APPEAL NO. 1203-0230-AC
Q.B. NO. 1103 14112

IN THE COURT OF APPEAL OF ALBERTA

IN THE MATTER OF THE TRUSTEE ACT, R.S.A 200, 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 TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust

APPELLANTS
(Respondent)

- 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
(Interested Parties)

Appeal from the Order of
The Honourable Justice D.R. Thomas
Dated the 12th day of June, 2012
Filed the 20th day of September, 2012

BOOK OF AUTHORITIES OF THE RESPONDENT
VOLUME 2 of 2

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V. LIST OF AUTHORITIES

Tab

1. *Alberta Rules of Court,* Alta Reg. 124/2010

2. *Blueberry Interim Trust (Re)* [2012] B.C.J. No. 343 (B.C.S.C.)

3. *Braid Builders Supply & Fuel Ltd. v. Genevieve Mortgage Corp.* [1972] M.J. No. 31 (C.A.)

4. *Canada Trust Co. v. Ontario Human Rights Commission* [1990] O.J. No. 615 (C.A.)

5. *D.L. v. Alberta (Child, Youth and Family Enhancement Act, Director)* [2012] S.C.C.A. No. 364 (S.C.C.)

6. *D.L. v. Alberta (Child, Youth and Family Enhancement Act, Director)* [2012] A.J. No. 958 (C.A.)

7. *E. (Mrs.) v. Eve* [1986] S.C.J. No. 60 (S.C.C.)

8. *Horse Lake First Nation v. Horseman* [2003] A.J. No. 179 (Q.B.)

9. *L.C. v. Alberta (Metis Settlements Child & Family Services, Region 10)* [2011] A.J. 396 (Q.B.)

10. *L.C. v. Alberta (Metis Settlements Child & Family Services, Region 10)* [2011] A.J. No. 84 (Q.B.)

11. *Myran et al.* v. *The Long Plain Indian Band et. al.* [2002] MBQB No. 48 (Q.B.)

12. *Nazarewycz v. Dool* [2009] A.J. No. 189 (C.A.)

13. *Penney Estate v. Resetar* [2011] O.J. No. 490 (O.N.S.C.)

14. *Poitras v. Sawridge Band* [2012] F.C.J. No. 193 (C.A.)

15. *Primo Poloniato Grandchildren's Trust (Trustee of) v. Browne* [2012] O.J. No. 5772 (C.A.)

16. *Public Trustee Act,* S.A. 2004, c. P-44.1

17. *Residential Warranty Co. of Canada Inc. (Re)* [2006] A.J. No. 1304 (C.A.)

18. *Rufenack v. Hope Mission* [2006] A.J. No. 172 (C.A.)

19. *Sadlemyer v. Royal Trust Corp. of Canada* [2012] A.J. No. 387 (Q.B.)

20. *Sawridge Band v. Canada* [2009] S.C.C.A. No. 248 (S.C.C.)

21. *Sawridge Band v. Canada* [2009] F.C.J. No. 465 (C.A.)

22. *Sawridge Band v. Canada* [2005] F.C.J. No. 1857 (F.C.)

23. *Sawridge Band v. Canada* [2004] F.C.J. No. 77 (F.C.C.)

24. *Sawridge Band v. Canada* [2003] F.C.J. No. 723 (C.A.)

25. *Sloan v. Fox Estate* [2011] O.J. No. 3624 (O.N.S.C.)

26. *Tataryn v. Tataryn Estate* [1994] S.C.J. No. 65 (S.C.C.)

27. *Taylor v. Alberta Teachers' Assn.* [2002] A.J. No. 1571 (Q.B.)

28. *Thomlinson v. Alberta (Child Services)* [2003] A.J. No. 716 (Q.B.)

29. *Twinn v. Poitras* [2012] S.C.C.A. No. 152 (S.C.C.)

TAB 17

Case Name:

Residential Warranty Co. of Canada Inc. (Re)

Between
Kingsway General Insurance Company, Appellant (Applicant), and
Deloitte & Touche Inc., Trustee In Bankruptcy of Residential Warranty Company of Canada Inc. and Residential Warranty Insurance Services Ltd., Respondent

[2006] A.J. No. 1304

2006 ABCA 293

275 D.L.R. (4th) 498

[2006] 12 W.W.R. 213

65 Alta. L.R. (4th) 32

417 A.R. 153

25 C.B.R. (5th) 38

[2006] I.L.R. 4552

153 A.C.W.S. (3d) 273

2006 CarswellAlta 1354

Docket: 0603-0093-AC

Alberta Court of Appeal
Edmonton, Alberta

Côté and Paperny JJ.A. and Sulyma J. (ad hoc)

Heard: September 5, 2006.
Judgment: October 10, 2006.

(41 paras.)

Insolvency law -- Trustees -- Renumeration -- Appeal from a decision by a case management judge who granted a charge for trustee fees against property subject to conflicting, undetermined trust claims -- Appeal dismissed -- The case management judge had inherent jurisdiction pursuant to the Bankruptcy and Insolvency Act to permit the trustee fees to be paid from property that was subject to undetermined trust claims -- She recognized that her power must be used sparingly, and did not err in the exercise of her jurisdiction under the circumstances.

Appeal by Kingsway General Insurance from a decision by a case management judge who granted a charge for trustee fees against property subject to conflicting, undetermined trust claims. Residential Warranty Company of Canada and Residential Warranty Insurance Services operated a home warranty business in Alberta and British Columbia. Kingsway underwrote warranty policies sold by RWI and RWC. RWI collected insurance premiums on behalf of Kingsway pursuant to a broker agreement. RWC and RWI also received funds from home builders by way of fees for membership in the warranty programs and by way of cash deposits or letters of credit as security for repairs covered by the warranty policies. RWC and RWI became bankrupt in 2005. Deloitte & Touche was appointed the trustee in bankruptcy of their estates. Kingsway claimed $11,200,000 pursuant to contractual, statutory and common law trusts from the bankrupt companies. Deloitte & Touche disallowed Kingsway's trust claim. Kingsway appealed the trustee's decision to the Court of Queen's Bench. Kingsway applied for an order that Deloitte & Touche was not entitled to use the realizations of any assets and property to pay its fees and expenses pending the hearing of the appeal on the amount they claimed was owed. It also sought the return of all fees already paid out, and the appointment of Deloitte & Touche as interim receiver of the assets for preservation purposes until the appeal had been resolved. Deloitte & Touche asked for a charge on the estate assets in order to pay its fees and disbursements. The case management judge denied Kingsway's application and granted Deloitte & Touche's application for a retrospective charge, as well as its application for a prospective charge once it filed an interim report with the court that would confirm the inspectors approved the actions proposed by Deloitte & Touche, including its involvement in the proceedings to determine Kingsway's trust claim. She stipulated that both the retrospective and prospective charges were subject to challenge by builders with trust claims who had not been given notice of the applications before her.

HELD: Appeal dismissed. The case management judge had inherent jurisdiction pursuant to the Bankruptcy and Insolvency Act to permit Deloitte & Touche's fees be paid from property that was subject to undetermined trust claims in appropriate circumstances. The case management judge recognized that power must be used sparingly, and did not err in the exercise of her jurisdiction in this case. The ultimate purpose of the administrative powers granted a trustee under the Act was to manage the estate in order to provide equitable satisfaction of the creditors' claims. Deloitte & Touche coordinated Kingsway's claims, and dealt with the validity and priority of the other trust claims. It provided the necessary information to the Court of Queen's Bench to resolve these issues. As a result of this assistance it provided to the court and all of the claimants in the bankruptcies, it was just and practical that inherent jurisdiction be used to grant the charge for its fees.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 67, s. 67(1), s. 81, s. 81(2), s. 183(1)

Insurance Act, R.S.A. 2000, c. I-3, s. 504

Appeal From:

Appeal from the Decision of The Honourable Madam Justice J. E. Topolniski. Dated the 24th day of March, 2006. (24 112232; 24 112233)

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[Editor's note: A Corrigendum was released from the Court October 18, 2006. The corrections have been made to the text and the Corrigendum is appended to this document.]

Reasons for Judgment

Reasons for judgment were delivered by Paperny J.A. Concurred in by Côté J.A. Concurred in by Sulyma J.

PAPERNY J.A.:--

Introduction

1 This is an appeal from a case management judge, sitting in bankruptcy, granting a charge for trustee's fees against property subject to conflicting, undetermined trust claims.

Background

2 The bankruptcy judge reviewed the facts in her reasons: (2006), 21 C.B.R. (5th) 57, 2006 ABQB 236. The following is a summary.

3 Residential Warranty Company of Canada ("RWC") and Residential Warranty Insurance Services ("RWI") operated a home warranty business in Alberta and British Columbia. The appellant Kingsway General Insurance ("Kingsway") underwrote warranty policies sold by RWI and RWC.

4 RWI collected insurance premiums on behalf of Kingsway pursuant to a broker agreement. RWC and RWI also received funds from home builders by way of fees for membership in the warranty programs and by way of cash deposits or letters of credit as security for repairs covered by the warranty policies.

5 RWC and RWI became bankrupt on May 31, 2005. The respondent, Deloitte & Touche, is the trustee in bankruptcy of their estates.

6 Kingsway filed proofs of claim pursuant to s. 81 of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 ("*BIA*") asserting that all property in the bankrupt estates is subject to a trust in Kingsway's favour. Unsecured creditors, Canada Revenue Agency and other competing trust claimants (home builders) also claim interests in the property.

7 Kingsway claims that the entirety of the bankrupts' estates is comprised of premiums which the bankrupts collected on its behalf and therefore is impressed with a trust under the *Insurance Act*, R.S.A. 2000, c. I-3 and corresponding legislation in British Columbia. Section 504 (formerly 124) of the Alberta statute provides that an insurance agent who acts for an insurer in negotiating, renewing or continuing a contract of insurance and who receives insurance premiums from an insured, is deemed to hold the premiums in trust for the insurer. Kingsway submits that these premiums cannot be subject to the charge granted because as trust funds they do not form part of the bankrupts' estates. Kingsway also asserts an express trust by virtue of the broker agreement and a constructive or resulting trust. The broker agreement between Kingsway and RWI provides that "[a]ll money received by the Broker [RWI] on behalf of the Company [Kingsway] less the Broker commission shall be the property of the Company and shall be held...as Trust Funds...".

8 The trustee disallowed Kingsway's trust claim and notified Kingsway pursuant to s. 81(2) of the *BIA*. The trustee's review of the records indicated to it that all premiums owing had been paid to Kingsway and that the funds in the estate represent other income from the operation of the business.

9 Kingsway appealed the trustee's decision to the Court of Queen's Bench, a summary proceeding under s. 81(2) of the *BIA*. That appeal is pending.

10 Kingsway applied to the bankruptcy judge seeking that Deloitte & Touche be prohibited from accessing any property in the estates for any purpose, including paying its past and future fees and expenses for appearing on the appeal and otherwise, pending the determination of Kingsway's trust claim.

11 The trustee opposed Kingsway's application and sought a retrospective and prospective charge against all assets under its administration.

12 The trustee has been administering the estates of RWC and RWI in accordance with the *BIA*, including: conducting financial analysis; securing and retaining possession of property of RWC and RWI; communicating with Kingsway and builders who are also advancing trust claims; establishing and executing a process to deal with builder claims to cash security deposits held by RWC and RWI; communicating with home owners claiming insurance coverage pursuant to policies issued by Kingsway; and administering insurance claims on a limited basis.

13 The trustee anticipates future costs arising from dealing with the validity and priority of the trust claims of Kingsway and various builders.

14 The trustee asserts that because Kingsway's trust claims encompass the entirety of the property under the trustee's administration, the ultimate determination of Kingsway's claim is critical to the administration of these bankruptcies. The trustee is concerned about prejudice to other creditors and competing trust claimants if it is unable to respond to Kingsway's appeal of the disallowance due to lack of funding.

Decision Below

15 The case management judge denied Kingsway's application and granted the trustee's application for a retrospective charge. She also granted the trustee's application for a prospective charge,

subject to the trustee filing an interim report with the court confirming the inspectors approved the actions proposed by the trustee, including its involvement in the proceedings to determine Kingsway's trust claim. She stipulated that both the retrospective and prospective charges were subject to challenge by builders with trust claims who had not been given notice of the applications before her. She further ordered the trustee to minimize general estate administration, not to pursue further asset realization without Kingsway's consent or the court's approval, and that Kingsway's appeal from the trustee's disallowance proceed on an expedited basis.

Issues on Appeal

16 This appeal raises the following issues:

1. Does a bankruptcy judge have jurisdiction to order that a trustee's fees be paid from property that is subject to undetermined trust claims?
2. If so, does that jurisdiction include the trustee's fees associated with determination of a trust claim?
3. If jurisdiction exists, what factors should a court consider in exercising its discretion to make such orders?
4. If jurisdiction exists, did the case management judge properly exercise the discretion?

Standard of Review

17 The first three issues raise a question of law, subject to the standard of correctness: ***Murphy Oil Co. v. Predator Corp.*** (2005), 384 A.R. 251, 2006 ABCA 69. The fourth issue involves the exercise of discretion of a case management justice and cannot be interfered with in the absence of a palpable or overriding error: ***Northstone Power Corp. v. R.J.K. Power Systems Ltd.*** (2002), 36 C.B.R. (4th) 272, 2002 ABCA 201.

Discussion

1. Jurisdiction to order trustee's fees be paid from property subject to undetermined trust claims

18 The *BIA* does not address the ability of a trustee to obtain a charge for its fees on property that is subject to undetermined trust claims. The trustee submits that the jurisdiction to do so is found in the inherent jurisdiction of the bankruptcy court.

19 Section 183(1) of the *BIA* preserves the inherent jurisdiction of the Court of Queen's Bench of Alberta sitting in bankruptcy, stating in part:

> 183. (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancilliary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers: ...

(d) in the Provinces of New Brunswick and Alberta, the Court of Queen's Bench;...

20 Inherent jurisdiction is not without limits, however. It cannot be used to negate the unambiguous expression of legislative will and moreover, because it is a special and extraordinary power, should be exercised only sparingly and in a clear case: ***Baxter Student Housing Ltd. v. College Housing Cooperative Ltd.***, [1976] 2 S.C.R. 475 at 480; ***Wasserman Arsenault Ltd. v. Sone*** (2002), 33 C.B.R. (4th) 145 (Ont. C.A.). In ***Wasserman***, the trustee applied for an increase in fees in a summary administration bankruptcy. Rule 128 of the *BIA* Rules caps the trustee's fees in summary administration bankruptcies with no permissive or discretionary language. The Ontario Court of Appeal concluded that inherent jurisdiction could not be used to conflict with that legislative expression.

21 Further limitations are based on the nature of the *BIA* - it is a detailed and specific statute providing a comprehensive scheme aimed at ensuring the certainty of equitable distribution of a bankrupt's assets among creditors. In this context, there should not be frequent resort to the power. However, inherent jurisdiction has been used where it is necessary to promote the objects of the *BIA*: ***Re Tlustie*** (1923), 3 C.B.R. 654 ; ***Canada (Minister of Indian Affairs and Northern Development) v. Curragh Inc.*** (1994), 27 C.B.R. (3d) 148 (Ont. S.C.). It has also been used where there is no other alternative available: ***Re Olympia & York Developments Ltd.*** (1997), 18 C.B.R. (4th) 243 (Ont. Gen.Div.); ***Re City Construction Company Ltd.*** (1961), 2 C.B.R. (N.S.) 245 (B.C.C.A.) and to accomplish what justice and practicality require:***Canada v. Curragh***.

22 Kingsway asserts that s. 67(1) of the *BIA* prohibits such a charge. That section states:

> 67. (1) The property of a bankrupt divisible among his creditors shall not comprise
> (a) property held by the bankrupt in trust for any other person...

23 Kingsway relies on s. 67 to assert that property held by a bankrupt in trust for others does not form part of the estate and therefore use of inherent jurisdiction to grant a charge on that property would be contrary to the Act. Section 67 does not mean, however, that trust property does not fall within a trustee's administration. It only addresses the division of the bankrupt's property among the creditors; it does not address what property forms the estate that must be administered by the trustee.

24 The Supreme Court of Canada addressed this issue in ***Ramgotra (Trustee of) v. North American Life Assurance Co.***, [1996] 1 S.C.R. 325 at para. 61:

> Unlike provisions of the [BIA] such as ss. 71(2), 91 or 68, s. 67(1) tells us nothing about the property-passing stage of bankruptcy. Instead, it relates to the estate-administration stage by defining which property in the estate is available to satisfy the claims of creditors. It effectively constitutes a direction to the trustee regarding the disposition of property...the trustee is barred from dividing two categories of property among creditors: property held by the bankrupt in trust for another person (s. 67(1)(a)), and property rendered exempt from execution or seizure under provincial legislation (s. 67(1)(b)). *While such property becomes part of the bankrupt's estate in the possession of the trustee, the trustee may not exercise his or her estate distribution powers over it by reason of s. 67.*
> (Emphasis added)

25 In any event, Kingsway's argument in regard to s. 67 rests on the premise that the property is in fact trust property, a proposition that remains undetermined.

26 Kingsway also asserts that there is no jurisdiction to order that a trustee's fees be paid from property subject to a statutory trust, citing ***P.A.T. Local 1590 v. Broome*** (1986), 61 C.B.R. (N.S.) 233 (Ont. Master) and ***Re C.J. Wilkinson Ford Mercury Sales Ltd.*** (1986), 60 C.B.R. (N.S.) 289 (Ont. S.C.).

27 In both of those cases, however, the validity of the trusts in question was clear and accepted by the trustee. Further, the question of fees for sorting out their validity was not squarely in issue in either decision. Here, a statutory trust as well as several other trust claims have been asserted but not accepted by the trustee and all remain to be determined by the Court of Queen's Bench.

28 Kingsway also relies on ***Re Gill*** (2002), 37 C.B.R. (4th) 257, 2002 BCSC 1401 at paras. 29-32 in support of its statutory trust argument. In that case, however, Sigurdson J. recognized the jurisdiction to grant a charge for trustee fees over assets subject to trust claims. He determined on the distinct facts before him not to grant the charge requested.

29 I therefore accept that inherent jurisdiction exists to grant a charge on property subject to undetermined trust claims.

