Clerk's Stamp:

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

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Introduction: What Justice Thomas Has Already Concluded

1. Thomas J. has already concluded that it is appropriate for the Public Trustee to make inquiries into both the membership application processes and practices of the Sawridge Band (and, by extension, the legal entity referred to herein as 'Sawridge First Nation').[1] The Court also ruled such information is relevant and material to the within proceeding. [2]

2. The form of the Public Trustee's request is indicative only of a desire to comply with the Judgment of the Alberta Court of Queen's Bench and to fulfill its Court ordered mandate to represent and identify the minor beneficiaries and candidate children affected by the Trustees' application.

3. Rule 9.6 provides as follows:

> Every judgment and every order, whether or not it has been entered, *comes into effect* on
> (a) the *date of pronouncement*, or
> (b) if the Court orders the judgment or order to come into effect before or after the date of pronouncement, *the date so ordered* [emphasis added].

4. The Judgment of Thomas J. was filed June 12, 2012. The Public Trustee's Amended Production Application represents a continuing effort to obtain information relating to the Sawridge Band membership criteria and processes.

5. It is counterproductive to re-litigate the *relevance* and *materiality* of information relating to the Sawridge Band membership process held by Sawridge First Nation. The Alberta Court of

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[1] *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2012 ABQB 365 at para 6 [Public Trustee's Authorities, August 21, 2015 Reply Brief, Tab 4].
[2] *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2012 ABQB 365 at para 55 [Public Trustee's Reply Authorities, August 21, 2015, Reply Brief, Tab 4].

Queen's Bench has already rendered its decision and the Respondent, Sawridge First Nation, concedes this point in their August 14, 2015 Brief .[3]

Sawridge First Nation is Subject to the Court's Jurisdiction Herein

6. Although Sawridge First Nation and the Sawridge Trust are distinct entities, Thomas J. noted that there is an overlap between the Sawridge Trustees and the Sawridge Band Chief and Council (who represent Sawridge First Nation). For example, at least four of the five Sawridge Trustees are also beneficiaries of the Trust. These overlaps have now been confirmed by two representatives of the Trustees.[4] As such, there is a *strong association* as between the Sawridge Trust and the Sawridge First Nation.

7. In its Brief, the Sawridge First Nation asserts it is not a party to these proceedings and that, as such, the Public Trustee is *not* entitled to proceed by way of the Amended Application referred to above.

8. This position must be compared to the Sawridge First Nation's ongoing participation in this proceeding, which includes:

i.) Filing written submissions opposing the Public Trustee's 2012 Application;

ii.) Appearing to make oral submissions opposing the Public Trustee's 2012 Application;

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[3] *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2012 ABQB 365 at para 55; Brief of Sawridge First Nation at para 40.

[4] Affidavit of Roman Bombak, dated June 12, 2015, Exhibit 7, pg. 143-145 (Paul Bujold Undertakings, UT #1-4, #6, and #8; Exhibit 16, pg. 189 and 268 (Affidavit of Catherine Twinn, dated December 8. 2014); Overlapping Roles of Sawridge Trustees, Appendix A, Brief of the Public Trustee, dated June 12, 2015.

iii.) Providing the Trustees with information regarding, and/or access to transcripts from, Federal Court Action T-66-86A/ 66-86B.[5]

iv.) Providing the Trustees with access to some or all of the Nation's legal file regarding Elizabeth Poitras' Federal Court Action No. T-2655-89.[6]

v.) Providing the Trustees with information and documentation to respond to the Undertakings of Paul Bujold.[7]

9. Regardless of whether the Sawridge First Nation is a full party or an interested party, this Court has jurisdiction over the Nation, including the ability to formally add the Nation as a full party.[8] The Court also has full jurisdiction to apply Rule 5.13, in its entirety, to any originating application.[9]

10. Even if the Nation were determined to be a true "non-party", Rule 9.19 provides helpful guidance and illustration of the Court's jurisdiction to involve a non-party where that non-party is subject to a Judgment of the Court:

> If a person is *not* a party to an action but (b) the person is *subject to a judgment or order granted in respect of that action*, the *judgment or order may be enforced against the person* in the same manner *as if the person were a party* to the action[10]

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[5] Affidavit of Roman Bombak, dated June 12, 2015, Exhibit 7, pg. 147-148 (Answers to Undertakings of Paul Bujold, UT #19).
[6] Transcript of Elizabeth Poitras Questioning , April 9, 2015, pg. 62 [Public Trustee's Excerpts Volume, filed June 12, 2015, pg. 199].
[7] Affidavit of Roman Bombak, dated June 12, 2015, Exhibit 7, pgs. 144-146 and 150-156 (Answers to Undertakings of Paul Bujold, UT # 4-6, #8, #11, #33-36, #42-46).
[8] *Rules of Court*, Alta Reg 124/2010, at 3.75 [Public Trustee's Reply Authorities, August 21, 2015, Reply Brief, Tab 3].
[9] *Rules of Court*, Alta Reg 124/2010, at 3.10 (1) and 3.14(1)(c) [Public Trustee Brief, filed June 12, 2015, Tab 1, Authorities].
[10] *Rules of Court*, Alta Reg 124/2010, at 9.19 [Public Trustee's Reply Authorities, August 21, 2015, Reply Brief, Tab 1].

11. Rule 3.10 explicitly states the Parts of the Rules that do not apply to actions started by originating application.[11] Part 9 is not excluded. Thus, while the text of Rule 9.19 does not make *explicit* reference to procedure in an application context (the word 'application' is absent from the Rule), a plain reading of Rule 3.10, and the specific circumstances of this proceeding, confirm the Sawridge First Nation is subject to the Judgment of Thomas J. filed June 12, 2012, regardless of the Nation's formal status as Respondent in this application.

12. In other words, this Honourable Court may order the Sawridge First Nation to file an Affidavit of Records or, in the alternative, require Sawridge First Nation to produce all *relevant* and *material* records pursuant to Rules 5.13 and 9.19 and in accordance with Thomas J.'s decision.

13. The Brief of Sawridge First Nation suggests that explicit use of the word 'application' is a condition precedent, necessary for the *Rules of Court* to have import in the present matter.[12]

14. Yet, at paragraph 66 of the Brief of Sawridge First Nation, the Respondent makes reference to Rule 5.33. This Rule does not make explicit reference to the word 'application' – only to 'action'. The Respondent cannot be heard to object to the Public Trustee's use of Rule 9.19 for want of the word 'application' alone.[13]

15. In the alternative, this Honourable Court should order Rules 9.19 and 5.13 apply to the present circumstances.

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[11] Public Trustee's Brief, dated June 12, 2015 [Tab 1, Authorities].
[12] Brief of Sawridge First Nation, filed August 14, 2015, at paras 24 and 25.
[13] Brief of Sawridge First Nation, filed August 14, 2015, at para 66.

The Material Sought is Both Relevant and Material: Application of Rule 5.13

16. Rule 5.13 provides, "...the Court may order a person who is *not a party* to produce a record at a specific date, time and place if (b) there is *reason to believe that the record is relevant and material*..."[emphasis added][14]

17. The Alberta Court of Queen's Bench has *already* determined Sawridge First Nation possesses material that may be both *relevant* and *material* to these proceedings. [15]

18. Determining the objects of the Sawridge Trust is an 'actual issue' in these proceedings.

19. One of three fundamental requirements (or 'certainties') of a valid trust is that the beneficiaries can be ascertained to a certain degree of reliability and precision. Information sought by the Public Trustee is relevant to ascertain the beneficiary class.

20. Thomas J. made specific conclusions about what materials the Public Trustee is entitled to receive – the specific request herein is carefully-measured, balanced, and absolutely necessary – necessary to determine exactly who is in the beneficiary class the Public Trustee is mandated to both represent and protect.

21. The Alberta Court of Queen's Bench has *directed* the Public Trustee to make certain requests of the Sawridge First Nation:

> 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[16]

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[14] *Rules of Court*, Alta Reg 124/2010, at 5.13(2)(b) [Public Trustee's Authorities, August 21, 2015 Reply Brief, Tab 2].
[15] *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2012 ABQB 365 at para 55. [Public Trustee's Authorities, August 21, 2015 Reply Brief, Tab 4].
[16] *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2012 ABQB 365 at para 55 [Public Trustee's Authorities, August 21, 2015 Reply Brief, Tab 4].

22. The Public Trustee seeks to investigate these issues to reassure itself (pursuant to its mandate) and this Honourable Court that the beneficiary class can be and has been adequately defined.[17]

23. The test for certainty of objects for a fixed trust is "class ascertainability". It must be possible to ascertain each and every object, so that a trustee can make a complete list of beneficiaries.[18]

24. A fixed trust is such that the trustees have no discretion to decide who the beneficiaries are or in what proportions they are to take – it is specified in the trust instrument or is ascertainable.[19]

25. Thomas J. noted the Sawridge Trustees' previous acknowledgment that proposed revisions to the term 'Beneficiaries' in the Sawridge Trust "...may *exclude* a significant number of the persons who are currently within that group".[20]

26. As per the 1985 Sawridge Trust, an interest in the Trust is conditioned upon membership in the Band. To speak plainly, in order to deny beneficiaries their due all that need be done is that membership be denied/delayed/or subsequently cancelled. The membership process is literally the legal *foundation* of the beneficiary rights of those to be ascertained and protected by the Public Trustee.

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[17] *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2012 ABQB 365 at para 46 [Public Trustee's Authorities, August 21, 2015 Reply Brief, Tab 4].
[18] A.H. Oosterhoof et al., *Oosterhoof on Trusts: Text, Commentary and Materials*, 8th ed. (Toronto: Thomson Reuters, 2014), p.219 [Public Trustee's Authorities, August 21, 2015 Reply Brief, Tab 8].
[19] A.H. Oosterhoof et al., *Oosterhoof on Trusts: Text, Commentary and Materials,* 8th ed. (Toronto: Thomson Reuters, 2014), p.216-220 [Public Trustee's Authorities, August 21, 2015 Reply Brief, Tab 8].
[20] *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2012 ABQB 365 at para 49 [Public Trustee's Authorities, August 21, 2015 Reply Brief, Tab 8]

27. The beneficiary class cannot be ascertained if identification of Band membership is 'difficult or impossible' – the uncertainty created by such a scheme could disrupt the 'certainty of object' and render the trust invalid.[21]

28. Indeed, the Alberta Court of Queen's Bench noted it would be 'peculiar' for the Court *not* to make some sort of inquiry as to the membership application process (a process the Sawridge Trustees and the Chief and Council acknowledge is underway).[22]

29. The Public Trustee has identified specific documents that are in the control or power of Sawridge First Nation.[23]

30. The Amended Production Application and paragraph 71 of the Public Trustee's June 12, 2015 brief provides a list of specific documents the Public Trustee is aware of, and seeks production of.

31. In addition to the evidence cited in paragraph 71 of the Public Trustee's June 12, 2015 Brief, evidence regarding the documents Sawridge First Nation creates and uses in its membership process can be found in the Affidavits of Roman Bombak.[24]

32. Sawridge First Nation's power and control over these documents cannot be seriously disputed. The evidence confirms that membership application forms are provided by Sawridge First Nation and then submitted to Sawridge First Nation.[25] If a membership application is

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[21] *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2012 ABQB 365 at para 47 [Public Trustee's Authorities, August 21, 2015 Reply Brief, Tab 4].
[22] *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2012 ABQB 365 at para 48 [Public Trustee's Authorities, August 21, 2015 Reply Brief, Tab 4].
[23] Sawridge First Nation Brief, dated August 14, 2015, para. 27-29.
[24] Affidavit of Roman Bombak, dated June 12, 2015, Exhibit 2; Affidavit of Roman Bombak, dated June 26, 2015, particularly Exhibit A.
[25] Affidavit of Elizabeth Poitras, filed December 9, 2011, Questioning of Elizabeth Poitras, filed by Sawridge Trustees; Affidavit of Roman Bombak, dated June 12, 2015, Exhibit 2, pg. 63-64; Affidavit of Roman Bombak, dated June 26, 2015, Exhibit A, para. 35-41; Exhibit C, para. 11-16 and 19-24.

actually processed, Sawridge First Nation sends a letter to the Applicant to advise of the result of their application.[26]

33. The Membership Review Committee at some point conducts a review of applications deemed "complete" and makes a recommendation to Chief and Council. While it is not clear who creates and receives it, there is clear evidence to show that a Membership Processing Form is created to document the considerations for at least some membership decisions.[27]

34. When Membership decisions are appealed, a written notice of appeal *must* be filed with Sawridge First Nation.[28] Appeal notices are created. There may be documents submitted to, or created by, the Appeal Committee. There may be written appeal decisions. There is evidence before the Court that Sawridge First Nation has created all of these documents in relation to at least some membership applications.[29]

35. Sawridge First Nation's possession and control over the documents it produced in Federal Court Action No. T66-86-A, T66-86-B and T-2655-89 is also indisputable. The Nation has already provided sworn evidence in those actions to the effect that the documents listed in its Affidavits of Records are within its power and control. The Trustees are also on record indicating that the Elizabeth Poitras documents they introduced in the within proceeding litigation were <u>not</u> obtained from the Affidavit of Records, but in their "original" form. Examining the nature of the those records (correspondence to or from the lawyers representing

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[26] Affidavit of Roman Bombak, dated June 12, 2015, Exhibit 2, pgs 24-61; Affidavit of Roman Bombak, dated June 26, 2015, Exhibit A [October 31, 2012 Letter from Sawridge First Nation to Gail O'Connell, being Exhibit L within her affidavit.].

[27] Affidavit of Roman Bombak, dated June 26, 2015, Exhibit A (Gail O'Connell Membership Processing Form, being exhibit M within her affidavit); Affidavit of Roman Bombak, dated June 12, 2015, Exhibit 7, Paul Bujold Answers to Undertakings, UT #43.

[28] Affidavit of Roman Bombak, dated June 12, 2015, Exhibit 2, pg. 65-68 [Appeal Procedure].

[29] Affidavit of Roman Bombak, dated June 12, 2015, Exhibit 2, pgs. 65-68; Affidavit of Roman Bombak, dated June 26, 2015, Exhibit A (Affidavit of Gail O'Connell, exhibits O and P within her affidavit).

Sawridge First Nation in T-2655-89), it is clear the documents were obtained from Sawridge First Nation or its legal counsel. No other entity would have had the documents in question in their "original" form.[30]

36. The Public Trustee's application meets all requirements of Rule 5.13.

A Straight-Forward Following of Justice Thomas' Judgment – There's Nothing New

37. Thomas J. found the Court has an obligation to make inquiries as to the procedures and status of Band memberships:

> 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.[31]

38. The Public Trustee seeks to obtain information in respect of the Sawridge First Nation membership processes as it is directly relevant to 'evaluate the proposed amendments to the 1985 Sawridge Trust'. The Public Trustee does *not* wish to *judicially review* those processes.

39. In *1985 Sawridge Trust*, the Alberta Court of Queen's Bench found the "'exclusive jurisdiction' of statutory courts is not as strict as alleged by the Trustees and the Band Chief and Council" (citing *783783 Alberta Ltd. v. Canada (Attorney General)*, 2010 ABCA 226)[32].

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[30] Transcript of Questioning of Elizabeth Poitras, April 9, 2015, pg. 62 [Found in Public Trustee's excerpts of evidence, filed June 12, 2015, pg. 199].

[31] *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2012 ABQB 365 at para 53 [Public Trustee's Authorities, August 21, 2015 Reply Brief, Tab 4].

[32] *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2012 ABQB 365 at para 51 [Public Trustee's Authorities, August 21, 2015 Reply Brief, Tab 4].

40. For Thomas J., this Honourable Court has authority to do the following:

a. examine band membership processes

b. evaluate whether band membership processes are discriminatory, biased, unreasonable, delayed without reason, breach *Charter* principles, or run afoul of the natural justice requirements[33]

41. That being said, Thomas J. concluded that to order judicial review of these processes would be inappropriate (grants a form of relief exclusively within the jurisdiction of the Federal Court).

42. The Court of Queen's Bench *cannot* order the judicial review of Band membership procedure, but *can* order a disclosure for purposes squarely within provincial jurisdiction (property and civil rights).[34]

43. The Nation *concedes* the material sought by the Public Trustee is relevant and material to this matter. Moreover, the Sawridge First Nation provides, at paragraph 40 of its Brief, that the Public Trustee *is* entitled to proceed with examinations related to same.[35]

The Material Sought (if Privileged Elsewhere) is Connected to These Proceedings

44. In *P.L. v. Alberta*, 2012 ABQB 309, Graesser J. (examining the implied undertaking of confidentiality) found that whether the present matter is, "...Connected with the proceedings in which disclosure was made, in the sense that they involve the same or similar parties, the same

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[33] *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2012 ABQB 365 at para 54 [Public Trustee's Authorities, August 21, 2015 Reply Brief, Tab 4].
[34] *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2012 ABQB 365 at para 54 [Public Trustee's Authorities, August 21, 2015 Reply Brief, Tab 4].
[35] Brief of Sawridge First Nation, filed August 14, 2015, at para 40.

or similar issues, and arise out of the same series of events"[36] is *relevant* to determine when an implied undertaking should be lifted.

45. Federal Court Action T-66-86A and T-66-86B included issues related to the Sawridge First Nation's membership process and the constitutionality thereof. Thomas, J. has already found the Charter compliance in the membership process is relevant in this proceeding. The Poitras litigation (Federal Court T-2655-89) clearly dealt extensively with the Sawridge First Nation membership process, as demonstrated by the Questioning of Ms. Poitras.[37]

46. These matters also involve similar parties. While the Sawridge First Nation was the party in those Federal Court actions, the Nation's nexus to the Trustees is impossible to ignore.

47. As stated by Thomas J., there is an 'overlap' between the Sawridge Trustees and the Sawridge Band Chief and Council, including:

- 'four of five' Trustees are also beneficiaries of the 1985 Sawridge Trust. All are current members of the Sawridge First Nation;[38]
- Trustee Bertha L'Hirondelle has acted as Chief and remains a current member of the Membership Review Committee;[39]

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[36] *P.L. v. Alberta*, 2012 ABQB 309 at para 118 [Public Trustee's Authorities, August 21, 2015 Reply Brief, Tab 6].
[37] *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2012 ABQB 365 at para 54 [Public Trustee's Authorities, August 21, 2015 Reply Brief, Tab 4]; Transcript of Questioning of Elizabeth Poitras, filed by the Sawridge Trustees.
[38] *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2012 ABQB 365 at para 11 [Public Trustee's Authorities, August 21, 2015 Reply Brief, Tab 4]; Affidavit of Roman Bombak, dated June 12, 2015, Exhibit 7, pg. 143-145 (Paul Bujold Undertakings, UT #1-4, #6, and #8; Exhibit 16, pg. 189 and 268 (Affidavit of Catherine Twinn, dated December 8. 2014); Overlapping Roles of Sawridge Trustees, Appendix A, Brief of the Public Trustee, dated June 12, 2015.
[39] Affidavit of Roman Bombak, dated June 12, 2015, Exhibit 7, pg. 143-145 (Paul Bujold Undertakings, UT #1-4, #6, and #8; Exhibit 16, pg. 189 and 268 (Affidavit of Catherine Twinn, dated December 8. 2014); Overlapping Roles of Sawridge Trustees, Appendix A, Brief of the Public Trustee, dated June 12, 2015.

