a trial could not also be set aside if subsequent events showed that the child had been under-compensated by the amount awarded at trial.

Note 9: The parens patriae jurisdication over minors extends beyond claims to which minors are a party. It also protects others who are under a legal disability: See Re Eve, [1986] 2 S.C.R. 388 at pp. 407-27, 31 D.L.R. (4th) 1 at 13-28 (S.C.C.); Rule 7. I refere only to minors, and only to the exercise of the parens patriae jurisdiction in the context of proceedings in which a minor is a party because those are the circumstances which operate in this case.

Note 10: Steeves and Fitzsimmons (1975), 11 O.R. (2d) 387, 66 D.L.R. (4th) 230 (H.C.J.) provides an interesting approach to this problem. The settlement approved by the court provided that the minor could apply to vary the judgment at any time before his seventh birthday.

Note 11: Tepperman v. Rosenberg (1985), 48 C.P.C. 317 (Ont. H.C.J.) is more on point than Makowka. In that case an infant plaintiff moved before O'Leary J. to set aside an order of Craig J. approving a settlement. The infant relied on evidence that was not before Craig J. O'Leary considered the fresh evidence so that he could decide whether the settlement was in the infant's best interests. He held that it was and dismissed the motion. As the fresh evidence did not effect the result, O'Leary did not have to decide whether he could have set aside the judgment of Craig J. solely on the basis that the new evidence suggested that the child's best interests were not served. The con-

cluding paragraphs of his reasons (p. 320) suggest he would have set the judgment aside if he thought the fresh evidence supported the conclusion that it was not in the child's best interests. In my view, it would have been wrong to do so without first considering the other relevant factors.

Case Name:

Waldner v. Ponderosa Hutterian Brethren

Between
Jonathon J. Waldner, Mendel J. Waldner, Ida Waldner, Caleb J. Waldner, Deborah C. Waldner, Walter J. Waldner and Ruth Waldner, plaintiffs, and Ponderosa Hutterian Brethren, Sam J. Entz, Andrew E. Wipf, Philip P. Entz, Mark S. Entz, Elias E. Wipf, Joe Doe and Jane Doe, defendants
And between
Ponderosa Hutterian Brethren, Sam J. Entz, Andrew E. Wipf, Philip P. Entz, Mark S. Entz and Elias E. Wipf, plaintiffs by counterclaim (defendants), and
Jonathon J. Waldner, Mendel J. Waldner, Ida Waldner, Caleb J. Waldner, Deborah C. Waldner, Walter J. Waldner and Ruth Waldner, defendants by counterclaim (plaintiffs)

[2003] A.J. No. 7

2003 ABQB 6

[2003] 9 W.W.R. 693

12 Alta. L.R. (4th) 170

119 A.C.W.S. (3d) 360

Action No. 0206 00812

Alberta Court of Queen's Bench
Judicial District of Lethbridge/Macleod

Hembroff J.

Heard: November 6, 2002.
Judgment: January 6, 2003.

(65 paras.)

Administrative law -- Natural justice -- What are requirements of natural justice -- The duty of fairness -- What constitutes procedural fairness -- Procedure, notice -- Effect of lack of notice -- Injunctions -- Interlocutory or interim injunctions -- Balance of convenience -- Requirement of strong prima facie case or appearance of right -- Requirement of irreparable injury -- What constitutes.

Application by Waldner for a declaration that his expulsion from the Brethren was invalid, and for an interim injunction immediately reinstating him. The action involved the expulsion of several members of the Waldner family and others. Waldner said he had devoted his adult lifetime to the Colony and had observed all of its rules. He claimed that his election as farm boss over the opposition of some members was at the root of the expulsion, and that there was a conspiracy to get rid of him. He argued that he was refused due process; that he was expelled without a proper hearing, without having an opportunity to know what the alleged reasons were for his expulsion, and without an opportunity to refute or at least respond to those reasons. The Brethren argued that Waldner knew what the reasons were and that he chose not to respond, and that he had been warned and had failed to accept and comply with the teachings, beliefs and rules of the Colony. There were a number of allegations dealing with Waldner's personal conduct, including erratic church attendance, overconsumption of alcohol, use of Colony vehicles for personal reasons, and pursuing activities for personal gain. Waldner ceased to be a member pursuant to a resolution of Directors terminating his membership. According to the Colony rules, he could only be reinstated if that resolution was not confirmed by the members within 30 days. As a result, Waldner had no rights to Colony food, clothing, transportation, health care and other benefits.