2. Permitting trustee costs involved in determining the validity of the trust to be paid out of trust property

30 Kingsway objects to the trustee being paid to "defeat" its claim out of what it alleges to be its property. Kingsway's opinion on the merits of its trust claim differs from the trustee's. However, Kingsway does not suggest that the trustee has acted improperly or unfairly in its disallowance of its claim.

31 I do not characterize the actions of the trustee as an attempt to "defeat" Kingsway's claims. Upon receiving a proof of claim claiming property in possession of the bankrupt, the trustee must respond in one of two ways according to s. 81(2) of the *BIA*. The trustee can either admit the claim and deliver possession of the property to the claimant, or give notice in writing to the claimant that the claim is disputed, indicating the reasons for the dispute. The section provides for an appeal to the Court of Queen's Bench if the trustee disputes the claim. The trustee is not to function as an adversary. Rather, it functions to advise the court of the relevant facts as its officer in a dispassionate manner, in furtherance of its role to administer the estates to completion, leaving the court to decide the matter: see ***Re Beetown Honey Products Inc.*** (2003), 46 C.B.R. (4th) 195 (Ont. S.C.J.), aff'd (2004), 3 C.B.R. (5th) 204 (Ont. C.A.) and *BIA*, s. 41(4). The trustee's conduct to date has been in accordance with requirements of the Act and its participation in the appeal is necessary in this case. Kingsway's claims purport to cover the entire estates of both bankrupts, against which there are competing property claims and unsecured claims.

32 There is precedent for allowing a trustee to be remunerated from trust property for efforts in sorting out trust claims and distributing the trust *res* to beneficiaries: see for example,***Re Nakashidze*** (1948), 29 C.B.R. 35 (Ont. S.C.); ***Re Rideout Real Estate Ltd.*** (1957), 36 C.B.R. 111 (Ont. S.C.); ***Re Kern Agencies, Ltd.*** (No. 3) (1932), 13 C.B.R. 333 (Sask. K.B.); ***Re NRS Rosewood***

Real Estate Ltd. (1992), 9 C.B.R. (3d) 163 (Ont. S.C.). In ***NRS Rosewood***, for example, Austin J. faced the same argument made by Kingsway in this case that the trustee had no entitlement to share in assets which were not the property of the bankrupt. Austin J. concluded that "[a]s the question had to be settled one way or another, and as the Trustee took the initiative, it is only reasonable that some part of the Trustee's fees be paid out of the property in issue".

33 I do not suggest that a trustee will in every case be entitled to be paid from trust property. On the contrary, such an order, based on inherent jurisdiction, must be granted sparingly. The situation before us is unique in many respects:

1. Kingsway asserts a trust on various grounds, none of which are obvious. Kingsway has delayed determination of its claim, resulting in additional work by the trustee;
2. Kingsway's claim encompasses the entirety of the estate;
3. There are other trust claimants making claims to the same funds;
4. There are significant sums in dispute;
5. This bankruptcy occurred as a result of a failed proposal. Deloitte & Touche went from interim receiver to trustee and the typical guarantee of the trustee's fees is not in place;
6. There is no other reasonable and more expeditious alternative but to have the trustee participate in the appeal process as part of its administration of these bankruptcies. Most of the other creditors are owed small amounts, aside from a government claim;
7. There is no suggestion that the trustee is acting improperly in disputing the claims; and
8. Kingsway seeks to link the appeal from the trustee's disallowance with the trial of other unrelated issues.

These circumstances and the centrality of the trust claims to the bankruptcies underscore the necessity of the trustee's involvement and the payment of its fees from the property subject to the disputed trusts.

34 Even if Kingsway is ultimately successful in its appeal of the trustee's disallowance, the trustee has been administering the property and a significant part of its work will likely have benefited Kingsway. The trustee has expended and will continue to expend considerable effort in sorting out other claims on the property, including the formulation of a plan that Kingsway has joined in for resolving builder claims. It has offered assistance to Kingsway in related proceedings concerning proposals made by directors and officers of the bankrupts. It has also formulated, coordinated and attended case management meetings throughout the course of its administration.

35 Kingsway suggests its claim will not go unchallenged if the trustee is not funded to defend the litigation on behalf of the estates; it asserts that one or more of the creditors can pursue the litigation at their own cost pursuant to s. 38 of the *BIA*. However, the litigation is central to these bankruptcies and not merely an action that interests select creditors. The validity and priority of Kingsway's trust claims must be determined and follows from the claims review process mandated by the *BIA*. That process is designed to ensure that only proper claimants share in the bankrupt's property and in these circumstances, the trustee plays an integral part.

36 Kingsway also submits that the appeal to the Queen's Bench from the trustee's disallowance will be complex, as it intends to bring other solvent parties into the action. Accordingly, Kingsway argues, the *res* of the estates could be frittered away with fees. However, the appeal to the Queen's Bench is intended to be a summary and efficient process to determine the issue relevant to the bankruptcy. To the extent that Kingsway chooses to increase the scope and complexity of the appeal, it must similarly accept the increased costs of the trustee in dealing with that action.

3. Factors in exercise of discretion

37 Generally, inherent jurisdiction should only be exercised where it is necessary to further fairness and efficiency in legal process and to prevent abuse. The following non-exhaustive factors should be considered before invoking inherent jurisdiction here:

1. The strength of the trust claim being asserted. The mere assertion of a trust claim is not determinative of the validity of the trust and cannot preclude the trustee from investigating concerns. In some cases, the trust claim may be obvious, as was the case in ***C.J. Wilkinson***, where the claim was based on statutory trusts in favour of employees or tax authorities and the interim receiver conceded their validity. In other circumstances, a trustee will have no choice but to have the issue of the trust determined in order to further the administration of the bankruptcy. In that event, the ultimate beneficiary of the trust may have to shoulder the costs of the determination;
2. The stage of the proceedings and the effect of such an order on them. For example, the ability of the trustee to make distributions and their amount may depend on the determination of the issue;
3. The need to maintain the integrity of the bankruptcy process. The equitable distribution of the bankrupt estate must remain at the forefront. The court should recognize the expertise of the trustee in this regard and in effective management of bankruptcy: see ***GMAC*** at para. 50. Also, the court should assess the extent to which the determination is necessary to administer the bankruptcy and discourage academic or potentially unrewarding litigation;
4. The realistic alternatives in the circumstances. This could include a s. 38 order, deferring a decision or empowering a court to review the decision in the future, for example, after final determination of the claims and the extent of the property available for distribution. The court should consider whether there is an existing guarantee of the trustee's fees, whether the party ultimately determined to be the beneficiary might bear some responsibility for the costs, and whether counsel might be hired on contingency;
5. The impact on the trust claimants and on the trust property as well as on other creditors. The court should examine the breadth of the trust claims, the existence of competing proprietary claims, and whether the trust claims leave any assets in the estate for unsecured creditors in assessing which stakeholder is going to suffer most from the trustee's disputing of the trust claim. In that exercise, the court should assess what part of the estate would ideally bear the burden of costs. It is

important to consider whether the determination would proceed by default if the trustee were not fully funded;

6. The anticipated time and costs involved. The court should contemplate whether the proposed determination represents an efficient and effective means of resolving the issue to the benefit of all stakeholders. Consideration should be given to expediting the process;
7. The limits that can be placed on the fees or charge; and
8. The role that the trustee will take in the determination process.

4. Exercise of discretion by the case management judge

38 The case management judge considered the relevant factors and the applicable law. She carefully constructed a limited charge that she viewed as suitable in the circumstances. The order for a prospective charge is subject to the trustee filing a report confirming the bankruptcy inspectors had approved the steps the trustee proposed to take. She delayed the operation of her order to give builder claimants an opportunity to challenge it. She held that if all the property was not ultimately found to be impressed with a trust in Kingsway's favour, that a further hearing be held in order to prorate the trustee's fees between estate and trust assets. Further, she directed that the trustee only address urgent matters of general administration, and that Kingsway's claim be addressed as quickly and efficiently as possible. I see no basis to disturb her exercise of discretion.

39 One of the fundamental purposes of the *BIA* is to ensure equitable distribution of a bankrupt debtor's assets among the estate's creditors: ***Ramgotra*** at para. 15, citing ***Husky Oil Operations Ltd. v. Minister of National Revenue***, [1995] 3 S.C.R. 453. Determination of the validity of Kingsway's trust claims is central to these bankruptcies. This trustee's participation in that process furthers appropriate distribution of the assets, whether that be to unsecured creditors in the event all or part of Kingsway's trust claim is rejected by the Court of Queen's Bench, or whether the estate stays out of reach of other creditors as trust property.

40 The ultimate purpose of the administrative powers granted a trustee under the *BIA* is to manage the estate in order to provide equitable satisfaction of the creditors' claims: ***Ramgotra*** at para. 45. The trustee will be assisting the court and all of the claimants in the bankruptcies in coordinating Kingsway's claims, as well as dealing with the validity and priority of the other trust claims and in providing the necessary information to the Court of Queen's Bench to resolve these issues. For these reasons, it is also just and practical that inherent jurisdiction be used to grant the charge for the trustee's fees.

Conclusion

41 There is inherent jurisdiction to permit trustee's fees to be paid from property that is subject to undetermined trust claims in appropriate circumstances. The case management judge recognized the power must be used sparingly and did not err in exercising jurisdiction in this case. The appeal is therefore dismissed.

PAPERNY J.A.
CÔTÉ J.A.:-- I concur.
SULYMA J. (ad hoc):-- I concur.

* * * * *

CORRIGENDUM

Released: October 18, 2006.

On page 6, [33] & [34] have been joined and now read: "....contrary, such an order, ..."

PAPERYNY J.A

cp/e/qw/qlmmm/qljxl/qlcas

TAB 18

Case Name:

Rufenack v. Hope Mission

Between
Harold Rufenack and Lynne Rufenack, appellants/respondents by cross-appeal (applicants), and
Hope Mission, Slavic Gospel Association Inc., Far East Broadcasting Associates of Canada, Whitefields Missionary Society, RBC Ministries and Walter Gnida, respondents/applicants by cross-appeal (respondents), and
The Attorney General of Alberta, respondent/Not a Party to the cross-appeal, and
The Canada Trust Company, respondent/respondent by cross-appeal, and
Beulah Alliance Church, Billy Graham Evangelistic Association, Camp Nakamun, Canadian Bible Society, Gideon's International in Canada, Gospel Missionary Union of Canada (also known as Avant Ministries Canada), respondents/appellants by cross-appeal (respondents)

[2006] A.J. No. 172

2006 ABCA 60

[2006] 7 W.W.R. 223

55 Alta. L.R. (4th) 231

384 A.R. 64

26 E.T.R. (3d) 122

148 A.C.W.S. (3d) 1035

2006 CarswellAlta 188

Docket No.: 0303-0212-AC

Alberta Court of Appeal
Edmonton, Alberta

Russell, Picard and Costigan JJ.A.

Heard: February 7, 2006.
Oral judgment: February 7, 2006.
Filed: February 15, 2006.

(28 paras.)

Civil procedure -- Appeals -- Cross-appeals -- Appeal by Rufenack from a trial judgment reported at [2002] A.J. No. 1490 that found they were trustees of a secret discretionary trust and the corresponding costs order allowed in part -- Cross-appeal by the charities from the finding that the Rufenacks had discretion to choose the charities that would benefit from the estate dismissed.

Wills, estates and trusts law -- Trusts -- Constructive trusts -- Secret trusts -- Appeal by Rufenack from a trial judgment reported at [2002] A.J. No. 1490 that found they were trustees of a secret discretionary trust and the corresponding costs order allowed in part -- Cross-appeal by the charities from the finding that the Rufenacks had discretion to choose the charities that would benefit from the estate dismissed.

Appeal by Rufenack from a trial judgment that found they were trustees of a secret discretionary trust, and the corresponding costs order. Cross-appeal by the charities from the finding that the Rufenacks had discretion to choose the charities that would benefit from the estate. The deceased made a will providing for specific gifts to certain charities. She tore it up when she became annoyed with the trustees named in it. She developed a close relationship with two other friends; four months before her death, she made another will leaving her estate of $944,000 to those friends. She told them she wanted her estate used to benefit charities which she regularly gave to. She discussed specific charities with one of the friends but not the other, and did not give them a list of charities she wished to benefit or the amount she wished to be given, despite one's request. The friends agreed to carry out her wishes. The charities named in the previous will challenged the deceased's testamentary capacity and the will. Rufenack made an application to declare the will valid. The application was allowed and the trial judge found that a valid discretionary secret trust was created which empowered and obligated them to use the estate to benefit charities of their choice. Costs were awarded on a solicitor-client basis to all parties because the litigation was caused by the deceased, there had been success all around, and the litigation was a legitimate matter for the court.

HELD: Appeal allowed in part. Cross-appeal dismissed. The trial judge did not fail to consider whether the deceased intended to create a legally binding obligation. The reasons demonstrated he was mindful of that question and his findings implicitly decided that question. The trial judge made an error in principle in awarding costs to Gnida to the extent that his award varied a previous award and the trial judge lacked jurisdiction to vary that order. There was no reviewable error on the balance of the costs award. Although the reasons contained statements suggesting the deceased may

have intended to benefit charities similar to those she had benefited during her lifetime, the trial judge clearly found the trust was discretionary.

Appeal From:

Appeal from the Judgment, Paragraphs 2, 3, 4, 5, 7 and 8 by The Honourable Mr. Justice G.A. Verville. Dated the 2nd day of December, 2002 and 22nd of January, 2003. Filed the 4th day of December, 2002. (Docket: 2002 ABQB 1055, ESO3 110489)

Counsel:

B.G. Doherty, for the Appellants/Respondents by Cross-Appeal

J.H. Odishaw and D. Sanchez-Glowicki, for the Respondents/Appellants by Cross-Appeal

D.W. Kinloch, Respondent/Not a Party to the Cross-Appeal

P.J. Renaud, Q.C. (no appearance), for the Respondent/Respondent by Cross-Appeal

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MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

The judgment of the Court was delivered by

1 COSTIGAN J.A. (orally):-- Harold Rufenack and Lynne Rufenack appeal a trial judgment that found they were trustees of a secret discretionary trust to distribute the estate of Edith McRae to charities of the Rufenacks' choosing. They also appeal aspects of the costs award.

2 The respondent charities cross-appeal the finding that the Rufenacks have discretion to choose the charities that will benefit from the estate. The Attorney-General appears in the exercise of parens patriae jurisdiction to support the trial judgment.

3 The facts are extensively reviewed in the trial judgment reported at [2002] A.J. No. 1490, 2002 ABQB 1055. On May 14, 1999, McRae signed a will appointing the Rufenacks as personal representatives and trustees of her estate. The residue of the estate was bequeathed to the Rufenacks for their own use absolutely. McRae had executed several previous wills appointing other representatives and leaving the residue to listed charities.

4 McRae had a falling out with the representatives in her previous will. Her physician, Dr. Ma, testified that McRae said she wanted to change her will, she intended to give her estate to charities and she trusted the Rufenacks.

5 McRae met with a lawyer, Johnson, to discuss the preparation of a new will. Johnson testified that McRae wanted to appoint the Rufenacks as her trustees and that she wanted everything to go to the Rufenacks. McRae said she had several charities she regularly gave to and it would be easier to give everything to the Rufenacks. She said the Rufenacks told her they would carry out McRae's wishes and make sure that the charities she regularly gave to received funds from the estate. McRae said this was simpler than listing all the charities in her will. Johnson told McRae she was making a leap of faith and the Rufenacks would not be legally required to benefit the charities.

6 McRae chose not to use Johnson's services and retained another lawyer to prepare the will. McRae told this lawyer she wanted the Rufenacks to be her personal representatives and the entire residue to go to the Rufenacks. There was no discussion with this lawyer about charities.

7 The Rufenacks admitted they discussed the will with McRae and agreed to be personal representatives.

8 Lynne Rufenack admitted she agreed to carry out McRae's wishes. She testified she asked McRae for a list of charities, but McRae said the Rufenack's should chose. She further testified she did not expect to receive any money from the estate.

9 Harold Rufenack admitted he and Lynne Rufenack agreed to carry out McRae's wishes and agreed to give the estate to charities. He testified McRae did not provide a list of the specific charities that she wished to benefit.

10 After McRae's death, a previous personal representative, Walter Gnida, filed a Notice of Objection challenging the will. On May 17, 2000, Murray J. struck out Gnida's Notice of Objection and gave Gnida until July 31, 2000 to take steps in an attempt to probate a previous will. Murray J. ordered Gnida to pay costs to the estate.

11 Ultimately, a consent order was filed directing a trial of several issues including, whether a trust should be imposed on the Rufenacks. Until shortly before trial, all of the respondent charities were represented by one counsel. Hope Mission was separately represented at trial.

12 The trial judge found that in order to establish a secret trust it was necessary to establish the intention of the donor, a communication of the intention to the donee, and acceptance of the obligation by the donee. He quoted a passage from Milsom v. Holien (2001), 40 E.T.R. (2d) 77, 2001 BCSC 868, saying the question was whether the donor intended to bind the trustee to a legally enforceable trust or, rather, to create a moral obligation to serve as a guide to the trustee's conscience.

13 He found McRae intended to create a trust and concluded there was nothing in the evidence, apart from the will, that suggested McRae intended to benefit the Rufenacks personally. He also found the evidence of Johnson and Ma supported the view that McRae wanted her estate to be given to charities.

14 The trial judge found McRae communicated her intention to create a trust to the Rufenacks and the Rufenacks accepted the trust.

15 The trial judge concluded McRae intended to give the Rufenacks discretion to decide which charities to benefit because McRae declined to provide a list and told Lynne Rufenack the Rufenacks were to decide. He also invited the Rufenacks to seek guidance from the court in fulfilling McRae's wishes.

16 At trial, costs were awarded on a solicitor-client basis to all parties because the "mess" was caused by McRae, there had been success all around, and the litigation was a legitimate matter for the court. The costs awarded to Gnida effected a reversal of the costs award made by Murray J.

17 After the Rufenacks filed their appeal, a panel of this Court removed them as executors, appointing Canada Trust as executor pending the outcome of the appeal. That panel concluded the Rufenacks were in conflict because the object of the appeal was "to overturn the finding of a trust and to restore the Rufenacks as sole beneficiaries in accordance with the terms of the will on its face."

18 The Rufenacks argue the trial judge erred in law by accepting Johnson's hearsay evidence as proof of its contents and by failing to consider whether McRae intended to create a legally enforceable obligation. They also say the trial judge erred in awarding costs to Gnida and in awarding costs to the charities.