- Roland Twinn is current Chief of the Sawridge Band and a member of the Membership Review Committee.[40]

- Trustee Catherine Twinn is a member of the Membership Review Committee. [41]
- Former Trustee Walter Felix Twinn is a former Band Councillor.

48. A strong factual nexus exists as between the individuals who manage Sawridge First Nation (as a political entity) and those who manage (as trustees) the Sawridge Trust.

49. As a matter of logic, Thomas J. found the Public Trustee has an interest in the material sought as the terms of the 1985 Sawridge Trust "…Link membership in the Band to an interest in the Trust property"[42].

50. The Chief and Councillors of Sawridge First Nation (a significant number of whom are Sawridge Trustees and/or Beneficiaries) influence membership in the Band.[43]

51. Membership is a condition precedent to receipt of Trust assets. As such, the Sawridge First Nation's membership application process, and the status of applications (past and current), is *directly* relevant to 'ascertain' the beneficiary class of Sawridge Trust.

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[40] *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2012 ABQB 365 at para 11 [Public Trustee's Authorities, August 21, 2015 Reply Brief, Tab 4]; Affidavit of Roman Bombak, dated June 12, 2015, Exhibit 7, pg. 143-145 (Paul Bujold Undertakings, UT #1-4, #6, and #8; Exhibit 16, pg. 189 and 268 (Affidavit of Catherine Twinn, dated December 8. 2014); Overlapping Roles of Sawridge Trustees, Appendix A, Brief of the Public Trustee, dated June 12, 2015..

[41] Affidavit of Roman Bombak, dated June 12, 2015, Exhibit 7, pg. 143-145 (Paul Bujold Undertakings, UT #1-4, #6, and #8; Exhibit 16, pg. 189 and 268 (Affidavit of Catherine Twinn, dated December 8. 2014); Overlapping Roles of Sawridge Trustees, Appendix A, Brief of the Public Trustee, dated June 12, 2015..

[42] *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2012 ABQB 365 at para 47 [Public Trustee's Authorities, August 21, 2015 Reply Brief, Tab 4].

[43] Note: Thomas J. concluded that a litigation representative was appropriate in this matter because the Sawridge Trustees were, by virtue of their status as beneficiaries of the Trust, in a conflict of interest situation see *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2012 ABQB 365 at paras 36, 40 [Public Trustee's Authorities, August 21, 2015 Reply Brief, Tab 4]..

52. To the extent that the Public Trustee's Amended Production Application involves any documents from other litigation (i.e. T-66-86A, T-66-86B, T-2955-89) where said documents are no longer available to the Sawridge First Nation in their "original form" [44], there are grounds to waive any applicable implied undertaking of confidentiality.

The Material Sought Will Not Create an Undue Burden on the Nation

53. The Nation submits the scope of production sought by the Public Trustee is overly onerous or inappropriate.[45]

54. The Public Trustee has already made a proposal for staged production that would ensure only the documents that were required in this proceeding, and relevant and material to the issues in it, would be produced from Federal Court Action No. T66-86-A, T66-86-B and T-2655-89.[46]

55. The Public Trustee seeks only such records as are necessary to ensure this Court has an objective, and complete, evidentiary record before it and to permit the Public Trustee to identify minor beneficiaries and candidate children.

Unfounded Confidentiality Concerns, Implied Undertaking of Confidentiality and Rule 5.33

56. The Nation takes the position that confidentiality concerns around personal information provide grounds to withhold the membership documents the Public Trustee seeks. It is well

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[44] Transcript of Questioning of Elizabeth Poitras, April 9, 2015, pg. 62 [Found in Public Trustee's excerpts of evidence, filed June 12, 2015, pg. 199].
[45] Brief of Sawridge First Nation, filed August 14, 2015, at para 16, and 22.
[46] Reply Brief of the Public Trustee, filed June 19, 2015, para. 59.

established that confidential material must be produced if it is relevant and material to the issues in the litigation.[47]

57. Caution should be exercised in relying on the RBC case, which is currently the subject of a Leave to Appeal application to the Supreme Court of Canada.[48]

58. The purpose of Rule 5.33 is to ensure that disclosure will not be used for collateral purposes[49]. The Public Trustee is *not* seeking any information from additional parties to litigation in question (T-66-86A, T-66-86B, T-2955-89) – it simply requests materials in accordance with Thomas J.'s judgment that are in the power or control of the Nation.

59. The effect of Rule 5.33 is to ensure that any information that *is obtained* by the Public Trustee would *not* be used for any purpose other than to advance the interests of Sawridge Trust minor beneficiaries and candidate children.

60. The Public Trustee receives its mandate from an enabling statute authorizing it to receive and deal with confidential information on a routine basis. That is the function of the Public Trustee. The Public Trustee understands its obligations under the implied undertaking of confidentiality in the within proceeding and is well positioned to fully satisfy those obligations.

Summary

61. The Public Trustee's Amended Production Application was, originally, directed at obtaining production from both the Trustees and the Nation. Following requests dating back to

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[47] *Husky Oil Operations Ltd.* v. *Anadarko Canada Corp.* [2004] ABCA No. 517, para. 11 [Public Trustee's Authorities, August 21, 2015, Tab 8]
[48] *Royal Bank of Canada* v. *Trang* [2014] ONCA 883 [Tab 17, Sawridge First Nation Book of Authorities, filed August 14, 2015; Leave to Appeal Application, SCC File No. 36296.
[49] *Juman v Doucette*, 2008 SCC 8 at paras 3, 20, 23-28 [Public Trustee's Authorities, August 21, 2015 Reply Brief, Tab 7].

2014, the Trustees have now chosen to *voluntarily* file an Affidavit of Records – welcome progress towards providing this Court and the Public Trustee a complete and objective evidentiary record.

62. The Trustees have not demonstrated an ability to compel the Nation to provide relevant and material documents regarding the Nation's membership process (see for example, Paul Bujold's Answers to Undertakings). Until the Nation produces its membership records, this Court and the Public Trustee cannot assess the Nation's membership process in accordance with the directions in the 2012 Judgment.

63. The Public Trustee has made clear its willingness to stage production to ensure the process is manageable and cost effective. However, there is simply no question that production from the Nation must occur.

64. The Sawridge First Nation may find it an unhappy or unpleasant duty to provide the membership information. The alternative is to require the Trustees to do so. All have access to the membership process information in their other roles.

65. The Trustees currently maintain they do not truly have power or control over the documents they access in their other roles.[50] As such, only the Sawridge First Nation has power and control over the relevant membership information the Public Trustee will require to, *inter alia*, "reassure itself (and the Court) that the beneficiary class can and has been adequately defined"[51]. The duty is a necessary if unhappy/unpleasant one – necessary to permit the Public Trustee to do its job as a party herein, with a statutory mandate to perform herein, as well.

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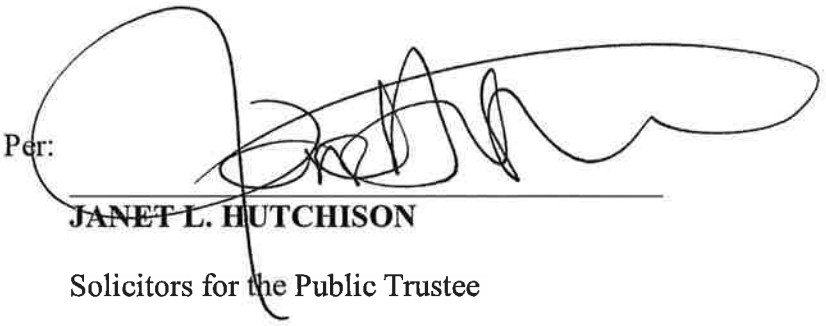
[50] Affidavit of Roman Bombak, dated June 12, 2015, Exhibit 7, pg 154 [Paul Bujold Answers to Undertakings, UT #54].

[51] *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2012 ABQB 365, at para. 46, *per* Thomas J.; and see paras. 48-49, 55: [Public Trustee's Reply Authorities, August 21, 2015, Reply Brief, Tab 4]

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at the City of Edmonton, Province of Alberta, this 21st day of August, 2015.

HUTCHISON LAW

Per: 

JANET L. HUTCHISON

Solicitors for the Public Trustee

LIST OF AUTHORITIES

LEGISLATION AND RULES	
TAB 1	*Rules of Court*, Alta Reg 124/2010, 9.19
TAB 2	*Rules of Court*, Alta Reg 124/2010, 5.13 and 5.33
TAB 3	*Rules of Court*, Alta Reg 124/2010, 3.75
CASE LAW	
TAB 4	*1985 Sawridge Trust v. Alberta (Public Trustee)*, 2012 ABQB 365
TAB 5	*783783 Alberta Ltd. v. Canada (Attorney General)*, 2010 ABCA 226
TAB 6	*P.L. v. Alberta*, 2012 ABQB 309
TAB 7	*Juman v Doucette*, 2008 SCC 8
TAB 8	*Husky Oil Operations Ltd.* v. *Anadarko Canada Corp.* [2004] ABCA No. 517
BOOKS	
TAB 9	A.H. Oosterhoof et al., *Oosterhoof on Trusts: Text, Commentary and Materials,* 8th ed. (Toronto: Thomson Reuters, 2014),

Tab 1

By whom applications are to be decided

9.16 An application under rule 9.12 *[Correcting mistakes or errors]*, 9.13 *[Re-opening a case]*, 9.14 *[Further or other order after judgment or order entered]* or 9.15 *[Setting aside, varying and discharging judgments and orders]* must be decided by the judge or master who granted the original judgment or order unless the Court otherwise orders.

Information note

For judgments against parties noted in default, see Part 3 *[Court Actions]*.

Division 4
Enforcement of Judgments and Orders

Enforcement: orders for payment and judgments for payment into Court

9.17(1) An order for payment may be enforced in any manner in which a judgment for the payment of money may be enforced.

(2) A judgment for the payment of money into Court may be enforced in any manner in which a judgment for the payment of money to a person may be enforced.

Information note

Rule 3.7 *[Post-judgment transfer of action]* permits a judgment creditor to apply to the Court, on notice to each of the other parties, for a temporary transfer of the action to a different judicial centre for purposes of an application to enforce the judgment or order.

Judgments and orders subject to conditions

9.18(1) If a judgment or order is made subject to conditions that a party must fulfil, a party to whom the conditions apply may not do anything further to enforce the judgment or order until

(a) the party has filed an affidavit confirming that the conditions have been met, or

(b) the Court so permits.

(2) An application to do anything further may be filed without notice to any other party unless the Court otherwise orders.

Persons who are not parties

9.19 If a person is not a party to an action but

(a) the person obtains an order or an order is obtained in the person's favour, the person may enforce the order in the same manner as if the person were a party to the action, or

(b) the person is subject to a judgment or order granted in respect of that action, the judgment or order may be enforced against the person in the same manner as if the person were a party to the action.

Time writ remains in force

9.20 Unless an enactment otherwise provides, and except for the purpose of the enactment, a writ remains in force as long as the judgment or order under which the writ was issued is in force.

Application for new judgment or order

9.21(1) On application, the Court may grant a judgment creditor a new judgment or order on a former judgment or any part of it that has not been paid.

(2) The application must require the judgment debtor to show cause why a new judgment or order should not be granted.

(3) Notice of the application must

(a) be filed before the expiry of the limitation period under the *Limitations Act* for an action on the judgment, and

(b) be served on the judgment debtor by the same method by which a commencement document must be served.

(4) An application under this rule is an application in the original action.

(5) If the judgment debtor does not appear at the hearing of the application, the Court may grant the judgment creditor a new judgment or order for the amount due and a costs award if the Court is satisfied that

(a) notice of the application was served on the judgment debtor, and

(b) the amount has not been paid under the original judgment or order.

(6) If the judgment debtor opposes the judgment creditor's application in whole or in part, the Court may

(a) give directions for the trial of an issue, and

(b) make any procedural order the Court considers necessary.

Information note

The method of service for commencement documents (see rule 9.21(3)(b)) is set out in Part 11 *[Service of Documents]* Division 2 *[Service of Commencement Documents in Alberta]*.

Application that judgment or order has been satisfied

9.22(1) On application, the Court may make an order that a judgment or order has been satisfied.

Tab 2

Penalty for not serving affidavit of records

5.12(1) In addition to any other order or sanction that may be imposed, the Court may impose a penalty of 2 times the amount set out in item 3(1) of the tariff in Division 2 of Schedule C *[Tariff of Recoverable Fees]*, or any larger or smaller amount the Court may determine, on a party who, without sufficient cause,

(a) does not serve an affidavit of records in accordance with rule 5.5 *[When an affidavit of records must be served]* or within any modified period agreed on by the parties or set by the Court,

(b) does not comply with rule 5.10 *[Subsequent disclosure of records]*, or

(c) does not comply with an order under rule 5.11 *[Order for a record to be produced]*.

(2) If there is more than one party adverse in interest to the party ordered to pay the penalty, the penalty must be paid to the parties in the proportions determined by the Court.

(3) A penalty imposed under this rule applies irrespective of the final outcome of the action.

Information note

One of the additional sanctions that may be imposed is the striking out of pleadings. See rule 3.68(3) *[Court options to deal with significant deficiencies]*.

Obtaining records from others

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.

Inspection and copying of records

5.14(1) Every party is entitled, with respect to a record that is relevant and material and that is under the control of another party, to all of the following:

(a) to inspect the record on one or more occasions on making a written request to do so;

(b) to receive a copy of the record on making a written request for the copy and paying reasonable copying expenses;

in which case the person relying on the documents filed must provide the material in writing or in any other form permitted by the Court.

Confidentiality and use of information

5.33(1) The information and records described in subrule (2) must be treated as confidential and may only be used by the recipient of the information or record for the purpose of carrying on the action in which the information or record was provided or disclosed unless

(a) the Court otherwise orders,

(b) the parties otherwise agree, or

(c) otherwise required or permitted by law.

(2) For the purposes of subrule (1) the information and records are:

(a) information provided or disclosed by one party to another in an affidavit served under this Division;

(b) information provided or disclosed by one party to another in a record referred to in an affidavit served under this Division;

(c) information recorded in a transcript of questioning made or in answers to written questions given under this Division.

Division 2
Experts and Expert Reports

Service of expert's report

5.34 An expert's report must

(a) be in Form 25 and contain the information required by the form, or any modification agreed on by the parties, and

(b) be served in the sequence required by rule 5.35 *[Sequence of exchange of expert reports]*.

Information note

The court clerk cannot schedule a trial date under rule 8.4 *[Trial date: scheduled by court clerk]* unless expert reports, if needed, have been exchanged. See also rule 8.5 *[Trial date: scheduled by the Court]*, which provides for a trial date to be scheduled by the Court.

Sequence of exchange of experts' reports

5.35(1) If a party intends to use the evidence of an expert at trial, the expert's report must be served in the sequence described in subrule (2).

(2) Unless the parties otherwise agree or the Court otherwise orders, experts' reports on which a party intends to rely must be served in the following sequence:

Tab 3

(c) a party was incorrectly named as a party or was incorrectly omitted from being named as a party.

(2) If subrule (1) applies, a judgment entered in respect of the action is without prejudice to the rights of persons who were not parties to the action.

Subdivision 2
Changes to Parties

Adding, removing or substituting parties after close of pleadings

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

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

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

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

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

Information note

An order under this rule is likely to include terms, conditions and time limits. See rule 1.4(2)(e) *[Procedural orders]*.

Adding, removing or substituting parties to originating application

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

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

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

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

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

Action to be taken when defendant or respondent added

3.76(1) If a defendant or respondent is added to or substituted in an action, the plaintiff, originating applicant, plaintiff-by-counterclaim or third party plaintiff must, unless the Court otherwise orders,

(a) amend the commencement document, as required, to name the new party, and

(b) serve the amended commencement document on each of the other parties.

(2) Unless the Court otherwise orders,

(a) in the case of a new defendant, the new defendant has the same time period to serve a statement of defence as the defendant had under rule 3.31 *[Statement of defence]*, and

(b) the action against the new defendant or new respondent, as the case may be, starts on the date on which the new party is added to or substituted in the action.

Subsequent encumbrancers not parties in foreclosure action

3.77 A plaintiff in a foreclosure action must not make any subsequent encumbrancer a party to the claim unless possession is claimed from the subsequent encumbrancer.

Information note

In foreclosure actions, a notice of address for service may be filed and served under rule 11.24 *[Notice of address for service in foreclosure actions]*.

Tab 4

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 member-

ship 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 in-

dependent 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 entity or person to serve as an independent representative in the event this Court concluded the potentially affected minors required representation.

41 The Sawridge Band cites recent caselaw where costs were denied parties in estate matters. These authorities are not relevant to the present scenario. Those disputes involved alleged entitlement of a person to a disputed estate; the litigant had an interest in the result. That is different from

a court-appointed independent representative. A homologous example to the Public Trustee's representation of the Sawridge Trust potential minor beneficiaries would be a dispute on costs where the Public Trustee had represented a minor in a dispute over a last will and testament. In such a case this Court has authority to direct that the costs of the Public Trustee become a charge to the estate: *Public Trustee Act*, s. 41(b).

42 The Public Trustee is a neutral and independent party which has agreed to represent the interests of minors who would otherwise remain unrepresented in proceedings that may affect their substantial monetary trust entitlements. The Public Trustee's role is necessary due to the potential conflict of interest of other litigants and the failure of the Sawridge Trustees to propose alternative independent representation. In these circumstances, I conclude that the Public Trustee should receive full and advance indemnification for its participation in the proceedings to make revisions to the 1985 Sawridge Trust.