HELD: Application allowed. Waldner's expulsion was declared invalid and an interim injunction was granted requiring Waldner's immediate reinstatement. Waldner did not receive natural justice. His membership was terminated at a Directors' meeting, for which he had no notice. The likelihood of the voting members of the Colony at large overturning the decision of the Directors was remote. There would have been no point of Waldner attending the meeting, and he had no formal indication as to what charges he faced. The question of irreparable harm favoured Waldner. Upon removal, he lost the benefit of the Colony's social welfare system. He lost the right to know what the actual allegations were against him and to have a chance to prepare himself to respond to those allegations. The harm to the Brethren was less significant and could be resolved in the long run. The question of balance of convenience was nearly even. There was clearly a triable issue, and as Waldner,s rights had been infringed, the injunctive relief was necessary to provide a remedy.

Counsel:

T. Jesse Wilde, for the plaintiffs (defendants by counterclaim).
Derek Redman, Q.C., for the defendants (plaintiffs by Counterclaim).

MEMORANDUM OF JUDGMENT

1 **HEMBROFF J.**:-- In July of 2002 the Plaintiffs commenced an action against the corporate and individual Defendants seeking a declaration the Plaintiffs were improperly expelled from the Defendant community, an injunction, interim and permanent, requiring the Defendants to reinstate the Plaintiffs and damages in the amount of $500,000.00. At the same time, the Plaintiffs filed a Notice of Motion seeking interim relief with particular reference to the Plaintiff Jonathon J. Waldner requiring him to be reinstated either permanently or at least pending the trial of the action. The Plaintiff Jonathan J. Waldner is the only person requesting interim relief. The other Plaintiffs have physically left the Defendant Colony. I would expect they will continue to be involved in the major action but they are not involved in this interim application.

2 In this Judgment, when I refer to the "Plaintiff", the "Applicant", or "JJW", I will be referring to the single Plaintiff, Jonathan J. Waldner.

3 The Defendants are a Hutterite Colony known as the Ponderosa Hutterite Colony, and Sam J. Entz, Andrew E. Wipf, Philip P. Entz, Mark S. Entz, Elias E. Wipf, are all Directors of the Corporate Colony, some of whom are also Officers of the Colony, and one of whom, Sam J. Entz is both the President of the Corporate Colony and Spiritual Leader of the Colony. In this Judgment when I refer to "the Defendants", "the Respondents", "the Colony", or "SJE", I am referring collectively to the Defendants.

4 The Defendants denied the various claims of all of the Plaintiffs and as well filed a counterclaim against all of the Plaintiffs seeking injunctive relief requiring all of the Plaintiffs, Defendants by Counterclaim, the seven named individuals, to remove themselves from the Colony. Their request for injunctive relief against all but JJW is of no further concern as all of the other six Defendants by Counterclaim have left the Colony some time ago.

5 While lengthy Affidavits were filed and relied upon at the hearing of this Notice of Motion, and while they will be referred to below, the position of the Plaintiff JJW very simply is he was expelled from the Colony without a proper hearing and without having an opportunity to know what the alleged reasons were for his expulsion and without an opportunity to refute or at least respond to those reasons. He says he was refused due process and on an interim basis should be entitled to remain within and as a member of the Colony. The Defendants say the Plaintiff JJW knew quite clearly what the Defendants' reasons were for his expulsion, that he did have an opportunity to respond, and he did not respond as a matter of his own choice.

