Tab B-3

2009 CAF 123, 2009 FCA 123
Federal Court of Appeal
Sawridge Band v. R.
2009 CarswellNat 4764, 2009 CarswellNat 944, 2009 CAF 123, 2009 FCA 123, 176 A.C.W.S. (3d) 681, 391 N.R. 375

Sawridge Band, Appellant (Plaintiff) and Her Majesty the Queen, Respondent (Defendant) and Congress of Aboriginal Peoples, Native Council of Canada (Alberta), Non-Status Indian Association of Alberta and Native Women's Association of Canada, Respondents (Interveners)

TSUU T'ina First Nation (formerly the Sarcee Indian Band), Appellant (Plaintiff) and Her Majesty the Queen, Respondent (Defendant) and Congress of Aboriginal Peoples, Native Council of Canada (Alberta), Non-Status Indian Association of Alberta and Native Women's Association of Canada, Respondents (Interveners)

Evans J.A., K. Sharlow J.A., Richard C.J.

Heard: April 20-21, 2009
Judgment: April 21, 2009
Docket: A-154-08, A-112-08

Proceedings: affirming *Sawridge Band v. R.* (2008), 2008 CarswellNat 582, 2008 FC 322, (sub nom. *Sawridge Indian Band v. Canada)* 319 F.T.R. 217 (Eng.) (F.C.); and affirming *Sawridge Band v. R.* (2008), 2008 FC 267, (sub nom. *Sawridge Indian Band v. Canada)* 320 F.T.R. 166 (Eng.), 2008 CarswellNat 534 (F.C.); additional reasons to *Sawridge Band v. R.* (2006), (sub nom. *Sawridge Band v. Canada)* [2007] 2 F.C.R. 773, (sub nom. *Sawridge Indian Band v. Canada)* 301 F.T.R. 6 (Eng.), 2006 FC 1218, 2006 CarswellNat 3247, 2006 CarswellNat 4826, 2006 CF 1218 (F.C.); and additional reasons to *Sawridge Band v. R.* (2007), 2007 CarswellNat 3496, 2007 FC 1054 (F.C.); and additional reasons to *Sawridge Band v. R.* (2007), 2007 CarswellNat 1735, 2007 FC 657, (sub nom. *Sawridge Indian Band v. Canada)* 307 F.T.R. 163 (Eng.) (F.C.)

Counsel: Edward H. Molstad, Q.C., Marco S. Poretti, David L. Sharko, Catherine M. Twinn, for Appellants
E. James Kindrake, Kevin Kimmis, Krista Epton, for Respondent, Her Majesty the Queen
Joseph E. Magnet, Janet L. Hutchison, for Respondent, Congress of Aboriginal Peoples
Jon Faulds, Q.C., Derek A. Cranna, for Respondent, Native Council of Canada (Alberta)
Michael J. Donaldson, for Respondent, Non-Status Indian Association of Alberta
Mary Eberts, for Respondent, Native Women's Association of Canada
Subject: Civil Practice and Procedure; Evidence; Public

Headnote

Civil practice and procedure --- Disposition without trial — Discontinuance of action — General principles
Plaintiffs brought action against Crown — Plaintiffs' past and future lay witnesses were struck because of non-compliant will-says — Plaintiffs informed trial judge they would be calling no further evidence — Plaintiffs' action was dismissed — Plaintiffs appealed — Appeals dismissed — No error on part of trial judge that warranted intervention — Orders and directions plaintiffs sought to challenge were discretionary decisions made by trial judge in furtherance of his obligation to control trial process — No factual foundation in record for argument that there was reasonable apprehension of bias on part of trial judge.

Civil practice and procedure --- Trials — Conduct of trial — General principles
Plaintiffs brought action against Crown — Plaintiffs' past and future lay witnesses were struck because of non-compliant will-says — Plaintiffs informed trial judge they would be calling no further evidence — Plaintiffs' action was dismissed — Plaintiffs appealed — Appeals dismissed — No error on part of trial judge that warranted intervention — Orders and directions plaintiffs sought to challenge were discretionary decisions made by trial judge in furtherance of his obligation to control trial process — No factual foundation in record for plaintiffs' argument that there was reasonable apprehension of bias on part of trial judge.

Civil practice and procedure --- Costs — Scale and quantum of costs — Quantum of costs — Allowance of increased costs
Plaintiffs brought action against Crown — Plaintiffs' lay witnesses were struck due to refusal to comply with will-say disclosure requirements — Plaintiffs were ordered to produce standard-compliant will-says and they assured they had — Plaintiffs brought unsuccessful adjournment motion — After calling eight lay witnesses, plaintiffs brought unsuccessful mistrial motion, revealing that they had not produced standard-compliant will-says and repudiating connection between will-says and evidence at trial — Plaintiffs elected not to provide reassurances of compliance and lay witnesses were

again struck — Costs totalling approximately $1.7 million were awarded in favour of Crown and interveners — Costs award included substantial amount as increased costs in excess of full indemnity — Plaintiffs appealed — Appeals dismissed — Trial judge did not err in law or fail to exercise his discretion judicially when he awarded increased costs as he did — In particular, there was no palpable and overriding error in trial judge's findings of misconduct on part of plaintiffs.

Civil practice and procedure --- Practice on appeal — Miscellaneous

Whether abuse of process.

Table of Authorities

Cases considered by *K. Sharlow J.A.*:

Sawridge Band v. R. (1995), *(*sub nom. *Sawridge Band v. Canada)* [1996] 1 F.C. 3, 1995 CarswellNat 1293, *(*sub nom. *Sawridge Band v. Canada)* [1995] 4 C.N.L.R. 121, *(*sub nom. *Twinn v. Canada)* 97 F.T.R. 161, 1995 CarswellNat 1292 (Fed. T.D.) — referred to

Sawridge Band v. R. (1997), *(*sub nom. *Sawridge Band v. Canada)* [1997] 3 F.C. 580, *(*sub nom. *Twinn v. Canada)* 215 N.R. 133, 1997 CarswellNat 1086, 3 Admin. L.R. (3d) 69, 1997 CarswellNat 2720 (Fed. C.A.) — referred to

Sawridge Band v. R. (December 1, 1997), Doc. 26169 (S.C.C.) — referred to

Sawridge Band v. R. (2004), 2004 CarswellNat 4031, 2004 FC 933, 2004 CarswellNat 2065, 2004 CF 933 (F.C.) — referred to

Sawridge Band v. R. (2004), 2004 CarswellNat 5190, 2004 CF 1436, 2004 FC 1436, 2004 CarswellNat 3752 (F.C.) — referred to

Sawridge Band v. R. (2004), 2004 CarswellNat 4360, 2004 FC 1653, 2004 CF 1653, 2004 CarswellNat 5450 (F.C.) — referred to

Sawridge Band v. R. (2005), 2005 CarswellNat 3696, 2005 FC 1476, [2006] 1 C.N.L.R. 292, *(*sub nom. *Sawridge Indian Band v. Canada)* 275 F.T.R. 1, 2005 CF 1476, 2005 CarswellNat 5793 (F.C.) — referred to

Sawridge Band v. R. (2006), 2006 FCA 228, 2006 CarswellNat 1662, 351 N.R. 144, 2006 CarswellNat 3254, 2006 CAF 228, *(*sub nom. *Sawridge Band v. Canada)* [2006] 4 C.N.L.R. 279 (F.C.A.) — referred to

Sawridge Band v. R. (2008), 2008 FC 267, *(*sub nom. *Sawridge Indian Band v. Canada)* 320 F.T.R. 166 (Eng.), 2008 CarswellNat 534 (F.C.) — referred to

Statutes considered:

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), c. 11, reprinted R.S.C. 1985, App. II, No. 44

s. 35 — referred to

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

Generally — referred to

Tariffs considered:

Federal Courts Rules, SOR/98-106

Tariff B, Table, column III — referred to

APPEALS by plaintiffs from judgment reported at *Sawridge Band v. R.* (2008), 2008 CarswellNat 582, 2008 FC 322, *(*sub nom. *Sawridge Indian Band v. Canada)* 319 F.T.R. 217 (Eng.) (F.C.), dismissing plaintiffs' action, and from judgment reported at *Sawridge Band v. R.* (2008), 2008 FC 267, *(*sub nom. *Sawridge Indian Band v. Canada)* 320 F.T.R. 166 (Eng.), 2008 CarswellNat 534 (F.C.), awarding costs in favour of defendant Crown and interveners.

***K. Sharlow J.A.*:**

1 These are appeals of the decision of Justice Russell to dismiss the appellants' action and to award costs totalling approximately $1.7 million in favour of the Crown and the other respondents (interveners at trial). That award includes a substantial amount as increased costs in excess of full indemnity. The reasons for dismissing the action are reported at 2008 FC 322. The reasons for the costs award are reported at 2008 FC 267 (F.C.). The appellants are seeking a retrial.

2 Despite the thorough and lengthy written and oral submissions of counsel for the appellants, we can discern no error on the part of Justice Russell that warrants the intervention of this Court. We do not consider it necessary to discuss the grounds of appeal in detail. We will offer only the following comments.

3 The dismissal of the action was the end of the retrial of an action commenced on January 15, 1986. The appellants were

seeking an order declaring that certain amendments to the *Indian Act*, R.S.C. 1985, c. I-5, breached the appellants' rights under section 35 of the *Constitution Act, 1982*. The statutory amendments compelled the appellants, against their wishes, to add certain individuals to the list of band members. The appellants argue that the legislation is an invalid attempt to deprive them of their right to determine the membership of their own bands.

4 The first trial began in September of 1993 and ended with a dismissal of the action on July 6, 1995 (*Sawridge Band v. R.* (1995), [1996] 1 F.C. 3 (Fed. T.D.)). That decision was set aside by this Court on the basis of a reasonable apprehension of bias (*Sawridge Band v. R.*, [1997] 3 F.C. 580 (Fed. C.A.), application for leave to appeal dismissed December 1, 1997 [*Sawridge Band v. R.* (December 1, 1997), Doc. 26169 (S.C.C.)]). A new trial was ordered. It began in January of 2007, after almost 10 years of procedural disputes and delays.

5 The action was dismissed again because, on January 7, 2008, the appellants informed Justice Russell that they would not be calling further evidence. This was in response to Justice Russell's oral ruling on September 11, 2007 striking all of the appellants' past and future lay witnesses because of non-compliant will-says. There being no case for the Crown to answer, the action necessarily failed. The action was formally dismissed on March 7, 2008.

6 In deciding to call no further evidence on the retrial, the appellants were not abandoning the cause that led them to begin the action in 1986. Rather, they chose to end the action when they did in order to challenge a series of rulings made by Justice Russell precluding the appellants from eliciting any evidence from lay witnesses that had not been disclosed in the will-says for those witnesses, as well as the oral ruling on September 11, 2007. The appellants also argue that Justice Russell's conduct since his appointment as trial judge raises a reasonable apprehension of bias.

7 It is not necessary to recount the lengthy procedural history of this matter, which is described in detail by Justice Russell. We note, however, that during the process of case management and after the discovery process had become hopeless, Justice Hugessen made an order requiring the appellants to produce will-say statements for all lay witnesses proposed to be called at trial. Justice Russell found the appellants' first attempt at will-says to be inadequate and ordered new will-says (2004 FC 933 (F.C.)). He found the second attempt also to be inadequate (2004 FC 1436 (F.C.)) and ordered a third attempt (2004 FC 1653 (F.C.)). Neither of these orders were appealed.

8 In November of 2005 Justice Russell made an order permitting the appellants to call 24 of their 57 potential lay witnesses, but prohibiting them from calling the other 33 because of various failures to comply with the will-say orders (2005 FC 1476 (F.C.)). The appellants' appeal of that order was dismissed (2006 FCA 228 (F.C.A.), application for leave to appeal dismissed, February 8, 2007).

9 The 2006 interlocutory appeal settled a number of issues. One was that the will-says were intended to provide a substitute for oral discovery, which "the parties had shown themselves incapable of conducting in a productive and focused manner" (see paragraph 9 of the reasons of Justice Evans, speaking for the Court). Another was that it was within the discretion of Justice Russell not to permit witnesses to be called because of the appellants' non-compliance with Court orders regarding the filing of will-says (see paragraph 13 of the reasons of Justice Evans).

10 In oral argument, counsel for the appellants argued that, despite the long history of controversy about will-says and what would constitute a compliant will-say, they were not aware when they prepared the second set of will-says that the evidence they could elicit from a witness for whom a will-say had been served could not include anything not set out in the will-say. Our review of the record discloses that the appellants should have been aware by the commencement of the retrial that they could be precluded from adducing any evidence from a witness for whom no compliant will-say had been produced, and that they could also be limited to eliciting evidence disclosed in the will-say. If they were confused on those points, however, they did little to clarify the situation when they indicated to Justice Russell that, although they considered their will-says to be compliant with the standard he had set, their ability to make their case would be compromised if they were barred from eliciting any evidence from a witness that did not appear in the will-say for that witness.

11 The appellants' equivocation when asked if their will-says were compliant led Justice Russell to conclude that if the appellants could not adequately make their case based on what was stated in the will-says, the will-says must necessarily have been non-compliant. The appellants take issue with Justice Russell's interpretation of their submissions and his reasoning. However, based on our review of the record, Justice Russell's understanding of the appellants' position, as expressed many times in his reasons, was reasonably open to him.

12 In our view, all of the orders and directions which the appellants now seek to challenge were discretionary decisions made by Justice Russell in furtherance of his obligation to control the trial process. He was required to discharge that obligation in circumstances that became increasingly difficult because of the appellants' apparent reluctance to accept that a trial judge may exclude relevant evidence on the basis that it was not properly disclosed in the discovery process or, as in this case, will-say statements that were intended to stand in the place of oral discoveries. A failure to make disclosures required by a court order may and occasionally does result in the exclusion of relevant evidence.

13 Finally, without endorsing every statement made by Justice Russell in his voluminous reasons, we find no factual foundation in the record for the appellants' argument that there was a reasonable apprehension of bias on the part of Justice Russell. On the contrary, we agree with the other panel of this Court in the 2006 interlocutory appeal that, given the circumstances facing him, Justice Russell displayed an appropriate mix of "patience, flexibility, firmness, ingenuity, and an overall sense of fairness to all parties" (paragraph 22, per Justice Evans).

14 We express no opinion on the comments of Justice Russell to the effect that he remains seized of matters relating to the possibility of proceedings against appellants' former counsel for contempt of court or professional disciplinary proceedings. No ground of appeal can arise in relation to those matters unless and until Justice Russell makes an order or renders judgment.

15 The Crown and other respondents have argued that this appeal is based largely on debates that were decided against the appellants in prior proceedings, some going so far as to say that the appeal itself is abusive. While there is some force in this argument, on balance we have concluded that, after the action was dismissed, it was open to the appellants to appeal the decision of Justice Russell to strike the evidence of the witnesses. While we have concluded that there is no merit in that appeal, it does not follow that the appeal itself is an abuse of process.

16 As to the appellants' appeal of the costs awarded at trial, we are not persuaded that Justice Russell erred in law or failed to exercise his discretion judicially when he awarded increased costs as he did. In particular, having considered the entire history of the retrial, we can detect no palpable and overriding error in Justice Russell's findings of misconduct on the part of the appellants.

17 This appeal will be dismissed with costs to the Crown and each of the other respondents (interveners at trial) on the ordinary scale (that is, the mid-range of Column III of Tariff B of the *Federal Courts Rules*). These reasons will be placed in Court file A-154-08 and a copy will be placed in Court file A-112-08.

Appeals dismissed.

Tab B-4

2013 FC 910, 2013 CF 910
Federal Court
Poitras v. Sawridge Band
2013 CarswellNat 3938, 2013 CarswellNat 3939, 2013 FC 910, 2013 CF 910, 235 A.C.W.S. (3d) 355, 438 F.T.R. 264 (Eng.)

Elizabeth Bernadette Poitras, Plaintiff and Walter Patrick Twinn, The Council of the Sawridge Band, The Sawridge Band and Her Majesty the Queen in Right of Canada as Represented by the Minister of Indian Affairs and Northern Development, Defendants

Kevin R. Aalto J.
Heard: May 14, 2013
Judgment: August 28, 2013
Docket: T-2655-89

Counsel: Mr. Terence P. Glancy, for Plaintiff
Mr. Philip Healy, for Defendants, Walter Patrick Twinn et al.
Mr. Kevin Kimmis, for Defendant, HMQ
Subject: Public; Civil Practice and Procedure; Constitutional

Headnote

Aboriginal law --- Government of Aboriginal people — Membership
Plaintiff, Aboriginal woman, brought action against defendant First Nation band, claiming membership in it (main action) — Band defended main action on ground that it had right to determine who was member of band — Main action was stayed pending outcome of closely related action, in which band was challenging amendments to Indian Act on same ground — Closely related action was dismissed — Case management judge ordered that issue of woman's membership in band was moot — Band unsuccessfully appealed — Woman brought motion to amend pleadings to claim damages against defendant Crown — Band brought motion to amend pleadings and to raise crossclaim against Crown — Woman's motion granted; band's motion granted in part — Parties were granted leave to amend pleadings in accordance with reasons — Issue of woman's membership in band was at end — Little if any prejudice would be occasioned to Crown by permitting amendment by woman regarding damages — While claim for damages could have been asserted earlier, there was legitimate position regarding discoverability and claim was not necessarily without hope.

Aboriginal law --- Practice and procedure — Pleadings — Amendment
Plaintiff, Aboriginal woman, brought action against defendant First Nation band, claiming membership in it (main action) — Band defended main action on ground that it had right to determine who was member of band — Main action was stayed pending outcome of closely related action, in which band was challenging amendments to Indian Act on same ground — Closely related action was dismissed — Case management judge ordered that issue of woman's membership in band was moot — Band unsuccessfully appealed — Woman brought motion to amend pleadings to claim damages against defendant Crown — Band brought motion to amend pleadings and to raise crossclaim against Crown — Woman's motion granted; band's motion granted in part — Parties were granted leave to amend pleadings in accordance with reasons — Issue of woman's membership in band was at end — Little if any prejudice would be occasioned to Crown by permitting amendment by woman regarding damages — While claim for damages could have been asserted earlier, there was legitimate position regarding discoverability and claim was not necessarily without hope.

Civil practice and procedure --- Pleadings — Counterclaim, crossclaim and set-off — Crossclaim
Plaintiff, Aboriginal woman, brought action against defendant First Nation band, claiming membership in it (main action) — Band defended main action on ground that it had right to determine who was member of band — Main action was stayed pending outcome of closely related action, in which band was challenging amendments to Indian Act on same ground — Closely related action was dismissed — Case management judge ordered that issue of woman's membership in band was moot — Band unsuccessfully appealed — Woman brought motion to amend pleadings to claim damages against defendant Crown — Band brought motion to amend pleadings and to raise crossclaim against Crown — Woman's motion granted; band's motion granted in part — There was no reason in law to let band resurrect

crossclaim against Crown — Band had previously asserted proper third party claim against Crown, and voluntarily discontinued that claim.