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

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

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

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

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

45 The Band Chief and Council argue that the rules of the Sawridge Band for membership and application for membership and the existence and status of any outstanding applications for such membership are irrelevant to this proceeding. They stress at para. 16 of their written brief that the "Advice and Direction Application" will not ask the Court to identify beneficiaries of the 1985

Sawridge Trust, and state further at para. 17 that "... the Sawridge First Nation is fully capable of determining its membership and identifying members of the Sawridge First Nation." They argue that any question of trust entitlement will be addressed by the Sawridge Trustees, in due course.

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

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

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

49 I agree with the Public Trustee. I note that the Sawridge Band Chief and Council argue that the Band membership issue is irrelevant and immaterial because Band membership will be clarified at the appropriate time, and the proper persons will then become beneficiaries of the 1985 Sawridge Trust. It contrasts the actions of the Sawridge Band and Trustees with the scenario reported in ***Barry v. Garden River 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.

cp/e/qlcct/qllmr/qlgpr/qljac/qlcas/qljac

Tab 5

Case Name:

783783 Alberta Ltd. v. Canada (Attorney General)

Between
783783 Alberta Ltd. carrying on business as Vue Weekly, Appellant (Plaintiff), Cross-Respondent, and The Attorney General of Canada, SEE Magazine, Great West Newspaper Group Ltd., Gazette Press Ltd., Jamison Newspapers Inc., Hollinger Canadian Publishing Holdings Co., Hollinger International Inc. also known as Sun Times Media Group, Inc., Respondents (Defendants), Cross-Appellants, and Hollinger Inc., Conrad M. Black and The Ravelston Corporation Limited, Not Parties to the Appeal, (Defendants)

[2010] A.J. No. 783

2010 ABCA 226

322 D.L.R. (4th) 56

482 A.R. 136

[2010] 6 C.T.C. 194

29 Alta. L.R. (5th) 37

89 C.P.C. (6th) 21

[2010] 12 W.W.R. 472

2010 CarswellAlta 1379

192 A.C.W.S. (3d) 359

Docket: 0903-0164-AC

Registry: Edmonton

Alberta Court of Appeal
Edmonton, Alberta

F.F. Slatter, P.A. Rowbotham and M.B. Bielby JJ.A.

Heard: May 26, 2010.
Judgment: July 14, 2010.

(50 paras.)

Civil litigation -- Civil procedure -- Parties -- Standing -- Disposition without trial -- Dismissal of action -- Lack of jurisdiction -- Appeal by plaintiff from decision that it could not challenge correctness of tax assessment against non-party through imposition of private law duty of care against Crown dismissed -- Cross-appeal by non-party from finding that it lacked standing allowed -- Court of Queen's Bench had jurisdiction over issues raised in statement of claim, as Tax Court of Canada had no jurisdiction to decide tort liability of Crown or non-party -- Non-party had a right to be heard on appeal and it was an error of law to deny standing.

Taxation -- Federal income tax -- Deductions from income -- Corporations -- Administration and enforcement -- Duties and powers of Minister and officials -- Appeal by plaintiff from decision that it could not challenge the correctness of a tax assessment against a non-party through the imposition of a private law duty of care against the Crown -- Appeal dismissed -- The Crown did not owe a duty of care to the appellant, so there was no cause of action -- Tax assessors were not responsible for protecting taxpayers from losses which arose from competitive disadvantages because of decisions made by the assessors -- Even if the necessary foreseeability and proximity could have been established, policy considerations precluded any private law duty in tort.

Tort law -- Torts by the Crown -- Liability of officials and employees -- Negligence -- Appeal by plaintiff from decision that it could not challenge the correctness of a tax assessment against a non-party through the imposition of a private law duty of care against the Crown -- Appeal dismissed -- The Crown did not owe a duty of care to the appellant, so there was no cause of action -- Tax assessors were not responsible for protecting taxpayers from losses which arose from competitive disadvantages because of decisions made by the assessors -- Even if the necessary foreseeability and proximity could have been established, policy considerations precluded any private law duty in tort.

Appeal by 783783 Alberta Ltd ("Vue") from a decision of a chambers judge who allowed in part Vue's appeal from a Master's decision to strike its statement of claim. The claim was struck on the grounds that it did not disclose a cause of action against the Crown, and further that the Tax Court of Canada had exclusive jurisdiction to consider the matter as it dealt with the validity of tax assessments. The Crown had contended that the Court of Queen's Bench did not have jurisdiction as although the claim was couched in negligence, it really challenged a tax assessment. Vue was an independent weekly news and entertainment magazine published in Edmonton that was distributed free of charge and relied upon advertising revenues to meet its production and distribution costs. Vue's main competitor was one of the defendants, See, which was also distributed free of charge in the Edmonton area. It also depended on advertising revenues to cover costs. Section 19 of the Income Tax Act enabled taxpayers to deduct, from income, expenses incurred from advertising in a Canadian issue of a Canadian newspaper. The advertisers in Vue and See were allowed by the Min-

ister of National Revenue to deduct their advertising expenses. Vue claimed it suffered damages because it lost advertising to See which it would not have lost if the Minister had properly exercised his duties, and the Minister was therefore liable for negligence. The chambers judge held that it would have been foreseeable to the Canada Revenue Agency assessors that their conduct might have caused damage to parties like Vue, but that policy reasons precluded finding a private law duty of care. He nevertheless concluded that the action could proceed if Vue got a declaration from the Tax Court of Canada, which the chambers judge concluded was the only court with jurisdiction, that See was not a Canadian newspaper. The chambers judge also denied standing to See on the basis that striking out the claim against Canada would not have affected See because it would have remained in the action. Since See had not applied for or been granted leave to intervene, it had no standing. Vue appealed the finding that the jurisdiction of the Court of Queen's Bench was conditional on the Tax Court of Canada declining jurisdiction. It also appealed the ruling that its claim for damages was conditional on a prior declaration that See was not a Canadian newspaper. The Crown cross-appealed from the decision on those same issues, and argued that no cause of action existed, with or without any declaration as to the status of See. See cross-appealed from the finding that it lacked standing.

HELD: Appeal dismissed; cross-appeals allowed. See's standing was confirmed and the order of the chambers judge was set aside, and the action was struck out as against the defendant Attorney General of Canada for failure to disclose a cause of action. The Crown did not owe a duty of care to Vue, so there was no cause of action. The relationship between the tax assessors and any taxpayer was to ensure that the taxpayer had been fairly assessed. The tax assessors also had a general duty to the government they worked for, and indirectly to the general public. Overall, the relationship was not one where the tax assessors were responsible for protecting taxpayers from losses which arose from competitive disadvantages of the type pleaded. Even if the necessary foreseeability and proximity could have been established, policy considerations precluded any private law duty in tort. As to jurisdiction, the Court of Queen's Bench had jurisdiction over the issues raised in the statement of claim, as the Tax Court of Canada had no jurisdiction to decide the tort liability of the Crown or See. As to standing, there was no authority for the proposition that a party to an action had to apply for intervenor status in order to make submissions. See had a right to be heard on the appeal from the Master, and it was an error of law to deny standing. Even if there was a residual discretion to deny See's standing, it was unreasonable in these circumstances to exercise that discretion.

Statutes, Regulations and Rules Cited:

Alberta Rules of Court, Rule 129, Rule 384(1), Rule 387.1(3)

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), s. 19(1), s. 152(8), s. 173, s. 241(1), s. 241(2), s. 241(3), s. 241(4), s. 241(10)

Appeal From:

Appeal from the Order by The Honourable Madam Justice A.B. Moen Dated the 12th day of March, 2009 Filed on the 25th day of May, 2009 (2009 ABQB 149, Docket: 0503-18023).

Counsel:

J.J. Arvay, Q.C., for the Appellant *Vue Weekly*.

M.E. Burns, for the Respondent Attorney General of Canada.

D.T. Yoshida, for the Respondents *SEE Magazine*, Great West Newspaper Group Ltd., Gazette Press Ltd., and Jamison Newspapers Inc.

No Appearance for the Respondents Hollinger Canadian Publishing Holdings Co., and Hollinger International Inc. also known as Sun Times Media Group Inc.

Memorandum of Judgment

The following judgment was delivered by

1 THE COURT:-- This appeal arises from an application under R. 129 to strike the pleadings for failure to disclose a cause of action. The issue is whether the Government of Canada owes a private law duty of care in tort to the plaintiff taxpayer, arising out of the way that Canada treated the deductibility of advertising expenses claimed by other taxpayers who are not parties to this action.

Facts

2 The plaintiff numbered company publishes a weekly newspaper under the name *Vue Weekly*. This newspaper is distributed free of charge to its readership. The plaintiff generates revenues from the newspaper by selling advertising to third parties.

3 The defendant Great West Newspaper Group Ltd. publishes a similar weekly newspaper under the name *SEE Magazine*. *SEE Magazine* is the main competitor in Edmonton for *Vue Weekly*. The other defendants (other than Canada) are part of the same corporate conglomerate as Great West Newspaper Group Ltd., which at the relevant times was ultimately controlled by the defendant Conrad Black. The defendants other than Canada can be collectively referred to as SEE Magazine.

4 The *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) provides that the expense of advertising in a "Canadian newspaper" is deductible:

> 19(1) In computing income, no deduction shall be made in respect of an otherwise deductible outlay or expense of a taxpayer for advertising space in an issue of a newspaper for an advertisement directed primarily to a market in Canada unless
>
> (a) the issue is a Canadian issue of a Canadian newspaper ...
>
> ...
>
> (5) In this section, ...
>
> "Canadian newspaper" means a newspaper the exclusive right to produce and publish issues of which is held by one or more of the following:

(a) a Canadian citizen [or Canadian controlled business entity].

...

Thus, the third party advertisers who purchase advertising in *Vue Weekly* or *SEE Magazine* can deduct the expense from their income for tax purposes only if *Vue Weekly* or *SEE Magazine* respectively are Canadian newspapers. It is not disputed that s. 19 was added to the *Income Tax Act* as a method of supporting the Canadian publishing industry.

5 The pleadings allege that in 2001 Conrad Black renounced his Canadian citizenship, the ultimate effect being that *SEE Magazine* no longer qualified as a Canadian newspaper. It is further alleged that notwithstanding that change of status, Canada continued to allow advertisers to deduct the expense of advertising in *SEE Magazine*. The plaintiff pleads that this conduct of Canada has deprived it of the competitive advantage accorded to it by the *Income Tax Act*, thereby causing damage to the plaintiff. It has commenced this action seeking a declaration that *SEE Magazine* is not a Canadian newspaper, and seeking damages from all of the defendants.

6 To summarize, the essential allegations, which are presumed to be true on this type of application, are:

a. The plaintiff's publication, *Vue Weekly*, is a free weekly news and entertainment magazine published in Edmonton;
b. The plaintiff's main competitor is one of the defendants' publications, *SEE Magazine*, which is also distributed free of charge in the Edmonton area;
c. The plaintiff and the SEE Magazine defendants rely upon advertising revenues to cover costs, and compete for advertising clients;
d. Section 19 of the *Income Tax Act* enables taxpayers to deduct from income expenses incurred from advertising in a Canadian issue of a Canadian newspaper, but not from advertising in a non-Canadian newspaper;
e. *SEE Magazine* was not a Canadian newspaper at the relevant time;
f. Notwithstanding that the defendant Canada knew or ought to have known that *SEE Magazine* was not a Canadian newspaper, it negligently allowed advertisers to deduct their advertising expenses with *SEE Magazine*. This caused advertisers who would otherwise have advertised with *Vue Weekly* to purchase advertising from *SEE Magazine*;
g. As a result of the diverted advertising revenues, the plaintiff has suffered damage; and
h. The plaintiff advised the Canada Revenue Agency of this situation on several occasions, but it has declined to take any action to prevent unauthorized deduction of non-Canadian advertising expenses.

7 The defendant Canada brought an application to strike the statement of claim as disclosing no cause of action. The SEE Magazine defendants did not bring an application to strike, but did appear in support of Canada's application.

Decision of the Master in Chambers

8 The Master in Chambers granted the application, and dismissed the action: ***783783 Alberta Ltd. v. Canada (Attorney General)***, 2007 ABQB 348, 430 A.R. 361. The Master concluded that the

Tax Court of Canada has the exclusive jurisdiction to determine the validity of tax assessments, that the action was a collateral attack on assessments, and that the Court of Queen's Bench has no jurisdiction over the allegations. In the alternative, the Master concluded that no private law duty of care was owed in the circumstances. Canada's duty in administering the *Income Tax Act* is a duty owed to the general public, not individual taxpayers. There was no legal proximity between the Canada Revenue Agency assessors and individual taxpayers with respect to the tax liability of third parties. Further, he concluded that the privacy provisions of the *Income Tax Act* would prevent the action from proceeding.

Decision of the Chambers Judge

9 The plaintiff appealed the decision of the Master. The chambers judge concluded that the SEE Magazine defendants did not have standing on the appeal.

10 The chambers judge held that it would be foreseeable to the Canada Revenue Agency assessors that their conduct might cause damage to parties like the plaintiff. However, policy reasons precluded finding a private law duty of care.

11 The chambers judge nevertheless concluded that the action could proceed if the plaintiff followed the proper procedures. Firstly, the plaintiff would have to get a declaration from the Tax Court of Canada (which the chambers judge concluded was the only court with jurisdiction) that *SEE Magazine* is not a Canadian newspaper. If the Tax Court of Canada refused to take jurisdiction over that issue, then the Court of Queen's Bench could invoke its intrinsic residual authority to do so. If and when the plaintiff was successful in obtaining a declaration that *SEE Magazine* was not a Canadian newspaper at the relevant time, then the chambers judge concluded that the action for damages could proceed, based on her interpretation of ***Holland v. Saskatchewan***, [2008] 2 S.C.R. 551, 2008 SCC 42. However, there could be no liability for any actions of the Canada Revenue Agency prior to obtaining that declaration, as its liability was conditional upon it refusing to comply with such a judicial decree.

12 The chambers judge accordingly allowed the appeal to the extent of permitting the plaintiff to seek a declaration that *SEE Magazine* was not a Canadian newspaper, if the Tax Court of Canada refused to engage that issue: ***783783 Alberta Ltd. v. Canada (Attorney General)***, 2009 ABQB 149, 8 Alta. L.R. (5th) 220, 466 A.R. 1. The plaintiff appealed the finding that the jurisdiction of the Court of Queen's Bench was conditional on the Tax Court of Canada declining jurisdiction. It also appealed the ruling that its claim for damages was conditional on a prior declaration that *SEE Magazine* was not a Canadian newspaper. Canada cross-appealed the decision on those same issues, arguing that no cause of action existed, with or without any declaration as to the status of *SEE Magazine*. The SEE Magazine defendants cross-appealed the finding that they lacked standing, indicating that they would support the position of Canada on the other issues.

Standard of Review

13 Whether a pleading discloses a cause of action is a question of law that is reviewed for correctness: ***Housen v. Nikolaisen***, [2002] 2 S.C.R. 235, 2002 SCC 33; ***Walton International Group Inc. v. Rocky View (Municipal District No. 44)***, 2007 ABCA 21, 32 M.P.L.R. (4th) 55 at para. 2; ***Mitten v. College of Alberta Psychologists***, 2010 ABCA 159 at para. 9. If the law is correctly stated, the decision to strike the pleadings must be reasonable: ***Heikkila v. Alberta (Appeals Commission for Alberta Workers' Compensation)***, 2007 ABCA 92, 404 A.R. 33 at para. 6.

14 Issues relating to the interpretation of statutes, and to the jurisdiction of the court are also issues of law reviewable for correctness: ***Thomson v. Canada (Deputy Minister of Agriculture)***, [1992] 1 S.C.R. 385, 133 N.R. 345 at para. 77.

Issues

15 There are three preliminary issues. The first is the standing of the SEE Magazine defendants. The second is the respective jurisdiction of the Tax Court of Canada and the Court of Queen's Bench. The third is the argument that the privacy provisions of the *Income Tax Act* (s. 241) prevent this litigation from continuing.

16 The principal issue is whether the facts as pleaded support a private law duty of care in tort. Preliminary to that general issue is the proper interpretation of the decision in ***Holland v. Saskatchewan***.

Standing

17 The SEE Magazine defendants had participated in the proceedings before the Master, supporting the position of Canada. However, when the appeal from the Master was argued before the chambers judge, she denied standing to the SEE Magazine parties. The basis for the ruling was that striking out the claim against Canada would not affect the SEE Magazine defendants, because they would remain in the action. Since the SEE Magazine defendants had not applied for or been granted leave to intervene, they had no standing.

18 The relevant *Rules of Court* read as follows:

> 384(1) An application in an action or proceeding shall be made by motion and, unless the court otherwise orders, notice of the motion shall be given to all parties affected.
>
> 387.1(3) Except as provided under any other Rule or under a statute, the court shall not deprive a party to an action of notice of or evidence in a motion in which that party has or likely will have any legitimate interest.

It would be a rare case where one defendant could justify not giving a co-defendant notice of an application to strike out the claim against it. Removing one of the defendants from the action obviously affects all the other defendants. If nothing else, the number of those potentially liable is reduced when one defendant exits the action. Further, claims against the various defendants usually overlap, meaning that a successful application to strike by one defendant will accrue either to the advantage or disadvantage of the other defendants. Further, there is a strong presumption that a party to an action has the right to make submissions on any application in the action, unless the submissions are vexatious or otherwise abusive: ***Votour v. Tucker***, 2009 ABQB 722 at paras. 22-32.

19 There is no authority for the proposition that a party to an action must apply for intervenor status in order to make submissions. A party need not apply to be an intervenor; it is a party. The SEE Magazine defendants had a right to be heard on the appeal from the Master, and it was an error of law to deny them standing. Even if there was a residual discretion to deny the SEE Magazine defendants standing, it was unreasonable in these circumstances to exercise that discretion. Where a

party alleges that its rights will be affected by a particular motion, it is rarely open to the chambers judge to second-guess the judgment of that party on that subject absent an abuse of process.

Jurisdiction of the Courts

20 The second issue is whether the Court of Queen's Bench has any jurisdiction over the status of *SEE Magazine* as a Canadian newspaper. Alternatively, does the Tax Court of Canada have exclusive jurisdiction, or any jurisdiction, to issue a declaration on that topic?

21 Section 152(8) of the *Income Tax Act* provides:

> 152(8) An assessment shall, subject to being varied or vacated on an objection or appeal under this Part and subject to a reassessment, be deemed to be valid and binding notwithstanding any error, defect or omission in the assessment or in any proceeding under this Act relating thereto.

The defendant Canada argues that this provision (which is reflective of the whole scheme of the *Income Tax Act*) precludes the cause of action being asserted in the Court of Queen's Bench, because the Tax Court of Canada has exclusive jurisdiction with respect to the procedures mentioned in this section.

