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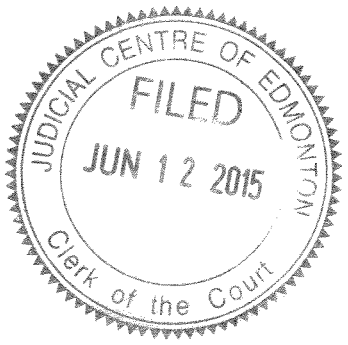

COURT FILE NUMBER:	1103 14112
COURT OF QUEEN'S BENCH OF ALBERTA JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A 2000,C. T-8, AS AMENDED IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19, now known as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

WRITTEN BRIEF OF THE APPLICANT, THE PUBLIC TRUSTEE OF ALBERTA

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INDEX

I. STATEMENT OF FACTS

A. Introduction

1. The Office of the Public Trustee of Alberta seeks an Order providing the Court's advice and direction as regards the following three issues which are directly related to the Public Trustee's ability to fulfill its mandate of identifying and protecting the interests of the minor beneficiaries, including the potential minor beneficiaries ("candidate children"):

   i.) Production of all documents that are relevant and material;

   ii.) Addressing the overlap in issues as between the within proceeding and QB 1403 04885, including providing a "green light" for appropriate communications between all counsel involved;

   iii.) Confirmation that the Order requiring the Public Trustee be indemnified for costs, includes agency legal services, where required.

B. Facts

i.) Background

2. The Sawridge Band is a First Nation located in Northern Alberta. Prior to the coming into effect of amendments to the *Indian Act* in 1985[1] (known as *Bill C-31*) and s.15 (equality) of the *Charter*, the Sawridge Band established Trusts to hold significant portions of the Band's assets.[2] The goal of the Trusts was to protect the Band assets against individuals, primarily women, that would be restored to Indian status and Band membership by *Bill C-31*. The 1985 Trust is the subject of the main application in this proceeding.

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[1] *An Act to amend the Indian Act*, S.C. 1985, c.27

[2] Affidavit of Paul Bujold, dated August 30, 2011 [Excerpts From Pleadings, Transcripts, Exhibits And Answers To Undertakings]

3. Under historical provisions of the *Indian Act*, a registered Indian woman lost her Indian status when she married a non-Indian male, and the couple's children were not entitled to be registered as Indians. As Band membership was an attribute of being a registered Indian, the woman and her children were also excluded from Band membership. This exclusion was permanent, surviving even the widowhood or divorce of the woman who had "married out". Losing Registered Indian status for marrying out was sometimes referred to as being "enfranchised".

4. Women who lost their Registered Indian status before 1985 for "marrying out" were restored to status by *Bill C-31*. These women, and any children they had with their non-Indian husbands, could be registered as Indians pursuant to s.6 of the *Indian Act*, enacted by *Bill C-31*.[3]

5. Once *Bill C-31* came into effect, the Sawridge Band was able to, and did, take control of its Band membership list.[4] The Sawridge Band then became involved in protracted litigation aimed primarily at excluding those individuals who regained registered Indian status and Band membership under *Bill C-31*.[5]

6. In 2011, the Trustees of the 1985 Sawridge Trust filed an application for advice and directions. The application seeks, *inter alia*, to: i.) vary the definition of beneficiary in the 1985 Trust to that of the 1986 Trust; ii.) the Court's advice on identification of beneficiaries; and iii.) to regularize the transfer of assets from the 1982 Trust to the 1985 Trust.

7. The application seeks to amend the 1985 Trust to adopt the definition of beneficiaries that exists in the 1986 Trust, namely "all persons who at that time qualify as members of the Sawridge Indian Band under the laws of Canada in force from time to time including, without restricting the generality of the

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[3] *Indian Act*, R.S.C. 1985, c. I-5, s.6 [Tab 2, Public Trustee Authorities]

[4] *Indian Act*, R.S.C. 1985, c. I-5, s.10, as enacted by S.C. 1985, c.27 [Tab 2, Authorities of the Public Trustee]

[5] For example see: *Sawridge Band* v. *Canada* [2009] F.C.J. No. 465 (C.A.), leave to appeal refused [2009] S.C.C.A. No. 248 [Tab 12, Authorities of the Public Trustee]

foregoing, the membership rules and customary laws of the Sawridge Indian Band as the same may exist from time to time to the extent that such membership rules and customary laws are incorporated into, or recognized by, the laws of Canada." In other words, the variance of the definition of beneficiary would render current Sawridge Band members the only beneficiaries of the 1985 Trust.[6]

8. The value of the 1985 Trust is approximately $70 million dollars. With the limited number of beneficiaries currently acknowledged, the impact on each individual who is a beneficiary or a potential beneficiary could be dramatic. [7]

9. The Office of the Public Trustee was notified of the proceeding and was appointed to represent the interests of minor beneficiaries by Court Order.[8] Justice Thomas's Reasons for Judgment included findings to the effect:

   a.) There are potential, or actual, conflicts of interest affecting the Sawridge Band officials, Sawridge Trustees and adult Sawridge Band members;[9]

   b.) The Public Trustee's role in the proceeding is necessary due, in part, to those conflicts or potential conflicts of interest;[10]

   c.) There are an unknown number of potentially affected minors, being children of individuals applying for Sawridge Band membership. The

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[6] Affidavit of Paul Bujold, September 12, 2011, ex. K, para. 2(a) [Excerpts From Pleadings, Transcripts, Exhibits And Answers To Undertakings]
[7] Affidavit of Paul Bujold, dated September 12, 2011, paras. 15, 17-18, 27, 29-31 [Excerpts From Pleadings, Transcripts, Exhibits And Answers To Undertakings]
[8] *1985 Sawridge Trust v. Alberta (Public Trustee)* [2012] ABQB 365 [Tab 4 Authorities of the Public Trustee]
[9] *1985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2012 ABQB 365, at para. 23, 25 and 28, [Tab 4, Authorities of the Public Trustee]
[10] *1985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2012 ABQB 365, at para. 42 [Tab 4, Authorities of the Public Trustee]

Public Trustee can only identify these children through inquiries into the outstanding Sawridge Band membership applications.[11]

d.) Inquiries into the Sawridge Band membership rules and application process is relevant and material in the within proceeding. These inquiries are necessary, *inter alia*, to reassure the Public Trustee, and the Court, that the beneficiary class for the 1985 Trust can be adequately defined. The inquiries are also necessary to evaluate whether the processes are discriminatory, biased, unreasonable, delayed without reason, and otherwise breach *Charter* principles and the requirements of natural justice.[12]

10. The Sawridge Trustees were also ordered to provide full, and advance, indemnification to the Public Trustee for its participation in the proceeding.[13]

ii. Proceedings to Date

11. Subsequent to the Public Trustee's appointment of the Court and the Court of Appeal's confirmation of this Court's cost order, questioning on Affidavit proceeded.

12. In response to the Public Trustee's request for relevant and material documents in advance of questioning, the Sawridge Trustees provided some documentation voluntarily.

13. Initial questioning of both Paul Bujold and Elizabeth Poitras have been completed. Answers to undertakings for Paul Bujold were provided in

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[11] *1985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2012 ABQB 365, at para. 31-32 [Tab 4, Authorities of the Public Trustee]
[12] *1985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2012 ABQB 365 at para. 46-49 and 53-55 [Tab 4, Authorities of the Public Trustee]
[13] *1985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2012 ABQB 365 at para. 42 and 56 [Tab 4, Authorities of the Public Trustee]

December 2014. Additional questioning of Mr. Bujold was scheduled to occur May 13, 2015.

14. The Public Trustee began to raise concerns about the completeness of the documentary production in 2014. The Public Trustee's concerns were enhanced:

i.) after the Sawridge Trustees relied on documents from Federal Court File No. T-2655-89 in Ms. Poitras' questioning;

ii.) upon certain answers to Paul Bujold's undertakings regarding membership and Federal Court Action T-66-86 being refused; and

iii.) upon learning of QB Action No. 1403 04885.[14]

15. After Counsel for the Public Trustee and the Sawridge Trustees were in the process of discussing the potential for resolution of the production issues by agreement and after the Public Trustee was in the process of confirming the scope of issues being raised in QB Action No. 1403 04885, the Sawridge Trustees raised concerns regarding communications amongst counsel, particularly regarding QB Action No. 1403 04885. The Public Trustee determined advice and direction of the Court was required prior to taking further steps in the proceeding. [15]

iii. Need for Further and Better Production of Documents

16. Counsel for the Sawridge Trusts has taken the position that it is "incumbent on all parties…to provide all relevant evidence to the Court." The Public Trustee fully supports this approach to production of evidence and has expressed concerns that production in the within proceeding has not occurred on that basis.[16]

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[14] Affidavit of Roman Bombak, dated June 12, 2015, ex.18
[15] Affidavit of Roman Bombak, dated June 12, 2015, ex.8 and 19
[16] Affidavit of Roman Bombak, dated June 12, 2015, ex.9 and 11

17. Based on the existing order of this Court, and in light of its statutory duties, the Public Trustee must have access to relevant and material evidence that would assist in:

    i.) Identifying the minors who are potential beneficiaries, such as children of individuals applying for, or potentially eligible for, Sawridge Band membership.

    ii.) Assessing whether the Sawridge Band membership process is in any way "discriminatory, biased, unreasonable, delayed without reason, and otherwise breach *Charter* principles and the requirements of natural justice".[17]

18. The Sawridge Band participated in the 2012 application. The Sawridge Band and the Sawridge Trustees have worked together on elements of the document production and answers to undertakings.[18]

19. However, the Sawridge First Nation is not currently under a specific obligation to produce all relevant and material evidence in the within proceeding. As is apparent in relation to, *inter alia*, answers to undertakings from Paul Bujold, if the Sawridge Band has relevant and material information, it will only be available to the Public Trustees, or indeed possibly the Sawridge Trustees, if the Sawridge Band decides to voluntarily produce it.[19]

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[17] *1985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2012 ABQB 365, at para. 54 [Tab 4, Authorities of the Public Trustee]; *Public Trustee Act*, S.A. 2004, c. P- 44.1, s. 5, 21, 22 [Tab 3, Authorities of the Public Trustee].
[18] Affidavit of Roman Bombak, dated June 12, 2015, ex.2 and 7
[19] Affidavit of Roman Bombak, dated June 12, 2015, ex.7, page 154, 155 and 157

20. Specifically, although general statistics regarding membership applications have been produced, undertakings requesting access to membership application documentation itself has been refused.[20]

21. The Public Trustee is now aware that a "membership processing form" exists and provides at least some insight into reasons for membership decisions. However, the Sawridge Band will not produce them.[21]

22. The importance of access to information about individual experiences negotiating the membership application process is highlighted by the experience of Elizabeth Poitras:

    i.) Her first verbal requests for membership were in 1985;[22]
    ii.) Eventually received a 75 page membership application form to fill out in or about 1990. She had objections to the intrusive nature of elements of the form;[23]
    iii.) Received a shorter, 40+ page application, in or about 1991;[24]
    iv.) Submitted the membership application form to Sawridge Band in 1994;
    v.) Engaged in over 9 years of discussion regarding the "completeness" of her membership application;[25]
    vi.) Sawridge Band developed a list of questions on her application that suggested a lack of neutrality toward the applicant;[26]
    vii.) Never received an actual membership decision from Sawridge Band. Was restored to membership by way of Court order in 2003.[27]

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[20] Affidavit of Roman Bombak, dated June 12, 2015, ex.7, page 154, 155 and 157
[21] Affidavit of Roman Bombak, dated June 12, 2015, ex.7, page 155
[22] Questioning of Elizabeth Poitras, May 29, 2014, page 19-24 [Excerpts From Pleadings, Transcripts, Exhibits And Answers To Undertakings]
[23] Questioning of Elizabeth Poitras, May 29, 2014, page 19-20, 23,47, 49-50, 66-69 [Excerpts From Pleadings, Transcripts, Exhibits And Answers To Undertakings]
[24] Questioning of Elizabeth Poitras, May 29, 2014, page 68-69 [Excerpts From Pleadings, Transcripts, Exhibits And Answers To Undertakings]
[25] Questioning of Elizabeth Poitras, May 29, 2014, pages 74 and 114 [Excerpts From Pleadings, Transcripts, Exhibits And Answers To Undertakings]
[26] Questioning of Elizabeth Poitras, April 9, 2015,ex.W [Excerpts From Pleadings, Transcripts, Exhibits And Answers To Undertakings]

23. The Sawridge Trustees have provided information in the within application to the effect that only 74 applications were "received" between 1985 and present. It is not clear if "received" applications would include applications deemed to be incomplete (as with Ms. Poitras). The Sawridge Trustees have confirmed that prior to 2006, thus 21 years of the period Sawridge Band controlled its membership process, incomplete applications were not "tracked".[28]

24. Without access to the membership files, it is impossible to determine what Sawridge Band deemed to be a "received" application. Without access to individual information, it is impossible to cross reference the membership application information to the 147 Trust beneficiary applications provided.[29]

25. The answer to Paul Bujold's Undertaking #24 indicates the 147 individual applications for beneficiary status refer to approximately 191 children of the individual applicants. Little is known about the membership status of the listed children.[30]

26. Without additional information, the Public Trustee cannot determine, with any precision, the number of listed children who actually remain minor dependents. A conservative estimate suggests that, in addition to the beneficiaries and non-beneficiaries the Sawridge Trustees regard as affected by the within application, there are 31 additional minor potential beneficiaries.[31]

27. In the absence of access to Sawridge Band membership files, the membership application status of these potential minor beneficiaries cannot be determined. Even for the few individuals affected by the bundle of membership decision

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[27] Questioning of Elizabeth Poitras, May 29, 2014, pages 74 and 114 [Excerpts From Pleadings, Transcripts, Exhibits And Answers To Undertakings]
[28] Paul Bujold Answers to Undertakings, Undertaking #33 [Affidavit of Roman Bombak, ex. 7]; Questioning of Paul Bujold, May 27-28, 2014, ex. 4.
[29] Paul Bujold Answers to Undertakings, Undertaking #24 [Affidavit of Roman Bombak, ex. 7]; Questioning of Paul Bujold, May 27-28, 2014, Exhibit 4.
[30] Paul Bujold Answers to Undertakings, Undertaking #24 [Affidavit of Roman Bombak, ex. 7]
[31] Table of Potential Minor Beneficiaries [Appendix C, Brief of the Public Trustee]

notice letters provided, it is not possible to determine fulsome reasons for the membership decisions issued.[32]

28. Answers to undertakings indicate that a document does exist that would provide more detailed information on the reasons for membership decisions, referred to as a membership processing form. However, the Sawridge Trustees refuse to produce it.[33]

29. In addition to these gaps in production, Counsel for the Sawridge Trustees has access to relevant and material evidence, that is not currently available to the Public Trustee, including:

i.) Documents from Elizabeth Poitras's Federal Court membership litigation (Federal Court Action No. T-2655-89);[34]

ii.) Documents from the Sawridge Band Federal Court membership litigation (Federal Court Action No. T-66-86)[35]

iii.) Counsel for the Sawridge Trustees in this matter was originally counsel of record in Court of QB Action No. 1403 04885. As such, they have been privy to all evidence generated in that proceeding, including a sworn but unfiled affidavit of Catherine Twinn.[36]

iv.) Some level of access to Membership application information similar to that refused in answers to undertakings;[37]

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[32] Table of Potential Minor Beneficiaries [Appendix C, Brief of the Public Trustee]; Affidavit of Roman Bombak, dated June 12, 2015, ex.2, page 24-55; Paul Bujold Answers to Undertakings, Undertaking #34, #42, and #43 [Affidavit of Roman Bombak, ex. 7]
[33] Paul Bujold Answers to Undertakings, Undertaking #43 [Affidavit of Roman Bombak, ex. 7]
[34] Questioning of Elizabeth Poitras, May 29, 2014, page 61-63 [Excerpts From Pleadings, Transcripts, Exhibits And Answers To Undertakings]; Affidavit of Roman Bombak, dated June 12, 2015, ex.12
[35] Paul Bujold Answers to Undertakings, Undertaking #19 [Affidavit of Roman Bombak, ex. 7]
[36] Affidavit of Roman Bombak, dated June 12, 2015, ex.13 and 16
[37] Affidavit of Roman Bombak, dated June 12, 2015, ex.2; Paul Bujold Answers to Undertakings, Undertaking #34, #42, and #43 [Affidavit of Roman Bombak, ex. 7]

30. Counsel for Ms. Poitras in her Federal Court litigation further indicates that the documents which have been produced from that litigation appear to be selective in nature.[38]

iv. Communications in QB Action No. 1403 04885

31. QB Action No. 1403 04885 was commenced by the Sawridge Trustees, represented by Dentons LLP, on April 1. 2014.[39]

32. On September 26, 2014, Counsel for Catherine Twinn (Ms. Platten, Q.C. of McLennan Ross LLP) filed an application for advice and directions, seeking the Court's guidance on matters including: "Seeks advice and direction regarding the proper composition of the Board of Trustees, including elimination or reduction of the number of elected officials of the Sawridge Indian Band." [Application for Advice and Direction, September 26, 2014][40]

33. On September 29, 2014, Dentons was provided with a sworn, but unfiled, affidavit by Catherine Twinn in related to QB Action No. 1403 04885. [41]

34. Although April 2015 correspondence suggested Dentons was not counsel in QB Action No. 1403 04885, Dentons did continue as counsel of record until the October 16, 2014 order was obtained. At some point after that, the Sawridge Trustees retained Bryan & Co to represent them in QB Action No. 1403 04885. [42]

35. On December 17, 2014 Bryan & Co and McLennan Ross attended in Court. It is unknown if Dentons LLP attended. Dentons LLP has advised Counsel for the

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[38] Affidavit of Roman Bombak, dated June 12, 2015, ex.13
[39] Affidavit of Roman Bombak, dated June 12, 2015, ex.13
[40] Affidavit of Roman Bombak, dated June 12, 2015, ex. 13 and 19
[41] Affidavit of Catherine Twinn, dated December 8, 2014, para. 8 [Affidavit of Roman Bombak, ex. 16]
[42] Affidavit of Catherine Twinn, dated December 8, 2014, para. 8[Affidavit of Roman Bombak, ex. 16]; Affidavit of Roman Bombak, dated June 12, 2015, ex.13 and 23

Public Trustee that the only issue dealt with that day was whether Justice Thomas was seized with QB Action No. 1403 04885 as a result of being seized with QB Action No. 1103 14112.[43]

36. The Public Trustee was not made aware of the December 17, 2014 hearing, nor indeed, the existence of the action by the Sawridge Trustees at any point in time.[44]

37. When the Public Trustee learned of the existence of QB Action No. 1403 04885, they obtained information on the proceeding through courthouse searches.

38. Based solely on a review of the pleadings in the two actions, there are significant overlaps in relation to key issues in the within proceeding.[45]

39. Counsel for the Public Trustee discussed, *inter alia*, its awareness of QB Action No 1403 04885, and concerns about overlap, with Counsel for the Sawridge Trustees in a teleconference on April 7, 2015. In particular, the Public Trustee noted the issues set out in the Affidavit of Catherin Twinn, dated December 8, 2014, particularly Exhibit J, Dentons advised the Public Trustee that those issues would not be decided by a Court.[46]

40. Counsel for the Public Trustee advised Counsel for the Sawridge Trustees that it would be contacting Ms. Platten, Q.C., counsel for Ms. Twinn in QB Action No. 1403 04885 to confirm this understanding.[47]

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[43] Affidavit of Roman Bombak, dated June 12, 2015, ex.13
[44] Affidavit of Roman Bombak, dated June 12, 2015
[45] Affidavit of Catherine Twinn, dated December 8, 2014 [Affidavit of Roman Bombak, ex. 16]; Table of Similarities and Dissimilarities Between Action No. 1103 14112 and 1403 04885 [Appendix A, Brief of the Public Trustee]
[46] Affidavit of Roman Bombak, dated June 12, 2015, para 11
[47] Affidavit of Roman Bombak, dated June 12, 2015, ex. 17, 18, and 23 (page 285)

41. Ms. Platten advised that issues #1, 3, 4 and 6 of paragraph E in Exhibit J remained live issues that would be addressed in QB Action No. 1403.[48]

42. In the course of the correspondence exchange, Counsel for the Sawridge Trustees in the within proceeding indicated they regarded themselves as being legal counsel to Catherine Twinn, apparently as an individual rather than incidentally to their representation of the Sawridge Trust as an entity.[49]

43. Counsel for the Sawridge Trustees objected to the communication between Counsel for the Public Trustee and Counsel for Catherine Twinn. Those objections lead to limited communications and progress in the litigation.[50]

44. The advice and direction of the Court is required.

v. Costs

45. The Court's order of June 12, 2012 required the Sawridge Trustees to pay the Public Trustee's legal costs in the within proceeding.[51]

46. In June 2014, Counsel for the Public Trustee requested approval to retain Mr. Terrance Glancy, to assist in the review of documents from Liz Poitras' Federal Court Action No. T-2655-89 prior to resumption of her questioning. Mr. Glancy's familiarity with that litigation, as counsel of record in it, was expected to improve efficiency and timeliness, as well as manage costs. Counsel for the Sawridge Trustees indicated this retainer would not be acceptable.[52]

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[48] Affidavit of Roman Bombak, dated June 12, 2015, para 21
[49] Affidavit of Roman Bombak, dated June 12, 2015, ex. 23 (page 284-286)
[50] Affidavit of Roman Bombak, dated June 12, 2015, ex. 8
[51] *1985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2012 ABQB 365, para 42 and 56 [Tab 4, Authorities of the Public Trustee]; *1985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2013 ABCA 226 [Tab 5, Authorities of the Public Trustee]
[52] Affidavit of Roman Bombak, dated June 12, 2015, ex. 11

47. In May 2015, after receipt of the Sawridge Trustees litigation plan, the Public Trustee advised it wished to retain Supreme Advocacy LLP for agency services, including legal research, to assist in moving the within proceeding along.[53]

48. The Sawridge Trustees have indicated they are opposed to such a retainer as well, although the grounds for that position are unknown at this time. [54]

PART II- ISSUES

49. The scope of production necessary in the within proceeding to provide the Public Trustee with the information it requires to fulfill its mandate, and provide the Court with a complete and objective evidentiary record;

50. The impact of the overlap in issues as between the within proceeding and QB 1403 04885;

51. Confirmation of the appropriate scope of communications as between counsel in both proceedings;

52. Confirmation that the Order requiring the Public Trustee be indemnified for costs includes agency legal services, where required.

PART III- SUBMISSIONS OF LAW

A. Application for Further and Better Production

i. Document Production in Originating Applications

53. Part 5 of the *Alberta Rules of Court*, setting requirements for production in actions, does not normally apply to Originating Applications.

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[53] Affidavit of Roman Bombak, dated June 12, 2015, ex. 35
[54] Affidavit of Roman Bombak, dated June 12, 2015, ex. 29, 30, 36

Alberta Rules of Court, Rule 3.10 (1) [Tab 1, Authorities of the Public Trustee]

54. Regardless, the Court has discretion to apply Part 5 production rules to applications where it is appropriate.

Alberta Rules of Court, Rule 3.13 and 3.14 [Tab 1, Authorities of the Public Trustee]

55. The purpose of Rule 5.1 includes obtaining evidence that will be relied upon in the proceeding, narrowing and defining the issues between the parties and encouraging early disclosure.

Alberta Rules of Court, Rule 5.1 [Tab 1, Authorities of the Public Trustee]

56. Application of those purposes within this proceeding will serve to promote the overarching purposes of the *Rules*, including identification of the real issues in dispute, facilitation of the most efficient means of resolving the issues and creating a greater likelihood for opportunities to resolve the claim by agreement.

Alberta Rules of Court, Rule 1.2 [Tab 1, Authorities of the Public Trustee]

L.C. v. *Alberta (Metis Settlements Child & Family Services, Region 10)* [2011] A.J. No. 36, para 75-77 [Tab 9, Authorities of the Public Trustee]

57. Application and interpretation of the Rules should also be consistent with the cultural shift aimed at creating a litigation environment that enhances, and does not obstruct, access to justice.

Canadian Natural Resources Limited v. *ShawCor Ltd.* [2014] ABCA 289, para. 33-34, [Tab 6, Authorities of the Public Trustee]

58. In relation to the Rule 1.2 (1)(c), the reality for the Public Trustee is that a consent order to resolve this proceeding cannot be seriously considered while there are dramatic gaps in the information available. The Public Trustee simply cannot fully assess the interests of the minor beneficiaries without complete and objective production. The inability to access the information regarding potential minor beneficiaries will also seriously hamper settlement discussions.

59. Although the Public Trustee submits the Sawridge Band is already a party to this proceeding, as evidenced by its participation in the 2012 application, the Court does have authority to compel production of records from a non-party.

> *Alberta Rules of Court*, Rule 5.13 [Tab 1, Authorities of the Public Trustee]

ii. This Application Requires a Different Standard of Production

60. The parties have, by conduct to date, already recognized the within Originating Application goes beyond the scope of most applications. It requires the benefit of at least some elements of the procedures applicable to an action. For example, the Sawridge Trustees did provide limited, but advance, production prior to questioning of their deponent.[55] Also, a litigation plan is being proposed for the within proceeding.[56]

61. The subject matter of the within proceeding is complex due, to the membership litigation. It also deals with an extremely valuable trust. The impact of the proceeding on individual beneficiaries has the potential to be significant.

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[55] Affidavit of Roman Bombak, dated June 12, 2015, ex.2-3
[56] Affidavit of Roman Bombak, dated June 12, 2015, ex. 36

62. The proceeding is further impacted by the existence of actual, or potential, conflicts of interest on the part of the Sawridge Trustees. Answers to undertakings have confirmed the extensive overlap in the roles of the Sawridge Trustees as between the Trusts, the Sawridge membership process and Sawridge band government.[57]

63. The combined effect of complex legal issues, significant sums of money at play and the existence of conflict of interest issues creates the need for a higher standard of disclosure and production than normally applies to an application.

ii. Relevant and Material Records

64. The relevance of information that will permit a full assessment of the Sawridge Band membership process has been ruled relevant and material to the within proceeding.[58]

65. The importance of the Public Trustee's ability to identify potential minor beneficiaries, or "candidate children" by way of inquiry into outstanding Band membership applications has also been recognized.[59]

66. The Sawridge Band has a 3 stage membership application process. After an application is deemed "complete", it is referred to the Membership Review Committee (populated by individuals, including current Trustees). The recommendation is reviewed by Chief and Council (also populated by current trustees). Chief and Council makes a membership decision. If applicants are

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[57] *1985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2012 ABQB 365, at para. 25-26 [Tab 4, Authorities of the Public Trustee]; Table of Overlapping Roles of Sawridge Trustees [Appendix B, Brief of the Public Trustee]; Questioning of Paul Bujold, May 27-28, 2014, pages 7-19, and 21-25 and 30-31; Application for Advice and Direction [Affidavit of Roman Bombak, dated June 12, 2015, ex.19]; Affidavit of Catherine Twinn, dated December 8, 2014, para. 8[Affidavit of Roman Bombak, ex. 16]

[58] *1985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2012 ABQB 365, at para. 46-48, 53-55 [Tab 4, Authorities of the Public Trustee];

[59] *1985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2012 ABQB 365, at para. 31-32 [Tab 4, Authorities of the Public Trustee];

dissatisfied with the membership decision, it can be appealed to the Membership Appeal Committee, which consists of all electors of the Sawridge Band (and thus includes current Trustees).[60]

67. Currently, the Public Trustee is being refused access to the information from every stage of this membership application process, other than general statistics.[61]

iii. *Objectivity in Production*

68. Currently, neither the Sawridge Trustees nor the Sawridge Band have a generalized obligation to locate and produce relevant and material evidence in their power and possession. The Public Trustee has been attempting to create a complete, objective evidentiary record for the Court through questioning on affidavit and requesting undertakings. However, it is clear those processes have yet to access all relevant and material evidence available to the other parties.

69. Creating a situation where the Public Trustee must apply for further and better production or further and better answers to undertakings as it becomes aware of new sources of relevant and material evidence is not efficient or consistent with Rule 1.2.

70. The Sawridge Trustees have taken the position in correspondence that: "It is incumbent on all parties to address the issue objectively and provide all relevant evidence to the Court."[62] The Public Trustee supports this approach in the within litigation.

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[60] Questioning of Paul Bujold, May 27-28, 2014, pages 14-15 and 30-31; Paul Bujold Answers to Undertakings, Undertaking #1-9 [Affidavit of Roman Bombak, ex. 7]; Table of Overlapping Roles of Sawridge Trustees [Appendix B, Brief of the Public Trustee]; Questioning of Paul Bujold, May 27-28, 2014, pages 7-19, and 21-25 and 30-31

[61] Paul Bujold Answers to Undertakings, Undertaking #34, 42 and 43 [Affidavit of Roman Bombak, ex. 7]

[62] Affidavit of Roman Bombak, dated June 12, 2015, ex.9, page 161

71. To date, the Public Trustee has become aware of the following information that is available to the Sawridge Trustees and/or Sawridge Band, but is not available to this Court:

i.) Individual Sawridge Band membership application files;[63]

ii.) Membership processing forms that would explain reasons for membership decision;[64]

iii.) Available information about applications or expressions of interest in membership during the time period incomplete applications were not tracked (1985-2006)[65]

iv.) Membership decisions;[66]

v.) Documents related to Elizabeth Poitras' membership litigation, as only a selection of documents have been produced to date; [67]

vi.) Documents related to the Sawridge Federal Court membership litigation (T-66-86);[68]

vii.) The evidence available in QB Action No. 1403 04885, including Catherine Twinn's sworn but unfiled affidavit, which appears to have the potential to relate to the issues set out in Exhibit J of her filed affidavit, namely:

- issues with the Sawridge Band membership process;
- how the membership process affects identification of beneficiaries of the Trust;
- issues arising from Sawridge Trustees' conflicts of interest; and
- Information regarding the transfer of assets into the 1985 Trust. [69]

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[63] Paul Bujold Answers to Undertakings, Undertaking #34 [Affidavit of Roman Bombak, ex. 7]
[64] Paul Bujold Answers to Undertakings, Undertaking #43 [Affidavit of Roman Bombak, ex. 7]
[65] Paul Bujold Answers to Undertakings, Undertaking #34 and #43 [Affidavit of Roman Bombak, ex. 7]
[66] Paul Bujold Answers to Undertakings, Undertaking #34 and #43 [Affidavit of Roman Bombak, ex. 7]
[67] Questioning of Elizabeth Poitras, May 29, 2014, page 61 [Excerpts From Pleadings, Transcripts, Exhibits And Answers To Undertakings]; Affidavit of Roman Bombak, dated June 12, 2015, ex.12
[68] Paul Bujold Answers to Undertakings, Undertaking #19 [Affidavit of Roman Bombak, ex. 7]
[69] Affidavit of Catherine Twinn, dated December 8, 2014, para. 8[Affidavit of Roman Bombak, ex. 16]

72. The Sawridge Band's evidence, through the Sawridge Trustees, suggests at least some of the evidence in the Federal Court Sawridge membership litigation (Action No. T-66-86) may be the only source for certain items of relevant and material evidence. For example, the findings of one Federal Court of Appeal decision refers to a Band Council Resolution that is relevant to identification of potential beneficiaries:

> *By Sawridge Band Council Resolution of July 21, 1988, the Band Council acknowledged that "at least 164 people had expressed an interest in writing in making application for membership in the Band." A list of such persons was attached to the Band Council Resolution.*[70]

73. The Sawridge Band states it no longer has a copy in its possession.[71] The documents from Federal Court T-66-86 may be the only remaining source for this document, but the Sawridge Trustees take the position none of those documents are producible in this proceeding.[72]

74. There have also been certain inconsistencies in production:

    i.) The Sawridge Trustees appear to have at least some measure of access to membership information, including decisions. However, they have relied on Sawridge Band's refusal to produce membership application and decision information on the grounds that its release would breach confidentiality.[73]

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[70] *Sawridge Band v. Canada* [2004] F.C.J. No. 77 (C.A.) at para. 34 [Tab 11, Authorities of the Public Trustee]

[71] Paul Bujold Answers to Undertakings, Undertaking #35 [Affidavit of Roman Bombak, ex. 7]
[72] Paul Bujold Answers to Undertakings, Undertaking #19 [Affidavit of Roman Bombak, ex. 7]
[73] Affidavit of Roman Bombak, dated June 12, 2015, ex.2; Paul Bujold Answers to Undertakings, Undertaking #34 and #43 [Affidavit of Roman Bombak, ex. 7]

ii.) Mr. Bujold acknowledges relying on evidence from the Federal Court membership litigation (T-66-86), but the Sawridge Trustees take the position none of the documents from that proceeding are admissible in this action.[74]

iii.) While taking the position relevant and material evidence from one Federal Court proceeding is inadmissible in the within proceeding, the Sawridge Trustees advance the position that documents from Elizabeth Poitras' Federal Court litigation is admissible.[75]

iv.) While accessing evidence from two separate proceedings, the Sawridge Trustees object to the Public Trustee seeking access to even general information regarding QB Action No. 1403 04885, despite the obvious overlap in issues with this proceeding.[76]

75. All of the above noted issues with production would be resolved by creating a generalized obligation on the Sawridge Trustees and Sawridge Band to produce relevant and material evidence in this application.

76. Complete disclosure will also increase opportunities to narrow, or even resolve, issues in the proceeding.

iv. *Court Authority to Waive the Implied Undertaking*

77. In relation to the Public Trustee's request for production of relevant and material documents filed in Court of QB Action No. 1403 04885, or either Federal Court Action, to the extent that an implied undertaking of confidentiality applies, the Court's authority to waive the implied undertaking is

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[74] Paul Bujold Answers to Undertakings, Undertaking #19 [Affidavit of Roman Bombak, ex. 7]
[75] Questioning of Elizabeth Poitras, May 29, 2014, page 61-63 [Excerpts From Pleadings, Transcripts, Exhibits And Answers To Undertakings]
[76] Table of Overlapping Roles of Sawridge Trustees [Appendix B], Brief of the Public Trustee]; Questioning of Paul Bujold, May 27-28, 2014, pages 7-19, and 21-25 and 30-31; Affidavit of Roman Bombak, dated June 12, 2015, ex.23.

well established. Such a waiver is highly unlikely to create prejudice where the parties to the two proceedings are the same, or similar.

Alberta Rules of Court, Rule 5.33 [Tab 1, Authorities of the Public Trustee]
Juman v. *Doucette* [2008] S.C.J. No. 8 at para. 20-25 [Tab 8 Authorities of the Public Trustee]
Henry v British Columbia (Attorney General) 2012 BCSC 1878, para 42-46 [Tab 7, Authorities of the Public Trustee]

v. *Refusal to Produce Documents Subject to June 12, 2012 Reasons for Judgment*

78. Sawridge Band, through the Sawridge Trustees, has refused to produce the documentation from individual membership files on the grounds that it is confidential and production would breach privacy legislation.[77]

79. This Court has already ruled regarding the relevance and materiality of Sawridge Band membership process information. The Court specifically contemplated that the Public Trustee would be given access to:

i.) Evidence about "candidate children" via inquiry into membership applications to the Sawridge Band.[78]

ii.) Evidence regarding the Sawridge membership process, including procedures and status of memberships, that would assist in determining whether the beneficiary class (namely Sawridge Band members) can be adequately defined;[79]

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[77] Paul Bujold Answers to Undertakings, Undertaking #34, #43 and#48 [Affidavit of Roman Bombak, ex. 7]
[78] *1985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2012 ABQB 365, at para. 31-32 [Tab 4, Authorities of the Public Trustee];
[79] *1985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2012 ABQB 365, at para. 46 and 48-49 [Tab 4, Authorities of the Public Trustee];

iii.) Evidence that would assist in assessing whether the membership processes are "*discriminatory, biased, unreasonable, delayed without reason, and otherwise breach Charter principles and the requirements of natural justice.*"[80]

80. Where legitimate claims of privilege exist, the party asserting the privilege, must provide sufficient information to permit a fulsome assessment of that claim. Such information was not provided in the claims of confidentiality and privacy.[81]

Canadian Natural Resources Limited v. *ShawCor Ltd.* [2014] ABCA 289, para. 5-8, [Tab 6, Authorities of the Public Trustee]

81. Without more than a bare assertion of confidentiality, the Sawridge Band cannot ignore the 2012 Reasons for Judgment. An order requiring the Sawridge Band to file an Affidavit of Records, with direction from the Court regarding producibility, will resolve critical gaps in the evidentiary record. Alternatively, further and better answers to undertakings #34, #43 and #48 would address the situation.

82. Should the Court find that answers to undertakings #34, #43 and #48 raises issues that go beyond the scope of the 2012 Reasons for Judgment, an application to deal with these production issues should be reflected in the proposed litigation plan and chambers dates should be secured.

B. <u>Court of QB Action No. 1403 04885</u>

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[80] *1985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2012 ABQB 365, at para. 53-55 [Tab 4, Authorities of the Public Trustee];
[81] Paul Bujold Answers to Undertakings, Undertaking #34, #43 and#48 [Affidavit of Roman Bombak, ex. 7]

83. Prior to January 2015, the Public Trustee was entirely unaware of this related proceeding. The Public Trustee did not have the opportunity to participate in the December 17, 2014 appearance, or address comments regarding the relationship between the actions to the Court.

84. A review of the pleadings in each Action reveals striking overlaps between the proceedings on central issues, including:[82]

    i.) Who qualifies as a Band member/ beneficiary identification;
    ii.) Existence of conflicts of interest affecting the Band membership process, Trustees, or both;
    iii.) Transfer of assets to the 1985 Trust;
    iv.) Administration and Management of the 1985 Trust

85. Based on its review to date, the Public Trustee has genuine concerns that a consolidation of the proceedings may be necessary to preserve the interests of the administration of justice.

    Alberta Rules of Court, Rule 3.72 [Tab 1, Authorities of the Public Trustee]

86. The overarching purpose of consolidation is to enhance the administration of justice. The factors that will normally be considered in a consolidation application include:

    i. whether there are common claims, disputes and relationships between the parties;
    ii. whether consolidation will save time and resources in pre-trial procedures;
    iii. whether time at trial will be reduced;
    iv. whether one party will be seriously prejudiced by having two trials together;
    v. whether one action is at a more advanced stage than the other; and

[82] Table of Overlapping Roles of Sawridge Trustees [Appendix B], Brief of the Public Trustee]; Questioning of Paul Bujold, May 27-28, 2014, pages 7-19, and 21-25 and 30-31; Affidavit of Roman Bombak, dated June 12, 2015, ex.19

vi. Whether consolidation will delay the trial of one action which will cause serious prejudice to one party."

Munro v. Munro [2011] A.J. No. 1054 (C.A.) at para. 7-8 and 28-29 and 40, [Tab 10, Authorities of the Public Trustee]

87. In order for the Public Trustee, and indeed this Court, to be in a position to fully assess these factors, more information is required. The Public Trustee was in the process of gathering information about QB Action No. 1403 04885, when the objections of the Sawridge Trustees' counsel limited further communications.

88. The order the Public Trustee seeks regarding relevant and material evidence will include production of relevant and material evidence from QB Action No. 1403 04885.

89. Once all counsel are returned to an "even playing field" in relation to access to relevant and material evidence, the Court should be updated, without delay, regarding whether the further production indicates a consolidation is merited.

C. Advice and Direction

i. Communication Between Counsel

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

91. There may be times where, for strategic reasons, only some members of a group of counsel are included in discussion. There is nothing inappropriate about such

conduct. Indeed, particularly where it will facilitate the purposes of the Rules, it should be encouraged.

92. Efforts to limit, or prevent, such communications is not consistent with the purposes under the Rules.

93. Communications between counsel in the within proceeding, and Court of QB Action No. 1403 04885, have recently been impeded by the concerns of counsel for the Sawridge Trustees.

94. The Public Trustee seeks a "green light" to resume discussions with all counsel, including Ms. Platten, Q.C. These communications may occur individually or with the group, as the situation and goals of discussion may dictate.

95. All counsel involved are experienced and well aware of the limitations the Code of Conduct would create in any such communications.

96. Fulsome communication will be particularly desirable once further production is provided. Counsel for the Public Trustee should be permitted to communicate fully and openly with any counsel in QB Action No. 1403 04885, whether individual, as a group, or both, regarding the appropriate weighing of the factors affecting consolidation applications under Rule 3.72

ii. Costs

97. The Courts June 12, 2012 Reasons for Judgment were unambigious regarding costs. The Sawridge Trustees are to indemnify the Public Trustee for its

participation in this proceeding. That award was upheld by the Court of Appeal.[83]

98. The Sawridge Trustees have rejected two proposals to include fees for agency services in the Public Trustees costs in this matter. There appears to be no principled reason for this opposition, arising for example, out of concerns about unreasonable billing to date.

99. The term indemnification indicate full , rather than partial, protection from the costs of the within proceeding was ordered for the Public Trustee.

100. If costs are necessary for the Public Trustee to properly fulfill its role and are reasonably connected to the proceedings, they fall within the scope of indemnification for costs.