6 In any event, say the Defendants, the Plaintiff JJW was not expelled. Rather he left the membership and the body of the Church when, of his own choice and after he was warned, he failed to accept and comply with the teachings, beliefs and rules of the Colony. The Defendants say simply, the Plaintiff JJW took himself out of the membership and can return simply by admitting he was wrong, seeking forgiveness and accepting the punishment that would be meeted out by the Colony in accord with their rules and beliefs.

7 In September of 2002 the corporate and named personal Defendants also brought a cross application by way of Notice of Motion referring to their Statement of Defence and Counterclaim and seeking an interim and permanent injunction requiring the Plaintiff JJW to remove himself from the property owned and controlled by the Defendant Ponderosa Hutterian Brethren.

8 Both applications were heard together.

BACKGROUND

9 From the Affidavits filed, it would appear there is a significant "history" leading up to the alleged expulsion of the Plaintiff by the Defendants. Much of the Affidavit evidence is contradictory and no independent or viva voce evidence was provided nor requested by the Court at the hearing of this matter. While there is much contradiction in the Affidavit material, a good part of that contradiction would not appear to arise from a deliberate attempt to mislead the Court or to be untruthful. What does appear is that the ongoing events referred to by each side are seen from a very different perspective. Any ultimate trial of this action will undoubtedly require complete and lengthy oral testimony encompassing many witnesses to sort out the evidence before significant fact finding can occur.

10 The Ponderosa Colony is a communal congregation, a part of the Hutterian Brethren Church. This Church has existed continuously since the 16th century and the presence of it's members on the streets of Southern Alberta communities is common and welcome. This particular colony was established in late 1974 when the founding group left, in accord with custom, a "mother colony" to start a new colony. The Plaintiff JJW was one of the migrating members as was the Defendant Sam J. Entz. As was the rule and custom, a colony hierarchy was established with the Defendant SJE becoming the Senior Minister, the spiritual and ecclesiastical leader, of the Defendant Colony. That remains the case up to the present.

11 As well as the Ponderosa Hutterian Brethren Church, there is a company duly incorporated called the Hutterian Brethren Church. The Defendant SJE is a Director and President of that company and has held those positions since the Colony was formed. The company is governed by a Memorandum of Association and Articles of Association. Relevant sections of each are reproduced below:

> MEMORANDUM OF ASSOCIATION
>
> The objects of the Company, as set forth in the Amended Memorandum of Association are as follows:
>
> (a) The Christian Religion and its religious teachings, and all matters that are part of or connected with such Religion or its teachings;
>
> (b) all or any of the following: farming, agricultural products, milling, manufacturing of flour and other articles from agricultural products, mechanics and mechanical arts, the buying, selling and dealing in agricultural products, products made and manufactured therefrom, and other articles, materials, machinery, implements and things belong to, or necessary to engage in, carry on and conduct any of the foregoing;
>
> (c) any business, venture, activity or matter that its Directors consider necessary, convenient or desirable to attain any of its other objects.
>
> ARTICLES OF ASSOCIATION
>
> Article 4.01(e) of the Articles of Association provide that each person who becomes a member must execute and deliver to Ponderosa Hutterian Brethren a conveyance and declaration that provides the following:

the committee what is going to be done, that is sufficient, although one might have thought it might have been better done.

82 As is apparent in Young, adequate and timely notice is as important for two reasons. First, it gives the person who may be expelled an opportunity to consider his or her position and either see the error of his or her ways and seek reconciliation, or prepare to defend himself or herself. Second, adequate and timely notice allows the members of the group who are to make the decision an opportunity to ensure that they will be able to attend the meeting and contribute to the discussion, or perhaps to ask for an adjournment if they are unable to attend.