22 It is clear that the Tax Court of Canada has exclusive jurisdiction over the tax liability of Canadian taxpayers, and the validity of their assessments. In ***Roitman v. Canada***, 2006 FCA 266, 353 N.R. 75 leave to appeal refused [2006] 2 S.C.R. xi, [2006] S.C.C.A. No. 353, the taxpayer compromised and settled a dispute over his tax liability. He then brought an action for damages alleging that he had been wrongly assessed. The Federal Court of Appeal held that a taxpayer could not collaterally attack his own tax liability by seeking damages for a wrongful assessment. It held that the Tax Court of Canada has exclusive jurisdiction over tax liability, to be exercised through the specialized procedures in the *Income Tax Act*. The present action is not, however, analogous to ***Roitman***.

23 Section 152(8) is intended to provide finality in the assessment process. It also prevents any collateral attacks to the correctness of the assessment, once all appeals are exhausted, or the time to appeal has expired. This action, however, does not involve in any way the tax liability or assessments of either the plaintiff or the SEE Magazine defendants. Their tax liability does not depend on s. 19 of the *Income Tax Act.* The only parties whose assessments or tax liability depend on the status of *SEE Magazine* as a Canadian newspaper are the third party advertisers. None of them are parties to this action, and neither the validity of their assessments nor their liability to pay tax is pleaded. Since the third party advertisers are not parties, no decision in this action creates an issue estoppel binding them or Canada in any tax litigation. As such, s. 152(8) does not preclude this claim.

24 The assumption underlying the claim is that some of the advertisers in *SEE Magazine* may have deducted their advertising expenses when they were not entitled to do so. This is said to have caused damage to the appellant, by diverting advertising revenues away from it. But this proceeding will not vary or upset the assessments of those advertisers, whether they are accurate or not. Assuming that all appeal processes have been exhausted, the advertisers will have to pay whatever they were assessed to pay, and no more. Whether this action is successful or unsuccessful the tax liability of the advertisers will not change. Section 152(8) is therefore not engaged or violated. This case is about the damage allegedly caused to the appellant, not directly about the taxes payable by the advertisers.

25 The plaintiff does not particularly care if the Canada Revenue Agency recovers any more tax from the third party advertisers. The limitation period within which the Canada Revenue Agency could challenge many of those assessments has probably passed. But in any event, all the plaintiff seeks is damages for the past allegedly tortious conduct of the Canada Revenue Agency. No collateral attack on the assessments of the third party advertisers is involved.

26 Just because the Tax Court of Canada has exclusive jurisdiction over tax liability and assessments does not mean that no other court can interpret the provisions of the *Income Tax Act,* if that is necessary to decide an issue properly before the court. The provincial superior courts have general jurisdiction to interpret statutes, including federal statutes: ***Longley v. M.N.R.*** (1992), 66 B.C.L.R. (2d) 238 (C.A.) at p. 243; ***Ontario (A.G.) v. Canada (A.G.)***, [1947] A.C. 127 at 151 (J.C.P.C.); ***Canada v. Foundation Co. of Canada***, [1980] 1 S.C.R. 695 at pp. 706-707; ***Northern Pipeline Agency v. Perehinec***, [1983] 2 S.C.R. 513 at pp. 521-522. The provincial superior courts routinely have to inquire into the tax status of parties, or the tax consequences of particular transactions. This can arise in many business or commercial disputes, in matrimonial proceedings, in the calculation of personal injury damages, and otherwise.

27 For example, s. 19 of the *Child Support Guidelines* under the *Divorce Act* allows the court with family law jurisdiction to impute guideline income to the payor spouse in certain circumstances. Those circumstances include "the spouse is exempt from paying federal or provincial income tax", "the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada", or "the spouse derives a significant portion of income from ... sources that are taxed at a lower rate". All of these provisions would require the court to interpret the *Income Tax Act*. They might require the court to comment on the tax status or liability of the spouse; the family law court does not have to refer those questions to the Tax Court of Canada. But no ruling would be binding on the Canada Revenue Agency, nor on the spouse as a taxpayer, and they would not affect the validity of any assessment of the spouse. The jurisdiction of the Tax Court of Canada is not compromised in any way.

28 Viewed from the other perspective, the Tax Court of Canada has no jurisdiction to decide the tort liability of Canada or the SEE Magazine defendants. That is part of the jurisdiction of the Court of Queen's Bench. In engaging that issue, the Court of Queen's Bench is entitled to make any factual and legal decisions that are required to come to its ultimate conclusion on liability.

29 Although none of the parties supported the position, the chambers judge on her own motion concluded that the Tax Court of Canada could assume jurisdiction under s. 173 of the *Income Tax Act*:

> 173(1) Where the Minister and a taxpayer agree in writing that a question of law, fact or mixed law and fact arising under this Act, in respect of any assessment, proposed assessment, determination or proposed determination, should be determined by the Tax Court of Canada, that question shall be determined by that Court.

This section is inapplicable. Firstly, the plaintiff is not a "taxpayer" within the meaning of this section, as its tax liability is not engaged under s. 19. The section does not give the plaintiff and the Minister the ability to put before the Tax Court of Canada the status of *SEE Magazine* or the tax liability of the third party advertisers. Secondly, the section depends on consent, and Canada made it clear no such consent would be forthcoming. Thirdly, this action concerns the liability of Canada in

tort, which is not an issue that arises "under this Act". Section 173 is not intended to extend the jurisdiction of the Tax Court of Canada beyond its core function of determining the income tax liability of particular taxpayers.

30 In summary, the Court of Queen's Bench has jurisdiction over the issues raised in the statement of claim. The Master and the chambers judge erred in concluding that the action should be dismissed or narrowed because of any jurisdictional limitations.

Privacy Provisions of the *Income Tax Act*

31 The Master relied in part on s. 241 of the *Income Tax Act* in dismissing the claim:

> 241(1) Except as authorized by this section, no official shall
>
> (a) knowingly provide, or knowingly allow to be provided, to any person any taxpayer information;
> (b) knowingly allow any person to have access to any taxpayer information; or
> (c) knowingly use any taxpayer information otherwise than in the course of the administration or enforcement of this Act ... or for the purpose for which it was provided under this section.
>
> (2) Notwithstanding any other Act of Parliament or any other law, no official shall be required, in connection with any legal proceedings, to give or produce evidence relating to any taxpayer information.
> (3) Subsections (1) and (2) do not apply in respect of ...
>
> (b) any legal proceedings relating to the administration or enforcement of this Act, ...
>
> (4) An official may ...
>
> (g) use taxpayer information to compile information in a form that does not directly or indirectly reveal the identity of the taxpayer to whom the information relates; ...
>
> (10) In this section, ...
>
> "taxpayer information" means information of any kind and in any form relating to one or more taxpayers that is
>
> (a) obtained by or on behalf of the Minister for the purposes of this Act, or
> (b) prepared from information referred to in paragraph (a),
>
> but does not include information that does not directly or indirectly reveal the identity of the taxpayer to whom it relates.

The Master concluded that, in the face of this provision, especially subsection (2), it would be impossible for the plaintiff to prove its case. The chambers judge concluded that it was not beyond doubt that the case fell within the exception in subsection (3), and also was of the view that the Court of Queen's Bench could protect the privacy of any information disclosed. She accordingly did not find s. 241 to be determinative.

32 Provisions of this type are common in statutes, and are generally in the nature of "anti-gossip" provisions: ***Alberta Mortgage and Housing Corp. v. Edson Manor Properties Ltd.*** (1992), 127 A.R. 138, 8 C.P.C. (3d) 257 (C.A.) at para. 4; ***Jahnke v. Wylie*** (1993), 13 Alta. L.R. (3d) 31, 144 A.R. 188, 107 D.L.R. (4th) 211 at para. 21; ***Alberta (Director of Child Welfare) v. C.H.S.***, 2005 ABQB 695, 55 Alta. L.R. (4th) 168, 385 A.R. 119 at para. 18. They generally do not override the obligation of a litigant to provide information during the course of litigation. Such information is, of course, covered by an implied undertaking that it will not be used for any collateral purpose.

33 In ***Slattery (Trustee of) v. Slattery***, [1993] 3 S.C.R. 430 the trustee in bankruptcy of Raymond Slattery sued his wife alleging that she held assets that belonged to the estate. Revenue Canada was the primary creditor. The trustee called two officials from Revenue Canada to prove its case, and the defendant appealed arguing that this evidence was entered in breach of s. 241. The Supreme Court confirmed the importance of privacy in the *Income Tax Act*, but concluded that this action fell within the exception in s. 241(3)(b) relating to "administration of the Act". In substance the action was one for collecting tax debts owing.

34 ***Slattery*** concerned the "administration of the Act" exception in s. 241(3)(b), not s. 241(2). The latter section appears to be directed at attempts to require the Canada Revenue Agency to provide information in actions to which it is not a party, (which in Alberta is provided for in R. 209). Prior to certain amendments in 1994, preventing non-party production was clearly the purpose of s. 241(2), and it is an open question whether the amendments were intended to change the impact of the section. While many of the policy considerations overlap, it is not clear that s. 241(2) provides the Canada Revenue Agency with immunity from discovering relevant and material information in actions to which it is itself a proper party.

35 However, on its face the section only prevents the disclosure of taxpayer information that would reveal the identity of the taxpayer: ss. 241(4)(g) and (10). In this case the only evidence that the plaintiff would need to prove its damages would be the gross total of advertising expenses relating to *SEE Magazine* that the defendant Canada improperly (allegedly) allowed to be deducted. The defendant Canada could compile that information without disclosing the identities of the individual taxpayers.

36 In any event, the section does not preclude the plaintiff from deriving the evidence it needs from sources other than the defendant Canada. It is reasonably common for a defendant to be in the possession of relevant and material information which need not be disclosed because it is privileged, but that does not prevent the lawsuit from proceeding. The plaintiff can try to prove its case without that evidence. Further, whether a pleading discloses a cause of action is a distinct issue from whether the plaintiff will be successful in marshalling the evidence needed to prove that cause of action. Section 241 is not determinative of this appeal.

Duty of Care

37 In the end, this appeal falls to be decided on whether a private law duty of care is owed by Canada to the plaintiff. The modern analysis is set out in a line of cases commencing with ***Cooper v. Hobart***, [2001] 3 S.C.R. 537, 2001 SCC 79.

38 The chambers judge relied in particular on ***Holland v. Saskatchewan***, a recent case that applied ***Cooper v. Hobart***. ***Holland*** was a class action commenced by a group of game farmers who refused to register in a federal herd certification program, because they objected to a broadly worded indemnification covenant that was required. The game farmers had, on judicial review, successfully established that the indemnification clause was invalid. Despite the declaration of invalidity, the government took no steps to certify the plaintiffs' herds, so they commenced the class action in negligence claiming damages.

39 The Supreme Court agreed that on the proper application of the analysis in ***Cooper v. Hobart***, the primary claim in ***Holland*** did not disclose a cause of action. Even if proximity was established, residual policy considerations militated against recognizing the cause of action. Negligent performance of a statutory duty did not itself establish a cause of action.

40 There was, however, another branch to the ***Holland*** action. The plaintiffs also claimed damages for "the negligent failure to implement a judicial decree". This claim related to the failure of the government to respond in any meaningful way to the judicial declaration that the indemnity covenant was invalid. The Supreme Court held that it was not without doubt that this claim could not succeed, and hence it could not be struck at this stage. The Supreme Court did not rule that such an action lies, just that the issue must be determined after a trial.

41 The chambers judge interpreted ***Holland*** as requiring a judicial decree as a condition precedent to a cause of action in tort:

> [81] Canadian tort law includes as a policy principle that the plaintiff has no right to pursue an action in tort until that plaintiff has exhausted all other administrative and judicial remedies. Stated in a different manner, proximity does not arise between an alleged tortfeasor and injured party until the injured party has exhausted all available non-tort remedies. ...
>
> [83] On that point, I note a recent decision of the Supreme Court of Canada, *Holland*, in which tort damages were claimed but the court found that the plaintiffs had alternative remedies. Therefore they could not sue in tort until those alternative remedies were exhausted and the government then disregarded the decision of the court. ...
>
> [89] As in *Holland*, Vue did not take all steps possible under the *ITA*. Until it does so, under the principles set out in *Holland*, it does not have a case in tort. I find that Vue has not exhausted its remedies and, therefore, similar to the situation in *Holland*, has no cause of action in this court. I conclude that the plaintiff's failure to exhaust all alternative non-tort remedies has negated proximity on policy grounds, that is, the Plaintiff has not established a *prima facie* duty of care between the CRA auditors (ergo the Minister) and a third party to the taxpayer relationship. ...

> [91] Therefore, in determining if there is proximity between the Crown and Vue, I find that Vue must exhaust its other remedies before it can come to this court. With a court decision that determines that SEE is not a Canadian newspaper, and that it is improper for the CRA auditors to permit the SEE Advertisers to deduct advertising expenses in SEE, Vue may have an action against the Crown in tort if the Minister fails to implement those court findings. ...

This analysis involves an over-reading of the ***Holland*** decision.

42 While the Supreme Court permitted the ***Holland*** claim of "negligent implementation of a judicial decree" to go to trial, it never held that a judicial decree was a condition precedent to an action in tort. The failure to implement a judicial decree was discussed because it was one specific claim made in ***Holland***, not because a judicial decree is always required. And un-implemented judicial decree is just one possible basis for tort liability, not a platform on which all tort liability must be built. ***Holland*** also does not incorporate into the law of tort the administrative law concept of exhaustion of remedies. The law of tort is a free-standing, primary basis for civil liability, not merely a residual cause of action which only exists when no other remedy can be identified. Further, ***Holland*** never confirmed that an action for negligent implementation of a judicial decree would succeed, as sometimes implied by the chambers judge, just that the validity of that type of claim could only be determined after a trial.

43 This case calls for the conventional application of the analysis in ***Cooper v. Hobart***. Recognizing a duty of care in tort requires that the plaintiff establish each of the following:

> (i) that the harm complained of is a reasonably foreseeable consequence of the alleged breach;
> (ii) that there is sufficient proximity between the parties that it would not be unjust or unfair to impose a duty of care on the defendants:
>
> > (a) "Proximity" describes the type of relationship in which a duty of care to guard against foreseeable harm may rightly be imposed;
> > (b) In performing the analysis the court looks at categories of relationships that have previously been recognized as creating a duty in tort, and analogies to them; and
>
> (iii) that there exist no policy reasons that would make the imposition of the duty unwise or unfair, so as to negative or otherwise restrict that duty. Since at this stage of the analysis one is generally dealing with a situation outside established categories, policy factors will play an especially important role once they are reached.

Cooper v. Hobart at paras. 21 ff; ***Odhavji Estate v. Woodhouse***, [2003] 3 S.C.R. 263, 2003 SCC 69 at paras. 45-52.

44 It is likely that the Canada Revenue Agency assessors could foresee that if they improperly allowed the deduction of advertising expenses in *SEE Magazine*, revenues could be diverted away from its competitors. It is unlikely however that the necessary proximity exists. There is no prior case establishing liability on the part of tax collectors to one group of taxpayers based on the taxes imposed on another group of taxpayers. As ***Holland*** confirms, negligent performance of statutory

duties is not itself actionable. It is significant that nothing in the *Income Tax Act* suggests that one taxpayer has any remedy with respect to the assessment of another taxpayer: ***Edwards v. Law Society of Upper Canada***, [2001] 3 S.C.R. 562, 2001 SCC 80 at para. 9.

45 The relationship between the tax assessors and any taxpayer is primarily to ensure that the taxpayer is fairly assessed. The tax assessors also have a general duty to the government they work for, and indirectly to the general public. But overall, the relationship is not one where the tax assessors should be responsible for protecting taxpayers from losses arising from competitive disadvantages of the type pleaded. The assessors' duty is directed elsewhere: ***Syl Apps Secure Treatment Centre v. B.D.***, [2007] 3 S.C.R. 83, 2007 SCC 38 at para. 28.

46 However, even if the necessary foreseeability and proximity could be established, policy considerations preclude any private law duty in tort. The Canadian income tax system is based on self-reporting by each taxpayer, followed by an assessment by the Canada Revenue Agency. The relationship between each taxpayer and the assessor is personal and private. The importance of the privacy provisions in the *Income Tax Act* was confirmed in ***Slattery***, and while those privacy provisions do not foreclose this action, they are a relevant policy consideration at this stage of the analysis. Imposing a duty on the assessor to account to one taxpayer for the way it assessed another taxpayer impedes on the relationship in an unacceptable way.

47 The argument assumes that the Canada Revenue Agency has no discretion in the way that it assesses any taxpayer, and that in any tort action like this the plaintiff could demonstrate that a particular assessment is "wrong". This presupposes that there is only one answer to any income tax question. But the *Income Tax Act* is long and notoriously complex. In many instances the self-reported tax liability of the taxpayer will call for an exercise of judgment by the taxpayer, often based on professional advice. Likewise, the response of the tax assessor will often require an exercise of judgment and common sense. Sometimes compromises will be necessary, and disputed tax liability will be settled by the taxpayer and the assessor. It would unreasonably interfere with this system of taxation if a third party could later appear and argue that the assessment was "wrong".

48 There are many provisions in the *Income Tax Act* that could, if not properly applied, provide a competitive advantage to one taxpayer over another. Recognizing a duty of care in tort in such circumstances would expose Canada to liability to an unidentifiable group for an indeterminate amount: ***Design Services Ltd. v. Canada***, [2008] 1 S.C.R. 737, 2008 SCC 22 at para. 62. Significant resources would have to be diverted to dealing with inquiries and complaints about the application of particular rules of taxation, many of which inquiries would have to go unanswered because of the privacy provisions of the *Act*. The plaintiff points out that s. 19 of the *Income Tax Act* is a much more obvious and focussed attempt to provide an incentive to one industry than possibly any other provision in the statute. It also notes that its claim is limited to a few taxation years, and arises out of the unusual change of control of the SEE Magazine defendants. But if any privately-owed duty in tort to assess taxpayers is recognized, it would be difficult, if not impossible, to draw a line between some sections of the statute, and others. If, in principle, a private law duty of care exists, the circumstances in which that duty could be triggered are unlimited.

49 When properly analyzed using the criteria in ***Cooper v. Hobart*** the statement of claim discloses no cause of action and should be struck out.

Conclusion

50 In conclusion, the cross-appeal of the SEE Magazine defendants is allowed, and their standing is confirmed. The appeal is dismissed. Canada's cross-appeal is allowed, the order of the chambers judge is set aside, and the action is struck out as against the defendant Attorney General of Canada for failure to disclose a cause of action.