Stagg v. *Condominium* Plan *No. 882-2999* [2013] A.J. No. 1306, para. 65-69 [Tab 13, Public Trustee Authorities]

PART IV- REMEDY SOUGHT

101. On the basis of the foregoing, the Public Trustee seeks an order:

a.) Applying Part 5 of the *Rules of Court* to the within proceeding to the extent of requiring Affidavits of Records be filed by the Sawridge Band and the Sawridge Trustees;

b.) Directing that in relation to the Affidavits of Records, and Paul Bujold's Answers to Undertakings #34, #43 and #48, relevant and material documents may not be withheld from production on the bare assertion of confidentiality or privacy;

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[83] 1*985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2012 ABQB 365, para 42 [Tab 4, Authorities of the Public Trustee]; *1985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2013 ABCA 226 [Tab 5, Authorities of the Public Trustee]

c.) Directing the parties to report back to the Court on the merits of consolidation within 60 days of the Public Trustee's receipt of the completed additional document production;

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

i) The evidence produced pursuant to the order requested herein;
ii) The real issues in dispute in either proceeding;
iii) The merits of consolidation, or concurrent hearings, of the two proceedings;
iv) The most efficient way to resolve the issues that overlap as between the two proceedings; or
v) Any other matter consistent with the purposes of the *Alberta Rules of Court*.

e.) Requiring the Sawridge Trustees to reimburse the Public Trustee for all legal costs, on a full indemnity basis, including for agency services that may be required from Terrance Glancy or Supreme Advocacy LLP.

f.) Amendments or revisions, as appropriate, to the Sawridge Trustee's proposed litigation plan to reflect these orders

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at the City of Edmonton, Province of Alberta, this 12th day of June, 2015.

HUTCHISON LAW

Per: _____
JANET L. HUTCHISON
Solicitor for the Public Trustee

Estimation of time for Oral Argument: 45 minutes

QB Action No. 1103 14112

Overlapping Roles of Sawridge Trustees

Taken from, inter alia, Paul Bujold Answers to Undertakings #1-#9

Name	Roles	Decisions
Walter P.Twinn	• Chief of Sawridge First Nation (pre-1985 through to October 30, 1997) • Trustee of 1985 Trust (April 1985-October 1997) • Trustee of 1986 Trust (August 1986-October 30, 1997) • Settlor of 1982, 1985 and 1986 Trust • Band member (and member of Membership Appeal Committee) • Trust beneficiary	<u>Past Trustee</u> Made membership decisions as a member of Council Heard appeals from those decisions as a Band Member (member of Appeal Committee)
George V. Twin	• Band Councillor (Feb 85-August 1997) • Trustee of 1985 Trust (April 1985-August 1997) • Trustee of 1986 Trust (August 1986 – August 1997) • Band member (and member of Membership Appeal Committee) • Trust beneficiary	<u>Past Trustee</u> Made membership decisions as a member of Council Heard appeals from those decisions as a Band Member (member of Appeal Committee)
Chief Roland Twinn	• Band Councillor (August 1997-Feb 2003) • Current Chief (February 2003-present) • Member of Membership Review Committee • witness in Sawridge Bill C-31 membership litigation • Trustee of 1985 Trust (March 2002-present) • Trustee of 1986 Trust (March 2002 to present) • Band member (and member of	<u>Current Trustee</u> Makes Membership decisions/ recommendations at every stage of the Membership process (membership review committee, Chief and Council and Membership Appeal Committee)

Name	Roles	Decisions
	Membership Appeal Committee) • Trust beneficiary	
Walter Felix Twinn	• Band Councillor (pre-1985 to Feb 2003, continuous) • Settlor of 1982, 1985 and 1986 Trust • Former Member of Membership Committee • Trustee of 1985 Trust (December 1986-January 2014) • Trustee of 1986 Trust (Nov 1997-January 2014) • Band member (and member of Membership Appeal Committee) • Trust beneficiary	<u>Past Trustee</u> Made Membership decisions/ recommendations at every stage of the Membership process (membership review committee, Chief and Council and Membership Appeal Committee)
Catherine Twinn	• Member of Membership Review Committee • -Counsel for Sawridge First Nation in Sawridge Bill C31 membership litigation • Trustee of 1985 Trust (December 1986-present) • Trustee of 1986 Trust (August 1986-present) • Band member (and member of Membership Appeal Committee) • Trust beneficiary	<u>Current Trustee</u>
Bertha L'Hirondelle	• former Chief (October 1997- February 2003) • Band Councillor (Feb 2003-Feb 2007) • Member of Membership Committee • witness in Sawridge Bill C-31 membership litigation • Trustee of 1985 Trust (November 1997-present) • Trustee of 1986 Trust (November 1997 to present)	<u>Current Trustee</u> Made Membership decisions/ recommendations at every stage of the Membership process (membership review committee, Chief and Council and Membership Appeal Committee)

Name	Roles	Decisions
	• Band member (and member of Membership Appeal Committee) • Trust beneficiary	
Clara Midbo	• Trustee of 1985 Trust (March 2002- July 2014) • Trustee of 1986 Trust (March 2002-July 2014) • witness in Sawridge Bill C-31 membership litigation • Band member (and member of Membership Appeal Committee) • Trust beneficiary	Former Trustee
Justin Twin	• Band Councillor (February 2005-present) • Trustee of 1985 Trust (January 2014 to present) • Trustee of 1986 Trust (January 2014 to present) • Band member (and member of Membership Appeal Committee) • Trust beneficiary	Present Trustee

SIMILARITIES

Issue #1: Who qualifies as Band Member/ Beneficiary-identification

QB 1103 14112:

- "The Public Trustee seeks to investigate these issues... to reassure itself (and the Court) that the beneficiary class can and has been adequately defined. [para 46, Justice D.R.G. Thomas, June 12, 2012 Reasons for Judgment ("Reasons")
- "... it would be peculiar if, in varying the definition of "Beneficiaries" in the trust documents, that the Court did not make some sort of inquiry as to the membership application process that the Trustees and the Chief and Council acknowledge is underway" [para 48, Reasons]
- "This Court has an obligation to make inquiries as to the procedure and status of Band memberships where a party (or its representative) who is potentially a claimant to the Trust queries whether the beneficiary class can be "ascertained" [para 49, Reasons]
- "The Trustees seek this Court's direction in setting the procedure for seeking the opinion, advice and direction of the Court in regard to: (a) Determining the Beneficiaries of the 1985 Trust" [para 14(a), Affidavit of Paul Bujold, August 30, 2011]

QB 1403 04885:

- "Examination of and ensuring that the system for ascertaining beneficiaries of the Trusts is fair, reasonable, timely, unbiased and in accordance with *Charter* principles and natural justice;" [Exhibit J, para E(3), Affidavit of Ms. Twinn, December 8, 2014]

Issue #2: Existence of Conflicts of Interest affecting Membership process, Trustees, or both

QB 1103 14112:

- "...the Sawridge Trustees are personally affected by the assignment of persons inside and outside the Trust." [para 23, Reasons]
- "...the key players in both the administration of the Sawridge Trust and of the Sawridge Band overlap and these persons are currently entitled to shares of the Trust property. The members of the Sawridge Band Chief and Council are elected by and answer to an interested group of persons, namely those

QB 1403 04885:

- "Seeks advice and direction regarding the proper composition of the Board of trustees, including elimination or reduction of the number of elected officials of the Sawridge Indian Band." [Application for Advice and Direction, September 26, 2014]
- "Trustee selection and succession, including issues of conflict of interest now and in the future, including examination of a separated model to remove conflict of interest, be it

who will have a right to share in the 1985 Sawridge Trust. These facts provide a logical basis for a concern by the Public Trustee and this Court of a potential for an unfair distribution of the assets of the 1985 Sawridge Trust." [para 25, Reasons] • "I reject the position of the Sawridge Band that there is no potential for a conflict of interest to arise in these circumstances." [para 26, Reasons] • "The Sawridge Trustees and the adult members of the Sawridge Band (including the Chief and Council) are in a potential conflict between their personal interests and their duties as fiduciaries" [para 28, Reasons] • "The Public Trustee's role is necessary due to the potential conflict of interest of other litigants and the failure of the Sawridge Trustees to propose alternative independent representation." [para 42, Reasons]	actual, structural or of the appearance of conflict of interest;" [Exhibit J, para E(1), Affidavit of Ms. Twinn, December 8, 2014]
Issue #3: Transfer of Assets to 1985 Trust	
QB 1103 14112: • "To seek direction with respect to the transfer of assets to the 1985 Sawridge Trust" [para 1(b), Order by Justice D.R.G. Thomas, September 6, 2011]	**QB 1403 04885:** • "Determination of how assets were held and transferred from Trust inception to the present day;" [Exhibit J, para E(6), Affidavit of Ms. Twinn, December 8, 2014]
Issue #4: Administration and Management of 1985 Trust	
QB 1103 14112: • "An application shall be brought by the Trustees of the 1985 Sawridge Trust for the opinion, advice and direction of the Court respecting the administration and management of the property held under the 1985 Sawridge Trust (hereinafter referred to as the "Advice and Direction Application")." [para 1, Order by Justice D.R.G. Thomas, September 6, 2011] • The Public Trustee of Alberta must protect	**QB 1403 04885:** • "I have serious concerns regarding the administration of the Trusts and it is my belief that it is important and my duty that this information be brought to the attention of the Court. It is my intention to provide a copy of my Affidavit, unfiled, to the Court at the hearing of this application so that the confidentiality of the subject matter of my Affidavit can be maintained pending further direction from this Honourable Court on how to proceed in this regard."[para 16, Affidavit

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

Paul Bujold, Undertaking #24
Potential Minor Beneficiaries

	Name	Date of Trust Application	Information on Membership Application	List of Minor Children; if any
1.	Conway Belcourt D.O.B.- 1971	February 24, 2010	Membership Denied, September 19, 2012. See Ex.7, Questioning P.Bujold	Kyle Belcourt-Gladue Kiersten Belcourt **(*likely minor dependants)**
2.	Sheena Lee Cardinal D.O.B. 1986	February 21, 2010	Membership Denied, December 11, 2011. See Ex.7, Questioning P.Bujold	Ronin Auger **(*likely minor dependant)**
3.	Misty Lee Dokken D.O.B. 1979	January 6, 2010	None available	Phoenix Fayant-Dion Joshua Fayant-Dion Avery Fayant-Dion **(*likely minor dependants)**
4.	Sydney Midbo D.O.B. February 26, 2006	April 30, 2010 *	None Available	**IS A MINOR** On list of non-beneficiaries- Paul Bujold UT #31
5.	Casey Elijah Midbo D.O.B.- August 21, 2003	April 30, 2010	None available	**IS A MINOR** *On list of minor non-beneficiaries- Paul Bujold UT #31
6.	Ethan Roy Midbo D.O.B. August 8, 2004	April 30, 2010 *	None Available	**IS A MINOR** On list of minor non-beneficiaries- Paul Bujold UT #31
7.	Jamie Gail Hunt (Maiden: O'Connell) D.O.B. 1978	April 5, 2010	None available	Kate Kona Hunt Kennedy Koda Hunt **(*likely minor dependants)**

Paul Bujold, Undertaking #24
Potential Minor Beneficiaries

	Name	Date of Trust Application	Information on Membership Application	List of Minor Children; if any
8.	Michelle Elizabeth Paquette D.O.B. 1972	November 7, 2010	None available	Victoria Ashley Taylor Matthew Aaron Taylor Amber Christian Faith Dix Franklyn Layne Dix Judith Charity Dix **(*likely minor dependants)**
9.	Heather Jacqueline Poitras D.O.B. 1970	June 9, 2010	None available	Theoren Poitras Anastasia Poitras Tamara Poitras (P.Bujold UT #22 includes 2011 email stating eldest just turned 18) **(*includes 1-2 minor dependants)**
10.	Jeanine Marie Potskin	February 5, 2010	None available	Jaise Ariel Potskin- D.O.B. March 25, 2003 Jorga Lynn Moodie- D.O.B. January 29, 2008 **(*minor dependants)** * On list of minor beneficiaries- Paul Bujold UT #31
11.	Nia Brooke Donald Lewis D.O.B. June 27, 2006	August 30, 2010	None available	**IS A MINOR**
12.	Niomi Mary Ann Donald D.O.B. December 12, 2007	August 30, 2010	None available	**IS A MINOR**

Paul Bujold, Undertaking #24
Potential Minor Beneficiaries

	Name	Date of Trust Application	Information on Membership Application	List of Minor Children; if any
13.	Stiles Ansley Donald January 5, 2005	August 30, 2010	None available	**IS A MINOR**
14.	Crystal Marie Poitras-John DOB 1968	May 11, 2010		Corbin Poitras (D.O.B. 1988) Jasmine Fowillard Jesse John Jordan John **(*likely includes 2-3 minor dependants)**
15.	Trent Ryan Albert Potskin D.O.B. 1981	January 28, 2010	None available	Ethan Elijah Tallia M.L. **(*minor dependants)** *On list of minor beneficiaries- Paul Bujold UT #31
16.	Nicole Tanya Marie Poitras	May 12, 2010	None available	Alisha Claire Poitras- D.O.B. 1995 Tonan Ashley Herman Poitras- D.O.B. 2000 Tyreese Cameron Poitras- DOB 2003 **(*includes 2 minor dependants)**
17.	Deanna Marie Quintal D.O.B. 1971	December 12, 2011	None available	Derek Luke Quintal Darren Luke Quintal Roseanna Mary Quintal **(*likely minor dependants)**

Paul Bujold, Undertaking #24
Potential Minor Beneficiaries

	Name	Date of Trust Application	Information on Membership Application	List of Minor Children; if any
18.	Justice Walter William Twin D.O.B. 2001	June 8, 2010	None available	**IS A MINOR** * On list of minor beneficiaries- Paul Bujold UT #31
19.	Nicole Charmaine Clara Twin	January 13, 2011 R: February 2, 2011	None available	Dominique Twin- D.O.B. 1994 Taylor Peterson- D.O.B. 2002 **(*includes 1 minor dependants)**
20.	Orleane Jennifer Claire Twin D.O.B. 1982	July 22, 2010	None available	Miel Bella Twin Abdi- D.O.B. 2004 Shirdon Keith Abdi- D.O.B. unknown **(*likely 2 minor dependants)**
21.	Miel Bella Twin, Abdi D.O.B. 2004 ***mother's application above	July 29, 2010	None available	**IS A MINOR**
22.	Wesley Irving Joseph Twin (son of Walter Felix Twin) D.O.B. 1963	February 26, 2010	Approved See April 17,.2008 letter, Ex. 7, P. Bujold Questioning.	Brittany Emma Marie Twin- D.O.B. 1993 Heather Doris Anne Twin- deceased Justice Walter William Twin- D.O.B. 2001 (*has own application) Alexander Lennon Luke Twin- D.O.B. 2005 (*has own application) **(*includes 2 minor dependants)** * On list of minor beneficiaries- Paul Bujold UT #31

Paul Bujold, Undertaking #24
Potential Minor Beneficiaries

	Name	Date of Trust Application	Information on Membership Application	List of Minor Children; if any
23.	Alexander Lennon Luke Twin D.O.B. 2005	R: June 8, 2010	None available	**IS A MINOR** *On list of minor beneficiaries- Paul Bujold UT #31
24.	Darcy Alexander Twin D.O.B. 1977	May 17, 2010	None available	Autumn Twin Logan Twin River **(*likely includes minor dependants)** *On list of minor beneficiaries- Paul Bujold UT #31
25.	Grace Erika Worden D.O.B. 1987	July 25, 2011 R: September 22, 2011		Kenzie Desha Kasokeo Kazley Tahilia Harmony Ward **(*likely minor dependants)**

List of Authorities

1. *Alberta Rules of Court,* Alta Reg. 124/2010
2. *Indian Act*, R.S.C. 1985, c. I-5
3. *Public Trustee Act,* S.A. 2004, c. P-44.1
4. *1985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2012 ABQB 365
5. *1985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2013 ABCA 226
6. *Canadian Natural Resources Limited* v. *ShawCor Ltd.* [2014] ABCA 289
7. *Henry* v. *British Columbia (Attorney General)* [2012] B.C.J. No. 2639 (B.C.S.C.)
8. *Juman* v. *Doucette* [2008] S.C.J. No. 8 (S.C.C.)
9. *L.C.* v. *Alberta (Metis Settlements Child & Family Services, Region 10)* [2011] A.J. No. 36 (Q.B.)
10. *Munro v. Munro* [2011] A.J. No. 1054 (C.A.)
11. *Sawridge Band v. Canada* [2004] F.C.J. No. 77 (C.A.)
12. *Sawridge Band* v. *Canada* [2009] F.C.J. No. 465 (C.A.), leave to appeal refused [2009] S.C.C.A. No. 248
13. *Stagg* v. *Condominium Plan No. 882-2999* [2013] A.J. No. 1306 (Q.B.)

ALBERTA
RULES OF COURT

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Purpose and intention of these rules

1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.

(2) In particular, these rules are intended to be used

(a) to identify the real issues in dispute,

(b) to facilitate the quickest means of resolving a claim at the least expense,

(c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable,

(d) to oblige the parties to communicate honestly, openly and in a timely way, and

(e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments.

(3) To achieve the purpose and intention of these rules the parties must, jointly and individually during an action,

(a) identify or make an application to identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense,

(b) periodically evaluate dispute resolution process alternatives to a full trial, with or without assistance from the Court,

(c) refrain from filing applications or taking proceedings that do not further the purpose and intention of these rules, and

(d) when using publicly funded Court resources, use them effectively.

(4) The intention of these rules is that the Court, when exercising a discretion to grant a remedy or impose a sanction, will grant or impose a remedy or sanction proportional to the reason for granting or imposing it.

Procedural orders

1.4(1) To implement and advance the purpose and intention of these rules described in rule 1.2 the Court may, subject to any specific provision of these rules, make any order with respect to practice or procedure, or both, in an action, application or proceeding before the Court.

(2) Without limiting subrule (1), and in addition to any specific authority the Court has under these rules, the Court may, unless specifically limited by these rules, do one or more of the following:

(a) grant, refuse or dismiss an application or proceeding;

(b) set aside any process exercised or purportedly exercised under these rules that is

(i) contrary to law,

(ii) an abuse of process, or

(iii) for an improper purpose;

(c) give orders or directions or make a ruling with respect to an action, application or proceeding, or a related matter;

(d) make a ruling with respect to how or if these rules apply in particular circumstances or to the operation, practice or procedure under these rules;

(e) impose terms, conditions and time limits;

(f) give consent, permission or approval;

(g) give advice, including making proposals, providing guidance, making suggestions and making recommendations;

(h) adjourn or stay all or any part of an action, application or proceeding, extend the time for doing anything in the proceeding, or stay the effect of a judgment or order;

(i) determine whether a judge is or is not seized with an action, application or proceeding;

(j) include any information in a judgment or order that the Court considers necessary.

(3) A decision of the Court affecting practice or procedure in an action, application or proceeding that is not a written order, direction or ruling must be

(a) recorded in the court file of the action by the court clerk, or

(b) endorsed by the court clerk on a commencement document, filed pleading or filed document or on a document to be filed.

Application of Part 4 and Part 5

3.10(1) Subject to subrule (2), Part 4 and Part 5 do not apply to an action started by originating application unless the parties otherwise agree or the Court otherwise orders.

(2) The rules in Divisions 2, 4, 5 and 6 of Part 4 and rules 4.1, 4.2(a) and (d) and 4.36 apply, with all necessary modifications, to actions started by originating application unless the Court otherwise orders.

Originating application evidence (other than judicial review)

3.14(1) When making a decision about an originating application, other than an originating application for judicial review, the Court may consider the following evidence only:

(a) affidavit evidence, including an affidavit by an expert;

(b) a transcript referred to in rule 3.13;

(c) if Part 5 applies by agreement of the parties or order of the Court to the originating application, the transcript evidence or answers to written questions, or both, under that Part that may be used under rule 5.31;

(d) an admissible record disclosed in an affidavit;

(e) anything permitted by any other rule or by an enactment;

(f) evidence taken in any other action, but only if the party proposing to submit the evidence gives each of the other parties 5 days' or more notice of that party's intention and obtains the Court's permission to submit the evidence;

(g) with the Court's permission, oral evidence, which if permitted must be given in the same manner as at trial.

(2) An affidavit or other evidence that is used or referred to at a hearing by the respondent, or by the originating applicant in response to the respondent, and that has not previously been filed in the action must be filed as soon as practicable after the hearing.

Consolidation or separation of claims and actions

3.72(1) The Court may order one or more of the following:

(a) that 2 or more claims or actions be consolidated;

(b) that 2 or more claims or actions be tried at the same time or one after the other;

(c) that one or more claims or actions be stayed until another claim or action is determined;

(d) that a claim be asserted as a counterclaim in another action.

(2) An order under subrule (1) may be made for any reason the Court considers appropriate, including, without limitation, that 2 or more claims or actions

(a) have a common question of law or fact, or

(b) arise out of the same transaction or occurrence or series of transactions or occurrences.

Ways the Court may manage action

4.11 The Court may manage an action in one or more of the following ways, in which case the responsibility of the parties to manage their dispute is modified accordingly:

(a) the Court may make a procedural order;

(b) the Court may direct a conference under rule 4.10;

(c) on request under rule 4.12, or on the initiative of the Chief Justice under rule 4.13, the Chief Justice may appoint a case management judge for the action;

(d) the Court may make an order under a rule providing for specific direction or a remedy.

Purpose of this Part

5.1(1) Within the context of rule 1.2, the purpose of this Part is

(a) to obtain evidence that will be relied on in the action,

(b) to narrow and define the issues between parties,

(c) to encourage early disclosure of facts and records,

(d) to facilitate evaluation of the parties' positions and, if possible, resolution of issues in dispute, and

(e) to discourage conduct that unnecessarily or improperly delays proceedings or unnecessarily increases the cost of them.

(2) The Court may give directions or make any order necessary to achieve the purpose of this Part.

Obtaining records from others

5.13

(1) On application, and after notice of the application is served on the person affected by it, the Court may order a person who is not a party to produce a record at a specified date, time and place if

(a) the record is under the control of that person,

(b) there is reason to believe that the record is relevant and material, and

(c) the person who has control of the record might be required to produce it at trial.

(2) The person requesting the record must pay the person producing the record an amount determined by the Court.

When something is relevant and material

5.2(1) For the purposes of this Part, a question, record or information is relevant and material only if the answer to the question, or the record or information, could reasonably be expected

(a) to significantly help determine one or more of the issues raised in the pleadings, or

(b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings.

(2) The disclosure or production of a record under this Division is not, by reason of that fact alone, to be considered as an agreement or acknowledgment that the record is admissible or relevant and material.

Confidentiality and use of information

5.33

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

(a) the Court otherwise orders,

(b) the parties otherwise agree, or

(c) otherwise required or permitted by law.

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

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

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

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

Applications generally

6.3(1) Unless these rules or an enactment otherwise provides or the Court otherwise permits, an application may only be filed during an action or after judgment is entered.

(2) Unless the Court otherwise permits, an application to the Court must

(a) be in the appropriate form set out in Schedule A, Division 1 to these rules,

(b) state briefly the grounds for filing the application,

(c) identify the material or evidence intended to be relied on,

(d) refer to any provision of an enactment or rule relied on,

(e) specify any irregularity complained of or objection relied on,

(f) state the remedy claimed or sought, and

(g) state how the application is proposed to be heard or considered under these rules.

(3) Unless an enactment, the Court or these rules otherwise provide, the applicant must file and serve on all parties and every other person affected by the application, 5 days or more before the application is scheduled to be heard or considered,

(a) notice of the application, and

(b) any affidavit or other evidence in support of the application.

Evidence at application hearings

6.11(1) When making a decision about an application the Court may consider only the following evidence:

(a) affidavit evidence, including an affidavit by an expert;

(b) a transcript of questioning under this Part;

(c) the written or oral answers, or both, to questions under Part 5 that may be used under rule 5.31;

(d) an admissible record disclosed in an affidavit of records under rule 5.6;

(e) anything permitted by any other rule or by an enactment;

(f) evidence taken in any other action, but only if the party proposing to submit the evidence gives every other party written notice of that party's intention 5 days or more before the application is scheduled to be heard or considered and obtains the Court's permission to submit the evidence;

(g) with the Court's permission, oral evidence, which, if permitted, must be given in the same manner as at trial.

(2) An affidavit or other evidence that is used or referred to at a hearing and that has not previously been filed in the action must be filed as soon as practicable after the hearing.

CANADA

OFFICE CONSOLIDATION

CODIFICATION ADMINISTRATIVE

Indian Act

Loi sur les Indiens

R.S., 1985, c. I-5

amended by
R.S., 1985, c. 32 (1st Supp.)
R.S., 1985, c. 27 (2nd Supp.)
R.S., 1985, c. 17, 43, 48 (4th Supp.)

L.R. (1985), ch. I-5

modifiée par
L.R. (1985), ch. 32 (1er suppl.)
L.R. (1985), ch. 27 (2e suppl.)
L.R. (1985), ch. 17, 43 et 48 (4e suppl.)

September, 1989

Septembre 1989

DEFINITION AND REGISTRATION OF INDIANS

Indian Register

Indian Register

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.

Existing Indian Register

(2) The names in the Indian Register immediately prior to April 17, 1985 shall constitute the Indian Register on April 17, 1985.

Deletions and additions

(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.

Date of change

(4) The Indian Register shall indicate the date on which each name was added thereto or deleted therefrom.

Application for registration

(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.

R.S., 1985, c. I-5, s. 5; R.S., 1985, c. 32 (1st Supp.), s. 4.

Persons entitled to be registered

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

(*a*) that person was registered or entitled to be registered immediately prior to April 17, 1985;

(*b*) that person is a member of a body of persons that has been declared by the Governor in Council on or after April 17, 1985 to be a band for the purposes of this Act;

(*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;

(*d*) 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*)(iii) pursuant to an

DÉFINITION ET ENREGISTREMENT DES INDIENS

Registre des Indiens

Tenue du registre

5. (1) Est tenu au ministère un registre des Indiens où est consigné le nom de chaque personne ayant le droit d'être inscrite comme Indien en vertu de la présente loi.

Registre existant

(2) Les noms figurant au registre des Indiens le 16 avril 1985 constituent le registre des Indiens au 17 avril 1985.

Additions et retranchements

(3) Le registraire peut ajouter au registre des Indiens, ou en retrancher, le nom de la personne qui, aux termes de la présente loi, a ou n'a pas droit, selon le cas, à l'inclusion de son nom dans ce registre.

Date du changement

(4) Le registre des Indiens indique la date où chaque nom y a été ajouté ou en a été retranché.

Demande

(5) Il n'est pas requis que le nom d'une personne qui a le droit d'être inscrite soit consigné dans le registre des Indiens, à moins qu'une demande à cet effet soit présentée au registraire.

L.R. (1985), ch. I-5, art. 5; L.R. (1985), ch. 32 (1er suppl.), art. 4.

Personnes ayant droit à l'inscription

6. (1) Sous réserve de l'article 7, une personne a le droit d'être inscrite si elle remplit une des conditions suivantes :

a) elle était inscrite ou avait le droit de l'être le 16 avril 1985;

b) elle est membre d'un groupe de personnes déclaré par le gouverneur en conseil après le 16 avril 1985 être une bande pour l'application de la présente loi;

c) son nom a été omis ou retranché du registre des Indiens ou, avant le 4 septembre 1951, d'une liste de bande, en vertu du sous-alinéa 12(1)*a*)(iv), de l'alinéa 12(1)*b*) ou du paragraphe 12(2) ou en vertu du sous-alinéa 12(1)*a*)(iii) conformément à une ordonnance prise en vertu du paragraphe 109(2), dans leur version antérieure au 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui d'une de ces dispositions;

d) son nom a été omis ou retranché du registre des Indiens ou, avant le 4 septembre 1951, d'une liste de bande, en vertu du sous-alinéa 12(1)*a*)(iii) conformément à une

order made under subsection 109(1), 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;

(*e*) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951,

(i) under section 13, as it read immediately prior to September 4, 1951, or under any former provision of this Act relating to the same subject-matter as that section, or

(ii) under section 111, as it read immediately prior to July 1, 1920, or under any former provision of this Act relating to the same subject-matter as that section; or

(*f*) that person is a person both of whose parents are or, if no longer living, were at the time of death entitled to be registered under this section.

ordonnance prise en vertu du paragraphe 109(1), dans leur version antérieure au 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui d'une de ces dispositions;

e) son nom a été omis ou retranché du registre des Indiens ou, avant le 4 septembre 1951, d'une liste de bande :

(i) soit en vertu de l'article 13, dans sa version antérieure au 4 septembre 1951, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui de cet article,

(ii) soit en vertu de l'article 111, dans sa version antérieure au 1er juillet 1920, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui de cet article;

f) ses parents ont tous deux le droit d'être inscrits en vertu du présent article ou, s'ils sont décédés, avaient ce droit à la date de leur décès.

Idem

(2) Subject to section 7, a person is entitled to be registered if that person is a person one of whose parents is or, if no longer living, was at the time of death entitled to be registered under subsection (1).

Idem

(2) Sous réserve de l'article 7, une personne a le droit d'être inscrite si l'un de ses parents a le droit d'être inscrit en vertu du paragraphe (1) ou, s'il est décédé, avait ce droit à la date de son décès.

Deeming provision

(3) For the purposes of paragraph (1)(*f*) and subsection (2),

(*a*) a person who was no longer living immediately prior to April 17, 1985 but who was at the time of death entitled to be registered shall be deemed to be entitled to be registered under paragraph (1)(*a*); and

(*b*) a person described in paragraph (1)(*c*), (*d*), (*e*) or (*f*) or subsection (2) and who was no longer living on April 17, 1985 shall be deemed to be entitled to be registered under that provision.

R.S., 1985, c. I-5, s. 6; R.S., 1985, c. 32 (1st Supp.), s. 4, c. 43 (4th Supp.), s. 1.

Présomption

(3) Pour l'application de l'alinéa (1)*f*) et du paragraphe (2) :

a) la personne qui est décédée avant le 17 avril 1985 mais qui avait le droit d'être inscrite à la date de son décès est réputée avoir le droit d'être inscrite en vertu de l'alinéa (1)*a*);

b) la personne visée aux alinéas (1)*c*), *d*), *e*) ou *f*) ou au paragraphe (2) et qui est décédée avant le 17 avril 1985 est réputée avoir le droit d'être inscrite en vertu de ces dispositions.

L.R. (1985), ch. I-5, art. 6; L.R. (1985), ch. 32 (1er suppl.), art. 4, ch. 43 (4e suppl.), art. 1.

Persons not entitled to be registered

7. (1) The following persons are not entitled to be registered:

(*a*) a person who was registered under paragraph 11(1)(*f*), as it read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as that paragraph, and whose name was subsequently omitted or deleted from the Indian Register under this Act; or

Personnes n'ayant pas droit à l'inscription

7. (1) Les personnes suivantes n'ont pas le droit d'être inscrites :

a) celles qui étaient inscrites en vertu de l'alinéa 11(1)*f*), dans sa version antérieure au 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui de cet alinéa, et dont le nom a ultérieurement été omis ou retranché du registre des Indiens en vertu de la présente loi;

Band control of membership

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.

Pouvoir de décision

10. (1) La bande peut décider de l'appartenance à ses effectifs si elle en fixe les règles par écrit conformément au présent article et si, après qu'elle a donné un avis convenable de son intention de décider de cette appartenance, elle y est autorisée par la majorité de ses électeurs.

Membership rules

(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.

Règles d'appartenance

(2) La bande peut, avec l'autorisation de la majorité de ses électeurs :

a) après avoir donné un avis convenable de son intention de ce faire, fixer les règles d'appartenance à ses effectifs;

b) prévoir une procédure de révision des décisions portant sur l'appartenance à ses effectifs.

Exception relating to consent

(3) Where the council of a band makes a by-law under paragraph 81(1)(*p*.4) bringing this subsection into effect in respect of the band, the consents required under subsections (1) and (2) shall be given by a majority of the members of the band who are of the full age of eighteen years.

Statut administratif sur l'autorisation requise

(3) Lorsque le conseil d'une bande prend, en vertu de l'alinéa 81(1)*p*.4), un règlement administratif mettant en vigueur le présent paragraphe à l'égard de la bande, l'autorisation requise en vertu des paragraphes (1) et (2) doit être donnée par la majorité des membres de la bande âgés d'au moins dix-huit ans.

Acquired rights

(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.

Droits acquis

(4) Les règles d'appartenance fixées par une bande en vertu du présent article ne peuvent priver quiconque avait droit à ce que son nom soit consigné dans la liste de bande avant leur établissement du droit à ce que son nom y soit consigné en raison uniquement d'un fait ou d'une mesure antérieurs à leur prise d'effet.

Idem

(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.

Idem

(5) Il demeure entendu que le paragraphe (4) s'applique à la personne qui avait droit à ce que son nom soit consigné dans la liste de bande en vertu de l'alinéa 11(1)*c*) avant que celle-ci n'assume la responsabilité de la tenue de sa liste si elle ne cesse pas ultérieurement d'avoir droit à ce que son nom y soit consigné.

Notice to the Minister

(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.

Avis au ministre

(6) Une fois remplies les conditions du paragraphe (1), le conseil de la bande, sans délai, avise par écrit le ministre du fait que celle-ci décide désormais de l'appartenance à ses effectifs et lui transmet le texte des règles d'appartenance.

Notice to band and copy of Band List

(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

Transmission de la liste

(7) Sur réception de l'avis du conseil de bande prévu au paragraphe (6), le ministre, sans délai, s'il constate que les conditions prévues au paragraphe (1) sont remplies :

(*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.

a) avise la bande qu'elle décide désormais de l'appartenance à ses effectifs;

b) ordonne au registraire de transmettre à la bande une copie de la liste de bande tenue au ministère.

Effective date of band's membership rules

(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.

Date d'entrée en vigueur des règles d'appartenance

(8) Lorsque la bande décide de l'appartenance à ses effectifs en vertu du présent article, les règles d'appartenance fixées par celle-ci entrent en vigueur à compter de la date où l'avis au ministre a été donné en vertu du paragraphe (6); les additions ou retranchements effectués par le registraire à l'égard de la liste de la bande après cette date ne sont valides que s'ils sont effectués conformément à ces règles.

Band to maintain Band List

(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.

Transfert de responsabilité

(9) À compter de la réception de l'avis prévu à l'alinéa (7)*b*), la bande est responsable de la tenue de sa liste. Sous réserve de l'article 13.2, le ministère, à compter de cette date, est dégagé de toute responsabilité à l'égard de cette liste.

Deletions and additions

(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.

Additions et retranchements

(10) La bande peut ajouter à la liste de bande tenue par elle, ou en retrancher, le nom de la personne qui, aux termes des règles d'appartenance de la bande, a ou n'a pas droit, selon le cas, à l'inclusion de son nom dans la liste.

Date of change

(11) A Band List maintained by a band shall indicate the date on which each name was added thereto or deleted therefrom.

R.S., 1985, c. I-5, s. 10; R.S., 1985, c. 32 (1st Supp.), s. 4.

Date du changement

(11) La liste de bande tenue par celle-ci indique la date où chaque nom y a été ajouté ou en a été retranché.

L.R. (1985), ch. I-5, art. 10; L.R. (1985), ch. 32 (1er suppl.), art. 4.

Membership rules for Departmental Band 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

(*a*) the name of that person was entered in the Band List for that band, or that person was entitled to have it entered in the Band List for that band, immediately prior to April 17, 1985;

(*b*) that person is entitled to be registered under paragraph 6(1)(*b*) as a member of that band;

(*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; or

(*d*) that person was born on or after April 17, 1985 and is entitled to be registered under paragraph 6(1)(*f*) and both parents of that person are entitled to have their names

Règles d'appartenance pour une liste tenue au ministère

11. (1) À compter du 17 avril 1985, une personne a droit à ce que son nom soit consigné dans une liste de bande tenue pour cette dernière au ministère si elle remplit une des conditions suivantes :

a) son nom a été consigné dans cette liste, ou elle avait droit à ce qu'il le soit le 16 avril 1985;

b) elle a le droit d'être inscrite en vertu de l'alinéa 6(1)*b*) comme membre de cette bande;

c) elle a le droit d'être inscrite en vertu de l'alinéa 6(1)*c*) et a cessé d'être un membre de cette bande en raison des circonstances prévues à cet alinéa;

d) elle est née après le 16 avril 1985 et a le droit d'être inscrite en vertu de l'alinéa 6(1)*f*) et ses parents ont tous deux droit à ce que leur nom soit consigné dans la liste de bande ou, s'ils sont décédés, avaient ce droit à la date de leur décès.

Province of Alberta

PUBLIC TRUSTEE ACT

Statutes of Alberta, 2004
Chapter P-44.1

Current as of June 1, 2015

Office Consolidation

Alberta Queen's Printer
7th Floor, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

(j) "represented adult" means

(i) a represented adult as defined in the *Adult Guardianship and Trusteeship Act*, and

(ii) an incapacitated person.

2004 cP-44.1 s1;2008 cA-4.2 s150;2013 c10 s25

Part 1
Office of the Public Trustee

Appointment of Public Trustee

2(1) The Lieutenant Governor in Council shall appoint a person to be Public Trustee.

(2) In accordance with the *Public Service Act*, there may be appointed any other persons as employees in the office of the Public Trustee as are necessary.

(3) The Minister may designate a person to act temporarily as Public Trustee if

(a) the person appointed under subsection (1) is unable to carry out the duties of the Public Trustee, or

(b) there is a vacancy in the position of Public Trustee.

(4) A designation under subsection (3) remains in effect until

(a) it is terminated by the Minister, or

(b) a person is appointed under subsection (1).

Corporation sole

3 The Public Trustee is a corporation sole under the name Public Trustee.

Delegation

4 The Public Trustee may in writing delegate to an employee or class of employee in the office of the Public Trustee any of the Public Trustee's powers, duties or functions.

Public Trustee functions

5 The Public Trustee may act

(a) as personal representative of a deceased person,

(b) as trustee of any trust or to hold or administer property in any other fiduciary capacity,

(c) to protect the property or estate of minors and unborn persons, and

(d) in any capacity in which the Public Trustee is authorized to act

(i) by an order of the Court, or

(ii) under this or any other Act.

Public Trustee not required to act

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

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

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

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

Part 2
Particular Functions of the Public Trustee

Division 1
Missing Persons and Unclaimed Property

Court may declare persons to be missing

7(1) If satisfied that after reasonable inquiry a person cannot be located, the Court, on application, may by order

(a) declare the person to be a missing person, and

Monitoring trustee for minors

21(1) A trust instrument may expressly appoint the Public Trustee to monitor the trustee on behalf of minor beneficiaries, including minor beneficiaries who have a contingent interest in the trust property.

(2) The duties of the Public Trustee when appointed by a trust instrument to monitor a trustee on behalf of minor beneficiaries are as follows:

(a) as soon as practicable after receiving notice that the trust has come into effect, to obtain and review

(i) a copy of the trust instrument,

(ii) an inventory of the trust's assets as of the date the trust came into effect, and

(iii) any other document or information that may be prescribed;

(b) at prescribed intervals, to obtain from the trustee the prescribed statements or information regarding the trust and to review them;

(c) if so provided by the trust instrument, to obtain from the trustee audited financial statements for the trust at intervals stipulated by the trust instrument, and to review them;

(d) to take any action referred to in subsection (5) that the Public Trustee determines to be necessary to protect the interests of the minor beneficiaries;

(e) to perform such additional duties as may be prescribed.

(3) If a trust instrument has appointed the Public Trustee to monitor a trustee, the trustee must provide the Public Trustee with the documents and information referred to in subsection (2) or requested by the Public Trustee under subsection (5)(a).

(4) The purpose of a review under subsection (2) is for the Public Trustee to determine, based on information provided by the trustee, whether the trustee appears to be

(a) keeping adequate records of the trustee's administration of the trust,

(b) avoiding dealings with trust property in which the trustee's self-interest conflicts with the trustee's fiduciary duties, and

(c) dealing with trust property in accordance with the trust instrument.

(5) If the Public Trustee is unable to make a determination described in subsection (4) or determines that the trustee appears not to be carrying out one or more of the duties referred to in subsection (4), the Public Trustee may do any one or more of the following:

(a) request the trustee to provide any documents or information that the Public Trustee may require to make the determination;

(b) request the trustee to take any action that the Public Trustee considers necessary for the trustee to carry out a duty referred to in subsection (4);

(c) apply to the Court for an order appropriate to protect the interests of the minor beneficiaries.

(6) If the Public Trustee is appointed by a trust instrument to monitor a trustee, the Public Trustee

(a) has no duty to question or interfere with a decision or action of the trustee that appears to be in accordance with the trust instrument,

(b) has no duty to question information provided to the Public Trustee by the trustee unless there is an obvious omission, error or inconsistency in the information provided, and

(c) owes no duty to any beneficiary of the trust other than a minor.

(7) The Public Trustee's duty to monitor the trustee terminates when there are no longer any minor beneficiaries of the trust.

(8) The duties of the Public Trustee under this section arise only when the Public Trustee has received evidence satisfactory to the Public Trustee that the trust has come into effect.

(9) The Court, on application, may terminate the Public Trustee's duty to monitor a trustee under this section if in the Court's opinion it is not in the best interest of the minor beneficiaries for the Public Trustee to monitor the trustee.

(10) The Public Trustee may provide to a person who was formerly a minor beneficiary of a trust monitored by the Public Trustee a copy of any statement or information provided to the Public Trustee under this section by the trustee.

(11) If the Public Trustee is appointed by a trust instrument to monitor a trustee on behalf of minor beneficiaries, the Public Trustee is entitled to be paid, and the trustee is authorized to pay, the prescribed fee out of the trust property.

(12) If the Public Trustee is monitoring a trustee at the time this subsection comes into force, subsections (2) to (10) apply as if the Public Trustee had been appointed under this section.

Court directives to monitor trustee for minors

22(1) The Court, on application, may by order direct the Public Trustee to monitor on behalf of minor beneficiaries a trustee appointed by

(a) a trust instrument, or

(b) an order of the Court.