44 He goes on to say at paragraph 161:

161 However, it must be remembered that natural justice required procedural fairness no matter how obvious the decision to be made may be. It does not mater whether it was utterly obvious that Daniel Hofer Jr., David Hofer and Larry Hofer would be expelled. Natural justice requires that they be given notice of a meeting to consider the matter, and opportunity to make representations concerning it. This may not change anything, but it is what the law requires.

45 Having reviewed the Affidavits, having reviewed other cases provided me, having reviewed the arguments of counsel, I am satisfied the Plaintiff JJW did not receive natural justice in the attempted expulsion of him by the Ponderosa Colony. As I read the Articles of Association, the Directors can determine when a person ceases to be a member by passing a motion terminating his membership. When that happens, it is clear the person is immediately terminated subject only to reinstatement as a member if the resolution is not confirmed within 30 days. It would appear to me and I would find JJW was terminated at a Board of Directors' meeting for which he had no notice, never mind notice of the reasons for the action they were going to take. He said, and I accept from his Affidavit evidence and from the evidence of the Defendant S.J. Entz, the likelihood of the voting members of the Colony at large overturning the decision of the Directors was virtually nil. There would have been no point in attending at that meeting and in any event as I review the material before me, he had no formal indication as to what charges he would be dealing with in any event. The attitude of the Defendants is he knew full well what the problems were but that doesn't answer the requirements set down in Lakeside and the other cases with regard to the timeliness, the manner and form of the notice. He was effectively terminated at the Directors' meeting without even having the opportunity to say one word in his own defence.

46 One might here consider the question of bias and certainly it occurs to me that such might be the case keeping in mind the Affidavit evidence before me. As I viewed the allegations of each party I would observe there is a strong suspicion that the minds of the Minister/Chairman of the Board and the Director were made up before any meeting was held.

47 However, as in the Lakeside decision, it is not necessary for me to decide this although the matter will certainly be open when this matter gets to trial, if in fact it does. In the result, and in answer to the question as to whether or not a declaration should be made that the expulsion of the Applicant from the Ponderosa Hutterian Brethren is invalid and of no force and effect my answer is "yes", such a declaration should be made and it is.

48 I would make it clear I am not prejudging the claim of the Plaintiff JJW in this matter and this decision is not intended to do anything more than to declare the manner in which the Colony attempted to remove him was not proper. Neither is this a comment on the nature of the punishment imposed on the Plaintiff by the Colony. That is a matter to be decided in accord with their religion, their corporate rules and their practices and customs.

49 Nor is this in any way a Judgment preventing the Colony, in a proper manner and in accord with it's rules and the rules of natural justice from disciplining the Plaintiff or any other member.

SHOULD AN INTERIM MANDATORY INJUNCTION BE GRANTED?

50 Both parties agree as to the nature of the test to be applied in determining whether an injunction should be granted. The test is found in American Cyanamid Co. v. Ethicon Ltd. [1975] 1 All E.R. 504, a decision of the English House of Lords. The test requires the applicant demonstrate he has raised a serious issue to be tried; secondly the applicant would suffer irreparable harm if no order was granted; and finally the balance of convenience considering the total situation of both parties favours the Order.

51 Our Court of Appeal has adopted this test on more than one occasion. Any trial of this action would include many more significant issues than an examination of the manner of the alleged expulsion. That is all I had before me and that is all I am deciding. The action itself would examine whether there was bias on the part of the Colony, whether the Colony properly applied it's own rules and which of the allegations advanced by each of the parties it would accept. The Court at trial would consider whether the expulsion, not just the procedure, was proper and if it was not what, if any, damages were sustained. The Court would also consider the position of the other six Plaintiffs who have no part of this action before me. None of these matters have been here decided. Clearly, there is a serious case to be tried.

52 On the question of irreparable harm, I'm of the view this part of the test is significantly in favour of the Applicant. If he is removed from the Colony without a proper hearing, he has lost the benefit of what amounts to a complete "cradle to grave" social welfare system. He has lost the right to know what the actual allegations are against him, to have had a chance to prepare himself to respond to those allegations should the Colony choose to exercise the expulsion process and to have had notice when ,where and in what manner these allegations are to be considered by the appropriate authorities.

