Clerk's stamp:	
COURT FILE NUMBER	1103 14112
COURT	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

APPLICANTS	ROLAND TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, CATHERINE TWINN, as trustees for the 1985 Sawridge Trust
DOCUMENT	**BRIEF OF THE TRUSTEES FOR SPECIAL CHAMBERS CASE MANAGEMENT MEETING ON JUNE 30, 2015**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

Dentons Canada LLP
2900 Manulife Place
10180 - 101 Street
Edmonton, AB T5J 3V5

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Telephone: (780) 423-7100
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Chamberlain Hutchison
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Edmonton, AB T5N 4C1

Attention: Janet L. Hutchison
Solicitors for the Public Trustee of Alberta

TABLE OF CONTENTS

INTRODUCTION

1. This Brief is in support of an application concerning the Sawridge Band Inter Vivos Settlement dated April 15, 1985 (the "1985 Sawridge Trust") brought by the trustees of the 1985 Trust (the "trustees"). The trustees seek the advice and direction of the Court with respect to:

   (a) the litigation plan dated April 30, 2015 and the litigation plan dated June 12, 2015;

   (b) the offer of settlement from the trustees dated June 1, 2015; and

   (c) the Public Trustee's future expenditures including hiring a Third Party Agent.

2. The litigation in this action has stalled and the Public Trustee has not responded in a substantive way to the trustees' proposed litigation plan. The trustees have made an offer to the Public Trustee to settle all issues to the unmitigated benefit of the minor children who are affected by a change in definition of the 1985 Sawridge Trust. To the date of this brief the Public Trustee has not responded to the offer. The Public Trustee proposes to retain a third party agent to assist it in ongoing litigation at costs that are of concern to the trustees.

3. Both parties are required to manage this litigation and plan its resolution in a timely and cost-effective way. This obligation derives not only from the *Rules of Court* but also from both parties' roles as trustees, who are obligated to advance this litigation to the benefit and expense of the beneficiaries to the 1985 Sawridge Trust as well as the minors represented by the Public Trustee. As the Public Trustee has unfortunately not responded in a substantive way to the trustees' proposed litigation plan, the Court's advice and direction is required to move this matter expeditiously towards resolution.

4. Further, the Court in its inherent jurisdiction in the protection of minors and its *parens patriae* authority must intervene on behalf of the interested children to review the offer of settlement from the trustees. The Court must consider whether it is appropriate for the Public Trustee to refuse the offer given that it represents a complete success in this matter for the minor children.

5. Finally, the trustees would be remiss in their fiduciary duty if they did not bring to the Court's attention and seek direction with respect to the Public Trustee's proposal to hire a third party agent in Ontario to assist it in its mandate when like services are available from local agents at a fraction of the cost. The trustees require the Court's direction with respect to the retainer of this agent, and the trustees also seek the right to a full audit and review of the Public Trustee's accounts at the conclusion of this matter with all accounts, including those of agents retained by the Public Trustee, produced in full without redaction. In accordance with the direction from the

Court of Appeal, this would ensure that the Public Trustee's costs are subject to oversight in the interest of fairness and reasonableness.

PART I – STATEMENT OF FACTS

A. Proposed Litigation Plan

6. The trustees served the solicitors for the Public Trustee on April 30, 2015 with a proposed litigation plan setting out a proposed schedule of actions to move this matter forward expeditiously. A copy of the proposed litigation plan is attached at **Tab 1.**

7. The solicitors for the Public Trustee have not provided a substantial response to the Trustee's proposed litigation plan.

8. As the litigation plan proposed is out of date, the trustees propose an updated litigation plan dated June 12, 2015 attached at **Tab 2.**

9. The trustees wish to proceed to a conclusion of the litigation and wish to have the Court's guidance and direction to proceed expeditiously.

B. Offer of Settlement

10. The trustees have made a "with prejudice" settlement offer to the Public Trustee which the trustees believe to be as near a complete favorable resolution of the minor children's concerns. A copy of the offer of settlement is attached at **Tab 3.**

C. Hiring of Third Party Agent by Public Trustee

11. Counsel for the Public Trustee has indicated that it wishes to retain the assistance of an agent to assist it in the further handling of this matter. A copy of a letter from the solicitors for the Public Trustee dated May 19, 2015 addressing the matter is attached at **Tab 4.**

12. In accordance with the Order of Mr. Justice Thomas pronounced on June 12, 2012, the Public Trustee is entitled to full indemnification for its costs for participation in these proceedings, to be paid by the 1985 Sawridge Trust. A copy of the Order of Mr. Justice Thomas is attached at **Tab 5**, and Reasons for Judgment filed June 12, 2012 are attached at **Tab 6.**

13. An appeal was made to the Alberta Court of Appeal. In its Memorandum of Judgment, the Court of Appeal noted that the costs award should not be construed as a "blank cheque" and that the costs incurred "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." See attached Memorandum of Judgment filed June 19, 2013 at **Tab 7**.

14. To date, the trustees have paid each of the accounts rendered by the Public Trustee. The Public Trustee has now requested the assistance of a third party agent to assist in respect of legal research and other services.

PART II - ISSUES

(a) Is a Litigation Plan warranted and is the Public Trustee required to respond to it?

(b) Should the Court in its inherent jurisdiction to protect minors and its *parens patriae* jurisdiction review the offer of settlement and determine whether it is appropriate for the Public Trustee to refuse the generous settlement offered to the minor children?

(c) Should the Public Trustee retain lawyers from out-of-province with significant fees payable by the Trust when the same services are available in Alberta at less cost, and should the trustees have the right to a full audit and review of the Public Trustee's accounts at the conclusion of this matter with all accounts, including those of agents retained by the Public Trustee, produced in full without redaction?

PART III - SUBMISSIONS

A. Law

(a) Rules of Court - Proposed Litigation Plan

15. Rule 4.1 provides that parties are responsible for managing their dispute and for planning its resolution in a timely and cost-effective way.

16. Rule 4.2 states that this responsibility requires (amongst other things) that the parties:

(a) act in a manner that furthers the purpose and intention of the rules described in Rule 1.2; and

(b) respond in a substantive way and within a reasonable time to any proposal for the conduct of an action.

17. The foundational Rule 1.2 provides that the purpose of the rules is to provide a way by which claims can be fairly and justly resolved through a court process in a timely and cost-effective manner.

18. Master K.R. Laycock in *Weins v Dewald*, 2011 ABQB 400 at para 16 [**Tab 8**] explained the relationship between these rules as follows:

> One of the principal goals of the rules is to encourage the parties to resolve their claims fairly and justly in a timely and cost-effective manner (rule 1.2(1)). In order to achieve this goal Part Four makes it the responsibility of the parties to manage their dispute in a timely and cost-effective way (rule 4.1). Rule 4.2(b) makes it the responsibility of the parties to respond in a substantial way and within a reasonable time to any proposal for the conduct of an action in a standard case.

19. If the Court is not satisfied that an action is being managed in accordance with Rule 4.2, the Court has the power to grant a procedural order pursuant to Rule 4.9.

20. The trustees seek the Court's direction in respect of a litigation plan to move the matter to a conclusion. A proposed plan is attached at **Tab 2**.

(b) Statutory Provisions Protecting Minors' Interests

21. Various legislation provides the Court with jurisdiction to protect minors' interests, including the *Minors' Property Act*, SA 2004, c M-18.1, which allows the Court to authorize or direct any disposition of or action respecting property of a minor if in the Court's opinion it is in the minor's best interest to do so (s 2) [**Tab 9**].

22. Under the *Minors' Property Act* a Court may confirm a settlement of a minor's claim if in the Court's opinion it is in the minor's best interest to do so (s 3) [**Tab 9**]. A settlement of a minor's claim is binding on a minor only if confirmed by the Court (s 4) [**Tab 9**].

23. Similarly, under the *Trustee Act*, RSA 2000, c T-8, s 42 [**Tab 10**] prior to approving variation of a trust the Court must be satisfied that it appears to be for the benefit of minor beneficiaries.

(c) The Court's *parens patriae* jurisdiction

24. The common law *parens patriae* role of the Courts is summarized in *E. v Eve (Guardian Ad Litem)*, [1986] 2 SCR 388, 31 DLR (4th) 1 [**Tab 11**] by the Supreme Court of Canada, per La Forest J., at p 28, as follows:

> The *parens patriae* jurisdiction is, as I have said, founded on necessity, namely the need to act for the protection of those who cannot care for themselves. The courts have frequently stated that it is to be exercised in the "best interest" of the protected person, or again, for his or her "benefit" or "welfare."
>
> The situations under which it can be exercised are legion; the jurisdiction cannot be defined in that sense. As Lord MacDermott put it in *J. v. C.*, [1970] A.C. 668 at p. 703, the authorities are not consistent and there are many twists and turns, but they have inexorably "moved towards a

> broader discretion, under the impact of changing social conditions and the weight of opinion ... ". In other words, the categories under which the jurisdiction can be exercised are never closed. Thus I agree with Latey J. in *Re X, supra*, at p. 699, that the jurisdiction is of a very broad nature, and that it can be invoked in such matters as custody, protection of property, health problems, religious upbringing and protection against harmful associations. This list, as he notes, is not exhaustive.
>
> What is more, as the passage from *Chambers* cited by Latey J. underlines, a court may act not only on the ground that injury to person or property has occurred, but also on the ground that such injury is apprehended. I might add that the jurisdiction is a carefully guarded one.

25. 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 [**Tab 12**]; *1985 Sawridge Trust v Alberta (Public Trustee)*, 2012 ABQB 365 at para 16 [**Tab 6**].

26. The exercise of the inherent *parens patriae* jurisdiction "is warranted whenever the best interests of the child are engaged": *Alberta (Child, Youth and Family Enhancement Act, Director) v DL*, 2012 ABCA 275 at para 4 [**Tab 13**]; *1985 Sawridge Trust v Alberta (Public Trustee)*, 2013 ABCA 226 at para 25 [**Tab 7**].

B. Application of Law

(a) Proposed Litigation Plan

27. The trustees' proposed litigation plan accords with its responsibility to manage this action in a timely and cost-effective way as intended by the Rules.

28. Contrary to its responsibility under the Rules, the Public Trustee has failed to respond in a substantial way and within a reasonable time to the Trustee's proposal for the completion of Questioning, mediation and the Advice and Direction Application. This failure undermines one of the principal goals of the Rules to encourage parties to resolve their claims fairly and justly in a timely and cost-effective manner.

29. Moreover, as trustees each party is mutually obligated to act efficiently and expeditiously. Both parties are advancing the litigation to the benefit and expense of beneficiaries. While the parties may be adverse to each other, they share a common obligation to advance the dispute to the benefit of the various beneficiaries of the trust.

30. In the circumstances, the Court has the power to grant an order setting a litigation plan as set out in Tab 2 or as the Court may deem appropriate.

(b) Offer of Settlement

31. Pursuant to the *Minors' Property Act* and *Trustee Act*, *supra* [**Tabs 9 & 10**], the Court has jurisdiction to act in certain instances where in the Court's view it is in the minors' best interest to do so.

32. Moreover, jurisprudence confirms that the Court's *parens patriae* jurisdiction goes well beyond its statutory authority. The matters in which it can be invoked are boundless and include any instance in which a minor's interests require protection.

R. W. v Alberta (Child, Youth and Family Enhancement Act Director), *supra* at para 15 [**Tab 12**]
1985 Sawridge Trust v Alberta (Public Trustee), *supra* at para 5 [**Tab 7**]
E. v Eve (Guardian Ad Litem), *supra* at p 28 [**Tab 11**]

33. It is respectfully submitted that this is a case in which the Court must invoke its inherent *parens patriae* jurisdiction in order to review the offer of settlement from the trustees and determine whether it is appropriate for the Public Trustee to refuse the generous settlement offered to the minor children.

34. Notably, it has already been found by the Alberta Court of Appeal that the interests of the affected minors require protection in this matter: *1985 Sawridge Trust v Alberta (Public Trustee)*, 2013 ABCA 226 at para 27 [**Tab 7**]. From this arose the Court's appointment of the Public Trustee.