19 In the cross-appeal, the respondent charities argue the trial judge made inconsistent findings because his reasons say McRae intended to create a trust to benefit the charities to which she had regularly donated, yet he found the trust was discretionary. The charities say the trial judge should have directed that the estate be distributed to them because they were listed as beneficiaries in the previous wills.

20 Questions of law are reviewed on a standard of correctness. Questions of fact and of mixed fact and law, absent an extricable error in principle, are reviewed on a standard of palpable and overriding error: Housen v. Nikolaisen, [2002] 2 S.C.R. 235, 2002 SCC 33. Costs awards are discretionary and should not be overturned absent misdirection on the law or palpable error in the assessment of facts: Deans v. Thachuk (2005), 48 C.C.P.B. 65, 2005 ABCA 368.

21 It is unnecessary for us to decide whether the trial judge erred in accepting the hearsay evidence as proof of its contents. Even if that evidence is excluded from consideration, there is a sufficient evidentiary basis in the Rufenack's own evidence, each corroborating the other, to support the trial judge's finding that McRae intended to impose a trust and that her intention was communicated to the Rufenacks and accepted by them.

22 We are not satisfied the trial judge failed to consider whether McRae intended to create a legally binding obligation. The reasons demonstrate he was mindful of that question and his findings implicitly decide that question. Indeed, it is difficult to imagine how he could have found otherwise given the Rufenack's admissions.

23 However, we are satisfied the trial judge made an error in principle in awarding costs to Gnida to the extent that his award varied Murray J.'s previous award. Murray J. ordered Gnida to pay costs to the estate. The trial judge lacked jurisdiction to vary that order: Paper Machine Ltd. v. Ross Engineering Corp., [1934] S.C.R. 186.

24 There is no reviewable error in the balance of the costs award. It is not an error in principle to award solicitor-client costs payable from the estate when the litigation is made necessary by the testator's conduct, and each charity was entitled to separate representation on the facts of this case.

25 The cross-appeal must be dismissed. Although the reasons contain statements suggesting McRae may have intended to benefit charities similar to those she had benefitted during her lifetime, the trial judge clearly found the trust was discretionary. The formal judgment, approved by all counsel as to form and content, says the trust is discretionary. There is evidence to support that finding. The appeal is from the judgment, not the reasons.

26 In the result, the appeal is dismissed except to the extent necessary to restore the order of Murray J. as to Gnida's costs. The cross-appeal is dismissed.

27 The trial judge found McRae intended the Rufenacks to distribute the estate to charities of their choosing. In order to give effect to that intention, it is necessary to restore the Rufenacks as executors of the estate. Accordingly, Canada Trust is removed as executor and the Rufenacks are restored.

COSTIGAN J.A.

[Discussion with counsel regarding costs]

28 RUSSELL J.A. (orally):-- As to the costs of the appeal, the panel is unanimous that each party bear their costs and the costs of the transcripts will remain as paid out of the estate.

RUSSELL J.A.

cp/e/qw/qlpha/qljxl

TAB 19

Case Name:

Sadlemyer v. Royal Trust Corp. of Canada

Between
Rebecca Ann Sadlemyer, Applicant, and
Royal Trust Corporation of Canada (in its capacity as Personal Representative and Trustee of the Estate of Grace Rebecca Hoover (also known as Grace Rebecca Huston), Respondent

[2012] A.J. No. 387

2012 ABQB 241

[2012] 9 W.W.R. 98

77 E.T.R. (3d) 100

215 A.C.W.S. (3d) 783

2012 CarswellAlta 673

61 Alta. L.R. (5th) 228

Docket: ES01 102109

Registry: Calgary

Alberta Court of Queen's Bench
Judicial District of Calgary

A.B. Sulatycky J.

Heard: October 18, 2011.
Judgment: April 12, 2012.

(77 paras.)

Wills, estates and trusts law -- Gifts -- Conditional gifts -- Vested and contingent gifts -- Nature of interest -- Contingent interest (conditions precedent) -- Contingent remainders -- Specific principles of vesting -- Gifts over on death generally -- Application by deceased's daughter for advice and di-

rections to terminate trust and distribute capital dismissed -- Applicant, age 72, was deceased's sole child -- Trust gave applicant life interest in estate residue's income -- Upon termination residue was to be used to set up trusts for deceased's grandchildren and great-grandchildren -- Grandchildren and great-grandchildren irrevocably renounced interests with exception of one minor great-grandchild -- Failure to include minor was fatal to proposed arrangement, as trust was still operative due to possibility of conditional vesting following death of grandchild prior to applicant -- Trustee Act, s. 42.

Wills, estates and trusts law -- Trusts -- Express trusts -- Termination, revocation and variation -- Application by deceased's daughter for advice and directions to terminate trust and distribute capital dismissed -- Applicant, age 72, was deceased's sole child -- Trust gave applicant life interest in estate residue's income -- Upon termination residue was to be used to set up trusts for deceased's grandchildren and great-grandchildren -- Grandchildren and great-grandchildren irrevocably renounced interests with exception of one minor great-grandchild -- Failure to include minor was fatal to proposed arrangement, as trust was still operative due to possibility of conditional vesting following death of grandchild prior to applicant -- Trustee Act, s. 42.

Application by the daughter of the deceased for advice and directions with the intent to vary a will by determining a testamentary trust and distributing its capital. The deceased passed away in February 2007. Her will was made in September 2000, with a codicil executed two years later. The Royal Trust Corporation was named as personal representative of the estate and trustee of the trusts set forth in the will. The applicant, age 72, was the sole child of the deceased. A life estate in the income of the residue of the estate was established for the benefit of the applicant. The will did not reserve any power to vary or terminate the trust prior to the death of the applicant. The applicant sought to have the trust terminated, its assets liquidated, and the proceeds transferred to her in order to administer them in Saskatchewan and engage in the planning required to dispose of them as part of her estate. She had three children of her own, who were contingent beneficiaries under the will at issue via a gift over clause for the distribution of residue. The will also provided for certain trusts for the deceased's great-grandchildren upon distribution of residue. The deceased's grandchildren and great-grandchildren, with one exception, Alex, a minor, formally and irrevocably renounced their interests in the estate in support of the applicant. Royal Trust did not oppose the application.

HELD: Application dismissed. Based on the ordinary meaning of the residue clauses, the great-grandchildren had a contingent interest in the remainder, whereby vesting was conditional on the death of a parent prior to the applicant. That condition remained a possibility. The trust thus continued to be operative. The applicant's failure to include Alex in her proposed arrangement was fatal to the application under s. 42(7) of the Trustee Act, as it failed to bestow a beneficial interest upon Alex, a minor remote contingent beneficiary.

Statutes, Regulations and Rules Cited:

Minor's Property Act, SA 2004, c M-18.1, s. 15, s. 15(2), s. 15(3)

Public Trustee Act, SA 2004, C P-44.1, s. 5(c)

Surrogate Rules, AR 130/95, Rule 4, Rule 55, Rule 57, Rule 57(h), Rule 58, Rule 64

Trustee Act, RSA 2000, c. T-8, s. 42, s. 42(2), s. 42(4), s. 42(5), s. 42(6), s. 42(7)

Wills Act, RSA 2000, c. W-12, s. 22

Counsel:

Benjamin J. Kormos, for the Applicant.

Victoria Coffin, for the Public Trustee.

Reasons for Judgment

A.B. SULATYCKY J.:--

I. Introduction

1 This is an application for advice and directions with the intent to vary a Will by terminating a testamentary trust and distributing the capital of the trust. In broad terms, I am asked to interpret a clause in the Will and to determine whether to interfere with the terms of a trust established by the deceased testatrix.

II. Background

2 The application concerns the Estate of Grace Rebecca Hoover (the "Deceased" or "Testatrix"), who died on February 5, 2007. She made her last will on September 15, 2000 (the "Will"), and a codicil to the Will on September 25, 2002.

3 The Deceased was resident in Alberta prior to her death, and made her Will pursuant to the laws of Alberta. A grant of probate for the Will was issued on June 5, 2007 by Madam Justice Nation, whereby the Royal Trust Corporation of Canada, located in Calgary, Alberta ("Royal Trust") was named as the Personal Representative of the Estate, and Trustee of the trusts set forth in the Will.

4 The Applicant in this case, Rebecca Ann Sadlemyer ("Ann" or the "Applicant") is the daughter of the Deceased, and was her sole child. She is presently 72 years old and lives in Pangman, Saskatchewan.

5 The Deceased established a life interest in the entire income of the residue of her Estate, invested by the Trustee, for the benefit of her daughter, Ann, under Clause 3(E)(i). The Will does not reserve any power to vary or terminate the trust established in Clause 3(E)(i) prior to its natural duration, being the death of the Applicant.

6 The Applicant wishes to have the Trust terminated, its assets liquidated, and the proceeds transferred to her, in order to administer them in Saskatchewan, and to dispose of them appropriately upon her own death in her own estate planning process, on the advice of professionals of her choosing. However, the Applicant has three children of her own, who are contingent beneficiaries under the Will:

1. Michael Edward Van Beek ("Michael");
2. Patricia Ann Klippenstine ("Patricia"); and

3. Rebecca Jane Anderson ("Jane"), (collectively, the "Grandchildren" under the Will).

7 All three Grandchildren have survived the Deceased and the Applicant and are presently alive. The Applicant is beyond child-bearing age and has deposed that she has no intention of adopting any children therefore Michael, Patricia and Jane will be the only Grandchildren relevant to the Will.

8 Clause 3(E)(ii) of the Will is the clause at issue in this Application. Pursuant to that Clause, upon the death of the Applicant, the Deceased purports to leave a gift over of her Estate in three (3) equal shares to each of her Grandchildren, Michael, Patricia, and Jane, with a further gift over to Great-Grandchildren. Two of the Deceased's Grandchildren, Patricia and Jane, have children of their own (Great-grandchildren under the Will):

1. Ann's son, Micheal, has no children.
2. Ann's daughter, Patricia, has two children:

    a) a daughter, Terri Klippenstein ("Terri"), who is 27 years old; and
    b) a son, Cameron Klippenstein ("Cameron"), who is 25 years old;

3. Ann's daughter, Jane, also has two children:

    a) a son, Zachary Anderson ("Zachary"), who is 19 years old; and
    b) a son, Alex Anderson ("Alex"), who is 16 years old, (collectively, the "Great-Grandchildren" under the Will).

9 Clause 3(F) of the Will provides for certain Trusts for the Great-Grandchildren upon operation of the second part of Clause 3(E)(ii).The trust provisions in Clause 3(F) provide for a delayed capital distribution until age 25, with a discretion to the Trustee to apply income or capital for the education, maintenance or benefit of a Great-Grandchild in the interim.

10 Clauses 3(E) and 3(F) of the Deceased's Will provide as follows:

> **3(E) Distribution of Residue**
>
> To distribute the residue of my estate in the following manner:
>
> **(i) Trust for Daughter**
>
> To invest and keep invested the residue of my estate for the lifetime of my daughter, and to pay all the net income to her.
>
> My Trustee shall have the power, during my daughter's lifetime, to pay or transfer from the capital of the residue of my estate such amounts as my Trustee may from time to time, in its absolute discretion, consider advisable for the maintenance or benefit of my daughter. I may leave a memorandum regarding the exercise of my Trustee's discretion to encroach upon the capital of my estate, and it is

my wish that my Trustee follow such memorandum as though it had formed part of my Will.

(ii) Bequest to Grandchildren

In the event my daughter fails to survive me, or upon her death, to divide the residue of my estate into three equal shares and to pay or transfer one such share to each of my grandchildren, if they respectively survive myself and my daughter. In the event any of my grandchildren predecease myself and my daughter, the share which he or she would have received if alive shall be divided equally amongst his or her children then alive (my great-grandchildren), subject to the Trust set out in clause 3(F) below, but failing such children shall be divided equally between my surviving grandchildren, or their children as above provided subject to the same Trust as their original share.

3(F) Trust for Great-grandchildren

In the event a great-grandchild of mine becomes entitled to receive a share of my estate before attaining the age of 25 years, the share of each such great-grandchild shall be invested on his or her behalf by my Trustee, subject to the following Trust:

(i) Capital Distribution

Each great-grandchild is entitled to receive the capital of his or her share, subject to encroachments, when they respectively attain the age of 25 years.

(ii) Trustee's Power to Encroach

While my Trustee holds any share of my estate on behalf of a great-grandchild of mine it shall have the power to pay or transfer from that great-grandchild's share, either to or on behalf of that great-grandchild, the income of capital or as much of either or both, including the authority to distribute the entire capital, as my Trustee may at any time, in its absolute discretion, consider advisable for the education, maintenance or benefit of the great-grandchild. I may leave a memorandum regarding the exercise of my Trustee's discretion to encroach upon the capital of my estate, and it is my wish that my Trustee follow such memorandum as though it had formed part of my Will.

(iii) Lapse of Trust

In the event any great-grandchild of mine otherwise entitled to a share of my estate predeceases me or dies before attaining the age of 25 years, the funds remain in that great-grandchild's Trust, if any, shall be divided equally amongst his or her living brothers and sisters, subject to the same Trust as their original share, but failing such brothers and sisters shall be divided equally between my surviv-

ing grandchildren, or their children as above provided subject to the same Trust as their original share.

11 Each of the Grandchildren and Great-grandchildren, with the exception of Alex, have formally and irrevocably renounced their interests in the Estate. The Grandchildren each delivered Renunciations of Inheritance in September, 2008 (the "Renunciations") to Royal Trust. The adult Great-grandchildren, Terri, Cameron, and Zachary, also each signed renunciations/disclaimers in August 2010.

12 The Renunciations direct that their interests in the residue set out in Clause 3(E)(ii) be paid by Royal Trust to the Applicant. The Great-grandchild, Alex, is incapable of disclaiming an interest in the Estate due to his minority, and is represented by the Public Trustee in these proceedings.

13 The Applicant wishes to have the Trust established by her mother in the Will terminated, and have its assets transferred to her. Her reasons for this are several. Firstly, she believes that the benefit of terminating it outweigh the cost (high fees) of continuing it. Further, she lives in Saskatchewan and conducts her banking there. All of her Grandchildren and adult Great-grandchildren (the contingent beneficiaries) support her decision.

14 In September 2008, the Applicant contacted Royal Trust and requested that the Trust be terminated and its assets paid to her. Royal Trust Responded in October 2008, indicating that it would determine whether the class in respect of Clause 3(E)(ii) had closed.

15 Solicitors retained by Royal Trust were of the opinion that:

a) although the Applicant must apply to the Court to vary the Trust, it is a reasonable interpretation of the Will to determine that, because all of the Grandchildren have survived the Deceased, Clause 3(E)(ii) does not provide for any gift over to the Great-grandchildren; and
b) the renunciations by the Grandchildren are valid and effective.

16 Royal Trust has advised counsel for the Applicant that it does not wish to oppose this Application, but rather it relies upon the Court to review the matter and provide directions. The Public Trustee however, on behalf of the minor remote contingent beneficiary, Alex Anderson, opposes this Application, on the basis that the minor would have a contingent interest that was not addressed.

17 As at June 30, 2010, the "market value" of capital in the residue invested by Royal Trust was $767,813.20.

III. Issues

18 The issues are as follows:

1. Does the Public Trustee for the Province of Alberta have standing in the proceedings relating this Application?
2. What are the benefits conferred by Clause 3(E)(ii) on the Grandchildren and the Great-grandchildren?
3. Does the Applicant have a form of "proposed arrangement" for the Court's consideration pursuant to s. 42 of the *Trustee Act?*

4. If a Proposed Arrangement is found to exist, can the Court approve the Arrangement as proposed by the Applicant?
5. If the Arrangement cannot be approved, can the Applicant be appointed as a Trustee under the Will, in the place of the Personal Representative, Royal Trust?

IV. Analysis

19 This matter comes before the Court as an Application for Directions pursuant to the *Surrogate Rules,* AR 130/95, ss. 4, 55, 57-58 and 64. As a person interested in the Estate, the Applicant seeks the Court's directions in respect of the interpretation to be given to Clause 3(E)(ii) of the Will, and the effect of that interpretation on the Trust established by Clause 3(E)(i) of the Will.

20 The Public Trustee is acting on behalf of the remote contingent beneficiary, Alex Anderson, pursuant to s. 5(c) of the *Public Trustee Act*, SA 2004, C P-44.1 and s. 15 of the *Minor's Property Act*, SA 2004, c M-18.1.

1. Standing.

21 Counsel for the Applicant submits that proving a beneficial interest in respect of the minor remote contingent beneficiary, Alex Anderson, is a pre-condition to the Public Trustee having standing to object to the termination of this Trust pursuant to s. 42 of the *Trustee Act.*

22 According to the Applicant, the Alberta Court of Appeal has held in *Zeidler v Campbell,* (1988) 91 AR 394, 53 DLR (4th) 350 (ABCA) at paras 10-15 that where no beneficial interest exists in a person, the Court need not consider that person in an Application under section 42. The British Columbia Court of Appeal took a similar position in respect of a provision in that province's legislation, and specifically rejected the Public Trustee's argument that a disclaimer of an interest cannot override the legislation: *McGavin v National Trust Co.,* (1998) 158 DLR (4th) 364, 22 ETR (2d) 36 (BCCA) at paras 9-10 and 22-36.

23 The Applicant has referred me to the cases of *Turnbull v Hagman*, 2011 NBQB 23, 368 NBR (2d) 272, 65 ETR (3d) 245 (NBQB) at paras 26-31, *McGavin v National Trust Co.*, *supra*, *Re Van Platten*, 2003 SKQB 187, (2003) 2 ETR (3d) 129, 235 Sask R 46 (QB) at paras 17-23, *Brannan v British Columbia (Public Trustee)*, (1991) 83 DLR (4th) 106, 41 ETR 210 (BCCA) at paras 11-15, 16, and 20-30 in support of the proposition that unless Clause 3(E)(ii) is found to bestow a beneficial interest upon the minor remote contingent beneficiary, then, by operation of the renunciations of the Grandchildren and the disclaimers by the Great-grandchildren in favour of the Applicant, the interests of the Grandchildren and Great-grandchildren accelerate and vest in the Applicant. In her view, given that Alex Anderson has no beneficial interest, it necessarily follows that the Public Trustee does not have standing and the sole remaining person with any interest in the trust would then be the Applicant.