F.F. SLATTER J.A.
P.A. ROWBOTHAM J.A.
M.B. BIELBY J.A.

Tab 6

Case Name:

P.L. v. Alberta

Between
P.L., Plaintiff, and
Her Majesty the Queen In Right of Alberta, Thomas Svekla, Mona, the Public Trustee of Alberta and John Doe, Defendants

[2012] A.J. No. 604

2012 ABQB 309

529 A.R. 21

64 Alta. L.R. (5th) 322

2012 CarswellAlta 1001

216 A.C.W.S. (3d) 868

Docket: 1003 09557

Registry: Edmonton

Alberta Court of Queen's Bench
Judicial District of Edmonton

R.A. Graesser J.

Heard: March 5 and 9, 2012.
Judgment: May 10, 2012.
Released: May 11, 2012.

(151 paras.)

[Editor's note: Supplementary reasons for judgment were released June 11, 2012. See [2012] A.J. No. 612.]

Civil litigation -- Civil procedure -- Pleadings -- Striking out pleadings or allegations -- Failure to disclose a cause of action or defence -- False, frivolous, vexatious or abuse of process -- Application by plaintiff for leave to use discovery materials from other actions and other relief allowed in

part and application by Province to strike out various portions of plaintiff's pleadings allowed in part -- Plaintiff's allegations which did not establish cause of action, did not relate to plaintiff or were evidence, were struck -- Transcripts of examinations on affidavits were public record and not subject to implied undertaking -- Examination for discovery transcripts could not be used as there was no connection between plaintiff and individual examined and no evidence individual had given contradictory evidence or disclosed fraudulent or criminal conduct.

Civil litigation -- Civil evidence -- Documentary evidence -- Public documents -- Court documents -- Application by plaintiff for leave to use discovery materials from other actions and other relief allowed in part and application by Province to strike out various portions of plaintiff's pleadings allowed in part -- Plaintiff's allegations which did not establish cause of action, did not relate to plaintiff or were evidence, were struck -- Transcripts of examinations on affidavits were public record and not subject to implied undertaking -- Examination for discovery transcripts could not be used as there was no connection between plaintiff and individual examined and no evidence individual had given contradictory evidence or disclosed fraudulent or criminal conduct.

Application by the plaintiff for leave to use discovery materials from other actions involving the Province, to lift the stay of her claim against the Public Trustee, for particulars and a further and better affidavit of records and application by the Province for an order striking out various portions of the statement of claim and reply to the statement of defence. The plaintiff commenced a claim for damages arising out of sexual assaults that occurred while she was in foster care. The plaintiff alleged that in 1995, while she was in foster care under a Temporary Guardianship Order, she was sexually assaulted by the defendant Svekla, her foster mother's boyfriend, over a nine-month period. She also alleged that the Province failed to provide adequate care and service and that the Pubic Trustee failed to file a timely claim for compensation as a victim of crime on her behalf. The plaintiff sought leave to use discovery material from other actions involving the Province including a portion of the transcript from an examination on an affidavit of an employee in the Public Trustee's office from another action and a portion of an examination for discovery transcript of a child welfare manager, a memo from the regional director of social services. The Province sought to strike various portions of the plaintiff's pleadings. It argued that allegations of systemic negligence on the basis that such claims were only relevant to class proceedings, not individual claims, that there was no cause of action arising out of funding decisions, that it could not be held vicarious liable for the negligence or misconduct of a foster parent and that her pleadings with respect to s. 7 of the Charter were lacking.

HELD: Application by the plaintiff allowed in part and application by the Province allowed in part. The parties agreed that the application for particulars and production of a further and better affidavit of records be deferred. The plaintiff's allegations of systemic negligence were relevant to her allegations of negligence. However, paragraphs which demonstrated no connection between the allegation and the plaintiff or which were irrelevant were struck. With respect to the plaintiff's pleadings of misfeasance in public office, allegations of malice and recklessness fit within the characterization of frivolous, irrelevant or improper and, as such, were struck. Allegations which did not establish a cause of action or which did not relate to the plaintiff were also struck. With respect to the plaintiff's claim of breach of fiduciary duty, only those paragraphs tat were unrelated to the plaintiff were struck. With respect the plaintiff's Charter claims, much of the plaintiff's pleadings advanced legal argument, not breaches of legal duties, and further amendments were required. The plaintiff's refer-

ences to International Conventions were not connected to the plaintiff and created no independent cause of action and were therefore struck. Transcripts of examinations on affidavits which had been filed became a matter of public record and therefore were not subject to the implied undertaking. The transcript of the examination for discovery of the child welfare worker could not be used as there was no connection between the plaintiff and that worker and no evidence that the worker had given contradictory evidence in this lawsuit or had disclosed fraudulent or criminal conduct. The plaintiff's request to lift the stay of her action against the Public Trustee was adjourned as it required her to opt-out of a class proceeding, which the court did not have jurisdiction to deal with.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 7

Class Proceedings Act, SA 2003, c. C-16.5, s. 17

Criminal Injuries Compensation Act, R.S.A. 1980, c. C-33,

Rules of Court, Rule 1.2(2)(a), Rule 3.62(1)(b)(ii), Rule 3.65(1), Rule 3.68, Rule 3.68(1)(a), Rule 3.68(2)(c), Rule 4.14(2), Rule 5.6, Rule 5.13, Rule 5.33 Rule 6.8, Rule 13.6, Rule 13.7

Supreme Court Act, R.S.C. 1985, c. S-26, s. 18(1)

Victims of Crime Act, RSA 2000, c. V-3,

Counsel:

Robert P. Lee, for the Plaintiff.

Ward Branch, G. Alan Meikle, Q.C., Peter Barber and Kate Bridgett, Alberta Justice, for the Defendants.

[Editor's note: A corrigendum was released by the Court on June 12, 2012; the corrections have been made to the text and the corrigendum is appended to this document.]

Reasons for Judgment

R.A. GRAESSER J.:--

Background

1 This decision comes out of case management of this action, following a number of applications by P.L. and by the Government defendants.

2 P.L. alleges that she was sexually assaulted by Thomas Svekla while she was in foster care. She claims damages against her foster mother, Mona, and Thomas Svekla who was Mona's boy friend. She also claims damages against the Province arising out of the sexual assaults, on various theories. The Public Trustee is a defendant, on the basis that it failed to protect P.L.'s legal rights by failing to seek compensation for her under the *Victims of Crimes Act*, R.S.A. 2000 c. V-3 or its predecessor statute, the *Criminal Injuries Compensation Act*, R.S.A. 1980 c. C-33.

3 The background of this action is more fully set out in my decision ***PL v. Alberta***, 2011 ABQB 771, wherein I dismissed P.L.'s summary judgment application against the Province.

4 In these applications, P.L. applies for:

1. Particulars of the Province's justification defence relating to the Province's allegation that it was justified in keeping P.L. in the care of the Director of Child Welfare after the deemed expiry of the Temporary Guardianship Order because of the Director's failure to file a service plan;
2. Production of a further and better Affidavit of Records from the Province, responsive to the allegations in P.L.'s Statement of Claim and Reply;
3. Leave to use discovery materials from other actions involving the Province in various applications and for various purposes in this action to avoid application of the implied undertaking of confidentiality rules;
4. Leave to amend her Statement of Claim; and
5. An order lifting the stay of her claim against the Public Trustee for failing to make appropriate claims for compensation on her behalf.

The Province opposes all of P.L.'s applications.

5 The Province applies for an order striking out various portions of the Statement of Claim and P.L.'s Reply to Statement of Defence. P.L. opposes that application.

6 It was agreed that P.L.'s application for particulars and production of a further and better Affidavit of Records should be deferred until issues relating to P.L.'s pleadings have been resolved and until the pleadings have been finalized.

7 The application was heard over two days, and at the beginning of the second day of the application, Mr. Lee advised that he was removing some of the objected-to portions of the Reply, such that a decision need not be made with respect to the Crown's arguments on para. 4(ii) of the Reply. Costs with respect to that portion of the application remain a live issue.

8 An application by P.L. for advance costs is pending, and it is in relation to that application that leave to use materials from other lawsuits is sought.

Introductory Comments

9 This application brings several dynamics into play. Firstly, there is the tension between brevity in pleadings and the need to clearly ensure that all causes of action the plaintiff wishes to advance are fully plead with sufficient clarity so that they are identifiable to the defendant. Secondly, there is the gray area between pleading facts and pleading evidence. Further, there is the gray area between alleging a cause of action and pleading sufficient facts to support it without pleading law. If evidence is plead, the defendant may object to prolix or otherwise improper pleadings. If not enough facts are plead, the defendant may demand particulars. If the cause of action is too baldly plead, or law is plead, the defendant may argue that the plaintiff must plead sufficient facts (not law) to support the cause of action.

10 There is a somewhat fine balance between what is too much to amount to prolixity, and what is too little to leave the plaintiff vulnerable to an application to strike, or arguments at trial that the correct cause of action has not been plead.

11 Over-pleading results in expanded scope for relevance and materiality attracting broader record and oral discovery. That expansion is contrary to the spirit of the new Rules of Court, with the foundational rules exhorting the parties to get to the real issues between them efficiently, quickly and economically.

12 With respect to the application or relaxation of the implied undertaking of confidentiality (Rule 5.33), the dynamics there are between the search for truth and protection of privacy rights. The use of records produced in other litigation, or transcripts of questioning done in other proceedings, are generally for credibility and cross-examination purposes, so that a party cannot give contrary evidence in different proceedings, or in the words of some of the cases approbate and reprobate. Nevertheless, record production and information obtained through questioning in other litigation is evidence produced under compulsion of law and is an intrusion into a party's right to privacy. How far that right goes in the face of the competing interest of the search for truth is a difficult dynamic and is essentially a discretionary call for a chambers judge.

13 A further element is the extent to which counsel involved in multiple proceedings is affected by the implied undertaking. A lawyer may find him or herself acting against the same defendant in more than one proceeding. If the proceedings are completely unrelated, there is probably no issue. There will be no common records and no common information sought on questioning. But the lawyer may have learned of matters related to the party's credibility which could be used to cross-examine the party on. Subject to the basic principle that matters solely relating to credibility may not be questioned on at questioning (discovery), and the collateral fact rule for evidence on credibility issues at trial, what a lawyer learns in one case against a party may be very helpful in how he or she approaches the same party in a different, and perhaps totally unrelated, lawsuit.

14 But there is no general prohibition against a lawyer acting against the same party in multiple lawsuits, even if that may be to the strategic disadvantage of the party. Indeed, a client may specifically choose a lawyer to act because of the lawyer's familiarity with the opposite party and his or her success in litigating against the opposite party.

15 There is a further element at play here. That is the extent to which claims seeking to expand existing causes of action or duties may be allowed to proceed. Rule 3.68 permits a party to seek to strike a pleading or part of a pleading on the basis that it does not plead a valid cause of action. Yet the law is not static, especially in the area of constitutional law, where the Supreme Court has expressly held that the law is "a living tree" and grows with the changes and needs of society. The law may well be developing in a certain area. The fact that the law has not yet reached a certain place may not mean that the law will never get there. But if a new cause of action, or new spin on an existing cause of action, is not allowed to proceed, how will the law ever develop? Some might say that is an area best left to legislators, but we do not, in the common law portions of Canada, have extensive codification of private law and much is left to common law principles, and the development of the common law through cases. A narrow view would be to strike a claim that discloses no existing cause of action. A broader view would be to allow currently unrecognized causes of action which might be found to be valid (such as ones the law may be heading towards recognizing) to proceed. That presumably would give broad latitude to a judge to allow a novel case to proceed. How that is reconcilable with the foundational rules is unclear, and new ground to be litigated itself. Should a defendant be forced to litigate novel issues, at the risk of only recovering party and party costs if it successfully defeats the novel claim?

> [26] Relief from the implied undertaking will only be granted in special circumstances The burden is on the party seeking relief to demonstrate cogent and persuasive reasons. To preserve the integrity of the implied undertaking and the discovery process, the burden is heavy: *LSI Logic*, [2001] A.J. No. 1083, at paragraph 107. Although the court may grant relief on a retroactive basis, it will only do so in rare circumstances: *LSI Logic* at paragraph 108.
>
> [27] In deciding whether or not to grant relief from then implied undertaking, the court must consider (and balance) the public interest and the importance of maintaining the integrity of the pre-trial discovery process. Factors to be considered include: the presence of fraud or criminal wrongdoing, whether or not the information could otherwise have been obtained, whether third parties are involved, whether the new proceedings are connected with the proceedings in which the disclosure was made: *LSI Logic* at para 105.

116 As Rule 5.33 is a codification of the common law as it existed in Alberta at the time the new Rules of Court came into force (November 1, 2010) and the rule has no significant differences from the common law, the prior case law on the implied undertaking is relevant to the new Rule.

117 From the case law, I conclude that on an application to lift the implied undertaking:

1. The party seeking to lift it bears the burden to demonstrate through cogent and persuasive reasons that the relief should be granted;
2. The information sought to be used must be relevant and material to the application or action in which it is sought to be used (in other words this should not be a fishing expedition); and
3. To grant the relief sought, the court must conclude that the public interest in seeing justice done in the particular case outweighs the privacy interest of the litigants involved in the other litigation and the integrity of the discovery process.

118 Considerations in determining whether the implied undertaking should be lifted include the presence of fraud or criminal wrongdoing, whether the information could have been obtained from other sources, whether third parties are involved, and whether the new proceedings are connected with the proceedings in which disclosure was made, in the sense that they involve the same or similar parties, the same or similar issues, and arise out of the same series of events (from ***LSI Logic***, *supra*).

Analysis

119 The first set of information the Plaintiff seeks to use (sealed envelope No. 1) is a portion of a transcript from the examination of RB, an employee in the Public Trustee's office, in an action ***TW*** and ***TW as Next Friend for JW and DW***, [2010] A.J. No. 876, (Action No. 0803-08196). The transcript comes from a cross-examination on an affidavit sworn by RB in relation to an action against the Province and the Public Trustee claiming that the Public Trustee should have sued the Director of Child Welfare for damages because TW had been kept in care after the Director had failed to file a care plan in a timely way.

Tab 7

** Preliminary Version **

Case Name:

Juman v. Doucette

Suzette F. Juman also known as Suzette McKenzie, Appellant;
v.
Jade Kathleen Ledenko Doucette, by her litigation guardian Greg Bertram, Chief Constable of the Vancouver Police Department, Attorney General of Canada and Attorney General of British Columbia, Respondents.

[2008] S.C.J. No. 8

[2008] A.C.S. no 8

2008 SCC 8

2008 CSC 8

[2008] 1 S.C.R. 157

[2008] 1 R.C.S. 157

75 B.C.L.R. (4th) 1

[2008] 4 W.W.R. 1

50 C.P.C. (6th) 207

EYB 2008-130634

J.E. 2008-501

290 D.L.R. (4th) 193

164 A.C.W.S. (3d) 765

2008 CarswellBC 411

372 N.R. 95

File No.: 31590.

Supreme Court of Canada

Heard: November 15, 2007;
Judgment: March 6, 2008.

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

(59 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Civil litigation -- Civil procedure -- Discovery -- Collateral use of discovery information -- Appeal by childcare worker from decision finding that the implied undertaking rule did not extend to bona fide disclosures of criminal activity allowed -- The Attorney General sought the release of discovery transcripts from civil proceedings to the police for the conduct of a criminal investigation -- The law imposed on the parties to the civil litigation an undertaking to the court not to use the documents or answers for any purpose other than securing justice in the civil proceedings in which the answers were compelled, whether or not such information was in its origin confidential or incriminatory in nature.

Civil litigation -- Civil evidence -- Constitutional issues -- Canadian Charter of Rights and Freedoms -- Against self-incrimination -- Appeal by childcare worker from decision finding that the implied undertaking rule did not extend to bona fide disclosures of criminal activity allowed -- The Attorney General sought the release of discovery transcripts from civil proceedings to the police for the conduct of a criminal investigation -- The law imposed on the parties to the civil litigation an undertaking to the court not to use the documents or answers for any purpose other than securing justice in the civil proceedings in which the answers were compelled, whether or not such information was in its origin confidential or incriminatory in nature.

Constitutional law -- Canadian Charter of Rights and Freedoms -- Legal rights -- Procedural rights -- Protection against self-incrimination, right to silence -- Appeal by childcare worker from decision finding that the implied undertaking rule did not extend to bona fide disclosures of criminal activity allowed -- The Attorney General sought the release of discovery transcripts from civil proceedings to the police for the conduct of a criminal investigation -- The law imposed on the parties to the civil litigation an undertaking to the court not to use the documents or answers for any purpose other than securing justice in the civil proceedings in which the answers were compelled, whether or not such information was in its origin confidential or incriminatory in nature.

Appeal by a childcare worker from a decision of the Court of Appeal finding that the implied undertaking rule did not extend to bona fide disclosures of criminal activity. A 16-month-old child suffered a seizure while in the appellant's care. The child's parents commenced a civil action claiming negligence. In the meantime, the Vancouver Police had been conducting a criminal investigation. Relying on the implied undertaking rule, the appellant brought an interlocutory motion to prohibit parties to the civil proceeding from providing the transcripts of discovery to the police. She also sought to prevent the release of information from the transcripts to the authorities and to prohibit them from obtaining and using copies of the transcripts and solicitor's notes without further court order. The Attorney General of British Columbia opposed appellant's motions and brought his own cross-motion for an order, if necessary, varying the legal undertaking to permit release of the transcripts to police. The civil action had since settled, and the discovery was never entered into evidence at a trial nor its contents disclosed in open court. At issue was whether the scope of the implied undertaking rule under which evidence compelled during pre-trial discovery from the appellant could be used by the parties only for the purpose of the litigation in which it was obtained. The chambers judge found that the implied undertaking rule did apply to evidence of crimes. In setting aside the chambers judge's decision, the Court of Appeal held that parties were at liberty to disclose the appellant's discovery evidence to the police to assist in the criminal investigation.