35. However, the appointment of the Public Trustee is not the end of the matter. The Court retains jurisdiction whenever the best interests of the affected minors are engaged.

Alberta (Child, Youth and Family Enhancement Act, Director) v DL, *supra* at para 4 [**Tab 13**]

36. It is respectfully submitted that the best interests of the affected children are clearly engaged in this matter. The trustees have offered to "grandfather" the 20 children who have not yet been admitted to membership such that they would not lose their beneficiary status despite the proposed change in definition of the 1985 Sawridge Trust. These individuals would keep their beneficiary status throughout their lifetime.

37. Accordingly, the trustees are essentially offering the minor children represented by the Public Trustee an unqualified success in this matter. Irrespective of their ability to obtain membership, these individuals would be included in the 1985 Sawridge Trust. While the trustees maintain that these individuals would likely become members in any event, the trustees would nevertheless grant them irrevocable beneficiary status in the 1985 Sawridge Trust.

38. Given the significant benefits to being granted beneficiary status without the need to apply for membership in the Sawridge Band, the best interests of the minor children are evidently engaged. As there is no guarantee that these minors would be granted beneficiary status in the final result of this action, these minors' interests may be injured if the Court does not step in to review the

offer of settlement. As such, it is respectfully submitted that it is incumbent on the Court to provide advice and direction with respect to the offer of settlement pursuant to its *parens patriae* jurisdiction.

(c) Hiring of Third Party Agent by Public Trustee

39. In principle, the trustees do not oppose the use of a third party agent to assist the Public Trustee in carrying out its mandate. The trustees recognize that the solicitors for the Public Trustee are a small firm without the resources of firms that are larger in size.

40. However, the trustees are concerned with respect to the costs that may be incurred. The solicitors for the Public Trustee have advised the trustees that they wish to retain the services of Supreme Advocacy LLP, an expensive out-of-province firm. Attached at **Tab 14** is a Statement of Account provided by solicitors for the Public Trustee under cover of their letter dated May 22, 2015, which includes a separate invoice dated May 15, 2015 from Supreme Advocacy LLP.

41. The trustees submit that the Public Trustee should not be hiring Supreme Advocacy LLP, as doing so will unnecessarily increase the fees paid by the 1985 Sawridge Trust which are already excessive. The hourly rates of the individuals involved at Supreme Advocacy LLP are significantly higher than hourly rates available from local firms that provide similar services including all of the lawyers who are currently working on this file.

42. The trustees recognize that it may be difficult for the Court to assess the usefulness of the agents at this juncture given the redacted accounts. The trustees seek the Court's direction with respect to the retainer of this agent and further seek the direction that the trustees have the right to a full audit and review of the Public Trustee's accounts at the conclusion of this matter with all accounts, including those of agents retained by the Public Trustee, produced in full without redaction. In addition, the trustees seek the Court's direction that the trustees do not have to pay for costs associated with out-of-province advice (such as long distance telephone calls, accommodation or travel).

43. The trustees submit that these directives would be in keeping with the Court of Appeal's direction that the Public Trustee's fees are subject to oversight and other mechanisms that will ensure the accounts are fair and reasonable. If there is a finding that the costs were not reasonable or fair, then the fees can be refunded by the Public Trustee.

44. The trustees have a fiduciary duty to bring this significant expenditure to the Court's attention and seek direction regarding the ongoing expenditure of funds from the 1985 Sawridge Trust.

PART IV – REMEDY SOUGHT

45. The trustees respectfully request that the Court provide advice and direction as hereby sought.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 12 DAY OF JUNE, 2015.

DENTONS CANADA LLP
REYNOLDS MIRTH RICHARDS & FARMER LLP

PER: _____
Doris Bonora
Marco S. Poretti
Solicitors for the trustees

PART V – LIST OF AUTHORITIES

CLERK'S STAMP

COURT FILE NUMBER	1103 14112
COURT OF QUEEN'S BENCH OF ALBERTA JUDICIAL CENTRE	Edmonton
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c, T-8, AS AMENDED
	IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS	ROLAND TWINN CATHERINE TWINN WALTER FELIX TWIN BERTHA L'HIRONDELLE and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust (the "Trustees")
DOCUMENT	PROPOSED LITIGATION PLAN
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	ATTENTION: DORIS BONORA DENTONS CANADA LLP #2900, 10180 – 101 STREET EDMONTON, AB T5J 3V5 FILE NUMBER : 551860-1-DCEB PH : 780-423-7100 FAX : 780-423-7276

1. The remaining steps and procedures are to be completed on or before the dates specified below:

ACTION		DUE ON OR BEFORE
Questioning of Paul Bujold on documents and undertakings		May 13, 2015
Application on Objections and documents		July 15, 2015
Questioning resulting from Application		September 15, 2015
Mediation to come up with joint proposal		October 15, 2015
Briefs for Applicant		November 15, 2015
Brief for Respondent		December 15, 2015
Application		January 15, 2016

This Litigation Plan is agreed to by the Parties

Dentons Canada LLP

Per:_____
Doris Bonora
Solicitors for the Applicants

Reynolds Mirth Richards & Farmer LLP

Per:_____
Marco S. Poretti
Solicitors for the Applicants

Chamberlain Hutchison

Per:_____
Janet L. Hutchison
Solicitors for the Office of the Public Trustee of Alberta

CLERK'S STAMP

COURT FILE NUMBER	1103 14112
COURT OF QUEEN'S BENCH OF ALBERTA JUDICIAL CENTRE	Edmonton
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c, T-8, AS AMENDED
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APPLICANTS	ROLAND TWINN CATHERINE TWINN WALTER FELIX TWIN BERTHA L'HIRONDELLE and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust (the "Trustees")
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1. The remaining steps and procedures are to be completed on or before the dates specified below:

ACTION		DUE ON OR BEFORE
Questioning of Paul Bujold on documents and undertakings		July 30, 2015
Application on Objections and documents		September 30, 2015
Questioning resulting from Application		November 30, 2015
Mediation to come up with joint proposal		December 31, 2015
Briefs for Applicant		January 31, 2016
Brief for Respondent		February 29, 2016
Application		March 31, 2016

This Litigation Plan is agreed to by the Parties

Dentons Canada LLP

Per:_____
Doris Bonora
Solicitors for the Applicants

Reynolds Mirth Richards & Farmer LLP

Per:_____
Marco S. Poretti
Solicitors for the Applicants

Chamberlain Hutchison

Per:_____
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June 1, 2015

File No.: 551860-1

SENT VIA E-MAIL

WITH PREJUDICE

Chamberlain Hutchison
Suite 155, Glenora Gates
10403 - 122 Street
Edmonton AB T5N 4C1

Attention: Ms. Janet L. Hutchison

Dear Madam:

RE: Sawridge Band Inter Vivos Settlement ("1985 Sawridge Trust" or "Trust" Action No. 1103 14112

These proceedings were initiated on August 31, 2011. At that time, the trustees of the 1985 Sawridge Trust obtained an Order directing that an application for advice and directions was to be brought regarding the definition of "beneficiaries" contained in the Trust deed. It is coming upon 4 years since the issuance of that Order, and despite great expense incurred by our clients, we are no nearer resolution of this issue. The time that has elapsed and the costs that have been incurred are detrimental to the Trust and are not in the best interests of the beneficiaries.

We are now in receipt of your letter dated May 15, 2015, wherein you advise that you will be seeking joinder of our action with Action No. 1403 04885. It is our respectful view that the two actions are unrelated, and joinder of these actions would result in further significant delay and expense to the Trust.

Our clients have considered how to best proceed given the circumstances and we wish to propose a settlement. As you know, the concern of the trustees is that the current definition of "beneficiaries" is discriminatory, and we are seeking the advice and direction of the Court to address this concern. By changing the definition of "beneficiaries" to one that references membership in the Band, it was thought that this would best express the intentions of all parties concerned including the settlors and trustees of the original trust. However, we acknowledge that such a change is a concern to your client and the minors that you represent. We have our list of beneficiaries and have included beneficiaries who were born after the litigation began and included children who have become adults and further included children who have become members. In particular, there are 24 children that are currently beneficiaries of the 1985 Sawridge Trust, and all but 4 of them would lose their beneficiary status should the definition of "beneficiaries" be changed to equate to membership. There are 4 children who have attained

membership status and thus they will continue to be beneficiaries if the definition of beneficiary changed to "members". See table 1 for a list of the children who would lose beneficiary status. See Table 2 for a list of the children who have been admitted as members. There are 4 minors who have become adults since the litigation began (or will be adults in 2015). They have remained on the tables despite becoming adults.

Our client is prepared to "grandfather" the 20 children who have not yet been admitted to membership whereby they would not lose their beneficiary status, despite the change in the definition. These individuals would maintain their beneficiary status throughout their lifetime. Thus we are essentially offering these minors a complete victory in this matter. They would not be excluded from the trust regardless of their ability to obtain membership. While we maintain that they are likely to become members, we would now guarantee their beneficiary status in the trust which could offer them significant benefits in the future. There is no guarantee that a change in definition if approved by the court would provide benefits for these children.

The perpetuation of discrimination in the current definition of beneficiaries is evident in respect the women who were excluded from beneficial status in the 1985 Trust by the Indian Act, 1970 even though they may have regained membership in the Sawridge First Nation. These women were granted membership in the Sawridge First Nation as a result of Bill C-31 either through application to the First Nation or as a result of a Court Order. Since these women are all current members of the Sawridge First Nation and since it is the intent of the Trustees to apply for a variance to the 1985 Trust definition of beneficiary which includes all members of the Sawridge First Nation as beneficiaries, these women will be included as beneficiaries in the 1985 Trust should the Court agree to the proposed variance to the 1985 Trust. The delay in this litigation and the delay in the change of definition perpetuates the discrimination for these women. They cannot receive benefits from this trust and they continue to be singled out as members who do not enjoy the same status as other members of the First Nation. A change in definition is a very good step to remedying the discrimination for these women as they are presently excluded from the trust and with the change in definition will be included as beneficiaries.

We believe that such a solution of grandfathering the minors on Table 1 is not only fair but provides the Public Trustee with everything that it could reasonably expect in these proceedings. Not only is the discriminatory provision removed, but all of the minor "beneficiaries" who would lose their status are protected. While we acknowledge that the Court will ultimately have to decide whether such a proposal is appropriate, we are hopeful that a joint submission to that effect will convince Justice Thomas of the same. We are also hopeful that your client will view such a proposal as a good faith attempt by the trustees to address the interests of the minor beneficiaries, and that you will agree to join us in seeking the necessary Order from the Court without delay. As noted above, we are essentially offering these minors a complete victory in this matter.

As we are proposing to grandfather as beneficiaries all of the minor children who would lose their status we feel that the Public Trustee has fulfilled the mandate provided to it by the court. We are offering to grandfather all of these children in the interests of fairness and in the interests of stopping the litigation and proceeding to use the trust assets for the benefit of the beneficiaries instead of the costs of litigation.

We would also seek consent or at least no opposition to the nunc pro tunc approval of the transfer of assets from the 1982 trust to the 1985 trust. We believe that this was clearly intended and the trust has been operating since 1982. It would be impossible to overturn the transactions and events that have occurred since 1982. Thus we seek the approval for the transfer of assets. It is a benefit to all the beneficiaries to remove this uncertainty. To be clear, if the transfer is not approved we believe that the assets would need to return to the 1982 trust in which the definition of beneficiary is the members of the First Nation and thus the children you represent would not be included.

Thus we seek your approval for an order

1. **To amend the definition of beneficiaries as follows:**

   "Beneficiaries" at any particular time shall mean:

   a. **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 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;**

   b. **the individuals who are listed as Schedule A to this trust (Schedule A would include all the individuals listed on Table 1).**

2. **Approving the transfer of assets from the 1982 trust to the 1985 trust nunc pro tunc.**

This offer is open for acceptance until **June 29, 2015**. We look forward to hearing from you.