(2) Unless otherwise provided by an order directing the Public Trustee to monitor a trustee, the duties of the Public Trustee under the order are the same as if the Public Trustee had been appointed to monitor the trustee by a trust instrument under section 21.

(3) An order directing the Public Trustee to monitor a trustee must not impose duties beyond what the Public Trustee would have had if appointed to monitor by a trust instrument under section 21 unless the Public Trustee has consented to the terms of the direction.

(4) The fee payable to the Public Trustee for monitoring a trustee when directed by the Court to do so is the same as would have been payable if the Public Trustee had been appointed to monitor by a trust instrument under section 21, unless an order imposing duties beyond what the Public Trustee would have had if appointed to monitor by a trust instrument specifies a higher fee.

Notice to proceed under Limitations Act

23(1) If a notice to proceed is delivered to the Public Trustee under section 5.1(3) of the *Limitations Act*,

(a) the Public Trustee must not act litigation representative of the minor except in accordance with section 5.1(6)(b) of the

Court of Queen's Bench of Alberta

Citation: 1985 Sawridge Trust v. Alberta (Public Trustee), 2012 ABQB 365

Date: 20120612
Docket: 1103 14112
Registry: Edmonton

In the Matter of the *Trustee Act*, R.S.A. 2000, c. T-8, as amended; and

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

Between:

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

Respondent

- and -

Public Trustee of Alberta

Applicant

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

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I. Introduction

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

[2] The 1985 Sawridge Trust is administered by the Trustees named as Respondents in this application [the "Sawridge Trustees" or the "Trustees"] who now seek the advice and direction of this Court in respect to proposed amendments to the definition of the term "Beneficiaries" in the 1985 Sawridge Trust and confirmation of the transfer of assets into that Trust. One consequence of these proposed amendments to the 1985 Sawridge Trust would be that the entitlement of certain dependent children to share in Trust assets would be affected. There is some question as to the exact nature of the effects, although it seems to be accepted by all of those involved on this application that certain children who are presently entitled to a share in the benefits of the 1985 Sawridge Trust would be excluded if the proposed changes are approved and implemented. Another concern is that the proposed revisions would mean that certain dependent children of proposed members of the Trust would become beneficiaries and entitled to shares in the Trust, while other dependent children would be excluded.

[3] At the time of confirming the scope of notices to be given in respect to the application for advice and directions, it was observed that children who might be affected by variations to the 1985 Sawridge Trust were not represented by counsel. In my Order of August 31, 2011 [the "August 31 Order"] I directed that the Office of the Public Trustee of Alberta [the "Public Trustee"] be notified of the proceedings and invited to comment on whether it should act in respect of any existing or potential minor beneficiaries of the Sawridge Trust.

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

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

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

II. The History of the 1985 Sawridge Trust

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

[8] In 1982 various assets purchased with funds of the Sawridge Band were placed in a formal trust for the members of the Sawridge Band. In 1985 those assets were transferred into the 1985 Sawridge Trust. At the present time the value of assets held by the 1985 Sawridge Trust is approximately $70 million. As previously noted, the beneficiaries of the Sawridge Trust are restricted to persons who were members of the Band prior to the adoption by Parliament of the *Charter* compliant definition of Indian status.

[9] In 1985 the Sawridge Band also took on the administration of its membership list. It then attempted (unsuccessfully) to deny membership to Indian women who married non-aboriginal persons: ***Sawridge Band v. Canada***, 2009 FCA 123, 391 N.R. 375, leave denied [2009] S.C.C.A. No. 248. At least 11 women were ordered to be added as members of the Band as a consequence of this litigation: ***Sawridge Band v. Canada***, 2003 FCT 347, [2003] 4 F.C. 748, affirmed 2004 FCA 16, [2004] 3 F.C.R. 274. Other litigation continues to the present in relation to disputed Band memberships: ***Poitras v. Sawridge Band***, 2012 FCA 47, 428 N.R. 282, leave sought [2012] S.C.C.A. No. 152.

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

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

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

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

III. Application by the Public Trustee

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

1. to determine which minors should be represented by it;

2. to order that the costs of legal representation by the Public Trustee be paid from the 1985 Sawridge Trust and that the Public Trustee be shielded from any liability for costs arising; and

3. to order that the Public Trustee be authorized to make inquiries through questioning into the Sawridge Band membership criteria and application processes.

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

[15] The Sawridge Trustees and the Band both argue that the Public Trustee is not a necessary or appropriate litigation representative for the minors, that the costs of the Public Trustee should not be paid by the Sawridge Trust and that the criteria and mechanisms by which the Sawridge

Band identifies its members is not relevant and, in any event, the Court has no jurisdiction to make such determinations.

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

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

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

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

A. Is a litigation representative necessary?

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

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

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

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

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

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

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

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

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

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

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

[25] It is obvious that very large sums of money are in play here. A decision on who falls inside or outside of the class of beneficiaries under the 1985 Sawridge Trust will significantly affect the potential share of those inside the Sawridge Trust. The key players in both the administration of the Sawridge Trust and of the Sawridge Band overlap and these persons are currently entitled to shares of the Trust property. The members of the Sawridge Band Chief and Council are elected by and answer to an interested group of persons, namely those who will have a right to share in the 1985 Sawridge Trust. These facts provide a logical basis for a concern by the Public Trustee and this Court of a potential for an unfair distribution of the assets of the 1985 Sawridge Trust.

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

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

[28] I conclude that the appointment of the Public Trustee as a litigation representative of the minors involved in this case is appropriate. No alternative representatives have come forward as a result of the giving of notice, nor have any been nominated by the Respondents. The Sawridge Trustees and the adult members of the Sawridge Band (including the Chief and Council) are in a potential conflict between their personal interests and their duties as fiduciaries.

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

B. Which minors should the Public Trustee represent?

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

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

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

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

V. The Costs of the Public Trustee

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

1. advance costs determined on a solicitor and own client basis are paid to the Public Trustee by the Sawridge Trust; and

2. that the Public Trustee is exempted from liability for the costs of other litigation participants in this proceeding by an order of this Court.

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

[36] Further, the Public Trustee observes that the Sawridge Trustees are, by virtue of their status as current beneficiaries of the Trust, in a conflict of interest. Their fiduciary obligations require independent representation of the potentially affected minors. Any litigation representative appointed for those children would most probably require payment of legal costs. It is not fair, nor is it equitable, at this point for the Sawridge Trustees to shift the obligation of their failure to nominate an independent representative for the minors to the taxpayers of Alberta.

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

[38] The Sawridge Trustees argue that the Public Trustee should only receive advance costs on a full indemnity basis if it meets the strict criteria set out in ***Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)***, 2007 SCC 2, [2007] 1 S.C.R. 38 ["***Little Sisters***"] and ***R. v. Caron***, 2011 SCC 5, [2011] 1 S.C.R. 78. They say that in this instance the Public Trustee can afford to pay, the issues are not of public or general importance and the litigation will proceed without the participation of the Public Trustee.

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

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

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

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

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

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

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

[43] The Public Trustee seeks authorization to make inquiries, through questioning under the *Rules*, into how the Sawridge Band determines membership and the status and number of applications before the Band Council for membership. The Public Trustee observes that the

application process and membership criteria as reported in the affidavit of Elizabeth Poitras appears to be highly discretionary, with the decision-making falling to the Sawridge Band Chief and Council. At paras. 25 - 29 of its written brief, The Public Trustee notes that several reported cases suggest that the membership application and review processes may be less than timely and may possibly involve irregularities.

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

A. those subjects are irrelevant to the application to revise certain aspects of the 1985 Sawridge Trust documentation; and

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

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

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

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

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

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

[49] I agree with the Public Trustee. I note that the Sawridge Band Chief and Council argue that the Band membership issue is irrelevant and immaterial because Band membership will be clarified at the appropriate time, and the proper persons will then become beneficiaries of the 1985 Sawridge Trust. It contrasts the actions of the Sawridge Band and Trustees with the scenario reported in ***Barry v. Garden River Band of Ojibways*** (1997), 33 O.R. (3d) 782, 147 D.L.R. (4th) 61 (Ont. C.A.), where premature distribution of a trust had the effect of denying shares to potential beneficiaries whose claims, via band membership, had not yet crystalized. While the Band and Trustees stress their good intentions, this Court has an obligation to make inquiries as to the procedures and status of Band memberships where a party (or its representative) who is potentially a claimant to the Trust queries whether the beneficiary class can be "ascertained". In coming to that conclusion, I also note that the Sawridge Trustees acknowledge that the proposed revised definition of "Beneficiaries" may exclude a significant number of the persons who are currently within that group.

B. Exclusive jurisdiction of the Federal Court of Canada

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

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

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

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

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

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

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

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

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

VII. Conclusion

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

Heard on the 5th day of April, 2012.
Dated at the City of Edmonton, Alberta this 12th day of June, 2012.

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

Appearances:

Ms. Janet L. Hutchison
(Chamberlain Hutchison)
for the Public Trustee / Applicants

Ms. Doris Bonora,
Mr. Marco S. Poretti
(Reynolds, Mirth, Richards & Farmer LLP)
for the Sawridge Trustees / Respondents

Mr. Edward H. Molstad, Q.C.
(Parlee McLaws LLP)
for the Sawridge Band / Respondents

In the Court of Appeal of Alberta

Citation: 1985 Sawridge Trust v Alberta (Public Trustee), 2013 ABCA 226

Date: 20130619
Docket: 1203-0230-AC
Registry: Edmonton

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

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

Between:

Roland Twinn, Catherine Twinn, Walter Felix Twinn, Bertha L'Hirondelle, and Clara Midbo, as Trustees for the 1985 Sawridge Trust

Appellants (Respondents)

- and -

Public Trustee of Alberta

Respondent (Applicant)

- and -

**Sawridge First Nation,
Minister of Indian Affairs and Northern Development,
Aline Elizabeth Huzar, June Martha Kolosky and Maurice Stoney**

Interested Parties

The Court:

**The Honourable Mr. Justice Peter Costigan
The Honourable Mr. Justice Clifton O'Brien
The Honourable Mr. Justice J.D. Bruce McDonald**

Memorandum of Judgment

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

Memorandum of Judgment

The Court:

I. Introduction

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

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

II. Background

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

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

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

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

[7] Sawridge is currently composed of 41 adult members and 31 minors. Of the 31 minors, 23 currently qualify as beneficiaries under the Trust, and 8 do not. It is conceded that if the definition

of beneficiaries is changed, as currently proposed, some children, formerly entitled to a share in the benefits of the trust, will be excluded, while other children who were formerly excluded will be included.

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

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

III. The Chambers Judgment

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

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

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

[13] The judge rejected the submission of the Trustees that advance costs were only available if the strict criteria set out in *Little Sisters Book and Art Emporium v Canada (Commissioner of*

Customs and Revenue), 2007 SCC 2, [2007] 1 SCR 38, were met. He stated that the criteria set out in *Little Sisters* applied where a litigant has an independent interest in the proceeding. He viewed the role of the Public Trustee as being "neutral" and capable of providing independent advice regarding the interests of the affected minors which may not otherwise be forthcoming because of the Trustees' potential conflicts.

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

IV. Grounds of Appeal

[15] The appellants advance four grounds of appeal:

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

V. Standard of Review

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

VI. Analysis

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

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

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

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

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

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

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

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

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

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

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

> 2.21 The Court may do one or more of the following:
>
> (a) terminate the authority or appointment of a litigation representative;
>
> (b) appoint a person as or replace a litigation representative;
>
> (c) impose terms and conditions on, or on the appointment of, a litigation representative or cancel or vary the terms or conditions.

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

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

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

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

and that it was necessary to secure the costs in such fashion to secure the requisite independent representation of the Public Trustee.

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

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

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

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

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

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

VII. Conclusion

[32] The appeal is dismissed.

Appeal heard on June 5, 2013

Memorandum filed at Edmonton, Alberta
this 19th day of June, 2013

Authorized to sign for: Costigan J.A.

O'Brien J.A.

McDonald J.A.

Appearances:

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

J.L. Hutchison
for the Respondent

Case Name:

Canadian Natural Resources Ltd. v. ShawCor Ltd.

Between
Canadian Natural Resources Limited, Respondent (Plaintiff), and
ShawCor Ltd., Shaw Pipe Protection Ltd.,
Bredero Shaw Company Limited,
Appellants (Defendants), and
IMV Projects Inc., Flint Field Services
Ltd., Flint Pipeline Services Ltd.,
formerly Transline Energy Services Ltd.,
ABC Ltd., and XYZ Inc., Not Parties
to the Appeal (Defendants), and
Ram River Pipeline Outfitters Ltd. and
Dunn Hiebert & Associates Ltd., Not
Parties to the Appeal (Third Party Defendants)

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580 A.R. 265

244 A.C.W.S. (3d) 109

376 D.L.R. (4th) 581

2 Alta. L.R. (6th) 146

2014 CarswellAlta 1582

Docket: 1301-0128-AC

Registry: Calgary

Alberta Court of Appeal

C.A. Fraser, C.M. Conrad and J. Watson JJ.A.

Heard: October 7, 2013.

Judgment: September 15, 2014.

(93 paras.)

Civil litigation -- Civil procedure -- Discovery -- Production and inspection of documents -- Affidavit or list of documents -- Sufficiency -- Privileged documents -- Documents prepared in contemplation of litigation -- Appeal by defendant from dismissal of application to compel plaintiff to produce certain documents allowed -- Plaintiff sued defendant for faulty construction of pipeline -- Reports on state of pipeline generated by plaintiff after blowout produced, but only until date plaintiff called in legal counsel -- Judge erred in considering subsequent reports prepared for dominant purpose of litigation where reports would have been created whether or not litigation ensued -- Blanket claim of privilege insufficient -- Plaintiff ordered to produce affidavit listing and describing documents and explaining why they were privileged -- Alberta Rules of Court, Rules 1, 5.

Appeal by ShawCor from the dismissal of its application to compel CNRL to produce certain records. CNRL sued ShawCor to recover damages sustained when CNRL's pipeline, constructed by ShawCor and others, had to be replaced following a well blowout. ShawCor had requested disclosure of CNRL's records regarding testing and investigation CNRL had carried out with respect to possible problems with the pipeline's insulation discovered after the January 3, 2009 blowout. CNRL produced the records up to February 4, 2009, the date on which CNRL called in its legal counsel. It claimed litigation and/or solicitor-client privilege over the post-February 2009 records. ShawCor was unable to convince the judge that the post-February 2009 records were not subject to litigation privilege. The judge found that these reports had been created for the dominant purpose of litigation and had been adequately described in CNRL's affidavit of documents. He found CNRL did not waive privilege over the reports through its pleadings, as the pleadings were not based on the privileged reports.

HELD: Appeal allowed. CNRL's initial affidavit made a blanket claim of privilege over an undisclosed number of documents. Its subsequent disclosure of the number of records over which privilege was asserted still fell short of what it was required to state. CNRL was directed to prepare a new affidavit containing numbered references to each document over which privilege was claimed, a brief description of each document, and the grounds for claiming privilege in relation to each document. The judge erred in finding all the post-February 2009 reports generated by CNRL about the pipeline problems were created for the dominant purpose of litigation, where investigations would have been ongoing to determine the cause and the proper remedial steps to take with respect to the pipeline even if litigation was not contemplated. Sending the reports through its legal counsel did not give CNRL the right to claim litigation privilege over reports not created for the dominant purpose of litigation.

Statutes, Regulations and Rules Cited:

Alberta Rules of Court, Alta. Reg.124/2010, Rule 1.2, Rule 5.1, Rule 5.1(2), Rule 5.3, Rule 5.4, Rule 5.6, Rule 5.6(1)(a), Rule 5.6(1)(b), Rule 5.6(2)(b), Rule 5.7, Rule 5.7(1), Rule 5.7(1) (b), Rule 5.7(2), Rule 5.7(2)(b), Rule 5.8, Rule 5.11, Rule 5.14(2), Rule 5.16, Rule 5.17(1), Rule 5.30, Rule 13.16

British Columbia Supreme Court Civil Rules, Rule 7-1(7)

Federal Courts Rules, SOR/98-106, Rule 223(2)

Interpretation Act, RSA 2000, c. I-8, s. 10

Judicature Act, RSA 2000, c. J-2, s. 28.1, s. 28.2, s. 63

Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 30.03

Saskatchewan Queen's Bench Rules, 2013, Rule 5-6, Rule 5-8

United States Federal Rules of Civil Procedure, Fed R Civ P, Rule 26(5)

Appeal From:

On appeal from the Order by the Honourable Chief Justice N.C. Wittmann Dated the 17th day of April, 2013 Filed on the 15th day of May, 2013 (2013 ABQB 230, Docket: 1001-01541).

Counsel:

J.E. Sharpe and R. Martz, for the Respondent.

C.C.J. Feasby and M. Burkett, for the Appellants.

M. Mohamed, for IMV Projects Inc. (Not Party to the Appeal).

W.J. Kenny, Q.C., for Flint Field Services Ltd. (Not Party to the Appeal).

Reasons for Judgment Reserved

The following judgment was delivered by

THE COURT:--

I. Introduction

1 This appeal requires us to examine aspects of Part 5 of the new Alberta *Rules of Court,* Alta Reg 124/2010 (*Rules*) relating to the content of an affidavit of records where a party claims privilege. We must also assess a claim by the respondent, Canadian Natural Resources Limited (CNRL), that certain of its records are privileged and therefore not subject to disclosure.

2 CNRL sued the appellants, ShawCor Ltd., Shaw Pipe Protection Ltd. and Bredero Shaw Company Limited (collectively ShawCor) along with others not parties to this appeal for damages relating to the alleged improper design and construction of its 32 kilometre pipeline running between its Primrose East Plant and its Wolf Lake Plant (the Pipeline). This Pipeline, completed in 2008, had been designed, constructed and installed by ShawCor and others. CNRL asserts that its damages flowed from the need to replace the Pipeline following a well blowout.

3 ShawCor applied to the court for an order that CNRL provide a further and better affidavit of records, asserting that CNRL had not disclosed all of the records in its possession in four critical areas. The main issue turned on disclosure of evidence relating to CNRL's testing and investigation of the Pipeline after February 4, 2009, the date on which CNRL called in its legal counsel. CNRL

had voluntarily disclosed investigation and testing records before that date but, with a few exceptions, had refused to provide any records created thereafter. It claimed that they were subject to either or both solicitor-client and litigation privilege. ShawCor contended that CNRL had made an improper Ablanket@ claim of privilege and thereby failed to describe each record or the privilege claimed to attach thereto. ShawCor also submitted that, in any event, CNRL had waived any privilege over the records by referring to them in its Statement of Claim.

4 The case management judge dismissed ShawCor's application: ***Canadian Natural Resources Limited v ShawCor Ltd***, 2013 ABQB 230, 559 AR 66. ShawCor appeals that decision. We have concluded that the appeal should be allowed, the order of the case management judge set aside, and an order issued requiring CNRL to prepare a new or supplementary affidavit of records in compliance with the *Rules* and this judgment.

5 The *Rules* reflect the cultural shift identified in ***Hryniak v Mauldin***, 2014 SCC 7 [***Hryniak***] at para 2: A... a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures...@ Accordingly, this shift should inform not merely this Court's interpretation of the specific rules under consideration but the overall approach to civil justice issues before the courts.

6 Tension has always existed between discovery and privilege in the civil justice system. Discovery facilitates a practical and effective search for the truth by ascertaining and limiting the real issues and facts in dispute. Privilege protects the integrity of the adversarial system and shields parties from damage to legitimate interests and relationships. Despite the culture shift, both competing values remain of importance in civil litigation. Any error in the parameters of discovery or privilege may impair the fairness of the process and deter or defeat *bona fide* litigants. Discovery should not be used to undermine legitimate spheres of privilege. At the same time, privilege should not be used to turn litigation into a game of hide and seek B with the seeker blindfolded.

7 Reforms to the civil justice system have enhanced the role of case management judges as gatekeepers in the litigation process. But this more active judicial role was not designed to lighten the burden on the parties or the responsibilities of their counsel. Thus, the *Rules* should be interpreted in a manner that maximizes the ability of opposing counsel or parties to resolve disputes over privilege and minimizes the time and expense involved in further litigation steps or judicial intervention. Simply put, resort to the courts on privilege issues should not be the first stop on the litigation highway.

8 We have concluded that a party preparing an affidavit of records must, short of revealing information that is privileged, provide a sufficient description of each record for which privilege is claimed to assist other parties in assessing the validity of the claimed privilege. While the objective is to reduce the need for parties to seek recourse to other time-consuming and costly litigation steps, we are equally satisfied that this can be accomplished in a manner that does not injure valid privileges. In addition, where a judge is nevertheless called on to determine privilege issues, a sufficient description of records will assist the judge in determining whether a more probing assessment is required and, if so, the confines of that assessment.

9 This result is premised on a number of specific conclusions. Rule 5.7 was intended to apply to all relevant and material records, even those a party objects to produce. Thus, in an affidavit of records, a party must number all records in a convenient manner and briefly describe them (Rule 5.7(1)). The right to bundle and treat that bundle as a single record under Rule 5.7(2) applies equal-

ly to records over which privilege is claimed. Rule 5.8 imposes additional responsibilities on a party who objects to produce a *prima facie* producible record. The particular ground(s) of the objection must be identified with respect to each record in order to assist other parties in assessing the validity of the claimed privilege. That means the party must state the actual privilege being relied upon with respect to that record and describe the record in a way that, without revealing information that is privileged, indicates how the record fits within the claimed privilege. These requirements apply equally to a bundled record over which a party claims privilege.

10 Our detailed reasons for these conclusions follow. We begin by outlining certain relevant background information (Part II). We then review the decision of the case management judge (Part III). We next outline the issues (Part IV) and briefly refer to the standard of review (Part V) before turning to our analysis of the various issues (Part VI). Finally, we confirm our disposition of this appeal and summarize the requirements for an affidavit of records involving privilege claims (Part VII).

II. Background Information

11 On January 3, 2009, a blowout of a heavy oil well in CNRL's Primrose East Field caused oil to flow to the surface. It is undisputed that, as a result of the blowout, CNRL decided, for periods of time, to allow hotter than usual bitumen to flow through its Pipeline, in particular bitumen that was hotter than 160 degrees Celsius.

12 In mid-January 2009, CNRL personnel observed that snow appeared to have melted at a number of Ahot spots@ along the Pipeline right-of-way. This caused CNRL to suspect that something was wrong with the Pipeline's insulation system, resulting in further tests being required. During the latter half of January 2009 and early February 2009, CNRL conducted an airborne thermal scan and began or completed excavation at several of these Ahot spots@. It subsequently characterized this period as the AInitial Investigation@.

13 On February 4, 2009, Jerry Harvey, CNRL's Executive Advisor of Commercial Operations, asked CNRL's Director of Legal Services for its Horizon Oil Sands Project, Paul Mendes, to provide legal advice regarding further investigation and testing of the Pipeline. On February 5, 2009, Mendes sent out an e-mail to the CNRL employees conducting the Pipeline investigation advising that the investigation would henceforth be conducted under the guidance of legal counsel. A protocol was established to funnel all reports and communications regarding the investigation produced after February 4, 2009 to the legal department. CNRL characterized this as the beginning of the ALitigation Investigation@ and took the position that the dominant purpose of the Pipeline investigation post-February 4, 2009 was to prepare for litigation.

14 On January 29, 2010, CNRL filed a Statement of Claim seeking damages against ShawCor and other defendants not parties to this appeal for faulty design, construction and installation of the Pipeline. The pleadings, and a later request for particulars, referred to information garnered from investigative steps taken both before and after February 4, 2009. In its pleadings, CNRL asserted that its investigation revealed a total or substantial failure of the Pipeline's coating and insulation system which, CNRL alleged, should have been able to withstand the temperatures to which it was subjected. ShawCor's defence was that any problems CNRL experienced with the Pipeline were due to CNRL's own negligence, in particular the fact that it had sent bitumen through the Pipeline that was hotter than allowable.

15 As the action proceeded, Harvey swore an Affidavit of Records on June 14, 2012 identifying what were, in CNRL's view, its producible records. That category included only those records relating to testing and investigation of the Pipeline failure up to February 4, 2009. Schedule 1 of that Affidavit of Records was replaced on August 17, 2012 by a new, unsworn, supplemental schedule. However, Schedule 2 dealing with privileged records remained the same. It simply made a blanket claim of privilege over an unspecified number of documents and listed the types of privilege claimed. That list was taken from the examples provided in Schedule 2 of Form 26 of the *Rules*. Following that format, Schedule 2 merely said this:

Relevant and material records under the Plaintiff's control for which there is an objection to produce:

(a) without prejudice communications;

(b) communications and copies of communications between solicitor and client;

(c) solicitor's work product, including all interoffice memoranda, correspondence, notes, memoranda and other records prepared by the solicitor or their assistants;

(d) records made or created for the dominant purpose of litigation, existing or anticipated;

(e) other: NIL

(f) records that fall into 2 or more of the categories described above.

16 It will be obvious that the only item of substance that CNRL included in this Schedule to its Affidavit of Records was the assertion that there were NIL records in the Aother@ category over which CNRL was claiming privilege. Nothing was said, whether in terms of numbers or description, about records claimed to fall within any of the other listed categories.

17 ShawCor then brought an application under Rule 5.11 of the *Rules* seeking an order that CNRL produce a new and better affidavit of records. The general purpose of the application was to compel CNRL to produce four broad categories of records that ShawCor considered had not been adequately produced: (a) records relating to the event(s) that caused CNRL's operation of the Pipeline at temperatures higher than designed for (what it termed AOut-of-Scope Operation@), the cause for that Out-of-Scope Operation and CNRL's response to such extended operation; (b) investigation and testing records relating to the Out-of-Scope Operation and its impact on the Pipeline; (c) records relating to other aspects of the Pipeline's operation relevant and material to the cause of the Out-of-Scope Operation, including the Pipeline's design capacities; and (d) regulatory filings relating to the failure of the Pipeline.

18 With regard to the investigation and testing records produced after February 4, 2009, ShawCor submitted that it was entitled to disclosure of all such records. It asserted that the mere fact that the records were directed to be sent to, and through, in-house counsel did not bring the records within the scope of solicitor-client privilege. It further contended that it was unreasonable to

conclude, in the circumstances, that litigation had been the dominant purpose behind the creation of all these documents. Alternatively, ShawCor submitted that any litigation privilege arising had been waived because CNRL had relied on the facts arising from the investigation and testing in its Statement of Claim. Finally, ShawCor took issue with the content of Schedule 2, noting that CNRL had neither individually listed the records for which privilege was claimed, nor provided any information about those records to allow ShawCor to assess whether privilege had been properly claimed.

19 In response, CNRL filed an affidavit sworn by Harvey on December 28, 2012, on which he was subsequently examined, replying to the issues raised in ShawCor's application. Attached to that affidavit were letters documenting CNRL's position. Essentially, CNRL refused to provide any records related to the blowout and the flow of oil to the surface, asserting that such records were irrelevant to the Pipeline's failure. It also refused to disclose testing and investigation records relating to the Pipeline failure generated after February 4, 2009 on the basis that they were, as part of the Litigation Investigation, subject to either or both solicitor-client and litigation privilege. With respect to the alleged deficiencies in Schedule 2, Harvey deposed that CNRL claimed privilege over documents falling into five discrete categories:

> Category #1: Litigation Investigation related documents created by CNRL's Consultant and its associates;
>
> Category #2: Communications between CNRL and [Burnet, Duckworth & Palmer LLP] relating to the formal litigation process;
>
> Category #3: Meeting minutes, meeting agendas, and correspondence between CNRL and CNRL's Consultant and its associates relating to the Litigation Investigation;
>
> Category #4: Internal CNRL documents relating to the Litigation Investigation; and
>
> Category #5: Documents created by other third party contractors in order to assist CNRL with the Litigation Investigation.

20 This second affidavit, which was not characterized as an amended Affidavit of Records, did at least disclose the number of documents B 1,058 B over which CNRL was claiming privilege. With respect to the investigation and testing records created after February 4, 2009, Harvey deposed that, by that date, it was clear from CNRL's Initial Investigation of the Pipeline that litigation was Aobvious@. Therefore, CNRL's position was that records from CNRL's continuing investigation and testing of the Pipeline from that point on had been created for the dominant purpose of litigation.

III. Decision of the Case Management Judge

21 In dismissing ShawCor's application, the case management judge made a number of determinations. First, he refused to order production of the records related to the cause of the blowout and the resulting flow of oil to the surface. He reasoned that CNRL was not claiming damages against any of the defendants in the Statement of Claim in connection with the blowout itself and

that CNRL had acknowledged it was solely responsible for deciding to send oil through the Pipeline at the high temperatures that it did. However, he did leave this issue open in the event that further evidence uncovered during discovery made this information relevant and material. ShawCor does not take issue with this particular conclusion and has not therefore appealed this aspect of the judgment.

22 Second, the case management judge found that all relevant and material records that were not privileged had been produced. He held that the question at issue in the lawsuit was whether the Pipeline should have been able to handle bitumen at such high temperatures and whether there were other shortcomings in the Pipeline. Despite ShawCor's concerns to the contrary, he accepted Harvey's evidence that CNRL had disclosed everything that was relevant, material, and non-privileged with respect to the Pipeline's operation records and regulatory filings. He also found that all records relating to CNRL's investigation of the Pipeline failure generated before February 4, 2009 had been produced. Finally, the case management judge agreed with CNRL's argument that by February 4, 2009 its investigation had moved from a preliminary stage to the point where its dominant purpose in creating records thereafter was to prepare for litigation. Thus, the case management judge held that CNRL's investigation and testing records generated after February 4, 2009 were protected by solicitor-client or litigation privilege.

23 Third, the case management judge found that the privileged documents had been properly described in Schedule 2. In particular, he found that there was no need under the *Rules* to list the documents or describe them in a manner that would allow the opposing side to assess the claim of privilege. In coming to this conclusion, he relied on ***Dorchak v Krupka*** (1997), 196 AR 81 (CA) [***Dorchak***] and ***Attila Dogan Construction v AMEC Americas Limited***, 2011 ABQB 794, 530 AR 264, stating at para 41:

> The Shaw Defendants also argue that CNRL has made an improper Ablanket@ claim of litigation privilege and has not listed in its Affidavit of Records which records it claims privilege over as required by Rule 5.6. The leading case in Alberta with respect to the requirements for listing privileged documents remains *Dorchak v. Krupka*... In *Attila Dogan Construction v. AMEC Americas Ltd.*, 2011 ABQB 794, this Court held at para. 57:
>
> > There is nothing in Rule 5.8 that would suggest that privileged documents should be identified in a manner that would allow the opposing party to assess the claim of privilege. I further agree that *Dorchak* is not distinguishable on the basis of the number of privileged records in question, nor the complexity of the lawsuit. It is clear that in *Dorchak* the Court of Appeal intended to establish a set of principles that would guide the identification of privileged documents in all litigation in Alberta, not merely litigation involving a small number of documents and a low level of complexity...

24 Finally, the case management judge decided that while it was possible to waive litigation privilege by referring to evidence in pleadings, a party did not have to Achoose between loss by default and privilege@, citing ***Can-Air Services Ltd v British Aviation Insurance Co*** (1988), 91 AR 258 at para 12, 63 Alta LR (2d) 61 (CA). He found that privilege was not waived since CNRL's pleadings were not based on privileged communications.

IV. Issues on Appeal

25 ShawCor submits that the case management judge erred in concluding that:

(a) CNRL was not required to describe each record and specify the type of privilege asserted for each record in its Affidavit of Records;

(b) CNRL properly claimed solicitor-client privilege and/or litigation privilege over the investigation records generated after February 4, 2009; and

(c) CNRL did not waive privilege over its investigation records by describing the investigation in its pleadings.

V. Standard of Review

26 Errors of law are reviewable on the correctness standard: ***Housen v Nikolaisen***, 2002 SCC 33 at para 8, [2002] 2 SCR 235 [***Housen***]. Interpretation of the *Rules* raises a question of law and is therefore reviewed for correctness: ***Dow Chemical Canada ULC v Nova Chemicals Corporation***, 2014 ABCA 244 [***Dow Chemical***] at para 11; ***Edmonton Flying Club v Edmonton Regional Airports Authority***, 2013 ABCA 91 at para 14, 544 AR 6.

27 Errors of fact, and mixed fact and law are reviewed on the standard of palpable and overriding error: ***Housen***, *supra* at paras 10, 36. An exercise of discretion also involves deference. Discretion as to whether records should be produced will only be interfered with on appeal where based on an error in principle, a misapprehension of the facts, or the decision itself is unreasonable: ***Dow Chemical***, *supra* at para 11.

VI. Analysis

A. The *Rules* and Records Subject to Claims of Privilege

1. Position of the Parties

28 ShawCor asserts that the *Rules* have changed the law relating to the content of affidavits of records where a party claims privilege and that CNRL's affidavits fell short of satisfying the *Rules*. In its view, the *Rules* require that: (a) records over which privilege is claimed must now be numbered in a convenient order, (b) the particular privilege or other legal right relied on to resist production must be stated with respect to each record, and (c) each individual record must be described to the extent necessary to permit the other side to challenge the claim of privilege or at least make it clear that it is within the privilege claimed. ShawCor accepts that a description need not give away the privileged information.

29 CNRL takes the position that ***Dorchak*** remains the law with respect to an affidavit of records involving privileged records and that under ***Dorchak***, no description of the records claimed to be privileged is required.

2. Interpretive Approach to the *Rules*

30 The *Rules* have a status comparable to a statute: *Judicature Act*, RSA 2000, c J-2, s. 28.1, s. 63. Therefore, the relevant Rules relating to disclosure and the content of affidavits of records must, like a provision in a statute, be read in their entire context, and in their grammatical and ordinary sense, harmoniously with the overall scheme of the legislation, its objects and the intention of the

legislature: ***Rizzo & Rizzo Shoes Ltd. (Re)***, [1998] 1 SCR 27 at para 21. That relevant context includes the culture shift endorsed in ***Hryniak***, one objective of which is to simplify pre-trial procedures in the delivery of justice. As the Supreme Court of Canada noted in ***Hryniak***, *supra* at para 1: AEnsuring access to justice is the greatest challenge to the rule of law in Canada today.@

31 The courts, bar and government in Alberta, as in other jurisdictions, identified this long-standing and persistent challenge years ago. All understood that delays, coupled with the high costs of litigation, created barriers to justice. Through the joint efforts of the Alberta Law Reform Institute, the Rules of Court Committee (established under s. 28.2 of the *Judicature Act*), and the Alberta government, the *Rules* were implemented. They were designed in part to streamline the civil litigation process and encourage early disclosure and settlement of issues. Once the Rules of Court Committee agreed to the *Rules* and recommended their adoption, Alberta promulgated the *Rules* by Order in Council under s. 28.1 of the *Judicature Act*. This section authorizes the Lieutenant Governor in Council, by regulation, to make rules governing practice and procedure in the Court of Queen's Bench and Court of Appeal.

32 Interpreting the *Rules* in a manner which promotes access to justice is also supported by the stated purposes of the *Rules* themselves. Although the purpose section of a statute carries less weight than a substantive provision, it is still useful for interpretive purposes as a statement of legislative intent: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham: LexisNexis, 2008) at 391. Of course, purpose language in legislation cannot be used to distort the legislation's specific operational words: *Gallant v Farries*, 2012 ABCA 98, 522 AR 13. Rule 1.2 of the *Rules* confirms the foundational purpose of the *Rules* and provides that parties have a joint and individual obligation to take steps to achieve that purpose. It reads in part:

> 1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost effective way.
>
> (2) In particular, these rules are intended to be used
>
> (a) to identify the real issues in dispute,
>
> (b) to facilitate the quickest means of resolving a claim at the least expense...
>
> (3) To achieve the purpose and intention of these rules the parties must, jointly and individually during an action,
>
> (a) identify... the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense...
>
> ...
>
> (c) refrain from filing applications or taking proceedings that do not further the purpose and intention of these rules, and
>
> (d) when using publicly funded Court resources, use them effectively.

33 Not only does this foundational purpose reflect the culture shift occurring throughout Canada, the *Rules* also include, for the first time, a statutory provision describing the intended purpose of Part 5 dealing with disclosure and records. That purpose is expressly stated in Rule 5.1:

> **Purpose of this Part**
>
> 5.1(1) Within the context of rule 1.2 *[Purpose and intention of these rules]*, the purpose of this Part is
>
> (a) to obtain evidence that will be relied on in the action,
>
> (b) to narrow and define the issues between parties,
>
> (c) to encourage early disclosure of facts and records,
>
> (d) to facilitate evaluation of the parties positions and, if possible, resolution of issues in dispute, and
>
> (e) to discourage conduct that unnecessarily or improperly delays proceedings or unnecessarily increases the cost of them.
>
> (2) The Court may give directions or make any order necessary to achieve the purpose of this Part.

34 Thus, our interpretation of the *Rules* is informed by the foundational purpose in Rule 1.2, the stated purpose relating to disclosure contained in Rule 5.1, and the culture shift required to create a litigation environment that enhances, and does not obstruct, access to justice. All three encourage early disclosure and narrowing of the issues in dispute between parties. One objective is to facilitate a timely evaluation of the parties' respective positions with a view to achieving, if possible, a settlement without the need to resort to a trial.

3. The *Rules* Relating to Affidavits of Records

35 We now turn to the specific rules dealing with disclosure of information under the *Rules*. The main rules relevant to the contents of an affidavit of records are Rules 5.6, 5.7 and 5.8, which provide in part as follows:

> **Form and contents of affidavit of records**
>
> 5.6(1) An affidavit of records must
>
> (a) be in Form 26, and
>
> (b) disclose all records that
>
> (i) are relevant and material to the issues in the action, and
>
> (ii) are or have been under the party's control.

(2) The affidavit of records must also specify

(a) which of the records are under the control of the party on whose behalf the affidavit is made,

(b) which of those records, if any, the party objects to produce and the grounds for the objection,

Producible records

5.7(1) Each producible record in an affidavit of records must

(a) be numbered in a convenient order, and

(b) be briefly described.

(2) A group of records may be bundled and treated as a single record if

(a) the records are all of the same nature, and

(b) the bundle is described in sufficient detail to enable another party to understand what it contains.

Records for which there is an objection to produce

5.8 Each record in an affidavit of records that a party objects to produce must be numbered in a convenient order and the affidavit must identify the grounds for the objection in respect of each record.

4. What Do the *Rules* on Affidavits of Records Require Regarding Privilege Claims?

36 Rules 5.6, 5.7 and 5.8 lie at the heart of this dispute. As noted above, we have concluded that a grammatical, purposive and contextual reading of these Rules imposes on a party the obligation to number and briefly describe each record that is relevant and material, including those it claims are privileged. In accordance with Schedule 2 of Form 26, those latter records should be set out in separate categories as contemplated therein. A party is entitled to bundle privileged records providing that the bundled record otherwise meets the requirements of Rule 5.7. For records that a party claims are privileged, the party must, in accordance with Rule 5.8, identify the particular grounds of the objection to production for each record in order to assist other parties in assessing the validity of the claimed privilege. That means the party must state the actual privilege being relied upon with respect to that record and describe the record in a way that, without revealing information that is privileged, indicates how the record fits within the claimed privilege. These requirements apply equally to a bundled record over which a party claims privilege. We offer four reasons for these conclusions.

(a) The Text of the *Rules* Supports a Modern Approach to Privileged Records

37 The textual wording of the provisions in the *Rules* dealing with disclosure of records supports a broad interpretation of a party's obligations with respect to records it claims are privileged. This is reinforced by s. 10 of the *Interpretation Act*, RSA 2000, c I-8, which provides that an enactment, which would include the *Rules*, Ashall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects@.

(i) Reading the Rules Together

38 The first issue is the scope of Rule 5.7. It requires that each producible record be numbered and briefly described. What was intended by the reference to Aproducible records@ in the heading and body of Rule 5.7? The key question is this. Does producible records in Rule 5.7 include those a party objects to disclose?

39 The starting point for this analysis must be Rule 5.6(1)(b). It requires that an affidavit Adisclose all records... relevant and material to the issues in the action@ that Aare or have been under the party's control@. Thus, all relevant and material records are *prima facie* producible. Subsection (2)(b) of this Rule goes on to require that the affidavit must also specify which of Athose records@, if any, the party objects to produce and the grounds for the objection. The words Athose records@ obviously refer back to records that Aare relevant and material to the issues in the action@. Therefore, relevant and material records include those a party objects to producing.

40 The next question is what is meant by Aproducible records@ in Rule 5.7. Rule 5.7(1) requires that each producible record be numbered in a convenient order and briefly described and Rule 5.7(2) allows bundling of a group of records. Does Aproducible records@ in Rule 5.7(1) and Arecords@ in Rule 5.7(2) include those records a party objects to producing? Again, in our view, the answer is yes (providing, of course, that the record is otherwise material and relevant). It was argued that a record that is objected to under Rule 5.8 ceases, as a result of that objection, to be a Aproducible@ record for purposes of description and bundling of those records under Rule 5.7. However, nothing in the language of either Rule 5.7 or 5.8 suggests this. Indeed, the only reason a party would *need* to object to production of a record under Rule 5.8 is because the record is otherwise producible under Rule 5.7. The language of these Rules does not suggest that the drafters intended that a record that is *prima facie* producible would somehow automatically lose that quality B or the requirement that it be briefly described B merely because an objection, yet to be considered, is taken. Accordingly, the word Aproducible@ as it appears in Rule 5.7 refers to records which are relevant and material, even where objection is taken to production. In other words, it includes records which are *prima facie* producible.