24 However, as a minor Alex Anderson is considered a person who may be interested in a particular estate pursuant to Rule 57(h) of the *Surrogate Rules*. Further, pursuant to section 5(c) of the *Public Trustee Act*, the Public Trustee may act to protect the property or interest of minors and unborn persons. Finally, s. 15 the *Minors' Property Act* sets out the role of the Public Trustee in relation to minors' property. Specifically, the Public Trustee has indicated that she will be represented on the Application pursuant to s. 15(2), and further pursuant to s. 15(3) is authorized to make representations.

25 I consider the Public Trustee as being authorized to act under the aforementioned sections of the *Minors' Property Act* and the *Public Trustee Act*. The Applicant has requested advice and direction that directly affect the interests of the Minor in the Deceased's Estate. Because the class at issue in the Application makes reference to a class of potential beneficiaries of which the Minor, Alex Anderson, is a member, the "existence, extent, nature, or disposition", to borrow the language of s. 15 of the *Minors' Property Act,* of the minor's interest is in issue, and will be affected by the outcome of this Application.

26 In addition, once it is clarified what is the minor's interest, the minor's potential interests would be affected in the case where the Court grants the relief sought by the Application in the form of a termination of a trust.

2. Benefits conferred on the Grandchildren and Great-Grandchildren under Clause 3(E)(ii) of the Will.

27 The Applicant takes the position that she is the sole remaining beneficiary to the Trust established under Clause 3(E) of the Will, given that the Grandchildren have irrevocably renounced their entitlement under Clause 3(E)(ii) in favour of the Applicant.

28 According to the Applicant, the distribution in favour the Great-grandchildren under the Will is now a legal impossibility. In her view, Clause 3(E)(ii) could give rise to an interest in favour of the Great-Grandchildren *only if* the relevant Grandchild predeceased *both* the Testatrix *and* the Applicant.

29 The Public Trustee takes the opposite view, that is, that the Great-grandchildren have a contingent interest in the remainder, where the vesting of the interest is conditional on the death of the Great-grandchild's parent prior to the Applicant. It is still a possibility that any of the Grandchildren may not survive the Applicant. In such a case, it is the view of the Public Trustee that the interests of the Great-grandchildren who are children of the deceased Grandchild vest.

30 The parties are in agreement that the proper interpretation of Clause 3(E)(ii) will depend upon the established legal principles of Wills interpretation.

I) Clause 3(E)(ii) in light of the whole Will

31 In order to correctly construe Clause 3(E)(ii), and in particular the second sentence of this clause, the Court must first consider as a whole all the provisions that relate to the distribution of the residue. This specific clause must be interpreted with a view to the overall construction of the Will, as established by the Alberta Court of Appeal in *Martini (Estate) v Christensen*, [1990] 10 WWR 417, 172 DLR (4th) 367 at para 12.

32 The provisions that refer to the distribution of the residue are stated in clauses 3(E) and 3(F) (together as "Residue Clauses"). These Residue Clauses were drafted as a complete blueprint to address all possible situations in regards to the distribution of the residue, under a framework which includes: an initial trust, rights to the residue when the trust lapses, a regime for beneficiaries who may be entitled prior to the age of 25, and even a lapse provision.

33 The overall framework of the Residue Clauses functions as follows:

> Clause 3(E)(i) - Under this clause, the Testatrix created a life estate for the Applicant such that the net annual income would be paid to her. This reflects an in-

> tention of the Testatrix not to create an inheritance for the Applicant, but to ensure that she would benefit by way of this life estate.
>
> Clause 3(E)(ii) - This clause, analysed in greater detail below, addresses entitlements to the residue where either the Applicant predeceases the Testatrix or the Applicant benefits from the life estate and thereafter dies.
>
> Clause 3(F) - This clause requires that trusts be established for any Great-grandchild who is under 25 when he or she becomes entitled.
>
> As a "lapse clause", 3(F)(iii) addresses the possibility that the Great-grandchild might predecease the testatrix, or does not reach the age of 25.
>
> This Clause provides that the entitlement is either redistributed among the Great-grandchild's siblings, or where that possibility is frustrated, the rights pass back up to the Grandchildren, and finally to the children of those Grandchildren.

34 There is no general clause, such that in the case of a lapsed provision the residue would be nevertheless distributed according to the Will. Instead, 3(F)(iii) introduces a provision in the case where a trust lapses in relation to a Great-grandchild's entitlement.

35 Bearing this framework in mind, I turn now to the interpretation of Clause 3(E)(ii).

II) Ordinary Meaning Rule and interpretation of Clause 3(E)(ii)

36 In *Starosielski v Starosielski Estate*, 1998 ABQB 651, 24 ETR (2d) 105 (QB), the Alberta Court of Queen's Bench indicated:

> [49] It is trite law that in construing a Will, the court is at liberty to construe the words used by the testator in their ordinary sense. (T.G. Feeney, The Canadian Law of Wills, vol. 2 Construction, pg. 12, Butterworths, 1982.)

37 In the interpretation of Clause 3(E)(ii), a reading pursuant to the Ordinary Meaning Rule would mean that within the framework described above, this Clause was drafted to address the different eventualities that might be possible depending on whether or not the Applicant predeceased the Testatrix.

38 I will begin by turning to the first sentence of Clause 3(E)(ii). It sets out the relationship between the Testatrix's death, the survival of the Applicant and the survival of the Grandchildren vis-à-vis the first two. The sentence reads as follows:

> *In the event my daughter fails to survive me, or upon her death, to divide the residue of my estate into three equal shares and to pay or transfer one such share to each of my grandchildren, if they respectively survive myself and my daughter.*

39 Based on a plain reading of this sentence, it seems reasonably clear that as long as the Grandchildren survived the Deceased and the Applicant, they would each take their share of the residue.

40 In regards to this first sentence, the Public Trustee submits that two possibilities are entertained. Either the Applicant does not survive the Testatrix or the Applicant thereafter dies. The phrase "or upon her death" highlights that the Testatrix had explicitly turned her mind to the possibility that either the Applicant predeceases her, or that the Applicant survived her, but later died. Where the Applicant had not survived the Testatrix, the residue would have had to be distributed in accordance with Clause 3(E)(ii). Likewise, where the applicant survived the Testatrix, the remainder would have had to be distributed according to this first sentence of Clause 3(E)(ii).

41 According to the Public Trustee, their interests vested, as it was only a matter of either the divestment of a life estate, or the immediate distribution in the case that the Applicant pre-deceased the Testatrix. It did not matter who died first, the Testatrix or the Applicant.

42 In the view of the Applicant, the relevant language, upon a plain reading of Clause 3(E)(ii) is "in the event of", a phrase which has been judicially considered to be words expressing a condition, fulfilled upon the occurrence of the event expressed, as opposed to a disposition of property: *Words and Phrases Judicially Defined in Canadian Courts and Tribunals*, vol. 4 F-1 (ann. suppl) (Toronto: Carswell, 2009) at 4-212 (vol. 4) and 8-116 (ann. supp.): "in the event of"; or "upon"; *Re Green Estate,* 2011 NLTD(G) 39, [2011] 311 Nfld & PEIR 189, 67 ETR (3d) 128 (Nfld TD).

43 In this case, the Applicant contends that the pre-condition to the Great-grandchildren having any interest in the Trust appears to be two-fold: a Grandchild must predecease both the Testatrix and predecease the Applicant. This, she submits, can not occur in this case. She refers me to the cases of *Re Green Estate*, *supra, Howell v Howell Estate*, [1999] B.C.J. No. 1490, 30 CELR (NS) 35, 1999 CarswellBC 1413, *Mandin Estate v Willey*, (1996) 194 AR 22, 15 ETR (2d) 100 (Alta Surr Ct), and *Ray v Gould* (1857), [1857-1866] OJ No 48, 1 Chy Chrs 186 (UCCQB *en banc*), which are cases considering similar clauses employing similar language, in support of her position.

44 I agree that the words "in the event of" operate to express a contingency; yet that does not clarify whether the contingency is met on the happening of a Grandchild predeceasing both the Testatrix and the Applicant, or either of the Testatrix and the Applicant. That subtle, but fundamental difference is the crux of this matter. The former is a legal impossibility, and extinguishes the interest of the Great-grandchildren, while the latter remains a plausible scenario whereby the Great-grandchildren continue to have an interest in the Estate.

45 The Public Trustee takes the position that the key word in Clause 3(E)(ii) is "respectively" in the last phrase of the clause:

> "...and to pay or transfer one such share to each of my grandchildren, if they *respectively* survive myself and my daughter."

46 It is not logical that "respectively" implies a chronological requirement to first survive the testatrix and then the Applicant, given how the sentence begins, with two possibilities (one where the Applicant does not survive the Testatrix). The Public Trustee submits that the intention was simply to require the grandchildren to survive both, regardless of when their deaths occur chronologically.

47 According to the Public Trustee, given this interpretation of the first sentence of Clause 3(E)(ii), the second sentence of Clause 3(E)(ii) should be construed in a manner consistent with the first sentence, and even as a further clarification of the first sentence. This means that the words

"[i]n the event any of my grandchildren predecease myself and my daughter,..." is a reference back to the event where the Grandchild does not survive both the Testatrix and the Applicant.

48 Finally, the Public Trustee submits that it is illogical that once the Applicant has survived the Testatrix, effectively Clause 3(E)(ii) is no longer operative. It would establish that the complete regime would nevertheless also be inoperative and instead would result in an intestacy in the case that the Grandchildren survived the Testatrix but not the Applicant. This would be contrary to the presumption against intestacy. The Court is to prefer a construction that would result in the disposal of the whole estate: *Feeney's Canadian Law of Wills* (4th Ed.) (Toronto: LexisNexis Canada Inc., 2000) at s. 10.74.

III) Vested and Contingent Interests

49 Section 22 of the *Wills Act* provides that "except when a contrary intention appears by the will, a will speaks and takes effect as if it had been made immediately before the death of the testator...". Accordingly, the interpretation to be applied to Clause 3(E)(ii) is assessed as at the moment of the Testatrix's death.

50 As previously stated, the Applicant affirms that as a condition precedent to any benefit being provided in respect of any one of the several Great-grandchildren, the respective Grandchild (such Great-grandchild's parent) predecease both the Testatrix and the Applicant. None of the children having predeceased the Testatrix, this contingency has not occurred nor is it now or ever possible for it to occur.

51 She further takes the position that the contingent benefit of the Great-grandchildren in the Will was likely only drafted into the Will to apply in the potential situation where neither the Applicant nor the respective Great-grandchild's parent (Grandchild) had an ability to make their own testamentary dispositions in favour of the Great-grandchildren in respect of the Applicant or Grandchild's own benefit under the Will.

52 The Public Trustee submits that at the time of the Testatrix's death, Clause 3(E)(ii) conferred on the Grandchildren a vested interest subject to divestment of the life estate trust upon the Applicant's death. At the time of the Testatrix's death, the Great-grandchildren had a contingent interest in the remainder.

53 The Grandchildren, should they survive the Applicant, will be entitled to their share in the remainder. They have a future interest. In *Re Jacques*, (1985) 49 OR (2d) 623, 18 ETR 65, 16 DLR (4th) 472, the Court determined that a future interest will vest "subject to divestment" where it is delayed simply in allowance of a prior interest: at p 474, referring to *Browne v Moody et al.*, [1936] OR 422, 4 DLR 1. In the case at hand, the Applicant has a prior interest over the Grandchildren, but otherwise, by operation of the first sentence of Clause 3(E)(ii), the Grandchildren's future interest will vest.

54 I share the view of the Public Trustee that based on the ordinary meaning of the Residue Clauses, the Great-grandchildren had a contingent interest in the remainder, where the vesting of the interest is conditional on the death of the Great-grandchild's parent prior to the Applicant.

55 To date, this remains the situation. The three grandchildren have thus far survived the Applicant. The Applicant is 72 and may possibly live many more years. It is still a possibility that any of the Grandchildren may not survive the Applicant. In such a case, by operation of the second sen-

tence of Clause 3(E)(ii) the interests of the Great-grandchildren who are the children of the deceased Grandchild vest. For other Great-grandchildren whose parents as Grandchildren continue to survive, their interest would remain contingent so long as their parent was alive. Where the parent survives the Applicant, the interests of the Great-grandchildren would be extinguished and the parent would take absolutely.

56 Though not the subject of this Application, it bears consideration that the Clause 3(F)(iii) anticipates a situation where both a Grandchild and his or her children do not take their entitlement. Two eventualities were anticipated. The first is that the Great-grandchild (and therefore the Grandchild) would have predeceased the Testatrix. The second is that a Grandchild had died and by operation of Clause 3(E)(ii) the Great-grandchild is entitled to take, but dies before attaining the age of 25 years.

57 Had the Testatrix intended on Clause 3(E)(ii) applying as argued by the Applicant, Clause 3(F)(iii) would have been superfluous. The ordinary reading of Clause 3(F)(iii) supports the contention that Clause 3(E)(iii) must be read as proposed by the Public Trustee.

3. Does the Applicant have a form of "proposed arrangement" for the Court's consideration pursuant to s. 42 of the Trustee Act?

58 The Applicant has argued that there is no form of Proposed Arrangement pursuant to s. 42 of the *Trustee Act*. She submits that sub-sections 42(5)-(7) are applicable to negotiated compromises of uncertain or contested terms and that no such proposal exists in this case. Accordingly, she submits that these subsections of the *Trustee Act* are inapplicable to the present matter.

59 Conversely, the Public Trustee suggests that the language of subs. 42(4) of the *Trustee Act* is sufficiently broad to encompass a variety of modalities, including the proposal by the Applicant of what the Public Trustee considers to be a particular approach or arrangement for the termination of a trust in which she has a life interest and the immediate distribution of the remainder. This type of arrangement is consistent with the definition given to "arrangement" by the Manitoba Court of Appeal in *Pozniak Estate v Pozniak*, [1993] 7 WWR 500, 88 Man R (2d) 36, at para 21.

60 The structure by which this is to be accomplished is through irrevocable disclaimers by the Grandchildren and adult Great-grandchildren to any part of the remainder. As the Applicant has not renounced her life estate, this remains in existence, but the trust would be terminated.

61 This, the Public Trustee contends, is similar in its purpose to the proposed arrangement placed before the Court of Queen's Bench in *Samoil v Samoil*, 1999 ABQB 526, (1999) 29 ETR (2d) 93. In that case, a trust that provided for a life estate was to be terminated to and paid to the beneficiary of a life estate, with an arrangement providing benefits for the contingent beneficiaries: para 20.

62 The arrangement in the case at bar seeks to achieve the same result as in *Samoil*, only differing in the terms proposed. I find in this case that a form of arrangement has been proposed for the Court's consideration.

4. Can the Court approve the Arrangement as proposed by the Applicant?

63 The Applicant has placed a Proposed Arrangement before the Court. For the reasons I will set out below, the failure to include the minor, Alex Anderson, in the arrangement is fatal to the Applicant's Proposed Arrangement under the terms of the *Trustee Act* at the present time.

64 Section 42(2) of the *Trustee Act* provides that a trust shall not be varied or terminated before the expiration of its natural duration as determined by the terms of the trust, except with the approval of the Court of Queen's Bench. Therefore, prior to determining whether to terminate the Trust established under Clause 3(E) of the Will, I must first consider whether I am able to approve the arrangement proposed by the Applicant. The Public Trustee contends that I am not able to approve the Arrangement in its present form.

65 It appears to me that the relief requested by the Applicant for an Order terminating the Trust is premature, as pursuant to section 42(7) of the *Trustee Act*, I must first be satisfied that the arrangement is of benefit to a person on whose behalf the Court may consent. According to the Court in *Samoil*, the two tests which must be satisfied before the Court can approve a proposed arrangement are those set out in s. 42(7). Firstly, the arrangement must appear to be for the benefit of each person on behalf of whom the Court may consent. Secondly, in all of the circumstances the arrangement must otherwise appear to be of a justifiable character: *Samoil* at para 29.

66 In the case at bar, the minor Alex Anderson is a person on behalf of whom the Court may consent vis-à-vis the arrangement.

67 In *Salt v Alberta (Public Trustee)*, (1986) 71 AR 161, 23 ETR 225, 45 Alta LR (2d) 331, the Court considered an Application to vary a Will by terminating the testamentary trusts and distributing the capital of the trust. Hutchinson J. commented on the protection by the Court of certain beneficiaries and concluded the following:

> [25] Whereas the potential interest of the infants and unborn beneficiaries is very likely remote, it is nonetheless real, and deserves some protection. The actuarially calculated value of the infants' share of the trust estate is insignificant having regard to the present total value of the estate and totally ignores the potential interest of unborn children, where such possibility exists as with the son.
>
> [26] Is the arrangement otherwise of a justifiable character? What is the meaning or purpose of those words? In his article, "The Rule in *Saunders v. Vautier* and Its Proposed Repeal", Estates and Trusts Quarterly, vol. 7, March 1986, William S. Bernstein is quoted at p. 277 as follows where he discusses the reasons that the arrangement must appear "otherwise to be of justifiable character":
>
> > It would seem that the additional requirement beyond satisfying the court that the arrangement is for the benefit of the incapacitated beneficiaries should be justified on the basis of allowing the court to balance the intentions of the settlor with the wishes of the beneficiaries...

68 Despite the fact that minor beneficiaries with contingent interests were to receive a distribution of capital of the trust, Hutchinson J. was unwilling to approve the arrangement.

69 In the present case, the Public Trustee opposes the proposed arrangement on the basis that it does not give effect to the intent of the Testatrix. I agree. By referring to the Great-grandchildren in Clause 3(E)(ii) of her Will, the Testatrix clearly had in her contemplation that her Estate could pass to three generations of descendants. As stated by Anderson J. in *Re Jacques*, where he stated that it is the basic obligation of the Court to ascertain, and give effect to, the intent of the Testatrix as expressed by the terms of the will: at 476.

70 For this reason, I cannot approve the arrangement at this time, given that, as in the case of *Samoil*, the Applicant's Proposed Arrangement to terminate the Trust fails to include at least one beneficiary, the minor Alex Anderson. I cannot, therefore, undertake the necessary analysis to determine whether I am satisfied with the proposed arrangement pursuant to s. 42(7) of the *Trustee Act*.