Yours very truly,
Dentons Canada LLP

Doris C.E. Bonora

Reynolds Mirth Richards & Farmer LLP

Marco Poretti
DCEB/pach

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Table 1: Minor Beneficiaries of the 1985 Trust as at August 31, 2011 updated to 2015

Beneficiary	Birthdate	Age in 2015	Category
1. Lamouche-Twin, Everett (Justin Twin)	05/10/2003	12	Illegitimate Child of Illegitimate Male Child of Female Band member Not Protested
2. Lamouche-Twin, Justice (Justin Twin)	02/04/2001	14	Illegitimate Child of Illegitimate Male Child of Female Band member Not Protested
3. Lamouche-Twin, Kalyn (Justin Twin)	24/08/2007	8	Illegitimate Child of Illegitimate Male Child of Female Band member Not Protested
4. Lamouche-Twin, Maggie (Justin Twin)	27/03/2009	6	Illegitimate Child of Illegitimate Male Child of Female Band member Not Protested
5. Moodie, Jorja L. (Jeanine Potskin)	29/01/2008	7	Illegitimate Child of Female Band member Not Protested
6. Potskin, Ethan E.R. (Trent Potskin)	15/01/2004	11	Illegitimate Child of Male Illegitimate Child of Female Band member Not Protested
7. Potskin, Jaise A. (Jeanine Potskin)	25/03/2003	12	Illegitimate Child of Female Illegitimate Child of Female Band member Not Protested
8. Potskin, Talia M.L. (Trent Potskin)	16/03/2010	5	Illegitimate Child of Male Illegitimate Child of Female Band member Not Protested
9. Robberstad, Jadyn (Jaclyn Twin)	04/07/2011	4	Illegitimate Child of Female Band member Not Protested
10. Twin, Alexander L. (Wesley Twin)	23/01/2005	10	Child of Married Male Band member
11. Twin, Autumn J. (Darcy Twin)	26/09/2002	13	Child of Married Male Band member
12. Twin, Destin D. (Jaclyn Twin)	24/06/2008	7	Illegitimate Child of Female Band member Not Protested
13. Twin, Justice W. (Wesley Twin)	20/09/2001	14	Child of Married Male Band member
14. Twin, Logan F. (Darcy	17/04/2007	8	Child of Married Male Band member

Beneficiary	Birthdate	Age in 2015	Category
Twin)			
15. Twin, River C. (Darcy Twin)	03/05/2010	5	Child of Married Male Band member
16. Twinn, Clinton (Irene Twinn)	03/02/1997	18	➢ Illegitimate Child of Female Band Member Not Protested ➢ **Adult after 30 August 2011**
17. Twinn-Vincent, Seth (Arlene Twinn)	01/07/2001	14	Child of Female Band member who married Non-Band member
18. Twinn-Vincent, W. Chase (Arlene Twinn)	31/07/1998	17	Child of Female Band member who married Non-Band member
19. Potskin, William (Aaron Potskin	19/09/2013	2	➢ Child of Male band member ➢ **Born after the litigation began**
20. Twinn, Kaitlin (Paul Twinn)	23/02/1995	20	➢ Child of male band member ➢ **Adult after 30 August 2011**

Table 1: Minor Beneficiaries of the 1985 Trust as at August 31, 2011 updated to 2015

DENTONS

Doris C.E. Bonora

doris.bonora@dentons.com
D +1 780 423 7188

Salans FMC SNR Denton
dentons.com

Dentons Canada LLP
2900 Manulife Place
10180 - 101 Street
Edmonton, AB, Canada T5J 3V5

T +1 780 423 7100
F +1 780 423 7276

Table 2: Beneficiaries to the 1985 Trust who have become members

Non-Beneficiary	Birthdate	Age in 2015	Category
1. Twinn, Alexander G. (Roland Twinn)	01/10/1997	18	➢ Child of Married Male Band member ➢ **Admitted as a member of the First nation** ➢ **Adult (this year) after 30 August 2011**
2. Twinn, Corey (Ardell Twinn)	18/01/1994	21	➢ Child of male band member ➢ **Admitted as a member of the First nation** ➢ **Adult after 30 August 2011**
3. Twin, Starr (Winona Twin)	29/11/2002	13	➢ Illegitimate Child of Female Band member Not Protested ➢ **Admitted as a member of the First nation**
4. Twin, Rainbow (Winona Twin)	31/05/1998	17	➢ Illegitimate Child of Female Band member Not Protested ➢ **Admitted as a member of the First nation**

Table 2: Beneficiaries to the 1985 Trust who have become members

HUTCHISON LAW

#155 Glenora Gates
10403 122 Street
Edmonton, Alberta
T5N 4C1

Telephone: (780) 423-3661
Fax: (780) 426-1293
Email: jhutchison@jlhlaw.ca
Website: www.jlhlaw.ca

* Janet L. Hutchison, L.L.B.
Rebecca C. Warner, B.A., J.D., Student-at-Law

Our File: 51433 JLH

SENT BY EMAIL ONLY

May 19, 2015

Reynolds Mirth Richards & Farmer LLP
Suite 3200 Manulife Place
10180 - 101 Street
Edmonton, Alberta T5J 3W8

Attention: Marco Poretti

Dentons LLP
2900 Manulife Place
10180 - 101 Street
Edmonton Alberta T5J 3V5

Attention: Doris Bonora

Dear Sir and Madam:

Re: Sawridge Band Inter Vivos Settlement (1985 Sawridge Trust); QB Action No. 1103 14112

I am writing in response to Ms. Bonora's proposed litigation plan in this matter, received by way of email from Ms. Hagerman on April 30, 2015. As you will be aware, that plan does not currently refer to the Public Trustee's pending application for Joinder and Advice and Directions. I suggest we revise the proposed litigation plan once the Public Trustee's application is set down.

Regardless of future changes to the litigation plan, it is clear that the main application will be proceeding on ambitious timelines. The Public Trustee has no objection to that approach. However, we have determined that there may be a need, from time to time, for the assistance of agent counsel to ensure the Public Trustee is able to act within those timelines, while thoroughly addressing all issues affecting the interests of the minor beneficiaries (or potential minor beneficiaries).

As such, the Public Trustee has instructed me to proceed to involve my firm of choice for agency services/ legal research, namely Supreme Advocacy LLP. I can advise that the hourly rates of the counsel we deal with at Supreme Advocacy LLP are as follows:

1.) Eugene Meehan - $750.00/hr.

2.) Marie France- Major- $500.00/hr.

3.) Thomas Slade- $300.00.

We have consistently found Supreme Advocacy's work to be extremely efficient and useful. When hiring other, less experienced agents, there is potential for wasted effort or overlapping work. That has never been my experience with Supreme Advocacy.

We would, of course, provide copies of Supreme Advocacy LLP's accounts on the same basis as we provide our own accounts. A detailed account would go to the Public Trustee for review. A redacted / less detailed account that removes all privileged information, lists the month the services are provided and provides total hours for each timekeeper would be provided to the Sawridge Trust.

I trust that this addition to our costs agreement of fall 2014 will not present any issues. I am confident that both Dentons and RMRF [being well-recognized firms with significant legal depth] will appreciate the need for a broader legal team in order to move this matter forward on ambitious timelines. However, should this request present any difficulty, I would appreciate your advice in this regard prior to **May 27, 2015** such that we can add this issue to the Public Trustee's application for advice and direction if it cannot be addressed by agreement.

Thank you for your attention to this matter.

Yours truly,

HUTCHISON LAW

PER: JANET L. HUTCHISON
JLH/cm

cc: Client

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

Date on which Judgment Pronounced: June 12, 2012

Location of hearing or trial: Edmonton, Alberta

Name of Justice who made this Order: Justice D.R.G. Thomas

UPON the application of the Public Trustee; AND UPON review of the Affidavits filed in this proceeding; AND UPON review of the filed written submissions; AND UPON hearing the submissions of Counsel for the Public Trustee, Counsel for the Sawridge Trustees and Counsel for the Sawridge First Nation; IT IS HEREBY ORDERED AND DECLARED as follows:

1. The Public Trustee is appointed litigation representative for the 31 minors who are children of current Sawridge First Nation members as well as any minors who are children of applicants seeking to be admitted into membership of the Sawridge First Nation.

2. The Public Trustee shall receive full, and advance, indemnification for its costs for participation in the within proceedings, to be paid by the Sawridge Trust.

3. The Public Trustee will be exempted from any responsibility to pay the costs of the other parties in the within proceeding.

4. The Public Trustee may inquire, on questioning on affidavits, into the process the Sawridge Band uses to determine membership, the Sawridge Band membership definition and into the status and number of Band membership applications that are currently awaiting determination.

5. The Public Trustee is granted costs of this application to be calculated on a solicitor and its own client basis, to be paid by the Sawridge Trust.

6. This Order may be consented to in counterpart and by way of facsimile signature.

Mr. Justice D. R. H. Thomas

CONSENTED TO AS TO FORM AND CONTENT:

REYNOLDS MIRTH RICHARDS & FARMER LLP
Per:

Marco S. Poretti
Solicitors for the Trustees

CHAMBERLAIN HUTCHISON
Per:

Janet Hutchison
Solicitors for the Office of the Public Trustee of Alberta

PARLEE McLAWS LLP
Per:

Edward H. Molstad, Q.C.
Counsel for Sawridge First Nation

MYLES J. KIRVAN - DEPUTY ATTORNEY GENERAL OF CANADA
Per:

E. James Kindrake
Solicitors for the Minister of Indian Affairs and Northern Development

DAVIS LLP
Per:

Priscilla Kennedy
Solicitors for Aline Elizabeth Huzar, June Martha Kolosky and Maurice Stoney

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Per:

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E. James Kindrake
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DAVIS LLP
Per:

_____
Priscilla Kennedy
Solicitors for Aline Elizabeth Huzar, June Martha Kolosky and Maurice Stoney

Court of Queen's Bench of Alberta

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

Date:
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

---

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

C.D.O'Brien for Costigan J.A.
Authorized to sign for: Costigan J.A.

C.D. O'Brien
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

Court of Queen's Bench of Alberta

Citation: Weins v. Dewald, 2011 ABQB 400

Date:20010624
Docket: 0401 11316
Registry: Calgary

Between:

George Wiens, Susan Wiens, and Wye-Knott Millennium Carriers Ltd.

Plaintiffs

- and -

Jim Dewald and Wye-Knott Holdings Ltd.

Defendants

Reasons for Judgment
of
K.R. Laycock, Master in Chambers

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[1] The plaintiffs are applying for a procedural order pursuant to rule 4.4(2) and the defendants have applied for an order striking the claim for long-delayed pursuant to rule 4.31 and 4.33. Rule 4.33 provides that a court must dismiss an action when delay longer that 2 years (modified to 5 years by the bridging provision in rule 15.4) has elapsed, subject to conditions that do not apply to this case.

[2] This proceeding involves an accounting between parties for transactions to a joint venture that operated between February 2002 and September 2003. The statement of claim was filed October 30, 2003 and the statement defence was filed August 20, 2004. A demand for particulars was filed December 15, 2003 and responded to on April 20, 2004. The plaintiffs affidavit of records was filed January 10, 2005 and the defendants affidavit of records filed April 8, 2005.

[3] Anna Kim deposes that an examination for discovery of George Wiens was held April 25, 2006. She further deposes that on October 9, 2009 a without prejudice offer of settlement was forwarded to the defendants' lawyers but no reply was received.

[4] Anna Kim further deposes that she served the defendants' lawyer with a proposed litigation plan on April 8, 2011 which proposes that questioning on answers to undertakings be completed by August 30, 2011; dispute resolution is not required pursuant to rule 15.3; and, the parties request the Court Clerk to schedule a date for trial before October 30, 2011 pursuant to rule 8.4. Anna Kim further deposes that she did not receive a response to the proposed litigation plan and therefore on April 19, 2009 she swore her affidavit and prepared an application with a hearing date of April 21, 2011. The parties agreed that the application be set over to May 18, 2011 and that "such delay by adjournment would not be used to dismiss the action pursuant to Rule 4.33 (1)(a) of the Alberta Rules of Court".