HELD: Appeal allowed. The root of the implied undertaking was the statutory compulsion to participate fully in pre-trial oral and documentary discovery. If the opposing party sought information that was relevant and was not protected by privilege, it had to be disclosed even if it tended to self-incrimination. A proper pre-trial discovery was essential to prevent surprise or litigation by ambush, to encourage settlement once the facts were known, and to narrow issues even where settlement proved unachievable. The public interest in getting at the truth in a civil action outweighed the appellant's privacy interest, but she was nevertheless entitled to a measure of protection. A litigant who had some assurance that the documents and answers would not be used for a purpose collateral or ulterior to the proceedings in which they were demanded would be encouraged to provide a more complete and candid discovery. Therefore, the law imposed on the parties to a civil litigation an undertaking to the court not to use the documents or answers for any purpose other than securing justice in the civil proceedings in which the answers were compelled, whether or not such documents or answers were in their origin confidential or incriminatory in nature. Nevertheless, the implied undertaking rule was not absolute, as it could be subject to legislative override. In the absence of a legislative override, a party bound by the undertaking could apply to the court for leave to use the information or documents otherwise than in the action, or, if there existed a situation of immediate and serious danger, a party would be justified in going directly to the police without a court order. In this case, the Attorney General, supported by the Vancouver Police, demonstrated a sufficient interest in the appellant's transcripts to be given standing to apply. However, it would be wrong for the police to be able to take advantage of statutorily compelled testimony in civil litigation to undermine the appellant's right to silence and the protection against self-incrimination afforded her by the criminal law. The Attorney General's application was rightly dismissed by the chambers judge.

Statutes, Regulations and Rules Cited:

Canada Evidence Act, R.S.C.1985, c. C-5, s. 5, s. 5(1), s. 5(2)

Canadian Charter of Rights and Freedoms, 1982, s. 7, s. 11(c), s. 13

Child, Family and Community Service Act, R.S.B.C. 1996, c. 46, s. 14

Criminal Code, R.S.C. 1985, c. C-46, s. 196, s. 487

Evidence Act, R.S.B.C. 1996, c. 124, s. 4

Fed. R. Civ, P. 26(c)

P.E.I., Rules of Civil Procedure, Rule 30.1

Queen's Bench Rules, M.R. 553/88, Rule 30.1

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 30.1

Rules of Court, B.C. Reg. 221/90, Rule 2(5), Rule 27(22), Rule 44, Rule 56(1), Rule 56(4), Rule 60(41), Rule 60(42), Rule 64(1)

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

Civil procedure -- Discovery -- Implied undertaking of confidentiality -- Collateral use of discovery information -- Discovery information thought to disclose criminal acts -- Underlying civil claim settled after discovery -- Authorities seeking to obtain information disclosed during pre-trial discovery -- Whether Attorney General has standing to seek to vary implied undertaking to which he is not party -- If so, whether application should be rejected in circumstances of this case.

Civil procedure -- Discovery -- Implied undertaking of confidentiality -- Scope of "implied undertaking" rule.

Court Summary:

The appellant, a childcare worker, provided day services in her home. A 16-month-old child suffered a seizure while in her care. The child was later determined to have suffered a brain injury. A civil action claiming negligence was commenced. The Vancouver Police started a criminal investigation, which is still ongoing. The appellant moved, prior to discovery, to prevent the authorities from accessing her discovery without further court order. She relied on the parties' implied undertaking to the court not to use documents or answers on discovery for any purpose other than securing justice in the civil proceedings in which the answers were compelled, whether or not such documents or answers were in their origin confidential or incriminatory in nature. The Attorney General of British Columbia brought a cross-motion to vary the undertaking to permit the authorities to gain access to the discovery transcripts. At discovery, the appellant claimed the protection of the Canadian and British Columbia *Evidence Acts* and the *Canadian Charter of Rights and Freedoms*. The transcripts are now in the possession of the parties and/or their counsel. After discovery, the underlying claim settled. The appellant's discovery was never entered into evidence at a trial. Its contents were not disclosed in open court.

The chambers judge found that the implied undertaking extended to evidence of crimes and concluded that it was not open to the police to seize the transcript under a search warrant. The Court of

Appeal set aside the decision of the chambers judge. In its view, the implied undertaking rule "does not extend to *bona fide* disclosure of criminal conduct". Accordingly, the parties were at liberty to disclose the appellant's discovery evidence to the police. The authorities could also obtain it by any lawful investigative means, including a search warrant or a subpoena *duces tecum*.

Held: The appeal should be allowed.

A party is not in general free to disclose discovery evidence of what they view as criminal conduct to the police or other strangers to the litigation without a court order. The root of the implied undertaking is the statutory compulsion on a party such as the appellant to participate fully in pre-trial oral and documentary discovery. If the opposing party seeks information that is relevant and is not protected by privilege, it must be disclosed even if it tends to self-incrimination. While the public interest in getting at the truth in a civil action outweighs the examinee's privacy interest, the latter is entitled to a measure of protection, and the law thus requires that the invasion of privacy should generally be limited to the level of disclosure necessary to do justice in the civil litigation in which the disclosure is made. The rules of discovery were not intended to constitute litigants as private attorneys general. [para. 3] [para. 20] [para. 25] [para. 44]

Here, because of the facts, much of the appellant's argument focussed on her right to protection against self-incrimination, but the implied undertaking rule is broader than that. It includes the wrongdoing of persons other than the examinee and covers innocuous information that is neither confidential nor discloses any wrongdoing at all. [para. 5]

Contrary to the submission of the Attorney General, the implied undertaking rule does not conflict with the "open court" principle. Pre-trial discovery does not take place in open court. Nor does the question of judicial accountability arise in pre-trial discoveries. The situations are simply not analogous. [paras. 21-22]

The court has the discretionary power to grant exemptions from or variations to the undertaking, but unless an examinee is satisfied that such exemptions or variations will only be granted in exceptional circumstances, the undertaking will not achieve its intended purpose. Accordingly, unless a statutory exemption overrides the implied undertaking, the onus will be on the person applying for the exemption or variation to demonstrate on a balance of probabilities the existence of a public interest of greater weight than the values the implied undertaking is designed to protect, namely privacy, protection against self-incrimination, and the efficient conduct of civil litigation. The factors that may be taken into account include public safety concerns or contradictory testimony by the examinee about the same matters in different proceedings. In situations of immediate and serious danger, the applicant may be justified in going directly to the police without a court order. However, the availability of an exemption relating to discovery disclosing criminal offences not amounting to serious and immediate danger should be left with the courts. The public interest in the prosecution of crime will not necessarily trump a citizen's privacy interest in statutorily compelled information. [para. 14] [paras. 32-33] [paras. 38-41] [para. 44] [para. 48]

It is important that applications for variation proceed expeditiously. Persons entitled to notice of these applications will be for the chambers judge to decide on the facts, but normally, only parties to the litigation will be entitled to notice of such an application, not the police nor the media. [para. 31] [para. 52]

The action here has been settled, but the policies reflected in the implied undertaking remain undiminished. If the parents of the victim or other party wished to disclose the appellant's transcript to

the police, they could have made an application to the court for permission to make disclosure, but none of them did so, and none of them is party to the current proceeding. [para. 5] [para. 22]

In this case, the Attorney General of British Columbia has standing to seek to vary an implied undertaking to which he is not a party, but the application should be rejected on the facts. His objective was to obtain evidence that would help assist the police investigation, and possibly to incriminate the appellant. It would be quite wrong for the police to be able to take advantage of statutorily compelled testimony in civil litigation to undermine the appellant's right to silence and the protection against self-incrimination afforded her by the criminal law. [para. 53] [para. 58]

On the other hand, the Court of Appeal correctly held that the implied undertaking is no bar to persons not party to it, and the appellant's discovery transcript and documents are not privileged or exempt from seizure. The authorities have available to them the usual remedies of subpoena *duces tecum* or a search warrant under the *Criminal Code*. However, if at this stage they do not have the grounds to obtain a search warrant, it is not open to them to build their case on the appellant's compelled testimony. [para. 5] [paras. 55-56]

The search warrant, where available, only gives the police access to the discovery material. It does not authorize its use in any proceedings that may be initiated. If criminal charges are brought, the prosecution may also compel a witness to produce a copy of the documents or transcripts in question from his or her possession by a subpoena *duces tecum*. The trial judge would then determine what, if any use could be made of the material, having regard to the appellant's *Charter* rights and any other relevant considerations. None of these issues arise for decision on the present appeal. [paras. 56-57]

Cases Cited

Referred to: *Hunt v. T & N plc* (1995), 4 B.C.L.R. (3d) 110; *Ross v. Henriques*, [2007] B.C.J. No. 2023 (QL), 2007 BCSC 1381; *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, [2001] 2 S.C.R. 743, 2001 SCC 51; *Stickney v. Trusz* (1973), 2 O.R. (2d) 469, aff'd (1974), 3 O.R. (2d) 538 (Div. Ct.), aff'd (1974), 3 O.R. (2d) 538 (C.A.), leave to appeal ref'd [1974] S.C.R. xii; *Tricontinental Investments Co. v. Guarantee Co. of North America* (1982), 39 O.R. (2d) 614; *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97; *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Slavutych v. Baker*, [1976] 1 S.C.R. 254; *Kyuquot Logging Ltd. v. British Columbia Forest Products Ltd.* (1986), 5 B.C.L.R. (2d) 1; *Home Office v. Harman*, [1983] 1 A.C. 280; *Shaw Estate v. Oldroyd*, [2007] B.C.J. No. 1310 (QL), 2007 BCSC 866; *Rayman Investments and Management Inc. v. Canada Mortgage and Housing Corp.*, [2007] B.C.J. No. 628 (QL), 2007 BCSC 384; *Wilson v. McCoy* (2006), 59 B.C.L.R. (4th) 1, 2006 BCSC 1011; *Laxton Holdings Ltd. v. Madill*, [1987] 3 W.W.R. 570; *Blake v. Hudson's Bay Co.*, [1988] 1 W.W.R. 176; *755568 Ontario Ltd. v. Linchris Homes Ltd.* (1990), 1 O.R. (3d) 649; *Rocca Enterprises Ltd. v. University Press of New Brunswick Ltd.* (1989), 103 N.B.R. (2d) 224; *Eli Lilly and Co. v. Interpharm Inc.* (1993), 161 N.R. 137; *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108 (1986); *Goodman v. Rossi* (1995), 125 D.L.R. (4th) 613; *Crest Homes plc v. Marks*, [1987] 2 All E.R. 1074; *Smith v. Jones*, [1999] 1 S.C.R. 455; *Lac Minerals Ltd. v. New Cinch Uranium Ltd.* (1985), 50 O.R. (2d) 260; *Miller (Ed) Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 90 A.R. 323; *Harris v. Sweet*, [2005] B.C.J. No. 1520 (QL), 2005 BCSC 998; *Scuzzy Creek Hydro & Power Inc. v. Tercon Contractors Ltd.* (1998), 27 C.P.C. (4th) 252; *Lubrizol Corp. v. Imperial Oil Ltd.* (1990), 33 C.P.R. (3d)

49; *Livent Inc. v. Drabinsky* (2001), 53 O.R. (3d) 126; *R. v. Henry*, [2005] 3 S.C.R. 609, 2005 SCC 76; *R. v. Nedelcu* (2007), 41 C.P.C. (6th) 357; *Rank Film Distributors Ltd. v. Video Information Centre*, [1982] A.C. 380; *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *R. v. Campbell*, [1999] 1 S.C.R. 565; *Attorney-General for Gibraltar v. May*, [1999] 1 W.L.R. 998; *Bank of Crete S.A. v. Koskotas (No. 2)*, [1992] 1 W.L.R. 919; *Sybron Corp. v. Barclays Bank Plc.*, [1985] 1 Ch. 299; *Bailey v. Australian Broadcasting Corp.*, [1995] 1 Qd. R. 476; *Commonwealth v. Temwood Holdings Pty Ltd.* (2001), 25 W.A.R. 31, [2001] WASC 282; *Perrin v. Beninger*, [2004] O.J. No. 2353 (QL); *Tyler v. M.N.R.*, [1991] 2 F.C. 68; *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451; *R. v. Serendip Physiotherapy Clinic* (2004), 189 C.C.C. (3d) 417.

Statutes and Regulations Cited

Canada Evidence Act, R.S.C.1985, c. C-5, s. 5.

Canadian Charter of Rights and Freedoms, ss. 7, 11(*c*), 13.

Child, Family and Community Service Act, R.S.B.C. 1996, c. 46, s. 14.

Criminal Code, R.S.C. 1985, c. C-46, ss. 196, 487.

Evidence Act, R.S.B.C. 1996, c. 124, s. 4.

Fed. R. Civ. P. 26(c).

P.E.I., *Rules of Civil Procedure*, r. 30.1.

Queen's Bench Rules, M.R. 553/88, r. 30.1.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 30.1.

Rules of Court, B.C. Reg. 221/90, rr. 2(5), 27, 44, 56(1), (4), 60(41), (42), 64(1).

Authors Cited

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Papile, Cristiano. "The Implied Undertaking Revisited" (2006), 32 *Adv. Q.* 190.

Stevenson, William A., and Jean E. Côté. *Civil Procedure Encyclopedia*, vol. 2. Edmonton: Juriliber, 2003.

History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Low and Kirkpatrick JJ.A.) (2006), 269 D.L.R. (4th) 654, 9 W.W.R. 687, 227 B.C.A.C. 140, 374 W.A.C. 140, 55 B.C.L.R. (4th) 66, 31 C.P.C. (6th) 149, [2006] B.C.J. No. 1176 (QL), 2006 BCCA 262, setting aside a decision of Shaw J., [2005] 11 W.W.R. 539, 45 B.C.L.R. (4th) 108, 15 C.P.C. (6th) 211, 129 C.R.R. (2d) 109, [2005] B.C.J. No. 589 (QL), 2005 BCSC 400. Appeal allowed.

Counsel:

Brian T. Ross and *Karen L. Weslowski*, for the appellant.

No one appeared for the respondent Jade Kathleen Ledenko Doucette, by her litigation guardian Greg Bertram.

Karen F. W. Liang, for the respondent the Chief Constable of the Vancouver Police Department.

Michael H. Morris, for the respondent the Attorney General of Canada.

J. Edward Gouge, *Q.C.*, and *Natalie Hepburn Barnes*, for the respondent the Attorney General of British Columbia.

The judgment of the Court was delivered by

1 **BINNIE J.**:-- The principal issue raised on this appeal is the scope of the "implied undertaking rule" under which evidence compelled during pre-trial discovery from a party to civil litigation can be used by the parties only for the purpose of the litigation in which it was obtained. The issue arises in the context of alleged child abuse, a matter of great importance and concern in our society. The Attorney General of British Columbia rejects the existence of an implied undertaking rule in British Columbia (factum, at para. 4). Alternatively, if there is such a rule, he says it does not extend to *bona fide* disclosures of criminal activity. In his view the parties may, without court order, share with the police any discovery documents or oral testimony that tend to show criminal misconduct.

2 In the further alternative, the Attorney General argues that the existence of an implied undertaking would not in any way inhibit the ability of the authorities, who are not parties to it, to obtain a subpoena *duces tecum* or to seize documents or a discovery transcript pursuant to a search warrant issued under s. 487 of the *Criminal Code*, R.S.C. 1985, c. C-46.

3 The British Columbia Court of Appeal held that the implied undertaking rule "does not extend to *bona fide* disclosure of criminal conduct" ((2006), 55 B.C.L.R. (4th) 66, 2006 BCCA 262, at para. 56). This ruling is stated too broadly, in my opinion. The rationale of the implied undertaking rule rests on the statutory compulsion that requires a party to make documentary and oral discovery regardless of privacy concerns and whether or not it tends to self-incriminate. The more serious the criminality, the greater would be the reluctance of a party to make disclosure fully and candidly, and the greater is the need for broad protection to facilitate his or her cooperation in civil litigation. It is true, as the chambers judge acknowledged, that there is an "immediate and serious danger" exception to the usual requirement for a court order prior to disclosure ((2005), 45 B.C.L.R. (4th) 108, 2005 BCSC 400, at paras. 28-29), but the exception is much narrower than is suggested by the *dictum* of the Court of Appeal, and it does not cover the facts of this case. In my view a party is not in general free to go without a court order to the police or any non-party with what it may view as "criminal conduct", which is a label that covers many shades of suspicion or rumour or belief about many different offences from the mundane to the most serious. The qualification added by the Court of Appeal, namely that the whistle blower must act *bona fides*, does not alleviate the difficulty. Many a tip to the police is tinged with self-interest. At what point does the hope of private advantage rob the communication of its *bona fides*? The lines need to be clear because, as the Court of Appeal itself noted, "non-*bona fide* disclosure of alleged criminal conduct would attract serious civil sanctions for contempt" (para. 56).

4 Thus the rule is that both documentary and oral information obtained on discovery, including information thought by one of the parties to disclose some sort of criminal conduct, *is* subject to the implied undertaking. It is not to be used *by the other parties* except for the purpose of that litigation, unless and until the scope of the undertaking is varied by a court order or other judicial order or a situation of immediate and serious danger emerges.

5 Here, because of the facts, much of the appellant's argument focussed on her right to protection against self-incrimination, but the implied undertaking rule is broader than that. It includes the wrongdoing of persons other than the examinee and covers innocuous information that is neither confidential nor discloses any wrongdoing at all. Here, if the parents of the victim or other party wished to disclose the appellant's transcript to the police, he or she or they could have made an application to the B.C. Supreme Court for permission to make disclosure, but none of them did so, and none of them is party to the current proceeding. The applicants are the Vancouver Police Department and the Attorney General of British Columbia supported by the Attorney General of Canada. None of these authorities is party to the undertaking. They have available to them the usual remedies of subpoena *duces tecum* or a search warrant under the *Criminal Code*. If at this stage they do not have the grounds to obtain a search warrant, it is not open to them to build their case on the compelled testimony of the appellant. Further, even if the authorities were thereby to obtain access to this compelled material, it would still be up to the court at the proceedings (if any) where it is sought to be introduced to determine its admissibility.

6 I agree with the chambers judge that the balance of interests relevant to whether disclosure should be made by a party of alleged criminality is better evaluated by a court than by one of the litigants who will generally be self-interested. Discoveries (both oral and documentary) are likely to run more smoothly if none of the disputants are in a position to go without a court order to the police, or regulators or other authorities with their suspicions of wrongdoing, or to use the material obtained for any other purpose collateral or ulterior to the action in which the discovery is obtained. Of course the implied undertaking does not bind the Attorney General and the police (who are not parties to it) from seeking a search warrant in the ordinary way to obtain the discovery transcripts if they have the grounds to do so. Apparently, no such application has been made. At this stage the matter has proceeded only to the point of determining whether or not the implied undertaking permits "the *bona fide* disclosure of criminal conduct" without court order (B.C.C.A., at para. 56). In my view it does not do so in the circumstances disclosed here. I would allow the appeal.