41 It follows that we do not view Rules 5.7 and 5.8 as creating discrete obligations and rights depending on whether a party objects to produce records. Rather, despite any ambiguity suggested by their headings, we are satisfied that Rule 5.7 was intended to apply to all relevant and material records that are *prima facie* producible and that Rule 5.8 was intended to impose *additional*, not separate, obligations on a party who objects to producing a *prima facie* producible record. What further information does Rule 5.8 require a party to disclose for records over which privilege is claimed? The answer is that it requires, in particular, that a party identify the Agrounds for the objection in respect of each record@.

42 This being so, even if we are wrong in concluding that relevant and material records a party objects to produce must, short of disclosing privileged information, be briefly described by that

party in accordance with Rule 5.7, the same result would follow given the requirements under Rule 5.8. Why? Identifying Athe grounds@ for claiming privilege in relation to each record obliges a party to do two things. First, it must state the actual privilege being relied upon with respect to a particular record (e.g. litigation privilege). Second, it must provide a sufficient description about that record to assist other parties in assessing the validity of the claimed privilege. An objection does not exist in a factual vacuum. It is tied to a specific record. Therefore, in explaining the grounds for claiming privilege over a specific record, a party will necessarily need to provide sufficient information about that record that, short of disclosing privileged information, shows why the claimed privilege is applicable to it. Depending on the circumstances, this may require more or less than the Abrief description@ contemplated under Rule 5.7(1)(b) although we expect that oftentimes the brief description will suffice.

43 Accordingly, under either interpretation of the relevant Rules, a party must provide a sufficient description of a record claimed to be privileged to assist other parties in assessing the validity of that claim. From this, it follows that all relevant and material records must be numbered and, at a minimum, briefly described, including those records for which privilege is claimed. As noted, though, this is subject to the proviso that the description need not reveal any information that is privileged.

44 The content of Form 26 set out in Schedule A of the *Rules* B specifying the format for an affidavit of records B also supports the conclusion that a party claiming that a record is privileged must satisfy these obligations. The use of the Form is mandatory since the word Amust@ is stated in Rule 5.6(1)(a) in reference to its completion. Nevertheless, its format is not strictly binding providing the substance of the form satisfies the requirements found in the *Rules*: see Rule 13.16.

45 Schedule 2 of Form 26 deals with documents a party objects to produce. It lists a number of specific kinds of records which would ordinarily attract privilege, such as Awithout prejudice communications@ or Alitigation privilege@. Significantly, however, each of these listed examples is followed by a colon, which indicates that a party is expected to provide more detailed information. In other words, the matters listed before the colon are various recognized categories of privilege, the first required element of the Agrounds@ for the claim. What a party must include after the colon, however, is the second aspect of the grounds, namely the description of each record, along with the numbering in convenient order, that indicates how the record fits within the claimed privilege. Once properly completed, the end result will be a list of individual or bundled records corresponding to the different categories of privilege, numbered and adequately described.

46 In summary, the *Rules* read together indicate that a party must provide more information in describing a record subject to a privilege claim than merely parroting the nature of the various privileges listed in Schedule 2 of Form 26 in an abstract, incomplete manner, untethered to any specific record. It would be ironic, indeed, if the *Rules* were interpreted so as to allow a party not to provide at least a brief description of records where that description is most required. After all, these are the records that another party is not entitled to examine unless it successfully challenges the privilege claim.

47 We stress, however, that the requirements we have identified are subject to the option to bundle records.

(ii) Interpreting Rule 5.7 to Include Privileged Records Allows Them to be Bundled

48 The *Rules* define for the first time what records may be bundled. Rule 5.7 permits records of the Asame nature@ to be bundled so long as the bundle can be Adescribed in sufficient detail to enable another party to understand what it contains@. Bundling can be helpful since it avoids the necessity of having to describe each record individually. There is no legitimate reason to deny this bundling tool to records a party objects to disclose based on privilege claims. Hence, this is another reason why we have concluded that producible records under Rule 5.7 was intended to include all *prima facie* producible records.

49 Moreover, the requirement in Rule 5.7(2)(b) that the bundle be described in sufficient detail to allow a party to understand its contents adds support for this interpretation. That description is of particular importance where an objection to disclosure is made. In all other cases, the bundle can be examined. But where a party claims a bundle is privileged, without a sufficient description to allow another party to understand the contents of the bundle, that other party would have no idea what is not being disclosed and why. Accordingly, we reject the notion that the *Rules* are encumbered by a false dichotomy under which records that are not subject to objections to disclosure may be bundled by a party but objected to records cannot be bundled at all. The *Rules* do not say that.

50 As noted, we have concluded that each record over which privilege is claimed must be (i) numbered in a convenient order and (ii) described in a way that, without revealing privileged information, indicates how that record fits within the claimed privilege. However, this requirement to describe each record individually is subject to the proviso that relevant and material records of the same nature can be bundled and treated as a single record so long as the requirements of Rule 5.7(2) are met. That is, the description offered for the bundle must be sufficiently clear so as to allow another party to understand what it contains. In addition, given the requirements of Rule 5.8, this description must also provide sufficient facts to assist other parties in assessing the validity of the claimed privilege over the bundle in question.

51 Bundling can be effective even with multiple claims of privilege. To illustrate, consider a party who claims privilege over 50 records. After describing the bundle in sufficient detail to enable another party to understand what it contains and providing sufficient information to assist other parties in assessing the validity of the claimed privilege over the bundle in question, the party objecting to disclosure identifies records 1 to 30 as subject to solicitor-client privilege, records 40 to 50 as litigation privilege and records 31 to 39 as both. This permits a party to identify which form(s) of privilege attaches to each record while recognizing that some records might have multiple reasons for objection, any one of which may be sufficient: see ***Opron Construction Co. v Alberta*** (1989), 100 AR 58 (CA) at para 5. Another party would be assisted by this degree of specificity and might well choose to accept the objections, or only resist them selectively. A judge reviewing the records under Rule 5.11 would also be in a better position to organize the evaluation of the objections.

52 We recognize that the predecessor rules of court to the *Rules* did not expressly permit bundling, much less stipulate what restrictions would apply to such bundling. While this Court's interpretation of prior iterations of the rules of court permitted bundling in certain circumstances, it did not require that the bundled records be described in sufficient detail to enable another party to understand what the bundle contains. However, the *Rules* now impose this obligation. Requiring this description balances the competing values of privilege and discovery by protecting the privileged information while providing some information to assess the claimed privilege and thereby hopefully narrowing the disputed areas to the margins of the privilege claims.

(iii) *Dorchak* is not a Barrier to Describing Records Subject to a Privilege Claim

53 The next question is whether this Court's decision in ***Dorchak*** commands a different reading of the text of the *Rules*. The answer is no. The parties spent some time on the implications of ***Dorchak***. It was asserted that ***Dorchak*** did not require that any description be provided with respect to records subject to a privilege claim. However, ***Dorchak*** was decided under different rules of court relating to disclosure. Those rules were amended shortly after that decision and have now been replaced with Part V of the *Rules*.

54 Since ***Dorchak*** was decided in 1997, vast and varied technological changes have allowed parties to litigation to massively enlarge the scope of their record keeping. The *Rules* accept that it is not too onerous for a party to briefly describe every record (or bundle of records) they object to produce. In this technological age, there can be no practical barrier to a party's preparing the necessary brief description of relevant and material records it claims are privileged. Indeed, in major litigation cases, this would typically be done as a matter of routine for the party's internal purposes alone. It is noteworthy that in this case, the parties had no difficulty providing brief descriptions for the more than 10,000 records they did not object to produce.

55 That said, much of what was said in ***Dorchak*** still has resonance. While concerned that privilege not be Afrittered away@ through description of a record, this Court was aware of the need to balance this concern against the need to describe enough facts about the record to bring it within the privilege. As noted in ***Dorchak***, *supra* at para 62:

> Ordinarily one should be able to describe a file or bundle in some manner which will not reveal secrets. For example, if it is E. Marshall Hall's file, one may call it a lawyer's file without naming the lawyer.

56 Indeed, ***Dorchak*** held that it was necessary for an affidavit of records to articulate the particular privilege being asserted with respect to a given document or bundle of documents. While this Court held that it was not necessary to describe each document or bundle of documents so as to Acorroborate the privilege@, a primary concern was that a party not be obliged to cite facts that effectively gave away the privilege. This concern remains valid today. Hence, we emphasize that the obligation to provide sufficient information to indicate how a record fits within the claimed privilege does not require a degree of particularity that would itself defeat the privilege. No doubt best practices by counsel for parties will develop over time to accommodate to the new realities.

(b) Context Supports a Modern Approach to Privileged Records

57 The legislative history sheds considerable light on the rationale for changes to the rules relating to claims of privilege. That history underscores why the *Rules* ought to be given a generous and liberal interpretation and why it is reasonable to conclude that they were intended to usher in a modern approach to privileged records.

58 Preparation of the *Rules* involved considerable consultation with the profession. That consultation revealed substantial professional complaints regarding how affidavits of records dealt with claims of privilege. The Alberta Law Reform Institute (ALRI) discussed many of these complaints in Consultation Memorandum No. 12.2 of the Alberta Rules of Court Project, *Document Discovery and Examination for Discovery*. That memorandum expressly recognized at 28-29 the serious con-

cerns in the legal profession associated with the description of privileged documents, or more to the point, the lack thereof:

> The general feeling is that privileged documents must be described in a manner which adequately describes the ground upon which privilege is claimed as there is no way of knowing that a document exists if it is not disclosed. Some counsel indicated that a recent case suggests that counsel may be negligent if they proceed without cross-examining on the affidavit of records to determine why privilege is claimed over specific records.

59 In our view, Part V of the *Rules* was aimed at remedying this problem. In addition, there is no good policy reason for adopting an interpretation of the *Rules* that exposes members of the legal profession to negligence claims if they fail to run down every blind alley that the rules themselves would otherwise be responsible for creating.

(c) Policy Reasons Support the Modern Approach to Privileged Records

60 Further, interpreting Rules 5.7 and 5.8 to require parties to describe records over which privilege is claimed to the extent we have identified is consistent with the purpose of Part V of the *Rules* and the shift toward early disclosure. Early disclosure facilitates the ability of another party to evaluate the legitimacy of privilege claims without resorting to the courts for resolution of all disputes. A contrary approach means that a party would provide no useful information whatever about records claimed to be privileged. It is difficult to fathom how such a system could operate effectively when an opposing party has no knowledge of what documents are subsumed under the blanket claim of privilege. To continue with this blanket approach to privilege claims makes little sense. Today, all involved in the justice system recognize the benefits of early resolution of contentious issues and early settlement before parties have wasted months, if not years, in protracted and costly litigation.

61 It has been suggested that it is unnecessary to require a description of records claimed to be privileged at the front end of any litigation because the *Rules*, as with the predecessor rules, provide several options for counsel to deal with disputes regarding privileged records. Rule 5.11 sets out the role of the court when a party alleges a relevant and material record has been omitted or a claim of privilege has been made incorrectly or improperly:

> 5.11(1) On application, the Court may order a record to be produced if the Court is satisfied that
>
> (a) a relevant and material record under the control of a party has been omitted from an affidavit of records, or
>
> (b) a claim of privilege has been incorrectly or improperly made in respect of a record.
>
> (2) For the purpose of making a decision on the application, the Court may
>
> (a) inspect a record, and

(b) permit cross-examination on the original and on any subsequent affidavit of records.

62 In addition, we recognize that there are several other Rules under which a privilege (or immateriality) position might perhaps be tested or affected, such as: (a) during questioning (Rule 5.17(1)); (b) by undertakings requested (Rule 5.30); (c) having a Master inspect the records (Rule 5.14(2)); (d) moving for directions (Rule 5.1(2)); (e) moving for modification of rights (Rule 5.3); (f) moving to have a corporate representative answer further questions by informing himself or herself from others (Rule 5.4); and (g) moving to bar records not disclosed (Rule 5.16).

63 However, the purpose of providing a brief description of each record claimed to be privileged is to mitigate the need for a party to seek a remedy under these other Rules. We accept that discovery is based on the honour system. But we are not oblivious to reality. The fact is that reasonable people may reasonably disagree on what is, or is not, privileged B and do. Indeed, the very existence of these numerous options demonstrates that a claimed privilege position may well be incorrect. Errors may still be made. Parties and their counsel must have some reasonable way of assuring themselves that the claims advanced are in fact appropriate. If there is no means by which an opposing party can satisfy itself that the privilege claimed is properly invoked from the way the affidavit of records is drafted, that party may well feel compelled to take other steps to assess the validity of the claims. That may include cross-examining on the affidavit, and then asking a judge to scrutinize the disputed records. Rule 5.11 makes plain that parties are entitled to seek to satisfy themselves on this point.

64 It is true that the right to have a judge review records claimed to be privileged remains the ultimate safeguard in the event of legitimate differences of opinion or allegations of abuse of the system. But it is preferable that the *Rules* be interpreted in a way that minimizes the need to pursue these other various options, all of which come at additional cost and time to the litigants. Full and fair discovery of records also militates in favour of earlier dispute resolution and enhances the likelihood that opposing parties will make only appropriate challenges.

65 Further, in this day of increasingly scarce judicial resources, judges should not be bogged down regularly by the need to examine volumes of records to assess privilege. And lawyers should not be put in the position of having to ask them to do so. This potential Hobson's choice can be avoided by a system of document discovery that requires a brief description of each record claimed to be privileged in the affidavit of records. Providing that description at an early stage will help counsel focus and, in many cases, resolve litigation privilege issues without their being required to shoot all the arrows in the litigation quiver. Many privilege claims will no doubt be readily accepted. It also means that where court review is still required, a judge will not likely be called on to examine every record subject to a privilege claim. And even if that should prove necessary, a brief description of the challenged records may well also save judicial time.

66 The trend towards increased disclosure is, in part, a reaction to the increased complexity of the modern commercial lawsuit, where parties are forced to deal with thousands of potentially relevant documents at a time. The circumstances in this case are a good example of the problems inherent in an approach that would allow counsel to simply slap a non-disclosure label on records by using a generic description of the privileges claimed. Here, CNRL'said it was claiming the various forms of privilege listed in Schedule 2 of Form 26 over an undisclosed number of records. There was, therefore, no means by which ShawCor could possibly assess the validity of the privilege(s)

claimed, or even affirm the number of records in question short of cross-examining or making the court application that it did.

67 CNRL responded to the court application by filing a second affidavit that quantified the number of documents which it claims to be privileged B 1,058 records B and set out five possible categories of privilege. It did not identify how many records fell into which category. Nor did it describe the documents in such a way that ShawCor or, for that matter, the case management judge, could assess the validity of the various privilege claims. Little wonder that during the application, the case management judge mused about whether he should examine the 1,000 plus documents to see if they fit within the privileges claimed. The parties were understandably reluctant to ask him to do so, as they recognized the burden this would place on him.

68 Thus, this case speaks for itself as to the difficulties inherent in the approach taken to date. The fact is that, like the case management judge, we have no idea to what extent CNRL's privilege claims over 1,058 documents are valid. Parties who face disclosure objections should not have to rely solely on the courts, whether through use of Rule 5.11 or otherwise, to assess privilege claims. Further, without an affidavit of records that complies with the requirements we have identified under the *Rules*, the courts themselves would often lack the institutional capacity B particularly where, as here, the records are voluminous B to adequately probe the issue of privilege. Finally, what this case demonstrates is the comparative ease of minimizing or avoiding these difficulties with the modern approach.

69 Ultimately the rule of law is effective as an honour system because the institutions and processes of the justice system are understandable and reliable to those caught up in it. In our increasingly complex society, that system must provide workable and efficient methods for getting to the heart of matters in dispute and providing a credible answer in a prompt and proportional manner. On the other hand, justice systems do not exist to strip personal privacy and legal autonomy away from litigants. The modern approach to disclosure reflected in the *Rules* continues the expression of confidence in *bona fide* justice system participation by parties and their counsel, but backstops that confidence with judicial intervention where necessary.

(d) The Modern Approach is Consistent with the Evolving Law on Privilege

70 Other jurisdictions which have faced similar problems to those documented by the ALRI have adopted solutions favouring greater disclosure of information to support claims of privilege. This includes requiring that privileged records be described to a sufficient extent that privilege claims can be challenged without immediate resort to the courts. For example, Rule 7-1(7) of the British Columbia *Supreme Court Civil Rules*, BC Reg 168/2009 states: AThe nature of any document for which privilege from production is claimed must be described in a manner that, without revealing information that is privileged, will enable other parties to assess the validity of the claim of privilege.@ Similar disclosure rules exist in Saskatchewan and Ontario, as well as in the federal courts of Canada and the United States: see Rules 5-6 and 5-8 of the *Queen's Bench Rules, 2013* (Saskatchewan); Rule 30.03 of the *Rules of Civil Procedure* (Ontario), RRO 1990, Reg 194; Rule 223(2) of the *Federal Courts Rules*, SOR/98-106; Rule 26(5) of the United States *Federal Rules of Civil Procedure,* Fed R Civ P.

71 While the rules of other jurisdictions are not, by themselves, a reason to interpret Alberta law in a particular way, they are indicative of the evolving trend in Canada towards more open disclosure in keeping with the philosophy the Supreme Court of Canada expressed in ***Hryniak***. It is

also fair to say that the approach that jurisdictions like British Columbia have taken is consistent with what courts generally have been doing in recent years to encourage greater disclosure. We hasten to add that there are differences in the language of the rules elsewhere and nothing we say should be understood as diminishing the made in Alberta solutions that were achieved after extensive consultation here.

5. Summary and Conclusion

72 In summary, records where privilege is asserted must now be dealt with individually. Each record must be numbered in a convenient order and briefly described, short of disclosing privileged information. Records may be bundled where privilege is being asserted providing that the bundled record otherwise meets the requirements of Rule 5.7. In accordance with Rule 5.8, a party must also identify the grounds for claiming privilege with respect to each record in order to assist other parties in assessing the validity of the claim. This latter requirement means that, for each record, a party must state the particular privilege being asserted and describe the record in a way, again without revealing information that is privileged, that indicates how the record fits within the claimed privilege. The description of all relevant and material records over which privilege is claimed should be set out in Schedule 2 of Form 26 in the separate categories contemplated therein.

73 CNRL's affidavits do not comply with these requirements. Harvey's first affidavit made a blanket claim of privilege over an undisclosed number of documents and merely listed the privilege categories set out in Schedule 2 of Form 26, with nothing added except the word ANIL@ in reference to the AOther@ category. While Harvey's later affidavit disclosed the number of records over which privilege was claimed, namely 1,058, and stated that these records fell into five discrete categories, this too falls well short of what is required under the *Rules*. It follows that the appeal must be allowed. CNRL is directed to prepare a new or supplementary affidavit in compliance with the *Rules* and this judgment.

B. The Status of the Investigation Records Generated After February 4, 2009

74 As noted, in the application before the case management judge, ShawCor sought production of four broad categories of records. These included what it described in its application as the ATesting and Investigation Records@ and in particular those produced after February 4, 2009. Those records are defined in the application as ARecords regarding or relating to the testing and investigations of the Out-of-Scope Operation and its impact on the Pipeline.@ The AOut-of-Scope Operation@ is described as the Aextended operation of the insulated and buried pipeline at temperatures higher than those provided for in its design.@ The net result of the investigation and testing conducted by CNRL with respect to the Pipeline is set out in paragraphs 23 and 24 of its Statement of Claim and forms the basis of CNRL's action against ShawCor and others.

75 The case management judge found at para 37 of his reasons that CNRL's testing and investigation would have continued past February 4, 2009 to satisfy a variety of on-going purposes, even if CNRL had not contemplated litigation after that date:

> The Shaw Defendants contend that the investigation efforts conducted by CNRL after February 4th, 2009 had several purposes other than litigation, including understanding the extent of the Pipeline failure, correcting the problems that had occurred and avoiding them in future; repairing the Pipeline; providing the necessary information to CNRL management to respond to the failure; satisfying any

> internal CNRL policies regarding management of pipeline failures; demonstrating the implementation of its own policies; satisfying regulatory requirements and advancing a claim under any applicable insurance policy. I agree with the Shaw Defendants that, even if this litigation had not occurred, CNRL would have conducted an investigation for some or all of these purposes. [emphasis added]

76 Despite this finding, the case management judge concluded that by February 4, 2009, CNRL had gathered enough information from its Initial Investigation that any further records generated thereafter relating to the investigation and testing of the Pipeline were created either to obtain legal advice with respect to a claim (and within solicitor-client privilege) or were for the dominant purpose of litigation (and within litigation privilege). He stated at paras 38-39:

> The Shaw Defendants further contend that CNRL has not provided any explanation as to why litigation and/or solicitor-client privilege attached to the investigation records over which CNRL has claimed privilege on and after February 5th, 2009. Here, I disagree. It is apparent that in the wake of an incident such as the Pipeline failure, the operator will immediately undertake to investigate the cause and to attempt to determine what, if anything, must be done in terms of repair, replacement, advancing an insurance claim and satisfying regulatory requirements. Documents generated in connection with this initial investigation may not be privileged. At some point, however, the operator will turn its mind to the potential for litigation. The proximity of this date to the date of the failure may depend upon the results of the operator's initial investigation.
>
> The explanation for the February 5th, 2009 date is in Harvey's evidence. He states that given the extremely short lifetime of the Pipeline and the conclusions of the Initial Investigation, it was clear very early that litigation would occur and that he made contact with Mendes, a lawyer employed by CNRL, on February 4th 2009, to discuss the failure and the further investigation and testing that was going to be necessary to determine fault and damages and to pursue litigation.

77 ShawCor submits that the case management judge erred in allowing blanket protection for these records simply because litigation was contemplated. ShawCor further contends he erred in concluding that the testing and investigation records obtained or created after February 4, 2009 fell under the rubric of solicitor-client privilege. It submits that this privilege only applies to communications between solicitor and client or a third party with the authority to obtain legal services or to act upon legal advice. In its view, the testing and investigation records did not fit into this category.

78 ShawCor also submits that the case management judge erred by finding that these same records were also covered by litigation privilege because there was no evidence before him that the records had been prepared for the dominant purpose of litigation. In fact, ShawCor submits that the judge's own findings suggest there were a variety of reasons for conducting the investigation. Therefore, in its view, the investigation would have been undertaken regardless of any contemplated litigation. Accordingly, given these findings, ShawCor questions how it could be said that the investigation was for the dominant purpose of litigation. In its view, the evidence supports the conclusion that on February 4, 2009, CNRL was still seeking out the root causes of the Pipeline failure before deciding, on the basis of that investigation, how to proceed, including whether to repair or replace the Pipeline.

79 To begin with, it is unclear on what basis the case management judge concluded that solicitor-client privilege attached to all the testing and investigation records obtained or created after February 4, 2009 that CNRL declined to disclose. CNRL did voluntarily release some information/records from the period after February 4, 2009: see case management judge's reasons at para 40. The case management judge seems to have assumed that because CNRL's management had decided that litigation would be necessary by that date, and because CNRL's in-house counsel had directed that all future documentation regarding the Pipeline failure come to him, this was by itself sufficient to place all records created thereafter and not disclosed by CNRL within the scope of the privilege. But this is not necessarily so.

80 The mere fact that a lawyer directs that all records obtained or created after a certain date must first come to him or her is not sufficient to automatically place all such records within the category of solicitor-client privilege. Not every form of communication with a solicitor by a client is necessarily covered by solicitor-client privilege: ***Foster Wheeler Power Co v SIGED Inc***, 2004 SCC 18 at paras 37-40, [2004] 1 SCR 456. The privilege attaches to communications between lawyer and client designed to seek out or give legal advice. While a number of the testing and investigation records in question, or perhaps even all, might well fall within this category, we have no way of knowing which ones do so because they have not been adequately described and the case management judge declined to examine them. Thus, the case management judge erred to the extent that he relied on this privilege as a blanket justification for refusing to order the disclosure of the testing and investigation records post-February 4, 2009. Nothing in CNRL's affidavits assists in making a determination whether any records for which privilege have been claimed fall under the near-absolute category of solicitor-client privilege.

81 Equally problematic is CNRL's blanket claim of litigation privilege which has characteristics and limitations that distinguish it from solicitor-client privilege: see ***Blank v Canada (Minister of Justice)***, 2006 SCC 39 at paras 23-37, [2006] 2 SCR 319 [***Blank***]. This Court discussed the purpose of litigation privilege in ***Moseley v Spray Lakes Sawmills (1980) Ltd.***, 1996 ABCA 141 (CanLII), 184 AR 101 [***Moseley***] at para 21:

> It is intended to permit a party to freely investigate the facts at issue and determine the optimum manner in which to prepare and present the case for litigation. As a rule, this preparation will be orchestrated by a lawyer, though in some cases parties themselves will initiate certain investigations with a view to providing information for the Alawyer's brief@.

82 The test for litigation privilege in Alberta is that of Adominant purpose@ as described by this Court in ***Nova, An Alberta Corporation v Guelph Engineering Co*** (1984), 50 AR 199 [***Nova***]. The dominant purpose test was explained in ***Moseley***, *supra* at para 24 as follows:

> The key is, and has been since this Court adopted the dominant purpose test in ***Nova***, that statements and documents will only fall within the protection of the litigation privilege where the dominant purpose for their creation was, at the time they were made, for use in contemplated or pending litigation. [emphasis in original]

83 Accordingly, a record will not be protected by litigation privilege simply because litigation was one of several purposes for which the record was created: ***Dow Chemical***, *supra* at para 38. In

Blank, *supra* at paras 59-60, the Supreme Court of Canada affirmed the dominant purpose test and emphasized its narrow nature at paras 60-61:

> The dominant purpose test is more compatible with the contemporary trend favouring increased disclosure...
>
> While the solicitor-client privilege has been strengthened, reaffirmed and elevated in recent years, the litigation privilege has had, on the contrary, to weather the trend toward mutual and reciprocal disclosure which is the hallmark of the judicial process.

84 In addition, it must be remembered that under the dominant purpose test, the focus is on the purpose for which the records were prepared or created, not the purpose for which they were obtained: ***Ventouris v Mountain***, [1991] 1 WLR 607 at 620-622 (Eng CA); ***General Accident Assurance Company v Chrusz et al*** (1999), 45 OR (3d) 321 at 334 (CA). Pre-existing records gathered or copied at the instruction of legal counsel do not automatically fall under litigation privilege: ***Bennett v State Farm Fire and Casualty Company***, 2013 NBCA 4 at paras 47-51, 358 DLR (4th) 229. Because the question is the purpose for which the record was originally brought into existence, the mere fact that a lawyer became involved is not automatically controlling.

85 This very point was made thirty years ago by this Court in ***Nova***, *supra* at para 20:

> The only case for exclusion which can be made [on the facts before the court] is for documents which were brought into existence by reason of an intention to provide information to solicitors. That this is *an* object is insufficient such a test provides a cloak where other purposes predominate. Such a test would clothe material that probably would otherwise have been prepared, and otherwise not privileged, with a privilege intended to serve a narrow interest. Such a test conflicts with the object of discovery today which is to disclose material provided for other purposes.

86 CNRL began its investigation into the Pipeline failure to discover its cause and to determine how to mitigate its effects in the context of a well blowout. That investigation was ongoing on February 4, 2009. Indeed, the case management judge identified seven reasons why CNRL, regardless of any decision to litigate, would have pursued testing and investigation beyond February 4, 2009. Among them were the following: Aunderstanding the extent of the Pipeline failure, correcting the problems that had occurred and avoiding them in future, repairing the Pipeline,@ and Aproviding the necessary information to CNRL management to respond to the failure...@. It appears, therefore, that the general character of the investigation remained the same even after Harvey's trip to see Mendes. The only thing that appears to have changed at that point was the direction of the mail. Thus, it is difficult to see how, without more information, the case management judge could have found that all the investigation records created post-February 4, 2009 not disclosed by CNRL were created for the *dominant* purpose of litigation. February 5 is simply the date that CNRL chose to direct all records through its in-house counsel.

87 We accept that when an investigation is ongoing, records may be created for the dominant purpose of litigation at any point after litigation is contemplated. And we recognize the case management judge effectively found that litigation would be pursued as of February 4, 2009. But the

purpose behind the creation of a record does not change simply because the record is forwarded to, or through, in-house counsel, or because in-house counsel directs that all further investigation records should come to him or her. Or even because a decision has been made to pursue litigation. One must always look to the particular record at issue and *determine* the dominant purpose behind its creation. After all, litigation privilege Amust be established document by document@: ***Gichuru v British Columbia (Information and Privacy Commissioner)***, 2014 BCCA 259 at para 32, citing ***Keefer Laundry Ltd. v Pellerin Milner Corp. et al.***, 2006 BCSC 1180 at para 96. An assertion that something was for the dominant purpose of litigation must always be examined in the context of all the facts, the nature of the records in question and all the real reasons that the records were created.

88 Here, the case management judge found that even if the subject litigation had not occurred, CNRL would have conducted an investigation for some or all of the purposes he identified. Thus, without further information from CNRL as to precisely what records were created, and for what purpose, we are unable to understand how all these testing and investigation records, created for a variety of purposes, could be found, without further inquiry, to fall within solicitor-client privilege or litigation privilege. This is so even accepting that CNRL had decided to pursue litigation as of the critical date. The reasons of the case management judge also indicate that he concluded that any third-party expert retained might Agenerate a privileged analysis for litigation purposes@: para 40. However, while the analysis would likely be privileged, it is not necessarily the case that the factual platform on which that analysis is built automatically shares that same status.

89 All this said, it does not follow that ShawCor is entitled to all the testing and investigation records created after February 4, 2009 not disclosed by CNRL. Some, many, or perhaps even all of those records might yet be found to be within the scope of either one or both of the privileges claimed. However, we are not able to determine on the materials before us whether these privileges have been properly invoked. Whether this continues to be a contentious issue after CNRL has provided the new or supplementary affidavit of records as directed herein remains to be seen. At that point, if the parties cannot agree on whether a particular record fits within the declared privilege, then the matter can be reviewed by a judge under Rule 5.11.

C. Waiver of Privilege and Content of Pleadings

90 Because CNRL is being directed to file a new or supplementary affidavit of records, it would be premature to discuss the issue of waiver and we decline to do so.

VII. Disposition and Summary

91 The appeal is allowed and CNRL is directed to provide a new or supplementary affidavit of records in compliance with the *Rules* and this judgment.

92 Without limiting what we have said, we summarize for convenience the requirements of the *Rules* discussed above relating to affidavits of records and privilege claims. We stress that this is not intended to be an exhaustive list of those requirements:

1. Every relevant and material record is *prima facie* producible and the minimum requirements and rights under Rule 5.7(1) and (2) apply to all such records, even where a party objects to production based on claimed privilege or some other legal ground.

2. Every relevant and material record must be numbered in a convenient order and briefly described. These should be set out in the separate Schedules applicable to each as contemplated in Form 26. Accordingly, a party claiming privilege over a number of records must number and briefly describe each record short of revealing information that is privileged. The description of those records should be set out in Schedule 2 of Form 26 in the separate categories contemplated therein.

3. A party is permitted to bundle and treat as a single record a group of records that are all of the same nature so long as the bundle is, in accordance with Rule 5.7(2)(b), described in sufficient detail to enable another party to understand what it contains. This bundling option also applies to records over which a party claims privilege.

4. If a party objects to the disclosure of otherwise relevant and material records, it shall, in addition to numbering the records in a convenient order and briefly describing them, set forth the grounds for objection in respect of each record to assist other parties in assessing the validity of the claimed privilege. In doing so, the party is required to (i) state the actual privilege being relied upon with respect to that record; and (ii) describe the record in a way that, without revealing privileged information, indicates how the record fits within the claimed privilege. These requirements also apply to a bundled record over which a party claims privilege.

93 We were advised in the course of this appeal that ShawCor filed an affidavit of records that took the same approach to disclosure of privileged documents as did CNRL. Disclosure is a two-way street. If CNRL is dissatisfied with the affidavit of records filed by ShawCor to date, it is also at liberty to pursue such steps as it considers necessary.

Judgment filed at Calgary, Alberta this 15th day of September, 2014

C.A. FRASER C.J.A.
C.M. CONRAD J.A.
J. WATSON J.A.

Case Name:

Henry v. British Columbia (Attorney General)

Between
Ivan William Mervin Henry, Plaintiff, and
Her Majesty the Queen in Right of the Province of British Columbia as represented by the Attorney General of British Columbia, City of Vancouver, William Harkema, Marilyn Sims, Bruce Campbell and Attorney General of Canada, Defendants

[2012] B.C.J. No. 2639

2012 BCSC 1878

222 A.C.W.S. (3d) 616

41 B.C.L.R. (5th) 422

274 C.R.R. (2d) 163

104 W.C.B. (2d) 515

2012 CarswellBC 3941

Docket: S114405

Registry: Vancouver

British Columbia Supreme Court
Vancouver, British Columbia

R.B.T. Goepel J.

Heard: November 21, 2012.
Judgment: December 13, 2012.

(60 paras.)

Civil litigation -- Civil procedure -- Discovery -- Examination for discovery -- Undertakings -- Deemed or implied -- Application by Henry for relief from implied undertaking allowed -- Henry

brought action against government defendants for damages based on convictions and imprisonment for sexual offences -- He applied for relief from implied undertaking applicable to documents disclosed to him during criminal proceedings -- Implied undertaking respecting documents that were part of record during appeal was spent -- Most other documents were relevant to issues in action -- There was already publication ban and sealing order designed to protect complainants' privacy interests.

Application by Henry for relief from an implied undertaking. Henry was tried in 1982 for 10 sexual offences against eight complainants, convicted, declared a dangerous offender and sentenced to indefinite imprisonment. A re-investigation led to his appeal in 2008. The British Columbia Court of Appeal quashed the convictions and entered acquittals in 2010. Henry brought an action against government defendants for damages based on the convictions and imprisonment. He applied for relief from an implied undertaking applicable to documents disclosed to him during the criminal proceedings, including complainants' statements.

HELD: Application allowed. The implied undertaking with respect to documents that were part of the record during Henry's appeal was spent and no longer restricted his use of them. Most of the other documents were relevant to the issues in the action. Henry was to list documents that he wished to use. He was not required to provide an express undertaking or request permission to show the documents to others. There was already a publication ban and sealing order designed to protect the complainants' privacy interests.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 7, s. 10, s. 11(d)

Criminal Code, R.S.C. 1985, c. C-46, s. 486.4(4)

Supreme Court Civil Rules, Rule 7-1, Rule 7-1(21)

Counsel:

Counsel for the Plaintiff: M.E. Sandford, D.M. Layton.

Counsel for the Defendant Her Majesty the Queen in right of the Province of British Columbia as represented by the Attorney General of British Columbia: J.J.L. Hunter, Q.C., D.C. Prowse, Q.C., E.W. Hughes, K. Johnston.

Counsel for the City of Vancouver, William Harkema, Marilyn Sims and Bruce Campbell: K.F.W. Liang, B. Quayle.

Counsel for the Defendant Attorney General of Canada: M.R.

Taylor, Q.C., S.G. Pereira.

Reasons for Judgment

R.B.T. GOEPEL J.:--

INTRODUCTION

1 The plaintiff, Ivan Henry, applies to be relieved from the implied undertaking that applies to documents that were disclosed to him in the course of criminal proceedings that were commenced against him in 1982 and concluded with his acquittal in 2010.

2 On March 15, 1983, a jury convicted Mr. Henry of ten sexual offence counts involving eight complainants. On November 23, 1983, the trial judge declared him a dangerous offender and sentenced him to an indefinite period of incarceration.

3 Mr. Henry remained incarcerated until granted bail on June 13, 2009. On October 27, 2010, the Court of Appeal quashed the convictions and entered acquittals on all counts: 2010 BCCA 462 (the "Appeal Reasons").

4 The Appeal Reasons, at paras. 11-34, set out in some detail the history leading up to the original trial and various events subsequent to the trial which ultimately led to an order on January 13, 2009 that the appeal be reopened and heard on its merits. For the purpose of these reasons, it is necessary that I repeat but a small part of that chronological history.

5 Mr. Henry now brings action against the City of Vancouver, William Harkema, Marilyn Sims and Bruce Campbell (collectively "the City"), Her Majesty the Queen in right of the Province of British Columbia ("the Province") and the Attorney General of Canada ("Canada") seeking damages for injury allegedly suffered as a consequence of the 1983 conviction and subsequent imprisonment. He alleges that due to the wrongful acts and omissions of the defendants, he was charged, detained in custody, wrongfully convicted and imprisoned. He claims damages for loss of liberty, pain and suffering, loss of enjoyment of life, subjugation to prison life and lost income.

6 Mr. Henry's claim against the City is centred on the Vancouver Police Department (the "VPD") investigation of a series of sexual assaults that took place in Vancouver between November 25, 1980, and June 8, 1982. At the material times, the individual defendants Harkema, Sims and Campbell were all members of the VPD. Mr. Henry alleges that the City owed the plaintiff the duty to take reasonable care in its investigation of him as a suspect.

7 Mr. Henry further alleges that the City was negligent in failing to disclose to Crown counsel

certain sexual assaults that took place subsequent to his arrest. He alleges that these assaults had some similarities in nature to those for which he was charged. In addition, he alleges that the City breached his rights under ss. 7, 10 and 11(d) of the *Charter of Rights and Freedoms* (the "*Charter*").

8 Mr. Henry's claims against Her Majesty the Queen in right of the Province of British Columbia (the "Province") relate to the actions of Crown counsel through the course of trial and subsequent appeal processes which are alleged to have been undertaken maliciously and/or constitute a breach of his rights under the *Charter*. The Province has admitted in its response that it is liable for any actionable misconduct on the part of Crown counsel.

9 The claim against the Attorney General of Canada ("Canada") concerns Canada's consideration of Mr. Henry's subsequent applications for review of his convictions. He claims that Canada was negligent in failing to carefully consider the review applications and to ensure that they were the subject of proper legal analysis. He claims that the acts and omissions of Canada breached his rights under s. 7 of the *Charter* not to be deprived of liberty except in accordance with the principles of fundamental justice.

THE APPLICATION

10 To facilitate document disclosure in this action Mr. Henry applies for the following orders:

1) Mr. Henry and his counsel are relieved of the implied and express undertakings attached to the criminal disclosure materials received from the Crown in relation to the prosecution that resulted in his being convicted on Vancouver Registry Indictment CC821614, including those criminal disclosure materials subsequently received in connection with his conviction appeal.
2) Those criminal disclosure materials referred to in para. 1) to which implied or express undertakings heretofore applied are subject to the same implied undertaking that will attach to any documents provided to Mr. Henry and his counsel by the defendants as part of the discovery process in this action.

11 In its response, the Province does not oppose Mr. Henry and his counsel being relieved of their implied and express undertakings attached to the criminal disclosure materials but submits the relief should be granted only on the following terms:

1) Mr. Henry and his counsel are released from the implied undertaking and the express undertakings which apply to documents which the Province produced to them in relation to the prosecution that resulted in Mr. Henry's conviction on Vancouver Registry Indictment CC821614 ("the Stinchcombe Documents") [R. v. Stinchcombe, [1991] 3 S.C.R. 326] on the following conditions:

(a) Mr. Henry and his counsel (including articling students) are subject to an express undertaking with respect to the Stinchcombe Documents which is the same as the implied undertaking governing documents produced under Rule 7-1 of the *Supreme Court Civil Rules*.

(b) Mr. Henry and his counsel retain possession and control of the Stinchcombe Documents and do not release them or show them to anyone other than Mr. Henry and the lawyers represented by Mr. Henry (including articling students) before these proceedings, absent prior consent of the Province or leave of the Court.

(c) Mr. Henry and his counsel not copy or reproduce the Stinchcombe Documents for any purpose other than the internal use of the lawyers (including articling students).

(d) Any party seeking to rely in Court on a Stinchcombe Document that contains third party information not subject to the publication ban in this proceeding either redact the document for that third party information or apply to amend the publication ban to include the third party information.

(e) No counsel disclose to its or his client Stinchcombe Documents that contain the addresses of the complainants other than the addresses at which the assaults occurred without seeking the prior consent of the Province.

(f) At the conclusion of these proceedings, and upon demand of the Province, Mr. Henry and his lawyers immediately return the Stinchcombe Documents plus any copies that were made.

2) The documents produced by the Province in this proceeding be subject to the same express undertaking listed above in subparagraphs (a) to (f).

3) All parties are subject to the same undertaking in paras. (1) and (2).

12 The Province's position is premised on its concern for the privacy rights of the complainants and other individuals who may be named in the documents.

13 Counsel for the City submits that Mr. Henry should not be relieved from the undertaking. They refer to the decision in *Juman v. Doucette*, 2008 SCC 8; [2008] 1 S.C.R. 157 [*Juman*] and submit that Mr. Henry has not met the onus of demonstrating a superior public interest in disclosure. He notes that most of the documents in issue will, in any event, be disclosed by the Province.

14 Canada supports the plaintiff's application. It submits that the documents in issue in the litigation should be freely available to all parties and any privacy concerns can properly be met by way of a publication ban, sealing order and the implied undertaking that governs disclosure of any documents in a civil proceeding.

15 Two of the complainants in the Henry criminal proceeding spoke at the hearing of this application. They expressed concern about their privacy rights. They noted that after an author of a proposed book about Mr. Henry obtained access to the Court of Appeal file, attempts were made to contact them. They wish the Court to take all appropriate steps to protect their privacy.

BACKGROUND

16 To put the application in context, it is necessary to review how the documents that are in issue came to be in the possession of Mr. Henry and his counsel. Much of this history is taken from the Appeal Reasons.

