

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



CDO'Brien for Costigan J.A.
Authorized to sign for: Costigan J.A.

CDO'Brien
O'Brien J.A.

[Signature]
McDonald J.A.

Appearances:

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