I. Facts

7 The appellant, a childcare worker, provided day services in her home. A 16-month-old child, Jade Doucette, suffered a seizure while in the appellant's care. The child was later determined to have suffered a brain injury. She and her parents sued the owners and operators of the day-care centre for damages, alleging that Jade's injury resulted from its negligence and that of the appellant.

8 The appellant's defence alleges, in part, that Jade suffered a number of serious mishaps, including a bicycle accident while riding as a passenger with her father, none of which involved the appellant, and none of which were disclosed to the appellant when the child was delivered into her care (Statement of Defence, at para. 3).

9 The Vancouver Police have for several years been conducting an investigation, which is still ongoing. In May 2004, the Vancouver police arrested the appellant. She was questioned in the absence of her counsel (A.R., at p. 179). She was later released. In August 2004, the appellant and her

husband received notices that their private communications had been intercepted by the police pursuant to s. 196 of the *Criminal Code*. To date, no criminal charges have been laid. In furtherance of that investigation, the authorities seek access to the appellant's discovery transcript.

10 In November 2004, the appellant brought an interlocutory motion to prohibit the parties to the civil proceeding from providing the transcripts of discovery (which had not yet been held) to the police. She also sought to prevent the release of information from the transcripts to the police or the Attorney General of British Columbia and a third motion to prohibit the Attorney General of British Columbia, the police and the RCMP from obtaining and using copies of the transcripts and solicitor's notes without further court order. She relied upon the implied undertaking rule.

11 The Attorney General of British Columbia opposed the appellant's motions and brought his own cross-motion for an order (if necessary) varying the legal undertaking to permit release of the transcripts to police. He also brought a second motion for an order permitting the police to apply for the transcripts by way of search warrant, subpoena or other investigative means in the usual way.

12 The appellant was examined for discovery for four days between June 2005 and September 2006. She claimed the protection of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, the British Columbia *Evidence Act*, R.S.B.C. 1996, c. 124, and (though an explicit claim was not necessary) of the *Canadian Charter of Rights and Freedoms*, and says that she answered all the appropriate questions put to her. The transcripts are now in the possession of the parties and/or their counsel.

13 In 2006, the underlying claim was settled. The appellant's discovery was never entered into evidence at a trial nor its contents disclosed in open court.

II. Judicial History

A. *Supreme Court of British Columbia (Shaw J.)* (2005), 45 B.C.L.R. (4th) 108, 2005 BCSC 400

14 The chambers judge observed that an examination for discovery is statutorily compelled testimony by rule 27 of the B.C. *Rules of Court*, B.C. Reg. 221/90. As a general rule, there exists in British Columbia an implied undertaking in civil actions that the parties and their lawyers will use discovery evidence strictly for the purposes of the court case. Discovery exists because getting at the truth in the pursuit of justice is an important social goal, but so (he held) is limiting the invasion of the examinee's privacy. Evidence taken on oral discovery comes within the scope of the undertaking. He noted that the court has the discretionary power to grant exemptions from or variations to the undertaking, and that in the exercise of that discretion courts must balance the need for disclosure against the right to privacy.

15 The chambers judge rejected the contention that the implied undertaking does not apply to evidence of crimes. Considerations of practicality supported keeping evidence of crimes within the scope of the undertaking because such evidence could vary from mere suspicion to blatant admissions and from minor to the most serious offences. It was better to leave the discretionary power of relief to the courts.

16 As to the various arguments asserted by the appellant under ss. 7, 11(*c*) and 13 of the *Charter*, the chambers judge concluded that "[t]he state is forbidden to use its investigatory powers to violate the confidentiality requirement of solicitor-client privilege; so too, in my view, should the state be forbidden to violate the confidentiality protected by discovery privilege" (para. 62). In his view, it was not open to the police to seize the transcript under a search warrant.

B. *Court of Appeal for British Columbia (Newbury, Low and Kirkpatrick JJ.A.)* (2006), 55 B.C.L.R. (4th) 66, 2006 BCCA 262

17 The Court of Appeal allowed the appeal. In its view, the parties were at liberty to disclose the appellant's discovery evidence to the police to assist in the criminal investigation. Further, the authorities could obtain the discovery evidence by lawful investigative means such as subpoenas and search warrants.

18 Kirkpatrick J.A., speaking for a unanimous court, noted the English law on the implied undertaking of confidentiality had been applied in British Columbia only in recent years. See *Hunt v. T & N plc* (1995), 4 B.C.L.R. (3d) 110. In that case, however, the British Columbia Court of Appeal had held that "[t]he obligation the law imposes is one of confidentiality from improper publication. It does not supersede all other legal, social or moral duties" (para. 65; quoted at para. 32). Thus, in Kirkpatrick J.A.'s opinion, "the undertaking in the action cannot form a shield from the detection and prosecution of crimes in which the public has an overriding interest" (para. 48).

19 Kirkpatrick J.A. then turned to the *Charter* issues in the case. She noted that no charges had been laid against the appellant and therefore that ss. 11(*c*) (which applies to persons "charged with an offence") and 13 (which provides use immunity) were not engaged. The appellant was not in any imminent danger of deprivation of her right to liberty or security, and therefore any s. 7 claim was premature. Kirkpatrick J.A. declared that an implied undertaking, being just a rule of civil procedure, should not be given "constitutional status". Discovery material is not immune to search or seizure. The appeal was therefore allowed.

III. Analysis

20 The root of the implied undertaking is the statutory compulsion to participate fully in pre-trial oral and documentary discovery. If the opposing party seeks information that is relevant and is not protected by privilege, it must be disclosed even if it tends to self-incrimination. See B.C. *Rules of Court*, rules 27(2), 44, 60(41), 60(42) and 64(1); *Ross v. Henriques*, [2007] B.C.J. No. 2023 (QL), 2007 BCSC 1381, at paras. 180-81. In Quebec, see *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, [2001] 2 S.C.R. 743, 2001 SCC 51, at para. 42. In Ontario, see *Stickney v. Trusz* (1973), 2 O.R. (2d) 469 (H.C.J), aff'd (1974), 3 O.R. (2d) 538 (Div. Ct.), at p. 539, aff'd (1974), 3 O.R. (2d) 538 (p. 539) (C.A.), leave to appeal ref'd, [1974] S.C.R. xii. The rule in common law jurisdictions was affirmed post-*Charter* in *Tricontinental Investments Co. v. Guarantee Co. of North America* (1982), 39 O.R. (2d) 614 (H.C.J.), and has been applied to public inquiries, *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97.

21 The Attorney General of British Columbia submits that *Lac d'Amiante*, which was based on the Quebec *Code of Civil Procedure*, R.S.Q., c. C-25, "was wrongly decided" (factum, at para. 16). An implied undertaking not to disclose pre-trial documentary and oral discovery for purposes other than the litigation in which it was obtained is, he argues, contrary to the "open court" principle stated in *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, and *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (factum, at para. 6). The Vancouver Police support this position (factum, at para. 48). The argument is based on a misconception. Pre-trial discovery does not take place in open court. The vast majority of civil cases never go to trial. Documents are inspected or exchanged by counsel at a place of their own choosing. In general, oral discovery is not conducted in front of a judge. The only point at which the "open court" principle is engaged is

when, if at all, the case goes to trial and the discovered party's documents or answers from the discovery transcripts are introduced as part of the case at trial.

22 In *Attorney General of Nova Scotia v. MacIntyre*, relied on by the Vancouver Police as well as by the Attorney General of British Columbia, the contents of the affidavit in support of the search warrant application were made public, but not until after the search warrant had been executed, and "the purposes of the policy of secrecy are largely, if not entirely, accomplished" (p. 188). At that point the need for public access and public scrutiny prevail. Here the action has been settled but the policies reflected in the implied undertaking (privacy and the efficient conduct of civil litigation generally) remain undiminished. Nor is *Edmonton Journal* helpful to the respondents. In that case the court struck down a "sweeping" Alberta prohibition against publication of matrimonial proceedings, including publication of the "comments of counsel and the presiding judge". In the face of such prohibition, the court asked, "how then is the community to know if judges conduct themselves properly" (p. 1341). No such questions of state accountability arise in pre-trial discoveries. The situations are simply not analogous.

A. *The Rationale for the Implied Undertaking*

23 Quite apart from the cases of exceptional prejudice, as in disputes about trade secrets or intellectual property, which have traditionally given rise to express confidentiality orders, there are good reasons to support the existence of an implied (or, in reality, a court-imposed) undertaking.

24 In the first place, pre-trial discovery is an invasion of a private right to be left alone with your thoughts and papers, however embarrassing, defamatory or scandalous. At least one side in every lawsuit is a reluctant participant. Yet a proper pre-trial discovery is essential to prevent surprise or "litigation by ambush", to encourage settlement once the facts are known, and to narrow issues even where settlement proves unachievable. Thus, rule 27(22) of the B.C. *Rules of Court* compels a litigant to answer all relevant questions posed on an examination for discovery. Failure to do so can result in punishment by way of imprisonment or fine pursuant to rules 56(1), 56(4) and 2(5). In some provinces, the rules of practice provide that individuals who are not even parties can be ordered to submit to examination for discovery on issues relevant to a dispute in which they may have no direct interest. It is not uncommon for plaintiff's counsel aggressively to "sue everyone in sight" not with any realistic hope of recovery but to "get discovery". Thus, for the out-of-pocket cost of issuing a statement of claim or other process, the gate is swung open to investigate the private information and perhaps highly confidential documents of the examinee in pursuit of allegations that might in the end be found to be without any merit at all.

25 The public interest in getting at the truth in a civil action outweighs the examinee's privacy interest, but the latter is nevertheless entitled to a measure of protection. The answers and documents are compelled by statute solely for the purpose of the civil action and the law thus requires that the invasion of privacy should generally be limited to the level of disclosure necessary to satisfy that purpose and that purpose alone. Although the present case involves the issue of self-incrimination of the appellant, that element is not a necessary requirement for protection. Indeed, the disclosed information need not even satisfy the legal requirements of confidentiality set out in *Slavutych v. Baker*, [1976] 1 S.C.R. 254. The general idea, metaphorically speaking, is that whatever is disclosed in the discovery room stays in the discovery room unless eventually revealed in the courtroom or disclosed by judicial order.

26 There is a second rationale supporting the existence of an implied undertaking. A litigant who has some assurance that the documents and answers will not be used for a purpose collateral or ulterior to the proceedings in which they are demanded will be encouraged to provide a more complete and candid discovery. This is of particular interest in an era where documentary production is of a magnitude ("litigation by avalanche") as often to preclude careful pre-screening by the individuals or corporations making production. See *Kyuquot Logging Ltd. v. British Columbia Forest Products Ltd.* (1986), 5 B.C.L.R. (2d) 1 (C.A.), *per* Esson J.A. dissenting, at pp. 10-11.

27 For good reason, therefore, the law imposes on the parties to civil litigation an undertaking *to the court* not to use the documents or answers for any purpose other than securing justice in the civil proceedings in which the answers were compelled (whether or not such documents or answers were in their origin confidential or incriminatory in nature). See *Home Office v. Harman*, [1983] 1 A.C. 280 (H.L.); *Lac d'Amiante*; *Hunt v. T & N plc*; *Shaw Estate v. Oldroyd*, [2007] B.C.J. No. 1310 (QL), 2007 BCSC 866, at para. 21; *Rayman Investments and Management Inc. v. Canada Mortgage and Housing Corp.*, [2007] B.C.J. No. 628 (QL), 2007 BCSC 384, *Wilson v. McCoy* (2006), 59 B.C.L.R. (4th) 1, 2006 BCSC 1011; *Laxton Holdings Ltd. v. Madill*, [1987] 3 W.W.R. 570 (Sask. C.A.); *Blake v. Hudson's Bay Co.*, [1988] 1 W.W.R. 176 (Man. Q.B.); *755568 Ontario Ltd. v. Linchris Homes Ltd.* (1990), 1 O.R. (3d) 649 (Gen. Div.); *Rocca Enterprises Ltd. v. University Press of New Brunswick Ltd.* (1989), 103 N.B.R. (2d) 224 (Q.B.); *Eli Lilly and Co. v. Interpharm Inc.* (1993), 161 N.R. 137 (F.C.A.). A number of other decisions are helpfully referenced in W. A. Stevenson and J. E. Côté, *Civil Procedure Encyclopedia* (2003), Vol. 2, at pp. 42-36 *et seq.*; and C. Papile, "The Implied Undertaking Revisited" (2006), 32 *Adv. Q.* 190, at pp. 194-96.

28 The need to protect the privacy of the pre-trial discovery is recognized even in common law jurisdictions where there is no implied undertaking. See J. B. Laskin, "The Implied Undertaking" (a paper presented to the CBA-Ontario, CLE Conference on *Privilege and Confidential Information in Litigation - Current Developments and Future Trends*, October 19, 1991), at pp. 36-40. Rule 26(c) of the United States *Federal Rules of Civil Procedure* provides that a court may, upon a showing of "good cause", grant a protective order to maintain the confidentiality of information disclosed during discovery. The practical effect is that the courts routinely make confidentiality orders limited to pre-trial disclosure to protect a party or person being discovered "from annoyance, embarrassment, oppression, or undue burden or expense". See, e.g., *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108 (3d Cir. 1986).

B. *Remedies for Breach of the Implied Undertaking*

29 Breach of the undertaking may be remedied by a variety of means including a stay or dismissal of the proceeding, or striking a defence, or, in the absence of a less drastic remedy, contempt proceedings for breach of the undertaking owed to the court. See *Lac d'Amiante*, at para. 64, and *Goodman v. Rossi* (1995), 125 D.L.R. (4th) 613 (Ont. C.A.), at p. 624.

C. *Exceptional Circumstances May Trump the Implied Undertaking*

30 The undertaking is imposed in recognition of the examinee's privacy interest, and the public interest in the efficient conduct of civil litigation, but those values are not, of course, absolute. They may, in turn, be trumped by a more compelling public interest. Thus, where the party being discovered does not consent, a party bound by the undertaking may apply to the court for leave to use the information or documents otherwise than in the action, as described in *Lac d'Amiante*, at para. 77:

Tab 8

Case Name:

Husky Oil Operations Ltd. v. Anadarko Canada Corp.

Between
Husky Oil Operations Limited, appellant (applicant),
and
Anadarko Canada Corporation, respondent (respondent)
(0301-19886)
And between
Anadarko Canada Corporation, respondent (plaintiff),
and
Gibson Petroleum Company Limited, respondent
(defendant) (0101-04546)

[2004] A.J. No. 517

2004 ABCA 154

31 Alta. L.R. (4th) 229

354 A.R. 16

140 A.C.W.S. (3d) 950

Docket No.: 0401-0032-AC

Alberta Court of Appeal
Calgary, Alberta

McFadyen and Paperny JJ.A. and Romaine J. (ad hoc)

Heard: April 19, 2004.
Judgment: filed May 6, 2004.

(14 paras.)

Civil Procedure -- Discovery -- Production and inspection of documents -- Privileged documents.

Appeal by plaintiff corporation of an order made by the chambers judge to produce documents. The plaintiff objected to producing the documents which were the subject of a confidentiality agreement with the defendant corporation.

HELD: Appeal allowed in part. The direction of the chambers judge was set aside. The matter was remitted to the Court of Queen's Bench for decision on the question of case by case privilege with respect to each of the documents. The function was best performed by the trial court.

Appeal From:

On appeal from the whole of the Order of Hart J., dated January 22, 2004, and filed January 23, 2004. Q.B. Docket No's. 0301-19886 and 0101-04546

Counsel:

Bryan C. Duguid and A. Turta, for the appellant (applicant), Husky Oil Operations Limited
Daniel J. McDonald, Q.C. and M. J. Donaldson, for the respondent (plaintiff), Anadarko Canada Corporation.
Frank R. Foran, Q.C., for the respondent (defendant), Gibson Petroleum Company Limited.

MEMORANDUM OF JUDGMENT

1 THE COURT:-- Husky Oil Ltd. ("Husky") appeals the order requiring Anadarko Canada Corporation ("Anadarko") to produce relevant records in the action which Anadarko commenced against Gibson Petroleum Company Limited ("Gibson"). The documents in question belong to Husky and are the subject of a confidentiality agreement between Husky and Anadarko.

FACTS

2 Husky and Gibson are competitors in the business of transporting crude oil for producers such as Anadarko. Anadarko entered into pipeline agreements with Husky in 1996 and 2000. Pursuant to these agreements, Husky provided Anadarko with confidential tariff and pricing information. Both pipeline agreements contain confidentiality clauses that prohibit the parties from divulging the terms of the agreement without the express written consent of the other party.

3 In 1997 and 1999, Anadarko and Gibson entered into agreements for the transportation, terminalling and blending of Anadarko's heavy oil at Gibson's Hardisty Terminal. Differences arose between Anadarko and Gibson. Anadarko commenced an action against Gibson alleging, among other things, that Gibson overcharged Anadarko for condensate, supplied butane but charged Anadarko for condensate and added too much condensate to Anadarko's heavy oil.

4 Anadarko claims that Gibson represented it would receive better net backs than Anadarko was receiving at that time pursuant to the Husky agreements. Anadarko intends to rely on the Husky agreements to support its claims against Gibson. As a result, information provided by Husky pursuant to the Husky agreements may be relevant and material to the Anadarko/Gibson action. The Husky/Anadarko agreements contain a confidentiality clause prohibiting disclosure of information except on consent of the parties or as required by law. Husky has refused to consent to disclosure of its confidential information.

5 Anadarko applied for an order permitting it to produce the confidential information subject to a confidentiality order that would protect Husky's interests. Husky brought a cross-application for a declaration and an injunction enjoining disclosure of the information by Anadarko. Subsequently, Husky consented to disclosure of some of the confidential information but continues to object to the production of documents containing tariff information and pricing information. Husky argues that it will be irreparably harmed if Gibson, its competitor, gained access to confidential information regarding its tariffs and pricing information, as this would allow Gibson to adjust its bids to undercut the prices being charged by Husky.

DECISION BELOW

6 The Chambers Justice noted that the principle of sanctity of contract and the notion of a fair trial were brought into direct conflict by the circumstances. After considering relevant Alberta case authorities, he concluded that the information was not privileged, that the confidential information must be produced, subject to a confidentiality order which he then made. He approved a form of order restricting disclosure to Gibson's counsel, expert witnesses and other Gibson employees who are directly connected with the case and who have a need to see the documents for the purpose of the litigation.

GROUNDS OF APPEAL

7 The appellant appeals on the following grounds:

(i) the Chambers Judge erred in law in allowing Anadarko to breach its obligations to keep Husky's information strictly confidential. The appellant says that the Chambers Judge erred in finding that the documents were not privileged.