[5] The defendants filed their cross application on May 10, 2011, supported by an affidavit from Mr. Dewald. He deposes that his examination for discovery and that of the plaintiff Wiens took place on April 25th 2006. He states that settlement correspondence was exchanged by counsel in 2007, 2008 and 2009, but no settlement was reached. He states that after receiving the proposed litigation plan and the plaintiffs motion he spoke to his lawyer on or about April 20, 2011 with respect to the litigation plan. He could not recall whether undertakings were given at discovery and instructed counsel to order transcripts.

[6] On April 20, 2011 the defendants' lawyer wrote to the plaintiffs' lawyer confirming that they did not have copies of the transcripts, a record of undertakings, or a record of having received any undertakings from the plaintiff. He could not agree to a litigation plan without the transcripts to help them more clearly determine the status of the action.

[7] The transcripts of the examination for discovery disclosed that the defendant had given four undertakings and taken two other requests under advisement. The plaintiff had given four undertakings. There is no evidence that the undertakings were ever supplied by either party.

Litigation Plan

[8] The plaintiffs refers to the following rules with respect to litigation planning.

> 4.4(1) Unless the parties otherwise agree, or the Court otherwise orders, and subject to matters arising beyond the control of the parties, the parties to an action categorized as a standard case must, within a reasonable period of time considering the nature of the action, complete each of the following steps or stages in the action:
>
> (a) close of pleadings;

(b) disclosure of information under Part 5 [*Disclosure of Information*];

(c) at least one of the dispute resolution process is described in rule 4.16(1), and less the requirement is waived by the Court;

(d) application for trial date.

4.4(2) A party to an action categorized as a standard case may serve on the other party a proposed litigation plan or a proposal for the completion or timing of any stage or step in the action, and if no agreement is reached, any party may apply to the Court for a procedural or other order respecting the plan or proposal.

[9] The parties agree that this is a standard case referred to in rule 4.4(1). Rule 4.4 (1) requires the parties to prepare a litigation plan. A completed litigation plan is therefore a procedural step required by the Rules of Court. According to ***Alberta v. Morasch*** 2000ABQB 24,completion of a procedural step required by the rules will always be a thing that materially advances the action.

[10] Merely proposing a litigation plan is not something that would have materially advanced this action. As the court said in ***Alberta v. Morasch*** at para. 13, merely setting a date for an examination for discovery, by itself, probably does not materially advance in action. See also ***Nelson v. Emsland***, 2007 ABQB 571, 427 A.R. 427 and ***Haekel v. Canada***, 2008 ABQB 701.

[11] The defendant argues that the first item of the litigation plan proposed by the plaintiff, agreeing to an end date to complete questioning on answers to undertakings, probably would not materially advance this action. The completion of the questioning on answers to undertakings would have materially advance the action.

[12] The defendant further argues that the second item in the proposed litigation plan merely confirms the existence of rule 15.3 which confirms that where discoveries have been completed under the former rules, dispute resolution is not a requirement. Confirming the effect of this rule would not have advanced this action.

[13] The third item in the litigation plan requires the parties to complete Form 37 and request a trial date from the court clerk before October 30, 2011. The only thing that the parties must do before completing a Form 37 is the delivery of undertakings and completion of any questioning on undertakings. The completion of a certificate of readiness by the plaintiff under the old rules was not a thing that materially advance the action: ***Morasch*** at para. 7. Agreeing to set a matter for trial on completion of undertakings would not materially advance an action: see ***Lanset Capital Corp. V. Waterloo Geological Consulting Ltd.,*** 2006 ABCA 77. However, the completion and filing of a certificate of readiness, under the former rules, or a Form 37, under the

new rules, would have materially advanced the action because a procedural step required by the rules would have been completed.

[14] The defendant argues that merely agreeing to request a trial date from the court clerk before October 30, 2011 would not have materially advanced this action. The completion of a litigation plan pursuant to rule 4.4(2) would be a permitted step in a proceeding and the completion of such a plan may have the effect of materially advancing an action, particularly an action that has stalled.

[15] If I should grant a procedural order in accordance with plaintiff's proposed litigation plan, such an order, granted pursuant to rule 4.4(2) must be considered to materially advance this action.

[16] One of the principal goals of the rules is to encourage the parties to resolve their claims fairly and justly in a timely and cost-effective manner (rule 1.2(1)). In order to achieve this goal Part Four makes it the responsibility of the parties to manage their dispute in a timely and cost-effective way (rule 4.1). Rule 4.2(b) makes it the responsibility of the parties to respond in a substantial way and within a reasonable time to any proposal for the conduct of an action in a standard case.

[17] The plaintiffs argue that the defendants did not respond within a reasonable period of time to their proposal for the completion of discovery and entry of the matter for trial. The defendants argue that a reasonable time had not passed for them to consider the plaintiff's proposal for the completion of steps necessary to proceed to trial.

[18] The defendants argue that they had insufficient knowledge to respond, up to April 21, 2011 because they did not know whether undertakings had been given and if so whether further questioning was necessary on answers to the undertakings. Since they did not receive the transcripts from the examination for discovery until sometime in May, they argue that they could not respond to the litigation plan and further that the Court would not have granted a procedural order on April 21, 2011.

[19] The defendants argue that it would have made no sense for the court to have directed a procedural order which included questioning on answers to undertakings, if no undertakings had been given. I disagree. Given the delay in bringing the matter to trial, but having regard to the fact that the plaintiff had not abandoned this action, as evidenced by their three separate settlement proposals, I would have granted a procedural order. I would have granted a procedural order on April 21, 2011 directing questioning on undertakings, if any, and required the parties to complete Form 37 and file it with the court clerk in the very near future. I would consider a provision in the procedural order to strike the action if the plaintiff did not comply with the timing in the order.

[20] Such a procedural order would have been that thing that materially advance the action. Therefore the prerequisites to rule 4.33 have not been met and I would not dismiss this action.

Rule 4.31 Delay

[21] Rule 4.31 states:

> If delay occurs in an action, on application the Court may
>
> (a) dismiss all or any part of the claimant if the Court is satisfied that the delay has resulted in significant prejudice to a party, or
>
> (b) make a procedural order or any other order provided for by these rules.

[22] As an alternative, counsel for the defendant asks for dismissal for delay pursuant to rule 4.31, the successor to rule 244(1). The former rule contained a presumption that delay caused prejudice. The new rule does not and accordingly the defendant acknowledges that it must provide evidence of prejudice, along with inordinate and inexcusable delay.

[23] The defendant argues that the passage of almost 5 years since the examination for discovery means that there is very long delay and that there is no evidence from the plaintiff that such delay is excusable. I am satisfied that there is inordinate delay in prosecuting this file and there is no evidence whatsoever from the plaintiff attempting to excuse the delay.

[24] The defendant deposes in his affidavit that he has stopped carrying on operations of the corporate defendants, and he has no contact with any of his former employees who could be witnesses. As a result he states that his ability to defend himself is seriously prejudice.

[25] The defendant does not state that any of his financial or corporate records are missing. He does not provide any evidence as to which employees would be witnesses and whether he has taken steps to locate them. There is no evidence that the documents required to answer his undertakings are lost or unavailable.

[26] This lawsuit is about an accounting between parties to a joint business venture and the accounting for income and expenses between the parties. I cannot conclude that there is sufficient evidence to satisfy me that there is significant prejudice to be suffered by the defendants in the continuation of this action. In ***Durnin v. Snider***, 2011 ABQB 383, Master Hanebury considered an application pursuant to the former rule 244 (1) and allowed an action to proceed where documentation formed the foundation of the lawsuit.

[27] I am satisfied that the plaintiff is entitled to a procedural order pursuant to rule 4.4 (2) and rule 4.31(b) that requires both parties to provide answers to undertakings within 30 days of the entry of this order and any questioning on answers to undertaking to be completed within 30 days

thereafter. The plaintiff shall prepare, and provide to the defendant, Form 37 on or before September 30, 2011, and the defendant shall complete and sign the form and return it to counsel for the plaintiff on or before October 14, 2011. The plaintiff shall submit Form 37 to the court clerk and request a trial date on or before October 21, 2011.

[28] Costs and default provisions may be spoken to by the parties.

Heard on the 18th day of May, 2011.
Dated at the City of Calgary, Alberta this 24th day of June, 2011.

K.R. Laycock
M.C.C.Q.B.A.

Appearances:

Anna S. Kim
Venture Law Group LLP
for the Plaintiffs

Katrina Edgerton-Meghan
Scott Venturo LLP
for the Defendants

Bill 20

MINORS' PROPERTY ACT

Chapter M-18.1

(Assented to March 30, 2004)

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Consequential Amendments, Repeal and Coming into Force

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Definitions

1 In this Act,

(a) "Court" means the Court of Queen's Bench;

(b) "deliver property" includes pay money;

(c) "property" includes money;

(d) "person obligated to a minor" means a person, including the Crown, who is under an obligation to deliver property to a minor or who would be under an obligation to deliver property to a minor if the minor were an adult;

(e) "Public Trustee" means the Public Trustee under the *Public Trustee Act*;

(f) "trust instrument" means a will, deed, declaration or other instrument in writing by which a person creates a trust.

Court-authorized Dispositions, Contracts and Settlements

Disposition of minor's property

2(1) The Court, on application, may by order authorize or direct a sale, lease or other disposition of or action respecting property of a minor if in the Court's opinion it is in the minor's best interest to do so, except that the Court shall not authorize a disposition or action prohibited by an instrument that created the minor's interest in the property.

(2) An order under subsection (1) may give any direction as to the method of carrying out a sale, lease, disposition or action authorized by the order and may impose any restriction or condition that the Court considers appropriate.

(3) The proceeds of any disposition authorized or directed under this section must be delivered

(a) to a trustee appointed by the Court under section 10, if the trustee is authorized by the appointment or the order under this section to receive the proceeds,

(b) to the Public Trustee, or

(c) as the Court directs, if the total amount of the proceeds does not exceed the amount prescribed by the regulations.

Court confirmation of minor's contracts

3(1) The Court may, on application, if in the Court's opinion it is in a minor's best interest to do so, confirm any contract

(a) the minor has entered into or proposes to enter into, or

(b) the minor's guardian has entered into or proposes to enter into on behalf of the minor.

(2) If the Court confirms a contract, the Court may

(a) determine the person to whom a person obligated to a minor under the contract may deliver the relevant property to discharge the obligation, and

(b) give any other direction relating to the contract that the Court considers to be in the minor's best interest.

(3) A person obligated to a minor under a contract that has been confirmed by the Court may discharge the obligation only by delivering the relevant property

(a) to the person determined under subsection (2)(a), or

(b) if no person has been determined under subsection (2)(a), to

(i) a trustee appointed by the Court under section 10 who is authorized by the appointment to receive the property, or

(ii) the Public Trustee.

(4) Subject to subsections (2) and (3), a contract confirmed by the Court under this section has the same effect that it would have if the minor had entered into the contract as an adult.

(5) This section does not

(a) apply to a settlement to which section 4 applies, or

(b) diminish the effect that any contract made by or on behalf of a minor has apart from this section.

Settlement of minor's claim

4(1) In this section,

(a) "claim" means a claim that, if proved in a court of competent jurisdiction, would result in a money judgment as defined in the *Civil Enforcement Act*;

(b) "indemnity" means an agreement by a minor's representative, given in connection with a settlement of the minor's claim, to compensate a person for liability or costs incurred by that person in the event that a claim is subsequently made by or on behalf of the minor regarding a matter covered by the settlement;

(c) "representative" means the guardian or next friend of a minor who has a claim.

(2) If a representative has agreed to a settlement of a minor's claim, the Court may, on application, confirm the settlement if in the Court's opinion it is in the minor's best interest to do so.