Table of Authorities

Cases considered by *Kevin R. Aalto J.*:

Apotex Inc. v. Pfizer Canada Inc. (2013), 2013 FC 493, 2013 CarswellNat 1543, 2013 CF 493, 2013 CarswellNat 3153 (F.C.) — followed

Canderel Ltd. v. R. (1993), (sub nom. *R. v. Canderel Ltd.*) 93 D.T.C. 5357, (sub nom. *Canderel Ltd. v. Canada*) [1994] 1 F.C. 3, (sub nom. *Minister of National Revenue v. Canderel Ltd.*) 157 N.R. 380, (sub nom. *Canderel Ltd. v. Canada*) [1993] 2 C.T.C. 213, 1993 CarswellNat 949, 1993 CarswellNat 1337 (Fed. C.A.) — considered

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

Meyer v. Canada (1985), 62 N.R. 70, 1985 CarswellNat 117 (Fed. C.A.) — considered

Poitras v. Sawridge Band (1999), 1999 CarswellNat 536, 1999 CarswellNat 4690 (Fed. T.D.) — referred to

Potskin v. Canada (Minister of Indian Affairs & Northern Development) (2011), 2011 CarswellNat 2922, 2011 CF 457, (sub nom. *Potskin v. Canada*) [2011] 3 C.N.L.R. 301, 2011 FC 457, 2011 CarswellNat 1465 (F.C.) — considered

Royal Canadian Legion Norwood (Alberta) Branch 178 v. Edmonton (City) (1994), 1994 CarswellAlta 24, [1994] 5 W.W.R. 39, 16 Alta. L.R. (3d) 305, 149 A.R. 25, 63 W.A.C. 25, 111 D.L.R. (4th) 141 (Alta. C.A.) — followed

Sawridge Band v. Poitras (2012), (sub nom. *Twinn v. Poitras*) 428 N.R. 282, 2012 CAF 47, 2012 FCA 47, 2012 CarswellNat 351, 2012 CarswellNat 831 (F.C.A.) — referred to

Sawridge Band v. R. (1997), (sub nom. *Sawridge Band v. Canada*) [1997] 3 F.C. 580, (sub nom. *Twinn v. Canada*) 215 N.R. 133, 1997 CarswellNat 1086, 3 Admin. L.R. (3d) 69, 1997 CarswellNat 2720 (Fed. C.A.) — referred to

Sawridge Band v. R. (2001), (sub nom. *Sawridge Indian Band v. Canada*) 213 F.T.R. 57 (note), 2001 FCA 338, 2001 CarswellNat 2526, 2001 CarswellNat 3526, (sub nom. *Sawridge Band v. Canada*) [2002] 2 F.C. 346, (sub nom. *Sawridge Indian Band v. Canada*) 283 N.R. 107 (Fed. C.A.) — referred to

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

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

Sawridge Band v. R. (2008), 2008 CarswellNat 582, 2008 FC 322, (sub nom. *Sawridge Indian Band v. Canada*) 319 F.T.R. 217 (Eng.) (F.C.) — referred to

Sawridge Band v. R. (2009), 2009 FCA 123, 2009 CarswellNat 944, 2009 CarswellNat 4764, 2009 CAF 123, (sub nom. *Sawridge Indian Band v. Canada*) 391 N.R. 375 (F.C.A.) — referred to

Sawridge Band v. R. (2009), 2009 CarswellNat 4215, 2009 CarswellNat 4216, (sub nom. *Sawridge Band v. Canada*) 403 N.R. 393 (note) (S.C.C.) — referred to

Toronto (City) v. C.U.P.E., Local 79 (2003), 232 D.L.R. (4th) 385, 9 Admin. L.R. (4th) 161, [2003] 3 S.C.R. 77, 17 C.R. (6th) 276, 2003 SCC 63, 2003 CarswellOnt 4328, 2003 CarswellOnt 4329, 311 N.R. 201, 2003 C.L.L.C. 220-071, 179 O.A.C. 291, 120 L.A.C. (4th) 225, 31 C.C.E.L. (3d) 216 (S.C.C.) — referred to

Statutes considered:

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), c. 11, reprinted R.S.C. 1985, App. II, No. 44
- s. 35 — considered

Indian Act, R.S.C. 1970, c. I-6
- Generally — referred to
- s. 10 — considered
- s. 10(4) — considered
- s. 10(5) — considered
- s. 11(1)(e) — considered

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

Limitations Act, R.S.A. 2000, c. L-12

s. 3(1) — considered
Rules considered:
Federal Courts Rules, SOR/98-106
Generally — referred to
R. 81 — considered
Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 28 — considered
Words and phrases considered
moot
Dukelow, *The Dictionary of Canadian Law* (Third Ed.) at p. 804 defines "moot" and "mootness" as follows:
MOOT. *Adj.* A case is moot when something occurs after proceedings are commenced which eliminates the issues between the parties.
MOOTNESS. *n.* 1. "[A]n aspect of general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or the proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot." *Borowski v. Canada (Attorney General)* (1989), 38 C.R.R. 232 at 239, [1989] 3 W.W.R. 97, 33 C.P.C. (2d) 105, 47 C.C.C. (3d) 1, 57 D.L.R. (4th) 231, 92 N.R. 110, [1989] 1 S.C.R. 342, 75 Sask. R. 82, the court per Sopinka, J. 2. The criteria for courts to consider in exercising discretion to hear a moot case (at pp. 358-63) are: (1) the presence of an adversarial context; (2) the concern for judicial economy; and (3) the need for the Court to be sensitive to its role as the adjudicative branch in our political framework. Sopinka, J. in *Borowski v. Canada*, cited above.

MOTION by Aboriginal woman to amend pleadings to claim damages against Crown; MOTION by First Nation band to amend pleadings and to raise crossclaim against Crown.

***Kevin R. Aalto J.*:**

1 Many gallons of judicial ink have been spilled in this case as it has inched its way along since 1989 to the present. Issues have gone up and down the judicial appellate escalator. Now after 24 years the Court is faced with motions to amend the pleadings.

2 In this proceeding (the Poitras Action) there are now two motions before the Court to amend the pleadings. The first motion is brought by the Plaintiff (Ms. Poitras) to amend her Amended Statement of Claim (Poitras Claim) to specifically claim damages against the Defendant, Her Majesty the Queen as represented by The Minister of Indian Affairs and Northern Development (the Crown). The second motion is brought by the Defendants, Walter Patrick Twinn, the Council of the Sawridge Band and the Sawridge Band (collectively the Sawridge Band) to amend their Amended Statement of Defence and to raise a "crossclaim" against the Crown (Sawridge Pleading). The crossclaim seeks to obtain indemnification from the Crown for any damages or costs for which the Sawridge Band may be found liable to Ms. Poitras. While this is a simple summary of the two motions, their resolution is not simple.

3 These motions must be considered in the context of the myriad of legal proceedings which have taken place, not only in this case, but in a second action, (*Sawridge Band v. R.*, 2008 FC 322 (F.C.) [aff'd 2009 FCA 123 (F.C.A.); leave to the S.C.C. refused December 10, 2009 [2009 CarswellNat 4215 (S.C.C.)]] (the Sawridge Band Action).

4 The Sawridge Band Action also had a long and tortuous history including a retrial. The issues in the Sawridge Band Action related to challenges by the Sawridge Band to amendments to the *Indian Act*, RSC 1970, c. I-6. Those amendments granted Indian bands such as the Sawridge Band a right under the *Constitution Act*, 1982, and specifically s. 35 thereof, to determine the membership of the Sawridge Band. The Sawridge Band Action has now been finally and conclusively decided by virtue of the Supreme Court refusing leave to appeal.

5 Part of the delay in moving the Poitras Action forward resulted from a stay issued by former Case Management Judge, Justice James Hugessen. The stay related to the constitutional issues in this action, the Poitras Action, pending the outcome of the constitutional issues in the Sawridge Band Action. The constitutional issues in this case and the Sawridge Band Action

were considered to be identical. Those issues centred on the constitutionality of the amendments to the *Indian Act*.

6 In light of the conclusions reached by the Courts in the Sawridge Band Action the constitutional issues and other matters raised are now finally concluded.

Background

7 In order to understand better the nature of the amendments now sought by Ms. Poitras and the Sawridge Band, some context is essential.

8 The starting point for the amendments to the pleadings begins with an order of Justice Hugessen, made July 22, 2010. In that order, Justice Hugessen bluntly ordered "the issue of Ms. Poitras' membership in the band is now moot" [the Mootness Order]. The meaning of the Mootness Order has been put in dispute by the Sawridge Band and is discussed in greater detail later in theses reasons.

9 The Sawridge Band appealed the Mootness Order. By a judgment dated February 8, 2012 [*Sawridge Band v. Poitras*, 2012 CarswellNat 351 (F.C.A.)], the FCA held as follows:

> The appeal is dismissed without costs, with a direction that the parties return to the current Case Management Judge to bring the pleadings into line with the issues that remain in light of this judgment and the reasons therefore.

10 Brief reasons for decision were given by Justice David Stratas on behalf of the Court (2012 FCA 47 (F.C.A.)). As those reasons are brief, they are set out in their entirety:

> **REASONS FOR JUDGMENT OF THE COURT**
> ***(Delivered from the Bench at Ottawa, Ontario, on February 8, 2012)***
> [1] This is an appeal against the Order dated July 27, 2010 made by a case management judge in the Federal Court (Justice Hugessen). The case management judge ordered that an issue central to an action (the "main action") has become moot.
> [2] The circumstances giving rise to the Order are as follows.
> [3] Some time ago, the respondent, Ms. Poitras, started the main action against the appellant Band, claiming membership in it. The Band defended, in part, on the basis that it had a right under section 35 of the *Constitution Act, 1982* to determine who was a member of the Band.
> [4] The main action was stayed pending the outcome of another action that the Federal Court regarded as being closely related (the "closely related action"). In the closely related action, the Band was challenging amendments to the *Indian Act*, advancing the same argument, namely that it had a right under section 35 of the *Constitution Act, 1982* to determine who was a member of the Band. That action had a long history, including a retrial. In the end result, the closely related action was dismissed: *Sawridge Band v. R.*, 2008 FC 322 (F.C.), aff'd 2009 FCA 123 (F.C.A.).
> [5] With the dismissal of the closely related action, what was to become of the main action and the issue of Ms. Poitras' membership in the Band? To determine this, the Federal Court issued a notice of status review concerning the main action.
> [6] As a result of the status review, a case management conference in the Federal Court was held. There, the issue of mootness was discussed, having been raised in the submissions filed.
> [7] The case management judge's Order followed. The case management judge ordered that the issue of Ms. Poitras' membership in the Band was moot.
> [8] In this Court, the appellants appeal that Order.
> [9] The appellate standard of review applies. The appellants must show that the Order is vitiated either by legal error or by palpable and overriding error on some issue of fact or fact-based discretion. In reviewing the exercise of discretion in this case, it must also be borne in mind that this is an Order made by a case management judge who had managed the main action and the closely related action for many years and, as a result, possessed great familiarity with the factual issues and history of the matters: *Sawridge Band v. R.*, 2001 FCA 338 (Fed. C.A.) at paragraph 11, (2001), [2002] 2 F.C. 346 (Fed. C.A.).
> [10] In our view, the appellants have not shown any reversible error on the part of the case management judge that would warrant permitting the Band to relitigate the constitutional issues.
> [11] There can be circumstances which can prompt the Court to exercise its discretion to allow relitigation, notwithstanding the doctrines of issue estoppel and abuse of process: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.); *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 (S.C.C.).

> [12] But there is nothing in the record of this case showing that the appellants offered to the case management judge any such circumstances. Indeed, the record shows that the appellants deliberately decided, for reasons known to them, to close their case in the closely related action knowing they could have called more evidence and made further submissions. They knew that a dismissal would result after they closed their case. See *Sawridge Band v. R.*, 2008 FC 322 (F.C.) at paragraphs 10-21 and 60.
>
> [13] For the foregoing reasons, we shall dismiss the appeal and direct the parties to return to the current case management judge to bring the pleadings into line with the issues that remain in light of this Court's decision.

11 By way of further background, on March 17, 1999, Justice Hugessen, granted a stay in the Poitras Action [Order, March 17, 1999 [*Poitras v. Sawridge Band*, 1999 CarswellNat 536 (Fed. T.D.)], Court File No. T-2655-89]. Justice Hugessen, also the Case Management Judge in the Sawridge Band Action, issued an injunction in the Sawridge Band Action on March 27, 2003 [*Sawridge Band v. R.*, 2003 FCT 347 (Fed. T.D.)]. The injunction in the Sawridge Band Action affirmed Ms. Poitras' right to membership in the Sawridge Band until the matters raised in the Sawridge Band Action were decided. The injunction order of Justice Hugessen was appealed to the FCA and was upheld [2004 FCA 16 (F.C.A.)].

12 The order granting the injunction resulted in the declaration that Ms. Poitras and certain other individuals who were seeking membership in the Sawridge Band, "are hereby ordered, pending a final resolution of the Plaintiff's action [the Sawridge Band Action] to enter or register on the Sawridge Band list the names of the individuals who acquired the right to be members of the Sawridge Band before it took control of its Band List with the full rights and privileges enjoyed by all Band members." Ms. Poitras was one of the individuals included in the scope of that Order (the Membership Order).

13 In his reasons for decision relating to the Membership Order, Justice Hugessen engaged in a thorough analysis of the provisions of the *Indian Act*, R.S.C. 1985 c.I-5, commonly known as the Bill C-31 amendments. The summary of their impact is taken from a judgment of the FCA in one of the many appeals in the Sawridge Band Action as follows:

> Briefly put, this legislation, while conferring on Indian Bands, the right to control their own Band List, obliged Bands to include in their membership certain persons who became entitled to Indian status by virtue of the 1985 legislation. Such persons included: women who had become disentitled to Indian status through marriage to non-Indian men and the children of such women; those who had lost status because their mother and paternal grandmother were non-Indian and had gained Indian status through marriage to an Indian; and those who had lost status on the basis that they were illegitimate offspring of an Indian women and a non-Indian man. Bands assuming control of their Band list would be obliged to accept all of these people as members. Such bands will also be allowed, if they chose to accept certain other categories of persons previously excluded from Indian status. [*Sawridge Band v. R.*, [1997] 3 F.C. 580 (Fed. C.A.) at para. 2]

14 In the course of his reasons for decision in the Membership Order, Justice Hugessen determined that an "interim" declaration of rights regarding membership was not legally possible. However, he was satisfied that injunctive relief could and should be granted regarding membership of certain individuals including Ms. Poitras. The Sawridge Band had contested the constitutionality of Bill C-31 (which amended the *Indian Act*) and further had argued that the women in question could not become members of the Sawridge Band because they had not applied for membership. Justice Hugessen disposed of this argument as follows:

> [12] Finally, the plaintiff argued strongly that the women in question have not applied for membership. This argument is a simple "red herring". It is quite true that only some of them have applied in accordance with the Band's membership rules, but that fact begs the question as to whether those rules can lawfully be used to deprive them of rights to which Parliament has declared them to be entitled. The evidence is clear that all of the women in question wanted and sought to become members of the Band and that they were refused at least implicitly because they did not or could not fulfil the rules' onerous application requirements. *Sawridge Band v. R.*, 2003 FCT 347 (Fed. T.D.)

15 The decision of Justice Hugessen was appealed by the Sawridge Band to the FCA. The appeal was dismissed [2004 FCA 16 (F.C.A.)]. Justice Rothstein writing for the Court made the following observation regarding the requirement to apply for membership as follows:

> 35. For these persons entitled to membership, a simple request to be included in the Band's membership list is all that is required. The fact that the individuals in question did not complete a Sawridge Band membership application is irrelevant. As Hugessen J. found, requiring acquired rights individuals to comply with the Sawridge Band membership code, in which preconditions have been created to membership, was in contravention of the Act.

16 As noted, the Sawridge Band Action involved two trials. During the re-trial of the Sawridge Band Action before the Justice James Russell, it appears that the Sawridge Band made a determination during the presentation of their case not to call further evidence and consented to the dismissal of the action so that they could immediately seek an appeal of prior orders of Justice Russell The FCA dismissed the appeal on April 22, 2009 [*Sawridge Band v. R.*, 2009 FCA 123 (F.C.A.)] and leave to the Supreme Court of Canada was denied on December 10, 2009 [*Sawridge Band v. R.* (2009), 403 N.R. 393 (note)]. As a result, the Sawridge Band Action finally came to an end.

17 Thereafter, on March 16, 2010, Justice Hugessen issued an Interim Notice of Status Review in this action, the Poitras Action. As a result of the Notice of Status of Review, counsel for Ms. Poitras took the position that the issue of Ms. Poitras' membership in the Sawridge Band had become moot. In reply submissions on behalf of the Sawridge Band, the Sawridge Band agreed with the submissions of Ms. Poitras which included the issue of Ms. Poitras' band membership being moot.

18 Notwithstanding these events, the Sawridge Band maintains the position that they can pursue defences to Ms. Poitras' claim for membership in the Sawridge Band.

19 The FCA upheld the decision of Justice Hugessen on the point of mootness and thus the parties now seek to bring their pleadings in line with the decision of the FCA and seek to add certain amendments which are the specific subject of the motions before the Court.

What are the Implications of the Mootness Order and the Appeal

20 During the course of argument of these motions, counsel for the Sawridge Band took the position that Ms. Poitras' membership in the Sawridge Band was still a live issue in this litigation. This position was taken notwithstanding the Mootness Order made by Justice Hugessen that the issue of Ms. Poitras' membership is moot and the Court of Appeal's dismissal of the Sawridge Band's appeal from that order. In essence, the Sawridge Band argues that only the constitutional issues became moot and not other issues which relate to the membership of Ms. Poitras. In particular, the Sawridge Band alleges in its proposed Sawridge Pleading as follows:

> 6. With respect to the allegations in paragraph 6 of the statement of claim, these defendants state that the plaintiff was never a member of the Sawridge Band and put the plaintiff to the strict proof thereof. In the alternative, these Defendants stated that if the Plaintiff and/or the Plaintiff's predecessors or forbearers were ever members of the Sawridge Band, they agreed to waive release, extinguish and thereafter voluntarily, did waive, release, and extinguish, for sufficient valuable consideration, their membership in the Band. In doing so, they voluntarily ended any connection they may have had with the Band and severed all interests, if any, that they and/or their decedants might otherwise have enjoyed in the Band or the Band's Indian title to its lands. In the further alternative, if the Plaintiff's predecessors or full bearers were ever members of the Sawridge Band, it was without the consent of the said Band and without the required transfer of lands and money. Accordingly, the Plaintiff has no right, title, or claim to the Sawridge reserve.
>
> 6a) These defendants state that the plaintiff is estopped, as would be the Plaintiff's forbearers, from asserting claims for membership.

21 Because these paragraphs do not relate to constitutional issues which were finally determined in the Sawridge Band Action, it is argued that it was not open to Justice Hugessen to finally determine once and for all that all issues relating to Ms. Poitras' membership in the Sawridge Band were moot. At best, the Sawridge Band argues the Mootness Order only deals with the question of Ms. Poitras' membership insofar as it falls within any of the constitutional issues relating to Bill C-31.