5. Can the Applicant be appointed as a Trustee under the Will, in the Place of the Personal Representative, Royal Trust?

71 Having concluded that I cannot approve the Proposed Arrangement to terminate the Trust, I must address the alternative argument of the Applicant, which is, whether the Applicant should be appointed as Trustee under the Will, in place of the Personal Representative, Royal Trust.

72 The intentions of the Testatrix are clear with respect to establishing a trust for the Applicant. Clause 3(E)(i) directs that a trust be established for the testatrix's daughter, who would, during her lifetime, have a beneficial right to the net annual income that arises from the invested residue. Further, this clause sets out that the Trustee has the power, but is not obligated to pay or transfer any part of the capital of the residue for the maintenance or benefit of the Applicant.

73 To appoint the Applicant as Trustee under the Will, in a case where the only trust established is to provide for her own life interest would be contrary to the Testatrix's intentions. As previously mentioned, a Will is to be construed so as not to be contrary to the clear intentions of the testatrix.

74 The proposal that the Court simply substitute the Applicant as Trustee, in the place of Royal Trust may be seen as requesting that the Court do indirectly that which it cannot do directly. The Applicant seeks to gain control over the Trust that is her life estate. I have determined that the Court cannot, at present, approve of the Arrangement proposed by the Applicant. This was due to the operation of s. 42(7) of the *Trustee Act* in relation to the minor who cannot consent to the Arrangement.

75 The purpose of s. 42 of the Trustee Act requires that I consider the overall effects of a new arrangement or termination. Having considered the effects of the Applicant's proposal that the Court simply substitute the Applicant as Trustee, in the place of Royal Trust, I am of the view that the proposed termination or variation of the trust would affect the interests of the minor, which I have previously clarified as being contingent interests. As determined above, the Court does not currently have the ability to approve the Applicant's proposed arrangement.

V. Conclusion

76 I conclude that the Trust established by Clause 3(E)(ii) the Will of Grace Rebecca Hoover continues to be operative. The failure of the Proposed Arrangement placed before the Court to include the minor, Alex Anderson, is at the present time fatal to the Applicant's proposed arrangement given s. 42(7) of the *Trustee Act*.

77 The costs in this Application shall be payable out of the Trust capital of the Estate on a solicitor-client basis.

A.B. SULATYCKY J.

cp/e/qlecl/qllmr/qlana/qlltl/qlced

TAB 20

Case Name:

Sawridge Band v. Canada

Sawridge Band
v.
Her Majesty the Queen, Congress of Aboriginal Peoples, Native Council of Canada (Alberta), Non-Status Indian Association of Alberta and Native Women's Association of Canada
And between
Tsuu T'ina First Nation (formerly the Sarcee Indian Band)
v.
Her Majesty the Queen, Congress of Aboriginal Peoples, Native Council of Canada (Alberta), Non-Status Indian Association of Alberta and Native Women's Association of Canada

[2009] S.C.C.A. No. 248

[2009] C.S.C.R. no 248

File No.: 33219

Supreme Court of Canada

Record created: June 19, 2009.
Record updated: December 10, 2009.

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Status:

Application for leave to appeal dismissed with costs (without reasons) December 10, 2009.

Catchwords:

Civil procedure -- Discovery -- Courts -- Judges -- Did the learned trial judge deprive the Applicants of their right to a fair hearing and determination of their Constitutional rights by prohibiting the Applicants from leading relevant evidence, notably oral history evidence, unless it had been reduced to writing and provided to the Crown in advance of trial? -- Did the learned trial judge err in issuing an order striking all 25 of the Applicants' lay witnesses, notably First Nations Elders, eight

of whom had already testified at trial?- Would the trial judge's extraordinarily harsh, unfounded, and insulting statements against the Applicants raise a reasonable apprehension of bias in the mind of the right-thinking and informed observer?

Case Summary:

The Applicants are an Aboriginal Band that applied for an order in 1986, declaring that certain amendments to the Indian Act, R.S.C. 1985, c. I-5, breached their rights under s. 35 of the Constitution Act, 1982 as an invalid attempt to deprive them of their right to determine the membership of their own bands. The trial began in September of 1993 and ended in a dismissal of the action in 1995. The Federal Court of Appeal set aside that decision on the basis of reasonable apprehension of bias in 1997, and ordered a retrial. In 2004, after the oral discovery process became unproductive, the case management judge ordered that the parties provide disclosure to one another by way of written "will-says" for all of their lay witnesses. The new trial commenced in January of 2007 after ten years of procedural disputes. The trial judge made a series of rulings in support of the 2004 order that precluded the parties from eliciting any evidence from lay witnesses that had not first been disclosed to the other side in written will-say statements. The Applicants did not comply with the trial judge's order that they give court reassurances that their will-says provided adequate disclosure for their 57 potential lay witnesses. On September 11, 2007, the trial judge struck out all of the Applicants' past and future lay witnesses because of non-compliant will-says. The Applicants were granted extra time to prepare for trial. On January 7, 2008, the Applicants informed the court that they would not call further evidence and were closing their case as they wished to proceed directly to appeal.

Counsel:

Edward H. Molstad, Q.C. (Parlee McLaws LLP), for the motion.

E. James Kindrake (A.G. of Canada), contra.

Chronology:

1. Application for leave to appeal:

FILED: June 19, 2009. S.C.C. Bulletin, 2009, p. 936.
SUBMITTED TO THE COURT: October 26, 2009. S.C.C. Bulletin, 2009, p. 1463.
DISMISSED WITH COSTS: December 10, 2009 (without reasons). S.C.C. Bulletin, 2009, p. 1713.
Before: Binnie, Fish and Charron JJ.

The application for leave to appeal is dismissed with costs to the respondents.

Procedural History:

Judgment at first instance: Applicants' action dismissed. Federal Court of Canada, Trial Division, Russell J., March 7, 2008.

Judgment on appeal: Appeal dismissed.
Federal Court of Appeal, Richard C.J. and Evans and
Sharlow JJ.A., April 21, 2009.
[2009] F.C.J. No. 465.

e/qlhbb

TAB 21

Case Name:

Sawridge Band v. Canada

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

[2009] F.C.J. No. 465

[2009] A.C.F. no 465

2009 FCA 123

176 A.C.W.S. (3d) 681

391 N.R. 375

Dockets A-154-08, A-112-08

Federal Court of Appeal
Ottawa, Ontario

Richard C.J., Evans and Sharlow JJ.A.

Heard: April 20 and 21, 2009.
Oral judgment: April 21, 2009.

(17 paras.)

Civil litigation -- Civil procedure -- Disposition without trial -- Dismissal of action -- Failure to comply with court order -- Appeal from the dismissal of appellant's action dismissed -- The action was dismissed because the appellants did not call further evidence in response to an oral ruling which struck all of their past and future lay witnesses because of non-compliant will-says -- There being no case for the Crown to answer, the action necessarily failed.

Appeal by the Sawridge Band from the dismissal of its action and to award costs totalling approximately $1.7 million in favour of the Crown and the other respondents (interveners at trial). The dismissal of the action was the end of the retrial of an action commenced on January 15, 1986. The Band sought an order declaring that certain amendments to the Indian Act breached their rights under s. 35 of the Constitution Act. The statutory amendments compelled the Band, against their wishes, to add certain individuals to the list of band members. The Band argued that the legislation was an invalid attempt to deprive them of their right to determine the membership of their own bands. The action was dismissed because the Band did not call further evidence in response to an oral ruling which struck all of their past and future lay witnesses because of non-compliant will-says. There being no case for the Crown to answer, the action necessarily failed.

HELD: Appeal dismissed. All of the orders and directions by the trial judge were discretionary decisions made in furtherance of his obligation to control the trial process. He was required to discharge that obligation in circumstances that became increasingly difficult because of the Band's apparent reluctance to accept that a trial judge may exclude relevant evidence on the basis that it was not properly disclosed in the discovery process or, as in this case, will-say statements that were intended to stand in the place of oral discoveries.

Appeal From:

Appeal from a Judgment of the Federal Court dated March 7, 2008, Federal Court Docket Number T-66-86, [2008] F.C.J. No. 389.

Counsel:

Edward H. Molstad, Q.C., Marco S. Poretti and David L. Sharko, for the Appellants.

Catherine M. Twinn, for the Appellants.

E. James Kindrake, Kevin Kimmis and Krista Epton, for the Respondent (Her Majesty the Queen).

Joseph E. Magnet, for the Respondent (Congress of Aboriginal Peoples).

Janet L. Hutchison, for the Respondent (Congress of Aboriginal Peoples).

Jon Faulds, Q.C. and Derek A. Cranna, for the Repondent (Native Council of Canada (Alberta)).

Michael J. Donaldson, for the Respondent (Non-Status Indian Association of Alberta).

Mary Eberts, for the Respondent (Native Women's Association of Canada).

The judgment of the Court was delivered by

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

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

3 The dismissal of the action was the end of the retrial of an action commenced on January 15, 1986. The appellants were seeking an order declaring that certain amendments to the *Indian Act*, R.S.C. 1985, c. I-5, breached the appellants' rights under section 35 of the *Constitution Act, 1982*. The statutory amendments compelled the appellants, against their wishes, to add certain individuals to the list of band members. The appellants argue that the legislation is an invalid attempt to deprive them of their right to determine the membership of their own bands.

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

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

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

7 It is not necessary to recount the lengthy procedural history of this matter, which is described in detail by Justice Russell. We note, however, that during the process of case management and after the discovery process had become hopeless, Justice Hugessen made an order requiring the appellants to produce will-say statements for all lay witnesses proposed to be called at trial. In June of 2004, Justice Russell found the appellants' first attempt at will-says to be inadequate and ordered new will-says (2004 FC 933). He found the second attempt also to be inadequate (2004 FC 1436) and ordered a third attempt (2004 FC 1653). None of these orders was appealed.

8 In November of 2005 Justice Russell made an order permitting the appellants to call 24 of their 57 potential lay witnesses, but prohibiting them from calling the other 33 because of various

failures to comply with the will-say orders (2005 FC 1476). The appellants' appeal of that order was dismissed (2006 FCA 228, application for leave to appeal dismissed, February 8, 2007).

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

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

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

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

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

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

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

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

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

SHARLOW J.A.

cp/e/qlaim/qlpxm/qlaxr/qlaxw/qlhcs/qljyw

TAB 22

Case Name:

Sawridge Band v. Canada

Between
Sawridge Band, plaintiff, and
Her Majesty the Queen, defendant, and
Native Council of Canada, Native Council of Canada (Alberta), Non-Status Indian Association of Alberta, Native Women's Association of Canada, interveners
And between
Tsuu T'ina First Nation, plaintiff, and
Her Majesty the Queen, defendant, and
Native Council of Canada, Native Council of Canada (Alberta), Non-Status Indian Association of Alberta, Native Women's Association of Canada, interveners

[2005] F.C.J. No. 1857

[2005] A.C.F. no 1857

2005 FC 1476

2005 CF 1476

275 F.T.R. 1

[2006] 1 C.N.L.R. 292

144 A.C.W.S. (3d) 247

Dockets T-66-86A, T-66-86B

Federal Court
Edmonton, Alberta

Russell J.

Heard: September 19-22, 2005.
Judgment: November 7, 2005.

(325 paras.)

Aboriginal law -- Aboriginal rights -- Effect of legislation -- Evidence of effect of legislation on other bands not relevant in case considering right of Sawridge Band to determine membership.

Aboriginal law -- Indian bands -- Self-government -- Band not entitled to adduce evidence relating to self-government, generally, in case considering right of band to determine membership.

Civil evidence -- Exclusionary rules -- Surprise or confusion of issues -- Band not entitled to adduce evidence relating to self-government, generally, in case considering right of band to determine membership.

Motion by the Crown to strike certain will-say statements, served by the Band, for failure to meet the required standards for disclosure and admissibility. The Crown asked the court to direct the Band not to call those witnesses at trial whose will-say statements were struck, or alternatively to direct the Band not to adduce evidence in respect to the will-say statements struck. The Crown asked for four months to prepare for trial once the Band's final witness list and admissible will-says were determined. In the action, the Band sought to present a wide array of evidence to support its right to determine its membership, based upon aboriginal rights, treaty rights and title in their reserve lands. The Crown sought to prevent the expansion of the action to include historical and political arguments about aboriginal self-government. The action was originated in 1993, the Band appealed from the judgment and a new trial was ordered. The Crown sought to rely upon the first trial record. The judge considered the Band uncooperative and obstructive, and placed time limits on examinations for discovery, service of witness lists, responses to interrogatories, and filing of expert reports. The witness list and will-says filed by the Band were ruled deficient because they were not individualized, the language to be used by each witness was not identified, the Band provided a list of topics rather than a synopsis of what each witness would say, and statements pertaining to oral histories did not identify past practices, customs and traditions. The witness list and will-says were struck with leave to the Band to propose a workable solution. The Band refused to acknowledge the deficiencies and claimed it had a right to call whomever it wanted. It proposed to produce 150 will-says by December 14, 2004 and the Crown would have 26 days over Christmas to review the materials and raise concerns with the court. The court considered this draconian and refused to give effect to the Band's proposal, instead placing conditions on the witnesses and will-says that the Band was permitted to file and serve. The Band missed deadlines and included witnesses that were not on an original witness list. The Crown was willing to overlook the late service of 57 will-say statements.

HELD: Motion allowed. Evidence relating to customs and practices of other aboriginal groups, and the effects of legislative amendments on these other groups, was not admissible. Evidence dealing with aboriginal self-government generally, and dealing with the general North American experience in dealing with aboriginal issues was not admissible. The court was to review the will-says and rule on whether or not they were admissible according to these guidelines. In borderline cases, the Band was to be given the benefit of the doubt. While there was nothing wrong with the Band using court process to gain legal recognition for its rights, such a broad-based objective was not contemplated by the present pleadings. The Band was not permitted to change the process dictated by the court, because the court's orders were made as a result of the Band's conduct. The court had already made

it clear it did not accept the Band's open-ended approach, but the Band was acting as if the court had approved of it. The only incident of self-government at issue was the right to determine membership. The Band was not permitted to assert a right to political sovereignty as a basis for the right to determine membership. Until the Band asked the court to vary the time limits for serving the will-says and witness lists, those identified after the deadline were not admissible. The Band was not required to show how each witness's evidence referred back to the pleadings. The Band was permitted to introduce new witnesses who had something new to add regarding the issues before the court. The Band was not permitted to add witnesses that were not on a previous witness list. Oral history evidence was admissible where it otherwise complied with court orders.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 25

Constitution Act, 1982, ss. 35, 35(1)

Indian Act

Counsel:

Edward H. Molstad, Marco S. Poretti and Nathan Whitling, Q.C., for the plaintiffs.

Catherine Twinn, for the plaintiffs.

Kevin Kimmis, Kathleen Kohlman, Dale Slafarek and Wayne M. Schafer, for the defendants.

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

Jon Faulds, Q.C., Derek A. Cranna and Karen E. Gawne, for the intervener, Native Council of Canada (Alberta).

Paul Fitzgerald, for the intervener, Native Council of Canada.

Michael Donaldson and Robert O. Millard, for the intervener, Non-Status Indian Association of Canada.

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RUSSELL J.:--

THE MOTION

1 This is the first of two motions brought by the Crown and heard in Edmonton during the week of September 19, 2005. The motions deal with important issues of pre-trial disclosure, scope of pleadings, and the admissibility of witnesses and evidence by the Plaintiffs that were first raised with the trial judge at a Trial Management Conference on September 17, 2004.

2 This first motion is brought by the Crown pursuant to paragraph 3 of Russell J.'s Order of November 25, 2004, which set out a procedure to allow the Plaintiffs to complete and serve their witness list and will-say statements, and for the Crown to raise any concerns about the materials so served.

3 Having reviewed the witness list and will-say statements served by the Plaintiffs, the Crown says they are deficient and do not meet the required standards for disclosure and admissibility. For this reason the Crown asks the Court to strike certain of the will-says served by the Plaintiffs in their entirety, and to direct that the Plaintiffs shall not call those witnesses at the trial whose will-says have been struck.

4 Alternatively, the Crown asks the Court to strike out those portions of the Plaintiffs' will-says that are found to be non-compliant or inadmissible, and to direct that the Plaintiffs shall not adduce evidence at the trial in respect of those portions so struck.

5 In addition, the Crown asks for a period of approximately four (4) months to prepare for trial once the Plaintiffs' final witness list and admissible will-says have been determined.

6 Behind both motions lie significant disagreements between the parties about what the pleadings encompass, and how best to organize and present the vast body of evidence the Plaintiffs say they need to call at trial in order to ensure the just, most expeditious and least expensive determination of the issues on their merits.

7 The concerns on both sides are entirely understandable. The Plaintiffs seek to present a wide array of evidence to support a right to determine their own membership that is based upon aboriginal rights, treaty rights and title in their reserve lands, all of which the Plaintiffs seek to place in a broad historical and political context. The Crown, on the other hand, and quite apart from the pre-trial disclosure difficulties, wishes to prevent an expansion of the action into areas that go beyond the pleadings and the governing jurisprudence, and that neglects to put to good use the voluminous record that already exists from the first trial of this matter that took place in 1993 and 1994.

8 These inevitable tensions have been exacerbated by what the Crown perceives as an expansionist approach to this litigation of late by the Plaintiffs, and the Plaintiffs' repeated refusal to submit to pre-trial disclosure in accordance with normal rules of procedure and specific orders made by this Court.

9 In view of the long trial that lies ahead the Court has been asked to address these concerns now to see if anything can, or should, be done that will ensure a more just, expeditious and efficient trial.

BACKGROUND

10 In more ways than one, history has laid a heavy hand on these proceedings. The pleadings raise matters of great historical significance between the Plaintiffs and the Crown. But the proceedings themselves, of which the present motion is a part, have a long and tortuous history that goes back to 1986. And even the specific issues of pre-trial disclosure and admissibility of evidence raised by the Crown in this motion have a considerable aetiology that has been complicated by previous motions and orders that the Court has been compelled to make to move this matter towards trial. All of these perspectives come into play on this motion, but time and space permit only a brief and skeletal account of what has led to the present impasse.

11 I have already given a synopsis of much of the relevant background in my Reasons for Order of May 3, 2005 that dealt with an apprehended bias motion. For the sake of convenience, I think it would help if I merely reproduced here what was said on that occasion with some modifications required to bring the present motion into focus.