(3) A settlement of a minor's claim is binding on the minor only if the settlement is confirmed under subsection (2).

(4) Any money payable to a minor under a settlement that is confirmed under subsection (2) must be paid

(a) to a trustee appointed by the Court under section 10 who is authorized by the appointment or by the order confirming the settlement to receive the money,

(b) to the Public Trustee, or

(c) as the Court directs, if the total amount payable to the minor under the settlement does not exceed the amount prescribed by the regulations.

(5) An indemnity given by a minor's representative is void.

TRUSTEE ACT

Chapter T-8

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(4) Every transfer, payment and delivery made pursuant to an order under subsection (3) is valid and takes effect as if it had been made on the authority or by the act of all the persons entitled to the money and securities so transferred, paid or delivered.

RSA 1980 cT-10 s40

Personal liability

41 If in any proceeding affecting trustees or trust property it appears to the court

(a) that a trustee, whether appointed by the court or by an instrument in writing or otherwise, or that any person who in law may be held to be fiduciarily responsible as a trustee, is or might be personally liable for any breach, whether the transaction alleged or found to be a breach of trust occurred before or after the passing of this Act, but

(b) that the trustee has acted honestly and reasonably and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which the trustee committed that breach,

then the court may relieve the trustee either wholly or partly from personal liability for the breach of trust.

RSA 1980 cT-10 s41

Variation of Trusts

Variation of trusts

42(1) In this section, "beneficiary", "beneficiaries", "person" or "persons" includes charitable purposes and charitable institutions.

(2) Subject to any trust terms reserving a power to any person or persons to revoke or in any way vary the trust or trusts, a trust arising before or after the commencement of this section, whatever the nature of the property involved and whether arising by will, deed or other disposition, shall not be varied or terminated before the expiration of the period of its natural duration as determined by the terms of the trust, except with the approval of the Court of Queen's Bench.

(3) Without limiting the generality of subsection (2), the prohibition contained in subsection (2) applies to

(a) any interest under a trust where the transfer or payment of the capital or of the income, including rents and profits

(i) is postponed to the attainment by the beneficiary or beneficiaries of a stated age or stated ages,

(ii) is postponed to the occurrence of a stated date or time or the passage of a stated period of time,

(iii) is to be made by instalments, or

(iv) is subject to a discretion to be exercised during any period by executors and trustees, or by trustees, as to the person or persons who may be paid or may receive the capital or income, including rents and profits, or as to the time or times at which or the manner in which payments or transfers of capital or income may be made,

and

(b) any variation or termination of the trust or trusts

(i) by merger, however occurring;

(ii) by consent of all the beneficiaries;

(iii) by any beneficiary's renunciation of the beneficiary's interest so as to cause an acceleration of remainder or reversionary interests.

(4) The approval of the Court under subsection (2) of a proposed arrangement shall be by means of an order approving

(a) the variation or revocation of the whole or any part of the trust or trusts,

(b) the resettling of any interest under a trust, or

(c) the enlargement of the powers of the trustees to manage or administer any of the property subject to the trusts.

(5) In approving any proposed arrangement, the Court may consent to the arrangement on behalf of

(a) any person who has, directly or indirectly, an interest, whether vested or contingent, under the trust and who by reason of minority or other incapacity is incapable of consenting,

(b) any person, whether ascertained or not, who may become entitled directly or indirectly to an interest under the trusts as being, at a future date or on the happening of a future event, a person of any specified description or a member of any specified class of persons,

(c) any person who is a missing person as defined in the *Public Trustee Act* or who is unborn, or

(d) any person in respect of any interest of the person's that may arise by reason of any discretionary power given to anyone on the failure or determination of any existing interest that has not failed or determined.

(6) Before a proposed arrangement is submitted to the Court for approval it must have the consent in writing of all other persons who are beneficially interested under the trust and who are capable of consenting to it.

(7) The Court shall not approve an arrangement unless it is satisfied that the carrying out of it appears to be for the benefit of each person on behalf of whom the Court may consent under subsection (5), and that in all the circumstances at the time of the application to the Court the arrangement appears otherwise to be of a justifiable character.

(8) When an instrument creates a general power of appointment exercisable by deed, the donee of the power may not appoint to himself or herself unless the instrument shows an intention that he or she may so appoint.

(9) When a will or other testamentary instrument contains no trust, but the Court is satisfied that, having regard to the circumstances and the terms of the gift or devise, it would be for the benefit of a minor or other incapacitated beneficiary that the Court approve an arrangement whereby the property or interest taken by that beneficiary under the will or testamentary instrument is held on trusts during the period of incapacity, the Court has jurisdiction under this section to approve that arrangement.

RSA 1980 cT-10 s42

Application to court for advice

43(1) Any trustee may apply in court or in chambers in the manner prescribed by the rules of court for the opinion, advice or direction of the Court of Queen's Bench on any question respecting the management or administration of the trust property.

(2) The trustee acting on the opinion, advice or direction given by the Court is deemed, so far as regards the trustee's own responsibility, to have discharged the trustee's duty as trustee in respect of the subject-matter of the opinion, advice or direction.

(3) Subsection (2) does not extend to indemnify a trustee in respect of any act done in accordance with the opinion, advice or direction of the Court if the trustee has been guilty of any fraud or wilful concealment or misrepresentation in obtaining that opinion, advice or direction.

RSA 1980 cT-10 s41

RE EVE

Supreme Court of Canada, Dickson C.J.C., Beetz, Estey, McIntyre, Chouinard, Lamer, Wilson, Le Dain and La Forest JJ. October 28, 1986.

Courts — Jurisdiction — Inherent jurisdiction — Parens patriae — Court should not authorize non-therapeutic sterilization of mentally retarded person under parens patriae jurisdiction — Sterilization of mentally incompetent matter of general social policy for legislature — Such legislation subject to scrutiny of courts under Canadian Charter of Rights and Freedoms.

Mental health — Incompetent persons — Consent to treatment — Sterilization — Court should not authorize non-therapeutic sterilization of mentally retarded person under parens patriae jurisdiction — Sterilization of mentally incompetent matter of general social policy for legislature — Such legislation subject to scrutiny of courts under Canadian Charter of Rights and Freedoms.

The court's discretion under its *parens patriae* jurisdiction must be exercised for the benefit of the retarded person, not for the benefit of others.

Thus courts should never authorize a non-therapeutic sterilization of a mentally retarded person under its *parens patriae* jurisdiction. The grave intrusion on the retarded person's rights and the certain physical damage that ensues from non-therapeutic sterilization without consent, when compared to the highly questionable advantages that can result from it, lead to the conclusion that it can never safely be determined that such a procedure is for the benefit of that person. Judges are generally ill-informed about many of the factors relevant to a wise decision in this difficult area. They generally know little of mental illness, of techniques of contraception or their efficacy. And, however well-presented a case may be, it can only partially inform. If sterilization of the mentally incompetent is to be adopted as desirable for general social purposes, the legislature is the appropriate body to do so. It is in a position to inform itself and is attuned to the feelings of the public in making policy in this sensitive area. The actions of the legislature will then be subject to the scrutiny of the courts under the *Canadian Charter of Rights and Freedoms* and otherwise.

Beverley's Case (1603), 4 Co. Rep. 123b, 76 E.R. 1118; *Wellesley v. Duke of Beaufort* (1827), 2 Russ. 1, 38 E.R. 236; affd *sub nom. Wellesley v. Wellesley* (1828), 2 Bli. N.S. 124, 4 E.R. 1078; *Re Beson and Director of Child Welfare, Nfld.; Jones et al., Intervenants* (1982), 142 D.L.R. (3d) 20, [1982] 2 S.C.R. 716, 39 Nfld. & P.E.I.R. 246, 30 R.F.L. (2d) 438 *sub nom. D.B. et al. v. Director of Child Welfare, Nfld.; M.K.J. et al., Intervenors*, 44 N.R. 602; *Re X (a minor)*, [1975] 1 All E.R. 697; *S. v. McC.; W. v. W.*, [1972] A.C. 24; *Re D (a minor)*, [1976] 1 All E.R. 326; *Re P. (a Minor)* (1981), 80 L.G.R. 301; *Re B (A Minor)* (1982), 3 F.L.R.

117; *Re K and Public Trustee* (1985), 19 D.L.R. (4th) 255, 63 B.C.L.R. 145, [1985] 4 W.W.R. 724; leave to appeal to S.C.C. refused D.L.R. *loc. cit.*, [1985] 4 W.W.R. 757*n*; *Buck v. Bell* (1927), 274 U.S. 200; *Re Guardianship of Tully* (1978), 146 Cal. Rptr. 266; *Hudson v. Hudson* (1979), 373 So. 2d 310; *Re Guardianship of Eberhardy* (1980), 294 N.W. 2d 540; *Stump v. Sparkman* (1978), 435 U.S. 349; *Re Grady* (1981), 426 A. 2d 467; *Re Sallmaier* (1976), 378 N.Y.S. 2d 989; *Re Guardianship of Hayes* (1980), 608 P. 2d 635; *J v. C.*, [1970] A.C. 668; *Strunk v. Strunk* (1969), 445 S.W. 2d 145, **consd**

Other cases referred to

Cary (Lord Falkland) v. Bertie (1696), 2 Vern. 333, 23 E.R. 814; *Morgan v. Dillon* (1724), 9 Mod. R. 135, 88 E.R. 361; *Beall v. Smith* (1873), L.R. 9 Ch. 85; *Re Guardianship of Eberhardy* (1981), 307 N.W. 2d 881; *Re C.D.M.* (1981), 627 P. 2d 607; *Re A.W.* (1981), 637 P. 2d 366; *Re Terwilliger* (1982), 450 A. 2d 1376; *Wentzel v. Montgomery General Hospital* (1982), 447 A. 2d 1244; *Re Moe* (1982), 432 N.E. 2d 712; *P.S. by Harbin v. W.S.* (1983), 452 N.E. 2d 969; *Re Application of A.D.* (1977), 394 N.Y.S. 2d 139; *Re Penny N.* (1980), 414 A. 2d 541; *Re Quinlan* (1976), 355 A. 2d 647

Constitutional law — Charter of Rights — Right to life, liberty and security — Right to free procreative choice — Assuming "liberty" protects right to free procreative choice it only protects individuals from laws or other state action that deprives them of that liberty — Canadian Charter of Rights and Freedoms, s. 7.

Constitutional law — Charter of Rights — Equality rights — Discrimination on basis of mental disability — Right to free procreative choice — Refusal of court to exercise parens patriae jurisdiction to order non-therapeutic sterilization of mentally retarded person not discriminating against that person on basis of mental disability — Equality rights not infringed — Canadian Charter of Rights and Freedoms, s. 15(1).

Statutes referred to

"Act to authorize the appointment of a Master of the Rolls to the Court of Chancery, and an Assistant Judge of the Supreme Court of Judicature in this Island", 1848 (P.E.I.), c. 6

"Act to provide for the care and maintenance of idiots, lunatics and persons of unsound mind", 1852 (P.E.I.), c. 36

"Act for the Relief of the Suitors of the High Court of Chancery", 1852 (U.K.), c. 87, s. 15

Canadian Charter of Rights and Freedoms, ss. 7, 15(1)

Chancery Act, R.S.P.E.I. 1951, c. 21, s. 3

Chancery Jurisdiction Transfer Act, 1974 (P.E.I.), c. 65, s. 2

Hospitals Act, R.S.P.E.I. 1974, c. H-11, s. 16 (am. 1985, c. 22, s. 4)

Mental Health Act, R.S.P.E.I. 1974, c. M-9 (amended 1974, c. 65, s. 5), ss. 2*n*, 30A(1), (2), 30B, 30L

Sexual Sterilization Act, R.S.A. 1970,c. 341 (repealed 1972, c. 87, s. 1)

Sexual Sterilization Act, R.S.B.C. 1960, c. 353 (repealed 1973, c. 79, s. 1), s. 5(1)

Rules and regulations referred to

Hospital Management Regulations, R.R.P.E.I. 1985, c. H-11, s. 48

APPEAL by the guardian *ad litem* of a mentally retarded woman from a judgment of the Prince Edward Island Supreme Court, *in*

banco, 115 D.L.R. (3d) 283, 27 Nfld. & P.E.I.R. 97 and 28 Nfld. & P.E.I.R. 359 (addendum), allowing an appeal by the mother of the incompetent from a judgment of C.R. McQuaid J., dismissing her application for authorization to consent to a sterilization operation being performed on her daughter.