53 On the other hand there may be some harm to the Ponderosa Colony and the Church simply because the Applicant will be a constant reminder of a significant problem within the Colony. If that is harmful, and it very well might be, I am not convinced the harm will be beyond repair. This is so particularly in light of the firm Christian beliefs in forgiveness and re-inclusion in the society as expressed by the Hutterite Church in their application before me and as I read the materials provided me. Counsel for the Respondents, in their Brief fairly agree and say:

> The Respondents cannot say that the granting of such an injunction would cause the dissolution of the Colony by any certain date, but any injunction would strain the fabric of the community and damage all of the relationship thereof.

That certainly may be so in the short term but as I have indicated above, I am not prepared to accept that this would be a problem beyond resolve in the long run.

54 The notion of balance of convenience presents a different and more difficult consideration. The circumstances of both parties have to be looked at and to some extent the same factual considerations apply in this arm of the test as do in considering irreparable harm. It would appear the balance is nearly even here.

55 The Plaintiff says the inconvenience to the Colony will be minimal and it is far outweighed by the positive effects to the Plaintiff and his wife if he is allowed to remain. The Plaintiff says simply, he has no other economic choice. He says further he has a right because his wife is still a member, to be supported and maintained by the Colony so long as he abides by the rules, regulations and requirements of the Colony and the Church. Whether he has abided by those rules or continued to do so is the real root of this entire argument and will not be resolved by this decision.

56 In response to the claims of the Plaintiff in this regard, the Defendant says as I have, in part quoted above:

> 37 ... The Respondents cannot say that the granting of such an injunction would cause the dissolution of the Colony by any certain date, but any injunction would strain the fabric of the community and damage all of the relationships thereof.
>
> 38 The Respondents submit that the balance of convenience in this matter favours the Colony, rather than the Applicant. It is submitted that the Applicant, being able-bodied, is obliged under any circumstances to earn his own living. It is submitted that the fact he has not even tried to do so in the 5 months since his expulsion, is telling. Should the Court refuse the Applicant's injunction, he will be obliged to make his own way in the world, as all able-bodied citizens are. Should the Court grant his injunction, the Members of the Ponderosa Colony will be obliged to alter their community in a way which is fundamentally opposed to their basic system of belief.

57 As well, the Plaintiff says he is entitled to remain on the Colony, pursuant to their rules, on the coattails of his wife. In response to that the Respondent says:

> The Applicant correctly cites sections under the Constitution of the Hutterian Brethren Church and the Articles of Association of the Ponderosa Hutterian Brethren which provides for those rights, however those rights are afforded only so long as the non-member conforms to the rules and regulations and instructions and requirements of the Colony and Church.

58 During the course of the few weeks after the application and prior to the completion of my Judgment, the Defendant made a further application to the Court for directions concerning an alleged breach of an Order I granted at the end of the application. I would not have had the same amount of difficulty in determining the balance of convenience on the injunction had that problem not arisen. I received and reviewed competing Affidavits and heard a brief application in which the Defendants sought some direction as to alleged breaches of my Order.

59 The fact this occurred suggests to me the problems will not end with this Judgment but will be ongoing and will be difficult for both the Plaintiff and the Defendants. This further application suggests to me the parties are not prepared to maintain a neutral status pending the outcome of this application and more importantly pending the outcome of the Plaintiff's lawsuit.

60 Nevertheless, if after finding the Defendant Colony clearly abused the rules of natural justice in the manner of the expulsion of the Plaintiff, and after finding there is clearly a triable issue, there is an element of irreparable harm to the Plaintiff outweighing any harm to the Defendant, and after finding at best the question of balance of convenience is almost equal, to refuse injunctive relief, I would be finding the Plaintiff has a right but that he has no remedy.