22 Further, the Sawridge Band argues that if membership in the band had been finally determined by the Mootness Order, then the FCA would simply have directed a reference to determine what damages, if any, Ms. Poitras would be entitled. As the FCA did not do so, but directed that the pleadings be amended to conform with the issues that remained, the FCA did not intend to remove the question of Ms. Poitras' membership as a live issue in the proceeding.

23 The argument by the Sawridge Band that the FCA would have sent this directly to a reference to determine damages if there were no issues relating to membership outstanding misses the point. The flaw in this argument is that there are still liability issues to be determined. In the Claim of Ms. Poitras, it does not automatically follow that Ms. Poitras is entitled to any damages. The Court must determine, based on the evidence led at trial, whether there is liability for damages, payable by whom and in what amount.

24 The Sawridge Band has defences which it can raise against any liability for payment of damages. For example, it alleges that there were misunderstandings regarding the interpretation to be given to s. 10(4) and s. 10(5) of the *Indian Act* which could result in no liability for damages.

25 In the both the granting of and the appeal from the Mootness Order, the Sawridge Band were fully aware of these issues as now pleaded in paragraphs 6 and 6(a). They did not seek to carve those out in any way in the proceeding in front of Justice Hugessen or in front of the FCA.

Meaning of "Moot"

26 Dukelow, *The Dictionary of Canadian Law* (Third Ed.) at p. 804 defines "moot" and "mootness" as follows:

> **MOOT.** *Adj.* A case is moot when something occurs after proceedings are commenced which eliminates the issues between the parties.
>
> **MOOTNESS.** *n.* 1. "[A]n aspect of general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or the proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot." *Borowski v. Canada (Attorney General)* (1989), 38 C.R.R. 232 at 239, [1989] 3 W.W.R. 97, 33 C.P.C. (2d) 105, 47 C.C.C. (3d) 1, 57 D.L.R. (4th) 231, 92 N.R. 110, [1989] 1 S.C.R. 342, 75 Sask. R. 82, the court per Sopinka, J. 2. The criteria for courts to consider in exercising discretion to hear a moot case (at pp. 358-63) are: (1) the presence of an adversarial context; (2) the concern for judicial economy; and (3) the need for the Court to be sensitive to its role as the adjudicative branch in our political framework. Sopinka, J. in *Borowski v. Canada*, cited above.

27 Thus, insofar as the membership of Ms. Poitras in the Sawridge Band is concerned, that issue is at an end. There are no extant issues regarding her membership. It has been finally determined. If the Sawridge Band wanted to carve out some requirement of membership they had ample opportunity to do so both before Justice Hugessen, and the FCA. They did not. They consented to the mootness determination made by Justice Hugessen and then appealed the Mootness Order with no reservations as to any matter outstanding relating to membership. One is required to twist the decision of the FCA out of all possible meaning and logic to conclude that the issue of Ms. Poitras' membership was still an open issue in this proceeding.

28 The doctrine of *stare decisis* also supports this approach. In a recent decision, *Apotex Inc. v. Pfizer Canada Inc.*, 2013 FC 493 (F.C.), Justice O'Reilly reviewed the meaning and application of this doctrine as follows:

> [11] The full Latin phrase from which the term *stare decisis* derives is *stare decisis et non quieta movere*, which means "to stand by decisions and not to disturb settled matters" (*Holmes v Jarrett*, [1993] OJ No 679 (Ont Ct J (Gen Div) [*Holmes*], at para 12). This doctrine serves important purposes in the administration of justice. It "promotes consistency, certainty and predictability in the law, sound judicial administration, and enhances the legitimacy and acceptability of the common law" (*R v Bedford*, 2012 ONCA 186, at para 56; see also *R v Neves*, 2005 MBCA 112, at para 90).
>
> [12] Judges readily accept that this doctrine obliges them to follow decisions of higher courts. But the actual concept is broader than that — if a matter is settled, then it should not be disturbed. A matter may be settled if another judge, even of the same Court, has decided it. Generally, only if the material facts are different will the earlier decision not be considered binding on judges of the same Court (*Holmes*, above, at para 12).

29 In this case, Justice Hugessen determined the issue of Ms. Poitras' membership to be moot, a decision upheld by the FCA and therefore the Court must stand by the decision and not disturb a settled matter. Not to put too fine a tautological point on it — moot is moot is moot is moot.

30 Since the issue of Ms. Poitras' membership in the Sawridge Band is now moot, the pleadings must, in the words of the FCA, be brought "into line with the issues that remain in light of this Court's decision".

Amendments to the Poitras Claim

31 Little if any prejudice is occasioned to the Crown by permitting an amendment even at this late date by Ms. Poitras

regarding damages. The burden is on Ms. Poitras to demonstrate damages and the quantum of those damages. The damages claim that Ms. Poitras alleges is very much the same against the Crown as it is against the Sawridge Band. A general damages claim has been in the claim against the Sawridge Band since the commencement of the action.

32 The Crown argues that to allow an amendment at this late date will be prejudicial as discoveries are almost complete. However, amendments should be permitted where any prejudice can be compensated for in costs. There is much jurisprudence to support this proposition: see, for example, *Meyer v. Canada*, 1985 CarswellNat 117 (Fed. C.A.); and, *Canderel Ltd. v. R.* (1993), [1994] 1 F.C. 3 (Fed. C.A.). In *Canderel Ltd.*, a judge of the Tax Court had refused a fourth amendment to the Crown's Reply. The request for the amendment came on the sixth day of trial and sought to raise an issue for the first time. On appeal, Justice Décary, made the following observations regarding amendments:

> 10. With respect to amendments, it may be stated, as a result of the decisions of this Court in *Northwest Airporter Bus Service Ltd. v. The Queen and Minister of Transport*; (1978), 23 N.R. 49 (F.C.A.). *The Queen v. Special Risks Holdings Inc.*; [1984] CTC 563 (F.C.A.); affg [1984] CTC 71 (F.C.T.D.). *Meyer v. Canada*; (1985), 62 N.R. 70 (F.C.A.). *Glisic v. Canada*, [1988] 1 F.C. 731 (C.A.). and *Francoeur v. Canada reflex*, [1992] 2 F.C. 333 (C.A.). and of the decision of the House of Lords in *Ketteman v. Hansel Properties Ltd*, [1988] 1 All E.R. 38 (H.L.). which was referred to in *Francoeur*, that while it is impossible to enumerate all the factors that a judge must take into consideration in determining whether it is just, in a given case, to authorize an amendment, the general rule is that an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties, provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice. Rule 54 of the *Tax Court of Canada Rules (General Procedure)*, [SOR/90-688] which applies in this instance, is not substantially different from Rule 420 of the *Federal Court Rules* [C.R.C., c. 663].

33 The FCA dismissed the appeal on the grounds that the trial judge had made no error of law in the exercise of discretion to deny the amendment six days into the trial after witnesses, including experts had been called and the issue was new. To permit the amendment at that late date in the proceeding amounted to an abuse of process.

34 In *Meyer*, an earlier decision of the Federal Court - Appeal Division, an amendment was allowed by the Trial Division during the course of the trial. The Federal Court-Appeal Division noted:

> 6. It is argued that the learned trial judge erred in exercising his discretion to allow the amendment. We accept the statement by Lord Esher, M.R., of the criteria properly to guide such an exercise of discretion. In *Steward v. North Metropolitan Tramways Co.* (1886), 16 Q.B.D. 556 at 558, he said:
>
> > The rule of conduct of the Court in such a case is that, however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed, if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs: but, if the amendment will put them into such a position that they must be injured, it ought not to be made.

35 The trial judge in *Meyer* allowed the amendment as it clarified the matter in dispute and was not prejudicial. The decision was upheld on appeal.

36 The Crown also argues that the amendment is legally hopeless as it is barred by the *Limitations Act*, RSA 2000, c L-12, s. 3(1). The Crown relies upon *Royal Canadian Legion Norwood (Alberta) Branch 178 v. Edmonton (City)* (1994), 149 A.R. 25 (Alta. C.A.) for the proposition that actions must be brought within six years of discovery of the cause of action.

37 While this is correct, Ms. Poitras' counsel argues that the delay was subject to a final determination of the constitutional issues which lasted until December 10, 2009 when the Supreme Court of Canada refused leave in the Sawridge Band Action. Thus, any limitations act commences in December, 2009. Ms. Poitras' counsel also argues that it was only during examinations for discovery that it became apparent that damages from 1985 to 2003 are appropriate against the Crown because of the knowledge of the Sawridge Band and the knowledge of the Crown.

38 Therefore, the amendment based on these arguments is within the discoverability principle as enunciated in the *Royal Canadian Legion Norwood (Alberta) Branch 178* case. While the claim for damages could have been asserted earlier there is a legitimate position regarding discoverability and therefore the claim is not necessarily without hope because of any limitations argument. This conclusion is, of course, without prejudice to the right of the Crown to raise any limitations defences it chooses.

39 The Crown also relies on *Potskin v. Canada (Minister of Indian Affairs & Northern Development)*, 2011 FC 457 (F.C.) for the proposition that the claim is hopeless in any event as the Crown owes no duty to Ms. Poitras. This case is argued to stand for the proposition that the Crown owes no fiduciary duty to individual band members and their registration as Indians or in respect of the benefits of band members. While that action was dismissed, it was decided on the basis of its "particular facts" (para. 4). The case involved illegitimate children within the meaning of s. 11(1)(e) of the *Indian Act* who alleged a fiduciary duty against the Crown to protect their economic interests and ensure that a payment was made to a trustee on their behalf when their mother was transferred out of the band by virtue of the operation of s. 10 of the *Indian Act*. The *Potskin* decision may ultimately be determinative in this case as to any fiduciary obligation owed by the Crown, but such can only occur on a full factual trial record.

40 In this case, a claim for damages has been an issue since the outset although not specifically against the Crown. Discoveries are not yet complete. While the Crown argues that Ms. Poitras' motion is not timely and will not lead to an expeditious trial, in my view, given the length of these proceedings and the fact that damages has always been an issue, there is no real prejudice to the Crown.

41 The Crown points out that various documents including an August 12th document at tab 3(f), the September 22 order of Justice Hugessen and documents at tabs 3 (h) and (i) all indicate no damages were being sought against the Crown it was only costs. However, based on a consideration of all of the arguments of the parties, leave to amend will be granted to Ms. Poitras.

42 The Crown seeks costs for the last three years in the event the amendment sought is granted. While costs would normally be awarded to the Crown, in this case as was explained during the hearing, there are arrangements in place with the Crown regarding payment of fees. An award of costs in the Crown's favour does not accomplish anything as it will simply go from one pocket to another within the Crown. Thus, the amendment is allowed but no costs are awarded to the Crown.

43 Ms. Poitras' amendment to claim damages against the Crown is therefore allowed.

Striking the Affidavit of Roland Twinn

44 The Crown moved to strike the affidavit of Roland Twinn (Twinn Affidavit) filed in support of the Sawridge Band's motion for its amendment. It was argued that the Twinn Affidavit was improper as it did not comply with Rule 81 of the *Federal Courts Rules*. Rule 81 requires that affidavits be "confined to facts within the deponent's person al knowledge" or "statements as to the deponent's belief" where the grounds for the belief are stated. The Crown argued that the Twinn Affidavit contained nothing more than a summary of legal argument, hearsay, prior legal positions taken, interpretations of court rulings, opinions and conclusions of law without including any material facts or the sources of belief. It was argued that the Twinn Affidavit was scandalous and vexatious and should be struck.

45 Having reviewed the in detail the Twinn Affidavit, there is no doubt that it contains opinions, conclusions and legal argument. However, during the course of the hearing I determined that it was not necessary to deal with the issue of the Twinn Affidavit in detail. While I have read it and considered it, I give it little weight in coming to the decisions herein.

"Crossclaim" by the Sawridge Band against the Crown

46 There is no reason in law to let the Sawridge Band resurrect a "crossclaim" against the Crown. This so for two reasons. First, there is no such thing in the *Federal Courts Rules* as a "crossclaim". Crossclaims are creatures of provincial civil procedure and are claims asserted in a case by one defendant against a co-defendant [see, for example, Rule 28, Ontario Rules of Civil Procedure].

47 Second, and more importantly, the Sawridge Band had previously asserted a proper third party claim against the Crown. The Sawridge Band voluntarily discontinued that third party claim against the Crown. It did so at a time when there was a claim for damages by Ms. Poitras against the Sawridge Band. The third party claim included a claim for indemnification for liability for damages from the Crown. Litigation requires finality. Parties should not be allowed to take one position one day in which they voluntarily give up a claim and then the next day resile from that position and try and assert the same claim in a non-sanctioned pleading. It is akin to withdrawing an admission in a pleading. Thus, the

"crossclaim" cannot be allowed. Termination of the third party proceeding voluntarily by the Band is final and binding.

48 It is argued by counsel for the Sawridge Band that the current proposed crossclaim and the discontinued third party claim are very different. It is argued that the discontinued third party claim was based on constitutional issues while this crossclaim is based on the allegation that the Sawridge Band and the Crown interpreted the *Indian Act* the same way which resulted in membership being denied to Ms. Poitras. Counsel argues that if the Sawridge Band is responsible for damages then the Crown is equally as liable as the Sawridge Band for misinterpreting the applicability of s. 10(4) and 10(5) of the *Indian Act.*

49 The denial of the amendment of the Sawridge Band Pleading does not, however, preclude the Sawridge Band from arguing that any liability be off-loaded onto the Crown as it can allege defences as to why it should not be liable and why it is the Crown that should be liable or why liability might be apportioned if liability for any damages is found.

50 The argument by the Sawridge Band that this is a new cause of action on a new set of facts and was not subsumed within the prior discontinued third party claim is without merit. None of the facts currently alleged are new and have been known since at least the outset of this proceeding some 24 years ago when the dispute arose over the interpretation and meaning of s. 10(4) and s. 10(5) of the *Indian Act.*

51 While other arguments were raised during the course of the hearing, they do not impact the final decision on the motions. What is necessary is to bring the pleadings into line with the FCA's decision on the appeal of the Mootness Order.

Pleadings

52 The amendment sought by Ms. Poitras is granted. However, there is much in the proposed Amended Amended Statement of Claim that is now unnecessary in light of the FCA's decision: for example, paragraphs 7, 9, 9A, 13A, 14, 15, 15A, 15E (as against the Sawridge Band) sub-paragraphs b) through h) and 15E (as against the Crown) sub-paragraphs a) through d).

53 All of these paragraphs were in a prior iteration of Ms. Poitras' claim and all relate to the claim for membership in the Sawridge Band. In light of the FCA's decision, the membership issue is moot and these paragraphs are no longer necessary. However, in order to provide context it will be necessary to include one or more brief paragraphs outlining the resolution of the issue of membership.

54 With respect to the Sawridge Band Pleading, the Crown opposes paragraphs 6, 6(a), 9-12, 17, 25-30, 32, 34, 45 and 46b-f. As held above, the crossclaim is disallowed. Therefore, paragraphs 34, 45 and 46 b. through f. are struck without leave to amend. Paragraphs 35 — 44 and 46a. had been previously crossed out by the Sawridge Band.

55 Paragraphs 6 and 6(a) of the Sawridge Band Pleading, recited above, are also struck without leave to amend. These paragraphs deal directly with the membership of Ms. Poitras in the Sawridge Band and amount to a denial of membership on various grounds. Paragraph 7 is also struck as it responds to paragraph 7 in the Poitras Claim which is struck. Paragraph 17 is also struck as it relates to membership.

56 Paragraphs 9 through 12 also deal with membership and are struck but with leave to amend. They are a mish mash of legal argument, conclusions and evidence. Paragraph 9 reads, in part: "In the further alternative, the Sawridge Band states that the plaintiff did not become a member of the Band for the claimed period for two reasons". The two reasons as further elaborated in paragraph 9 and paragraphs 10 through 12 essentially contain legal argument justifying the positions taken by the Sawridge Band regarding the membership of Ms. Poitras. They address alleged misinterpretations of sub-sections 10(4) and 10(5) of the *Indian Act*; the Sawridge Band's Membership Code; that Ms. Poitras did not "satisfactorily" complete a membership application; and, an allegation that the Sawridge Band is not liable for damages but if there is liability it is that of the Crown. This mish mash pleading contains the nuggets of matters that the Sawridge Band may rely upon at trial: for example, that by virtue of the misinterpretation they are not liable to Ms. Poitras; and that if there is any liability it is that of the Crown (paragraph 11). To this limited extent the Sawridge Band is granted leave to amend these provisions as it will bring it into line with the FCA decision.

57 With respect to paragraphs 25 -30, all of these paragraphs relate to an allegation that the Crown failed to provide

information and resources required by the Sawridge Band to consider Ms. Poitras' application for membership or reinstatement to membership in the Sawridge Band. Again, as membership is not a live issue, these paragraphs must be struck.

58 All matters alleging that Ms. Poitras is not a member of the Sawridge Band or that she failed to complete a membership application are struck without leave to amend. As was noted by Justice Rothstein in *Sawridge Band v. R.*, 2004 FCA 16 (F.C.A.) at para. 35:

> 35 For these persons entitled to membership a simple request to be included in the Band's membership is all that is required. The fact that the individuals in question [of which Ms. Poitras was one] did not complete a Sawridge Band membership application is irrelevant. As Hugessen J. found, requiring acquired rights individuals to comply with the Sawridge Band membership code, in which preconditions had been created to membership, was in contravention of the Act.

59 In the result, the Poitras Claim and the Sawridge Band Pleading shall be amended in accordance with these reasons.

60 With respect to costs, there shall be no costs as between the Crown and Ms. Poitras for the reasons discussed above. As between the Sawridge Band and the Crown, costs were not specifically addressed at the hearing. The Crown was substantially successful in opposing the amendments, particularly the "crossclaim". Thus, in the ordinary course costs should be in favour of the Crown at a fixed amount. The Sawridge Band and the Crown are encouraged to agree upon costs, failing which written submissions on costs may be made by the Crown within 20 days of this order and by the Sawridge Band within 10 days thereafter.

Order

THIS COURT ORDERS that:

1. The Plaintiff is granted leave to amend her Statement of Claim in accordance with these reasons and for greater particularity paragraphs 7, 9, 9A, 13A, 14, 15, 15A, 15E (as against the Sawridge Band) sub-paragraphs b) through h) and 15 E (as against the Crown) sub-paragraphs a) through d) are struck.
2. The Defendants, Walter Patrick Twinn, the Council of the Sawridge Band and the Sawridge Band are granted leave to amend their Statement of Defence in accordance with these reasons and for greater particularity:
    a. Paragraphs 6, 6(a), 7, 17, 25 — 30, 34, 45 and 46 b. through f. are struck without leave to amend; and,
    b. Paragraphs 9 — 12 are struck but with leave to amend.
3. The pleadings shall be amended in accordance with this order within 30 days of the date of this Order.
4. The parties shall provide mutual available dates to the Court in order to convene a case conference to review and discuss the next steps in this proceeding.

Aboriginal woman's motion granted; First Nation band's motion granted in part.