(ii) the Chambers Judge erred in failing to impose a sufficiently restrictive confidentiality order, and that the order as drafted fails to provide any protection for Husky's protected commercial interests.

STANDARD OF REVIEW

8 The granting of an application for production or discovery of documents is a discretionary decision: see, for example, Grain Claims Bureau Ltd. v. Canada Surety Co., [1927] 4 D.L.R. 297

(Man. K.B.); Agala v. Agala, [1998] B.C.J. No. 2827. The granting of a confidentiality order is, similarly, an exercise of judicial discretion: Sierra Club v. Canada (Minister of Finance), [2002] 2 S.C.R. 522.

9 The standard of review for decisions involving judicial discretion is high. The Supreme Court of Canada has addressed the appropriate standard of review in a number of decisions. In Elsom v. Elsom, [1989] 1 S.C.R. 1367, the Court held that appellate interference with decisions involving the exercise of a trial judge's discretion may only be justified where the decision is "so clearly wrong as to amount to an injustice". This standard was echoed in R. v. Regan, [2002] 1 S.C.R. 297 at para. 117 wherein it was held that "an appellate court will be justified in intervening in a trial judge's exercise of his discretion only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice". It was also acknowledged in Regan, however, that an appellate court may be entitled to interfere where the "trial judge has made some palpable and overriding error which affected his assessment of the facts" (para. 118). See also R.B. v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315.

10 It is clear that this Court is not entitled to interfere with the exercise of judicial discretion by the Chambers Judge if it merely comes to a different conclusion. Rather, an error in principle, misapprehension of facts or the exercise of discretion in a non-judicial manner must be demonstrated.

ANALYSIS

11 The Chambers Judge correctly decided that the documents were not subject to a class privilege. However, the record does not reveal whether the question of case by case privilege based on confidentiality obligations was properly addressed. In dealing with the issue of privilege, the Chambers Judge stated at p. 127: "It is also well established in Alberta jurisprudence that confidential material or information, if relevant and material to the issues in the lawsuit, must be produced notwithstanding confidentiality." The Chambers Judge relied on the decisions of the Alberta Court of Appeal in M.R. Morris Architect Ltd. v. C.L. Bain Interior Design Ltd., [1991] A.J. No. 239 (Alta C.A.); Acapulco Holdings Ltd. v. Jegen (1997), 193 A.R. 287, (C.A.) and the Queen's Bench decision in Aetna Insurance Co. v. Mason and Co. (1998), 236 A.R. 49 (Q.B.). It is not clear whether the question of the existence of privilege on a case by case basis was raised in these cases. The relevant authorities were not referred to in the reasons for judgment.

12 The appellant relies on the Supreme Court of Canada decision in Slavutych v. Baker, [1976] 1 S.C.R. 254 and the Alberta Supreme Court Appellate Division in Strass v. Goldsack, Dux and Gosset and Canadian Indemnity Company (Third Party), [1975] 6 W.W.R. 155 . Slavutych is, of course, based on unusual facts. The University, which sought comments from its staff on a confidential basis, later sought to use the comments provided as grounds for dismissal of Slavutych. However, Spence J., giving the judgment of the Court, approved the use of the four Wigmore criteria in determining whether qualified privilege exists:

(1) The communications must originate in a confidence that they will not be disclosed.
(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

Spence J. concluded that the University which had obtained the information on the condition of strictest confidence could not later use the confidential information to justify dismissal. The appellant also relies on R. v. Gruenke, [1991] 3 S.C.R. 263 where the Supreme Court of Canada applied the Wigmore criteria. Lamer C.J., giving the majority judgment, approved the use of the Wigmore criteria as the basis for the determination of the existence of a case by case privilege. He makes it clear that case by case privilege can only be decided after a careful consideration of the facts in each case: At p. 286, he stated: "In other words, the case by case analysis requires that the policy reasons for excluding otherwise relevant evidence be weighed in each particular case." Romaine J. in Anderson Exploration Ltd. v. Pan-Alberta Gas Ltd., [1998] A.J. No. 575, 1998 ABQB 455 (Q.B.), set out the procedure to be followed in assessing a claim for privilege.

13 The appellant submits that the key issue in this case relates to Wigmore criteria four and the balancing of the protected interests, being the protection of the confidential communication and the need for disclosure in the litigation. The Chambers Judge was aware that the case brought contractual confidentiality obligations into conflict with the entitlement to a fair trial in which all litigants have the ability to advance or defend claims without restriction of access to relevant information unless the information was privileged. After reviewing the authorities, the Chambers Judge concluded that privilege did not apply to information protected by confidentiality agreements where the information was necessary for Court proceedings. The appellant submits that the procedure followed did not permit the parties and the Court to fully explore the balancing of the interests. It is not apparent from the record that the Chambers Judge considered case by case privilege or decided the balancing issue. He made no reference to the four Wigmore criteria nor did he examine documents necessary to decide that issue. In cases where it is established that disclosure is necessary to ensure a fair trial, truth may triumph over private commercial interests, however, a case by case privilege analysis is required to determine the relative importance of the competing interests.

CONCLUSION

14 We are therefore of the view that the Chambers Judge's direction must be set aside and the matter remitted to the Court of Queen's Bench for decision on the question of case by case privilege with respect to each of the documents. While counsel for the appellant has invited this court to

make that decision, that function is best performed by the trial court and not by this Court. The parties may file supplemental affidavits dealing with the issue of case by case privilege and are free to bring such other applications as may be advised. Should these applications give rise to appeals, we recommend that steps be taken to ensure that all interlocutory appeals be heard together.

MCFADYEN J.A.
PAPERNY J.A.
ROMAINE J. (ad hoc)

Tab 9

OOSTERHOFF ON TRUSTS:
TEXT, COMMENTARY AND MATERIALS

Eighth Edition
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Re Hunter,[123] below, the same approach cannot be used if the relevant class contains a large number of individuals. $100,000 split evenly among a group of four makes sense; the same amount split into equal shares for 100,000 people does not.

8. Mr. Boyce has two daughters named Maria and Charlotte. By will, he leaves four houses on trust. Maria is entitled to choose one house for herself and Charlotte is to take the remaining three. Maria dies without having made her choice. What property, if any, does Charlotte enjoy under the trust?[124] Is there an effective mechanism for determining the beneficiaries' interests?

A testator, who had three sons, owned several properties at the time of death. His will aimed to give one property to the first son, another property to the second son, and the remaining properties to the third son. The testator did not, however, specify the property to which each son is entitled, nor did he expressly provide the first or second son with a power of selection. Are any of the sons entitled to any of the properties?[125]

9. Does constitution invariably cure uncertainty of subject-matter? If so, how? Refer back to this question after completing the heading on constitution, below.

4.3.3 Certainty of Objects

4.3.3(a) *Introduction*

In addition to certainty of intention and certainty of subject matter, an express trust also requires certainty of objects. The phrase "certainty of objects" sometimes is used to indicate that an express trust must benefit persons, rather than non-charitable purposes. Purpose trusts are discussed in Chapters 7 and 8. In the present context, the need for certainty of objects refers instead to the fact that the beneficiaries must be sufficiently described so as to facilitate performance of the trust.

Certainty of objects is important from various perspectives. The settlor wants to be sure that the trust property is distributed to the intended beneficiaries. Those beneficiaries similarly want to ensure that their property is not given to someone else. Because an improper distribution results in liability, the trustee must be able to determine, with sufficient certainty, who falls within the class of beneficiaries. And finally, because a trust cannot fail for want of a trustee, and because a judge may be required to direct the disposition of trust property if a trustee does not do so, it is crucial, from the courts' perspective, that trust objects be certain. Judges are not willing to speculate as to whom property ought to be given.

Certainty of objects also is important for the purposes of the rule in *Saunders v. Vautier*.[126] That rule exists in Canada's common law jurisdictions, other than Alberta and Manitoba. As explained in more detail in the next chapter, *Saunders v. Vautier* states that, as long as they are *sui juris* and unanimous in the desire, the beneficiaries of a trust may demand an immediate distribution of the trust property, even if the settlor intended for the trust to be executed at some future

123 (1970), [1971] A.C. 424, [1970] 2 All E.R. 228 (H.L.).

124 See *Boyce v. Boyce* (1849), 16 Sim. 476, 60 E.R. 959.

125 *Guild v. Mallory* (1983), 13 E.T.R. 218, 144 D.L.R. (3d) 603 (Ont. H.C.). See also *Re Sapusak* (1984), 16 E.T.R. 197, 8 D.L.R. (4th) 158 (Ont. C.A.).

126 (1841), 4 Beav. 115, 49 E.R. 282, affirmed (1841), 1 Cr. & Ph. 240, 41 E.R. 482.

date. The application of that rule obviously requires ascertainment of the beneficiaries.

4.3.3(b) *Persons and Purposes*

As previously noted, it is necessary to distinguish between trusts for persons and trusts for purposes. The former category includes both natural and legal persons — *i.e.* human beings and corporations. The rules regarding certainty of objects are the same in either event. The rules governing purpose trusts are examined in Chapters 7 and 8. One comment nevertheless is warranted at this point. A personal trust sometimes looks like a purpose trust if the quantum of the beneficiary's interest is defined by some purpose. A trust involving the disposition of "such amounts as my trustee determines is appropriate for the purpose of educating my daughter" is not, despite use of the word "purpose," a purpose trust. The settlor's aim is not to advance education generally, but rather to benefit his daughter personally. The reference to "purpose" merely provides a means of ascertaining the amount to which the daughter is entitled.

4.3.3(c) *Tests of Certainty of Objects*

The precise requirements for certainty of objects depend upon the nature of the trust. A personal express trust may be either *fixed* or *discretionary*. A fixed trust is one in which the beneficiaries and their shares are fully determined by the settlor. A discretionary trust is one in which the settlor directs the trustee to exercise a choice as to the beneficiaries or their shares or both. Because the trustee *must* exercise that choice, the disposition is a trust, rather than a power. The trust is discretionary, rather than fixed, however, because the trustee is required, for example, to distribute $5000 "to either A or B," or to distribute to A "such amount as is thought appropriate."

Re Gulbenkian's Settlement,[127] which appeared in the preceding chapter, contains *dicta* to the effect that the objects of both fixed trusts and discretionary trusts require "class ascertainability." In fact, as the extracts in this section explain, that test properly applies to fixed trusts only. Discretionary trusts, like powers, are governed instead by the test of "individual ascertainability."

4.3.3(d) *Evidentiary and Conceptual Certainty*

Whichever test applies, it generally is said that equity requires *conceptual*, rather than *evidentiary*, certainty of objects. The criteria for admission into the class of beneficiaries must be clear, even if the actual identification of those beneficiaries requires considerable effort. Evidentiary difficulties can be worked out, by a judge if necessary, as they arise.[128] Indeed, as Wynn-Parry J. said in *Re*

127 [1970] A.C. 508 (H.L.).

128 *Re Baden's Trusts Deeds (No. 2)* (1972), [1973] Ch. 9 (C.A.) at 19 ("the court is never defeated by evidential uncertainty").

Eden,[129] "it may well be that a large part, even the whole of the funds available, would be consumed in the inquiry. To say the least of it, that would be very unfortunate, but it cannot of itself constitute any reason why such an inquiry, whether by the trustees or by the court, should not be undertaken."

4.3.3(e) *Saving Potentially Uncertain Objects*

As previously explained, the courts often exercise considerable flexibility in overcoming potential problems regarding certainty of subject matter. Though perhaps less pronounced, the same sometimes is true with respect to certainty of objects. Once again, for example, the "armchair rule" allows the settlor's words to be interpreted in context. A trust for one's "good friends" *prima facie* is invalid for uncertainty of objects. The category of "good friends" is hopelessly open-ended. The disposition nevertheless may be saved by evidence proving that the settlor invariably used the operative phrase in reference to certain individuals.

Seemingly uncertain objects also may be saved if the settlor entrusted some person (usually the trustee) to resolve such difficulties. There is some debate, however, as to the scope of that proposition. It occasionally is said that while a third party may be allowed to determine *factual* issues, *conceptual* uncertainties are not amenable to the same approach.[130] In a case of factual difficulty, the settlor provides a conceptually clear test and the third party merely bears responsibility for determining whether the criteria are met. In a case of conceptual difficulty, in contrast, the settlor has not established a clear standard. And since the trust derives from the settlor's intention, it is not appropriate to allow a third party to supply the criteria for membership in the class of beneficiaries. *Re Tuck's Settlement Trusts*[131] provides an illustration. A trust purportedly was created for benefit of a man as long as he was "of the Jewish faith" and married to an "approved wife." The settlor further directed that, in the event of factual dispute or doubt, "the decision of the Chief Rabbi in London . . . shall be conclusive."[132] Although the operative terms were held to be sufficiently certain by themselves, the Court of Appeal favourably entertained the possibility that the Chief Rabbi, acting "in the business in which he is expert," otherwise could have been of assistance.

4.3.3(f) *Timing Issues*

It generally is said that the test for certainty of objects must be satisfied at the time that the trust is created. The test therefore applies immediately in the context of an *inter vivos* trust and at the moment of death in the context of a testamentary trust. Significantly, however, the test does not necessarily require the actual identification of the beneficiaries at the outset. In some situations, it is

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129 [1957] 2 All E.R. 430 (Ch.) at 435.

130 G. Thomas & A. Hudson, *The Law of Trusts* (Oxford, Oxford University Press, 2004) at 120-123.

131 [1978] Ch. 49 (C.A.).

132 *Ibid.*, at 49-50.

enough that the beneficiaries and shares will be identifiable at the moment of distribution. Without that flexibility, the courts would be required to strike down a large number of trusts that commonly are used in practice. It is possible, for example, to create a trust that consists of a life interest for A, followed by a remainder interest for A's heir at the time of A's death. Although the trust arises immediately, A's heir will not be known for some time. Similarly, it is possible to create a trust subject to a condition precedent, so that the identity of the beneficiaries (if any arise) will be known only if and when the condition is met.

4.3.3(g) *Consequences of Uncertainty*

If the objects are not sufficiently certainty, the attempted trust will fail. Following the general rule, any property that has been given to the "trustee" presumptively will return to the settlor by way of resulting trust.

Further Reading

J.W. Harris, "Trust, Power and Duty" (1971), 87 L.Q.R. 31.

J. Hopkins, "Certain Uncertainties of Trusts and Powers," [1971] C.L.J. 68.

Y.F.R. Grbich, "Certainty of Objects: The Rule That Never Was" (1973), 5 N.Z.U.L. Rev. 348.

G.E. Palmer, "Private Trusts for Indefinite Beneficiaries" (1972), 71 Mich L. Rev. 359.

L. McKay, "Re Baden and the Criterion of Validity" (1974), 7 V.U.W.L. Rev. 258.

M.C. Cullity, "Fiduciary Powers" (1976), 54 Can. Bar Rev. 229.

R. Burgess, "The Certainty Problem" (1979), 30 N.I.L.Q. 24.

C.T. Emery, "The Most Hallowed Principle — Certainty of Beneficiaries of Trusts and Powers of Appointment" (1982) 98 L.Q.R. 551.

4.3.3(h) *Test for Certainty of Objects of a Fixed Trust: Class Ascertainability*

A fixed trust triggers the *class ascertainability* test. It must be possible to draw a complete list of the beneficiaries.

Class ascertainability is required by the very nature of a fixed trust. The trustee has no discretion as to recipients or shares; the property must be distributed as directed by the settlor. Consequently, for example, a fixed trust that calls for $100,000 to be distributed "to the members of my family in equal shares" requires a precise determination as to the number of recipients. Since the test is conceptual, rather than evidentiary, the trustee need not necessarily locate each member of the family. At a minimum, however, the trustee must know the number of beneficiaries in order to determine the size of each share. (If some family members are known to be alive, but cannot be located, the relevant share can be held in trust pending their appearance.)

Given the nature of the test, it is impossible, in normal circumstances, to have a fixed trust "for equal distribution among my friends." The problem is not merely that the concept of "friends" is vague, so as to make it difficult, at least at the margins, to know whether the test is satisfied. The more fundamental problem is

[illegible] the concept of "friends" is vague, the trustees would never know if [illegible] had compiled a complete list, and without a complete list it is impossible to know the proper size of a single share, even for a person who undoubtedly [illegible] fall within the class.

Notes and Questions

1. Explain why the following disposition is a fixed trust: "$10,000 to be held in trust for the members of my family in equal shares". Does it pass the certainty of objects test for a fixed trust? Why or why not?

2. Is the class ascertainability test concerned with conceptual or evidential uncertainty?

3. A testatrix left $10,000 in trust in equal shares for her "aged housekeepers". She had four housekeepers whose ages, at the time of her death, were 21, 45, 87 and 89.

(i) Is the trust fixed or discretionary?

(ii) Does the description "aged housekeepers" pass the certainty of objects test? Should it?

(iii) Reconsider your answer to question 2 above.

4.3.3(i) *Test for Certainty of Objects of a Discretionary Trust: Individual Ascertainability*

For the purposes of certainty of objects, the courts historically drew a sharp distinction between trusts on the one hand and powers on the other. *Dicta* in *Re Gulbenkian's Settlement*,[133] which appeared in the last chapter, indicated that the objects of a trust, whether fixed or discretionary, must meet the test of class ascertainability. The *ratio* of the same case was that the objects of a power need merely satisfy the test of *individual ascertainability*.

Class ascertainability sets a high standard. The trustee must be able to list all of the beneficiaries. Individual ascertainability is far less demanding. As formulated in *Re Gulbenkian's Settlement*, that test merely requires the ability to say with certainty "that any given individual is or is not a member of the class." There is no need to compile a complete list of beneficiaries.

The fact that the test of individual ascertainability is more easily satisfied, and the fact that courts prefer to save dispositions whenever possible, occasionally resulted in damning regrets[134] and disingenuous decisions. Despite clear evidence that the settlor intended a trust, a judge might characterize a disposition as a power, if the objects were described in terms that defied class ascertainability. *McPhail v. Doulton*,[135] which appears below, is illustrative. Even though the settlor stated that he "trustees shall apply the net income . . .," the Court of Appeal,

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133 [1971] A.C. 424, [1970] 2 All E.R. 228 (H.L.).

134 Harman J. referred to the "most unfortunate doctrine" that triggered two very different tests depending upon whether a disposition was characterized as a power or a discretionary trust: *Re Baden's Deed Trusts*, [1969] 2 Ch. 388 at 397.

135 [1971] A.C. 424, [1970] 2 All E.R. 228 (H.L.).