17 On July 29, 1982, Mr. Henry was charged with 17 sexual offences involving 15 complainants. In November 1982, Mr. Henry was committed for trial on 17 counts involving 15 complainants. At trial, the Crown proceeded on 10 counts involving 8 complainants.

18 At the beginning of the trial, Crown counsel provided Mr. Henry with disclosure of a number of statements made to the VPD by the eight trial complainants. Later in the trial, Crown counsel provided Mr. Henry with a number of statements made to the VPD by complainants who were involved in the preliminary hearing but were not complainants at trial.

19 In or about 1985, the VPD provided Mr. Henry with investigation and follow-up reports regarding his case in response to a Freedom of Information request. These reports were redacted to remove information provided by the complainants including their names, addresses and contents of their statements to police.

20 In approximately 2000, the National Parole Board provided Mr. Henry with many but not all of the documents received from the VPD in 1995, but in unredacted form.

21 In 2002, the VPD began to re-investigate 25 unsolved sexual assaults that had been committed from April 12, 1983 to July 3, 1988. This investigation became known as "Project Smallman". The first of these offences was committed more than nine months after Mr. Henry had been arrested on July 29 1982. Because he was in prison, Mr. Henry could not have committed any of these offences.

22 Through DNA testing, a Mr. McRae was linked to three of these offences. On May 27, 2005, he pleaded guilty to these three offences and was sentenced to five years in prison.

23 About this time, two senior prosecutors in the Vancouver Regional office, including lead counsel at Mr. Henry's 1982 trial, became aware of certain similarities between the case against Mr.

Henry and information generated by Project Smallman. They brought their concerns to the attention of the Criminal Justice Branch of the provincial Ministry of the Attorney General.

24 On November 15, 2006, the Criminal Justice Branch appointed Leonard T. Doust, Q.C., a senior counsel in private practice, to investigate a potential miscarriage of justice in the convictions of Mr. Henry. Mr. Doust conducted a detailed review of his convictions and the evidence relating to Mr. McRae. In his report delivered in March 2008, he recommended that the Crown not oppose any application Mr. Henry might bring to re-open his appeal.

25 On March 28, 2008, the Criminal Justice Branch issued a media release indicating that Mr. Doust had prepared a written report with respect to his review. Mr. Doust's recommendations included that the Crown disclose to Mr. Henry or his counsel the following category of materials:

1. the results of the VPD investigation known as Project Smallman, which in Mr. Doust's view, contained relevant potentially exculpatory evidence;
2. the totality of the evidence in its possession relating to the offences for which Mr. Henry was charged and/or convicted, so as to ensure him the benefit of any potential exculpatory evidence which may not have been previously disclosed;
3. a copy of Mr. Doust's report; and
4. the documents and information collected by Mr. Doust in his review.

26 In the spring of 2008, Mr. Henry retained Mr. Ward, Ms. Sandford and Mr. Layton to represent him for the purpose of appealing his criminal convictions. The Crown appointed E. D. Crossin, Q.C. as Special Prosecutor.

27 Mr. Crossin provided counsel for Mr. Henry with the materials that Mr. Doust had recommended be disclosed. The material in the Crown's possession relating to the offences with which Mr. Henry was charged or convicted and the materials that had been collected by Mr. Doust together filled about 10 Bankers boxes. The materials relating to Project Smallman were contained on a CD and amounted to about 3,000 pages.

28 The materials collected by Mr. Doust included files of Crown counsel, Mr. Henry's own files, court files for the British Columbia Supreme Court and Court of Appeal, files of the Department of Justice Criminal Convictions Review Division and court files in other post-conviction proceedings brought by Mr. Henry in the Supreme Court of Canada, the Saskatchewan Court of Queen's Bench and Court of Appeal and the Federal Court of Canada Trial Division and Court of Appeal.

29 At Mr. Crossin's request, counsel for Mr. Henry received the Doust Report and the Project Smallman CD under certain specific express undertakings. Mr. Crossin asked that the Doust Report be subject to an express undertaking because, among other reasons, the Crown considered it to be a privileged document. The Project Smallman material was subject to an express undertaking because, unlike the boxes of materials relating to the police investigation of the Henry offences, it

was not subject to the usual vetting and redaction that is employed with respect to criminal disclosure.

30 On January 13, 2009, the Court of Appeal granted Mr. Henry's application to reopen his appeal. Over time, and in particular once publication bans protecting the identities of the complainants were in place, the Crown relaxed the Smallman express undertakings in various respects. By April 21, 2009, the terms of the express undertakings were as follows:

1. That you would retain possession and control of the Project Smallman investigation materials (which includes all McRae materials disclosed to the defence) and not release this material or show it to anyone, other than Mr. Henry and lawyers (including articling students) retained by Mr. Henry for these proceedings, absent prior consent of the Crown or leave of the court.
2. You may not copy or reproduce the Project Smallman material or CD for any purpose other than the internal use of lawyers (including articling students) retained by Mr. Henry for these proceedings, absent the prior consent of the Crown or leave of the court.
3. You are not to discuss the contents of the report or Project Smallman material with anyone other than Mr. Henry or lawyers (including articling students) retained by Mr. Henry for these proceedings, absent prior consent of the Crown or leave of the court.
4. Upon request by the Crown, you will immediately return the Project Smallman material and/or CD plus any copies that may have been made.

31 The Smallman undertaking was further modified on January 25, 2010 to allow defence counsel to interview:

1) the Project Smallman complainants;
2) witnesses involved in other incidents involving Mr. McRae, who was the only individual convicted of any of the Project Smallman offences; and
3) police witnesses involved in Project Smallman or other McRae incidents.

32 Following the reopening of Mr. Henry's appeal, his counsel from time to time asked for and received additional disclosure from Mr. Crossin. Much of this material became the subject of the Smallman express undertakings.

33 In May 2010, counsel for Mr. Henry filed his material with the Court of Appeal in relation to the upcoming appeals of his convictions. These materials included all of the statements given to the police by the complainants with respect to whom Mr. Henry was convicted. The material also included any statements provided by the complainants with respect to whom Mr. Henry was at one time charged but never tried and the Project Smallman complainants. The defence required release from the Smallman express undertakings in order to file any of the Project Smallman or McRae

materials with the Court of Appeal. Prior to filing, Crown counsel reviewed and made redactions to the material the defence proposed to file. Crown counsel also asked that some redactions be made to the Henry material that was to be filed which were not objected to by the defence. Once the redactions were made, the defence filed its material with the court.

34 The Court of Appeal heard Mr. Henry's appeal on June 21 and June 22, 2010, and on October 27, 2010, the Court of Appeal overturned Mr. Henry's convictions, entered acquittals on all counts and set aside his dangerous offender designation. Following the hearing of Mr. Henry's appeal, Mr. Crossin's office asked defence counsel for Mr. Henry to return all copies of the Doust Report and the Project Smallman CD. Counsel for Mr. Henry has complied with these requests.

35 On November 4, 2011, Joan McEwan, who is writing a book on the Henry matter, obtained an order from the Court of Appeal, with the consent of counsel for the Crown and Mr. Henry, permitting her to review most of the Court of Appeal file pertaining to Mr. Henry's 2010 appeal, including all of the material filed by the parties on the appeal itself. The only limit on Ms. McEwan's use of the material was that she acknowledge in writing the existence of two publication bans which prohibited the publication of the names of complainants in both the Henry and Smallman investigations or the name of Mr. McRae.

36 As a result of the order, Ms. McEwan has had full access to the materials filed in the Court of Appeal and has copied much of that material. No other restrictions have been placed on her use of the material.

37 On June 28, 2011, Mr. Henry commenced this civil action. Most or all of the criminal disclosure materials referred to in the preceding paragraphs has been listed by the Province on its November 15, 2012 list of documents.

38 On September 20, 2012, in reasons found at 2012 BCCA 374, Finch C.J.B.C. vacated the publication ban that had shielded the identity of Mr. McRae. He said at para. 19:

> It would appear that Mr. McRae would like to avoid the suggestion, in the media or elsewhere, that he may have been involved in crimes for which he has not been charged or convicted. I am not convinced that this can be seen as a sufficiently pressing risk to the proper administration of justice to warrant a continuation of the publication ban. Many individuals are in a similar position to Mr. McRae and yet are unable to shield themselves from media attention. Mr. McRae has received a three-year reprieve from such attention, but I can see no reason why it is necessary for that reprieve to continue.

39 On November 21, 2012, I ordered a publication ban in this proceeding. Pursuant to the ban no person can publish any document, or broadcast or publicly transmit in any way any information that can identify the 52 complainants of sexual assault identified in the course of the Henry and Smallman investigations. The order does not apply to the disclosure of information made in the

course of this proceeding when it was not the purpose of the disclosure to make the information known to the community. This limitation on the publication ban is consistent with that that found in s. 486.4(4) of the *Criminal Code*.

40 On November 21, 2012, I also made a sealing order. Pursuant to the terms of the sealing order, any document which could identify any of the 52 sexual assault complainants will be sealed pending further order of the court.

DISCUSSION

A. Overview

41 The application raises two distinct but intertwined issues. The first issue is whether Mr. Henry and his counsel should be relieved of the implied undertaking concerning their use of the documents disclosed in the criminal proceeding. The second issue concerns what restrictions if any should be imposed on counsel's use of documents in this action. The second issue arises from the Province's response to the application.

B. The Implied Undertaking

42 Pursuant to the implied undertaking rule, evidence compelled during pre-trial discovery can be used only for the purpose of the litigation in which it was obtained. The rule applies to both civil and criminal proceedings: *R. v. Basi*, 2011 BCSC 314.

43 The rule attempts to balance the public interest in getting at the truth against a litigant's privacy interest. To that end a litigant will be compelled to make full disclosure, but the law imposes on the party an undertaking to the court not to use the documents or answers for any purpose other than securing justice in the proceedings in which the answers or documents were compelled: *Juman* paras. 23-28.

44 The undertaking is not absolute. It may be trumped by a more compelling public interest and a party may apply to the court for leave to use the information or documents other than in the action in which they were disclosed. An application to modify or be relieved against an implied undertaking requires the applicant to demonstrate on a balance of probabilities the existence of a public interest of greater weight than the values that the implied undertaking is designed to protect: *Juman*, para. 32.

45 In *Juman*, the court discussed the criteria and factors the court should weigh in determining whether or not to lift an undertaking when an application is made to use material in one action in a different proceeding. The court noted at para. 35 that when discovery material in one action is sought to be used in another action between the same or similar parties and raising the same or similar issues, the prejudice is virtually non-existent and leave will generally be granted.

46 The implied undertaking continues even after the proceeding in which it originated terminates. The undertaking is, however, spent when the documents become part of the court record at trial but not otherwise, except by consent or court order: *Juman*, para. 51.

47 In this case, many of the documents that were subject to undertakings were filed and became part of the record during Mr. Henry's criminal appeal. In regard to those documents, the undertaking is spent and no longer restricts the plaintiff's use of those documents. With regard to those documents that did not become part of the record on the criminal appeal, most but not necessarily all, are relevant to the issues in this action. The issues in this action as between Mr. Henry, the Province and the City are closely related to the issues in Mr. Henry's criminal prosecution. The Province has already listed most of documents in their own list. To the extent that the undertaking is not spent, I relieve the plaintiff and his counsel from the undertaking and they are entitled to use the documents in their possession in this proceeding.

48 In reaching this conclusion, I have not overlooked the position taken by the Province that the undertaking should be relieved only on conditions as set out in their response to the application. With respect, the question of whether conditions should be placed on the use of documents in this action is separate and apart from the question as to whether the plaintiff should be relieved of the undertakings given in the criminal proceeding. Whether it is appropriate to restrict the use of documents in the manner suggested in the Province's response is a separate matter that I deal with below.

49 While I am prepared to relieve Mr. Henry from the undertaking, it does not follow that all the documents that were subject to undertakings will be relevant or used in this proceeding. To the extent that Mr. Henry wishes to use such documents in this proceeding, he will have to list those documents pursuant to Rule 7-1. Generally speaking, unless a document is listed, the party may not use the document in evidence in the proceeding or use it for the purpose of examination or cross-examination: Rule 7-1(21).

50 Mr. Henry in his application seeks an order that the documents disclosed to him in the criminal proceedings to which implied or express undertakings formerly applied are subject to the same implied undertaking as any other documents provided to Mr. Henry as part of the discovery process in this action. I so order.

C. Restrictions on Document Use

51 As set out at para. 10 above, the Province seeks to impose conditions on the parties use of documents in this action. The Province submits that this Court, pursuant to its inherent jurisdiction, has the power to make such orders: *Hamilton v. Alberta,* (1991), 118 A.R. 267 (Q.B.).

52 The Province submits that such restrictions are necessary to protect the privacy interests of the complainants and other third parties who may be named in the documents. There is evidence before me on this application that some of the complainants who gave evidence against Mr. Henry in his

1983 trial have as a result of this matter being re-opened suffered symptoms of trauma similar to that they initially experienced including sleeplessness, generally heightened anxiety, nightmares and fearfulness. For the victims of sexual assault to have to relive those events after more than 30 years is an almost unimaginable horror. It cannot, however, in this case, be avoided. It is a necessary by-product of the allegations made in this proceeding.

53 While I accept that in appropriate circumstances that the Court can, pursuant to its inherent jurisdiction, impose restrictions on the use of documents, it is a power to be used sparingly. In this case there is already in place a publication ban and a sealing order both designed to protect the privacy interests of the complainants. With one exception set out below, I find that those restrictions are sufficient to protect the complainant's privacy interests and further restrictions on how counsel use the documents is not warranted.

54 All counsel are subject to the implied undertaking rule in regard to their use of the documents disclosed in this proceeding. I do not see in the circumstances of this case the need for Mr. Henry, his counsel or counsel for the other parties to provide an express undertaking in terms similar to the implied undertaking which already is in place. Mr. Henry and his counsel have had most of the documents in their possession for almost four years. There is no suggestion of any breach of any of the implied or express undertakings pursuant to which they have held the documents. If they breach the implied undertaking, they run the risk of having the action struck out or being held in contempt. An express undertaking in addition to the implied is not necessary.

55 The suggestions in paras. (b) and (c) of the Province's Response that counsel cannot show the documents to anyone other than Mr. Henry and not copy or reproduce the documents for any purpose other than the internal use of the lawyers absent prior consent of the Province or leave of the Court is not necessary. There may be investigators or other persons to whom counsel may wish to show documents as they prepare their case for trial. They need not seek the leave of the Court to do so. The suggestion that the lawyers should request the permission of the Province before showing a document to someone else, when the Province has an adverse interest in this litigation, would be prejudicial and unduly hamper the plaintiff's ability to prosecute his claim.

56 Similarly, the suggestion in para. (d) of the Province's Response that a party seeking to rely on any document which contains third party information not subject to a publication ban must either redact the document for that third party information or apply to amend the publication ban to include the third party information is not warranted. The complainants in this matter are protected by the publication ban and sealing order. If other third parties are named in documents, they are not entitled, generally speaking, as noted by Finch C.J.B.C. in the reasons quoted at para. 38 above, to have their privacy interests protected. If the Province or any party believes that there is specific third party information that should be subject to the publication ban and they cannot agree amongst themselves to redact that information, they are at liberty to apply in regard to that information.

57 In regard to para. (e) of the Province's Response, I will order that no counsel disclose to his or

her client any documents which contain the addresses of the complainants other than the addresses at which the assaults occurred without seeking the prior consent of the Attorney General. If that consent is not forthcoming, the party can apply to Court to release that information if they believe it is necessary to do so. I was advised at the hearing that Mr. Henry and his counsel did not object to this provision.

58 I will make no order at this time concerning the return of documents upon conclusion of this proceeding. At the conclusion of this proceeding the documents will remain subject to the implied undertaking unless they have become part of the trial record. If, at the conclusion of this proceeding, the Province believes such an order is necessary, they may make application.

SUMMARY

59 In summary therefore, Mr. Henry is entitled to use all of the documents disclosed to him in the criminal proceeding. Those documents are all subject to the implied undertaking. As noted, the right to use the documents does not necessarily mean they will become documents in this proceeding. If the Province or any party believes that additional specific orders are required to restrict the use of particular individual documents in order to protect third party confidentiality or otherwise, they may apply.

60 Given the privacy rights of the complainants, this application was necessary to determine what restrictions, if any, should attach to the use of documents in this action. In the circumstances there will be no costs for or against any party.

R.B.T. GOEPEL J.

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---- End of Request ----
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** Preliminary Version **

Case Name:

Juman v. Doucette

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

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

[2008] A.C.S. no 8

2008 SCC 8

2008 CSC 8

[2008] 1 S.C.R. 157

[2008] 1 R.C.S. 157

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

[2008] 4 W.W.R. 1

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

EYB 2008-130634

J.E. 2008-501

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

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

2008 CarswellBC 411

372 N.R. 95

File No.: 31590.

Supreme Court of Canada

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

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

(59 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

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

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

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

Appeal by a childcare worker from a decision of the Court of Appeal finding that the implied undertaking rule did not extend to bona fide disclosures of criminal activity. A 16-month-old child suffered a seizure while in the appellant's care. The child's parents commenced a civil action claiming negligence. In the meantime, the Vancouver Police had been conducting a criminal investigation.

Relying on the implied undertaking rule, the appellant brought an interlocutory motion to prohibit parties to the civil proceeding from providing the transcripts of discovery to the police. She also sought to prevent the release of information from the transcripts to the authorities and to prohibit them from obtaining and using copies of the transcripts and solicitor's notes without further court order. The Attorney General of British Columbia opposed appellant's motions and brought his own cross-motion for an order, if necessary, varying the legal undertaking to permit release of the transcripts to police. The civil action had since settled, and the discovery was never entered into evidence at a trial nor its contents disclosed in open court. At issue was whether the scope of the implied undertaking rule under which evidence compelled during pre-trial discovery from the appellant could be used by the parties only for the purpose of the litigation in which it was obtained. The chambers judge found that the implied undertaking rule did apply to evidence of crimes. In setting aside the chambers judge's decision, the Court of Appeal held that parties were at liberty to disclose the appellant's discovery evidence to the police to assist in the criminal investigation.

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

Statutes, Regulations and Rules Cited:

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

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

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

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

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

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

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

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

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

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

Subsequent History:

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Court Catchwords:

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

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

Court Summary:

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

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

Held: The appeal should be allowed.

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

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

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

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

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

The action here has been settled, but the policies reflected in the implied undertaking remain undiminished. If the parents of the victim or other party wished to disclose the appellant's transcript to the police, they could have made an application to the court for permission to make disclosure, but none of them did so, and none of them is party to the current proceeding. [para. 5] [para. 22]

In this case, the Attorney General of British Columbia has standing to seek to vary an implied undertaking to which he is not a party, but the application should be rejected on the facts. His objective was to obtain evidence that would help assist the police investigation, and possibly to incriminate the appellant. It would be quite wrong for the police to be able to take advantage of

statutorily compelled testimony in civil litigation to undermine the appellant's right to silence and the protection against self-incrimination afforded her by the criminal law. [para. 53] [para. 58]

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

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

Cases Cited

Referred to: *Hunt v. T & N plc* (1995), 4 B.C.L.R. (3d) 110; *Ross v. Henriques*, [2007] B.C.J. No. 2023 (QL), 2007 BCSC 1381; *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, [2001] 2 S.C.R. 743, 2001 SCC 51; *Stickney v. Trusz* (1973), 2 O.R. (2d) 469, aff'd (1974), 3 O.R. (2d) 538 (Div. Ct.), aff'd (1974), 3 O.R. (2d) 538 (C.A.), leave to appeal ref'd [1974] S.C.R. xii; *Tricontinental Investments Co. v. Guarantee Co. of North America* (1982), 39 O.R. (2d) 614; *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97; *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Slavutych v. Baker*, [1976] 1 S.C.R. 254; *Kyuquot Logging Ltd. v. British Columbia Forest Products Ltd.* (1986), 5 B.C.L.R. (2d) 1; *Home Office v. Harman*, [1983] 1 A.C. 280; *Shaw Estate v. Oldroyd*, [2007] B.C.J. No. 1310 (QL), 2007 BCSC 866; *Rayman Investments and Management Inc. v. Canada Mortgage and Housing Corp.*, [2007] B.C.J. No. 628 (QL), 2007 BCSC 384; *Wilson v. McCoy* (2006), 59 B.C.L.R. (4th) 1, 2006 BCSC 1011; *Laxton Holdings Ltd. v. Madill*, [1987] 3 W.W.R. 570; *Blake v. Hudson's Bay Co.*, [1988] 1 W.W.R. 176; *755568 Ontario Ltd. v. Linchris Homes Ltd.* (1990), 1 O.R. (3d) 649; *Rocca Enterprises Ltd. v. University Press of New Brunswick Ltd.* (1989), 103 N.B.R. (2d) 224; *Eli Lilly and Co. v. Interpharm Inc.* (1993), 161 N.R. 137; *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108 (1986); *Goodman v. Rossi* (1995), 125 D.L.R. (4th) 613; *Crest Homes plc v. Marks*, [1987] 2 All E.R. 1074; *Smith v. Jones*, [1999] 1 S.C.R. 455; *Lac Minerals Ltd. v. New Cinch Uranium Ltd.* (1985), 50 O.R. (2d) 260; *Miller (Ed) Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 90 A.R. 323; *Harris v. Sweet*, [2005] B.C.J. No. 1520 (QL), 2005 BCSC 998; *Scuzzy Creek Hydro & Power Inc. v. Tercon Contractors Ltd.* (1998), 27 C.P.C. (4th) 252; *Lubrizol Corp. v. Imperial Oil Ltd.* (1990), 33 C.P.R. (3d) 49; *Livent Inc. v. Drabinsky* (2001), 53 O.R. (3d) 126; *R. v. Henry*, [2005] 3 S.C.R. 609, 2005 SCC 76; *R. v. Nedelcu* (2007), 41 C.P.C. (6th) 357; *Rank Film Distributors Ltd. v. Video Information Centre*, [1982] A.C. 380; *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *R. v. Campbell*, [1999] 1 S.C.R. 565; *Attorney-General for Gibraltar v. May*, [1999] 1 W.L.R. 998; *Bank of Crete S.A. v. Koskotas (No. 2)*, [1992] 1 W.L.R. 919; *Sybron Corp. v. Barclays Bank Plc.*, [1985] 1 Ch. 299; *Bailey v. Australian Broadcasting Corp.*, [1995] 1 Qd. R. 476; *Commonwealth v. Temwood Holdings Pty Ltd.* (2001), 25 W.A.R. 31, [2001] WASC 282; *Perrin v. Beninger*, [2004] O.J. No. 2353 (QL); *Tyler v. M.N.R.*, [1991] 2 F.C. 68; *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451; *R. v. Serendip Physiotherapy Clinic* (2004), 189 C.C.C. (3d) 417.

Statutes and Regulations Cited

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

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

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

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

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

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

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

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

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

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

Authors Cited

Laskin, John B. "The Implied Undertaking". A paper presented to the Canadian Bar Association - Ontario at a Continuing Legal Education Conference on *Privilege and Confidential Information in Litigation - Current Developments and Future Trends*, October 19, 1991.

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

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

History and Disposition:

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

Counsel:

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

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

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

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

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

The judgment of the Court was delivered by

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

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

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

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

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

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

I. Facts

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

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

9 The Vancouver Police have for several years been conducting an investigation, which is still ongoing. In May 2004, the Vancouver police arrested the appellant. She was questioned in the absence of her counsel (A.R., at p. 179). She was later released. In August 2004, the appellant and her husband received notices that their private communications had been intercepted by the police pursuant to s. 196 of the *Criminal Code*. To date, no criminal charges have been laid. In furtherance of that investigation, the authorities seek access to the appellant's discovery transcript.

10 In November 2004, the appellant brought an interlocutory motion to prohibit the parties to the civil proceeding from providing the transcripts of discovery (which had not yet been held) to the police. She also sought to prevent the release of information from the transcripts to the police or the

Attorney General of British Columbia and a third motion to prohibit the Attorney General of British Columbia, the police and the RCMP from obtaining and using copies of the transcripts and solicitor's notes without further court order. She relied upon the implied undertaking rule.

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

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

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

II. Judicial History

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

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

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

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

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

17 The Court of Appeal allowed the appeal. In its view, the parties were at liberty to disclose the appellant's discovery evidence to the police to assist in the criminal investigation. Further, the

authorities could obtain the discovery evidence by lawful investigative means such as subpoenas and search warrants.

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

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

III. Analysis

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

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

22 In *Attorney General of Nova Scotia v. MacIntyre*, relied on by the Vancouver Police as well as by the Attorney General of British Columbia, the contents of the affidavit in support of the search warrant application were made public, but not until after the search warrant had been executed, and "the purposes of the policy of secrecy are largely, if not entirely, accomplished" (p. 188). At that point

the need for public access and public scrutiny prevail. Here the action has been settled but the policies reflected in the implied undertaking (privacy and the efficient conduct of civil litigation generally) remain undiminished. Nor is *Edmonton Journal* helpful to the respondents. In that case the court struck down a "sweeping" Alberta prohibition against publication of matrimonial proceedings, including publication of the "comments of counsel and the presiding judge". In the face of such prohibition, the court asked, "how then is the community to know if judges conduct themselves properly" (p. 1341). No such questions of state accountability arise in pre-trial discoveries. The situations are simply not analogous.

A. *The Rationale for the Implied Undertaking*

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

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

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

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

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

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

B. *Remedies for Breach of the Implied Undertaking*

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

C. *Exceptional Circumstances May Trump the Implied Undertaking*

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

> Before using information, however, the party in question will have to apply for leave, specifying the purposes of using the information and the reasons why it is justified, and both sides will have to be heard on the application.

In such an application the judge would have access to the documents or transcripts at issue.

D. *Applications Should Be Dealt with Expeditiously*

31 The injury to Jade Doucette occurred on November 19, 2001. The police investigation was launched shortly thereafter. Almost four years ago the appellant was (briefly) arrested. Three and a half years ago the present court applications were launched. Over two years ago the appellant was examined for discovery. It is apparent that in many of these cases delay will defeat the purpose of the application. It is important that they proceed expeditiously.

E. *Criteria on the Application for a Modification or Variance of the Implied Undertaking*

32 An application to modify or relieve against an implied undertaking requires an applicant to demonstrate to the court on a balance of probabilities the existence of a public interest of greater weight than the values the implied undertaking is designed to protect, namely privacy and the efficient conduct of civil litigation. In a case like the present, of course, there weighs heavily in the balance the right of a suspect to remain silent in the face of a police investigation, and the right not to be compelled to incriminate herself. The chambers judge took the view (I think correctly) that in this case that factor was decisive. In other cases the mix of competing values may be different. What is important in each case is to recognize that unless an examinee is satisfied that the undertaking will only be modified or varied by the court in exceptional circumstances, the undertaking will not achieve its intended purpose.

33 Reference was made to *Crest Homes plc v. Marks*, [1987] 2 All E.R. 1074, where Lord Oliver said, on behalf of the House of Lords, that the authorities "illustrate no general principle beyond this, that the court will not release or modify the implied undertaking given on discovery save in special circumstances and where the release or modification will not occasion injustice to the person giving discovery" (p. 1083). I would prefer to rest the discretion on a careful weighing of the public interest asserted by the applicant (here the prosecution of a serious crime) against the public interest in protecting the right against self-incrimination as well as upholding a litigant's privacy and promoting an efficient civil justice process. What is important is the identification of the competing values, and the weighing of one in the light of the others, rather than setting up an absolute barrier to occasioning any "injustice to the person giving discovery". Prejudice, possibly amounting to injustice, to a particular litigant may exceptionally be held justified by a higher public interest, as in the case of the accused whose solicitor-client confidences were handed over to the police in *Smith v. Jones*, [1999] 1 S.C.R. 455, a case referred to in the courts below, and discussed hereafter. Of course any perceived prejudice to the examinee is a factor that will always weigh heavily in the balance. It may be argued that disclosure to the police of the evil secrets of the psychopath at issue in *Smith v. Jones* may have been prejudicial to him but was not an "injustice"in the overall scheme of things, but such a gloss would have given cold comfort to an accused who made his disclosures in the expectation of confidentiality. If public safety trumps solicitor-client privilege despite a measure of injustice to the (unsympathetic) accused in *Smith v. Jones*, it can hardly be disputed in this jurisdiction that the implied undertaking rule would yield to such a higher public interest as well.

34 Three Canadian provinces have enacted rules governing when relief should be given against such implied or "deemed" undertakings, (see *Queen's Bench Rules*, M.R. 553/88, r. 30.1 (Manitoba), *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 30.1 (Ontario), and *Rules of Civil Procedure*, r. 30.1 (Prince Edward Island)). I believe the test formulated therein (in identical terms) is apt as a reflection of the common law more generally, namely:

> If satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence, the court may order that [the implied or "deemed" undertaking] does not apply to the evidence or to

> information obtained from it, and may impose such terms and give such direction as are just.

35 The case law provides some guidance to the exercise of the court's discretion. For example, where discovery material in one action is sought to be used in another action with the same or similar parties and the same or similar issues, the prejudice to the examinee is virtually non-existent and leave will generally be granted. See *Lac Minerals Ltd. v. New Cinch Uranium Ltd.* (1985), 50 O.R. (2d) 260 (H.C.J.), at pp. 265-66; *Crest Homes*, at p. 1083; *Miller (Ed) Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 90 A.R. 323 (C.A.); *Harris v. Sweet*, [2005] B.C.J. No. 1520 (QL), 2005 BCSC 998; *Scuzzy Creek Hydro & Power Inc. v. Tercon Contractors Ltd.* (1998), 27 C.P.C. (4th) 252 (B.C.S.C.).

36 On the other hand, courts have generally not favoured attempts to use the discovered material for an extraneous purpose, or for an action wholly unrelated to the purposes of the proceeding in which discovery was obtained in the absence of some compelling public interest. See, e.g., *Lubrizol Corp. v. Imperial Oil Ltd.* (1990), 33 C.P.R. (3d) 49 (F.C.T.D.), at p. 51. In *Livent Inc. v. Drabinsky* (2001), 53 O.R. (3d) 126 (S.C.J.), the court held that a non-party to the implied undertaking could in unusual circumstances apply to have the undertaking varied, but that relief in such cases would virtually never be given (p. 130).

37 Some applications have been refused on the basis that they demonstrate precisely the sort of mischief the implied undertaking rule was designed to avoid. In *755568 Ontario Ltd.*, for example , the plaintiff sought leave to send the defendant's discovery transcripts to the police. The court concluded that the plaintiff's strategy was to enlist the aid of the police to discover further evidence in support of the plaintiff's claim and/or to pressure the defendant to settle (p. 655).

(i) The Balancing of Interests

38 As stated, the onus in each case will be on the applicant to demonstrate a superior public interest in disclosure, and the court will be mindful that an undertaking should only be set aside in exceptional circumstances. In what follows I do not mean to suggest that the categories of superior public interest are fixed. My purpose is illustrative rather than exhaustive. However, to repeat, an undertaking designed in part to encourage open and generous discovery by assuring parties being discovered of confidentiality will not achieve its objective if the confidentiality is seen by reluctant litigants to be too readily set aside.

(ii) Statutory Exceptions

39 The implied undertaking rule at common law, and in those jurisdictions which have enacted rules, more or less codifying the common law, is subject to legislative override. In the present case for example, the Attorney General of British Columbia and the Vancouver Police rely on s. 14 of the *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46, which provides that:

> (1) A person who has reason to believe that a child needs protection under section 13 must promptly report the matter to a director or a person designated by a director.
> (2) Subsection (1) applies even if the information on which the belief is based
>
> (a)

is privileged, except as a result of a solicitor-client relationship, or

(b) is confidential and its disclosure is prohibited under another Act.

It is apparent from the extensive police investigation to date and the appearance of the Attorneys General and the Vancouver Police in these proceedings that a report was made to the authorities. We do not know the details. Undoubtedly, a report could have been made without reference to anything said or produced at discovery. At this point the matter has proceeded beyond a mere "report" and involves the collection of evidence. This will require, in the ordinary way laid down by Parliament in s. 487 of the *Criminal Code*, the application for a search warrant or a subpoena *duces tecum* at trial, if there is a trial.

(iii) Public Safety Concerns

40 One important public interest flagged by the chambers judge was the "public safety" issue raised by way of analogy to *Smith v. Jones*, a case dealing with solicitor-client privilege. While solicitor-client privilege constitutes an interest higher than the privacy interest at issue here, the chambers judge used the case to illustrate the relevant balancing of interests. There, a psychiatrist was retained by defence counsel to prepare an assessment of the accused for purposes of the defence generally, including potential submissions on sentencing in the event of a conviction. During his interview with the psychiatrist, the accused described in considerable detail his plan to kidnap, rape and kill prostitutes. The psychiatrist concluded the accused was a dangerous individual who would, more likely than not, commit future offences unless he received immediate psychiatric treatment. The psychiatrist wished to take his concerns to the police and applied to the court for leave to do so notwithstanding that the psychiatrist's only access to the accused was under the umbrella of solicitor-client privilege. In such a case the accused/client would undoubtedly consider himself to be the victim of an injustice, but our Court held that the privilege yielded to "clear and imminent threat of serious bodily harm to an identifiable group ... if this threat is made in such a manner that a sense of urgency is created" (para. 84). Further, in circumstances of "immediate and serious danger", the police may be contacted without leave of the court (paras. 96-97). If a comparable situation arose in the context of an implied undertaking, the proper procedure would be for the concerned party to make application to a chambers judge but if, as discussed in *Smith v. Jones* there existed a situation of "immediate and serious danger", the applicant would be justified in going directly to the police, in my opinion, without a court order.

(iv) Impeaching Inconsistent Testimony

41 Another situation where the deponent's privacy interest will yield to a higher public interest is where the deponent has given contradictory testimony about the same matters in successive or different proceedings. If the contradiction is discovered, the implied undertaking rule would afford no shield to its use for purposes of impeachment. In provinces where the implied undertaking rule has been codified, there is a specific provision that the undertaking "does not prohibit the use of evidence obtained in one proceeding, or information obtained from such evidence, to impeach the testimony of a witness in another proceeding", see Manitoba r. 30.1(6), Ontario r. 30.1.01(6), Prince Edward Island r. 30.1.01(6). While statutory, this provision, in my view, also reflects the general common law in Canada. An undertaking implied by the court (or imposed by the legislature) to make civil litigation more effective should not permit a witness to play games with the administration of justice: *R. v. Henry*, [2005] 3 S.C.R. 609, 2005 SCC 76. Any other outcome would allow a person accused of an

offence "[w]ith impunity [to] tailor his evidence to suit his needs in each particular proceeding" (*R. v. Nedelcu* (2007), 41 C.P.C. (6th) 357 (Ont. S.C.J.), at paras. 49-51).

(v) The Suggested "Crimes" Exception

42 As stated, Kirkpatrick J.A. concluded that "the undertaking in the action cannot form a shield from the detection and prosecution of crimes in which the public has an overriding interest" (para. 48). In her view,

> a party obtaining production of documents or transcriptions of oral examination of discovery is under a general obligation, in most cases, to keep such document confidential. A party seeking to use the discovery evidence other than in the proceedings in which it is produced must obtain the permission of the disclosing party or leave of the court. However, the obligation of confidentiality does not extend to *bona fide* disclosure of criminal conduct. On the other hand, non-*bona fide* disclosure of alleged criminal conduct would attract serious civil sanctions for contempt. [para. 56]

43 The chambers judge put his finger on one of the serious difficulties with such an exception. He wrote:

> ... considerations of practicality support keeping evidence of crimes within the scope of the undertaking. In this regard, it should be understood that evidence relating to a crime may vary from mere suspicion to blatant admissions, from peripheral clues to direct evidence, from minor offences to the most heinous. There are also many shades and variations in between these extremes. [para. 27]

This difficulty is compounded by the fact that parties to civil litigation are often quick to see the supposed criminality in what their opponents are up to, or at least to appreciate the tactical advantage that threats to go to the police might achieve, and to pose questions to the examinee to lay the basis for such an approach: see *755568 Ontario Ltd.*, at p. 656. The rules of discovery were not intended to constitute litigants as private attorneys general.

44 The chambers judge took the view that "leaving the discretionary power of exemption or variation with the courts is preferable to giving litigants the power to report to the police, without a court order, anything that might relate to a criminal offence" (para. 27). I agree. On such an application the court will be able to weigh against the examinee's privacy interest the seriousness of the offence alleged, the "evidence" or admissions said to be revealed in the discovery process, the use to which the applicant or police may put this material, whether there is evidence of malice or spite on the part of the applicant, and such other factors as appear to the court to be relevant to the exercise of its discretion. This will include recognition of the potential adverse effects if the protection of the implied undertaking is seen to be diluted or diminished.

45 Kirkpatrick J.A. noted that in some circumstances

> neither party has an interest in or is willing to seek court ordered relief from the disclosure of information under the undertaking or otherwise. Nor does it [the chambers judge's approach] contemplate non-exigent circumstances of

> disclosed criminal conduct. It is easy to imagine a situation in which criminal conduct is disclosed in the discovery process, but no one apprehends that immediate harm is likely to result. [para. 55]

This is true, but it presupposes that the police are entitled to be handed a transcript of statutorily compelled answers which they themselves have no authority to compel, thereby using the civil discovery process to obtain indirectly what the police have no right to obtain directly. Such a rule, if accepted, would undermine the freedom of a suspect to cooperate or refuse to cooperate with the police, which is an important element of our criminal law.

46 In reaching her decision, Kirkpatrick J.A. relied on *dicta* of the House of Lords in *Rank Film Distributors Ltd. v. Video Information Centre*, [1982] A.C. 380 (p. 425). Lord Fraser said:

> If a defendant's answers to interrogatories tend to show that he has been guilty of a serious offence I cannot think that there would be anything improper in his opponent reporting the matter to the criminal authorities with a view to prosecution, certainly if he had first obtained leave from the court which ordered the interrogatories, and probably without such leave... . [p. 447]

These observations, however, must be read in light of the fact that in England, unlike British Columbia, there existed at the time (since amended) "a privilege against compulsory self-incrimination by discovery or by answering interrogatories" (p. 446). There was thus absent from the English procedure the very foundation of the appellant's case, namely that she had *no* right to refuse to answer questions on discovery that might incriminate her, because she was obliged by statute to give the truth, the whole truth and nothing but the truth.

47 It is true that solicitor-client privilege includes a "crime" exception , but here again there is no proper analogy to an implied undertaking. In *Solosky v. The Queen*, [1980] 1 S.C.R. 821, Dickson J. observed at p. 835:

> ... if a client seeks guidance from a lawyer in order to facilitate the commission of a crime or a fraud, the communication will not be privileged and it is immaterial whether the lawyer is an unwitting dupe or knowing participant.

See also *R. v. Campbell*, [1999] 1 S.C.R. 565. Abuse of solicitor-client privilege to facilitate criminality is contrary to its purpose. Adoption of the implied undertaking to facilitate full disclosure on discovery *even by crooks* is of the very essence of its purpose. In England, the weight of authority now seems to favour requiring leave of the court where the protected material relates to alleged criminality. See *Attorney-General for Gibraltar v. May*, [1999] 1 W.L.R. 998 (C.A.), at pp. 1007-8; *Bank of Crete S.A. v. Koskotas (No. 2)*, [1992] 1 W.L.R. 919 (Ch. D), at p. 922; *Sybron Corp. v. Barclays Bank Plc.*, [1985] 1 Ch. 299, at p. 326. The same practice prevails in Australia: *Bailey v. Australian Broadcasting Corp.*, [1995] 1 Qd. R. 476 (S.C.); *Commonwealth v. Temwood Holdings Pty Ltd.* (2001), 25 W.A.R. 31, [2001] WASC 282.

48 In reaching her conclusion, Kirkpatrick J.A. rejected the view expressed in *755568 Ontario Ltd.* and *Perrin v. Beninger*, [2004] O.J. No. 2353 (QL) (S.C.J.), that the public interest in investigating possible crimes is *not* in all cases sufficient to relieve against the undertaking. It is inherent in any balancing exercise that one interest will not always and in every circumstance prevail over other

interests. It will depend on the facts. In *Tyler v. M.N.R.*, [1991] 2 F.C. 68 (C.A.), in a somewhat analogous situation of statutory compulsion, the appellant was charged with narcotics offences. Revenue Canada, on reading about the charges in a newspaper, began to investigate the possibility that the appellant had not reported all of his income in earlier years. The Minister invoked his statutory powers to compel information from the appellant, who sought to prevent the Minister from communicating any information thereby obtained to the RCMP. Stone J.A., speaking for an unanimous Federal Court of Appeal, agreed that the Minister should be permitted to continue using his compulsory audit for *Income Tax Act* purposes but prohibited the Minister from sharing the information compulsorily obtained from the appellant with the RCMP. Stone J.A. was of the view that the prosecution of crime did not necessarily trump a citizen's privacy interest in the disclosure of statutorily compelled information and I agree with him.

49 The B.C. Court of Appeal qualified its "crimes" exception by the requirement that the communication to the police be made in good faith. Aside from the difficulties in applying such a requirement, as previously mentioned, I do not see how a "good faith" requirement is consistent with the court's rationale for granting relief against the undertaking. If, as the hypothesis requires, it is determined in a particular case that the public interest in investigating a crime and bringing the perpetrators to justice is paramount to the examinee's privacy interest, the good faith of the communication should no more be an issue here than in the case of any other informant. Informants are valued for what they can tell not for their worthy motives.