Tab B-5

Bertha L'Hirondelle suing on her own behalf and on behalf of all other members of the Sawridge Band (*Plaintiffs*)

v.

Her Majesty the Queen (*Defendant*)

and

Native Council of Canada, Native Council of Canada (Alberta), Non-Status Indian Association of Alberta, Native Women's Association of Canada(*Interveners*)

Indexed as: Sawridge Band v. Canada (T.D.)

Trial Division, Hugessen J.--Toronto, March 19 and 20; Edmonton, March 27, 2003.

Native Peoples -- Registration -- Crown motion for interlocutory declaration or mandatory injunction requiring registration on Band List of persons having acquired rights under 1985 amendments to Indian Act -- Crown says Band has refused to comply with Bill C-31 remedial provisions -- Interim relief necessary due to old age of women seeking registration, protracted litigation -- Band's argument: doing only what empowered by legislation -- Interim declaration could not be granted -- Band having effectively given itself injunction to which not entitled in terms of irreparable harm, balance of convenience -- Public interest damaged by Band's flouting of law enacted by Parliament -- Court having power to grant injunction -- Crown not lacking standing -- Irrelevant that some of 11 women in question not having applied under Band membership rules as implicitly refused -- Amendments intended to bring Indian Act into line with Charter guarantee of gender equality -- Band having imposed onerous membership application rules for acquired rights persons -- Whether acquired rights persons entitled to automatic membership, inclusion in Band's own List -- As of date assumed control of List, Band obliged to include names of acquired rights women -- Could not create membership barriers for those deemed members by law -- Intention of Parliament revealed by House of Commons debates -- Amendments recognized women's rights at expense of certain Native rights -- Mandatory injunction granted.

Administrative Law -- Judicial Review -- Injunctions -- Interlocutory mandatory injunction sought by Crown requiring registration on Indian Band List of persons having acquired rights under 1985 Indian Act amendments -- Crown says Band refused to comply with remedial legislation -- Interim relief needed as litigation protracted, women seeking registration aged -- Band says just exercising powers conferred by legislation -- Band having, in effect, given itself injunction, disregarding law -- Three-part test reversed in unusual circumstances: has Band raised serious issue, will it suffer irreparable harm if law enforced, where lies balance of convenience? -- Band not meeting last two parts of test -- Enforcement of law rarely causes irreparable harm -- Flouting of law damaging to public interest -- Private interests of women seeking registration -- Delegated, subordinate Band legislation (membership rules) insufficient to abrogate Charter-protected rights -- Mandatory injunction granted.

Some 17 years ago, plaintiff commenced litigation against the Crown seeking a declaration that the 1985 amendments to the *Indian Act*--Bill C-31--were unconstitutional. That legislation, while conferring on bands the right to control their own band lists, obliged them to include certain persons in their membership.

This motion by the Crown was for an interlocutory declaration, pending final determination of plaintiff's action, that those who acquired the right of membership in the Sawridge Band before it took control of its List, be deemed to be registered thereon or, in the alternative, an interlocutory mandatory injunction requiring plaintiffs to register such persons. The Crown alleged that the Band has refused to comply with the remedial provisions of Bill C-31 and that 11 women who lost Band membership due to marriage to non-Indians continue to be denied the benefits of the amendments. Interim relief is needed since these women are getting on in years and it may still be a long time before a trial date is fixed. The Band argued that it is merely exercising the powers conferred upon it by the legislation.

Held, a mandatory injunction should be granted.

An interim declaration of right could not be granted for that is a contradiction in terms. A declaration of right puts an end to a matter. On the other hand, there can be no entitlement to have an unproved right declared to exist. Therefore the motion was considered as one for an interlocutory injunction.

In the unusual--perhaps unique--circumstances of this case, the three-part test was, in effect, reversed. If the allegations of non-compliance are true, the Band has effectively given itself an injunction, choosing to act as if the law did not exist. Would the Band have been entitled to an interlocutory injunction suspending the effects of Bill C-31 pending trial? The classic test required that the Court determine (1) whether the Band had raised a serious issue, (2) whether it will suffer irreparable harm if the law is enforced, and (3) where lay the balance of convenience. The test was not altered in that the injunction sought was mandatory in nature.

While the Band met the first part of the test, it could not possibly meet the other two parts. Rarely will the enforcement of a law cause irreparable harm. Any inconvenience to the Band in admitting 11 elderly women to membership is nothing compared to the damage to the public interest caused by the flouting of a law enacted by Parliament and to the private interests of the these women who are unlikely to benefit from a statute adopted with persons such as them in mind.

The argument that the Court lacked power to grant the injunction in that the Crown had not alleged a cause of action in support thereof in its statement of defence, was rejected. The Court's power to issue injunctions is granted by *Federal Court Act*, section 44 and is very broad. Nor could the Court agree that the Crown lacked standing. It is the Crown which represents the public interest in upholding the laws of Canada unless and until struck down by a court of competent jurisdiction.

It was irrelevant that only some of these women had applied in accordance with the Band's membership rules. They were refused, at least implicitly, because they could not fulfil the onerous application requirements.

The amending statute was made retroactive to the date Charter, section 15 took effect. That was an indication that the amendments were intended to bring the legislation into line with the Charter guarantee of gender equality.

The Band lost no time in taking control of its List and none of these 11 women were able to have their names entered by the Registrar before the Band took control. Under the Band's membership rules, to secure membership acquired rights individuals must either be resident on the reserve or demonstrate a significant commitment to the Band and they must also complete a 43-page application form requiring the composition of several essays. In addition, they must submit to interviews. If the legislation provides for automatic membership entitlement, these requirements would violate it. The Act does entitle women who lost status for marrying non-Indians to be registered as status Indians and to have their names automatically added to the Departmental Band List. The question remains as to whether a band is obliged to add names to its own Band List. Unfortunately, subsections 10(4) and 10(5) do not make it absolutely clear that acquired rights persons are entitled to automatic membership and that a band may not establish pre-conditions for membership. But the use of "shall" in section 8 makes it clear that a band must enter the names of all entitled persons on the list, which it maintains. As of the date the Sawridge Band assumed control of its List, it was obliged to include therein the names of the acquired rights women. A band may not create barriers to membership for those deemed by law to be members. By reference to certain debates in the House of Commons and what was said by the Minister to the Standing Committee on Indian Affairs and Northern Development, it was clear that Parliament's intention was to create an automatic right to Band membership even though this would restrict a band's control over membership. The legislation establishes a membership regime that recognizes women's rights at the expense of certain Native rights.

Subsection 10(5) states, by reference to paragraph 11(*c*), that nothing can deprive an acquired rights individual of automatic membership entitlement unless the entitlement is subsequently lost. The Band's membership rules fail to make specific provision for the subsequent loss of membership and establishment of the application requirements was not enough to abrogate the rights of Charter-protected persons. The Band's application of its membership rules in which pre-conditions were created to membership, is in contravention of the *Indian Act*.

A mandatory injunction should be granted and the names of these 11 acquired rights women shall be added to the Band List. They shall be accorded all the rights of Band membership.

statutes and regulations judicially

considered

An Act to amend the Indian Act, R.S.C., 1985 (1st Supp.), c. 32.

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule

B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 15.

Federal Court Act, R.S.C., 1985, c. F-7 , s. 44.

Federal Court Rules, 1998, SOR/98-106, r. 369.

Indian Act, R.S.C., 1985, c. I-5 , ss. 2(1) "member of a band", 5 (as am. by R.S.C., 1985 (1st Supp.), c. 32, s. 4), 6 (as am. *idem*), 8 (as am. *idem*), 9 (as am. *idem*), 10 (as am. *idem*), 11 (as am. *idem*), 12 (as am. *idem*).

cases judicially considered

applied:

Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v. Canadian Pacific Ltd., 1996 CanLII 215 (SCC), [1996] 2 S.C.R. 495; (1996), 136 D.L.R. (4th) 289; 21 B.C.L.R. (3d) 201; 45 Admin. L.R. (2d) 95; 50 C.P.C. (3d) 128; 198 N.R. 161.

considered:

Sawridge Band v. Canada, 1997 CanLII 5294 (FCA), [1997] 3 F.C. 580; (1997), 3 Admin. L.R. (3d) 69; 215 N.R. 133 (C.A.); *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, 1987 CanLII 79 (SCC), [1987] 1 S.C.R. 110; (1987), 38 D.L.R. (4th) 321; [1987] 3 W.W.R. 1; 46 Man. R. (2d) 241; 25 Admin. L.R. 20; 1986 CanLII 5 (SCC), 87 CLLC 14,015; 18 C.P.C. (2d) 273; 73 N.R. 341; *RJR -- MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311; (1994), 111 D.L.R. (4th) 385; 54 C.P.R. (3d) 114; 164 N.R. 1; 60 Q.A.C. 241.

referred to:

Sankey v. Minister of Transport, [1979] 1 F.C. 134 (T.D.); *Ansa International Rent-a-Car (Canada) Ltd. v. American International Rent-a-Car Corp.*(1990), 32 C.P.R. (3d) 340; 36 F.T.R. 98 (F.C.T.D.); *Canada (Human Rights Commission) v. Canadian Liberty Net*, 1998 CanLII 818 (SCC), [1998] 1 S.C.R. 626; (1998), 157 D.L.R. (4th) 385; 6 Admin. L.R. (3d) 1; 22 C.P.C. (4th) 1; 224 N.R. 241.

authors cited

Canada. *House of Commons Debates*, Vol. II, 1st Sess., 33rd Parl., March 1, 1985, p. 2644.

Canada. House of Commons. *Minutes of Proceedings and Evidence of the Standing Committee on Indian Affairs and Northern Development*, Issue No. 12 (March 7, 1985).

MOTION for an interlocutory declaration or an interlocutory mandatory injunction with respect to the registration of names on an Indian Band List. Mandatory injunction granted.

appearances:

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Mary Eberts for intervener Native Women's Association of Canada.

solicitors of record:

Aird & Berlis LLP, Toronto, for plaintiffs.

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Lang Michener, Ottawa, for intervener Native Council of Canada.

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The following are the reasons for order and order rendered in English by

[1]Hugessen J.: In this action, started some 17 years ago, the plaintiff has sued the Crown seeking a declaration that the 1985 amendments to the *Indian Act*, R.S.C., 1985, c. I-5, commonly known as Bill C-31 [*An Act to amend the Indian Act*, R.S.C., 1985 (1st Supp.), c. 32], are unconstitutional. While I shall later deal in detail with the precise text of the relevant amendments, I cannot do better here than reproduce the Court of Appeal's brief description of the thrust of the legislation when it set aside the first judgment herein and ordered a new trial [*Sawridge Band v. Canada*, 1997 CanLII 5294 (FCA), [1997] 3 F.C. 580 (C.A.), at paragraph 2]:

Briefly put, this legislation, while conferring on Indian bands the right to control their own band lists, obliged bands to include in their membership certain persons who became entitled to Indian status by virtue of the 1985 legislation. Such persons included: women who had become disentitled to Indian status through marriage to non-Indian men and the children of such women; those who had lost status because their mother and paternal grandmother were non-Indian and had gained Indian status through marriage to an Indian; and those who had lost status on the basis that they were illegitimate offspring of an Indian woman and a non-Indian man. Bands assuming control of their band lists would be obliged to accept all these people as members. Such bands would also be allowed, if they chose, to accept certain other categories of persons previously excluded from Indian status.

[2]The Crown defendant now moves for the following interlocutory relief:

a. An interlocutory declaration that, pending a final determination of the Plaintiff's action, in accordance with the provisions of the *Indian Act*, R.S.C. 1985 c. I-5, as amended, (the "*Indian Act, 1985*") the individuals who acquired the right to be members of the Sawridge Band before it took control of its own Band List, shall be deemed to be registered on the Band List as members of the Sawridge Band, with the full rights and privileges enjoyed by all band members;

b. In the alternative, an interlocutory mandatory injunction, pending a final resolution of the Plaintiffs' action, requiring the Plaintiffs to enter or register on the Sawridge Band List the names of the individuals who acquired the right to be members of the Sawridge Band before it took control of its Band list, with the full rights and privileges enjoyed by all band members.

[3]The basis of the Crown's request is the allegation that the plaintiff Band has consistently and persistently refused to comply with the remedial provisions of Bill C-31, with the result that 11 women, who had formerly been members of the Band and had lost both their Indian status and their Band membership by marriage to non-Indians pursuant to the former provisions of paragraph 12(1)(*b*) of the Act, are still being denied the benefits of the amendments.

[4]Because these women are getting on in years (a twelfth member of the group has already died and one other is seriously ill) and because the action, despite intensive case management over the past five years, still seems to be a long way from being ready to have the date of the new trial set down, the Crown alleges that it is urgent that I should provide some form of interim relief before it is too late.

[5]In my view, the critical and by far the most important question raised by this motion is whether the Band, as the Crown alleges, is in fact refusing to follow the provisions of Bill C-31 or whether, as the Band alleges, it is simply exercising the powers and privileges granted to it by the legislation itself. I shall turn to that question shortly, but before doing so, I want to dispose of a number of subsidiary or incidental questions which were discussed during the hearing.

[6]First, I am quite satisfied that the relief sought by the Crown in paragraph a. above is not available. An interim declaration of right is a contradiction in terms. If a court finds that a right exists, a declaration to that effect is the end of the matter and nothing remains to be dealt with in the final judgment. If, on the other hand, the right is not established to the court's satisfaction, there can be no entitlement to have an unproved right declared to exist. (See *Sankey v. Minister of Transport*, [1979] 1 F.C. 134 (T.D.).) I accordingly treat the motion as though it were simply seeking an interlocutory injunction.

[7]Second, in the unusual and perhaps unique circumstances of this case, I accept the submission that since I am dealing with a motion seeking an interlocutory injunction, the well-known three-part test established in such cases as *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, 1987 CanLII 79 (SCC), [1987] 1 S.C.R. 110 and *RJR--MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311 should in effect be reversed. The universally applicable general rule for anyone who contests the constitutionality of legislation is that such legislation must be obeyed unless and until it is either stayed by court

order or is set aside on final judgment. Here, assuming the Crown's allegations of non-compliance are correct, the plaintiff Band has effectively given itself an injunction and has chosen to act as though the law which it contests did not exist. I can only permit this situation to continue if I am satisfied that the plaintiff could and should have been given an interlocutory injunction to suspend the effects of Bill C-31 pending trial. Applying the classic test, therefore, requires that I ask myself if the plaintiff has raised a serious issue in its attack on the law, whether the enforcement of the law will result in irreparable harm to the plaintiff, and finally, determine where the balance of convenience lies. I do not accept the proposition that because the injunction sought is of a mandatory nature, the test should in any way be different from that set down in the cited cases. (See*Ansa International Rent-a-Car (Canada) Ltd. v. American International Rent-a-Car Corp.* (1990), 32 C.P.R. (3d) 340 (F.C.T.D.).)

[8]It is not contested by the Crown that the plaintiff meets the first part of the test, but it seems clear to me that it cannot possibly meet the other two parts. It is very rare that the enforcement of a duly adopted law will result in irreparable harm and there is nothing herein which persuades me that this is such a rarity. Likewise, whatever inconvenience the plaintiff may suffer by admitting 11 elderly ladies to membership is nothing compared both to the damage to the public interest in having Parliament's laws flouted and to the private interests of the women in question who, at the present rate of progress, are unlikely ever to benefit from a law which was adopted with people in their position specifically in mind.

[9]Thirdly, I reject the proposition put forward by the plaintiff that would deny the Court the power to issue the injunction requested because the Crown has not alleged a cause of action in support thereof in its statement of defence. The Court's power to issue injunctions is granted by section 44 of the *Federal Court Act* [R.S.C., 1985, c. F-7] and is very broad. Interpreting a similar provision in a provincial statute in the case of *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v. Canadian Pacific Ltd.*, 1996 CanLII 215 (SCC), [1996] 2 S.C.R. 495, the Supreme Court said at page 505:

Canadian courts since *Channel Tunnel* have applied it for the proposition that the courts have jurisdiction to grant an injunction where there is a justiciable right, wherever that right may fall to be determined. . . . This accords with the more general recognition throughout Canada that the court may grant interim relief where final relief will be granted in another forum.

[10]The Supreme Court of Canada confirmed the Federal Court of Canada's broad jurisdiction to grant relief under section 44: *Canada (Human Rights Commission) v. Canadian Liberty Net*, 1998 CanLII 818 (SCC), [1998] 1 S.C.R. 626.

[11]Likewise, I do not accept the plaintiff's argument to the effect that the Crown has no standing to bring the present motion. I have already indicated that I feel that there is a strong public interest at play in upholding the laws of Canada unless and until they are struck down by a court of competent jurisdiction. That interest is uniquely and properly represented by the Crown and its standing to bring the motion is, in my view, unassailable.

[12]Finally, the plaintiff argued strongly that the women in question have not applied for membership. This argument is a simple "red herring". It is quite true that only some of them have

applied in accordance with the Band's membership rules, but that fact begs the question as to whether those rules can lawfully be used to deprive them of rights to which Parliament has declared them to be entitled. The evidence is clear that all of the women in question wanted and sought to become members of the Band and that they were refused at least implicitly because they did not or could not fulfil the rules' onerous application requirements.

[13]This brings me at last to the main question: has the Band refused to comply with the provisions of Bill C-31 so as to deny to the 11 women in question the rights guaranteed to them by that legislation?

[14]I start by setting out the principal relevant provisions.

2. (1) . . .

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

. . .

5. (1) There shall be maintained in the Department an Indian Register in which shall be recorded the name of every person who is entitled to be registered as an Indian under this Act.

. . .

(3) The Registrar may at any time add to or delete from the Indian Register the name of any person who, in accordance with this Act, is entitled or not entitled, as the case may be, to have his name included in the Indian Register.

. . .

(5) The name of a person who is entitled to be registered is not required to be recorded in the Indian Register unless an application for registration is made to the Registrar.

6. (1) Subject to section 7, a person is entitled to be registered if

. . .

(*c*) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(*a*)(iv), paragraph 12(1)(*b*) or subsection 12(2) or under subparagraph 12(1)(*a*)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;

. . .

8. There shall be maintained in accordance with this Act for each band a Band List in which shall be entered the name of every person who is a member of that band.

9. (1) Until such time as a band assumes control of its Band List, the Band List of that band shall be maintained in the Department by the Registrar.

(2) The names in a Band List of a band immediately prior to April 17, 1985 shall constitute the Band List of that band on April 17, 1985.

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

. . .

(5) The name of a person who is entitled to have his name entered in a Band List maintained in the Department is not required to be entered therein unless an application for entry therein is made to the Registrar.

10. (1) A band may assume control of its own membership if it establishes membership rules for itself in writing in accordance with this section and if, after the band has given appropriate notice of its intention to assume control of its own membership, a majority of the electors of the band gives its consent to the band's control of its own membership.

(2) A band may, pursuant to the consent of a majority of the electors of the band,

(*a*) after it has given appropriate notice of its intention to do so, establish membership rules for itself; and

(*b*) provide for a mechanism for reviewing decisions on membership.

. . .