Eugene P. Rossiter, for appellant.
Walter A. McEwen, for respondent.
B.A. Crane, Q.C., for intervener, Canadian Mental Health Association.
David H. Vickers, *Harvey Savage* and *S.D. McCallum*, for intervener, Canadian Association for the Mentally Retarded.
M. Anne Bolton, for intervener, Public Trustee of Manitoba.
E.A. Bowie, Q.C., and *B. Starkman*, for intervener, Attorney-General of Canada.

The judgment of the court was delivered by

LA FOREST J.:—These proceedings began with an application by a mother for permission to consent to the sterilization of her mentally retarded daughter who also suffered from a condition that makes it extremely difficult for her to communicate with others. The application was heard by McQuaid (C.R.) J. of the Supreme Court of Prince Edward Island, Family Division. In the interests of privacy, he called the daughter "Eve", and her mother "Mrs. E".

Background

When Eve was a child, she lived with her mother and attended various local schools. When she became 21, her mother sent her to a school for retarded adults in another community. There she stayed with relatives during the week, returning to her mother's home on week-ends. At this school, Eve struck up a close friendship with a male student; in fact, they talked of marriage. He too is retarded, though somewhat less so than Eve. However, the situation was identified by the school authorities who talked to the male student and brought the matter to an end.

The situation naturally troubled Mrs. E. Eve was usually under her supervision or that of someone else, but this was not always the case. She was attracted and attractive to men and Mrs. E. feared she might quite possibly and innocently become pregnant. Mrs. E. was concerned about the emotional effect that a pregnancy and subsequent birth might have on her daughter. Eve, she felt, could not adequately cope with the duties of a mother and the responsibility would fall on Mrs. E. This would

in this case, ought to authorize consent to non-therapeutic sterilization. Before going on, it may be useful to summarize my views on the *parens patriae* jurisdiction. From the earliest time, the Sovereign, as *parens patriae*, was vested with the care of the mentally incompetent. This right and duty, as Lord Eldon noted in *Wellesley v. Duke of Beaufort*, *supra*, at 2 Russ. at p. 20, 38 E.R. at p. 243, is founded on the obvious necessity that the law should place somewhere the care of persons who are not able to take care of themselves. In early England, the *parens patriae* jurisdiction was confined to mental incompetents, but its *rationale* is obviously applicable to children and, following the transfer of that jurisdiction to the Lord Chancellor in the 17th century, he extended it to children under wardship, and it is in this context that the bulk of the modern cases on the subject arise. The *parens patriae* jurisdiction was later vested in the provincial superior courts of this country, and in particular, those of Prince Edward Island.

The *parens patriae* jurisdiction is, as I have said, founded on necessity, namely the need to act for the protection of those who cannot care for themselves. The courts have frequently stated that it is to be exercised in the "best interest" of the protected person, or again, for his or her "benefit" or "welfare".

The situations under which it can be exercised are legion; the jurisdiction cannot be defined in that sense. As Lord MacDermott put it in *J. v. C.*, [1970] A.C. 668 at p. 703, the authorities are not consistent and there are many twists and turns, but they have inexorably "moved towards a broader discretion, under the impact of changing social conditions and the weight of opinion . . .". In other words, the categories under which the jurisdiction can be exercised are never closed. Thus I agree with Latey J. in *Re X*, *supra*, at p. 699, that the jurisdiction is of a very broad nature, and that it can be invoked in such matters as custody, protection of property, health problems, religious upbringing and protection against harmful associations. This list, as he notes, is not exhaustive.

What is more, as the passage from *Chambers* cited by Latey J. underlines, a court may act not only on the ground that injury to person or property has occurred, but also on the ground that such injury is apprehended. I might add that the jurisdiction is a carefully guarded one. The courts will not readily assume that it has been removed by legislation where a necessity arises to protect a person who cannot protect himself.

I have no doubt that the jurisdiction may be used to authorize

2010 ABCA 412
Alberta Court of Appeal

W. (R.) v. Alberta (Director of Child Welfare)

2010 CarswellAlta 2477, 2010 ABCA 412, [2010] A.J. No. 1489,
[2011] A.W.L.D. 451, [2011] W.D.F.L. 511, 44 Alta. L.R. (5th) 313

R.W. and T.W. (Respondents / Respondents) and The Director of Child Welfare (Applicant / Appellant)

Clifton O'Brien J.A.

Heard: December 21, 2010
Judgment: December 23, 2010
Docket: Calgary Appeal 1001-0284-AC

Counsel: L.A. Cooney-Burk for Respondents
C. Dylke for Applicant
R.N. Joshi for Children

Subject: Family; Civil Practice and Procedure

Headnote

Family law — Children in need of protection — Practice and procedure in custody hearings — Appeal of order — General principles

Leave to appeal — Director of child welfare sought permanent guardianship of five children — Guardianship opposed by grandparents — Grandparents' application for custody was dismissed — Trial judge found grandparents had health problems and concern existed about parenting style — Trial judge found care by grandparents was not in best interests of children — Grandparents' appeal was allowed — Director brought application for leave to appeal — Application granted — No appeal may be made from decision under Family Law Act without leave — Termination of permanent guardianship order was consequential to grandparents' guardianship order under Act, and did not eliminate requirement for leave — Questions of law for appeal included whether proper caselaw was applied, whether evidence of parenting style was properly weighed, and jurisdiction to impose conditions — Question of whether judge could exercise parens patriae jurisdiction to impose transitionary terms was noteworthy.

Table of Authorities

Cases considered by *Clifton O'Brien J.A.*:

Eve, Re (1986), 13 C.P.C. (2d) 6, (sub nom. *E. v. Eve)* [1986] 2 S.C.R. 388, 31 D.L.R. (4th) 1, 71 N.R. 1, 61 Nfld. & P.E.I.R. 273, 185 A.P.R. 273, 8 C.H.R.R. D/3773, 1986 CarswellPEI 37, 1986 CarswellPEI 22 (S.C.C.) — followed

F. (A.), Re (2009), 61 R.F.L. (6th) 64, 2009 ABCA 25, 2009 CarswellAlta 33, (sub nom. *T.W. v. Director of the Alberta Child, Youth & Family Enhancement (Alta.))* 446 A.R. 333, (sub nom. *T.W. v. Director of the Alberta Child, Youth & Family Enhancement (Alta.))* 442 W.A.C. 333, (sub nom. *W. (T.) v. Alberta (Child, Youth & Family Enhancement Act, Director))* 307 D.L.R. (4th) 140, 99 Alta. L.R. (4th) 28 (Alta. C.A.) — referred to

F. (T.) v. Alberta (Director of Child & Family Services) (2009), 70 R.F.L. (6th) 278, 2009 CarswellAlta 1378, 2009 ABCA 290 (Alta. C.A.) -- referred to

J. (D.M.), Re (1995), 1995 CarswellBC 1036, 15 B.C.L.R. (3d) 340, 18 R.F.L. (4th) 333, 71 B.C.A.C. 4, 117 W.A.C. 4 (B.C. C.A.) -- referred to

Platner v. Platner (2010), 2010 ABCA 342, 2010 CarswellAlta 2192 (Alta. C.A.) -- followed

W. (K.V.) v. Alberta (Director of Child Welfare) (2006), 2006 CarswellAlta 1773, 2006 ABCA 404, [2007] 3 W.W.R. 626, (sub nom. *K.W. v. Director of Child Welfare (Alta.)*) 391 W.A.C. 175, (sub nom. *K.W. v. Director of Child Welfare (Alta.)*) 401 A.R. 175, 69 Alta. L.R. (4th) 215 (Alta. C.A.) -- followed

Statutes considered:

Child, Youth and Family Enhancement Act, R.S.A. 2000, c. C-12
Generally — referred to

Family Law Act, S.A. 2003, c. F-4.5
Generally — referred to

s. 18 — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
R. 12.71(1) — considered

APPLICATION by Director of Child Welfare for leave to appeal determination allowing appeal by grandparents from determination granting custody of five children to director.

Clifton O'Brien J.A.:

I. Introduction

1 The Director seeks a declaration that leave to appeal is not required from a decision of a Court of Queen's Bench judge who allowed an appeal from a family court judge and granted a private guardianship order under the *Family Law Act*, SA 2003 c F-4.5 (*Act*). In the event that leave is determined to be required, the Director seeks leave to appeal the decision of the appeal justice.

II. Background

2 The respondents are the grandparents of five children. They applied for private guardianship of the children, under the *Act*, in a previous proceeding in which the Director was seeking a permanent guardianship order under the *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12, (*CYFEA*). Their application was dismissed, because both the family court judge, and the Queen's Bench justice on appeal, found that the private guardianship provisions in the *CYFEA* constituted a complete code when dealing with children in care. As a consequence, neither court considered it had jurisdiction to consider an application for private guardianship under the *Act*. The family court judge granted the Director a permanent guardianship order on November 21, 2006. The children were subsequently placed with foster parents; the three older children were placed in one foster home, and the two younger ones in another. This Court dismissed an appeal brought by the parents from the permanent guardianship order. The grandparents did not participate in that appeal, and the Director took the position that their then pending application

for private guardianship would not be prejudiced by the affirmation of the permanent guardianship order: *F. (T.) v. Alberta (Director of Child & Family Services)*, 2009 ABCA 290 (Alta. C.A.) at para. 42, (2009), 70 R.F.L. (6th) 278 (Alta. C.A.).

3 This Court allowed an appeal of the grandparents from the dismissal of their application, held that they were not precluded from making a guardianship application under the *Act*, and directed a new trial: *F. (A.), Re*, 2009 ABCA 25, 307 D.L.R. (4th) 140 (Alta. C.A.).

4 The grandparents returned to family court for a hearing of their private guardianship application. After hearing the evidence, the trial judge accepted that the grandparents were caring individuals who had much to offer the children. He noted, however, that the grandparents had health problems and that there were concerns about their approach to parenting. The trial judge stated:

> And one of the principles which I follow is that in determining what is in the best interests of children we should be able to find a real benefit in any change of care and custody.

And then concluded:

> The children do appear to be thriving about as much as children often do in foster care and so I'm — I would have to look for a real benefit in making a change in starting to integrate.
>
> That all being said, on the whole of the evidence I just — I can't find that that benefit is there. Accordingly I refuse to waive the six months and dismiss the application for guardianship.

5 The grandparents appealed this decision to the Court of Queen's Bench. The appeal justice considered that the reasons of the trial judge, particularly as set out in the passages above, were inconsistent with this Court's decision in *W. (K.V.) v. Alberta (Director of Child Welfare)*, 2006 ABCA 404, 401 A.R. 175 (Alta. C.A.). In that case, this Court held that where there are competing guardianship applications between a private guardian and the Director, the private guardianship application should be conducted first, so as to avoid making a comparison between the private applicants and the foster parents (see paras. 22-26). This Court also stated that it was a "fundamental error" to treat the application for private guardianship as a competition between the applicant member of the family and the foster parents "then or now" (para. 21).