50 Finally, Kirkpatrick J.A. feared that

> if an application to court is required before a party may disclose the alleged conduct, the perpetrator of the crime may be notified of the disclosure and afforded the opportunity to destroy or hide evidence or otherwise conceal his or her involvement in the alleged crime. [para. 55]

This concern is largely remedied by permitting the party wishing to be relieved of the obligation of confidentiality to apply to the court *ex parte*. It would be up to the chambers judge to determine whether the circumstances justify proceeding *ex parte*, or whether the deponent and other parties to the proceeding should be notified of the application.

F. *Continuing Nature of the Implied Undertaking*

51 As mentioned earlier, the lawsuit against the appellant and others was settled in 2006. As a result the appellant was not required to give evidence at a civil trial; nor were her examination for discovery transcripts ever read into evidence. The transcripts remain in the hands of the parties and their lawyer. Nevertheless, the implied undertaking continues. The fact that the settlement has rendered the discovery moot does not mean the appellant's privacy interest is also moot. The undertaking continues to bind. When an adverse party incorporates the answers or documents obtained on discovery as part of the court record at trial the undertaking is spent, but not otherwise, except by consent or court order. See *Lac d'Amiante*, at paras. 70 and 76; *Shaw Estate v. Oldroyd*, at paras. 20-22. It follows that decisions to the contrary, such as the decision of the House of Lords in *Home Office v. Harman* (where a narrow majority held that the implied undertaking not to disclose documents obtained on discovery continued even after the documents in question had been read aloud in open court), should not be followed in this country. The effect of the *Harman* decision has been reversed by a rule change in its country of origin.

G. *Who Is Entitled to Notice of an Application to Modify or Vary the Implied Undertaking*

52 While the issue of notice will be for the chambers judge to decide on the facts of any particular case, I do not think that in general the police are entitled to notice of such an application. Nor are the media. The only parties with a direct interest, other than the applicant, are the deponent and the other parties to the litigation.

H. *Application to Modify or Vary an Implied Undertaking by Strangers to It*

53 I would not preclude an application to vary an undertaking by a non-party on the basis of standing, although I agree with *Livent Inc. v. Drabinsky* that success on such an application would be unusual. What has already been said provides some illustrations of potential third party applicants. In this case the Attorney General of British Columbia, supported by the Vancouver Police, demonstrated a sufficient interest in the appellant's transcripts to be given standing to apply. Their objective was to obtain evidence that would help explain the events under investigation, and possibly to incriminate the appellant. I think it would be quite wrong for the police to be able to take advantage of statutorily compelled testimony in civil litigation to undermine the appellant's right to silence and the protection against self-incrimination afforded him by the criminal law. Accordingly, in my view, the present application was rightly dismissed by the chambers judge. On the other hand, a non-party engaged in *other* litigation with an examinee, who learns of potentially contradicting testimony by the examinee in a discovery to which that other person is not a party, would have standing to seek to obtain a modification of the implied undertaking and for the reasons given above may well succeed. Of course if the undertaking is respected by the parties to it, then non-parties will be unlikely to possess enough information to make an application for a variance in the first place that is other than a fishing expedition. But the possibility of third party applications exists, and where duly made the competing interests will have to be weighed, keeping in mind that an undertaking too readily set aside sends the message that such undertakings are unsafe to be relied upon, and will therefore not achieve their broader purpose.

I. *Use Immunity*

54 Reference was earlier made to the fact that at her discovery the appellant claimed the benefit of s. 5 of the *Canada Evidence Act* which eliminates the right formerly enjoyed by a witness to refuse to answer "any question on the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person" (s. 5 (1)). Answers given under objection, however, "shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury" (s. 5(2)). Similar protection is provided under s. 4 of the British Columbia *Evidence Act*. Section 13 of the *Charter* applies without need of objection. Derivative use immunity is a question for the criminal court at any trial that may be held: *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451, at paras. 191-92 and 204. The appellant's statutory or *Charter* rights are not in peril in the present appeal and her claims to *Charter* relief at this stage were properly dismissed.

J. *Implied Undertaking Is No Bar to Persons Not a Party to It*

55 None of the parties to the original civil litigation applied to vary the undertaking. Neither the Attorneys General nor the police are parties to the implied undertaking and they are not bound by its terms. If the police, as strangers to the undertaking, have grounds, they can apply for a search warrant under s. 487 of the *Criminal Code* in the ordinary way.

56 The appellant's discovery transcript and documents, while protected by an implied undertaking of the parties to the court, are not themselves privileged, and are not exempt from seizure: *R. v.*

Serendip Physiotherapy Clinic (2004), 189 C.C.C. (3d) 417 (Ont. C.A.), at para. 35. A search warrant, where available, only gives the police access to the material. It does not authorize its use of the material in any proceedings that may be initiated.

57 If criminal charges are brought, the prosecution may also compel a witness to produce a copy of the documents or transcripts in question from his or her possession by a subpoena *duces tecum*. The trial judge would then determine what, if any use could be made of the material, having regard to the appellant's *Charter* rights and any other relevant considerations. None of these issues arise for decision on the present appeal.

K. *Disposition of the Present Appeal*

58 As stated, none of the parties bound by the implied undertaking made application to the court to be relieved from its obligations. The application is made solely by the Attorney General of British Columbia to permit

> any person in lawful possession of the transcript to provide a copy to the police or to the Attorney-General to assist in the investigation and/or prosecution of any criminal offence which may have occurred... . [B.C.S.C., at para. 6]

While I would not deny the Attorney General standing to seek to vary an implied undertaking to which he is not a party, I agree with the chambers judge that his application should be rejected on the facts of this case. The purpose of the application was to sidestep the appellant's silence in the face of police investigation of her conduct. The authorities should not be able to obtain indirectly a transcript which they are unable to obtain directly through a search warrant in the ordinary way because they lack the grounds to justify it.

IV. Disposition

59 I would allow the appeal with costs to the appellant both here and in the courts below.

Solicitors:

Solicitors for the appellant: Miller Thomson, Vancouver.

Solicitor for the respondent the Chief Constable of the Vancouver Police Department: City of Vancouver, Vancouver.

Solicitor for the respondent the Attorney General of Canada: Attorney General of Canada, Toronto.

Solicitor for the respondent the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Case Name:

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

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

[2011] A.J. No. 36

2011 ABQB 12

509 A.R. 43

4 C.P.C. (7th) 323

197 A.C.W.S. (3d) 341

2011 CarswellAlta 31

Docket: 0703 10836

Registry: Edmonton

Alberta Court of Queen's Bench
Judicial District of Edmonton

R.A. Graesser J.

Heard: November 9, 2010.
Judgment: January 6, 2011.
Released: January 7, 2011.

(111 paras.)

Civil litigation -- Civil procedure -- General principles -- Parties -- Class or representative actions -- Procedure -- Representative plaintiff -- Pre-trial procedures -- Application by plaintiff in proposed class action for court directions to identify issues in dispute so that case could proceed efficiently allowed in part -- Action commenced as one of several similar cases relating to children who were subject to temporary guardianship orders and for whom no care plan had been filed within statutory time limit -- Plaintiff's counsel had written letter to defendant Crown seeking clarification of procedural issues but was dissatisfied with response -- In light of parties' obligations to manage their litigation and comply with principles in Rule 1.2, Crown to provide meaningful response to certain of plaintiff's questions -- Alberta Rules of Court, Rule 1.2(2).

Family law -- Child protection -- Civil actions and liabilities -- Practice and procedure -- General principles -- Legislation -- Interpretation -- Rules -- Application by plaintiff in proposed class action for court directions to identify issues in dispute so that case could proceed efficiently allowed in part -- Action commenced as one of several similar cases relating to children who were subject to temporary guardianship orders and for whom no care plan had been filed within statutory time limit -- Plaintiff's counsel had written letter to defendant Crown seeking clarification of procedural issues but was dissatisfied with response -- In light of parties' obligations to manage their litigation and comply with principles in Rule 1.2, Crown to provide meaningful response to certain of plaintiff's questions -- Alberta Rules of Court, Rule 1.2(2).

Government law -- Crown -- Practice and procedure -- General principles -- Legislation -- Interpretation -- Rules -- Application by plaintiff in proposed class action for court directions to identify issues in dispute so that case could proceed efficiently allowed in part -- Action commenced as one of several similar cases relating to children who were subject to temporary guardianship orders and for whom no care plan had been filed within statutory time limit -- Plaintiff's counsel had written letter to defendant Crown seeking clarification of procedural issues but was dissatisfied with response -- In light of parties' obligations to manage their litigation and comply with principles in Rule 1.2, Crown to provide meaningful response to certain of plaintiff's questions -- Alberta Rules of Court, Rule 1.2(2).

Application by plaintiff for relief under Rule 1.2(2) of the new Alberta Rules of Court and for directions from the court to "identify the real issues in dispute so that the case can proceed efficiently". The underlying action was one of a number of similar cases relating to a proposed class action concerning plaintiff children were subject to temporary guardianship orders and for whom no care plan had been filed within the statutory time limit. Two other proposed class actions were abandoned, and the role of representative plaintiff fell to L.C. in the present action, which included claims by the parent/guardian, the apprehended child and siblings. A Crown application to strike all claims but the child's negligence breach of fiduciary duty and false imprisonment claims was previously upheld. The plaintiff's counsel, Lee, wrote a letter to the Crown seeking clarification of many procedural issues, but was not satisfied with the response. Lee now alleged: (1) the defendants' actions in the proposed class action during its long procedural history had been

inconsistent with the purpose and intent of the New Rules of Court; (2) the defendants' actions had related to procedural technicalities having no bearing on the real issues in dispute; (3) the defendants' actions had the opposite effect of facilitating the quickest means of resolving the claim at the least expense; and (3) the defendants were not communicating honestly and openly.

HELD: Application allowed in part. The Crown's response to Lee's letter was non-responsive. However, a defendant was not required to assist the plaintiff in making its case. (1) The Crown had no obligation to act in accordance with the purpose and intent of the New Rules until Nov. 1, 2010. However, none of its responses were frivolous, and they could all have been taken had the New Rules been in effect. (2) The Crown was entitled to know who the plaintiff was and what his/her claims were. The Crown's steps were aimed at ensuring the requirements of the Class Proceedings Act were met. Rule 1.2 could not be interpreted in a manner that allowed the court to ignore of jump over specific provisions in provincial legislation. (3) In light of the obligations on the parties to manage their own litigation and comply with the principles in Rule 1.2, counsel for the plaintiff was entitled to a meaningful response to his letter to the Crown to see if there were things they could agree upon in order to facilitate resolving certain issues. The court addressed the individual questions asked. For example, it was inappropriate for counsel to require the Crown to give advice as to who the plaintiff or an appropriate next friend might be. Counsel was entitled to a meaningful response to questions 5, 6, 7, 9, 11 and 13. Although the New Rules recognized that litigation was not just the plaintiff's problem, a defendant was not required to forego or limit any of the steps or processes it was entitled to take under the Rules. (4) There was nothing in the Crown's conduct in the related actions or the present action that could remotely be characterized as dishonest. The parties ought to exchange information to assist in the design of a process that would address the real issues in a fair way. The Crown was to provide a response by Jan. 28, 2011.

Statutes, Regulations and Rules Cited:

Alberta Rules of Court, Rule 1.2, Rule 3.68, Rule 4.1, Rule 6.37, Rule 12.4(3)

Canadian Charter of Rights and Freedoms, R.S.C. 1985, App. II, No. 44, Schedule B, s. 2(d), s. 7, s. 9, s. 12

Child Welfare Act, S.A. 1984, c. C-8.1,

Child Welfare Amendment Act, 2002, No. 2, SA 2002, c. 10,

Child Welfare Amendment Act, 2003, SA 2003, c. 16,

Class Proceedings Act, SA 2003, c. C-16.5, s. 2, s. 5, s. 7

Counsel:

Robert P. Lee, for the Plaintiff.

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

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

Memorandum of Decision

R.A. GRAESSER J.:--

I. Nature of Application

1 Mr. Lee has applied for relief under New Rule 1.2(2). He seeks directions from the Court to "identify the real issues in dispute so that the case can proceed efficiently".

2 This lawsuit is one of a number of similar cases relating to a proposed class action. The plaintiffs in ***C.H.S. v. Alberta (Director of Child Welfare)***, Action No. 0503 12123 (the "C.H.S. Action"), were originally intended to be the representative plaintiffs in the class action. However, it appears that C.H.S. no longer wishes to be the representative plaintiff in the proposed class action, either for herself as a parent or as Next Friend for her children.

3 The torch was then passed to the plaintiffs in ***T.W. v. Alberta (Edmonton and Area Child & Family Services, Region 6)***, Action No. 0803 08196 (the "T.W. Action"). However, as Permanent Guardianship Orders were granted with respect to T.W.'s children, T.W. is no longer able to act as Next Friend for them and they are now represented by other counsel. Further, T.W. is not a suitable representative plaintiff for the proposed class of parents and guardians of apprehended children as her status as an "ordinary" plaintiff is unclear and Mr. Lee has been unable to obtain proper instructions from her with respect to any surviving claims.

4 Now, the role of representative plaintiff has fallen to L.C. in this Action (the "L.C. Action"). The L.C. Action was commenced as an individual action by L.C. on her behalf and on behalf of her three children. The Statement of Claim in the L.C. Action reflects only these individual claims and was not issued with the intent of converting the action to a class proceeding. L.C. and her children are now being put forward as the representative plaintiffs for the proposed class action.

5 Mr. Lee is counsel for C.H.S., T.W. and L.C., as well as other plaintiffs who have commenced similar actions against the Crown.

II. Background

A. Procedural History

subclass members requires that they be represented separately, the Court may, in addition to appointing the representative plaintiff for the class, appoint from among the prospective subclass members a representative plaintiff for the subclass who, in the opinion of the Court,

(a) will fairly and adequately represent the interests of the subclass,
(b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members of the proceeding, and
(c) does not have, in respect of the common issues for the subclass, an interest that is in conflict with the interests of other prospective subclass members.

(2) Where the Court is satisfied that more than one subclass meets the criteria under subsection (1) for a representative plaintiff to be appointed, the Court may appoint a representative plaintiff for each subclass.

(3) If a class is made up of persons who are residents of Alberta and persons who are not residents of Alberta, that class is to be divided into resident and non-resident subclasses.

(4) Notwithstanding subsection (1), the Court may certify a person who is not a member of the subclass as the representative plaintiff for the subclass in the class proceeding but may do so only if, in the opinion of the Court, to do so will avoid a substantial injustice to the subclass.

(5) Section 2(5) and (6) apply to the appointment of a representative plaintiff for a subclass under this section.

IV. Rule 1.2 Application

A. Background

70 In anticipation of the New Rules coming into force on November 1, 2010, Mr. Lee wrote to counsel for the Crown as follows:

> The New Rules of Court will be in force in less than 10 days. Under the new Rules of Court lawyers have an obligation to act in a manner to achieve the

purposes of the new Rules. In particular, I make reference to Rule 1.2(2) which refers to identifying the real issue in dispute, facilitating quick resolution at the least expense, and encouraging parties to resolve the claims, open and honest communication between lawyers.

We would like to identify the real issues in dispute so that the case can proceed efficiently.

With this in mind, we have the following questions for the Defendant:

Procedural Issues

1. What does the Defendant believe is the best procedure for resolving the issue of whether a child in care who was entitled to have a service plan filed, but did not have a service plan filed be resolved? Why is a class action not the best procedure?
2. What does the Defendant believe is the best procedure for resolving the issue of whether a parent of a child in care who was entitled to have a service plan filed, but did not have a service plan filed be resolved? Why is a class action not the best procedure?
3. What does the Defendant believe is the best procedure for resolving the issue of whether a sibling of a child in care who was entitled to have a service plan tiled, but did not have a service plan filed be resolved? Why is a class action not the best procedure?
4. What is the best way to put a head on this action?
5. Is a representative plaintiff, that is not a class member, a workable option? If not, then why not?
6. Is there a need for separate representative plaintiffs for each subclass of class members? (child who did not have a service plan filed, parent of child that did not have a service plan filed, sibling of child that did not have service plan filed, child that did not have an adequate service plan filed, parent of a child that did not have an adequate service plan filed, sibling of a child that did not have an adequate service plan filed, child that was under care under an invalid consent order/agreement, parent of a child that was under care under an invalid consent order/agreement, sibling of a child that was under care under an invalid consent order/agreement.)
7. If multiple representative plaintiffs are needed, is the Government prepared to pay the fees for litigation representatives for each subclass?

8. Do the Defendants agree that there are many plaintiffs that have the same common legal issue?
9. If there are subclasses, such as children who did not have a service plan filed, children who did not have an adequate service plan filed and children who were in care under an invalid Order or agreement, does the Government believe that one class action would be the best way to deal with the issues or would 3 separate class actions be preferable? Why?
10. Do the Defendants take the position that they do not have to work co-operatively with the Plaintiffs to identify the real issues in dispute and that the Defendants can just sit back and respond to motions brought by the Plaintiff?

SUBSTANTIVE ISSUES

11. In the claim for children that did not have a service plan filed, are the only issues whether or not those children are entitled to compensation and the amount of the compensation? Does the Defendant take the position that it is not an unlawful confinement and it is not a charter breach?
12. Do the Defendants agree that the issue of whether children who did not have an adequate service plan filed have a possible cause of action or do they believe that this claim ought to be struck.
13. Do the Defendants take the position that a child does have a possible claim when a TGO, TGA, PGO or PGA was obtained by obtaining consent from the parents that was not informed consent? Do the Defendants take the position that this claim should be struck?
14. Are there any common issues that the Defendants are willing to certify in a class action?

If you want the Plaintiffs to clarify anything, please let me know and when I have a client capable of giving me instructions to clarify those issues, I will let you know their reply.

If the Defendant does not wish to work collaboratively towards clearing up the issues, then I will seek instructions to make an application under Rule 1.2 (3).

71 Mr. Barber, on behalf of the Crown, responded:

At this stage of the proceeding it is not possible to address the questions you pose. In particular:

1. You have admitted that the Statement of Claim needs to be amended, but we do not have your amended claim;
2. You have admitted that the Plaintiffs need to be changed, but we do not know yet who the Plaintiffs will be; and
3. We do not have your motion for certification in this action, so we do not know the proposed scope of, or evidence in support of, class certification.

It is not possible to discuss the issues in dispute until the Plaintiffs settle on the matters the Plaintiffs will put in issue. This will not occur until these three steps are complete.

Further, we do not agree that New Rule 1.2(3) implies that the Plaintiff can bring an application at the outset of the litigation to compel answers to the types of questions you pose, particularly in the absence of the documentation outlined above.

72 In essence, Mr. Lee appears to be seeking agreement from the Crown that:

(a) There be a single class action;
(b) Ms. Lightning be appointed as the representative plaintiff;
(c) Ms. Lightning should be paid for serving as the representative plaintiff;
(d) There has been unlawful confinement of the children, charter breaches affecting the children, their parents, guardians and siblings; and
(e) The only remaining issue is compensation for the class members.

73 It is fair to characterize the Crown's response as non-responsive.

B. Can an Application be Made Under Rule 1.2?

74 The threshold issue is whether a stand-alone application can be made under Rule 1.2(3). Rule 1.2 states the following:

Purpose and intention of these rules

1.2 (1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.

(2) In particular, these rules are intended to be used

(a) to identify the real issues in dispute,
(b) to facilitate the quickest means of resolving a claim at the least expense,
(c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable,
(d) to oblige the parties to communicate honestly, openly and in a timely way, and
(e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments.

(3) To achieve the purpose and intention of these rules the parties must, jointly and individually during an action,

(a) identify or make an application to identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense,
(b) periodically evaluate dispute resolution process alternatives to a full trial, with or without assistance from the Court,
(c) refrain from filing applications or taking proceedings that do not further the purpose and intention of these rules, and
(d) when using publicly funded Court resources, use them effectively.

(4) The intention of these rules is that the Court, when exercising a discretion to grant a remedy or impose a sanction, will grant or impose a remedy or sanction proportional to the reason for granting or imposing it.

75 Rule 1.2 is clearly intended to guide the interpretation of the New Rules and might be described as the New Rules' guiding principles. Any application for relief under a Rule may bring Rule 1.2 into play, which will influence any interpretation issues. Rule 1.2 may be described as the lens through which all Rules must be interpreted. I expect that where there are competing interpretations, the interpretation closest to the intentions expressed in Rule 1 will prevail. However, there are competing interests identified in Rule 1.2: a fair and just result does not automatically equate with a timely and cost-effective one. Our system has long entitled a defendant to know the case it has to meet, which often requires extensive discovery that is both time-consuming and expensive. However, limiting discovery in the interests of timeliness and cost-effectiveness may be viewed as impairing a party's entitlement to a fair and just result.

76 Litigation remains an adversarial process. The New Rules still contain requirements with

respect to pleadings and allows a defendant the opportunity to apply to dismiss an action based on deficient pleadings: Rule 3.68. A defendant is not required to assist the plaintiff in making its case against the defendant. While the New Rules contemplate greater cooperation among counsel in moving an action along towards dispute resolution and then to trial if necessary, the New Rules do not contemplate that the parties must agree to short-circuit or jump over processes to achieve a timely and cost-effective result.

77 The clear wording of the Rule itself contemplates an application being made to "identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense". There is no timeframe set out in Rule 1.2. Rule 1.2(3) would appear to make the existence of an action the only pre-condition to making an application, although in my view, it would be premature for an application to be made if the parties have not first made an effort among themselves to identify the issues in dispute and to determine the quickest way of resolving the dispute at the least expense.

78 Rule 1.2(3) contemplates that both substantive and procedural matters be addressed: the issues to be resolved presumably relate to the elements of the plaintiff's claims and the defendant's defences. I would suggest that the days when the defendant could file a defence in the old form, namely that "the Defendant denies all allegations in the Statement of Claim and puts the Plaintiff to the strict proof thereof", are over. Defendants will be required to disclose their position and state their defences sooner rather than later. But defendants are still entitled to defend actions against them vigorously and to maintain any and all defences that are not unreasonable or frivolous and can withstand a summary judgment application. They are also entitled to insist that the plaintiff follow proper procedures and comply with the Rules of Court.

79 Mr. Lee has written to the Crown seeking their response to a number of procedural and substantive matters, specifically referencing Rule 1.2; the Crown's response was essentially non-responsive. Thus, I conclude that there is no procedural bar to Mr. Lee's application that prevents me from taking jurisdiction to consider his application.

C. Grounds for Rule 1.2 Application

80 Mr. Lee's Notice of Motion filed October 28, 2010, states the following grounds:

1. The Defendants' actions in this proposed class action have been inconsistent with the purpose and intent of the New Rules of Court;
2. The Defendants' actions have related to procedural technicalities that have no bearing on the real issues in dispute;
3. The Defendants' actions have the opposite effect of facilitating the quickest means of resolving the claim at the least expense;
4. The Defendants are not communicating honestly and openly.

81 The Crown disputes these grounds and takes particular exception to the fourth ground, namely

Case Name:

Munro v. Munro

Between
David Whyte Munro, Appellant (Defendant), and
Nancy Lynn Munro, Respondent (Plaintiff)

[2011] A.J. No. 1054

2011 ABCA 279

513 A.R. 363

2 R.F.L. (7th) 298

207 A.C.W.S. (3d) 411

50 Alta. L.R. (5th) 247

50 Alta. L.R. (5th) 421

341 D.L.R. (4th) 635

2011 CarswellAlta 1670

207 A.C.W.S. (3d) 411

Docket: 1101-0143-AC

Registry: Calgary

Alberta Court of Appeal
Calgary, Alberta

M.S. Paperny, F.F. Slatter and M.B. Bielby JJ.A.

Heard: September 13, 2011.
Judgment: October 6, 2011.

(46 paras.)

Family law -- Maintenance and support -- Practice and procedure -- Appeal by husband from order dismissing his application to consolidate action for breach of matrimonial property agreement and application for retroactive child support dismissed -- Wife initially brought action alleging that business asset was not accurately disclosed and sought equal sharing, later commencing second proceeding for retroactive variation of child support -- Chambers judge did not err in concluding that any benefit of having claims heard together was diminished by fundamental difference in issues and outweighed by prejudice that would have occurred if child support application were delayed to await trial with contract action.

Civil litigation -- Civil procedure -- Actions -- Causes of action -- Joinder and consolidation -- Appeal by husband from order dismissing his application to consolidate action for breach of matrimonial property agreement and application for retroactive child support dismissed -- Wife initially brought action alleging that business asset was not accurately disclosed and sought equal sharing, later commencing second proceeding for retroactive variation of child support -- Chambers judge did not err in concluding that any benefit of having claims heard together was diminished by fundamental difference in issues and outweighed by prejudice that would have occurred if child support application were delayed to await trial with contract action.

Appeal by the husband from an order dismissing his application to consolidate an action for breach of a matrimonial property agreement and an application for retroactive child support. The parties were divorced in 2003 after a 15-year marriage. There were two children of the marriage, aged 19 and 21. The younger child attended university and the older child lived with the wife. The parties entered into a divorce and property agreement on May 23, 2003. The major asset retained by the husband was his 45 per cent interest in Gienow Building Products Ltd. Approximately a year and a half after the property agreement was finalized, the assets of that business were sold into an income trust. More than $100,000,000 was paid into the business. In May 2010, the wife brought an action alleging that the business asset was not accurately disclosed in the 2003 agreement and, in accordance with the provisions of the agreement, should be shared equally. In August 2010, she commenced a second proceeding seeking retroactive variation of child support.

HELD: Appeal dismissed. The chambers judge was concerned that a consolidation order would have unnecessarily delayed the determination of the child support application, which could otherwise have been dealt with in fairly short order, to the prejudice of the wife. The potential for delay of the child support application, if the two claims were consolidated, was clear. The contract action was at a very early stage, while the child support application was ready to proceed. Given the discretionary nature of an order for retroactive child support, the concern about going back more than three years in making such an order, and the potentially large award, the chambers judge's perception of prejudice resulting from the inevitable delay was reasonable. The chambers judge did not err in principle in concluding that any benefit of having the claims heard together was diminished by the fundamental difference in the issues and outweighed by the prejudice that would have occurred if the child support application were delayed to await trial with the contract action.

Statutes, Regulations and Rules Cited:

Alberta Rules of Court, Rule 3.72

Matrimonial Property Act, R.S.A., c M-8,

Appeal From:

Appeal from the whole of the Order by The Honourable Madam Justice S.M. Bensler. Dated the 14th day of April, 2011 (Docket: 4801-109973).

Counsel:

F.R. Fenwick, Q.C., for the Appellant.

M.A. Ghert, for the Respondent.

Reasons for judgment were delivered by M.S. Paperny and M.B. Bielby JJ.A. Separate dissenting reasons were delivered by F.F. Slatter J.A.

Memorandum of Judgment

1 M.S. PAPERNY and M.B. BIELBY JJ.A.:-- This is an appeal from an order dismissing the appellant's application to consolidate two matters, one an action for breach of a matrimonial property agreement, and the other an application for retroactive child support.

2 The parties were divorced in 2003 after a 15-year marriage. There are two children of the marriage, aged 19 and 21, at the time of the application below. The younger child is attending university and the older lives with the respondent wife.

3 The parties entered into a divorce and property agreement on May 23, 2003. The major asset retained by the appellant was his 45.83% interest in Gienow Building Products Ltd. Approximately a year and a half after the property agreement was finalized, the assets of that business were sold into an income trust. More than $100 million was paid into the business.

4 In May 2010, the respondent commenced an action by way of statement of claim alleging that the business asset was not accurately disclosed in the 2003 agreement, and, in accordance with the provisions of the agreement, should be shared equally. In August 2010, she commenced a second proceeding by notice of motion seeking retroactive variation of child support. The appellant applied pursuant to R 3.72 to have the two claims consolidated. That application was dismissed.

5 Rule 3.72 provides:

> 3.72 (2) An order under subrule (1) may be made for any reason the Court considers appropriate, including, without limitation, that 2 or more claims or actions
>
> (a) have a common question of law or fact, or
>
> (b) arise out of the same transaction or occurrence or series of transactions or occurrences.

6 An order to consolidate is discretionary, and the standard of review is reasonableness: *Alliance Pipeline Limited v. Universal Ensco, Inc*, 2007 ABCA 285 at para 3; 417 AR 1. Absent a material error in principle, a significant misapprehension or disregard of the evidence, or a decision which is clearly wrong, an appellate court will not interfere with an exercise of discretion: *AB v. CD*, 2008 ABCA 51 at para 10; 85 Alta LR (4th) 18.

7 When faced with an application to consolidate claims, a court must weigh several relevant factors. They include the extent to which there are common claims and disputes, and the possibility that consolidation may save time and resources in pre-trial procedures and at trial. The court must also consider potential prejudice to the parties which may arise from consolidation if, for example, one action is more advanced than the other and if consolidation will result in prejudicial delay of a trial.

8 The chambers judge was alive to the relevant considerations. She recognized that the two claims have some common facts, but noted that the issues are very different. She concluded that the main issue raised by the breach of contract action is whether the appellant ought to have known about his future transactions at the time of the 2003 matrimonial property agreement, and, if so, whether that triggered a remedy as a result of non-disclosure under that agreement.

9 The retroactive child support application involves different considerations, the main issue being the determination of the appellant's income for the relevant years. Determination of income involves many factors, only one of which is the value of the appellant's interest in the business asset. Further, the treatment of that asset for purposes of calculating guideline income may well be different from its treatment for purposes of division under the *Matrimonial Property Act*, RSA, c M-8: see, for example, *Shields v. Shields*, 2006 ABQB 368, 150 ACWS (3d) 182 and *Schick v. Schick*, 2008 ABCA 196, 433 AR 242. Although the child support application may have been precipitated by the alleged non-disclosure and the substantial sale of the appellant's business interest, the focus of the inquiry will be substantially different. In addition to attribution of income for child support purposes, the issues will include the duration of any order, whether there has been delay in bringing the application, whether the children remain children of the marriage, and quantum.

10 The appellant argued at length before the chambers judge that both claims were so interwoven as to require consolidation to avoid inconsistent verdicts and the necessity of calling evidence on the same point twice. He raised a concern about expert accounting and tax evidence being required for both. Those arguments were rejected. Implicit in the chambers judge's decision is a conclusion that the linkage is not as strong as suggested, and that the complexity was being used in part as a tactic to delay.

11 The chambers judge was obviously concerned that a consolidation order would unnecessarily delay a determination of the child support application, which could otherwise be dealt with in fairly short order, to the prejudice of the respondent. The potential for delay of the child support application, if the two claims are consolidated, is clear. The contract action is at a very early stage, while the child support application is essentially ready to proceed. The appellant notes that the parties have agreed that the examinations on affidavits conducted in the child support application can be used as discovery in the contract action, but that agreement does not remove the possibility of further discovery in the latter proceeding. At this point, the contract action has proceeded only so far as the respondent having filed her affidavit of records; the appellant has not yet filed his affidavit of records. Moreover, neither party has obtained an expert report in the contract action and it is not clear whether the report obtained by the respondent in the child support application could be used in both proceedings. The appellant has not filed expert evidence in either proceeding. Given the discretionary nature of an order for retroactive child support, the concern about going back more than three years in making such an order, and the potentially large award, the chambers judge's perception of prejudice resulting from the inevitable delay is reasonable.

12 We see no error in principle in the decision of the chambers judge. She was aware of the overlap in the factual context between the two claims, but concluded that any benefit of having the claims heard together was diminished by the fundamental difference in the issues and outweighed by the prejudice that would occur if the child support application was delayed to await trial with the contract action.

13 On appeal, considerable emphasis was placed on the possibility of inconsistent verdicts. That seems to raise the spectre of double-dipping, a concept that, although of potential concern in applications for spousal support, does not arise in child support applications. The matrimonial property agreement is between the two parents; child support is for the benefit of the children. The chambers judge was alive to this issue and adopted the following comments from *Shields* at paras 14-15, with which we also agree:

> In this case there is no indication in the parties' agreement that the matrimonial property division was intended to or did benefit the parties' children. The Minutes of Settlement provide for child maintenance based on guideline amounts as described above. Property issues are dealt with separately in the agreement and are not related to the parties' child support obligations. In the absence of any link between matrimonial property and child support, I see no basis to

> characterize this as a special provision nor to find any specific benefit to the children.
>
> I am also not satisfied that the application of the Guidelines would result in an amount of child support that is inequitable given the parties' agreement. While double dipping might be a concern if spousal support were being sought, this concern does not arise with regard to child support.

See also *Russell v. Russell*, 2002 BCSC 1233, [2002] BCJ No 1983; *Plett v. Plett*, 2009 BCSC 227 at paras 38-40; [2009] BCWLD 481.

14 It is also suggested that the prejudice found by the chambers judge was overemphasized because the children are not suffering financially. Accordingly, it is suggested, any prejudice can be dealt with subsequently by an award of interest. Underlying this observation is the assumption that the quantum of a parent's child support obligation is based purely on the needs of the children. It is not. Children are, as a matter of law, entitled to the benefit of child support in an amount commensurate with their parents' incomes. They are also entitled to "benefit from a sudden increase in lifestyle and money" available to the payor parent: *Marinangeli v. Marinangeli* (2003), 66 OR (3d)40 at para 30 (CA); 228 DLR (4th) 376. As this Court stated in *Schick* at para. 27, that approach is consistent with the purpose of the guidelines, s 16 and s 1.

15 The proper approach under the guidelines was described by Bastarache J. in *DBS v. SRG*, 2006 SCC 37 at para 45; 270 DLR (4th) 297:

> ... Under a pure need-based regime, the underlying theory is that both parents should provide enough support to their children to meet their needs, and that they should share this obligation proportionate to their incomes. But under the general Guidelines regime, the underlying theory is that the support obligation itself should fluctuate with the payor parent's income. Under a pure need-based regime, when a payor parent does not increase the amount of his/her support when his/her income increases, it is the *recipient parent* who loses: the recipient parent is the one entitled to receive greater help in meeting the child's needs. But under the general *Guidelines* regime, when a payor parent does not increase the amount of his/her support when his/her income increases, it is the *child* who loses: the child is the one who is entitled to a greater quantum of support in absolute terms. [emphasis in original]

16 Finally, we note that it is not for this court to re-weigh the relevant factors. Were that so, the exercise of judicial discretion in the first instance would have little meaning. In the absence of reviewable error, there is no basis for this court's interference.

17 The appeal is dismissed.

M.S. PAPERNY J.A.
M.B. BIELBY J.A.

18 F.F. SLATTER J.A. (dissenting):-- The issue on this appeal is whether two proceedings should be consolidated. The first is an action that seeks to vary a matrimonial property division for breach of contract based on misrepresentation or inadequate disclosure. The second is an application to vary child support, which includes an application to include in the appellant's income some of the value of the allegedly undisclosed assets.

Facts

19 The parties separated in approximately November of 2000 after 12 years of marriage, a statement of claim for divorce and division of matrimonial property was issued by the respondent in June of 2001, and the parties were divorced in 2003. At the time of the divorce the parties entered into a Divorce and Property Agreement. Under this agreement, the appellant retained his minority 45.83% shareholding in Gienow Building Products Ltd., which was valued by a jointly retained business valuator, PriceWaterhouseCoopers. The respondent received other assets and an equalization payment.

20 The divorce judgment directed that the appellant pay child support for the two children of the marriage, which, given his specified income of $500,000, was significant. One of the children is now 19 and attending university, and the other is 21 and residing with the respondent. It is not suggested that the child support payments are in arrears.

21 Approximately one year after the Divorce and Property Agreement, Gienow Building Products Ltd. sold all of its assets to a publicly traded income trust. Approximately $100 million was paid from the income trust into Gienow Building Products Ltd. None of that money has been distributed to the shareholders, but the appellant has an indirect 45.83% interest in it.

22 On May 20, 2010 the respondent issued a statement of claim. It recites the provision in the Divorce and Property Agreement that each party had fully and completely disclosed his and her assets, "which included the assumptions included in the PriceWaterhouseCoopers draft report". The statement of claim goes on to allege fraudulent or negligent misrepresentations by the appellant. Specifically, it alleges that at the time of the Divorce and Property Agreement, the appellant knew of the plans to convert Gienow Building Products Ltd. into a publicly traded income trust. As a consequence of these misrepresentations, the respondent alleges that Gienow Building Products Ltd. was significantly undervalued. The relief requested is a transfer of one half of the allegedly undisclosed value of Gienow Building Products Ltd. to the respondent. The respondent did not serve the statement of claim on the appellant.

23 In May of 2010 the respondent also served a Notice to Disclose/Notice of Motion in anticipation of varying child support. In August of 2010 the respondent initiated the second proceeding in issue in this appeal, which was a notice of motion for ongoing and retroactive

variation of child support. A lengthy affidavit was filed in support of this motion. It recounts the history of negotiations leading up to the Divorce and Property Agreement, and summarizes the important correspondence between counsel that led up to the settlement. It alleges that the appellant delayed resolution of the issues arising from the marriage, resisted financial disclosure, and was generally unreasonable and obstructionist.

24 The affidavit in support of the application to vary child support recites the transfer of the assets of Gienow Building Products Ltd. into the income trust. It proposes that one way to calculate child support would be to add $53,800,000 of value to the appellant's guideline income in 2004.

25 Before the application to vary child support could be heard, the appellant's counsel discovered the statement of claim alleging breaches of the Divorce and Property Agreement that had been issued but not served. A statement of defence was filed on November 24, 2010, notwithstanding the lack of service. The appellant also filed an affidavit denying any misconduct during the negotiation of the original settlement, and deposing to the high standard of living enjoyed by the children. He deposed that he has purchased a home for the one child to live in while he attends the University of Lethbridge, and that the other child is employed full-time and self-supporting. He specifically denied any knowledge, at the time that the Divorce and Property Agreement was negotiated, of the prospect of Gienow Building Products Ltd. being converted into an income trust, and denied that it was undervalued at the time of the settlement. He deposed that the retained earnings arising from the creation of the income trust could not be distributed without significant tax liability being triggered.

26 The statement of defence filed by the appellant requested consolidation of the two proceedings, and a notice of motion requesting that relief was filed the same day. The chambers judge considered the provisions of R. 3.72 and found that there were no common issues of fact or law that would justify consolidation. She concluded:

> The issue in the statement of claim in this case is in regard to matrimonial property. The issue in the notice of motion is child support. As one would imagine, they do have some common facts, but the issues are very different. In addition, the issue of child support can be dealt with in fairly short order. I see that affidavits have been exchanged and the motion has advanced considerably. If I were to consolidate at this point, the trial would probably not take place until 2013.
>
> As to the complexity of the issues, I do not find either proceeding to be overly complex, except when it comes to numbers maybe. I think it is in all parties' interest that the issues be dealt with separately.

The appellant then launched this appeal.

Standard of Review

27 Consolidation of proceedings is dealt with in R. 3.72:

> 3.72(1) The Court may order one or more of the following:
>
> (a) that 2 or more claims or actions be consolidated;
> (b) that 2 or more claims or actions be tried at the same time or one after the other;
> (c) that one or more claims or actions be stayed until another claim or action is determined;
> (d) that a claim be asserted as a counterclaim in another action.
>
> (2) An order under subrule (1) may be made for any reason the Court considers appropriate, including, without limitation, that 2 or more claims or actions
>
> (a) have a common question of law or fact, or
> (b) arise out of the same transaction or occurrence or series of transactions or occurrences.

The proper interpretation of the rule is a question of law which is subject to review on appeal for correctness. Whether consolidation should be ordered in any particular case involves an element of judicial discretion. The exercise of discretion will only be interfered with on appeal if it discloses an error of principle, it considers irrelevant factors, it fails to consider relevant factors, or the decision is clearly wrong: ***Alliance Pipeline Ltd. v. C.E. Franklin Ltd.***, 2007 ABCA 285, 417 AR 1 at para. 3; ***A.B. v. C.D.***, 2008 ABCA 51, 85 Alta. L.R. (4th) 18, 429 AR 89 at para. 10.

Consolidation of the Actions

28 The considerations in consolidating actions were outlined in ***Mikisew Cree First Nation v. Canada***, 1998 ABQB 675, 224 AR 157 at para. 2:

> i) whether there are common claims, disputes and relationships between the parties;
> ii) whether consolidation will save time and resources in pre-trial procedures;
> iii) whether time at trial will be reduced;
> iv) whether one party will be seriously prejudiced by having two trials together;
> v) whether one action is at a more advanced stage than the other; and
> vi) whether consolidation will delay the trial of one action which will cause

serious prejudice to one party.

The purposes of consolidation were summarized in ***Alliance Pipeline***:

> 6 The purpose of consolidation is to enhance the administration of justice. A court should consider the possibility of inconsistent verdicts, the prospect of prejudice to the parties and the impact of consolidation and non-consolidation, both at the pre-trial and trial stages on scarce resources, including administrative, judicial and financial. In other words, a court must be able to conclude that having regard to all the circumstances, on balance, it is in the interests of justice that the actions be consolidated. Some of the relevant factors that should be considered are discussed in *Mikisew*. These, however, are not necessarily the only relevant factors, nor are they in themselves determinative. Each case must be assessed on its own merits and should include consideration, not just of the common claims, but the extent of the distinct claims between the parties. The focus in each case must be on the impact of consolidation on the parties and on the administration of justice.

The new rule does not change the underlying principles. It specifically empowers the court to consider all relevant considerations that arise in the particular case. The particular factors listed in R. 3.72(2)(a) and (b) are by way of example only; the rule specifically states that they are "without limitation" to the consideration of other factors. The parties to this appeal identified a number of relevant considerations.