(4) Membership rules established by a band under this section may not deprive any person who had the right to have his name entered in the Band List for that band, immediately prior to the time the rules were established, of the right to have his name so entered by reason only of a situation that existed or an action that was taken before the rules came into force.

(5) For greater certainty, subsection (4) applies in respect of a person who was entitled to have his name entered in the Band List under paragraph 11(1)(*c*) immediately before the band assumed control of the Band List if that person does not subsequently cease to be entitled to have his name entered in the Band List.

(6) Where the conditions set out in subsection (1) have been met with respect to a band, the council of the band shall forthwith give notice to the Minister in writing that the band is

assuming control of its own membership and shall provide the Minister with a copy of the membership rules for the band.

(7) On receipt of a notice from the council of a band under subsection (6), the Minister shall, if the conditions set out in subsection (1) have been complied with, forthwith

(*a*) give notice to the band that it has control of its own membership; and

(*b*) direct the Registrar to provide the band with a copy of the Band List maintained in the Department.

(8) Where a band assumes control of its membership under this section, the membership rules established by the band shall have effect from the day on which notice is given to the Minister under subsection (6), and any additions to or deletions from the Band List of the band by the Registrar on or after that day are of no effect unless they are in accordance with the membership rules established by the band.

(9) A band shall maintain its own Band List from the date on which a copy of the Band List is received by the band under paragraph (7)(*b*), and, subject to section 13.2, the Department shall have no further responsibility with respect to that Band List from that date.

(10) A band may at any time add to or delete from a Band List maintained by it the name of any person who, in accordance with the membership rules of the band, is entitled or not entitled, as the case may be, to have his name included in that list.

. . .

11. (1) Commencing on April 17, 1985, a person is entitled to have his name entered in a Band List maintained in the Department for a band if

. . .

(*c*) that person is entitled to be registered under paragraph 6(1)(*c*) and ceased to be a member of that band by reason of the circumstances set out in that paragraph; . . . .

. . .

(2) Commencing on the day that is two years after the day that an Act entitled *An Act to amend the Indian Act*, introduced in the House of Commons on February 28, 1985, is assented to, or on such earlier day as may be agreed to under section 13.1, where a band does not have control of its Band List under this Act, a person is entitled to have his name entered in a Band List maintained in the Department for the band

(*a*) if that person is entitled to be registered under paragraph 6(1)(*d*) or (*e*) and ceased to be a member of that band by reason of the circumstances set out in that paragraph; or

(*b*) if that person is entitled to be registered under paragraph 6(1)(*f*) or subsection 6(2) and a parent referred to in that provision is entitled to have his name entered in the Band List or, if no longer living, was at the time of death entitled to have his name entered in the Band List.

[15]The amending statute was adopted on June 28, 1985 but was made to take effect retroactively to April 17, 1985, the date on which section 15 of theCharter [*Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]] took effect. This fact in itself, without more, is a strong indication that one of the prime objectives of the legislation was to bring the provisions of the *Indian Act* into line with the new requirements of that section, particularly as they relate to gender equality.

[16]On July 8, 1985, the Band gave notice to the Minister that it intended to avail itself of the provisions of section 10 allowing it to assume control of its own Band List and that date, therefore, is the effective date of the coming into force of the Band's membership rules. Because Bill C-31 was technically in force but realistically unenforceable for over two months before it was adopted and because the Band wasted no time in assuming control of its own Band List, none of the 11 women who are in question here were able to have their names entered on the Band List by the Registrar prior to the date on which the Band took such control.

[17]The relevant provisions of the Band's membership rules are as follows:

3. Each of the following persons shall have a right to have his or her name entered in the Band List:

(a) any person who, but for the establishment of these rule, would be entitled pursuant to subsection 11(1) of the Act to have his or her name entered in the Band List required to be maintained in the Department and who, at any time after these rules come into force, either

(i) is lawfully resident on the reserve; or

(ii) has applied for membership in the band and, in the judgment of the Band Council, has a significant commitment to, and knowledge of, the history, customs, traditions, culture and communal life of the Band and a character and lifestyle that would not cause his or her admission to membership in the Band to be detrimental to the future welfare or advancement of the Band;

. . .

5. In considering an application under section 3, the Band Council shall not refuse to enter the name of the applicant in the Band List by reason only of a situation that existed or an action that was taken before these Rules came into force.

. . .

11. The Band Council may consider and deal with applications made pursuant to section 3 of these Rules according to such procedure and as such time or times as it shall determine in its discretion and, without detracting from the generality of the foregoing, the Band Council may conduct such interviews, require such evidence and may deal with any two or more of such applications separately or together as it shall determine in its discretion.

[18]Subparagraphs 3(a)(i) and (ii) clearly create pre-conditions to membership for acquired rights individuals, referred to in this provision by reference to subsection 11(1) of the Act. Those individuals must either be resident on the reserve, or they must demonstrate a significant commitment to the Band. In addition, the process as described in the evidence and provided for in section 11 of the membership rules requires the completion of an application form some 43 pages in length and calling upon the applicant to write several essays as well as to submit to interviews.

[19]The question that arises from these provisions and counsel's submissions is whether the Act provides for an automatic entitlement to Band membership for women who had lost it by reason of the former paragraph 12(1)(*b*). If it does, then the pre-conditions established by the Band violate the legislation.

[20]Paragraph 6(1)(*c*) of the Act entitles, *inter alia*, women who lost their status and membership because they married non-Indian men to be registered as status Indians.

[21]Paragraph 11(1)(*c*) establishes, *inter alia*, an automatic entitlement for the women referred to in paragraph 6(1)(*c*) to have their names added to the Band List maintained in the Department.

[22]These two provisions establish both an entitlement to Indian status, and an entitlement to have one's name added to a Band List maintained by the Department. These provisions do not specifically address whether bands have the same obligation as the Department to add names to their Band List maintained by the Band itself pursuant to section 10.

[23]Subsection 10(4) attempts to address this issue by stipulating that nothing in a band's membership code can operate to deprive a person of her or his entitlement to registration "by reason only of" a situation that existed or an action that was taken before the rules came into force. For greater clarity, subsection 10(5) stipulates that subsection 10(4) applies to persons automatically entitled to membership pursuant to paragraph 11(1)(*c*), unless they subsequently cease to be entitled to membership.

[24]It is unfortunate that the awkward wording of subsections 10(4) and 10(5) does not make it absolutely clear that they were intended to entitle acquired rights individuals to automatic membership, and that the Band is not permitted to create pre-conditions to membership, as it has done. The words "by reason only of" in subsection 10(4) do appear to suggest that a band might legitimately refuse membership to persons for reasons other than those contemplated by the provision. This reading of subsection 10(4), however, does not sit easily with the other provisions in the Act as well as clear statements made at the time regarding the amendments when they were enacted in 1985.

[25]The meaning to be given to the word "entitled" as it is used in paragraph 6(1)(*c*) is clarified and extended by the definition of "member of a band" in section 2, which stipulates that a person who is entitled to have his name appear on a Band List is a member of the Band. Paragraph 11(1)(*c*) requires that, commencing on April 17, 1985, the date Bill C-31 took effect, a person was entitled to have his or her name entered in a Band List maintained by the Department of Indian Affairs for a band if, *inter alia*, that person was entitled to be registered under paragraph 6(1)(*c*) of the 1985 Act and ceased to be a member of that band by reason of the circumstances set out in paragraph 6(1)(*c*).

[26]While the Registrar is not obliged to enter the name of any person who does not apply therefor (see subsection 9(5)), that exemption is not extended to a band which has control of its list. However, the use of the imperative "shall" in section 8, makes it clear that the band is obliged to enter the names of all entitled persons on the list which it maintains. Accordingly, on July 8, 1985, the date the Sawridge Band obtained control of its List, it was obliged to enter thereon the names of the acquired rights women. When seen in this light, it becomes clear that the limitation on a band's powers contained in subsections 10(4) and 10(5) is simply a prohibition against legislating retrospectively: a band may not create barriers to membership for those persons who are by law already deemed to be members.

[27]Although it deals specifically with Band Lists maintained in the Department, section 11 clearly distinguishes between automatic, or unconditional, entitlement to membership and conditional entitlement to membership. Subsection 11(1) provides for automatic entitlement to certain individuals as of the date the amendments came into force. Subsection 11(2), on the other hand, potentially leaves to the band's discretion the admission of the descendants of women who "married out."

[28]The debate in the House of Commons, prior to the enactment of the amendments, reveals Parliament's intention to create an automatic entitlement to women who had lost their status because they married non-Indian men. Minister Crombie stated as follows (*House of Commons Debates*, Vol. II, March 1, 1985, page 2644):

. . . today, I am asking Hon. Members to consider legislation which will eliminate two historic wrongs in Canada's legislation regarding Indian people. These wrongs are discriminatory treatment based on sex and the control by Government of membership in Indian communities.

[29]A little further, he spoke about the careful balancing between these rights in the Act. In this section, Minister Crombie referred to the difference between status and membership. He stated that, while those persons who lost their status and membership should have both restored, the descendants of those persons are only automatically entitled to status (*House of Commons Debates, idem*, at page 2645):

This legislation achieves balance and rests comfortably and fairly on the principle that those persons who lost status and membership should have their status and membership restored. While there are some who would draw the line there, in my view fairness also demands that the first generation descendants of those who were wronged by discriminatory legislation should have status under the Indian Act so that they will be eligible for individual benefits provided by

the federal Government. However, their relationship with respect to membership and residency should be determined by the relationship with the Indian communities to which they belong.

[30]Still further on, the Minister stated the fundamental purposes of amendments, and explained that, while those purposes may conflict, the fairest balance had been achieved (*House of Commons Debates, idem*, at page 2646):

. . . I have to reassert what is unshakeable for this Government with respect to the Bill. First, it must include removal of discriminatory provisions in theIndian Act; second, it must include the restoration of status and membership to those who lost status and membership as a result of those discriminatory provisions; and third, it must ensure that the Indian First Nations who wish to do so can control their own membership. Those are the three principles which allow us to find balance and fairness and to proceed confidently in the face of any disappointment which may be expressed by persons or groups who were not able to accomplish 100 per cent of their own particular goals.

This is a difficult issue. It has been for many years. The challenge is striking. The fairest possible balance must be struck and I believe it has been struck in this Bill. I believe we have fulfilled the promise made by the Prime Minister in the Throne Speech that discrimination in the Indian Act would be ended.

[31]At a meeting of the Standing Committee on Indian Affairs and Northern Development, Minister Crombie again made it clear that, while the Bill works towards full Indian self-government, the Bill also has as a goal remedying past wrongs (*Minutes of Proceedings and Evidence on the Standing Committee on Indian Affairs and Northern Development*, Issue No. 12, March 7, 1985, at page 12:7):

Several members of this committee said during the debate on Friday that this bill is just a beginning and not an end in itself, but rather the beginning of a process aimed at full Indian self-government. I completely agree with that view. But before we can create the future, some of the wrongs of the past have to be corrected. That is, in part, the purpose of Bill C-31.

[32]Furthermore, in the Minister's letter to Chief Walter Twinn on September 26, 1985, in which he accepted the membership code, the Minister reminded Chief Twinn of subsections 10(4) and (5) of the Act, and stated as follows:

We are both aware that Parliament intended that those persons listed in paragraph 6(1)(c) would at least initially be part of the membership of a Band which maintains its own list. Read in isolation your membership rules would appear to create a prerequisite to membership of lawful residency or significant commitment to the Band. However, I trust that your membership rules will be read in conjunction with the Act so that the persons who are entitled to reinstatement to Band membership, as a result of the Act, will be placed on your Band List. The amendments were designed to strike a delicate balance between the right of individuals to Band membership and the right of Bands to control their membership. I sponsored the Band control of membership amendments with a strongly held trust that Bands would fulfill their obligations and act fairly and reasonably. I believe you too feel this way, based on our past discussions.

[33]Sadly, it appears from the Band's subsequent actions that the Minister's "trust" was seriously misplaced. The very provisions of the Band's rules to which the Minister drew attention have, since their adoption, been invoked by the Band consistently and persistently to refuse membership to the 11 women in question. In fact, since 1985, the Band has only admitted three acquired rights women to membership, all of them apparently being sisters of the addressee of the Minister's letter.

[34]The quoted excerpts make it abundantly clear that Parliament intended to create an automatic right to Band membership for certain individuals, notwithstanding the fact that this would necessarily limit a band's control over its membership.

[35]In a very moving set of submissions on behalf of the plaintiff, Mrs. Twinn argued passionately that there were many significant problems with constructing the legislation as though it pits women's rights against Native rights. While I agree with Mrs. Twinn's concerns, the debates demonstrate that there existed at that time important differences between the positions of several groups affected by the legislation, and that the legislation was a result of Parliament's attempt to balance those different concerns. As such, while I agree wholeheart-edly with Mrs. Twinn that there is nothing inherently contradictory between women's rights and Native rights, this legislation nevertheless sets out a regime for membership that recognizes women's rights at the expense of certain Native rights. Specifically, it entitles women who lost their status and band membership on account of marrying non-Indian men to automatic band membership.

[36]Subsection 10(5) is further evidence of my conclusion that the Act creates an automatic entitlement to membership, since it states, by reference to paragraph 11(1)(*c*), that nothing can deprive acquired rights individuals of their automatic entitlement to membership unless they subsequently lose that entitlement. The Band's membership rules do not include specific provisions that describe the circumstances in which acquired rights individuals might subsequently lose their entitlement to membership. Enacting application requirements is certainly not enough to deprive acquired rights individuals of their automatic entitlement to band membership, pursuant to subsection 10(5). To put the matter another way, Parliament having spoken in terms of entitlement and acquired rights, it would take more specific provisions than what is found in section 3 of the membership rules for delegated and subordinate legislation to take away or deprive Charter protected persons of those rights.

[37]As a result, I find that the Band's application of its membership rules, in which pre-conditions have been created to membership, is in contravention of the *Indian Act*.

[38]While not necessarily conclusive, it seems that the Band itself takes the same view. Although on the hearing of the present motion, it vigorously asserted that it was in compliance with the Act, its statement of claim herein asserts without reservation that Bill C-31 has the effect of imposing on it members that it does not want. Paragraph 22 of the fresh as amended statement of claim reads as follows:

22. The plaintiffs state that with the enactment of the Amendments, Parliament attempted unilaterally to require the First Nations to admit certain persons to membership. The

Amendments granted individual membership rights in each of the First Nations without their consent, and indeed over their objection. Furthermore, such membership rights were granted to individuals without regard for their actual connection to or interest in the First Nation, and regardless of their individual desires or that of the First Nation, or the circumstances pertaining the First Nation. This exercise of power by Parliament was unprecedented in the predecessor legislation.

[39]I shall grant the mandatory injunction as requested and will specifically order that the names of the 11 known acquired rights women be added to the Band List and that they be accorded all the rights of membership in the Band.

[40]I reserve the question of costs for the Crown. If it seeks them, it should do so by moving pursuant to rule 369 of the *Federal Court Rules, 1998*[SOR/98-106]. While the interveners have made a useful contribution to the debate, I would not order any costs to or against them.

ORDER

The plaintiff and the persons on whose behalf she sues, being all the members of the Sawridge Band, are hereby ordered, pending a final resolution of the plaintiff's action, to enter or register on the Sawridge Band List the names of the individuals who acquired the right to be members of the Sawridge Band before it took control of its Band List, with the full rights and privileges enjoyed by all Band members.

Without restricting the generality of the foregoing, this order requires that the following persons, namely, Jeannette Nancy Boudreau, Elizabeth Courtoreille, Fleury Edward DeJong, Roseina Anna Lindberg, Cecile Yvonne Loyie, Elsie Flora Loyie, Rita Rose Mandel, Elizabeth Bernadette Poitras, Lillian Ann Marie Potskin, Margaret Ages Clara Ward and Mary Rachel L'Hirondelle be forthwith entered on the Band List of the Sawridge Band and be immediately accorded all the rights and privileges attaching to Band membership.

Tab B-6

2007 ABQB 157
Alberta Court of Queen's Bench
InnerSense International Inc. v. University of Alberta
2007 CarswellAlta 312, 2007 ABQB 157, [2007] A.W.L.D. 4142, 156 A.C.W.S. (3d) 567, 414 A.R. 390

InnerSense International Inc. (Plaintiff) and The Board of Governors of the University of Alberta and the University of Alberta (Defendants)

L.D. Acton J.
Heard: February 1, 2007
Judgment: March 7, 2007
Docket: Edmonton 0103-20235

Counsel: Wendy J. Bridges (Agent for Wilhelmina K. Tyler) for Plaintiff
Sharon R. Stefanyk, Geoff M. Hope for Defendants
Peter P. Taschik for Dr. Brian Fisher
Michael A. Waite for Capital Health Authority
Subject: Civil Practice and Procedure; Public; Evidence

Headnote

Civil practice and procedure --- Discovery — Discovery of documents — Scope of documentary discovery — Documents in possession of non-party — General principles
Plaintiff alleged that Dr. F had agreed to perform scientific research for it, but breached agreement as he refused to provide it with documents related to research — In previous action, plaintiff brought unsucessful application against Dr. F and P Inc. for mareva injunction for plaintiff to take possession of documents, and brought unsuccessful application for production of records by University — New application was brought against University for production of documents based on allegation that University failed to inform it that international ethical guidelines would have to be complied with by Dr. F in conducting research project, and was negligent in failing to properly supervise project — Number of documents related to Dr. F's research were in possession of M LLP, as M LLP had acted for Dr. F in prior application for mareva injunction — Number of documents of Dr. F's research were in possession of Health Authority — Plaintiff brought application for order requiring non-parties, Health Authority and M LLP, to produce documents related to research project in their possession, as documents are of probable relevance to its claim against University — Application granted — Documents sought met "probable relevance" test for production of documents in hands of non-parties in that they related to project undertaken by Dr. F and results obtained in that research study or at least put into context those research results — Order for production subject to condition that documents containing individually identifying health information of study subjects should be produced to court for determination of how documents should be edited for confidentiality.

Table of Authorities

Cases considered by *L.D. Acton J.*:

Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co. (1988), 63 Alta. L.R. (2d) 189, 94 A.R. 17, 1988 CarswellAlta 219 (Alta. Q.B.) — followed

Klemke Mining Corp. v. Shell Canada Ltd. (2006), 2006 ABQB 486, 2006 CarswellAlta 912 (Alta. Q.B.) — considered

Rhoades v. Occidental Life Insurance Co. of California (1973), 1973 CarswellBC 76, [1973] 3 W.W.R. 625 (B.C. C.A.) — considered

Statutes considered:

Health Information Act, R.S.A. 2000, c. H-5
Generally — referred to

Hospitals Act, R.S.A. 2000, c. H-12
Generally — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68

R. 209 — considered
R. 209(1) — considered
R. 209(3) — considered

Tariffs considered:

Alberta Rules of Court, Alta. Reg. 390/68
Sched. C, Tariff of Costs, column 5 — referred to

APPLICATION by plaintiff for order requiring production of documents from non-parties.

***L.D. Acton J.*:**

I. Nature of the Application

1 The Plaintiff applies under Rule 209 for an order requiring that Capital Health Authority and the law firm of McLennan Ross LLP produce documents in their possession that relate to the EV-1 clinical trial for the research project which is the subject matter of this action.