6 The appeal justice found the trial judge erred in law by rejecting the application of the grandparents because they could not demonstrate that the children would be better off with them than continuing with the foster parents. Rather than return the matter to the family court, however, the appeal justice proceeded to determine the application on its merits, based upon the evidentiary record before him. In the absence of findings by the trial judge, the appeal justice found that the grandparents were fit to parent the children and that it was in their best interests that the grandparents be appointed guardians. He discussed the evidence of the Director's experts, who testified about the grandparents' failure to appreciate the gravity of the children's situation when living with their biological parents, and about their "attributional style". He considered that whatever concerns there might be in either regard, they were overwhelmed by other factors which supported granting the private guardianship application. Thus, he granted the grandparents' application for guardianship of the children, and vacated the order for permanent guardianship, commenting as follows:

> As to the history of care for the children, it is clear from the evidence of the grandmother that before state intervention and even thereafter, where permitted, the grandparents had an extensive and close relationship with each of the children since their birth (the possible exception is [P.], who was quite young at the time she was removed from her parents home). The evidence also establishes that the grandparents have lived in their home for 16 years and that their home is entirely suitable for raising children. The grandparents have taken parenting courses to assist them in parenting their grandchildren and to learn appropriate parenting and disciplinary techniques. The grandparents have continued to have frequent contact with the children while they were in care until the permanent guardianship order was granted, whereafter they have not been allowed access to the children. The applicants are physically and mentally able to conduct normal childcare. The applicants are not financially unstable. There's no indication whatsoever of any family violence involving the grandparents. The applicants have demonstrated an ability and willingness to care for and meet the needs of the children. They have indicated that they will allow the children to maintain meaningful relationships with their foster parents. There are no civil

or criminal proceedings against the applicants. The applicants have indicated their willingness to be governed by an order of the court prohibiting or limiting access of the children to their biological parents.

For all the reasons expressed above, I am of the opinion that the applicants are fit persons to assume guardianship of the children and that it would be in all of the children's best interests that guardianship be awarded to the applicants. Therefore, the appeal is allowed. The effect of this order is to vacate the public guardianship order which granted guardianship to the director.

7 The order for the appeal justice granting private guardianship to the grandparents was made on October 22, 2010, and contained the following express terms, which were referred to by counsel as "conditions" of his order:

. . .

*4. Within the next 30 days, the Director of Child Welfare shall provide complete information to the Appellants with respect to details of each child including any special needs, schooling, special programming an therapeutic requirements.

5. On the 31 st day after the granting of the within Order, the children shall be delivered to the Appellants. The Appellants shall have no contact with the children until this day.

6. The Director of Child Welfare shall be entitled to meet with the Appellants on a monthly basis for a period of six months to aid with the transition of the children.

7. The Appellants shall not permit the children to have any contact with the biological parents of the children until each child is 18 years of age except by further Order of this Court.

8. The parties shall work cooperatively for the transition of the children.

*[The above numbers refer to the paragraph numbers of the subject order.]

III. Analysis

(a) Leave to Appeal Required

8 The application of the grandparents for guardianship was made under the *Act*. Rule 12.71(1) of the *Alberta Rules of Court*, Alta Reg 124/2010, provides:

No appeal lies to the Court of Appeal from a decision of the Court of Queen's Bench sitting as an appeal court for decisions made under the *Family Law Act* except on a question of law or jurisdiction, or both, with leave of a judge of the Court of Appeal.

9 Despite the clear wording of the Rule, the Director submits that leave is not necessary because the application was intertwined with the proceedings under the *CYFEA*, with the result that it is not simply a decision granted under the *Act*. The Director further submits that the need for leave is inconsistent with his statutory duty to act in the best interests of children.

10 It is not disputed that the private guardianship order was made under the *Act*. The termination of the permanent guardianship order was merely consequential. In my view, the rule is plain and clear. No appeal may be made to this Court from a decision made under the *Act*, except on questions of law or jurisdiction, with leave of a justice of this Court. The Director is not excepted. If that had been intended, it would have been easy to insert an express exception in favour of the Director. The arguments of the Director as to why the rule should be interpreted to except the Director, are essentially arguments in favour of changing the rule. As the rule now stands, the Director requires the leave of this Court to proceed with his appeal.

(b) Test for Leave

11 In *Platner v. Platner*, 2010 ABCA 342 (Alta. C.A.), Paperny J.A. dealt with an application for leave to appeal from a Queen's Bench order in proceedings under the *Act*. She stated at para. 6:

> Ms Platner seeks leave to appeal the Queen's Bench order. This is a Part J appeal. The test for leave to appeal is that the applicant must show that there is an important question of law or a precedent, that there is a reasonable chance of success on appeal, and that the delay will not unduly hinder the progress of the action or cause undue prejudice.

And concluded at para. 8:

> I am satisfied that the test for leave to appeal has been met. Questions of procedural fairness are important questions of law, at least as raised in this context. The standard of procedural fairness required in the circumstances is important to these parties and to the practice. The appeal also raises the issue of standard of review. It is submitted that the appeal judge erred by failing to consider the appropriate standard of review applicable to the decision of the trial judge in allowing the hearing to proceed, and dealing with the contempt in the manner in which he did. It also raises the issue under what circumstances is it appropriate for a Queen's Bench judge to direct a transfer of proceedings originating in Provincial Court to Queen's Bench, particularly in the absence of any application by either of the parties to do so. All these issues are questions of law of significance to the practice, have a reasonable prospect of success on appeal, and, while they result in additional litigation between the parties, it cannot be said that they unduly hinder the progress of the action.

(c) Leave Granted

12 The Director and counsel for the children submit that the appeal justice erred in the following ways:

> (i) when he found that the trial judge engaged in a comparison of the grandparents with the foster parents;
>
> (ii) by too narrowly construing the best interests of the child test under section 18 of the *Act*, in not giving sufficient weight to the conflict between the grandparents and the Director, and the evidence relating to the grandparents' "attributional style of parenting";
>
> (iii) by substituting his own fact finding for those facts found by the lower court;
>
> (iv) by concluding that the trial judge made no findings in relation to credibility;
>
> (v) by relying on facts not in evidence, including a finding that it was reasonable for the grandparents to be more sympathetic to their own biological children rather than accepting the concerns raised by the Director;
>
> (vi) by failing to appreciate the fact that the children have had no contact with the grandparents for a very significant period of time, and failing to distinguish *W. (K.V.)* on this basis; and
>
> (vii) by imposing conditions without any jurisdictional basis under the *Act* after waiving the six month continuous care requirement, and in so doing implicitly acknowledging that the grandparents are not suitable to care for these children because they do not have the requisite knowledge.

13 Not all of the issues raised are questions of law, nor do all qualify as significant or important questions of law. However, I am satisfied that the record raises the following questions of law or jurisdiction that are material to the interests of the children:

> 1. Did the appeal justice misapply the decision of the Court in *W. (K.V.)* in the circumstances of this case?
>
> 2. Did the appeal justice in proceeding on the evidentiary record before him correctly determine what was in the best interests of the children pursuant to section 18 of the *Act*; in particular, did he err in failing to give deference and sufficient weight to findings of the trial judge relative to the conflict between the grandparents and the Director and the grandparents' so-called "attributional style of parenting"; and

3. Did the appeal judge have jurisdiction, or otherwise err in law, in imposing the above quoted "conditions" in his order?

14 I am particularly concerned with the Director's challenge to the jurisdiction of the appeal justice to impose terms which are obviously aimed at ensuring that the transition of guardianship from the foster parents to the grandparents is carried out in a manner consistent with the best interests of the children.

15 The Director seems to be saying that his statutory responsibilities are necessarily terminated once the guardianship order is made. While such obligations may not be found in the governing legislation, the appeal justice appears to have been exercising *parens patriae* jurisdiction. It is correct, of course, that such jurisdiction cannot conflict with the scope of the Director's statutory obligations; however, it may be exercised where gaps exist in the legislation: *J. (D.M.), Re* (1995), 71 B.C.A.C. 4, 15 B.C.L.R. (3d) 340 (B.C. C.A.). As pointed out by LaForest J. in *Eve, Re*, [1986] 2 S.C.R. 388 (S.C.C.), at 425-426, (1986), 31 D.L.R. (4th) 1 (S.C.C.), *parens patriae* jurisdiction is founded on necessity, namely to act for the protection of those who cannot care for themselves, and "the categories under which the jurisdiction can be exercised are never closed". In any event, it is clear that a satisfactory transition plan was an important factor in the order made by the appeal justice. In my view, this issue of law or jurisdiction, as the case may be, requires determination.

16 The appeal justice stayed his order pending the outcome of the appeal proceedings instituted by the Director. In doing so, the appeal justice "directed that the matter be expedited as quickly as is practicable". It is necessary to expedite the process in these circumstances to avoid undue prejudice. The litigation has already taken too long, and it is in the interests of the children that the matter be determined as quickly as possible.

17 It appears that the proceedings both before the trial judge and the appeal justice have already been transcribed. An appeal record can therefore be quickly prepared. Accordingly, I direct that the appeal record be prepared, filed and served not later than January 14, 2011. I further direct that counsel consult with the Case Management Officer at this time to secure a date for hearing of the appeal not later than the March 2011 sittings in Calgary.

IV. Conclusion

18 The Director is granted leave to appeal on the questions of law or jurisdiction set out above. The appeal will be expedited in accordance with the above directions.

Application granted.

End of Document

[Indexed as: **Alberta (Director, Child, Youth and Family Enhancement Act) v. L. (D.)**]

Director (Child, Youth and Family Enhancement Act), Respondent (Applicant) and D.L. and M.B., Appellants (Respondents)

Alberta Court of Appeal

Docket: Edmonton Appeal 1203-0209-AC

2012 ABCA 275

Keith Ritter, Frans Slatter, Myra Bielby JJ.A.

Heard: September 19, 2012

Judgment: September 19, 2012

Family law — Child welfare — Jurisdiction — Chambers judge has jurisdiction to direct that permanently comatose two and a half year old child be provided only with palliative care and that life-extending treatment be withdrawn — If withdrawal of care does not fall within "essential treatment" in Child, Youth and Family Enhancement Act, chambers judge entitled to exercise parens patriae jurisdiction — Court of Appeal has jurisdiction to consider application for leave to appeal to the Supreme Court of Canada and deny stay pending leave application — No legal issues of sufficient uncertainty to warrant overriding best interest of child — Child, Youth and Family Enhancement Act, R.S.A. 2000, c. C-12.

Appeal — Leave to appeal — Supreme Court of Canada — Chambers judge has jurisdiction to direct that permanently comatose two and a half year old child be provided only with palliative care and that life-extending treatment be withdrawn — If withdrawal of care does not fall within "essential treatment" in Child, Youth and Family Enhancement Act, chambers judge entitled to exercise parens patriae jurisdiction — Court of Appeal has jurisdiction to consider application for leave to appeal to the Supreme Court of Canada and deny stay pending leave application — No legal issues of sufficient uncertainty to warrant overriding best interest of child — Child, Youth and Family Enhancement Act, R.S.A. 2000, c. C-12.

Appeal — Stay pending appeal — Chambers judge directed that permanently comatose two and a half year old child be provided only with palliative care and that life-extending treatment be withdrawn — Parents' appeal dismissed — Court of Appeal has jurisdiction to consider application for leave to appeal to the Supreme Court of Canada and deny stay pending leave applica-

tion — No legal issues of sufficient uncertainty to warrant overriding best interest of child.

The chambers judge directed that a two and a half year old child, permanently comatose, be provided only with palliative care and that life-extending treatment be withdrawn. The parents, charged with aggravated assault and other related offences appealed, arguing that the chambers judge had no jurisdiction to grant the order as the withdrawal of care did not fall within "essential treatment" in the *Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12

The parents also applied for a stay pending an application for leave to appeal to the Supreme Court of Canada.

Held: The appeal was dismissed; the application for a stay was dismissed.

If life-sustaining treatment is not included in the definition of "essential treatment" in the Act, there is a gap in the legislative scheme but the chambers judge was entitled to invoke her *parens patriae* jurisdiction which is warranted whenever the best interests of a child are engaged. There was no error of principle in the chambers judge's decision which warranted interference. The decision was made after careful reflection and consideration of the parents' religious beliefs.

An application for leave to appeal to the Supreme Court of Canada can be made to the Court of Appeal. There were no legal issues of sufficient uncertaintly to warrant overriding the best interests of the child.