However, as was the case with Elder Alec Crowchild, Elder Starlight indicates in his supplementary will-say that he intends to give oral history evidence (specifically paragraphs 2 and 4) that cannot be related to the relevant oral history summary. As with Elder Crowchild, this issue should be dealt with in accordance with the Reasons.

7. BERTHA L'HIRONDELLE

Ms. L'Hirondelle's will-say is compliant as regards detail. I can see that there will be numerous challenges to her evidence on the basis of relevance, hearsay and otherwise. But I am satisfied that she is focussed upon membership in the Sawridge Band and the impact of Bill C-31 upon Sawridge.

Any objections to her evidence should be left until the trial. Ms. L'Hirondelle may be called.

8. CHRIS SHADE

Mr. Shade is a past Chief of the Blood First Nation who says he can provide oral history evidence about Treaty 7 and the pre-contact ways of life of the First Nations of the Blackfoot Confederacy, including the Tsuu T'ina Nation.

It is apparent from his will-say, and the accompanying explanation, that there will be significant problems at trial concerning the relevance of much of what he has to say for the pleadings. Much of his focus appears to be general self-government and it is unclear as to how much of his evidence will be connected to the Plaintiffs in this case.

There is also a lack of sufficient detail on some topics.

However, it appears to the Court that Mr. Shade's evidence could have some possible relevance for the issues in this law suit, and any objections could be dealt with at trial.

He is another witness whose evidence raises oral history problems that should be dealt with in accordance with the Reasons.

Mr. Shade, also, is another witness who did not appear on the September 15, 2004 list. Hence, he should not be called without further leave of the Court. If leave is sought, the Plaintiffs should indicate which portions of his will-say they still regard as relevant, given the Reasons on this motion.

9. CHESTER BRUISED HEAD

I see no need to exclude Mr. Bruised Head at this stage. Any problems with his evidence can be dealt with at trial.

Mr. Bruised Head may be called.

10. CLARA MIDBO

I see no need to exclude Mms. Midbo as a witness at this time. Any problems with her evidence can be dealt with at trial.

Ms. Midbo may be called.

11. CLIFFORD CARDINAL

His evidence may be objectionable for a variety of reasons which the Crown raises, but this is one of those witnesses where the Plaintiffs should be given the benefit of the doubt and objections dealt with at trial.

Any prejudice to the Crown as a result of discrepancies between Mr. Davis' proposed evidence and the oral history summary should be dealt with as already indicated.

This witness may be called.

37. REGINALD BLACK PLUME

Elder Black Plume is an elder of the Blood First Nation and he wishes to give evidence concerning "the Indian understanding of Treaty 7" and the life of the First Nations of the Blackfoot Confederacy.

It is unclear from the will-say how much, if anything, that he has to say is relevant to the Plaintiffs in these proceedings. Nevertheless, he does refer to the Tsuu T'ina people and he appears to have something to say about how they managed their own internal affairs, although the details are missing.

Once again, the Crown makes significant objections to this witness on a variety of grounds but I think the Plaintiffs should have the benefit of the doubt and any objections should be dealt with at trial.

This witness may be called.

38. ROLAND TWINN

Chief Twinn is an important witness for the Sawridge. His will-say has a lot in it about self-government generally and other matters not relevant to the pleadings, but he can give direct evidence about the Sawridge community and the impact of Bill C-31 on that community.

The Crown raises a variety of objections to his evidence, but they can be dealt with at trial.

The witness may be called.

39. ROSE LABOUCAN

Chief Laboucan's will-say is entirely concerned with the Aboriginal self-government issue in general. I cannot relate anything she raises with the specifics of this law suit.

This witness should not be called.

40. SAMMY SIMONS

I see no reason to exclude this witness at this stage. Any objections can be dealt with at trial.

This witness may be called.

41. REGENA CROWCHILD

I see that the Crown raises many objections to the proposed evidence of this witness, but this is abother case where the Plaintiffs should have the benefit of the doubt and objections dealt with at trial.

TAB 23

Case Name:

Sawridge Band v. Canada

Between
Bertha L'hirondelle, suing on her own behalf and on behalf of all other members of the Sawridge Band, plaintiffs (appellants), and
Her Majesty the Queen, defendant (respondent), and Native Council of Canada, Native Council of Canada (Alberta), Native Women's Association of Canada, and Non-status Indian Association of Alberta, interveners (respondents)

[2004] F.C.J. No. 77

[2004] A.C.F. no 77

2004 FCA 16

2004 CAF 16

[2004] 3 F.C.R. 274

[2004] 3 R.C.F. 274

316 N.R. 332

[2004] 2 C.N.L.R. 316

128 A.C.W.S. (3d) 856

Docket A-170-03

Federal Court of Appeal
Calgary, Alberta

Rothstein, Noël and Malone JJ.A.

Heard: December 15 and 16, 2003.
Judgment: January 19, 2004.

(61 paras.)

Counsel:

Martin J. Henderson and Catherine Twinn, for the appellant.
E. James Kindrake and Kathleen Kohlman, for the respondent.
Kenneth Purchase, for the intervener, Native Council of Canada.
P. Jon Faulds, for the intervener, Native Council of Canada, Alberta.
Mary Eberts, for the intervener, Native Women's Association of Canada.
Michael J. Donaldson, for the intervener, Non-status Indian Association of Alberta.

The judgment of the Court was delivered by

1 **ROTHSTEIN J.A.**:-- By Order dated March 27, 2003, Hugessen J. of the Trial Division (as it then was) granted a mandatory interlocutory injunction sought by the Crown, requiring the appellants to enter or register on the Sawridge Band List the names of eleven individuals who, he found, had acquired the right to be members of the Sawridge Band before it took control of its Band list on July 8, 1985, and to accord the eleven individuals all the rights and privileges attaching to Band membership. The appellants now appeal that Order.

HISTORY

2 The background to this appeal may be briefly stated. An Act to amend the Indian Act, R.S.C. 1985, c. 32 (1st Supp.) [Bill C-31], was given Royal Assent on June 28, 1985. However, the relevant provisions of Bill C-31 were made retroactive to April 17, 1985, the date on which section 15, the equality guarantee, of the Canadian Charter of Rights and Freedoms [the Charter] came into force.

3 Among other things, Bill C-31 granted certain persons an entitlement to status under the Indian Act, R.S.C. 1985, c. I-5 [the Act], and, arguably, entitlement to membership in an Indian Band. These persons included those whose names were omitted or deleted from the Indian Register by the Minister of Indian and Northern Affairs prior to April 17, 1985, in accordance with certain provisions of the Act as they read prior to that date. The disqualified persons included an Indian woman who married a man who was not registered as an Indian as well as certain other persons disqualified by provisions that Parliament considered to be discriminatory on account of gender. The former provisions read:

> 12. (1) The following persons are not entitled to be registered, namely,
>
> (a) a person who
>
> ...
>
> (iii) is enfranchised, or

(iv) is born of a marriage entered into after September 4, 1951 and has attained the age of twenty-one years, whose mother and whose father's mother are not persons described in paragraph 11(1)(a), (b) or (d) or entitled to be registered by virtue of paragraph 11(1)(e),

unless, being a woman, that person is the wife or widow of a person described in section 11; and

(b) a woman who married a person who is not an Indian, unless that woman is subsequently the wife or widow of a person described in section 11.

(2) The addition to a Band List of the name of an illegitimate child described in paragraph 11(1)(e) may be protested at any time within twelve months after the addition, and if on the protest it is decided that the father of the child was not an Indian, the child is not entitled to be registered under that paragraph.

* * *

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

a) une personne qui, selon le cas :

...

(iii) est émancipée,
(iv) est née d'un mariage célébré après le 4 septembre 1951 et a atteint l'âge de vingt et un ans, dont la mère et la grand-mère paternelle ne sont pas des personnes décrites à l'alinéa 11(1)a), b) ou d) ou admises à être inscrites en vertu de l'alinéa 11(1)e),

sauf si, étant une femme, cette personne est l'épouse ou la veuve de qulequ'un décrit à l'article 11;

b) une femme qui a épousé un non-Indien, sauf si cette femme devient subséquemment l'épouse ou la veuve d'une personne décrite à l'article 11.

(2) L'addition, à une liste de bande, du nom d'un enfant illégitime décrit à l'alinéa 11(1)e) peut faire l'objet d'une protestation dans les douze mois de l'addition; si, à la suite de la protestation, il est décidé que le père de l'enfant n'était pas un Indien, l'enfant n'a pas le droit d'être inscrit selon cet alinéa.

4 Bill C-31 repealed these disqualifications and enacted the following provisions to allow those who had been stripped of their status to regain it:

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

...

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

...

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

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

* * *

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

...

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

...

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

...

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

5 By an action originally commenced on January 15, 1986, the appellants claim a declaration that the provisions of Bill C-31 that confer an entitlement to Band membership are inconsistent with section 35 of the Constitution Act, 1982 and are, therefore, of no force and effect. The appellants say that an Indian Band's right to control its own membership is a constitutionally protected Abo-

riginal and treaty right and that legislation requiring a Band to admit persons to membership is therefore unconstitutional.

6 This litigation is now in its eighteenth year. By Notice of Motion dated November 1, 2002, the Crown applied for:

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

7 The basis of the Crown's application was that until legislation is found to be unconstitutional, it must be complied with. The mandatory injunction application was brought to require the Band to comply with the provisions of the Act unless and until they are determined to be unconstitutional. By Order dated March 27, 2003, Hugessen J. granted the requested injunction.

8 This Court was advised that, in order for the Band to comply with the Order of Hugessen J., the eleven individuals in question were entered on the Sawridge Band list. Nonetheless, the appellants submit that Hugessen J.'s Order was made in error and should be quashed.

ISSUES

9 In appealing the Order of Hugessen J., the appellants raises the following issues:

1. Does the Band's membership application process comply with the requirements of the Act?
2. Even if the Band has not complied with the Act, did Hugessen J. err in granting a mandatory interlocutory injunction because the Crown lacks standing and has not the met the test for granting interlocutory injunctive relief.

APPELLANTS' SUBMISSIONS

10 The appellants say that the Band's membership code has been in effect since July 8, 1985 and that any person who wishes to become a member of the Band must apply for membership and satisfy the requirements of the membership code. They say that the eleven individuals in question have never applied for membership. As a result, there has been no refusal to admit them. The appellants submit that the code's requirement that all applicants for membership go through the application process is in accordance with the provisions of the Act. Because the Band is complying with the Act, there is no basis for granting a mandatory interlocutory injunction.

11 Even if the Band has not complied with the Act, the appellants say that Hugessen J. erred in granting a mandatory interlocutory injunction because the Crown has no standing to seek such an injunction. The appellants argue that there is no lis between the beneficiaries of the injunction and the appellants. The Crown has no interest or, at least, no sufficient legal interest in the remedy. Further, the Crown has not brought a proceeding seeking final relief of the nature sought in the mandatory interlocutory injunction application. In the absence of such a proceeding, the Court is without jurisdiction to grant a mandatory interlocutory injunction. Further, there is no statutory authority for the Crown to seek the relief in question. The appellants also argue that the Crown has not met the three-part test for the granting of an interlocutory injunction.

ARE THE APPELLANTS COMPLYING WITH THE INDIAN ACT?

The Appropriateness of Deciding a Legal Question in the Course of an Interlocutory Injunction Application

12 The question of whether the Sawridge Band membership code and application process are in compliance with the Act appears to have been first raised by the appellants in response to the Crown's injunction application. Indeed, the appellants' Fresh As Amended Statement of Claim would seem to acknowledge that, at least when it was drafted, the appellants were of the view that certain individuals could be entitled to membership in an Indian Band without the consent of the Band. Paragraph 22 of the Fresh as Amended Statement of Claim states in part:

> The plaintiffs state that with the enactment of the Amendments, Parliament attempted unilaterally to require the First Nations to admit certain persons to membership. The Amendments granted individual membership rights in each of the First Nations without their consent, and indeed over their objection.

13 There is nothing in the appellants' Fresh As Amended Statement of Claim that would suggest that an issue in the litigation was whether the appellants were complying with the Act. The entire Fresh As Amended Statement of Claim appears to focus on challenging the constitutional validity of the Bill C-31 amendments to the Indian Act.

14 The Crown's Notice of Motion for a mandatory interlocutory injunction was based on the appellants' refusal to comply with the legislation pending determination of whether the legislation was constitutional. The Crown's assumption appears to have been that there was no dispute that, barring a finding of unconstitutionality, the legislation required the appellants to admit the eleven individuals to membership.

15 Be that as it may, the appellants say that the interpretation of the legislation and whether or not they are in compliance with it was always in contemplation in and relevant to this litigation. It was the appellants who raised the question of whether or not they were in compliance in response to the Crown's motion for injunction. It, therefore, had to be dealt with before the injunction application itself was addressed. The Crown and the interveners do not challenge the need to deal with the question and Hugessen J. certainly accepted that it was necessary to interpret the legislation and determine if the appellants were or were not in compliance with it.

16 Courts do not normally make determinations of law as a condition precedent to the granting of an interlocutory injunction. However, that is what occurred here. In the unusual circumstances of this case, I think it was appropriate for Hugessen J. to have made such a determination.

17 Although rule 220 was not expressly invoked, I would analogize the actions of Hugessen J. to determining a preliminary question of law. Rules 220(1) and (3) read as follows:

> 220. (1) A party may bring a motion before trial to request that the Court determine
>
> (a) a question of law that may be relevant to an action;
>
> ...

(3) A determination of a question referred to in subsection (1) is final and conclusive for the purposes of the action, subject to being varied on appeal.

* * *

220. (1) Une partie peut, par voie de requête présentée avant l'instruction, demander à la Cour de statuer sur :

a) tout point de droit qui peut être pertinent dans l'action;

...

(3) La décision prise au sujet d'un point visé au paragraphe (1) est définitive aux fins de l'action, sous réserve de toute modification résultant d'un appel.

18 Although the appellants did not explicitly bring a motion under Rule 220, the need to determine the proper interpretation of the Act was implicit in their reply to the respondent's motion for a mandatory interlocutory injunction. It would be illogical for the appellants to raise the issue in defence to the injunction application and the Court not be able to deal with it. There is no suggestion that the question could not be decided because of disputed facts or for any other reason. It was raised by the appellants who said it was relevant to the action. Therefore, I think that Hugessen J. was able to, and did, make a preliminary determination of law that was final and conclusive for purposes of the action, subject to being varied on appeal.

Does the Band's Membership Application Process Comply with the Requirements of the Indian Act?

19 I turn to the question itself. Although the determination under appeal was made by a case management judge who must be given extremely wide latitude (see Sawridge Band v. Canada, [2002] 2 F.C. 346 at paragraph 11 (C.A.)), the determination is one of law. Where a substantive question of law is at issue, even if it is decided by a case management judge, the applicable standard of review will be correctness.

20 The appellants say there is no automatic entitlement to membership and that the Band's membership code is a legitimate means of controlling its own membership. They rely on subsections 10(4) and 10(5) of the Indian Act which provide:

10(4) Membership rules established by a band under this section may not deprive any person who had the right to have his name entered in the Band List for that band, immediately prior to the time the rules were established, of the right to have his name so entered by reason only of a situation that existed or an action that was taken before the rules came into force.

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

* * *

> 10(4) Les règles d'appartenance fixées par une bande en vertu du présent article ne peuvent priver quiconque avait droit à ce que son nom soit consigné dans la liste de bande avant leur établissement du droit à ce que son nom y soit consigné en raison uniquement d'un fait ou d'une mesure antérieurs à leur prise d'effet.
>
> (5) Il demeure entendu que le paragraphe (4) s'applique à la personne qui avait droit à ce que son nom soit consigné dans la liste de bande en vertu de l'alinéa 11(1)c) avant que celle-ci n'assume la responsabilité de la tenue de sa liste si elle ne cesse pas ultérieurement d'avoir droit à ce que son nom y soit consigné.

21 The appellants say that subsections 10(4) and (5) are clear and unambiguous and Hugessen J. was bound to apply these provisions. They submit the words "by reason only of" in subsection 10(4) mean that a band may establish membership rules as long as they do not expressly contravene any provisions of the Act. They assert that the Band's code does not do so. The code only requires that if an individual is not resident on the Reserve, an application must be made demonstrating, to the satisfaction of the Band Council, that the individual:

> has applied for membership in the band and, in the judgment of the Band Council, has a significant commitment to, and knowledge of, the history, customs, traditions, culture and communal life of the Band and a character and lifestyle that would not cause his or her admission to membership in the Band to be detrimental to the future welfare or advancement of the Band (paragraph 3(a)(ii)).

22 With respect to subsection 10(5), the appellants say that the words "if that person does not subsequently cease to be entitled to have his name entered in the Band List" mean that the Band is given a discretion to establish membership rules that may disentitle an individual to membership in the Band. They submit that nothing in the Act precludes a band from establishing additional qualifications for membership.

23 The Crown, on the other hand, says that persons in the position of the individuals in this appeal have "acquired rights." I understand this argument to be that paragraph 11(1)(c) created an automatic entitlement for those persons to membership in the Indian Band with which they were previously connected. The Crown submits that subsection 10(4) prohibits a band from using its membership rules to create barriers to membership for such persons.

24 Hugessen J. was not satisfied that subsections 10(4) and (5) are as clear and unambiguous as the appellant suggests. He analyzed the provisions in the context of related provisions and agreed with the Crown.

25 The appellants seem to object to Hugessen J.'s contextual approach to statutory interpretation. However, all legislation must be read in context. Driedger's well known statement of the modern approach to statutory construction, adopted in countless cases such as Re Rizzo & Rizzo Shoes Ltd., [1998] 1 S.C.R. 27 at paragraph 21, reads:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of

> Parliament (Elmer A. Driedger, Construction of Statutes, 2d ed. (Toronto: Butterworths, 1983) at 87).

Hugessen J. interpreted subsections 10(4) and (5) in accordance with the modern approach and he was correct to do so.