Prejudice

29 The prejudice to the parties arising from consolidation or an absence of consolidation is a relevant consideration. Prejudice, however, is a two-way street; the impact on both parties is relevant.

30 The respondent argued that she would be prejudiced in a number of ways. First of all, she argued that the child-support application is ready to be heard, whereas the matrimonial property action is not as advanced. While the chambers judge relied on this consideration, developments in the actions have undermined its impact:

* The respondent assumed that the child-support application could be heard as a special chambers application. It appears, however, that expert accounting and tax evidence is going to be required, and it is likely that a trial of an issue will result.
* The parties have examined on the affidavits, and have agreed that those transcripts can be used as if they were examinations for discovery. The matrimonial property litigation is therefore more advanced than might be anticipated.

* While the appellant has not yet filed his affidavit of records in the matrimonial property action, his counsel advises that it is nearly complete, and that the respondent in fact has copies of all the documents that will be listed. Other financial information required by the experts is being provided through undertakings.
* The respondent has already prepared her initial expert report, and the appellant's expert report is being prepared.

The chambers judge's conclusion that neither of the proceedings is overly complex may have been somewhat optimistic, as matters have developed. This conclusion, in any event, would appear to support consolidation. Since it now appears that both of the actions will require overlapping expert evidence, it does not appear that there would be significant delay if the two proceedings were consolidated.

31 Any delay that the respondent might experience in receiving any increased child support that is ordered can be remedied by interest. This is not a situation where the custodial parent is having trouble meeting basic needs. It seems clear that all concerned enjoy very privileged lifestyles, and that the children do not want for any necessities of life.

32 The respondent also argued that she would suffer prejudice if the child support hearing was delayed, because the children's lives are evolving. In a year or two neither of the children may be children of the marriage. Little weight can be placed on this factor. The relevant time for determining the status of the children is the "time of application": ***D.B.S. v. S.R.G.***, 2006 SCC 37, [2006] 2 SCR 231 at paras. 88-9. It appears that the most important issue will be the appellant's guideline income in about 2004 or 2005. The status of the children as "children of the marriage" at that date will not change. Likewise, the status of the children at the time the present application was brought (August 2010) will not change just because the adjudication is delayed.

33 The appellant counters that he will suffer prejudice if the actions are not consolidated. He argues that he will be exposed to the risk of inconsistent findings, and that multiple hearings will have to be held concerning common issues of fact and law.

Inconsistent Findings

34 The respondent argues that there is a significant risk of inconsistent findings if the two proceedings are not consolidated.

35 The child support application and the matrimonial property litigation are based on inconsistent assumptions about the ownership of the underlying value of Gienow Building Products. In her statement of claim, the respondent asserts that she is entitled to one half of the additional value created by the income trust transaction. In the child support application, she asserts that this value is owned by and available to the appellant, and that his guideline income should include those amounts. A real risk of inconsistent remedies being awarded exists on this record.

36 To paraphrase the appellant's argument:

* If the child support recalculation application proceeds first, and the respondent is successful, she will potentially be able to add as much as $50 million to the appellant's guideline income for about 2004. The appellant argues that the face value of the child support claim may be as much as $9 million.
* If the respondent is subsequently successful in a later trial of the matrimonial property claim, plus interest, her income for child support purposes will be significantly increased, and the appellant's income will be correspondingly reduced. It will then become apparent that the child support calculation was based on erroneous assumptions.

37 The respondent argues that this possibility of inconsistent findings can be avoided. She argues that to the extent that she is successful on the child support application, the judge who subsequently hears the matrimonial property action could adjust the remedy awarded to her. It is, however, difficult to understand how this can happen. The issue of child support would be *res judicata*, and it is unclear how any set off in the matrimonial property action could be handled. The hypothetical finding of the child support judge, that the value of Gienow Building Products is owned by the appellant, would be contradicted by the finding of the matrimonial property judge that it is partly owned by the respondent. The argument that such an adjustment or set off is possible is also inconsistent with the respondent's argument that the two actions are really independent. The very need to contemplate this kind of future adjustment shows that they are interrelated.

38 But even if some set off or adjustment were possible in the matrimonial property action, how is it in the interests of the administration of justice to proceed in that manner? The whole point of consolidation is to avoid that sort of thing, so as to avoid inconsistent findings, enhance confidence in the adjudication of related disputes, and to promote finality in judicial decision making. Further, if such adjustment or set off is required, it is clearly in the best interest of the administration of justice that it be made by the same judge, preferably at the same time. This factor strongly supports consolidation, and is the overriding consideration on this appeal: ***Alliance Pipeline***, *supra*.

Common Issues of Fact

39 The respondent argues (and the chambers judge appears to have accepted) that there are few issues of common fact between the two applications.

40 To use the words of ***Mikisew***, there are clearly "common claims, disputes and relationships between the parties" in the two proceedings. The proceedings both arise out of the parties' marriage, and the essential dispute is over the financial consequences of the divorce. In the child support application, the appellant will undoubtedly raise the argument that the respondent is not seeking true child support, but is seeking to redistribute assets in the guise of a child support application. The matrimonial property litigation is overtly about redistributing assets. Section 15.1(5) of the *Divorce*

Act, RSC 1985 c. 3 (2nd Supp) makes the provisions of any matrimonial property agreement relevant to the issue of child support, which provides a statutory link between the issues in the two proceedings.

41 The matrimonial property action is based largely on allegations of negligent or fraudulent non-disclosure by the appellant during the time leading up to the Divorce and Property Agreement. The course of those negotiations, and the inferences of non-disclosure, are set out in great detail in the respondent's affidavit in support of the application for child support. It does not lie easily in the mouth of the respondent to now argue that all that evidence is irrelevant to child support; that would imply that it was merely placed on the record to paint the appellant as a person of bad character.

42 As the appellant's counsel pointed out during oral argument, it would be extremely risky for the appellant to respond to the child support application on the principled basis that the respondent's extensive allegations of misconduct are technically irrelevant. If the appellant entered no evidence to rebut those allegations, and the chambers judge were to rule that the allegations of misconduct are, in whole or in part, relevant, the appellant would suffer serious prejudice. It seems inevitable that the allegations of misconduct (principally, non-disclosure) will have to be dealt with in both the child support application, and matrimonial property proceeding.

43 The course of the negotiations is, arguably, relevant to both the matrimonial property action and the application for retroactive child support. The alleged misconduct (i.e., misrepresentation or non-disclosure) of the appellant is admitted to be central to the matrimonial property action. Misconduct is also an important consideration in deciding whether a retroactive child support award should be made: ***D.B.S. v. S.R.G.*** at para. 106. Such misconduct might well be used to explain why the application for retroactive child support has been delayed, and why it should be ordered even though the children may no longer be children of the marriage. It might also (arguably) be a factor to consider in deciding whether the payor spouse has improperly avoided distributing to himself income under his control in his corporation, in order to artificially reduce child support: Child Support Guidelines, s. 18. The argument that there are few common facts in issue is unsupportable on this record. It appears that the witnesses (both parties and possibly their previous counsel) will have to testify in both proceedings as to the course of negotiations leading up to the Divorce and Property Agreement.

44 There will also be overlap in the expert evidence. The evidence as to the tax implications of drawing cash out of Gienow Building Products will be common to both proceedings. So too will be the evidence about the practical access that the appellant has to those funds, having regard to tax and business considerations. There will likely be some common expert evidence about the nature of the income trust transaction, when it became reasonably foreseeable, and its impact on the value of the shares.

45 It is likely that if the two proceedings are consolidated, it will take longer to resolve them, although the extra time is unlikely to be of significant duration. While delay should be avoided

when possible, it is equally important to the administration of justice that inconsistent decisions be avoided. Further, the total amount of time and court resources that will be required is relevant. If the two actions proceed independently, they will undoubtedly consume more resources than if they are resolved together.

Conclusion

46 In conclusion, the decision under appeal discloses reviewable error. The chambers judge under-emphasized the importance of the common issues of fact and law that arise on this record. She does not appear to have given any weight to the prospect that allowing the two proceedings to proceed independently might result in inconsistent findings. That is the most important consideration on this record. The chambers judge also failed to focus on the effect that non-consolidation would have on the administration of justice. While the respondent can point to some possible prejudice if the actions are consolidated, that prejudice is not overwhelming, and much of it can be remedied in other ways. The appeal should accordingly be allowed, and an order consolidating the two proceedings should issue. The parties could then apply to take advantage of the case management regime in the Court of Queen's Bench if they anticipate any avoidable delay.

F.F. SLATTER J.A.

cp/e/qlcct/qlvxw/qlcas/qlgpr/qlcas

Case Name:

Sawridge Band v. Canada

Between
Bertha L'hirondelle, suing on her own behalf and on behalf of all other members of the Sawridge Band, plaintiffs (appellants), and
Her Majesty the Queen, defendant (respondent), and Native Council of Canada, Native Council of Canada (Alberta), Native Women's Association of Canada, and Non-status Indian Association of Alberta, interveners (respondents)

[2004] F.C.J. No. 77

[2004] A.C.F. no 77

2004 FCA 16

2004 CAF 16

[2004] 3 F.C.R. 274

[2004] 3 R.C.F. 274

316 N.R. 332

[2004] 2 C.N.L.R. 316

128 A.C.W.S. (3d) 856

Docket A-170-03

Federal Court of Appeal
Calgary, Alberta

Rothstein, Noël and Malone JJ.A.

Heard: December 15 and 16, 2003.

Judgment: January 19, 2004.

(61 paras.)

Counsel:

Martin J. Henderson and Catherine Twinn, for the appellant.
E. James Kindrake and Kathleen Kohlman, for the respondent.
Kenneth Purchase, for the intervener, Native Council of Canada.
P. Jon Faulds, for the intervener, Native Council of Canada, Alberta.
Mary Eberts, for the intervener, Native Women's Association of Canada.
Michael J. Donaldson, for the intervener, Non-status Indian Association of Alberta.

The judgment of the Court was delivered by

1 ROTHSTEIN J.A.:-- By Order dated March 27, 2003, Hugessen J. of the Trial Division (as it then was) granted a mandatory interlocutory injunction sought by the Crown, requiring the appellants to enter or register on the Sawridge Band List the names of eleven individuals who, he found, had acquired the right to be members of the Sawridge Band before it took control of its Band list on July 8, 1985, and to accord the eleven individuals all the rights and privileges attaching to Band membership. The appellants now appeal that Order.

HISTORY

2 The background to this appeal may be briefly stated. An Act to amend the Indian Act, R.S.C. 1985, c. 32 (1st Supp.) [Bill C-31], was given Royal Assent on June 28, 1985. However, the relevant provisions of Bill C-31 were made retroactive to April 17, 1985, the date on which section 15, the equality guarantee, of the Canadian Charter of Rights and Freedoms [the Charter] came into force.

3 Among other things, Bill C-31 granted certain persons an entitlement to status under the Indian Act, R.S.C. 1985, c. I-5 [the Act], and, arguably, entitlement to membership in an Indian Band. These persons included those whose names were omitted or deleted from the Indian Register by the Minister of Indian and Northern Affairs prior to April 17, 1985, in accordance with certain provisions of the Act as they read prior to that date. The disqualified persons included an Indian woman who married a man who was not registered as an Indian as well as certain other persons disqualified by provisions that Parliament considered to be discriminatory on account of gender. The former provisions read:

> 12. (1) The following persons are not entitled to be registered, namely,

(a) a person who

...

(iii) is enfranchised, or
(iv) is born of a marriage entered into after September 4, 1951 and has attained the age of twenty-one years, whose mother and whose father's mother are not persons described in paragraph 11(1)(a), (b) or (d) or entitled to be registered by virtue of paragraph 11(1)(e),

unless, being a woman, that person is the wife or widow of a person described in section 11; and

(b) a woman who married a person who is not an Indian, unless that woman is subsequently the wife or widow of a person described in section 11.

(2) The addition to a Band List of the name of an illegitimate child described in paragraph 11(1)(e) may be protested at any time within twelve months after the addition, and if on the protest it is decided that the father of the child was not an Indian, the child is not entitled to be registered under that paragraph.

* * *

12. (1) Les personnes suivantes n'ont pas le droit d'être inscrites :

a) une personne qui, selon le cas :

...

(iii) est émancipée,
(iv) est née d'un mariage célébré après le 4 septembre 1951 et a atteint l'âge de vingt et un ans, dont la mère et la grand-mère paternelle ne sont pas des personnes décrites à l'alinéa 11(1)a), b) ou d) ou admises à être inscrites en vertu de l'alinéa 11(1)e),

sauf si, étant une femme, cette personne est l'épouse ou la veuve de qulequ'un décrit à l'article 11;

b) une femme qui a épousé un non-Indien, sauf si cette femme devient subséquemment l'épouse ou la veuve d'une personne décrite à l'article 11.

(2) L'addition, à une liste de bande, du nom d'un enfant illégitime décrit à l'alinéa 11(1)e) peut faire l'objet d'une protestation dans les douze mois de l'addition; si, à la suite de la protestation, il est décidé que le père de l'enfant n'était pas un Indien, l'enfant n'a pas le droit d'être inscrit selon cet alinéa.

4 Bill C-31 repealed these disqualifications and enacted the following provisions to allow those who had been stripped of their status to regain it:

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;

...

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;

* * *

6. (1) Sous réserve de l'article 7, une personne a le droit d'être inscrite si elle remplit une des conditions suivantes :

...

c) son nom a été omis ou retranché du registre des Indiens ou, avant le 4 septembre 1951, d'une liste de bande, en vertu du sous-alinéa 12(1)a)(iv), de l'alinéa 12(1)b) ou du paragraphe 12(2) ou en vertu du sous-alinéa 12(1)a)(iii) conformément à une ordonnance prise en vertu du paragraphe 109(2), dans leur version antérieure au 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui d'une de ces dispositions;

...

11. (1) À compter du 17 avril 1985, une personne a droit à ce que son nom soit consigné dans une liste de bande tenue pour cette dernière au ministère si elle remplit une des conditions suivantes :

...

c) elle a le droit d'être inscrite en vertu de l'alinéa 6(1)c) et a cessé d'être un membre de cette bande en raison des circonstances prévues à cet alinéa;

5 By an action originally commenced on January 15, 1986, the appellants claim a declaration that the provisions of Bill C-31 that confer an entitlement to Band membership are inconsistent with section 35 of the Constitution Act, 1982 and are, therefore, of no force and effect. The appellants say that an Indian Band's right to control its own membership is a constitutionally protected Aboriginal and treaty right and that legislation requiring a Band to admit persons to membership is therefore unconstitutional.

6 This litigation is now in its eighteenth year. By Notice of Motion dated November 1, 2002, the Crown applied for:

> an interlocutory mandatory injunction, pending a final resolution of the Plaintiff's 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.

7 The basis of the Crown's application was that until legislation is found to be unconstitutional, it must be complied with. The mandatory injunction application was brought to require the Band to comply with the provisions of the Act unless and until they are determined to be unconstitutional. By Order dated March 27, 2003, Hugessen J. granted the requested injunction.

8 This Court was advised that, in order for the Band to comply with the Order of Hugessen J., the eleven individuals in question were entered on the Sawridge Band list. Nonetheless, the appellants submit that Hugessen J.'s Order was made in error and should be quashed.

ISSUES

9 In appealing the Order of Hugessen J., the appellants raises the following issues:

1. Does the Band's membership application process comply with the requirements of the Act?
2. Even if the Band has not complied with the Act, did Hugessen J. err in granting a mandatory interlocutory injunction because the Crown lacks standing and has not the met the test for granting interlocutory injunctive relief.

APPELLANTS' SUBMISSIONS

10 The appellants say that the Band's membership code has been in effect since July 8, 1985 and that any person who wishes to become a member of the Band must apply for membership and satisfy the requirements of the membership code. They say that the eleven individuals in question have never applied for membership. As a result, there has been no refusal to admit them. The appellants submit that the code's requirement that all applicants for membership go through the application process is in accordance with the provisions of the Act. Because the Band is complying with the Act, there is no basis for granting a mandatory interlocutory injunction.

11 Even if the Band has not complied with the Act, the appellants say that Hugessen J. erred in granting a mandatory interlocutory injunction because the Crown has no standing to seek such an injunction. The appellants argue that there is no lis between the beneficiaries of the injunction and the appellants. The Crown has no interest or, at least, no sufficient legal interest in the remedy. Further, the Crown has not brought a proceeding seeking final relief of the nature sought in the mandatory interlocutory injunction application. In the absence of such a proceeding, the Court is without jurisdiction to grant a mandatory interlocutory injunction. Further, there is no statutory authority for the Crown to seek the relief in question. The appellants also argue that the Crown has not met the three-part test for the granting of an interlocutory injunction.

ARE THE APPELLANTS COMPLYING WITH THE INDIAN ACT?

The Appropriateness of Deciding a Legal Question in the Course of an Interlocutory Injunction Application

12 The question of whether the Sawridge Band membership code and application process are in compliance with the Act appears to have been first raised by the appellants in response to the Crown's injunction application. Indeed, the appellants' Fresh As Amended Statement of Claim would seem to acknowledge that, at least when it was drafted, the appellants were of the view that certain individuals could be entitled to membership in an Indian Band without the consent of the Band. Paragraph 22 of the Fresh as Amended Statement of Claim states in part:

> 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.

13 There is nothing in the appellants' Fresh As Amended Statement of Claim that would suggest that an issue in the litigation was whether the appellants were complying with the Act. The entire Fresh As Amended Statement of Claim appears to focus on challenging the constitutional validity of the Bill C-31 amendments to the Indian Act.

14 The Crown's Notice of Motion for a mandatory interlocutory injunction was based on the appellants' refusal to comply with the legislation pending determination of whether the legislation was constitutional. The Crown's assumption appears to have been that there was no dispute that, barring a finding of unconstitutionality, the legislation required the appellants to admit the eleven individuals to membership.

15 Be that as it may, the appellants say that the interpretation of the legislation and whether or not they are in compliance with it was always in contemplation in and relevant to this litigation. It was the appellants who raised the question of whether or not they were in compliance in response to the Crown's motion for injunction. It, therefore, had to be dealt with before the injunction application itself was addressed. The Crown and the interveners do not challenge the need to deal with the question and Hugessen J. certainly accepted that it was necessary to interpret the legislation and determine if the appellants were or were not in compliance with it.

16 Courts do not normally make determinations of law as a condition precedent to the granting of an interlocutory injunction. However, that is what occurred here. In the unusual circumstances of this case, I think it was appropriate for Hugessen J. to have made such a determination.

17 Although rule 220 was not expressly invoked, I would analogize the actions of Hugessen J. to determining a preliminary question of law. Rules 220(1) and (3) read as follows:

> 220. (1) A party may bring a motion before trial to request that the Court determine
>
> (a) a question of law that may be relevant to an action;

...

(3) A determination of a question referred to in subsection (1) is final and conclusive for the purposes of the action, subject to being varied on appeal.

* * *

220. (1) Une partie peut, par voie de requête présentée avant l'instruction, demander à la Cour de statuer sur :

a) tout point de droit qui peut être pertinent dans l'action;

...

(3) La décision prise au sujet d'un point visé au paragraphe (1) est définitive aux fins de l'action, sous réserve de toute modification résultant d'un appel.

18 Although the appellants did not explicitly bring a motion under Rule 220, the need to determine the proper interpretation of the Act was implicit in their reply to the respondent's motion for a mandatory interlocutory injunction. It would be illogical for the appellants to raise the issue in defence to the injunction application and the Court not be able to deal with it. There is no suggestion that the question could not be decided because of disputed facts or for any other reason. It was raised by the appellants who said it was relevant to the action. Therefore, I think that Hugessen J. was able to, and did, make a preliminary determination of law that was final and conclusive for purposes of the action, subject to being varied on appeal.

Does the Band's Membership Application Process Comply with the Requirements of the Indian Act?

19 I turn to the question itself. Although the determination under appeal was made by a case management judge who must be given extremely wide latitude (see Sawridge Band v. Canada, [2002] 2 F.C. 346 at paragraph 11 (C.A.)), the determination is one of law. Where a substantive question of law is at issue, even if it is decided by a case management judge, the applicable standard of review will be correctness.

20 The appellants say there is no automatic entitlement to membership and that the Band's membership code is a legitimate means of controlling its own membership. They rely on subsections 10(4) and 10(5) of the Indian Act which provide:

10(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.

* * *

10(4) Les règles d'appartenance fixées par une bande en vertu du présent article ne peuvent priver quiconque avait droit à ce que son nom soit consigné dans la liste de bande avant leur établissement du droit à ce que son nom y soit consigné en raison uniquement d'un fait ou d'une mesure antérieurs à leur prise d'effet.

(5) Il demeure entendu que le paragraphe (4) s'applique à la personne qui avait droit à ce que son nom soit consigné dans la liste de bande en vertu de l'alinéa 11(1)c) avant que celle-ci n'assume la responsabilité de la tenue de sa liste si elle ne cesse pas ultérieurement d'avoir droit à ce que son nom y soit consigné.

21 The appellants say that subsections 10(4) and (5) are clear and unambiguous and Hugessen J. was bound to apply these provisions. They submit the words "by reason only of" in subsection 10(4) mean that a band may establish membership rules as long as they do not expressly contravene any provisions of the Act. They assert that the Band's code does not do so. The code only requires that if an individual is not resident on the Reserve, an application must be made demonstrating, to the satisfaction of the Band Council, that the individual:

> 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 (paragraph 3(a)(ii)).

22 With respect to subsection 10(5), the appellants say that the words "if that person does not subsequently cease to be entitled to have his name entered in the Band List" mean that the Band is given a discretion to establish membership rules that may disentitle an individual to membership in the Band. They submit that nothing in the Act precludes a band from establishing additional qualifications for membership.

23 The Crown, on the other hand, says that persons in the position of the individuals in this appeal have "acquired rights." I understand this argument to be that paragraph 11(1)(c) created an automatic entitlement for those persons to membership in the Indian Band with which they were previously connected. The Crown submits that subsection 10(4) prohibits a band from using its membership rules to create barriers to membership for such persons.

24 Hugessen J. was not satisfied that subsections 10(4) and (5) are as clear and unambiguous as the appellant suggests. He analyzed the provisions in the context of related provisions and agreed with the Crown.

25 The appellants seem to object to Hugessen J.'s contextual approach to statutory interpretation. However, all legislation must be read in context. Driedger's well known statement of the modern approach to statutory construction, adopted in countless cases such as Re Rizzo & Rizzo Shoes Ltd., [1998] 1 S.C.R. 27 at paragraph 21, reads:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament (Elmer A. Driedger, Construction of Statutes, 2d ed. (Toronto: Butterworths, 1983) at 87).

Hugessen J. interpreted subsections 10(4) and (5) in accordance with the modern approach and he was correct to do so.

26 I cannot improve on Hugessen J.'s statutory construction analysis and I quote the relevant portions of his reasons, which I endorse and adopt as my own:

> [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 by 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 section 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."

...

[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 individual [sic] to 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.

27 I turn to the appellants' arguments in this Court.

28 The appellants assert that the description "acquired rights" used by Hugessen J. reads words into the Indian Act that are not there. The term "acquired rights" appears as a marginal note beside subsection 10(4). As such, it is not part of the enactment, but is inserted for convenience of reference only (Interpretation Act, R.S.C. 1985, c. I-21, s. 14). However, the term is a convenient "shorthand" to identify those individuals who, by reason of paragraph 11(1)(c), became entitled to automatic membership in the Indian Band with which they were connected. In other words, the instant paragraph 11(1)(c) came into force, i.e. April 17, 1985, these individuals were entitled to have their names entered on the membership list of their Band.

29 The appellants say that the words "by reason only of" in subsection 10(4) do not preclude an Indian Band from establishing a membership code, requiring persons who wish to be considered for membership to make application to the Band. I acknowledge that the words "by reason only of" could allow a band to create restrictions on continued membership for situations that arose or actions taken after the membership code came into force. However, the code cannot operate to deny membership to those individuals who come within paragraph 11(1)(c).

30 A band may enact membership rules applicable to all of its members. Yet subsections 10(4) and (5) restrict a band from enacting membership rules targeted only at individuals who, by reason of paragraph 11(1)(c), are entitled to membership. That distinction is not permitted by the Act.

31 The appellants raise three further objections. First, they say that their membership code is required because of "band shopping." However, in respect of persons entitled to membership under paragraph 11(1)(c), the issue of band shopping does not arise. Under paragraph 11(1)(c), the individuals in question are only entitled to membership in the band in which they would have been a member but for the pre-April 17, 1985 provisions of the Indian Act. In this case, those individuals would have been members of the Sawridge Band.

32 Second, the appellants submit that the opening words of subsection 11(1), "commencing on April 17, 1985," indicate a process and not an event, i.e. that there is no automatic membership in a band and that indeed some persons may not wish to be members; rather, the word "commencing" only means that a person may apply at any time on or after April 17, 1985. I agree that there is no automatic membership. However, there is an automatic entitlement to membership. The words "commencing on April 17, 1985" only indicate that subsection 11(1) was not retroactive to before April 17, 1985. As of that date, the individuals in question in this appeal acquired an automatic entitlement to membership in the Sawridge Band.

33 Third, the appellants say that the individuals in question have not made application for membership. Hugessen J. dealt with this argument at paragraph 12 of his reasons:

> [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.

34 The appellants submit, contrary to Hugessen J.'s finding, that there was no evidence that the individuals in question here wanted to become members of the Sawridge Band. A review of the record demonstrates ample evidence to support Hugessen J.'s finding. For example, by Sawridge Band Council Resolution of July 21, 1988, the Band Council acknowledged that "at least 164 people had expressed an interest in writing in making application for membership in the Band." A list of such persons was attached to the Band Council Resolution. Of the eleven individuals in question here, eight were included on that list. In addition, the record contains applications for Indian status and membership in the Sawridge Band made by a number of the individuals.

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 had been created to membership, was in contravention of the Act

36 Of course, this finding has no bearing on the main issue raised by the appellants in this action, namely, whether the provisions entitling persons to membership in an Indian band are unconstitutional.

THE INJUNCTION APPLICATION

Standing

37 I turn to the injunction application. The appellants say that there was no lis between the Band and the eleven persons ordered by Hugessen J. to be included in the Band's Membership List. The eleven individuals are not parties to the main action. The appellants also say that the Crown is not entitled to seek interlocutory relief when it does not seek the same final relief.

38 I cannot accept the appellants' arguments. The Crown is the respondent in an application to have validly enacted legislation struck down on constitutional grounds. It is seeking an injunction, not only on behalf of the individuals denied the benefits of that legislation but on behalf of the public interest in having the laws of Canada obeyed. The Crown, as represented by the Attorney General, has traditionally had standing to seek injunctions to ensure that public bodies, such as an Indian band council, follow the law (see Robert J. Sharpe, Injunctions and Specific Performance, looseleaf (Aurora, ON: Canada Law Book, 2002) at paragraph 3.30; Ontario (Attorney General) v.

Ontario Teachers' Federation (1997), 36 O.R. (3d) 367 at 371-72 (Gen. Div.)). Having regard to the Crown's standing at common law, statutory authority, contrary to the appellants' submission, is unnecessary. Hugessen J. was thus correct to find that the Crown had standing to seek the injunction.

39 I also cannot accept the argument that the Crown may not seek interlocutory relief because it has not sought the same final relief in this action. The Crown is defending an attack on the constitutionality of Bill C-31 and is seeking an interlocutory injunction to require compliance with it in the interim. If the Crown is successful in the main action, the result will be that the Sawridge Band will have to enter or register on its membership list the individuals who are the subject of the injunction application. The Crown therefore is seeking essentially the same relief on the injunction application as in the main action.

40 Further, section 44 of the Federal Courts Act, R.S.C. 1985, c. F-7, confers jurisdiction on the Federal Court to grant an injunction "in all cases in which it appears to the Court to be just or convenient to do so." The jurisdiction conferred by section 44 is extremely broad. In Canada (Human Rights Commission) v. Canadian Liberty Net, [1998] 1 S.C.R. 626, the Supreme Court found that the Federal Court could grant injunctive relief even though there was no action pending before the Court as to the final resolution of the claim in issue. If section 44 confers jurisdiction on the Court to grant an injunction where it is not being asked to grant final relief, the Court surely has jurisdiction to grant an injunction where it will itself make a final determination on an interconnected issue. The requested injunction is therefore sufficiently connected to the final relief claimed by the Crown.

The Test for Granting an Interlocutory Injunction

41 The test for whether an interlocutory injunction should be granted was set out in American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396 (H.L.) and adopted by the Supreme Court in Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., [1987] 1 S.C.R. 110 and RJR-Macdonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311 where, at 334, Sopinka and Cory JJ. summarized the test as follows:

> First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

42 The appellants submit that Hugessen J. erred in applying a reverse onus to the test. Since, as will be discussed below, the Crown has satisfied the traditional test, I do not need to consider whether the onus should be reversed.

Serious Question

43 In RJR-Macdonald at 337-38, the Court indicated that the threshold at the first branch is low and that the motions judge should proceed to the rest of the test unless the application is vexatious or frivolous.

44 The appellants say that in cases where a mandatory injunction is sought, the older pre-American Cyanamide test of showing a strong prima facie case for trial should continue to apply. They rely on an Ontario case, Breen v. Farlow, [1995] O.J. No. 2971 (Gen. Div.), in support of this proposition. Of course, that case is not binding on this Court. Furthermore, it has been questioned by subsequent Ontario decisions in which orders in the nature of a mandatory interlocutory injunction were issued (493680 Ontario Ltd. v. Morgan, [1996] O.J. No. 4776 (Gen. Div.); Samoila v. Prudential of America General Insurance Co. (Canada), [1999] O.J. No. 2317 (S.C.J.)). In Morgan, Hockin J. stated that RJR-Macdonald had modified the old test, even for mandatory interlocutory injunctions (paragraph 27).

45 The jurisprudence of the Federal Court on this issue in recent years is divided. In Relais Nordik Inc. v. Secunda Marine Services Ltd. (1988), 24 F.T.R. 256 at paragraph 9, Pinard J. questioned the applicability of the American Cyanamide test to mandatory interlocutory injunctions. On the other hand, in Ansa International Rent-A-Car (Canada) Ltd. v. American International Rent-A-Car Corp. (1990), 36 F.T.R. 98 at paragraph 15, MacKay J. accepted that the American Cyanamide test applied to mandatory injunctions in the same way as to prohibitory ones. Both of these cases were decided before the Supreme Court reaffirmed its approval of the American Cyanamide test in RJR-Macdonald. More recently, in Patriquen v. Canada (Correctional Services), [2003] F.C.J. No. 1186, 2003 FC 927 at paragraphs 9-16, Blais J. followed the RJR-Macdonald test and found that there was a serious issue to be tried in an application for a mandatory interlocutory injunction (which he dismissed on the basis that the applicant had not shown irreparable harm).

46 Hugessen J. followed Ansa International and held that the RJR-Macdonald test should be applied to an interlocutory injunction application, whether it is prohibitory or mandatory. In light of Sopinka and Cory JJ.'s caution about the difficulties of engaging in an extensive analysis of the constitutionality of legislation at an interlocutory stage (RJR-Macdonald at 337), I think he was correct to do so. However, the fact that the Crown is asking the Court to require the appellants' to take positive action will have to be considered in assessing the balance of convenience.

47 In this case, the Crown's argument that Bill C-31 is constitutional is neither frivolous nor vexatious. There is, therefore, a serious question to be tried.

Irreparable Harm

48 Ordinarily, the public interest is considered only in the third branch of the test. However, where, as here, the government is the applicant in a motion for interlocutory relief, the public interest must also be considered in the second stage (RJR-Macdonald at 349).

49 Validly enacted legislation is assumed to be in the public interest. Courts are not to investigate whether the legislation actually has such an effect (RJR-Macdonald at 348-49).

50 Allowing the appellants to ignore the requirements of the Act would irreparably harm the public interest in seeing that the law is obeyed. Until a law is struck down as unconstitutional or an interim constitutional exemption is granted by a court of competent jurisdiction, citizens and organizations must obey it (Metropolitan Stores at 143, quoting Morgentaler v. Ackroyd (1983), 42 O.R. (2d) 659 at 666-68 (H.C.)).

51 Further, the individuals who have been denied membership in the appellant band are aging and, at the present rate of progress, some are unlikely ever to benefit from amendments that were adopted to redress their discriminatory exclusion from band membership. The public interest in preventing discrimination by public bodies will be irreparably harmed if the requested injunction is denied and the appellants are able to continue to ignore their obligations under Bill C-31, pending a determination of its constitutionality.

52 The appellants argue that there cannot be irreparable harm because, if there was, the Crown would not have waited sixteen years after the commencement of the action to seek an injunction. The Crown submits that it explained to Hugessen J. the reasons for the delay and stated that the very length of the proceedings had in fact contributed to the irreparable harm as the individuals in question were growing older and, in some cases, falling ill.

53 The question of whether delay in bringing an injunction application is fatal is a matter of discretion for the motions judge. There is no indication that Hugessen J. did not act judicially in exercising his discretion to grant the injunction despite the timing of the motion.

Balance of Convenience

54 In Metropolitan Stores at 149, Beetz J. held that interlocutory injunctions should not be granted in public law cases, "unless, in the balance of convenience, the public interest is taken into consideration and given the weight it should carry." In this case, the public interest in seeing that laws are obeyed and that prior discrimination is remedied weighs in favour of granting the injunction requested by the Crown.

55 As discussed above and as Hugessen J. found, there is a clear public interest in seeing that legislation is obeyed until its application is stayed by court order or the legislation is set aside on final judgment. As well, Bill C-31 was designed to remedy the historic discrimination against Indian women and other Indians previously excluded from status under the Indian Act and band membership. There is therefore a public interest in seeing that the individuals in this case are able to reap the benefits of those amendments.

56 On the other hand, the Sawridge Band will suffer little or no damage by admitting nine elderly ladies and one gentleman to membership (the Court was advised that one of the eleven individuals

had recently died). It is true that the Band is being asked to take the positive step of adding these individuals to its Band List but it is difficult to find hardship in requiring a public body to follow a law that, pending an ultimate determination of its constitutionality, is currently in force. Even if the Band provides the individuals with financial assistance on the basis of their membership, that harm can be remedied by damages against the Crown if the appellants subsequently succeed at trial. Therefore, as Hugessen J. found, the balance of convenience favours granting the injunction.

CONCLUSION

57 The appeal should be dismissed.

COSTS

58 The Crown has sought costs in this Court and in the Court below. The interveners have sought costs in this Court only.

59 In his Reasons for Order, Hugessen J. reserved the question of costs in favour of the Crown, indicating that the Crown should proceed by way of a motion for costs under rule 369. He awarded no costs to the interveners. It is not apparent from the record that the Crown made a costs motion under rule 369 and in the absence of an order for costs and an appeal of that order, I would not make any award of costs in the Court below.

60 As to costs in this Court, the Crown and interveners are to make submissions in writing, each not exceeding 3 pages, double-spaced, on or before 7 days from the date of these reasons. The appellants shall make submissions in writing, not exceeding 10 pages, double-spaced, on or before 14 days from the date of these reasons. The Court will, if requested, consider the award of a lump sum of costs inclusive of fees, disbursements, and in the case of the interveners, GST (See Consorzio del Prosciutto di Parma v. Maple Leaf Meats Inc., [2003] 2 F.C. 451 (C.A.)).

61 The Judgment of the Court will be issued as soon as the matter of costs is determined.

ROTHSTEIN J.A.
NOËL J.A.:-- I agree.
MALONE J.A.:-- I agree.

cp/e/qw/qlklc/qlhcs

Case Name:

Sawridge Band v. Canada

Between
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)
And between
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)

[2009] F.C.J. No. 465

[2009] A.C.F. no 465

2009 FCA 123

176 A.C.W.S. (3d) 681

391 N.R. 375

Dockets A-154-08, A-112-08

Federal Court of Appeal
Ottawa, Ontario

Richard C.J., Evans and Sharlow JJ.A.

Heard: April 20 and 21, 2009.
Oral judgment: April 21, 2009.

(17 paras.)

Civil litigation -- Civil procedure -- Disposition without trial -- Dismissal of action -- Failure to comply with court order -- Appeal from the dismissal of appellant's action dismissed -- The action was dismissed because the appellants did not call further evidence in response to an oral ruling which struck all of their past and future lay witnesses because of non-compliant will-says -- There being no case for the Crown to answer, the action necessarily failed.

Appeal by the Sawridge Band from the dismissal of its action and to award costs totalling approximately $1.7 million in favour of the Crown and the other respondents (interveners at trial). The dismissal of the action was the end of the retrial of an action commenced on January 15, 1986. The Band sought an order declaring that certain amendments to the Indian Act breached their rights under s. 35 of the Constitution Act. The statutory amendments compelled the Band, against their wishes, to add certain individuals to the list of band members. The Band argued that the legislation was an invalid attempt to deprive them of their right to determine the membership of their own bands. The action was dismissed because the Band did not call further evidence in response to an oral ruling which struck all of their past and future lay witnesses because of non-compliant will-says. There being no case for the Crown to answer, the action necessarily failed.

HELD: Appeal dismissed. All of the orders and directions by the trial judge were discretionary decisions made 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 Band's 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.

Appeal From:

Appeal from a Judgment of the Federal Court dated March 7, 2008, Federal Court Docket Number T-66-86, [2008] F.C.J. No. 389.

Counsel:

Edward H. Molstad, Q.C., Marco S. Poretti and David L. Sharko, for the Appellants.

Catherine M. Twinn, for the Appellants.

E. James Kindrake, Kevin Kimmis and Krista Epton, for the Respondent (Her Majesty the Queen).

Joseph E. Magnet, for the Respondent (Congress of Aboriginal Peoples).

Janet L. Hutchison, for the Respondent (Congress of Aboriginal Peoples).

Jon Faulds, Q.C. and Derek A. Cranna, for the Repondent (Native Council of Canada (Alberta)).

Michael J. Donaldson, for the Respondent (Non-Status Indian Association of Alberta).

Mary Eberts, for the Respondent (Native Women's Association of Canada).

The judgment of the Court was delivered by

1 SHARLOW J.A. (orally):-- 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. 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. Canada (T.D.)*, [1996] 1 F.C. 3. That decision was set aside by this Court on the basis of a reasonable apprehension of bias (*Sawridge Band v. Canada (C.A.*, [1997] 3 F.C. 580, application for leave to appeal dismissed December 1, 1997). 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. In June of 2004, Justice Russell found the appellants' first attempt at will-says to be inadequate and ordered new will-says (2004 FC 933). He found the second attempt also to be inadequate (2004 FC 1436) and ordered a third attempt (2004 FC 1653). None of these orders was 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). The appellants' appeal of that order was dismissed (2006 FCA 228, 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 third 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.

SHARLOW J.A.

Case Name:

Sawridge Band v. Canada

Sawridge Band
v.
Her Majesty the Queen, Congress of Aboriginal Peoples, Native Council of Canada (Alberta), Non-Status Indian Association of Alberta and Native Women's Association of Canada
And between
Tsuu T'ina First Nation (formerly the Sarcee Indian Band)
v.
Her Majesty the Queen, Congress of Aboriginal Peoples, Native Council of Canada (Alberta), Non-Status Indian Association of Alberta and Native Women's Association of Canada

[2009] S.C.C.A. No. 248

[2009] C.S.C.R. no 248

File No.: 33219

Supreme Court of Canada

Record created: June 19, 2009.
Record updated: December 10, 2009.

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Status:

Application for leave to appeal dismissed with costs (without reasons) December 10, 2009.

Catchwords:

Civil procedure -- Discovery -- Courts -- Judges -- Did the learned trial judge deprive the Applicants of their right to a fair hearing and determination of their Constitutional rights by prohibiting the Applicants from leading relevant evidence, notably oral history evidence, unless it

had been reduced to writing and provided to the Crown in advance of trial? -- Did the learned trial judge err in issuing an order striking all 25 of the Applicants' lay witnesses, notably First Nations Elders, eight of whom had already testified at trial?- Would the trial judge's extraordinarily harsh, unfounded, and insulting statements against the Applicants raise a reasonable apprehension of bias in the mind of the right-thinking and informed observer?

Case Summary:

The Applicants are an Aboriginal Band that applied for an order in 1986, declaring that certain amendments to the Indian Act, R.S.C. 1985, c. I-5, breached their rights under s. 35 of the Constitution Act, 1982 as an invalid attempt to deprive them of their right to determine the membership of their own bands. The trial began in September of 1993 and ended in a dismissal of the action in 1995. The Federal Court of Appeal set aside that decision on the basis of reasonable apprehension of bias in 1997, and ordered a retrial. In 2004, after the oral discovery process became unproductive, the case management judge ordered that the parties provide disclosure to one another by way of written "will-says" for all of their lay witnesses. The new trial commenced in January of 2007 after ten years of procedural disputes. The trial judge made a series of rulings in support of the 2004 order that precluded the parties from eliciting any evidence from lay witnesses that had not first been disclosed to the other side in written will-say statements. The Applicants did not comply with the trial judge's order that they give court reassurances that their will-says provided adequate disclosure for their 57 potential lay witnesses. On September 11, 2007, the trial judge struck out all of the Applicants' past and future lay witnesses because of non-compliant will-says. The Applicants were granted extra time to prepare for trial. On January 7, 2008, the Applicants informed the court that they would not call further evidence and were closing their case as they wished to proceed directly to appeal.

Counsel:

Edward H. Molstad, Q.C. (Parlee McLaws LLP), for the motion.

E. James Kindrake (A.G. of Canada), contra.

Chronology:

1. Application for leave to appeal:

FILED: June 19, 2009. S.C.C. Bulletin, 2009, p. 936.
SUBMITTED TO THE COURT: October 26, 2009. S.C.C.