61 Accordingly my Judgment is as follows. Firstly and as I have indicated above, there will be a declaration the expulsion of the Applicant from the Ponderosa Hutterian Brethren was invalid and of no force and effect because of a failure on the part of the Board of Directors of the Defendants to meet the ordinary rules of natural justice in coming to the decision they did.

62 Further, there will be an Interim Injunction granted to the Plaintiff requiring the Defendant to forthwith reinstate the Plaintiff. In granting that injunction a further problem arises. To what extent and with what rights should the Plaintiff be reinstated? It would appear during most of 2001 and the early part of 2002, the Plaintiff was on some form of probation to last for a year. I make no observations as to the rectitude of the March 2001 probationary punishment. It would appear that term expired before the expulsion with what result I have no evidence. Because this Judgment only refers to the time at which the Defendant attempted to expel the Plaintiff, the status of the Plaintiff in the Colony at that time must be considered. Whatever the status of the Plaintiff should have been at the time of the wrongful expulsion will be the status to which he is returned. It is not my intention to interfere with any proper sanctions that may have been imposed on the Plaintiff prior to the wrongful expulsion.

63 The Application of the Defendant for interim relief is dismissed.

64 I recognize this Judgment may not resolve the problems of the parties but may even exacerbate them. However this Judgment is intended to answer the question posed to the Court.

65 With regard to the question of costs, the Plaintiff has been successful and he's entitled to one set of costs on the usual party and party basis to be calculated on Column 2 on the combined applications.

HEMBROFF J.

cp/i/nc/qw/qlmmm

Case Name:

Waldner v. Ponderosa Hutterian Brethren

Between
Jonathan J. Waldner, Mendel J. Waldner, Ida Waldner, Caleb J. Waldner, Deborah C. Waldner, Walter J. Waldner and Ruth Waldner, plaintiffs, and Ponderosa Hutterian Brethren, Sam J. Entz, Andrew E. Wipf, Philip P. Entz, Mark S. Entz, Elias E. Wipf, John Doe and Jane Doe, defendants
And between:
Ponderosa Hutterian Brethren, Sam J. Entz, Andrew E. Wipf, Philip P. Entz, Mark S. Entz, Elias E. Wipf, appellants (plaintiffs by counterclaim/defendants), and
Jonathan J. Waldner, respondent (defendant by counterclaim/plaintiff), and
Mendel J. Waldner, Ida Walder, Caleb J. Waldner, Deborah C. Waldner, Walter J. Waldner and Ruth Waldner, not Parties to this Appeal (defendants by counterclaim/plaintiffs)

[2003] A.J. No. 1503

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[2004] 5 W.W.R. 619

24 Alta. L.R. (4th) 203

Docket No.: 0301-0051-AC

Alberta Court of Appeal
Calgary, Alberta

Costigan, PapernyJ.J.A. and Clark J (ad hoc)

Heard: December 4, 2003.
Oral judgment: December 4, 2003.
Filed: December 8, 2003.

(2 paras.)

Practice -- Appeals.

Appeal from an order.

HELD: The appeal was allowed with regard to the declaratory portion of the order, which was set aside. It was dismissed with regard to the injunctive relief.

Appeal From:

On appeal from the order of Hembroff J., dated November 6, 2002 and filed February 12, 2003.

Counsel:

D.G. Redman, for the appellants.
T.J. Wilde, for the respondent.

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

The judgment of the Court was delivered by

1 COSTIGAN J.A. (orally):-- The Court is of the view, unanimously, that the declaratory portion of the Order under appeal, insofar as it purports to be a final determination of those issues between the parties, is set aside. The issues addressed in the declaratory portion of the Order are at large and remain to be determined by the trial judge ultimately, should this matter proceed to trial.

2 Therefore, the appeal is allowed to the extent that the declaratory portion of the Order is set aside. The appeal is dismissed insofar as its relates to the injunctive relief.

COSTIGAN J.A.

cp/e/nc/qw/qlmmm