26 I cannot improve on Hugessen J.'s statutory construction analysis and I quote the relevant portions of his reasons, which I endorse and adopt as my own:

> [24] It is unfortunate that the awkward wording of subsections 10(4) and 10(5) does not make it absolutely clear that they were intended to entitle acquired rights individuals to automatic membership, and that the Band is not permitted to create pre-conditions to membership, as it has done. The words "by reason only of" in subsection 10(4) do appear to suggest that a band might legitimately refuse membership to persons for reasons other than those contemplated by the provision. This reading of subsection 10(4), however, does not sit easily with the other provisions in the Act as well as clear statements made at the time regarding the amendments when they were enacted in 1985.
>
> [25] The meaning to be given to the word "entitled" as it is used by paragraph 6(1)(c) is clarified and extended by the definition of "member of a band" in section 2, which stipulates that a person who is entitled to have his name appear on a Band List is a member of the Band. Paragraph 11(1)(c) requires that, commencing on April 17, 1985, the date Bill C-31 took effect, a person was entitled to have his or her name entered in a Band List maintained by the Department of Indian Affairs for a band if, inter alia, that person was entitled to be registered under paragraph 6(1)(c) of the 1985 Act and ceased to be a member of that band by reason of the circumstances set out in paragraph 6(1)(c).
>
> [26] While the Registrar is not obliged to enter the name of any person who does not apply therefor (see section 9(5)), that exemption is not extended to a band which has control of its list. However, the use of the imperative "shall" in section 8, makes it clear that the band is obliged to enter the names of all entitled persons on the list which it maintains. Accordingly, on July 8, 1985, the date the Sawridge Band obtained control of its List, it was obliged to enter thereon the names of the acquired rights women. When seen in this light, it becomes clear that the limitation on a band's powers contained in subsections 10(4) and 10(5) is simply a prohibition against legislating retrospectively : a band may not create barriers to membership for those persons who are by law already deemed to be members.
>
> [27] Although it deals specifically with Band Lists maintained in the Department, section 11 clearly distinguishes between automatic, or unconditional, entitlement to membership and conditional entitlement to membership. Subsection 11(1) provides for automatic entitlement to certain individuals as of the date the amendments came into force. Subsection 11(2), on the other hand, potentially

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

27 I turn to the appellants' arguments in this Court.

28 The appellants assert that the description "acquired rights" used by Hugessen J. reads words into the Indian Act that are not there. The term "acquired rights" appears as a marginal note beside subsection 10(4). As such, it is not part of the enactment, but is inserted for convenience of reference only (Interpretation Act, R.S.C. 1985, c. I-21, s. 14). However, the term is a convenient "shorthand" to identify those individuals who, by reason of paragraph 11(1)(c), became entitled to automatic membership in the Indian Band with which they were connected. In other words, the instant paragraph 11(1)(c) came into force, i.e. April 17, 1985, these individuals were entitled to have their names entered on the membership list of their Band.

29 The appellants say that the words "by reason only of" in subsection 10(4) do not preclude an Indian Band from establishing a membership code, requiring persons who wish to be considered for membership to make application to the Band. I acknowledge that the words "by reason only of" could allow a band to create restrictions on continued membership for situations that arose or actions taken after the membership code came into force. However, the code cannot operate to deny membership to those individuals who come within paragraph 11(1)(c).

30 A band may enact membership rules applicable to all of its members. Yet subsections 10(4) and (5) restrict a band from enacting membership rules targeted only at individuals who, by reason of paragraph 11(1)(c), are entitled to membership. That distinction is not permitted by the Act.

31 The appellants raise three further objections. First, they say that their membership code is required because of "band shopping." However, in respect of persons entitled to membership under paragraph 11(1)(c), the issue of band shopping does not arise. Under paragraph 11(1)(c), the individuals in question are only entitled to membership in the band in which they would have been a member but for the pre-April 17, 1985 provisions of the Indian Act. In this case, those individuals would have been members of the Sawridge Band.

32 Second, the appellants submit that the opening words of subsection 11(1), "commencing on April 17, 1985," indicate a process and not an event, i.e. that there is no automatic membership in a

band and that indeed some persons may not wish to be members; rather, the word "commencing" only means that a person may apply at any time on or after April 17, 1985. I agree that there is no automatic membership. However, there is an automatic entitlement to membership. The words "commencing on April 17, 1985" only indicate that subsection 11(1) was not retroactive to before April 17, 1985. As of that date, the individuals in question in this appeal acquired an automatic entitlement to membership in the Sawridge Band.

33 Third, the appellants say that the individuals in question have not made application for membership. Hugessen J. dealt with this argument at paragraph 12 of his reasons:

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

34 The appellants submit, contrary to Hugessen J.'s finding, that there was no evidence that the individuals in question here wanted to become members of the Sawridge Band. A review of the record demonstrates ample evidence to support Hugessen J.'s finding. For example, by Sawridge Band Council Resolution of July 21, 1988, the Band Council acknowledged that "at least 164 people had expressed an interest in writing in making application for membership in the Band." A list of such persons was attached to the Band Council Resolution. Of the eleven individuals in question here, eight were included on that list. In addition, the record contains applications for Indian status and membership in the Sawridge Band made by a number of the individuals.

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

36 Of course, this finding has no bearing on the main issue raised by the appellants in this action, namely, whether the provisions entitling persons to membership in an Indian band are unconstitutional.

THE INJUNCTION APPLICATION

Standing

37 I turn to the injunction application. The appellants say that there was no lis between the Band and the eleven persons ordered by Hugessen J. to be included in the Band's Membership List. The eleven individuals are not parties to the main action. The appellants also say that the Crown is not entitled to seek interlocutory relief when it does not seek the same final relief.

38 I cannot accept the appellants' arguments. The Crown is the respondent in an application to have validly enacted legislation struck down on constitutional grounds. It is seeking an injunction, not only on behalf of the individuals denied the benefits of that legislation but on behalf of the pub-

lic interest in having the laws of Canada obeyed. The Crown, as represented by the Attorney General, has traditionally had standing to seek injunctions to ensure that public bodies, such as an Indian band council, follow the law (see Robert J. Sharpe, Injunctions and Specific Performance, looseleaf (Aurora, ON: Canada Law Book, 2002) at paragraph 3.30; Ontario (Attorney General) v. Ontario Teachers' Federation (1997), 36 O.R. (3d) 367 at 371-72 (Gen. Div.)). Having regard to the Crown's standing at common law, statutory authority, contrary to the appellants' submission, is unnecessary. Hugessen J. was thus correct to find that the Crown had standing to seek the injunction.

39 I also cannot accept the argument that the Crown may not seek interlocutory relief because it has not sought the same final relief in this action. The Crown is defending an attack on the constitutionality of Bill C-31 and is seeking an interlocutory injunction to require compliance with it in the interim. If the Crown is successful in the main action, the result will be that the Sawridge Band will have to enter or register on its membership list the individuals who are the subject of the injunction application. The Crown therefore is seeking essentially the same relief on the injunction application as in the main action.

40 Further, section 44 of the Federal Courts Act, R.S.C. 1985, c. F-7, confers jurisdiction on the Federal Court to grant an injunction "in all cases in which it appears to the Court to be just or convenient to do so." The jurisdiction conferred by section 44 is extremely broad. In Canada (Human Rights Commission) v. Canadian Liberty Net, [1998] 1 S.C.R. 626, the Supreme Court found that the Federal Court could grant injunctive relief even though there was no action pending before the Court as to the final resolution of the claim in issue. If section 44 confers jurisdiction on the Court to grant an injunction where it is not being asked to grant final relief, the Court surely has jurisdiction to grant an injunction where it will itself make a final determination on an interconnected issue. The requested injunction is therefore sufficiently connected to the final relief claimed by the Crown.

The Test for Granting an Interlocutory Injunction

41 The test for whether an interlocutory injunction should be granted was set out in American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396 (H.L.) and adopted by the Supreme Court in Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., [1987] 1 S.C.R. 110 and RJR-Macdonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311 where, at 334, Sopinka and Cory JJ. summarized the test as follows:

> First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

42 The appellants submit that Hugessen J. erred in applying a reverse onus to the test. Since, as will be discussed below, the Crown has satisfied the traditional test, I do not need to consider whether the onus should be reversed.

Serious Question

43 In RJR-Macdonald at 337-38, the Court indicated that the threshold at the first branch is low and that the motions judge should proceed to the rest of the test unless the application is vexatious or frivolous.

44 The appellants say that in cases where a mandatory injunction is sought, the older pre-American Cyanamide test of showing a strong prima facie case for trial should continue to apply. They rely on an Ontario case, Breen v. Farlow, [1995] O.J. No. 2971 (Gen. Div.), in support of this proposition. Of course, that case is not binding on this Court. Furthermore, it has been questioned by subsequent Ontario decisions in which orders in the nature of a mandatory interlocutory injunction were issued (493680 Ontario Ltd. v. Morgan, [1996] O.J. No. 4776 (Gen. Div.); Samoila v. Prudential of America General Insurance Co. (Canada), [1999] O.J. No. 2317 (S.C.J.)). In Morgan, Hockin J. stated that RJR-Macdonald had modified the old test, even for mandatory interlocutory injunctions (paragraph 27).

45 The jurisprudence of the Federal Court on this issue in recent years is divided. In Relais Nordik Inc. v. Secunda Marine Services Ltd. (1988), 24 F.T.R. 256 at paragraph 9, Pinard J. questioned the applicability of the American Cyanamide test to mandatory interlocutory injunctions. On the other hand, in Ansa International Rent-A-Car (Canada) Ltd. v. American International Rent-A-Car Corp. (1990), 36 F.T.R. 98 at paragraph 15, MacKay J. accepted that the American Cyanamide test applied to mandatory injunctions in the same way as to prohibitory ones. Both of these cases were decided before the Supreme Court reaffirmed its approval of the American Cyanamide test in RJR-Macdonald. More recently, in Patriquen v. Canada (Correctional Services), [2003] F.C.J. No. 1186, 2003 FC 927 at paragraphs 9-16, Blais J. followed the RJR-Macdonald test and found that there was a serious issue to be tried in an application for a mandatory interlocutory injunction (which he dismissed on the basis that the applicant had not shown irreparable harm).

46 Hugessen J. followed Ansa International and held that the RJR-Macdonald test should be applied to an interlocutory injunction application, whether it is prohibitory or mandatory. In light of Sopinka and Cory JJ.'s caution about the difficulties of engaging in an extensive analysis of the constitutionality of legislation at an interlocutory stage (RJR-Macdonald at 337), I think he was correct to do so. However, the fact that the Crown is asking the Court to require the appellants' to take positive action will have to be considered in assessing the balance of convenience.

47 In this case, the Crown's argument that Bill C-31 is constitutional is neither frivolous nor vexatious. There is, therefore, a serious question to be tried.

Irreparable Harm

48 Ordinarily, the public interest is considered only in the third branch of the test. However, where, as here, the government is the applicant in a motion for interlocutory relief, the public interest must also be considered in the second stage (RJR-Macdonald at 349).

49 Validly enacted legislation is assumed to be in the public interest. Courts are not to investigate whether the legislation actually has such an effect (RJR-Macdonald at 348-49).

50 Allowing the appellants to ignore the requirements of the Act would irreparably harm the public interest in seeing that the law is obeyed. Until a law is struck down as unconstitutional or an interim constitutional exemption is granted by a court of competent jurisdiction, citizens and organizations must obey it (Metropolitan Stores at 143, quoting Morgentaler v. Ackroyd (1983), 42 O.R. (2d) 659 at 666-68 (H.C.)).

51 Further, the individuals who have been denied membership in the appellant band are aging and, at the present rate of progress, some are unlikely ever to benefit from amendments that were adopted to redress their discriminatory exclusion from band membership. The public interest in

preventing discrimination by public bodies will be irreparably harmed if the requested injunction is denied and the appellants are able to continue to ignore their obligations under Bill C-31, pending a determination of its constitutionality.

52 The appellants argue that there cannot be irreparable harm because, if there was, the Crown would not have waited sixteen years after the commencement of the action to seek an injunction. The Crown submits that it explained to Hugessen J. the reasons for the delay and stated that the very length of the proceedings had in fact contributed to the irreparable harm as the individuals in question were growing older and, in some cases, falling ill.

53 The question of whether delay in bringing an injunction application is fatal is a matter of discretion for the motions judge. There is no indication that Hugessen J. did not act judicially in exercising his discretion to grant the injunction despite the timing of the motion.

Balance of Convenience

54 In Metropolitan Stores at 149, Beetz J. held that interlocutory injunctions should not be granted in public law cases, "unless, in the balance of convenience, the public interest is taken into consideration and given the weight it should carry." In this case, the public interest in seeing that laws are obeyed and that prior discrimination is remedied weighs in favour of granting the injunction requested by the Crown.

55 As discussed above and as Hugessen J. found, there is a clear public interest in seeing that legislation is obeyed until its application is stayed by court order or the legislation is set aside on final judgment. As well, Bill C-31 was designed to remedy the historic discrimination against Indian women and other Indians previously excluded from status under the Indian Act and band membership. There is therefore a public interest in seeing that the individuals in this case are able to reap the benefits of those amendments.

56 On the other hand, the Sawridge Band will suffer little or no damage by admitting nine elderly ladies and one gentleman to membership (the Court was advised that one of the eleven individuals had recently died). It is true that the Band is being asked to take the positive step of adding these individuals to its Band List but it is difficult to find hardship in requiring a public body to follow a law that, pending an ultimate determination of its constitutionality, is currently in force. Even if the Band provides the individuals with financial assistance on the basis of their membership, that harm can be remedied by damages against the Crown if the appellants subsequently succeed at trial. Therefore, as Hugessen J. found, the balance of convenience favours granting the injunction.

CONCLUSION

57 The appeal should be dismissed.

COSTS

58 The Crown has sought costs in this Court and in the Court below. The interveners have sought costs in this Court only.

59 In his Reasons for Order, Hugessen J. reserved the question of costs in favour of the Crown, indicating that the Crown should proceed by way of a motion for costs under rule 369. He awarded no costs to the interveners. It is not apparent from the record that the Crown made a costs motion under rule 369 and in the absence of an order for costs and an appeal of that order, I would not make any award of costs in the Court below.

60 As to costs in this Court, the Crown and interveners are to make submissions in writing, each not exceeding 3 pages, double-spaced, on or before 7 days from the date of these reasons. The appellants shall make submissions in writing, not exceeding 10 pages, double-spaced, on or before 14 days from the date of these reasons. The Court will, if requested, consider the award of a lump sum of costs inclusive of fees, disbursements, and in the case of the interveners, GST (See Consorzio del Prosciutto di Parma v. Maple Leaf Meats Inc., [2003] 2 F.C. 451 (C.A.)).

61 The Judgment of the Court will be issued as soon as the matter of costs is determined.

ROTHSTEIN J.A.
NOËL J.A.:-- I agree.
MALONE J.A.:-- I agree.

cp/e/qw/qlklc/qlhcs

TAB 24

Case Name:

Sawridge Band v. Canada

Between
Bertha L'Hirondelle suing on her own behalf and on behalf of all other members of the Sawridge Band, plaintiffs, and
Her Majesty the Queen, defendant, and
Native Council of Canada, Native Council of Canada (Alberta), Non-Status Indian Association of Alberta and Native Women's Association of Canada, interveners

[2003] F.C.J. No. 723

[2003] A.C.F. no 723

2003 FCT 347

2003 CFPI 347

[2003] 4 F.C. 748

[2003] 4 C.F. 748

232 F.T.R. 54

[2003] 3 C.N.L.R. 344

123 A.C.W.S. (3d) 2

Docket T-66-86A

Federal Court of Canada - Trial Division
Toronto, Ontario

Hugessen J.

Heard: March 19 and 20, 2003.
Judgment: March 27, 2003.

(40 paras.)

Injunctions -- Interlocutory or interim injunctions -- Arguable issues of law involved or serious question to be tried -- Balance of convenience -- Requirement of irreparable injury -- Indians, Inuit and Metis -- Nations, tribes and bands -- Bands -- Membership.

Motion by the defendant Crown for an interlocutory declaration, or in the alternative for an interlocutory mandatory injunction. The plaintiff Sawridge Band sued the Crown for a declaration that certain amendments to the Indian Act were unconstitutional. The amendments conferred on Indian bands the right to control their own band lists, but obliged bands to include in their membership certain persons who became entitled to Indian status by virtue of the amendments. The Crown alleged that the Sawridge Band refused to comply with the remedial provisions of the amending legislation, resulting in 11 former members of the Band being denied the benefits of the amendments. The 11 former members were women who lost both their Indian status and their Band membership for having married non-Indian men. The Crown sought an interlocutory declaration that, pending a final determination of the action, the individuals who acquired the right to be members of the Sawridge Band before it took control of its own band list be deemed to be registered on the band list with full rights and privileges. In the alternative, the Crown sought an interlocutory injunction requiring the Band to register the names of those individuals on the band list, with full rights and privileges.

HELD: Motion for an injunction allowed. An interim declaration of right was a contradiction in terms, since a right either existed or did not exist. Therefore, the motion was treated as seeking only an interlocutory injunction. The Band had created pre-conditions to membership, but the statutory amendments provided for an automatic entitlement to Band membership for women who had lost it by marriage to non-Indians. Therefore, the Band's membership rules contravened the legislation, such that the Band had effectively given itself an injunction to act as though the law did not exist. The Band was not entitled to such an injunction. Even though it had raised a serious issue, enforcement of a duly adopted law did not result in irreparable harm. The inconvenience to the Band in admitting the 11 individuals was outweighed by the damage to the public interest in having federal law flouted.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 15.
Federal Court Rules, Rule 369.
Indian Act, R.S.C. 1985, c. I-5, ss. 2(1), 5(1), 5(3), 5(5), 6(1)(c), 8, 9(1), 9(2), 9(3), 9(5), 10(1), 10(2), 10(4), 10(5), 10(6), 10(7), 10(8), 10(9), 10(10), 11(1)(c), 11(2), 12(1)(b).

Counsel:

Martin J. Henderson, Lori A. Mattis, Catherine Twinn and Kristina Midbo, for the plaintiffs.
E. James Kindrake and Kathleen Kohlman, for the defendant.
Kenneth S. Purchase, for the intervener, Native Council of Canada.
P. Jon Faulds, for the intervener, Native Council of Canada (Alberta).
Michael J. Donaldson, for the intervener, Non-Status Indian Association of Alberta.
Mary Eberts, for the intervener, Native Women's Association of Canada.