2 The application is for production of the following:

1. Requisition forms submitted to Capital Health Authority;
2. Study proposal;
3. Verified results;
4. Result printouts from the blood testing instruments — this would include the original set that had handwriting and whiteouts on the documents because of the printer problem in the lab, and the set of results that Ms. Connie Prosser printed out from the archives. It would also include any printout that could be produced from the archives of the ACS machine today, if the information is still in the computer archives;
5. Invoice;
6. The record of payment and copy of payment check;
7. The name of the authorizing and verifying physicians or other persons who may have authorized or verified the clinical trial;
8. The memos and e-mails between Victor Tron and Gloria Publicover or Linda Chapelsky, between the dates of February 8, 2000 and June 25, 2001, discussing the elk velvet project;
9. Copy of the letter written by Ms. Connie Prosser that accompanied the printout she received from the archives of the ACS machine.

II. The Law

3 Rule 209 provides in part that:

209 (1) On application, the Court may, with or without conditions, direct the production of a record at a date, time and place specified when

(a) the record is in the possession, custody or power of a person who is not a party to the action,
(b) a party to the action has reason to believe that the record is relevant and material, and
(c) the person in possession, custody or power of the record might be compelled to produce it at the trial.

4 The law governing Rule 209 applications against non-parties is set out in *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 94 A.R. 17 (Alta. Q.B.).

5 Wachowich J. (as he then was), in that case adopted the "probable relevance" standard set out by the British Columbia Court of Appeal in *Rhoades v. Occidental Life Insurance Co. of California*, [1973] 3 W.W.R. 625 (B.C. C.A.), at 629 for determining whether to order production of documents in the hands of a non-party to the action. He also accepted the following caveats to that rule outlined by the Court in *Rhoades*:

1. The rule should not be used as a fishing expedition to discover whether or not a person is in possession of a document.
2. The documents need not necessarily be admissible in evidence at trial.
3. The documents of which production is sought must be adequately described, but not necessarily so specifically that they can be picked out from any number of other documents.
4. The third parties' objections to production must be considered, but are not determinative.

6 Wachowich J. added the further caveat that the rule cannot be used as a method of obtaining discovery of a person who is not a party to the action.

III. Background

7 A number of the sought-after documents are in the possession of the law firm of McLennan Ross LLP as a result of a member of that firm having acted for Dr. Brian Fisher in an action (the "Fisher action") commenced against him and Phyllis Woolley-Fisher by the Plaintiff in the present lawsuit. InnerSense alleged in the Fisher action that Dr. Fisher had agreed to perform scientific research for it into the effects of a substance derived from elk velvet, but in breach of their agreement he refused to provide it with the raw data and results of the research project. As final relief in the action, InnerSense sought an order in the nature of a Mareva injunction permitting it to take possession of the research data and results and any materials in the possession of Dr. Fisher relating to the research project, the business of InnerSense or any of its proprietary information.

8 Dr. Fisher filed a defence in which he claimed that he did provide InnerSense with the research results. InnerSense brought an application for replevin of the records in the Fisher action. Sulyma J. dismissed that application on the basis that there was a serious issue for trial as to who owned the research results. McLennan Ross LLP ceased to act for Dr. Fisher, who by that time had moved to the United States. As Dr. Fisher and Ms. Woolley-Fisher had failed to comply with an order that they file an affidavit of records, InnerSense applied for an order that they be found in civil contempt. Lee J. made that finding and struck their defence. InnerSense subsequently brought a Rule 209 application in the Fisher action for production of the records by the University of Alberta. My understanding is that that application too was denied by Lewis J., who concluded that as the documents had been provided to the University under trust conditions imposed by McLennan Ross LLP, the Court had no jurisdiction to compel the University to breach those trust conditions.

9 Although the two applications to obtain the same documents in the Fisher action were unsuccessful before Sulyma and Lewis JJ., in my view, that does not bar an application in this action for production of those documents. The present action is against the University of Alberta and its Board of Governors and is based (at least in part) on the Plaintiff's allegation that the University failed to inform it that international ethical guidelines would have to be complied with by Dr. Fisher in conducting the research project and was negligent in failing to properly supervise the project. InnerSense is not specifically claiming ownership of the records in this lawsuit. However, it is seeking production of those records from McLennan Ross LLP and Capital Health Authority as it believes that the documents are of probable relevance to its claim against the Defendants in this action. InnerSense contends that the records were not made in contemplation of litigation and therefore are not privileged in the hands of McLennan Ross LLP.

10 The Plaintiff points out that at examinations for discovery, the Defendants' officer said that the University relied on the research results now held by McLennan Ross LLP in preparing a press release which is at issue in this lawsuit. McLennan Ross LLP concedes that, on the evidence of Exhibit A to the affidavit of the Plaintiff's officer, the laboratory records that were reviewed by the University prior to issuing the press release would be relevant to this lawsuit. However, McLennan Ross LLP opposes the production of any of the other documents on the basis that the previous Rule 209 application has settled the matter. I disagree. That application was brought in an entirely different action, and appears to have been denied on the basis that InnerSense was attempting to obtain documents from the University that it possessed under trust conditions imposed by McLennan Ross.

11 I am satisfied that the documents sought meet the test of "probable relevance" set out in *Ed Miller Sales & Rentals Ltd.* in that they all relate to the elk velvet project undertaken by Dr. Fisher and the results obtained in that research study or at least put into context those research results.

12 McLennan Ross LLP indicates that it has possession of data received from Dr. Fisher and data it obtained as part of its solicitor's brief from Capital Health Authority. It has a solicitor's lien on these documents for its unpaid legal fees. The firm does not claim that the documents in its possession are subject to privilege. However, it does submit that the research results are confidential in nature and that there might be competition issues that could arise in relation to those results. As a consequence, it suggests that if an order for production is granted, conditions should be imposed to maintain the confidentiality of the records, similar to those imposed by Mr. Justice C.P. Clark in *Klemke Mining Corp. v. Shell Canada Ltd.*, 2006 ABQB 486 (Alta. Q.B.).

13 Capital Health Authority does not oppose or consent to the application. It advises that it holds copies of certain of the records under trust conditions imposed by McLennan Ross LLP that it not disclose or discuss those records. Capital Health Authority cannot confirm if it has the originals of any of the documents as it has not had time to search its records. However, there are two files in its Legal Services Department which may contain some of the documents sought. Capital Health Authority is uncertain whether its present technology will allow it to simply reprint the project results.

14 Capital Health Authority argues that item number 8 in the demand is too broad and violates the prohibition against requesting discovery from a non-party. It submits that no specific documents have been identified in number 8, and therefore the request is not appropriate. I disagree. The documents requested are memos and e-mails between specific individuals discussing the elk velvet project, made within a specified time. In my view, that is specific enough to meet the criteria for a Rule 209 order.

15 I am prepared to order production of the sought-after documents from McLennan Ross LLP and Capital Health Authority. The documents which Capital Health Authority holds under trust conditions are to be produced by McLennan Ross LLP either directly or through Capital Health Authority. If Capital Health Authority wishes to assert a privilege claim over any of the documents which are the subject of this order after reviewing the two legal files mentioned by its counsel, it may bring an application before me on notice to the parties in this lawsuit.

16 Although McLennan Ross LLP raised concerns about the potential proprietary nature of the data, it did not explain what parties other than the Plaintiff here might be claiming ownership of or interest in the information sought. The University takes the position that Dr. Fisher was not acting under its auspices in conducting the study. Dr. Fisher did not claim ownership of the raw data in his Statement of Defence in the Fisher action, and, in any event, he has moved to the United States, been found in contempt by this Court, and had his Statement of Defence struck. I note, however, that InnerSense has not yet applied for judgment in the Fisher action.

17 There is no evidence before me of any proprietary information other than possibly that of the Plaintiff. The *Klemke* case referred to by McLennan Ross LLP in which conditions were imposed on production by a non-party is distinguishable in that the document sought in that case was an agreement entered into by the defendant with a non-party and the plaintiff was a direct competitor of the non-party. That is not the situation here.

18 It is possible that the documents in question contain individually identifying health information of the study subjects pursuant to the *Hospitals Act*, R.S.A. 2000, c. H-12 or the *Health Information Act*, R.S.A. 2000, c. H-5. If McLennan Ross LLP or Capital Health Authority believes that to be the case, those documents should be produced to me for review and I will determine how and by whom they are to be edited for confidentiality.

19 Subject to these comments, the application of the Plaintiff is granted. On the conclusion of the present action, the documents and all copies thereof shall be returned to McLennan Ross LLP and counsel for Capital Health Authority.

20 McLennan Ross LLP and Capital Health Authority seek their costs of searching for and producing these documents. McLennan Ross LLP asks for solicitor-client costs for this undertaking, while Capital Health Authority seeks Schedule C, Column 5 document production costs; namely, $1,500.

21 I am satisfied that it is appropriate in this matter to order costs of $1,500 plus proper disbursements payable to McLennan Ross LLP and to order costs for Capital Health Authority of $1,500 plus proper disbursements. In accordance with Rule 209(3), these costs are to be borne in the first instance by the Plaintiff, but may be the subject of a further ruling by the Court if it appears that by reason of the production there has been a saving of expense.

Application granted.

Tab B-7

1988 CarswellAlta 219
Alberta Court of Queen's Bench
Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.
1988 CarswellAlta 219, [1988] A.J. No. 1005, 12 A.C.W.S. (3d) 157, 63 Alta. L.R. (2d) 189, 94 A.R. 17

ED MILLER SALES & RENTALS LTD. v. CATERPILLAR TRACTOR CO. et al.

Wachowich J.
Judgment: November 2, 1988
Docket: Edmonton No. 8003-12393

Counsel: *J.B. Laskin*, for plaintiff.
M.H. Dale, Q.C., for defendants.
D.N. Jardine, for Bank of Nova Scotia.
Subject: Civil Practice and Procedure

Headnote

Practice --- Discovery — Discovery of documents — Scope of documentary discovery — Documents in possession of non-party — Bank records

Civil procedure — Discovery — Discovery of documents — Documents subject to production — Documents in possession or control of non-party — Rule 209(1) of Rules of Court providing for production of documents in possession or control of non-party — Certain documents in possession of non-party bank intimately involved in plaintiff's day-to-day operations being producible to defendant — Probable relevance test applying — Court discussing nature of test and documents producible.

The defendants applied for an order directing the plaintiff bank, which was not a party to the action, to produce a series of documents relating to the bank's dealings with the plaintiff. The defendants had been unable to obtain those documents from the plaintiff. A special and unique relationship existed between the plaintiff and the bank during this extremely lengthy and complex litigation which had commenced in 1980. From the time that the plaintiff first began dealing with the bank until the date the bank put the plaintiff into receivership, the bank was intimately involved in the day-to-day operations of the plaintiff. In addition, being the sole unsatisfied secured creditor, the bank would be the only one to benefit if the action were successful.

Held:

Application granted in part.

Rule 209(1) of the Rules of Court permits the court to direct a third person not a party to an action to produce documents related to the matters in issue. The standard of "probable relevance" is the test for determining whether to order production in such a situation. This test provides that: the party seeking production cannot go on a fishing expedition to discover whether or not a person is in possession of a document: the documents need not necessarily be admissible in evidence at trial; the documents must be adequately described; the third party's objections to production must be considered, but are not determinative; and the rule cannot be used as a method of obtaining discovery of a person not a party to the action. Here, the special circumstances, especially the bank's intimate involvement in the day-to-day operations of the plaintiff, justified the use of R. 209(1) to allow discovery of many of the documents in the bank's possession relating to this matter. The bank should be ordered to produce: material supplied by the plaintiff to the bank, such as financial statements, executive summaries and budgets; minutes of meetings and records of verbal discussions in which bank officials participated together with officers of the plaintiff; and communications from the bank to the plaintiff, both written and oral. However, the bank should not be required to produce documents representing the bank's internal communications and analyses, including interoffice memoranda and internal reports.

Table of Authorities

Cases considered:

Markowitz v. Toronto Transit Comm., [1965] 2 O.R. 215 (H.C.) — *applied*

Rhoades v. Occidental Life Ins. Co. of California, [1973] 3 W.W.R. 625 (B.C.C.A.)*applied*

Rules considered:

Alberta Rules of Court

R. 209(1)

Application for order directing plaintiff's bank, not a party to action, to produce documents.

Wachowich J.:

1 This is a motion by the Caterpillar defendants for an order directing the Bank of Nova Scotia ("the bank"), which is not a party to the action, to produce a series of documents described in Sched. D to the defendants' notice of motion and which relate to the bank's dealings with the plaintiff.

2 The defendants rely on the provisions of R. 209(1) of the Rules of Court (Alberta), which provides as follows:

> 209. (1) When a document is in possession of a third person not a party to the action and it is alleged that any party has reason to believe that the document relates to the matters in issue, and the person in whose possession it is might be compelled to produce it at the trial, the court may on the application of any party direct the production of the document at such time and place as the court directs and give directions respecting the preparation of a certified copy thereof which may be used for all purposes in lieu of the original, saving all just exceptions.

3 In Sched. D the defendants set out 13 categories of documents which they are seeking from the bank; however, they notified the court that they are no longer pursuing the request in para. 13. The bank objects to producing any of the requested documents, with the exception of documents given to it by the plaintiff. This is the type of documentation sought in paras. 1 and 10, and the bank indicated to the court that this will be supplied.

4 Counsel for the bank divides the types of documents requested in Sched. D into four broad categories:

5 1. Material supplied by the plaintiff to the bank, such as financial statements, executive summaries and budgets.

6 2. Minutes of meetings and records of verbal discussions in which bank officials participated together with officers of the plaintiff.

7 3. Communications from the bank to the plaintiff, both (i) written, and (ii) oral.

8 4. Documents representing the bank's internal communications and analyses, including interoffice memoranda and internal reports.

9 In support of its motion, the defendants submitted an affidavit of Sona Holt, assistant secretary of Caterpillar Incorporated (formerly Caterpillar Tractor Co.). Among other things, this affidavit attests to the special and unique relationship which existed between the plaintiff and the bank in this extremely lengthy and complex litigation which commenced in May 1980. From the time that the plaintiff first began dealing with the bank in January 1980 until the date of receivership in November 1986, the bank was intimately involved in the day-to-day operations of the plaintiff company. For example, during most of this period the plaintiff was required to report to the bank before making any acquisitions, and an officer from the bank visited the plaintiff company on a twice weekly basis.

10 Another special circumstance of this case, the defendants argue, is that the bank was responsible for putting the plaintiff company into receivership, and is now the sole unsatisfied secured creditor; as such, it would be the sole one to benefit if this action is successful. The defendants also state that it has proven to be very difficult and sometimes impossible to get necessary information from the plaintiffs, and that they have good reason to believe that much of this information is in the possession of the bank.

11 The British Columbia Court of Appeal in *Rhoades v. Occidental Life Ins. Co. of California*, [1973] 3 W.W.R. 625, set out the standard of "probable relevance" as the basis test for determining whether to order production of documents in the hands of a person not a party to the action. In considering the scope of O. 31, R. 20A of the rules of the Supreme Court (the equivalent of Alberta R. 209(1)), McFarlane J.A. stated at p. 629:

> In the present case it is clear that the mental and physical condition of the insured during the period preceding her death is relevant to the issues in the action. It is shown that the University has in its possession, through Dr. Miles, records which are probably relevant to that condition. Therefore, "This is no fishing expedition", to use the words of Keith J. in *Coderque v. Mutual of Omaha Insur. Co.*, [1970] 1 O.R. 473 at 477, [1969] I.L.R. 1-297.

12 The court attached four caveats to the "probable relevance" test:

13 1. The rule should not be used as a fishing expedition to discover whether or not a person is in possession of a document.

14 2. The documents need not *necessarily* be admissible in evidence at trial.

15 3. The documents of which production is sought must be adequately described, but not necessarily so specifically that they can be picked out from any number of other documents.

16 4. The third party's objections to production must be considered, but are not determinative.

17 I accept this approach, with the additional condition that the rule cannot be used as a method of obtaining discovery of a person not a party to the action. As Mr. Justice Thompson of the Ontario High Court said in *Markowitz v. Toronto Transit Comm.*, [1965] 2 O.R. 215 at 217, when considering the Ontario equivalent of R. 209(1):

> Rule 349 was never intended to be used merely as a means of obtaining discovery from a stranger to the action; nor for exploratory purposes alone ...

18 In this case, I feel that the special circumstances, especially the bank's intimate involvement in the day-to-day operations of the plaintiff company, justify the use of R. 209(1) to allow discovery of many of the documents in the possession of the bank relating to this matter. However, I appreciate the bank's argument that an unlimited order for production of documents would work a hardship on them in this situation, since the total documentation would amount to thousands of pages. I also accept their submission that that internal bank memoranda expressing the private opinions of bank officials are of no relevance in this action. Further, some of the defendants' requests, as set out in Sched. D., are so broadly worded that they have all appearances of exploratory "fishing expeditions" or attempts to obtain examination for discovery of a third party.

19 With these principles in mind, I order that the bank produce all the documents which fall into the first three of the four categories described by counsel for the bank. All documents which properly fall into category 4, including all internal bank communications and memoranda relating to the plaintiff's business, ought not to be produced. This will exclude the documents sought in paras. 3, 5 and 9 of Sched. D, and will limit the documents producible under paras. 4, 7, 8, 11 and 12.

20 If the matter of costs has not been agreed upon counsel may speak to me in regards to the same.

Application granted in part.

Tab B-8

2008 ABQB 601
Alberta Court of Queen's Bench
Trimay Wear Plate Ltd. v. Way
2008 CarswellAlta 1330, 2008 ABQB 601, [2009] A.W.L.D. 1351, 172 A.C.W.S. (3d) 880, 456 A.R. 371

Trimay Wear Plate Ltd. (Plaintiff) and Keith Way and Premetalco Inc., carrying on business under the firm name and style Wilkinson Steel and Metals (Defendants)

R.A. Graesser J.
Heard: May 20, 2008
Judgment: September 30, 2008
Docket: Edmonton 9703-22138

Counsel: Donald J. Wilson for Plaintiff
Robert P. James for Defendants
Louis Belzil for Third Parties
Subject: Corporate and Commercial; Civil Practice and Procedure

Headnote

Business associations --- Legal proceedings involving business associations — Practice and procedure in actions involving corporations — Discovery — Production of documentsTable of Authorities

Cases considered by *R.A. Graesser J.*:

Berube v. Wingrowich (2005), 2005 CarswellAlta 670, 2005 ABQB 367, 382 A.R. 189 (Alta. Q.B.) — considered

Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co. (1988), 63 Alta. L.R. (2d) 189, 94 A.R. 17, 1988 CarswellAlta 219 (Alta. Q.B.) — followed

Esso Resources Canada Ltd. v. Stearns Catalytic Ltd. (1989), 98 A.R. 374, 45 C.C.L.I. 143, 1989 CarswellAlta 714 (Alta. Q.B.) — referred to

Esso Resources Canada Ltd. v. Stearns Catalytic Ltd. (1990), 74 Alta. L.R. (2d) 262, 1990 CarswellAlta 95, 41 C.P.C. (2d) 222, 108 A.R. 161 (Alta. C.A.) — referred to

Koenen v. Koenen (2001), 277 A.R. 265, 242 W.A.C. 265, 2001 ABCA 46, 2001 CarswellAlta 241, 15 R.F.L. (5th) 101 (Alta. C.A.) — referred to

Metropolitan Trust Co. of Canada v. 337807 Alberta Ltd. (March 8, 1996), Doc. 15519, 15594, 15767 (Alta. C.A.) — considered

Wasylyshen v. Canadian Broadcasting Corp. (September 5, 2006), Doc. 0403-08497 (Alta. Q.B.) — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68

R. 209 — considered

***R.A. Graesser J.*:**

Introduction

1 The Defendants apply for an order under Rule 209 directing two non-party corporations to produce records they claim are relevant to the action.