Bulletin, 2009, p. 1463.
DISMISSED WITH COSTS: December 10, 2009 (without reasons). S.C.C. Bulletin, 2009, p. 1713.
Before: Binnie, Fish and Charron JJ.

The application for leave to appeal is dismissed with costs to the respondents.

Procedural History:

Judgment at first instance: Applicants' action dismissed. Federal Court of Canada, Trial Division, Russell J., March 7, 2008.

Judgment on appeal: Appeal dismissed.
Federal Court of Appeal, Richard C.J. and Evans and Sharlow JJ.A., April 21, 2009.
[2009] F.C.J. No. 465.

e/qlhbb

Case Name:

Stagg v. Condominium Plan No. 882-2999

Between
Rod Stagg and Greg Stokowski, Plaintiffs/Applicants, and The Owners: Condominium Plan 882-2999, Sunreal Property Management Ltd. and Wayne Herve, Defendants/Respondents

[2013] A.J. No. 1306

2013 ABQB 684

235 A.C.W.S. (3d) 831

2013 CarswellAlta 2393

574 A.R. 363

Docket: 1201 06002

Registry: Calgary

Alberta Court of Queen's Bench
Judicial District of Calgary

W.A. Tilleman J.

Heard: September 16, 2013.
Judgment: November 19, 2013.

(71 paras.)

Civil litigation -- Civil procedure -- Costs -- Particular orders -- Solicitor and client or substantial indemnity -- For improper conduct -- Application by Stagg and Stokowski for solicitor-client costs allowed -- Stagg and Stokowski's originating application sought reimbursement to Stokowski, a member of the respondent Condominium Corporation's Board of Directors, for monies expended on the Corporation's behalf -- The Court found that the Corporation's Board of Directors had engaged in improper conduct and ordered the Corporation to reimburse Stokowski -- The applicants were the successful party and the respondent Corporation's Board of Directors engaged in improper

conduct that resulted in significant prejudice to the applicants -- The applicants were entitled to full indemnity for their costs.

Real property law -- Proceedings -- Practice and procedure -- Costs -- Considerations -- Application by Stagg and Stokowski for solicitor-client costs allowed -- Stagg and Stokowski's originating application sought reimbursement to Stokowski, a member of the respondent Condominium Corporation's Board of Directors, for monies expended on the Corporation's behalf -- The Court found that the Corporation's Board of Directors had engaged in improper conduct and ordered the Corporation to reimburse Stokowski -- The applicants were the successful party and the respondent Corporation's Board of Directors engaged in improper conduct that resulted in significant prejudice to the applicants -- The applicants were entitled to full indemnity for their costs.

Application by Stagg and Stokowski for an award of costs. The costs application related to an originating application in which Stagg and Stokowski sought reimbursement to Stokowski in the amount of $14,527. Stokowski, a member of the respondent Corporation's Board of Directors, personally expended the monies for the Corporation. The Corporation then failed to reimburse him. The Court found that the Corporation's Board of Directors had engaged in improper conduct and ordered the Corporation to reimburse Stokowski. The applicants now sought solicitor-client costs on a full indemnity basis. The respondents took the position that there was no conduct warranting an award of solicitor-client costs and that party-party costs ought to be awarded to the applicants.

HELD: Application allowed. The applicants were the successful party and the respondent Corporation's Board of Directors engaged in improper conduct that resulted in significant prejudice to the applicants. The Board of Directors vilified the applicants to all owners of the condominium and attempted to hinder and delay the litigation. As a result, Stagg and Stokowski were entitled to full indemnity for their costs. However, the Court did not fix the amount of solicitor-client costs as the applicants had not submitted a bill of costs.

Statutes, Regulations and Rules Cited:

Alberta Rules of Court, Alta Reg 124/2010, Rule 10.31, Rule 10.33

Condominium Property Act, RSA 2000, c C-22, s. 39, s. 42, s. 67, s. 67(2)

Court of Queen's Bench Act, RSA 2000, c C-31, s. 21

Counsel:

Laurie S. Kiedrowski, for the Plaintiffs/Applicants.

Harvey Hait, for the Defendants/Respondents.

Reasons for Judgment

W.A. TILLEMAN J.:--

I. INTRODUCTION

1 Rodd Stagg and Greg Stokowski [the "Applicants"] seek against The Owners: Condominium Plan No. 882 299, a condominium corporation known as Points West Resort [the "Corporation"] an award of costs pursuant to rule 10.31 of *Alberta Rules of Court*, Alta Reg 124/2010 [the "*Rules*"] and section 67 of the *Condominium Property Act*, RSA 2000, c C-22 [the "*Act*"].

2 This Application for costs is made against the Corporation for the Originating Application by the Applicants, filed on May 17, 2012, for relief pursuant to section 67 of the *Act* against The Owners: Condominium Plan No. 882 299, Sunreal Property Management Ltd. and Wayne Herve [collectively, the "Respondents"]. The Originating Application was made by the Applicants for, among other things, reimbursement to Greg Stokowski in the amount of $14,527.31 for a deposit paid by Mr. Stokowski [the "Deposit"] on behalf of the Corporation and rectification of minutes for a meeting of the Board that took place on July 23, 2011.

3 The Applicants discontinued their action against Sunreal Property Management Ltd. on October 9, 2012.

4 The Originating Application primarily concerned the fact that Mr. Stokowski, as a member on the Board of Directors of the Corporation and acting as a duly delegated agent of the Corporation, personally expended monies for the Corporation in the amount of $14,527.31, comprised of a deposit of $10,000.00 against the purchase of a new hot tub and $4,527.31 for the acquisition of sports pad related equipment, which amount the Board of the Corporation then failed to reimburse.

5 The Originating Application also concerned the Board's subsequent actions and behaviour towards the Applicants, which included: refusing to approve and blocking attempts by the Applicants to approve the PDF version of minutes for the July 23, 2011 meeting of the Board; failing to convene a duly scheduled Board meeting on August 20, 2011 and re-characterizing the meeting as an informal informational meeting; actively participating in the removal of the Applicants from the Board following the payment of the Deposit by Mr. Stokowski and the Applicants' attempts to have the PDF minutes (which version was the correct version, as confirmed by the finding of the Investigator) approved.

6 On October 16, 2012 an Order of this Court made a declaration that, among other things, the Board of Directors of the Corporation engaged in "improper conduct" within the meaning of section 67(1)(a) of the *Act* by failing to exercise their powers or conduct the business affairs of the Corporation fairly, and as an interim measure appointed an investigator [the "Investigator"] pursuant to section 67(2)(e) of the *Act* to investigate and report back to the Court on several issues.

7 Ronald V. Clarke, Q.C. was appointed by the Court as the Investigator in accordance with the October 16, 2012 Order.

8 A supplementary Order of this Court was also pronounced on January 18, 2013 as a result of the Investigator seeking supplemental terms to the Order of October 16, 2012. The Supplemental Order primarily concerned the role of the Investigator, required the parties to fully cooperate with the Investigator, and provided for payment to the Investigator, among other items.

9 On March 2, 2013, Ronald V. Clarke produced a Report of Investigator [the "Report"], wherein he found, among others, that the following three actions of the Board fell within the ambit of a broad and liberal interpretation of "improper conduct" per section 67 of the *Act*: (1) refusing to reimburse Greg Stokowski for the Deposit, which he expended as the duly delegated agent of the

Corporation; (2) blocking attempts by the Applicants to effect adoption of the PDF or final draft of the minutes of the Board Meeting of July 23, 2011 prepared by its contract manager, Sunreal Property Management Ltd. and, more than four months later, adopting the Word version or first draft of the minutes of that meeting; and (3) without authority, failing to convene the duly schedule Board meeting of August 20, 2011 and to proceed with the Agenda distributed for that meeting and, instead, electing to describe it as an informal "information" meeting where the said Agenda would not be followed and no motions would be permitted. In his Report, the Investigator also identified a number of actions taken by the Board that he did not support, which actions in aggregate might constitute an incident of "improper conduct", although the Investigator was uncertain whether they would be so construed.

10 The overall effect of the Report was that it confirmed the Originating Application of the Applicants with respect to the reimbursement of the Deposit in favour of the Applicants and the conduct of the Board with respect to the approval of the PDF version of minutes and the failure to convene the August 20, 2011 meeting.

11 To that effect, the Applicants and Respondents both agreed to a Consent Order on September 16, 2013, which ordered in favour of the Applicants that, among other things, the Corporation reimburse Greg Stokowski the full amount of the Deposit ($14,527.31) plus applicable pre-judgment interest, and that the matter of costs be determined in a Special Chambers Application on September 16, 2013. As of September 16, 2013, the Deposit amount had not been repaid by the Respondents.

12 To that end, I have now heard the parties' submissions on the issue of costs, and received written briefs from both parties.

II. ISSUES

13 The parties have agreed on the final form of the Consent Order of September 16, 2013, but have not agreed on costs. The Consent Order awarded is in favour of the Applicants. Accordingly, the issue of the appropriate costs to be awarded to the Applicants is the only outstanding matter to be decided by this Court.

III. POSITION OF THE PARTIES

14 The Applicants seek solicitor-client costs on a full indemnity basis in the amount of approximately $75,000.00, which they request be payable by the Corporation on a proportionate unit factor basis. This would work out to a cost of approximately $650.00 per unit in the Corporation. The Applicants also request the Respondents bear the full cost of the Investigator's Report.

15 The Applicants contend that the legislative intent of the costs provision in section 67 of the *Act* was to give the Court the ability and discretion to protect owners from having to pay the costs of litigation for making a board do what it is legally obligated to do. The Applicants also argue that as a matter of precedent, it would send the wrong message to condominium corporation boards if the end result of this case was that the Applicants had to bear the prohibitive legal fees they expended in order to recover $14,527.31 - money that was properly spent by them and would encourage the "I dare you" attitude to the detriment of the well-meaning, good natured volunteer who goes above and beyond in an attempt to better the collective whole in a collective ownership situation like a condominium corporation. (The "I dare you" comment arose in an Undertaking that, despite the advice of

the condominium's professional management company to the Board to do whatever they could to avoid litigation, Mr. Herve stated on a few occasions that he "dared" the Applicants to "come after the Board", as then the Board would be obliged to enter into a lawsuit where the Applicants would lose.)

16 In relying on rule 10.31 of the *Rules* and section 67 of the *Act*, the Applicants submit that they should be awarded full costs because they are the clear victors in these proceedings, that the necessity of these legal proceedings was only as a result of the Respondents' conduct and lack of cooperation at several instances during the litigation, that they attempted to settle with the Respondents, and that the issues raised by the litigation and the Investigator's Report are important issues.

17 The Respondents respond that this Court ought to award party-party costs to the Applicants as a reasonable apportioning of the expense of litigation between parties, and an award of solicitor-client costs or a multiple of Schedule C: Tariff of Recoverable Fees ["Schedule C"] costs is exceptional. The Respondents also submit that increased tariff costs are an exception to the general rule, and the indicia supporting an award of increased Schedule C costs are similar to those supporting an award of solicitor-client costs.

18 In the facts of the case at bar, the Respondents submit that there is no conduct by the Respondents warranting an award of solicitor-client costs or an increase to the Tariff of Recoverable Fees. The Respondents also argue that these proceedings were not legally complex nor particularly protracted, and submit that the Applicants, specifically Stokowski, did not properly mitigate. Instead, the Respondents request that any costs payable to the Applicants be set as one times the fees set out in Column 1 of Schedule C.

19 The Respondents also request costs for this Application, and that the costs associated with the Investigator's Report be apportioned between the parties on a 50/50 basis.

IV. THE LAW

A. Trial Judge Discretion to Award Costs

20 It is well-settled law that trial judges have a wide discretion to order costs: rule 10.31(1); *Court of Queen's Bench Act*, RSA 2000, c C-31, s 21. This discretion extends to awarding "any amount that the Court considers to be appropriate in the circumstances, including ... an indemnity to a party for that party's lawyer's charges": rule 10.31(1)(b)(i). However, a trial judge's discretion must be exercised "judicially and in accordance with established principles": ***Lameman v. Alberta***, 2011 ABQB 532 at para 6, leave to appeal refused, 2011 ABQB 724.

21 As the Court of Appeal recently stated in the case of ***Hill v. Hill***, 2013 ABCA 313 at para 38: "We must keep in mind that Schedule C is a purely-optional rubber stamp for a judge, who may use it or not, or amend it, as he or she sees fit."

22 Under section 67(2) of the *Act*, this Court also has broad statutory authority to make certain orders, including costs, where "improper conduct" has been found to exist. Section 67(2) of the *Act* reads as follows:

67(2) Where on an application by an interested party the Court is satisfied that improper conduct has taken place, the Court may do one or more of the following:

(a) direct that an investigator be appointed to review the improper conduct and report to the Court;
(b) direct that the person carrying on the improper conduct cease carrying on the improper conduct;
(c) give directions as to how matters are to be carried out so that the improper conduct will not reoccur or continue;
(d) if the applicant suffered loss due to the improper conduct, award compensation to the applicant in respect of that loss;
(e) award costs;
(f) give any other directions or make any other order that the Court considers appropriate in the circumstances.

23 Rule 10.31 of the *Rules* provides guidance to the Court ordering a costs award:

10.31(1) After considering the matters described in rule 10.33, the Court may order one party to pay to another party, as a costs award, one or a combination of the following:

(a) the reasonable and proper costs that a party incurred to file an application, to take proceedings or to carry on an action, or that a party incurred to participate in an application, proceeding or action, or
(b) any amount that the Court considers to be appropriate in the circumstances, including, without limitation,

(i) an indemnity to a party for that party's lawyer's charges, or
(ii) a lump sum instead of or in addition to assessed costs.

(2) Reasonable and proper costs under subrule (1)(a)

(a) include the reasonable and proper costs that a party incurred to bring an action;

...

(3) In making a costs award under subrule (1)(a), the Court may order any one or more of the following:

(a) one party to pay to another all or part of the reasonable and proper costs with or without reference to Schedule C;
(b) one party to pay to another an amount equal to a multiple, proportion or fraction of an amount set out in any column of the tariff in Division 2 of Schedule C or an amount based on one column of the tariff, and to pay to

another party or parties an amount based on amounts set out in the same or another column;

(c) one party to pay to another party all or part of the reasonable and proper costs with respect to a particular issue, application or proceeding or part of an action;

(d) one party to pay to another a percentage of assessed costs, or assessed costs up to or from a particular point in an action.

...

(6) The Court's discretion under this rule is subject to any specific requirement of these rules about who is to pay costs and what costs are to be paid.

B. **Solicitor-Client Costs**

24 Here, the Applicants request solicitor-client costs on a full indemnity basis; they have not submitted a Bill of Costs but have stated that their costs are approximately $75,000.00.

25 There is some confusion in the jurisprudence regarding the recognition of a distinction between the different scales of costs awards, as well as the terminology used to refer to these different levels of costs. The common law traditionally recognized three different scales of costs in Alberta: party-party (sometimes referred to as "party and party"), solicitor-client (or "solicitor and client"), and solicitor and own client (or "solicitor and his own client") costs. See ***Sidorsky v. CFCN Communications*** (1995), 167 AR 181 at para 5, 27 Alta LR (3d) 296 (QB) [*Sidorsky*], var'd on other grounds, 1997 ABCA 280, 206 AR 382, reconsideration or rehearing ref'd 1998 ABCA 127, 216 AR 151, additional reasons in 1999 ABCA 140, 232 AR 189:

> There are three levels of costs that may be payable by one party to another:
>
> 1. Party and party costs: calculated on the basis of Schedule C of the Alberta Rules of Court or some multiple thereof, plus reasonable disbursements.
> 2. Solicitor and client costs: which provide for indemnity to the party to whom they are awarded for costs that can be said to be essential to and arising within the four corners of the litigation.
> 3. Solicitor and his own client costs: sometimes referred to as complete indemnity for costs. These are costs which a solicitor could tax against a resisting client and may include payment for services which may not be strictly essential to the conduct of the litigation.

26 The issue has also been raised more recently in ***Brown v. Silvera***, 2010 ABQB 224, var'd on other grounds 2011 ABCA 109.

27 A review of the case law reveals that the award of costs to a party on a full indemnity basis has been described interchangeably as both "solicitor-client" and "solicitor and own client" costs, and it seems that the distinction between the two is often one of semantics. I agree with the statement made by Justice Veit of this Court in ***Max Sonnenberg Inc v. Stewart, Smith (Canada) Ltd***, 48 Alta LR (2d) 367 at 371, [1987] 2 WWR 75 (QB) [*Max Sonnenberg*], which statement I note was made more than twenty-five years ago, although it remains relevant:

> Because of the confusion in the jurisprudence, I agree with the suggestion made by Megarry V.C. in *EMI Records Ltd. v. Ian Cameron Wallace Ltd.*, [1983] Ch. 59, [1982] 3 W.L.R. 245, [1982] 2 All E.R. 980 (Ch. D.), to the effect that when a judge wishes to indemnify a party in a costs award the phrase "indemnity basis" should be preferred to "solicitor and his own client".

28 Justice Rooke (as he then was) also discussed the distinction between solicitor-client costs and solicitor and own client costs in ***Guarantee Co of North America v. Beasse et al*** (1993), 139 AR 241 at para 4, 14 CPC (3d) 182 (QB) [*Beasse*] where he concluded the distinction was one "which is not well documented in case authority, and is (I state with some hesitation) perhaps not well understood by practitioners, and some judges (which included me)".

29 Justice Rooke summarized the distinction at paras 7-9 of *Beasse*:

> Taxing Officer Morin of the Alberta Court of Queen's Bench in *Canada Permanent Trust Co. v. Santos* (1985), 63 A.R. 103, at 105, cited Orkin, *The Law of Costs* (Toronto: Canada Law Book, 1968), at 2-7, especially 5:
>
> > Orkin states that costs "as between solicitor and client" are intended to provide complete indemnity as to costs essential to and arising from the four corners of the litigation. This is more generous than costs on a party and party basis, but not necessarily the same as costs "as between a solicitor and his client".
>
> I would add reference to Orkin, *The Law of Costs*, second edition (Aurora: Canada Law Book, 1992) ("Orkin, 1992"), at 1-1 to 1-10, and note further that Orkin defined costs as between a solicitor and his client as being "the costs that a solicitor can tax against a resisting client" -- see also: *Colquhoun v. Colquhoun* (1988), 52 Man. R. (2d) 193, at 197.
>
> Then Taxing Officer Morin went on to state his views, with which I am in accord:
>
> > My view is that costs "as between solicitor and client" are not necessarily less than costs "as between a solicitor and his client", but that unnecessary costs are not recoverable. This might be viewed as "no frills" litigation, whereas costs "as between a solicitor and his client" might allow for "extras", if properly instructed by the client ...
> >
> > Where neither unnecessary legal services are provided nor unnecessary disbursements incurred, the practical outcome would seem to be that costs "as between a solicitor and his client" would equal the same amount as costs calculated "as between solicitor and client".

30 I accept in principle that such a distinction was intended to exist in this Court as between "solicitor-client" and "solicitor and own client" scales of costs. However, given the interchangeable

use of these two terms in the jurisprudence, as well as the inconsistent application of the actual costs awarded, I am not convinced that the distinction exists on a practical level.

31 Nonetheless, in my view, the significant issue to be determined by this Court is whether the costs are to be awarded on a full indemnity or partial indemnity basis. To that end, when I use the term "solicitor-client" costs, I am referring to costs awarded on a full indemnity basis for costs essential to and arising from the four corners of the litigation, and have relied on the jurisprudence awarding "solicitor and own client costs" and "solicitor and client costs" where such costs were awarded on a full indemnity basis.

32 Further, judicial authority to order solicitor-client costs is not totally unfettered, and must be awarded in accordance with established legal principles regarding when such an "exceptional" award is justified. In ***Jackson v. Trimac Industries Ltd*** (1993), 138 AR 161 at para 28, 8 Alta LR (3d) 403 (QB), aff'd on costs (1994), 155 AR 42, 20 Alta LR (3d) 117 (CA) [*Jackson*], Justice Hutchinson listed the following authorities as examples of the "rare and exceptional or unusual" cases in which solicitor-client or solicitor and own client costs may be awarded:

1. circumstances constituting blameworthiness in the conduct of the litigation by that party (Reese, [1992] A.J. No. 745);
2. cases in which justice can only be done by a complete indemnification for costs (Foulis v. Robinson, [1978] O.J. No. 3596);
3. where there is evidence that the plaintiff did something to hinder, delay or confuse the litigation, where there was no serious issue of fact or law which required these lengthy, expensive proceedings, where the positively misconducting party was "contemptuous" of the aggrieved party in forcing that aggrieved party to exhaust legal proceedings to obtain that which was obviously his (Sonnenberg);
4. an attempt to deceive the court and defeat justice, an attempt to delay, deceive and defeat justice, a requirement imposed on the plaintiff to prove facts that should have been admitted, thus prolonging the trial, unnecessary adjournments, concealing material documents from the plaintiffs and failing to produce material documents in a timely fashion (Olson, [1986] A.J. No. 347);
5. where the defendants were guilty of positive misconduct, where others should be deterred from like conduct and the defendants should be penalized beyond the ordinary order of costs (Dusik v. Newton, [1984] B.C.J. No. 3084);
6. defendants found to be acting fraudulently and in breach of trust (Davis v. Davis, [1981] M.J. No. 320);
7. the defendants' fraudulent conduct in inducing a breach of contract and in presenting a deceptive statement of accounts to the court at trial (Kepic v. Tecumseh Road Builder et al., [1987] O.J. No. 890);
8. fraudulent conduct (Sturrock, [1990] A.J. No. 738);
9. an attempt to delay or hinder proceedings, an attempt to deceive or defeat justice, fraud or untrue or scandalous charges (Pharand, [1991] A.J. No. 902).

C. **Solicitor-Client Costs Awarded Under Section 67 of the *Act***

33 Jurisprudence considering section 67 of the *Act* is limited, particularly on the award of solicitor-client costs in the context of improper conduct of a condo board.

34 In ***Condominium Corporation No 0111505 v. Anders***, 2005 ABQB 401 [*Anders*], Justice Clark awarded "full indemnity costs" to the Defendant against the Plaintiff condo board, holding that she "should not have been put to the cost of retaining counsel ... [and] is entitled to her costs against the Board on a full indemnity basis": para 9. As I will discuss further in my analysis, the facts of *Anders* resemble the facts in the case at bar insofar as the board in *Anders* chose to proceed with unnecessary litigation before this Court and ought not to have put the Defendant to the cost of such litigation in the first place. Justice Clark did not, however, make a finding of improper conduct against the Board in *Anders*, focusing instead on the fact that the litigation was ultimately unnecessary.

35 In ***Condominium Plan No 772 0093 v. Rathbone***, 2010 ABQB 69 [*Rathbone*], Master Smart canvassed the jurisprudence awarding costs under the *Act* in deciding whether it was appropriate to award solicitor-client costs in relation to a finding of improper conduct on the part of an owner under section 67. Although section 67 provides for the award of costs in a finding of improper conduct, the condominium corporation relied on sections 39 and 42 of the *Act* (which reliance was, in my respectful opinion, an error) in order to recover solicitor-client costs from the Defendant. In his analysis at paras 15-18, Master Smart focused on the award of solicitor-client costs under the *Act* and whether the condominium by-laws in question provided for the award of solicitor-client costs:

> In *Maverick Equities Inc. v. Condominium Plan No. 942 2336*, 2008 ABCA 221, which involved an appeal from a decision of the chambers judge relating to whether certain behaviour of the unit owner was improper conduct for purposes of s. 67 of the Act, the Court of Appeal granted solicitor-client costs of the appeal, but such costs were provided for in the bylaws.
>
> Solicitor-client costs have been awarded in certain other cases dealing with s. 67 of the Act, but largely without comment as to whether the bylaws provided for such.
>
> In *934859 Alberta Inc. v. Condominium Corporation*, 2007 ABQB 640, 434 A.R. 41, Chrumka J. heard an appeal by a condominium corporation from a Master's order granted on a s. 67 application in favour of the applicant unit owner. The appeal was allowed and the corporation was granted party-party costs against the unit owner.
>
> In *Devlin v. Condominium Plan No. 9612647*, 2002 ABQB 358, 318 A.R. 386, the applicant unit owner sought a declaration that a restrictive covenant against leasing the condominium units was void. He was successful and asked for solicitor-client costs. No mention was made as to whether the bylaws allowed for such costs. Power J. pointed out (at para. 28) that costs are in the discretion of the Court under the Alberta Rules of Court, but that discretion is limited by judicial propriety. While he acknowledged that he had the discretion to order solicitor/client costs in a proper case, he was of the view that the matter before him was not such a case. In the end result, he ordered party-party costs.

36 Ultimately, Master Smart concluded in *Rathbone* that it was not appropriate to award solicitor-client costs to the Plaintiff condominium corporation under sections 39 and 42 of the *Act* because the condominium corporation did not establish that there was money owing from the Defendant pursuant to section 39 and did not take steps to collect any amount. Further, in his analysis, Master Smart noted that he reviewed the bylaws of the condominium corporation and they did not provide for solicitor-client costs. Party-party costs were awarded. I note that Master Smart has written several condo decisions, specifically considering section 67 of the *Act* in a number of them.

37 I agree with the analysis of Master Smart in *Rathbone* that sections 39 and 42 of the *Act* are not the appropriate basis for an award of solicitor-client costs upon a finding of improper conduct under section 67 of the *Act*. In my view, the award of costs under sections 39/42 of the *Act* requires a different analysis and involves markedly different issues than the award of costs under section 67 of the *Act*. Sections 39/42 concern a condominium corporation's ability to recover debts owing to it from owners, including (i) the recovery of reasonable costs, including legal expenses and interest, incurred by the corporation in collecting such amounts, or (ii) the reasonable expenses incurred by the corporation with respect to the preparation, registration, enforcement and discharge of a caveat when a caveat is required for such debts. This language is different than that embodied in section 67, which gives the Court the power to "award costs". Further, and most significantly in my opinion, sections 39 and 42 do not deal with findings of improper conduct.

38 Master Smart, in undertaking an analysis and review of the section 67 costs cases vis-à-vis whether such costs are provided for in the by-laws of the condominium corporation, appears to be relying on the Court of Appeal's statement in ***Maverick Equities Inc v. Condominium Plan No 942 2336***, 2008 ABCA 221 at para 15 [*Maverick Equities (CA)*] that: "The appellant is entitled to solicitor and client appellate costs, as provided for in the bylaws".

39 Similarly, Justice Lee in ***Owners: Condominium Plan No 022 1347 v. N Y***, 2003 ABQB 790 at para 80 granted solicitor-client costs to the plaintiff condominium corporation on an indemnity basis "pursuant to ... the Bylaws", finding improper conduct on the part of the Defendant owner. However, in his reasons at para 79, Justice Lee stated: "The Condominium Corporation is entitled to its costs as the sole reason it is in court proceedings is because the Appellant failed to comply with the Bylaws, and then failed to leave the premises when she was evicted" [emphasis added].

40 With the greatest respect, I do not interpret the Court of Appeal's holding in *Maverick Equities (CA)* to impose an additional requirement under section 67 of the *Act* that a Court may only award solicitor-client costs where such solicitor-client costs are provided for in the by-laws of the condominium in question. Such a requirement is not prescribed by the *Act*, and I see no reason to add this requirement to the analysis of a costs award under section 67; to do so would unnecessarily circumscribe judicial discretion. The Courts are already guided by the legal principles enunciated in *Jackson* and by the considerations in rules 10.31 and 10.33 in determining the appropriateness of a solicitor-client costs award.

41 It is significant that the Court in *Devlin* and *Rathbone* recognized that it had the discretion to award solicitor-client costs, but declined to do so on the basis that the circumstances required for the award of solicitor-client costs did not exist on the facts. Similarly, Justice Chrumka in his very useful decision of ***934859 Alberta Inc v. Condominium Corporation No 0312180***, 2007 ABQB 640, granted party-party costs in favour of the condominium corporation, reversing the order of the Master on the basis that there was no improper conduct on the part of the Board in that case.

42 Whether a condo's by-laws provide for solicitor-client costs may at times factor into the Court's analysis in awarding such costs; however, I do not think it is a useful or relevant consideration in the present situation and I would not import it as a requirement into the Court's analysis of a costs award under section 67(2) of the *Act*. The case at bar involved the improper conduct of a Board of Directors that resulted in significant prejudice to the Applicants. Having considered the relevant facts, I have determined that the circumstances described in *Jackson* are satisfied in the present case, for reasons I will elaborate on in my analysis.

V. ANALYSIS

A. Solicitor-Client Costs

43 Taking into account all of the facts of the case at bar, and relying on rule 10.31(1)(b)(i) of the *Rules* and section 67(2)(e) of the *Act*, as well as the established legal principles enunciated in *Jackson*, I consider it appropriate to award the Applicants solicitor-client costs.

i. Circumstances Enunciated in *Jackson v. Trimac*

44 The Board's aberrant conduct falls within the exceptional circumstances listed in *Jackson* as justifying an award of solicitor-client costs in the present case. I accept the Applicants' argument and find circumstances constituting blameworthiness in the conduct of litigation by the Respondents, and conduct which constituted an attempt to hinder and delay the litigation, requiring the plaintiff to prove facts that should have been admitted, and failure to produce material documents in a timely fashion.

45 The Applicants were forced to make unnecessary Applications in this Court due to a lack of cooperation on the part of the Respondents. This includes the July 30, 2012 Application by the Applicants for an Order making directions for the efficient progression of this matter. Such an Application and Order were only required due to the fact that the Respondents failed to file Affidavits by the end of July, notwithstanding counsel's agreement to hold mutual questionings by then. This Order was granted. This also includes the urgent October 11, 2012 application to sanitize the Court file prior to the October 16, 2012 hearing, which was a result of the Respondents' breach of the July 30, 2012 Order by filing an additional affidavit after the Court-ordered deadline and seeking to rely upon this evidence in their Brief. This Order was also granted.

46 This conduct also includes the fact that the Applicants made several attempts to avoid litigation entirely, both directly and through their counsel, even attempting to settle as late as the questioning stage of this litigation. I accept the argument of the Applicants in this regard and find that the Board, against the advice of their professional property manager, remained steadfast and stubborn in its refusal to deal with the Applicants and to settle this matter prior to proceeding to litigation. Such steadfast refusal continued even after this Court made a clear finding of improper conduct on the part of the Board in its October 16, 2012 Order.

47 For example, despite the Investigator's Report being filed on March 2, 2013, which Report recognized that the PDF version of meeting minutes was the correct version, the incorrect version of the meeting minutes (the Word version) was still posted on the Corporation's website nearly six months later, at the time of the September 16, 2013 special hearing in this Court on costs.

48 I also note that the Corporation actively misinformed condominium owners regarding this Court's October 16, 2012 Order by mailing an "update" to owners on or about January 11, 2013 stating that an investigator had been appointed to determine if there was any wrongdoing on the part of the Board, and not stating that this Court made a finding of improper conduct on the part of the Board in its October 16, 2012 Order. This misinformation was posted on the Sunreal Property Management Ltd. website on or about January 11, 2013 as an "Update on Legal Proceedings and Special Assessment" which levied a special assessment of $500.00 on all unit owners to fund this litigation for the Corporation against the Applicants.

49 Further, on or about May 9, 2013, Sunreal Property Management Ltd. issued a newsletter to owners at the condominium essentially blaming the Applicants for this litigation, and misinforming owners that the Applicants were responsible for this litigation specifically proceeding to this Court, an argument which they repeated at the September 16, 2013 special hearing. The newsletter states:

> The Applicants and their solicitor established the venue of these legal proceedings. They have been provided numerous opportunities and options to revise the sixteen (16) remedies sought under their Originating Application, use more appropriate and efficient venues for seeking remedy, but they continue to support their legal rights through the Court of Queen's Bench of Alberta. Therefore, we have been advised we are obligated to participate in this process to ensure an equitable and fair decision.

50 I reject this position, and find the Board has continuously behaved in a harsh and oppressive manner toward the Applicants, including: vilifying the Applicants to all owners at the condominium, removing them from the Board, and placing the blame for these proceedings on the Applicants in their official communications with owners, such as the newsletter quoted above. This represents the abuse of power I find in the way that the Board has conducted itself, both by actively misinforming the owners at the condominium of the facts of these proceedings, and by preventing the Applicants from having an opportunity to present their facts to other unit owners. The Respondents argue that the Applicants have not been prejudiced in this process; I disagree.

51 Neither do I accept the Respondents' argument that the case of ***Evans v. The Sports Corporation***, 2011 ABQB 616 [*Evans*] somehow stands for the proposition that a party's bad behaviour is justified in "a bitterly contested lawsuit" where the parties do not like each other: *Evans* at para 31. Further, this Court has already made a finding of improper conduct on the part of the Respondents. That is quite opposite to the facts in *Evans*, where Justice Graesser stated at para 47: "The [unfounded] allegations created noise, but were irrelevant."

52 The argument that the Applicants chose this Court as the venue for these proceedings is also without merit, as the *Act* directs applicants to this Court, the Court of Queen's Bench, as the appropriate forum for resolving disputes related to improper conduct under the *Act*. This is significant as it precluded the Applicants from filing in Provincial Court, thereby increasing their legal fees and expenses. Taking into consideration the total amount of the claim for the Deposit (less than $15,000.00), the ability to make an application in Provincial Court would have minimized legal fees on all sides. On this point, the Respondents' argument that the Applicants "chose" to proceed in this Court is in error, as they were in fact required to proceed in the Court of Queen's Bench in order to litigate these matters.

53 The Respondents have made numerous arguments regarding the characterization of this litigation, arguing that this dispute was not about a $14,527.31 debt, nor about the correct version of board meeting minutes. Rather, they continue to assert that the Board members acted honestly and in good faith and that the refusal of the Board to reimburse Stokowski for the Deposit and to rectify the incorrect version of meeting minutes is due to the fact that this matter is ultimately about the powers of a Board of Directors, and how a condominium board fulfils its duties to "interested parties". The Respondents argued that the fundamental issues to be determined relate to a condominium board's ability to ensure that projects are properly approved, that decisions are clearly and fully understood and that a condominium corporation's scarce financial resources are properly accounted for and spent. I reject this argument.

54 This litigation fundamentally concerned the improper conduct of a Board of Directors of a condominium corporation, and the use of oppressive, prejudicial, and coercive tactics taken by the Board towards the Applicants. As already discussed, these tactics continued throughout litigation. The argument put forth by the Respondents is not consistent with the manner in which they have conducted this litigation, nor in their repeated refusal to settle with or deal with the Applicants who attempted to avoid litigation, nor in their failure to accurately inform owners at the Corporation of the facts regarding the litigation.

55 There were instances of positive misconduct on the part of the Respondents, and others should be deterred from like conduct. In that regard, the Respondents should be penalized beyond the ordinary order of costs. This is also illustrated by the "I dare you to sue" attitude taken by the Board during the conduct of this litigation. I would expect that a Board of Directors acting on behalf of a condominium corporation honestly and in good faith would not take such an approach to costly and time-consuming litigation where such litigation could and ought to have been avoided. The Board members ought to have been acting in the best interests of the Corporation, not on their own personal agendas.

56 The Respondents argued repeatedly in oral argument that the conduct of the Board was not sufficient to justify an award of costs: that there has been no scandalous, outrageous or reprehensible conduct on the part of the Board during the course of the litigation itself. As well, the Respondents downplayed both the "I dare you to sue because you'll lose" comment made by a member of the Board (my paraphrasing) and the intent of the Board in misinforming the owners regarding the status of the litigation, arguing that it was an honest mistake and there was no intent to deceive the owners. I similarly reject these arguments. (At some point, words carry meaning and this is a prime example.)

57 Here, I believe a complete indemnification for costs is warranted and, from what I have seen, a proper exercise of my authorities under the *Act* and the *Rules* can only be done by awarding a full indemnification of costs.

ii. Consideration of Factors Listed in Rule 10.33

58 In making this award, I am also guided by rule 10.33 of the *Rules*, which sets out a number of factors that may be considered by the Court in making a costs award:

> 10.33(1) In making a costs award, the Court may consider all or any of the following:

(a) the result of the action and the degree of success of each party;
(b) the amount claimed and the amount recovered;
(c) the importance of the issues;
(d) the complexity of the action;
(e) the apportionment of liability;
(f) the conduct of a party that tended to shorten the action;
(g) any other matter related to the question of reasonable and proper costs that the Court considers appropriate.

(2) In deciding whether to impose, deny or vary an amount in a costs award, the Court may consider all or any of the following:

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

59 The Applicants were the successful party of this Application and the Originating Application (rule 10.33(1)(a)), and have claimed and been awarded the full amount of $14,527.31 (rule 10.33(1)(b)). There is no apportioning of liability (rule 10.33(1)(e)). The Respondents argue that the Applicants were not wholly successful; I reject this argument.

60 I have also considered the importance of the issues here, which I agree with the Applicants will ultimately benefit all of the unit owners at the Corporation (rule 10.33(1)(c)). I accept the Applicants' argument that the Report is clear and unequivocal, and makes recommendations and provides advice to the Board relating to the overall governance of the Corporation, being information which will benefit all owners in the Corporation.

61 I have also considered, as discussed above, the conduct of the Respondents (rules 10.33(2)(a)(b)(d)(g)), including conduct which amounted to applications, proceedings or steps in the Action which were unnecessary, and that unnecessarily lengthened or delayed the action or any stage or step of the action; as well as the Respondents' denial of or refusal to admit facts that should have been admitted; and the Respondents' misconduct.

62 In my opinion, which is confirmed by the findings outlined in the Investigator's Report, the Applicants should never have had to resort to litigation in this Court in the first place. The actions of the Board, in refusing to reimburse a duly delegated agent of the Corporation for the amount of $14,527.31 (which amount I note is less than 25% of the costs being sought), in repeatedly refusing to settle with the Applicants and instead "daring" them to sue, instead engaging in a campaign of

public rebuke and criticism of the Applicants, was behaviour that both necessitated and prolonged this litigation. So, too, was the conduct of the Board in steadfastly refusing to approve the PDF version of the meeting minutes in question.

63 In making these findings, I feel compelled to state that this is not a case where the Board asserted in good faith a legal position through established legal procedures, which legal position turned out to be erroneous: *Maverick Equities CA* at para 14. This Court's finding, which finding was confirmed by the Report of the Investigator, was improper conduct on the part of the Board, which conduct was carried out quite intentionally and against the advice of the Board's professional management company. Had the Board acted appropriately, and taken steps to reimburse the Applicants for the Deposit amount and approve the appropriate version of meeting minutes, this matter would never have proceeded to litigation, thereby eliminating significant legal costs for all parties. The conduct of the Board was frivolous and unnecessary and such frivolous and unnecessary litigation ought to be discouraged.

64 As I have already discussed, I accept the Applicants' argument that they only took necessary legal action and have been successful at every step of this litigation.

B. **Quantum of Costs to Be Awarded**

65 Solicitor-client costs provide a "full indemnity for all legal costs contracted for between solicitor and client which are necessary for the proper presentation of the case": ***Boje v. Boje (Estate of)***, 2005 ABCA 73 at para 34. In other words, solicitor-client costs are based on what a solicitor could claim against a resisting client for work "reasonably connected to the proceedings": ***Trizec Equities Ltd. v. Ellis-Don Management Services***, 1999 ABQB 801 at para 19; see also *Sidorsky, Max Sonnenberg.*

66 In awarding the Applicants' requested solicitor-client costs, I am cognizant of Justice Kenny's statement in ***Cooper v. Cooper***, 2013 ABQB 117 [*Cooper*] at para 14 that the amount of solicitor and own client costs awarded must "bear some resemblance to the quantum in dispute." Generally, I agree. In *Cooper*, Justice Kenny reasoned that it was inappropriate to award $28,000.00 in solicitor and own client costs, exclusive of disbursements, for a matter in which the plaintiff was awarded $56,000.00 in pension benefits. As a result, Justice Kenny awarded solicitor and own client costs of only $15,000.00 plus reasonable disbursements: *Cooper* at paras 14-15.

67 The Respondents, relying on *Cooper,* argued that it is difficult to justify an award of solicitor-client costs especially when the quantum in dispute is low. The Respondents also submit that this Court ought to take into consideration the quantum in the present dispute in determining the quantum of costs to be awarded.

68 With respect to Justice Kenny's *Cooper* decision and the problematic circumstances of the case at bar, I do not think it appropriate to calibrate the Applicants' costs in proportion to the quantum in dispute. A principled analysis focuses on whether the amount of costs to be awarded is reasonable, necessary and prudent, and whether the costs are reasonably connected to the work. I have also looked at the factors in rules 10.33(2)(a)(b)(d) and (g), as discussed above.

69 The Applicants have identified their costs as being in the range of $75,000.00. I am satisfied that the Applicants are entitled to a full indemnity for their costs, but have not fixed the amount of solicitor-client costs to be awarded as the Applicants have not submitted a Bill of Costs. For greater certainty, the quantum of the solicitor-client costs to be awarded should provide a complete indem-

nity for the Applicants' costs which were necessary for the proper presentation of their case and which were arising from the four corners of the litigation.

VI. CONCLUSION

70 I award the Applicants solicitor-client costs and, should there be a dispute about what that amount is, I direct it to taxation.

71 I order that the Report of the Investigator be filed with the Court and made available to all parties, with the cost of the Report being borne by the Corporation. The Report and this Judgment should be specifically provided to all of the unit owners in the Corporation without charge, as they are the beneficiaries of this information.

W.A. TILLEMAN J.