Cases considered by *Frans Slatter J.A.*:

Alberta (Director, Child, Youth, and Family Enhancement Act) v. L. (D.) (2012), 2012 CarswellAlta 1532, 2012 ABQB 562 (Alta. Q.B.) — **referred to**

Statutes considered:

Child, Youth and Family Enhancement Act, R.S.A. 2000, c. C-12
s. 22.1(2) [en. 2003, c. 16, s. 25] — **referred to**
Supreme Court Act, R.S.C. 1985, c. S-26
s. 65.1 [en. 1990, c. 8, s. 40] — **referred to**

APPEAL by parents from judgment granting Director's application for order withdrawing all non-palliative medical care from child in need of protection; APPLICATION by parents for judicial stay of any order made should within appeal be dismissed pending appeal to Supreme Court of Canada.

R.R. Callioux, for Respondent
L. Bubel, for Appellant, D.L.
A.C. Kellett, for Appellant, M.B.
J.T. Quinn, for the Child, M.

Frans Slatter J.A.:

1 This appeal concerns the fate of M., a two and a half year old permanently comatose child in the Pediatric Intensive Care Unit at the Stollery Children's Hospital. The physicians unanimously agree that the child's condition is irreversible, and that no further medical intervention is warranted. M. will never be able to regain consciousness, nor interact in any way with her environment. The chambers judge directed that she be provided only with palliative care, and that life-extending treatment be withdrawn: *Alberta (Director, Child, Youth, and Family Enhancement Act) v. L. (D.)*, 2012 ABQB 562 (Alta. Q.B.).

2 The parents have appealed the order of the chambers judge. The Director supports the assumption of jurisdiction by the chambers judge, but takes no position on the merits of the decision. Independent counsel appointed to represent the child supports the order granted.

3 The parents have been charged with aggravated assault and other related offences, and if M. dies their jeopardy may be enhanced. They initially gave a "do not resuscitate" order, but because of their incarceration they have been unable to communicate with each other or with the medical team for several months. As a result, they have not been as involved in the decisions regarding baby M.'s care as would ordinarily be the case. The father deposed that his love for M. and his religious beliefs preclude him from accepting the doctors' recommendation that life sustaining medical treatment be withdrawn.

4 The appellants argue that the chambers judge had no jurisdiction to grant the order. They argue that the withdrawal of care does not fall within "essential treatment" in the statute: *Child, Youth and Family Enhancement Act*, RSA 2000, c. C-12, s. 22.1(2). There is much to be said for the argument that "essential treatment" is the care that is essential for the best interests of the patient, and that may be palliative care. But if the appellants are correct that withdrawing life sustaining treatment is not included, there is a gap in the legislative scheme, and the chambers judge was entitled to invoke her *parens patriae* jurisdiction. The exercise of that inherent jurisdiction is warranted whenever the best interests of the child are engaged.

5 The sanctity of human life is one of the core values of our society and our legal system. But life is not without end. The issue before us is whether M.'s life should be artificially extended by modern medical

technology, or whether matters should be allowed to take their course without further human intervention.

6 The medical team is aware of the difficult moral and ethical issues it faces. The chambers judge also faced those ethical issues, as well as the consequent difficult legal issues. After careful reflection, including a consideration of the parents' religious beliefs, the chambers judge made a decision. The medical condition of M. is such that the decision to provide only palliative care would be the same, whether the parents were said to be responsible for her injuries or not. Upon review, we cannot see any error of principle in that decision which would warrant interference by this Court.

7 The appeal is therefore dismissed.

8 In relation to the parents' request for a final visit with M., we request that the Edmonton Police Service or the Correctional Service, within the next 24 hours, if resources are available, escort each of them separately to the hospital where she is located for a visit of a maximum of 20 minutes duration with her. The parents are not to be present at the same time as each other for any portion of these visits. Medical personnel and the police escort may remain in the room with the parent and M. for the duration of each visit.

9 Whether and how these visits occur is in the discretion of the Edmonton Police Service or the Correctional Services. In making this direction we are not varying the terms of any existing bail order. Each parent will continue to remain in custody at all times throughout transport to and from the hospital and for the duration of each visit.

(application for a stay)

10 The appellant parents now seek a further stay, pending an application for leave to appeal to the Supreme Court of Canada. That application could be made to the Supreme Court, but it can also be made to this Court: *Supreme Court Act*, RSC 1985, c. S-26, s. 65.1.

11 This matter has now been before the courts for several months. Baby M. has been in intensive care that whole time, and if treatment is to continue she will require some invasive medical procedures. There are no legal issues of sufficient uncertainty to warrant overriding the best interests of M. There is nothing further that the legal system can do to improve the situation. While it is true that refusing a stay might render the appeal moot, the Supreme Court has the authority to consider moot appeals when the issue is important and elusive of review.

12 The application for a stay is dismissed.

Appeal dismissed; Application dismissed.

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Our File: 51433 JLH

SENT BY EMAIL ONLY

May 22, 2015

Reynolds Mirth Richards & Farmer LLP
Suite 3200 Manulife Place
10180 - 101 Street
Edmonton, Alberta T5J 3W8

Attention: Marco Poretti

Dentons LLP
2900 Manulife Place
10180 - 101 Street
Edmonton Alberta T5J 3V5

Attention: Doris Bonora

Dear Sir and Madam:

Re: In the Matter of the Sawridge Band Inter Vivos Settlement – Court of Q.B. Action No. 1103 14112

We are taking this opportunity to enclose our Statement of Account, File 51433, Invoice #4015, for services rendered between April 16, 2015 and May 19, 2015, balance owing $19,369.69. In accordance with our agreement with the Sawridge Trustees, we are providing you with an account showing total time and charges but with privileged information blocked out. Should you have any questions or concerns on the account, please contact me directly.

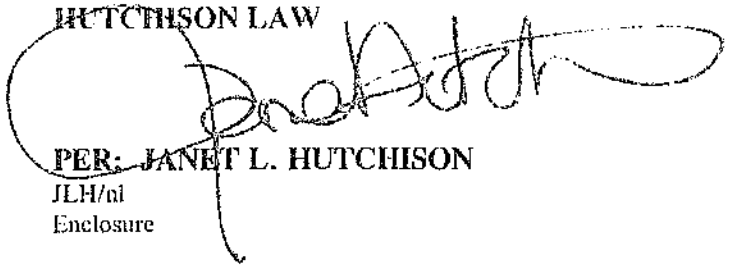
We look forward to receiving payment of this account in the amount of $19,369.69 within 30 days of the issuance of this account.

If the Sawridge Trustees ate objecting to Supreme Advocacy charges, we would request that all amounts other than the Supreme Advocacy disbursement be paid as per our costs agreement.

We look forward to continuing to provide you with quality legal services in this matter.

Yours truly,

HUTCHISON LAW



PER: JANET L. HUTCHISON
JLH/nl
Enclosure

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STATEMENT OF ACCOUNT

Public Trustee of Alberta
400 South, 10365 97 Street
Edmonton, Alberta T5J 3Z8

File #:51433
Inv #: 4015
May 21, 2015

RE: In the Matter of the Sawridge Band Inter Vivos Settlement - Court of Q.B. Action No. 1103 14112

To all legal services rendered in connection with the above-noted matter, including the following:

DATE	DESCRIPTION	HOURS	AMOUNT
Apr-15	Review file; Receipt and review of correspondence [redacted]; Correspondence to [redacted]		
Apr-15	Receipt and review of correspondence from D. Bonora and M. Poretti; Correspondence to M. Poretti; Receipt and review of correspondence [redacted]; Correspondence to [redacted]; Receipt and review of correspondence from D. Bonora. Review file; Correspondence to D. Bonora.		
Apr-15	Receipt and review of correspondence from D. Bonora, M. Poretti and N. Cummings; Review file; Correspondence to D. Bonora and N. Cummings; Correspondence [redacted]; Teleconference [redacted] Review file [redacted]; Review file re: questioning on P. Bujold's undertakings; Draft correspondence [redacted]		
Apr-15	Receipt and review of correspondence; Review file [redacted]; Meeting with [redacted] Review P. Bujold answers to undertakings; Draft correspondence.		
Apr-15	Legal research [redacted]		

[redacted]; Review file [redacted]

May-15 Receipt and review of correspondence from Dentons;2.80

Receipt and review of correspondence [redacted]; Legal research; Teleconference [redacted]; Correspondence [redacted]; Correspondence [redacted].

May-15 Review file re: preparation for P. Bujold questioning; Draft and revise [redacted]; Legal research; Draft and revise correspondence to M. Poretti and D. Bonora; Receipt and review of correspondence [redacted]; Receipt and review of correspondence [redacted]; Correspondence [redacted]; Receipt and review of correspondence [redacted]; Correspondence [redacted]; Update [redacted]. (full day)

May-15 Review and [redacted]; Telephone consultation [redacted] Receipt and review of correspondence [redacted]; Receipt and review of correspondence [redacted].

Review and revise correspondence to D. Bonora and M. Poretti; Review file [redacted]

May-15 Review file [redacted]; Meeting [redacted]

May-15 Receipt and review of correspondence [redacted]; Review file [redacted] Review correspondence [redacted]; Draft correspondence [redacted]; Draft correspondence [redacted]; Draft correspondence [redacted]

May-15 Receipt and review of correspondence [redacted]; Review and revise correspondence [redacted].

May-15 Review file; Telephone consultation [redacted] Revise correspondence to Dentons and RMRF.

FEES FOR PROFESSIONAL SERVICES	32.10	$13,642.50

Total Hours: 32.10 X $425/Hr (J. L. Hutchison)

OTHER CHARGES		
Photocopies	$272.75	
Total Other Charges		$272.75
DISBURSEMENTS		
Accusript Reporting Services Invoice #17739	$221.00	
Parking - Meeting	$5.71	
Supreme Advocacy Invoice #2254	$4,955.00	
Total Disbursements		$5,181.71
GST		$272.73
Total Fees, Disbursements & GST		$19,369.69
Balance Due		**$19,369.69**

Hutchison Law

E. & O.E.

* tax-exempt

GST # 87325 1573

Per: _____
Janet E. Hutchison

Payable upon receipt Interest charged at 18% per annum on accounts over 30 days.

TRUST STATEMENT

		DISBURSEMENTS	RECEIPTS
May-05-15	Received From: Sawridge Trust Conduct Monies for Elizabeth Poitras		338.76
May-06-15	Paid To: Liz Poitras Payment of Conduct money to witness	288.76	
	Paid To: Janet Hutchison Prof Corp Reimbusement of Conduct money advance to witness	50.00	
	Total Trust	$338.76	$338.76
	Trust Balance		**$0.00**

Invoice # 2254
Date: 05/15/2015
Due On: 06/14/2015

ADVOCACY

340 Gilmour Street Suite 100
Ottawa, Ontario
K2P 0R3
Phone: 613-695-8855
613-695-8580

Janet L. Hutchison
Hutchison Law
#155, Glenora Gates
10403 - 122 Street
Edmonton, Alberta
T5N 4C1

0274-006

1985 Sawridge Trust v. Alberta (Public Trustee)

Attorney	Description	Date
TS	Receive emails from client and review same; discussion ; prepare for teleconference; teleconference debrief	April 2015
MFM	Review of email sent	April 2015
EM	Email correspondence, detailed review of same, & making notes, meeting	April 2015
TS	Discussion	April 2015
EM	Email teleconference meetings	April 2015
TS	Review summary email ; discussion review	April 2015
MFM	Review	April 2015

Time Keeper	Position	Quantity	Rate	Total
Marie-France Major	Attorney	2.05	$500.00	$1,025.00
Eugene Meehan	Attorney	4.3	$750.00	$3,225.00

Thomas Slade	Attorney	2.35	$300.00	$705.00
			Subtotal	**$4,955.00**
			HST (13.0%)	**$644.15**
			Total	**$5,599.15**

All invoice totals are in CDN funds.
HST #839003308
Please make all amounts payable to: Supreme Advocacy LLP

Please pay within 30 days.

E & OE

Supreme Advocacy LLP

Per: Eugene Meehan, Q.C.