2 Trimay seeks damages or an accounting of profits from the Defendants, claiming that Way breached fiduciary duties owed to Trimay and misappropriated proprietary information of Trimay, for the benefit of his new employer Premetalco Inc. Way left Trimay's employ in 1996 and immediately went to work for Premetalco. Trimay alleges that Way and Premetalco used Trimay's confidential and proprietary information to compete with it in the wear plate business. Trimay also alleges that Way improperly solicited clients and prospective clients of Trimay. The Defendants deny the allegations. The action, commenced in 1997, is now being case managed by me.

3 This application arose in the course of case management.

Facts

4 The non-party corporations are 735458 Alberta Inc. and Alberta Industrial Metals Ltd. The evidence before me is that 735458 is the sole shareholder of Trimay. Alberta Industrial is the sole shareholder of 735458. Maurice Shugarman and Garry Stein are officers of Trimay. They are directors of Alberta Industrial, and they or their holding companies are shareholders in that company. Stein is a director of 735458.

5 The evidence discloses that Trimay purchases materials from Alberta Industrial. Both Trimay and 735458 operate out of the same facility. 735458 and Alberta Industrial lease equipment to Trimay, which Trimay uses in the production of wear plate. Alberta Industrial has invested in Trimay. Alberta Industrial was involved in an investigation into the activities of a former senior manager of Trimay, which the Defendants allege are relevant to the qualification of Trimay's damage claim.

6 The records sought to be produced from 735458 and Alberta Industrial are described as:

(a) documents relating to the alleged "proprietary" nature of Trimay's technology and processes; and

(b) documents relating to the damages claimed by Trimay.

7 Production of these records was sought by the Defendants when examining officers of Trimay for discovery, and the Plaintiff has since refused to produce records of 735458 and Alberta Industrial.

Argument

8 The Defendants rely on Rule 209, which provides:

209(1) On application, the Court may, with or without conditions, direct the production of a record at a date, time and place specified when

(a) the record is in the possession, custody or power of a person who is not a party to the action,

(b) a party to the action has reason to believe that the record is relevant and material, and

(c) the person in possession, custody or power of the record might be compelled to produce it at the trial.

(1.1) The Court may also give directions respecting the preparation of a certified copy of the record, which may be used for all appropriate purposes in place of the original.

(2) A person producing a record is entitled to receive such conduct money as the person would receive if examined for discovery.

(3) The costs of the application shall in the first instance be borne by the party making the application but if it thereafter appears to the Court that by reason of the production there has been a saving of expense the Court may award the whole or part of the costs to the party making the application.

9 The Defendants allege that one of the fundamental issues in the action is whether or not Trimay had any proprietary or confidential information in the first place. The Defendants deny they are liable to Trimay for damages or an accounting, and dispute the amount of damages being claimed by Trimay. Damages are very much in issue

10 Trimay has not yet elected whether it will seek damages (its own losses) arising out of the alleged misconduct of the Defendants, or whether it will seek an accounting of the Defendants' profits (disgorgement). The Defendants dispute Trimay's losses and claim, amongst other things, that Trimay's losses for some of the relevant time resulted from or were contributed to by mismanagement of the former senior manager.

11 The Defendants rely on *Esso Resources Canada Ltd. v. Stearns Catalytic Ltd.* (1990), 74 Alta. L.R. (2d) 262 (Alta. C.A.) and *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 63 Alta. L.R. (2d) 189 (Alta. Q.B.).

12 With reference to the records sought, the Defendants are particularly interested in the purchase agreement whereby 735458 acquired the shares in Trimay, although they seek:

(a) documents surrounding 735458's ownership of Trimay, which they say are relevant to whether any proprietary processes or technology exist;

(b) documents concerning 735458's and Alberta Industrial's business dealings with Trimay, which they say are relevant to Trimay's costs and are thus relevant to Trimay's damage claim;

(c) documents concerning Alberta Industrial's business dealings with Trimay which they say relate to the former the Defendants' allegations about mismanagement of Trimay and are thus relevant to damages; and

(d) documents of both 735458 and Alberta Industrial relating to the former senior manager, which they say go to

Trimay's damage claim.

13 The Defendants reference the tests for production from third parties as set out in *Ed Miller Sales*:

- the documents should be "probably relevant";
- the application is not a fishing expedition;
- the documents need not necessarily be admissible;
- the documents must be adequately described;
- the third party's objections must be considered; and
- the application is not a means of obtaining discovery from a stranger to the action.

14 Since *Ed Miller Sales* and *Esso Resources* were decided, Rule 209 has been amended to apply to records that are "relevant and material". At the time of those decisions, documents could be sought from third parties which "any party has reason to believe...relates to the matters in issue". As is obvious, the current rule provides a narrower scope of production than was the case when *Ed Miller Sales* and *Esso Resources* were decided.

Response

15 735458 and Alberta Industrial resist the application, and cite *Koenen v. Koenen*, 2001 ABCA 46 (Alta. C.A.), *Berube v. Wingrowich*, 2005 ABQB 367 (Alta. Q.B.), *Ed Miller Sales* (*supra*), *Esso Resources Canada Ltd. v. Stearns Catalytic Ltd.* (1989), 98 A.R. 374 (Alta. Q.B.) Aff'd (1990), 108 A.R. 161 (Alta. C.A.), *Wasylyshen v. Canadian Broadcasting Corp.*, [2006] A.J. No. 1169 (Alta. Q.B.), and *Metropolitan Trust Co. of Canada v. 337807 Alberta Ltd.*, [1996] A.J. No. 291 (Alta. C.A.). They also refer to the commentary on Rule 209 in Stevenson and C_t_, *Alberta Civil Procedure Handbook*, vol. I (Edmonton: Juriliber, 2005) at 215-216.

16 In essence, the third parties argue that the application should fail for lack of specificity of the Defendants' requests. Instead of seeking production of specific documents, the Defendants seek discovery in general areas of questioning. The third parties point to a lack of evidence that the purchase documents dealt with proprietary processes or technology. They also point out that many of the records relating to business transactions between Trimay and the third parties can be obtained through Trimay.

Analysis

17 As noted by Veit J. In *Berube*, the mere fact that entities are associated with a party is not a sufficient basis to require production. A close affiliation between the target entity and a litigant does not remove the requirements of Rule 209 that the records sought be relevant and material (at para. 4).

18 *Wasylyshen*, referring to the *Alberta Civil Procedure Handbook*, notes that Rule 209 is to be interpreted narrowly and is to be used only to gain access to *specific* records.

19 Lack of specificity was key to the Court of Appeal denying the application for production in *Metropolitan Trust*.

20 Here, the Defendants have identified only 2 specific documents: the purchase agreement between 735458 and the former owner of Trimay's shares, and a lease agreement between Trimay and 735458 of a welding machine.

21 There is no evidence before me that any of the records sought relating to business transactions between Trimay and 735458 and Alberta Industrial are unavailable through Trimay. The Defendants are apparently seeking to corroborate the accuracy of information that has been provided to them by Trimay, although there is no evidence to suggest that the information provided by Trimay is unreliable.

22 The Defendants have already had extensive discovery of Trimay's officer and Messrs. Stein and Shugarman concerning management issues surrounding Trimay and the investigation of the former senior manager. Production of records from the third parties is apparently sought to corroborate the information already provided by Trimay's officers. Again, there is no evidence to suggest that the information already provided is inaccurate.

23 In argument, there was considerable discussion about the lease of the welding machine, which apparently could not be

located by Trimay. There was also considerable discussion about what may or may not be in the share purchase agreement.

Decision

24 On the evidence and submissions before me, I am not satisfied that the Defendants have provided the degree of specificity required to establish that the third parties have any relevant and material records, other than with respect to the purchase agreement and the lease of the welding machine.

25 The lease has not been produced by Trimay, and should be produced by 735458. It is relevant to an item of expense, which is relevant to Trimay's costs of production of the products in issue in the lawsuit.

26 The purchase agreement is relevant to the extent that it may disclose whether proprietary processes or technology were considered in the purchase of the shares. This is clearly relevant to the existence of trade secrets. 735458 should produce this agreement, but in producing it, is entitled to expurgate irrelevant and confidential information such as the purchase price and financial details.

27 Otherwise, I am of the view that the records sought are of tertiary relevance to the issues in the lawsuit, at best. Records relating to corroboration of information already provided, or only testing credibility, may be relevant, but are not generally material. I am not convinced of the materiality of any of the records sought, other than the lease and purchase agreement discussed above.

28 Other than with respect to the two specific documents, the Defendants' application is dismissed.

29 There has been mixed success on the application. I will leave costs in the cause on this application. In the event that the Plaintiff succeeds in this action, the third parties should also have their costs of the application. If the Defendants succeed, their costs of this application are recoverable from the Plaintiff, but not the third parties.

Tab B-9

Wasylyshen v. Canadian Broadcasting Corp.

Between
Robert Wasylyshen, Plaintiff, and
Canadian Broadcasting Corporation, Morris Karp, Mark Kelley, Cecil Rosner, Timothy Sawa, Tessa Sproule, Tania White and Jim Williamson, Defendants

[2006] A.J. No. 1169

Docket No. 0403 08497

Alberta Court of Queen's Bench
Judicial District of Edmonton

Murray J.

Heard: August 11, 2006.
Judgment: September 5, 2006.
Filed: September 6, 2006.

(33 paras.)

Civil procedure -- Examination for discovery -- Production and inspection of documents -- Production by non-parties -- Application by the defendants for production of third party documents dismissed -- The parties were involved in a defamation action -- The defendants sought the production of records by the plaintiff's former employer related to the allegedly defamatory broadcast -- The employer objected on the basis that the category of records sought was ill-defined, and was of no obvious probative value -- The court held that the request for documents was premature, overbroad and imprecise, and thus amounted to a costly discovery of a non-party to the action -- Alberta Rules of Court, Rule 209.

Statutes, Regulations and Rules Cited:

Alberta Rules of Court, Rule 209

Freedom and Protection and Privacy Act, R.S.A. 2000, c. F-25

Counsel:

Gerald B. Robertson, Q.C., for the Plaintiff (Respondent)

Matthew Woodley for the Defendants (Applicants)

Kevin S. Feth and Kristen McLeod for the Edmonton Police Service

David P. Jones, Q.C. for the Edmonton Police Commission

REASONS FOR JUDGMENT

MURRAY J.:--

Introduction

1 This is a defamation action. The Plaintiff is Robert Wasylyshen, the former Chief of Police for the Edmonton Police Service ("E.P.S."). The Defendants are the Canadian Broadcasting Corporation ("C.B.C.") and a number of its employees who at the relevant times were acting in the course of their employment. Neither the E.P.S. nor the Edmonton Police Commission ("E.P.C.") are parties to the action. This application by the Defendants is to acquire documents in the possession of the E.P.S. and E.P.C. pursuant to Rule 209 of the *Rules of Court*.

2 The producibility of the specific documents referred to in the Notice of Motion was dealt with in court. Insofar as records 2(b)(v), 2(b)(vi) and 2(b)(vii) which were documents identified as being letters to the E.P.C. Neither the E.P.S. or the E.P.C. objected to these being produced if they were relevant to any of the issues in the action. The Court reviewed these documents and though the relevancy is questionable, they were ordered disclosed. The E.P.S. objected to the production of the documents identified as 2(b)(i), (ii), (iii) and (iv) on the basis of solicitor-client privilege. The Court reviewed them and upheld that position. They were not ordered to be produced.

Issue

3 At the end of the day, the only issue before the Court was whether or not the disclosure sought by the Plaintiff in Paragraphs 2(a), 2(c) and 2(d) should be ordered. Those paragraphs read as follows:

> 2.Pursuant to Rule 209, directing the Edmonton Police Service to produce the following records, which are relevant and material to this action.
>
> a. Any records made with respect to any reviews done by the Edmonton Police Service, or at the request of the Edmonton Police Service, of or with respect to the Edmonton Police Service. file number H-316 ("H-316").
> c. Any records, including electronic mail messages, between the Plaintiff and any individual with respect to H-316, and any and all investigations thereof.
> d. Any records with respect to the Edmonton Police Service's decision not to grant the Defendant, Timothy Sawa, an interview with the Plaintiff when one was requested.

The Law

4 Rule 209 states:

> **209(1)** On application, the Court may, with or without conditions, direct the production of a record at a date, time and place specified when
>
> (a) the record is in the possession, custody or power of a person who is not a party to the action,
>
> (b) a party to the action has reason to believe that, the record is relevant and material, and
>
> (c) the person in possession, custody or power of the record might be compelled to produce it at the trial.

5 The purpose of Rule 209 is to allow a party to obtain papers or records from a non-party. It is a valuable tool for acquiring relevant and material documents that are in the hands of a non-party. If unregulated this rule could be used to gain unlimited discovery on a third party. However, the Courts have recognized the inconvenience and expense to third

parties that are required to produce documents. To balance the need for a party to obtain relevant material with the concerns of undue cost and inconvenience to the third party, a number of limitations have been placed on the rule.

6 In my view, the scope of Rule 209 is fairly described in Stevenson and Côté, *Alberta Civil Procedure Handbook*, vol. I (Edmonton: Juriliber, 2005) at 215-216, where it is stated:

> This Rule is a curious hybrid or compromise. It allows a party to secure existing papers or records held by a non-party. This Rule and R. 468 on inspection afford the only means of discovery of strangers to a lawsuit. Other rules are confined to parties or their employees, assignors, et al. Therefore, used properly, R. 209 can be very valuable. However, the courts have interpreted R. 209 as having a narrower purpose: that it is not to be used to fish, and can be used only if the relevance of the papers is shown. It cannot be used to discover what records the non-party may hold, but is merely to be used to see specific records and copy them (and certify the copies). In theory, the Rule exists to avoid making the non-party come to trial only to produce a few papers. Therefore, a party wishing to use this Rule must prepare the ground carefully beforehand, and give the court evidence that the non-party actually possesses certain records. And that the documents are probably relevant. Indeed, they must have enough relevance to justify disturbing the non-party to produce them.

7 Mr. Justice Wachowich (as he then was) of this Court in **Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.**, (1989), 94 A.R. 17, adopted the standard of "probable relevance" as the test for determining whether to order production of documents by a non-party. He relied on the British Columbia Court of Appeal decision in **Rhoades v. Occidental Life Ins. Co. of California**, [1973] 3 W.W.R. 625. At Paragraph 8. his Lordship adopted the four caveats to the "probable relevance" test:

1. The rule should not be used as a fishing expedition to discover whether or not a person is in possession of a document.
2. The documents need not necessarily be admissible in evidence at trial.
3. The documents of which production is sought must be adequately described, but not necessarily so specifically that they can be picked out from any number of other documents.
4. The third party's objections to production must be considered, but are not determinative.

At Paragraph 17, Wachowich J. also added the condition that the "rule cannot be used as a method of obtaining discovery of a person not a party to the action."

8 In **Metropolitan Trust Co. of Canada v. 337807 Alberta Ltd.**, (1996), 38 Alta. L.R. (3d) 150, the Alberta Court of Appeal overturned a lower court decision to order production of documents from a third party. The documents at issue were described entirely by reference to the affidavit of documents of a defendant and were described only by numbers and the titles preceding those numbers. The unanimous Court stated at Paragraph 4:

> Given the lack of specificity in this description of the documents, we are unable to tell whether these documents are "relevant" or "probably relevant" to quote the words of the decision in *Esso Resources Canada Ltd. v. Stearns Catalytic Ltd.* (1989), 98 A.R. 374, aff'd. (1990), 74 Alta. L.R. (2d) 262 (C.A.), where it is stated at paragraph 25, "Rule 209 should not be used to permit discovery of a person not a party if it amounts to a fishing expedition" and, at paragraph 29, "relevance or probable relevance must be established by the applicant."

9 More recently in **Fullowka v. Royal Oak Mines Inc. (Re Canadian Broadcasting Corp)** [2001] 5 W.W.R. 719, 2001 NWTSC 4, affirmed [2003] 2 W.W.R. 213, 2002 NWTCA 3, Vertes J. dealt with a case where a party was seeking production of videotapes from the CBC, who was a non-party to the action. The order was sought under Rule 231 of the *Rules of the Supreme Court of the Northwest Territories* which is similar to Rule 209 of our *Rules of Court*.

10 Vertes J. noted there was no right to an order under the rule but it was within the discretion of the Court to grant production of records from a third party. Among the questions the Court identified to use in exercising discretion were:

1. Have the criteria of the rule been met?
2. Have the material sought been adequately identified?

3. What is the probative value of the information sought? In other words, what is the degree of relevance and importance of the information to the case?
4. Is production necessary at the pre-trial stage? Or, would it be less speculative and intrusive to defer the issue to the trial judge who can assess the necessity of the evidence in the context of all the evidence?
5. Is information of the same or similar evidentiary value available from other sources? Have reasonable efforts been made to obtain it?
6. Will discovery of the parties with respect to the issues to which the documents may be relevant be adequate?
7. Have the applicants put forth a sufficient evidentiary basis so as to draw conclusions with respect to items 1 through 6? If not, the application can be dismissed simply on that basis?,
8. What is the relationship of the non-party to the litigation or the parties? Is the respondent here a true stranger to the litigation?

History

11 In 1983, Vern Colley ("Colley"), an E.P.S. officer, was assigned to investigate allegations of police misconduct with prostitutes and in particular allegations that peace officers were picking up street prostitutes and using them for sexual gratification as well as possibly taking money from them. Colley assembled a number of documents which have collectively been referred to as "File H-316". The E.P.S. take the position that it does not recognize such a file. However, for our purposes, I will refer to these documents as "File H-316". Apparently, some 20 or more statements were taken from possible victims, witnesses and prostitutes who allege they had been sexually abused and robbed by police officers. Certain police officers were identified as possible suspects, one of whom was the Plaintiff who at the time held the rank of Sergeant. Colley's report was contained in "File H-316". It seems Colley retained these documents when he left the E.P.S.

12 Subsequently, a Judicial Review proceeding was commenced by Ron Robertson ("Robertson"), a member of the E.P.S., seeking to quash disciplinary action brought against himself by the E.P.S. Colley filed an affidavit in that proceeding where he set out his version of what had taken place in 1983, produced "File H-316" and alleged that in his belief Robertson would not obtain a fair hearing.

13 Shannon Kovacs, an employee of the E.P.S., in her affidavit filed in support of the position of the E.P.S. in these proceedings deposed at Paragraphs 2-4:

> 2. From June 2003 through March 2004, the EPS was a respondent in a judicial review application brought by Ron Robertson, an EPS member, in which Mr. Robertson sought to quash disciplinary proceedings brought against him by the EPS. The judicial review application was heard on March 26, 2004 in the Court of Queen's Bench of Alberta (the "Judicial Review").
> 3. The Judicial Review included a sworn affidavit by Vern Colley, a former EPS member, in which Mr. Colley deposed to the possibility that the Plaintiff Robert Wasylyshen and other EPS members were involved in criminal acts of extorting favours from prostitutes during the early 1980s (the "Allegations"), and that Mr. Colley's efforts to investigate the Allegations were stopped and covered up within the EPS.
> 4. I am informed by Bonnie Bokenfohr, legal counsel for the EPS in the Legal Advisors' Section, and verily believe that:
>
> a. In support of the Allegations, Mr. Colley produced a bundle of documents which are sometimes collectively referred to as "File H-316"; and
> b. The EPS does not recognize File H-316 as a case file of the EPS.

14 In October of 2003, an initiative called Project KARE, which was led by a Royal Canadian Mounted Police ("R.C.M.P.") Task Force with the assistance of the E.P.S., commenced a search for a number of prostitutes who were killed during the previous 20 years. In the course of this investigation the allegations that E.P.S. members had been involved in criminal acts respecting prostitutes in the early 1980s was revisited with "File H-316" being a focal point.

15 Kovacs deposed that in mid-January 2004 the E.P.S. became aware that the C.B.C. was undertaking an investigation into some of these allegations and as a result considered the possibility of legal proceedings arising. Legal advice

was sought both in-house and externally. Presumably "records" were produced. During this same time frame both in-house counsel and external counsel for the E.P.S. were involved with the judicial review process and one must again assume "records" were produced.

16 On February 3rd through February 5 2004, the C.B.C. television program "Disclosure" and various other of its radio programs broadcast in the Edmonton area dealt with its investigations including "File H-316". In the course of doing so, statements were made which are the subject matter of this litigation.

17 The C.B.C. has in its possession "File H-316" or copies thereof. Counsel for the Defendants advised that they are only seeking records created from June 25, 2003 to April 26, 2004 ("the time frame"). These being respectively the dates Colley swore his affidavit in the Judicial Review proceedings and the date the Statement of Claim in this action was commenced. Also, Kovacs deposed that when the Plaintiff filed his Supplementary Affidavit of Records containing E.P.S. documents, legal counsel for the E.P.S. became involved and more "records" were produced which would not have come into being during the time frame stipulated by the Defendants.

18 In support of their application the Plaintiffs filed an affidavit of Timothy Sawa. All that is said insofar as the claim for production of the records in question is contained in Paragraph 6 where he deposes:

> I also believe that the Edmonton Police Service and the Edmonton Police Commission possess other records that are relevant to the issues in this action, and that representative from those organizations might be compelled to produce those records at the trial of this action.

19 The E.P.S. in support of its position in this application filed a further affidavit by Ayaaz Janmohamed, its infrastructure manager, dealing with the request for electronic, e-mail data. He deposed that to retrieve e-mail which was contained in back-up tapes prior to 2004 would involve hiring systems and personnel external to the E.P.S. It was estimated to cost $10,000.00 for equipment and $110.00 per hour for at least 40 hours for personnel to restore the data. In addition, more time would be needed if the restoration process did not go perfectly. Once recovered, E.P.S. staff would then be required to manually go through the e-mails to investigate whether they fit within the parameters requested.

Discussion

20 Counsel for the E.P.S. points out that the ability of the E.P.S. to produce "records" is circumscribed by privacy obligations imposed by statute, including the *Freedom and Protection and Privacy Act*, R.S.A. 2000, c. F-25 ("F.O.I.P.P.A."). The E.P.S. will honour requests for public disclosure of "records" where that disclosure is authorized or directed by F O.I.P.P.A. or where directed by the Court.

21 The E.P.S. does not object to the production of certain "records" which have been specifically identified, can be readily located, are material to the issues, and to which no privilege applies. However, it does resist this application to the extent that the Defendants wish the E.P.S. to embark on an extensive search for ill-defined categories of "records", of no obvious probative value, for an action in which the E.P.S. is not a party.

22 The Defendants take the position that they have no way of knowing whether or not any "records" exist which are probably relevant to the issues before the Court and which are not subject to any form of privilege. The Defendants also contend that because there was at one time a close relationship between the Plaintiff, the E.P.S. and the E.P.C., it strengthens their position in asking the Court to have the E.P.S. seek out and identify such "records". They point out that the Plaintiff was the Chief of the E.P.S., at the time of the impugned broadcasts which focused on events that took place while the Plaintiff was an officer of the E.P.S. As well, at one point the Plaintiff and the E.P.S. had jointly retained legal counsel with respect to the C.B.C. broadcasts. The Defendants also point to the fact that the majority of the "records" which are sought would have been created while the Plaintiff was acting in his capacity as Chief of E.P.S.

23 The onus rests upon the Defendants to satisfy the Court that it should exercise its discretion and grant the order sought. To achieve this they must show that the "records" are probably relevant to the issues in the litigation before the Court. This is complex litigation and involves many issues, particularly when one examines the defences raised. The Defendant asks the Court to imply probable relevance from the affidavit of the Defendant Sawa and the previously close relationship with the EPS and the Plaintiff.

24 The Plaintiff is no longer an employee of the E.P.S. nor was he when the Statement of Claim was issued. He has filed an Affidavit of Records as well as a Supplementary Affidavit of Records setting out the "records" in his possession. In my opinion, the past relationship between the E.P.S. and the Plaintiff does not assist the Defendants.

25 The E.P.S. "records" produced prior to and following the C.B.C. broadcast and those produced during the "time frame" which may touch upon some aspects of "File H-316" may or may not be relevant to the issues raised before this Court in this action. If they are, they may be subject to privilege of one form or another and indeed may come within the ambit of the F.O.I.P.P.A. Based upon the affidavit evidence of Kovacs there are in all likelihood a great number of "records" which would have to be found, reviewed, and assessed on the basis of relevance and privilege. This would be a an extensive and expensive undertaking. We have the evidence of Janmohamed as to the costs, etc. respecting the e-mails alone which may have been created.

26 It must be remembered that if, as matters stand, the E.P.S. were ordered to conduct searches respecting the three categories of documents sought, it would first have to be determined what "records" in some way touched upon the various documents which go to make up "File H-316" and the requested interview by Sawa. Once identified, those "records" would then have to be examined, presumably by a solicitor for the E.P.S., to determine possible relevancy. If considered to be relevant, then an assessment would have to be made to determine if privilege would be sought. Insofar as any records with respect to which privilege was sought or which fell within or were caught by the provisions of the F.O.I.P.P.A., those could then become the subject matter of further applications before the Court to determine whether they should be produced. The issue of relevance might also be placed before the Court.

27 As to paragraph 2(d) of the Notice of Motion in which the Defendants seek "Any records with respect to the E.P.S.'s decision not to grant the Defendant, Timothy Sawa an interview with the Plaintiff", the Defendants have pled the defence of "qualified" and "public interest" privilege. They refer to three of a number of factors listed by Lord Nicholls of Birkenhead in the case of **Reynolds v. Times Newspapers Limited,** [2001] 2 A.C. 127, para. 57. The Defendants take the position that the request made by Sawa to interview the Plaintiff in January of 2004 and the decision by the E.P.S. to deny that request is relevant to the steps taken by the Defendants to communicate a balanced news story and whether the Defendants engaged in "responsible journalism". They also say that the Plaintiff's reaction to the request for an interview is relevant to damages.

28 The only evidence before this Court in this context is again the Paragraph 6 of the Affidavit of Sawa as well as Exhibit "B" to that Affidavit. Exhibit "B" contains a copy of a transcript of a telephone conversation that took place on January 6, 2004 between Sergeant Chris Hayden the officer in charge of Edmonton Police Service Media Relations Unit and Sawa, in which Sawa sought to arrange an interview with the Plaintiff apparently in his capacity as Chief of the E.P.S. Also attached as part of Exhibit "B" was an internal memo of the E.P.S. setting out a discussion between Hayden and the Defendant Morris Karp on January 9, 2004. In that memo Hayden told Karp:

> "The Chief and his legal council have also reviewed the request. Given the Chief's role in the disciplinary process and his obligation to maintain its fairness, it is not appropriate for him to comment publicly on the evidence in an ongoing proceeding."

The disciplinary process referred to being the Robertson Application. It would seem to me that such evidence as there may be respecting either of these defences would for the most part be within the knowledge of the Defendants. They were advised by the E.P.S. of its reasons why the interview was not granted. There may be records which in some way pertain to the refusal other than the ones that the Defendants already have in their possession. In addition the Defendants must show the Court how the reasons for the decision by the E.P.S. to refuse the interview would be relevant to the defences of "qualified" and "public interest" privilege as raised in response to the Plaintiff's personal claim. Again the request is too broad and premature.

29 As earlier noted, one of the main thrusts of the Defendant is the close relationship that existed between the Plaintiff and the E.P.S. It seems to me that the Plaintiff's former relationship with the E.P.S. may well enable him when examined for discovery, to readily identify specific "records" or groups of "records" relating to "File H-136" or the requested interview which are, probably relevant and in the possession of the E.P.S. and which can be readily retrieved and their producibility considered by the E.P.S. or this Court. There may also be people such as Colley who are prepared to assist in this regard. Whatever the case, the only material before this Court in support of this application in respect of the remaining three items is the brief statement of Sawa, and Exhibit "B" to his Affidavit. To date, as far as this Court is aware, no steps have been taken by the Defendants to try and narrow the scope of these requests.

30 In my opinion, the breadth of the three outstanding requests is too broad, is too imprecise. and is premature. They do not meet the criteria as earlier set out in the authorities cited. The Defendants do not ask for specific "records" that can be readily identified by the E.P.S. Instead, they have asked for a large number of "records" relating to "File H-316" and the request to grant an interview. In my view, these requests amount to a fishing expedition or at least a

discovery of a non-party to the litigation. The Defendants' attempt to limit the scope of the production to "the time frame" is of little assistance.

31 I appreciate that it is not necessary for the Defendants to specifically identify each document they wish to see when dealing with Rule 209. However, there is simply not enough evidence before this Court to meet the conditions set out in Rule 209. Nor are the requirements met that our Courts have set out to justify disturbing and putting a non-party to the expense of searching out and if found assessing and producing such "records" as it may have. Indeed, there is no evidence before the Court explaining what "File H-316" is or how a review of that file or "records" prepared incidental to it may be relevant to the issues in this action. As noted, the E.P.S. does not recognize "File H-316" as a case file of the E.P.S.

Decision

32 In the result, the application is dismissed respecting the remaining three categories of records identified and sought before this Court. The Defendants are of course, at liberty to bring further applications under Rule 209.

33 The parties may speak to costs if they cannot come to an agreement.

MURRAY J.

Tab B-10

In the Court of Appeal of Alberta

Citation: Esso Resources Canada Limited v. Lloyd's Underwriters & Companies, 1990 ABCA 144

Date: 19900529
Docket: 11313
Registry: Calgary

Between:

Esso Resources Canada Limited, Canadian Occidental Petroleum Ltd., Gulf Canada Limited, Petro-Canada Inc., Alberta Energy Company Ltd., PanCanadian Petroleum Limited, HBOG-Oil Sands Limited Partnership, Syncrude Canada Ltd.

Plaintiffs
(Respondents)

- and -

Lloyd's Underwriters & Companies, *et al*

Respondents
(Insurers)

- and -

Stearns Catalytic Ltd., Felix Dinielle, A. Contreras, C. Silva, Jun-Ki Kim and J. Hadfield
Air Products & Chemicals Inc.

Defendants
(Appellants)

- and -

Bechtel Canada Limited and Sequanda Ventures Inc.

Third Parties

- and -

Her Majesty the Queen

Intervenor

The Court:

The Honourable Mr. Justice Harradence
The Honourable Mr. Justice Stevenson
The Honourable Madam Justice Hetherington

Memorandum of Judgment

COUNSEL

R.J. Simpson, Esq., for the Plaintiffs (Respondents)

W.E. Code, Q.C. and Ms. L.A. Taylor, for the Respondent (Insurers)

M.A. Putnam, Q.C., D.J. Cichy Esq., S.F. Goddard, Q.C. and J.K. McFadyen, Esq., for the Defendants (Appellants)

Ms. C.A. Kent, for the Third Parties

Ms. S.I.E.M. Lobay, for the Intervenor

MEMORANDUM OF JUDGMENT

STEVENSON, J.A.:

[1] At the conclusion of argument for the appellants, we advised counsel that the appeal was dismissed. We were not persuaded that the Chief Justice was in error. We advised counsel that this memorandum would follow.

[2] The defendants applied for a declaration that the action was brought for the benefit of the plaintiffs' insurers within the meaning of rule 187, thus entitling the defendants to production of documents by the insurers. They alternatively sought to require the insurers to produce a series of documents under rule 209, which permits the court to order the production of documents which could be required for the purposes of trial.

[3] The issue with respect to the first application is whether the insurers come within the rule, as "persons for whose benefit an action is prosecuted". The second application depended upon the defendants' identifying any document which they could compel the insurer, as a non party to produce at trial.

[4] The facts were agreed upon and for the purpose of this appeal may be shortly stated. The plaintiffs' claim arises out of a fire which caused substantial damage to an oil sands plant necessitating extensive repairs and giving rise to a loss of income. The plaintiffs had insurance against some, if not all, their losses and made claims against their insurers. Those claims have not been resolved in full, but some payments have been made. The insurers acknowledge that they will seek to share in the proceeds of any recovery and claim a "subrogated" interest to that extent. The plaintiffs acknowledge that they have insurance for some of the loss but do not admit that the insurers are subrogated. The action was brought by the plaintiffs, not the insurers. The plaintiffs produced documents relating to their claims under the policies, but the defendants now seek the documents held by the insurers.

[5] In my view, the question of whether the insurers came within rule 187 has already been decided by a decision of this court, *Gullion v. Burtis* [1945] 1 W.W.R. 242. The defendants sought, firstly, to distinguish that case. At a later stage in the argument they took the position that it was not distinguishable, but wrongly decided. They pressed us with a comment in the Civil Procedure Guide, at 539, that the case "seems odd and may be distinguishable on special facts." In that case the Workmens' Compensation Board was, by statute, subrogated to the claim of an injured workman. The plaintiff had the concurrence of the Board to sue but the Board expressly declined to participate in the action except to assert that it would have a right to share in the judgment.

[6] In the case at bar, the insurers' position is not distinguishable. No claim for subrogation in the proper sense of that word can be made until the plaintiffs are fully indemnified by the insurer. The insurers here are not subrogated in the correct sense of that expression. Even if they can be said to be "subrogated" by statute their position cannot be distinguished from that of the Board in *Gullion.*

[7] In the *Gullion* case, the statute said the Board was subrogated if a workman applied for compensation. The Board, in that case, had made some payment, but the amount was not settled and the Board declined to participate in the case, but expressly reserved its rights to participate in any recovery.

[8] The case is not distinguishable. The insurers are not "participating" in this case any more than the Board was a participant in *Gullion.* The issue is settled by *Gullion.* The defendants were, in my view, correct in finally conceding indistinguishability. We do not ordinarily entertain an argument that a decision of this court is wrong without a panel having

granted leave to so argue. There is some authority for the proposition that the court is not, strictly speaking, bound by its own practice decisions. That view arose at a time when the court considered itself bound by its own previous decisions in other cases. Since then we have established a procedure for obtaining leave, in a proper case, to argue that any previous decision was wrongly decided.

[9] We would have been inclined, in this case, simply to refuse to permit the argument that *Gullion* was wrongly decided. We add, however, that the defendants failed to persuade us that *Gullion* was wrongly decided. It is clearly not enough that the person sought to be equated to a party will benefit, that would permit the examination of a mere creditor. It is not enough that the person has some legal entitlement to share in the proceeds.

[10] This is a counterpart of rule 201, dealing with oral discovery. While there is a tendency to broaden discovery, there are countervailing considerations in not unnecessarily subjecting persons who are not party litigants to the examination process and in not permitting "fishing trips". There is no material here to show that the insurers are the real litigants or, more significantly, that they have any real part in formulating the claims. I am not persuaded that, in these circumstances, there is any injustice in applying the previous decision.

[11] I turn now to the second application. The defendants now take the alternative position that the insurers are not parties, and seek production of groups of documents under rule 209.

[12] Again, I am not persuaded the chambers judge erred. I agree with him that what was sought here is, in essence, document discovery of a non-party. We challenged the defendants, during argument, to show us one identifiable document that met the tests for production under this rule. We were taken to the plaintiff's production and referred to documents showing correspondence with an insurer with reference to enclosures which were not separately produced by the plaintiffs. In my view this rule should not be used against a non-party unless it can be shown that the document is in existence and not available through other means, in this case, through a party. If the document is relevant, and was in the possession of the plaintiffs they are required to disclose its existence under rule 186, and may be asked about its disposition in the course of oral discovery.

[13] I also agree with the Chief Justice that this form of production should be related to specific documents of at least probable relevance and is not a form of discovery of a non-party.

[14] The appeals must be dismissed. The respondents will have their costs of the appeal.

[15] Counsel for Her Majesty the Queen, plaintiff in a parallel action, sought to intervene. We reserved that application, expressing doubt about whether the tests for intervention have been met. At the conclusion of argument counsel for the other parties indicated their view that the crown should have been permitted to intervene and to have costs as it had filed a factum. In these particular circumstances the Crown is given leave to intervene to support the plaintiffs (on the appeal only) and will have its costs.

DATED at CALGARY, Alberta
this 29th day of MAY,
A.D. 1990

HETHERINGTON, J.A., (HARRADENCE, J.A. concurring);

[16] The facts which are relevant to this appeal are set out in the judgment of Stevenson, J.A.

[17] The appellants applied under Rule 187 of the Rules of Court for a declaration that this action was brought for the benefit of the insurers of some of the respondents. Had they been successful, the insurers would then have been regarded as parties for the purposes of discovery of documents. However, the chambers judge refused to make the declaration sought. This appeal followed.

[18] In our view the chambers judge did not err in refusing to declare that this action was brought for the benefit of the insurers. Even if the insurers are subrogated to the rights of the respondents, which we need not and do not decide, the decision of this court in Gullion v. Burtis, [1945] 1 W.W.R. 242 (1944), prevents the appellants from succeeding in their application under Rule 187. It cannot be distinguished and is binding on us.

[19] The appellants also applied under Rule 209 for a direction that the insurers produce documents. The chambers judge refused to make this direction. For the reasons given by Stevenson, J.A. we are of the view that the chambers judge made no error in arriving at this decision.

[20] We would therefore dismiss the appeal. We agree with the disposition as to costs proposed by Stevenson, J.A.

DATED at CALGARY , Alberta
this 29th day of MAY,
A.D. 1990