REASONS FOR ORDER AND ORDER

1 **HUGESSEN J.**:-- In this action, started some 17 years ago, the plaintiff has sued the Crown seeking a declaration that the 1985 amendments to the Indian Act, R.S.C. 1985, c. I-5, commonly known as Bill C-31, are unconstitutional. While I shall later deal in detail with the precise text of the relevant amendments, I cannot do better here than reproduce the Court of Appeal's brief description of the thrust of the legislation when it set aside the first judgment herein and ordered a new trial:

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

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

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

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

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

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

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

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

7 Second, in the unusual and perhaps unique circumstances of this case, I accept the submission that since I am dealing with a motion seeking an interlocutory injunction, the well-known three part test established in such cases as Manitoba (Attorney General) v. Metropolitain Stores (MTS) Ltd, [1987] 1 S.C.R. 110 and R J R Macdonald v. Canada (Attorney General), [1994] 1 S.C.R. 311 should in effect be reversed. The universally applicable general rule for anyone who contests the constitutionality of legislation is that such legislation must be obeyed unless and until it is either stayed by court order or is set aside on final judgment. Here, assuming the Crown's allegations of non-compliance are correct, the plaintiff Band has effectively given itself an injunction and has chosen to act as though the law which it contests did not exist. I can only permit this situation to continue if I am satisfied that the plaintiff could and should have been given an interlocutory injunction to suspend the effects of C-31 pending trial. Applying the classic test, therefore, requires that I ask myself if the plaintiff has raised a serious issue in its attack on the law, whether the enforcement of the law will result in irreparable harm to the plaintiff, and finally, determine where the balance of convenience lies. I do not accept the proposition that because the injunction sought is of a mandatory nature, the test should in any way be different from that set down in the cited cases. (See Ansa International Rent-A-Car (Canada) Ltd. v. American International Rent-A-Car Corp., [1990] F.C.J. No. 514; 32 C.P.R. (3d) 340.)

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

9 Thirdly, I reject the proposition put forward by the plaintiff that would deny the Court the power to issue the injunction requested because the Crown has not alleged a cause of action in sup-

port thereof in its statement of defence. The Court's power to issue injunctions is granted by section 44 of the Federal Court Act and is very broad. Interpreting a similar provision in a provincial statute in the case of Canadian Pacific Ltd. v. Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation, [1996] 2 S.C.R. 495, the Supreme Court said at page 505:

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

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

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

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

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

14 I start by setting out the principal relevant provisions.

> 2.(1) "member of a band" means a person whose name appears on a Band List or who is entitled to have his name appear on a Band List.
>
> 5. (1) There shall be maintained in the Department an Indian Register in which shall be recorded the name of every person who is entitled to be registered as an Indian under this Act.
>
> ...
>
> (3) The Registrar may at any time add to or delete from the Indian Register the name of any person who, in accordance with this Act, is entitled or not entitled, as the case may be, to have his name included in the Indian Register.
>
> ...

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

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

...

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

...

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

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

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

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

...

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

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

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

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

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

...

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

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

(6) Where the conditions set out in subsection (1) have been met with respect to a band, the council of the band shall forthwith give notice to the Minister in writing that the band is assuming control of its own membership and shall provide the Minister with a copy of the membership rules for the band.

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

(a) give notice to the band that it has control of its own membership; and
(b) direct the Registrar to provide the band with a copy of the Band List maintained in the Department.

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

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

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

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

...

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

(2) Commencing on the day that is two years after the day that an Act entitled An Act to amend the Indian Act, introduced in the House of Commons on February 28, 1985, is assented to, or on such earlier day as may be agreed to under section

13.1, where a band does not have control of its Band List under this Act, a person is entitled to have his name entered in a Band List maintained in the Department for the band

(a) if that person is entitled to be registered under paragraph 6(1)(d) or (e) and ceased to be a member of that band by reason of the circumstances set out in that paragraph; or
(b) if that person is entitled to be registered under paragraph 6(1)(f) or subsection 6(2) and a parent referred to in that provision is entitled to have his name entered in the Band List or, if no longer living, was at the time of death entitled to have his name entered in the Band List.

15 The amending statute was adopted on June 27, 1985 but was made to take effect retroactively to April 17, 1985, the date on which section 15 of the Charter took effect. This fact in itself, without more, is a strong indication that one of the prime objectives of the legislation was to bring the provisions of the Indian Act into line with the new requirements of that section, particularly as they relate to gender equality.

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

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

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

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

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

...

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

...

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

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

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

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

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

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

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

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

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

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

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

28 The debate in the House of Commons, prior to the enactment of the amendments, reveals Parliament's intention to create an automatic entitlement to women who had lost their status because they married non-Indian men. Minister Crombie stated as follows :

> ... today, I am asking Hon. Members to consider legislation which will eliminate two historic wrongs in Canada's legislation regarding Indian people. These wrongs are discriminatory treatment based on sex and the control by Government of membership in Indian communities.
>
> [Canada, House of Commons Debates, March 1, 1985, p. 2644]

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

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

> residency should be determined by the relationship with the Indian communities to which they belong.
>
> [Debates, supra at 2645]

30 Still further on, the Minister stated the fundamental purposes of amendments, and explained that, while those purposes may conflict, the fairest balance had been achieved :

> ... I have to reassert what is unshakeable for this Government with respect to the Bill. First, it must include removal of discriminatory provisions in the Indian Act; second, it must include the restoration of status and membership to those who lost status and membership as a result of those discriminatory provisions; and third, it must ensure that the Indian First Nations who wish to do so can control their own membership. Those are the three principles which allow us to find balance and fairness and to proceed confidently in the face of any disappointment which may be expressed by persons or groups who were not able to accomplish 100 per cent of their own particular goals.
>
> This is a difficult issue. It has been for many years. The challenge is striking. The fairest possible balance must be struck and I believe it has been struck in this Bill. I believe we have fulfilled the promise made by the Prime Minister in the Throne Speech that discrimination in the Indian Act would be ended.
>
> [Debates, supra at 2646]

31 At a meeting of the Standing Committee on Indian Affairs and Northern Development, Minister Crombie again made it clear that, while the Bill works towards full Indian self-government, the Bill also has as a goal remedying past wrongs :

> Several members of this committee said during the debate on Friday that this bill is just a beginning and not an end in itself, but rather the beginning of a process aimed at full Indian self-government. I completely agree with that view. But before we can create the future, some of the wrongs of the past have to be corrected. That is, in part, the purpose of Bill C-31...
>
> [Canada, House of Commons, Minutes of the Proceedings of the Special Committee on Indian Affairs and Northern Development, Issue no. 12, March 7, 1985 at 12:7]

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

> We are both aware that Parliament intended that those persons listed in paragraph 6(1)(c) would at least initially be part of the membership of a Band which maintains its own list. Read in isolation your membership rules would appear to create a prerequisite to membership of lawful residency or significant commitment to the Band. However, I trust that your membership rules will be read in conjunc-

> tion with the Act so that the persons who are entitled to reinstatement to Band membership, as a result of the Act, will be placed on your Band List. The amendments were designed to strike a delicate balance between the right of individuals to Band membership and the right of Bands to control their membership. I sponsored the Band control of membership amendments with a strongly held trust that Bands would fulfill their obligations and act fairly and reasonably. I believe you too feel this way, based on our past discussions.

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

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

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

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

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

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

22. The plaintiffs state that with the enactment of the Amendments, Parliament attempted unilaterally to require the First Nations to admit certain persons to membership. The Amendments granted individual membership rights in each of the First Nations without their consent, and indeed over their objection. Furthermore, such membership rights were granted to individuals without regard for their actual connection to or interest in the First Nation, and regardless of their individual desires or that of the First Nation, or the circumstances pertaining the First Nation. This exercise of power by Parliament was unprecedented in the predecessor legislation.

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

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

ORDER

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

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

HUGESSEN J.

cp/e/qlaimdrs/d/qw/qlbdp/qlsdd/qljal

TAB 25

Case Name:

Sloan v. Fox Estate

IN THE ESTATE OF Eve Fox (also known as Eve Moldaver Richler, also known as Eve Richler), deceased
RE: Arna Sloan, Applicant, and
Rosalind Moldaver Witkin and Lester Fox, in their capacities as Estate Trustees of the Estate of Eve Fox (also known as Eve Moldaver Richler, also known as Eve Richler) and Rosalind Moldaver Witkin and Gary Bomza, in their capacities as Trustees of a fund set aside for payment to Elliott David Moldaver, Respondents

[2011] O.J. No. 3624

2011 ONSC 4434

Court File No. 01-2178/07

Ontario Superior Court of Justice

A. Hoy J.

Heard: June 10, 2011.
Judgment: July 19, 2011.

(13 paras.)

[Editor's note: Supplementary reasons for judgment were released August 4, 2011. See [2011] O.J. No. 3625.]

Counsel:

J. David Sloan, for the Applicant.

David C. Rosenbaum, for the Respondents Rosalind Moldaver Witkin, in her capacity as Estate Trustee of the Estate of Eve Fox (also known as Eve Moldaver Richler, also known as Eve Richler) and Rosalind Moldaver Witkin and Gary Bomza, in their capacities as Trustees of a fund set aside for payment to Elliott David Moldaver.

ENDORSEMENT AS TO COSTS

1 **A. HOY J.**:-- For reasons released June 15, 2011, I dismissed the motion of the estate of the late Eve Fox (the "Fox Estate") for an order that Arna Sloan did not have standing to bring an application for a determination of the rights of the estate of the late Elliot David Moldaver, Eve Fox's son, under Eve Fox's will, and granted the motion of Arna Sloan for an order pursuant to Rule 10.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 permitting Ms. Sloan to bring her application in the absence of a person representing the estate of Elliot Moldaver.

2 This is the costs disposition arising out of those motions.

3 Ms. Sloan seeks costs on a substantial indemnity basis, in the amount of $19,070.27, payable by the respondents - Rosalind Witkin and Lester Fox, Estate Trustees of the Fox Estate, and Rosalind Witkin and Gary Bomza, as Trustees of a fund set aside for payment to Elliot David Moldaver - personally, or, in the alternative, payable by the Fox Estate. Counsel for Ms. Sloan submits that while normally the Estate itself would pay costs arising out of an application for interpretation of a will which on its face has an obvious gap, the respondents should be personally responsible in this case because they did not take steps to have the will interpreted and threw up a procedural roadblock, bringing its motion and necessitating Ms. Sloan's cross-motion, when Ms. Sloan attempted to do so.

4 The Fox Estate submits that: (1) the costs should be payable out of the Trust Fund set up for the late Elliot David Moldaver under Ms. Fox's will; (2) there is no basis for awarding substantial (as opposed to partial) indemnity costs; and (3) while it takes no issue with the time spent or the rates charged by counsel for Ms. Sloan, it could not reasonably have expected to pay costs in the amount claimed. The Fox Estate submits that partial indemnity costs in the amount of $6,000, plus HST and the disbursements claimed by Ms. Sloan would be reasonable and fair.

Who should pay?

5 The procedural motions before me arose out of a dispute about the interpretation of Ms. Fox's will. The ambiguities which gave rise to Ms. Sloan's application were caused by Ms. Fox. The gap in the will is clear. The Fox Estate did not argue in its costs submissions that the dispute was unreasonable. There is, in my view, no basis for ordering the costs payable out of the Trust Fund set up for Elliot Moldaver. It is in my view appropriate for Ms. Sloan's costs to be paid out of the Fox Estate. See *McDougald Estate v. Gooderham*, [2005] O.J. No. 2432 (C.A.) and *Smith Estate v. Rotstein*, [2010] O.J. No. 3266 (S.C.J.).While, as discussed below, I was troubled that the executors of the Fox Estate did not simply bring the application themselves, I have concluded that costs against the respondents personally are not warranted.

Scale

6 The Fox Estate argues there must be clear evidence of reprehensible conduct before substantial indemnity costs will be awarded, and there is no such conduct here. See *Smith Estate v. Rotstein* at para. 18; and *Clarington (Municipality) v. Blue Circle Canada Inc.*, 2009 ONCA 722. They correctly note that I accepted the principle in *Raiz v. Vaserbakh* (1986), 9 C.P.C. (2d) 141 (Ont. Dist. Ct.) that the court should be cautious in granting authority to carry out litigation without the burden of administering the entire estate. Their motion, they argue, was properly based on this principle.

7 As noted in my reasons, about $350,000 is at issue. If Ms. Sloan's interpretation prevails, Ms. Witkin - Ms. Fox's daughter and one of the two executors of the Fox Estate - will receive less under

Ms. Fox's will. Surprisingly, in face of the dispute, the executors of the Fox Estate did not themselves seek an interpretation of the will. Whether or not their failure to do so, and the consequent bringing of their motion, was "reprehensible", in light of Ms. Witkin's self-interest, it is troubling. Had the Fox Estate brought the application, Ms. Sloan would not have had to incur any costs in relation to these motions. Moreover, the Estate's costs in doing so would not likely have been appreciably greater than the costs it itself incurred on these procedural motions.

8 *Smith Estate* involved an award of costs against an unsuccessful objector, not a situation where costs were payable out of the estate. In my view, where, consistent with *McDougald Estate*, costs are properly payable out of the estate, it is not necessary to find reprehensible conduct before awarding costs on a substantial indemnity scale.

9 In the result, costs are fixed on a substantial indemnity scale.

Quantum

10 Counsel for the Fox Estate says that no costs should be awarded for the parties' first attendance on this matter, on March 8, 2011. Counsel for Ms. Sloan claims 3.1 hours for preparation and attendance at court on that date. The hearing was adjourned because the court file had been misplaced. Essentially, the Fox Estate submits that it could not reasonably have expected to have to pay for a court attendance adjourned other than as a result of something done, or not done, by it. Without establishing a general principle that a "losing party" cannot reasonably be expected to pay costs associated with inefficiencies in the court system - which regrettably exist - in this case I would disallow one-half of the 3.1 hours at issue. In this manner, the parties share the burden of the inefficiencies.

11 The procedural motions were very important to Ms. Sloan.

12 The Fox Estate itself incurred significant, although as at March 8, 2011, lower, costs with respect to these two motions. In the Bill of Costs it prepared in advance of the March 8, 2011 attendance, it calculated its partial indemnity fees at approximately $9,000 and claimed fees of $6,000, and $7,852.50, inclusive of taxes and disbursements. Counsel for the Fox Estate advises that these amounts include some legal fees in relation to a motion with respect to the Moldaver estate which was ultimately put on hold and not argued, so that its actual partial indemnity costs would have been somewhat less. An allocation was not provided. The Fox Estate did not indicate what its costs were between March 8 and June 10, 2011.

13 In my view, in light of the specific facts and circumstances in this case, and having regard to the quantum of fees incurred by the Fox Estate[1] and the costs it was planning to seek on March 8, 2011 if successful, in the amount of $15,000 on a substantial indemnity scale, inclusive of taxes and disbursements, is a fair and reasonable amount for the Fox Estate to pay to Ms. Sloan.

A. HOY J.

cp/e/qllxr/qlvxw

1 Counsel for Ms. Sloan spent a further 11 hours after March 8, 2011. That additional time spent seemed reasonable. Therefore, I have assumed that counsel for the Fox Estate spent a similar amount of time, and would have incurred similar fees during that period.

TAB 26

Case Name:

Tataryn v. Tataryn Estate

Mary Tataryn, appellant;
v.
Edward James Tataryn, Executor named in the Will of Alec Tataryn, a.k.a. Alex Tataryn and Alexander Tataryn, deceased, respondent.

[1994] S.C.J. No. 65

[1994] A.C.S. no 65

[1994] 2 S.C.R. 807

[1994] 2 R.C.S. 807

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

169 N.R. 60

[1994] 7 W.W.R. 609

J.E. 94-1135

46 B.C.A.C. 255

93 B.C.L.R. (2d) 145

3 E.T.R. (2d) 229

49 A.C.W.S. (3d) 208

1987 CanLII 51

File No.: 23398.

Supreme Court of Canada

1994: May 3; 1994: July 14.

Present: La Forest, L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Wills -- Variation -- Testator having statutory duty to make adequate provision for proper maintenance and support of surviving spouse and children -- Testator leaving wife only life estate in matrimonial home and benefit of discretionary trust -- Whether courts below failed to provide for wife appropriately in varying will -- Meaning of "adequate, just and equitable in the circumstances" -- Wills Variation Act, R.S.B.C. 1979, c. 435, s. 2(1).

The appellant and the testator were married for 43 years. Through their joint efforts they amassed an estate held in the testator's name at the time of his death consisting of the house in which they lived, a rental property next door inherited from the testator's father and money in the bank. They had two sons, J and E. The testator did not wish to leave anything to J, whom he disliked, and feared that if he left any of his estate to his wife in her own right, she would pass it on to him. He made a will leaving his wife a life estate in the matrimonial house and making her the beneficiary of a discretionary trust of the income from the residue of the estate, with E as trustee. After her death, everything was to go to E. The appellant and J claimed against the estate under the Wills Variation Act, s. 2(1) of which provides that if the testator fails to make adequate provision for the proper maintenance and support of a surviving spouse and children, the court may order the provision from the estate that it considers "adequate, just and equitable in the circumstances". The trial judge revoked the gift to E of the house next door and granted the appellant a life estate in it; directed that J and E each receive an immediate gift of $10,000 out of the residue of the estate; and directed that when the appellant died, the residue of the estate be divided one-third to J and two-thirds to E. The Court of Appeal dismissed the appeal, but clarified that certain expenditures should be made from the residue and that the trustee's discretion to encroach upon the residue to make payments to the appellant should be "exercised in a manner that will ensure that she shall have a reasonable standard of living commensurate with the standard of living she had prior to the death of her husband."

Held: The appeal should be allowed and the following order substituted for that of the trial judge: (1) to the appellant: (a) title to the matrimonial home; (b) a life interest in the rental property; and (c) the entire residue of the estate after payment of the immediate gifts to the sons; (2) to each son: an immediate gift of $10,000; (3) upon the appellant's death, the rental property to be divided one-third to J and two-thirds to E.

The generous language of the Act confers a broad discretion on the court and, combined with the rule in the Interpretation Act that a statute is always speaking, means that the Act must be read in light of modern values and expectations. The first consideration in determining what is "adequate, just and equitable" in the circumstances of the case must be the testator's legal responsibilities during his or her lifetime. Maintenance and provision for basic needs may or may not be sufficient to meet this legal obligation. Depending on the length of the relationship, the contribution of the claimant spouse and the desirability of independence, each spouse is entitled to a share of the estate. For further guidance in determining what is "adequate, just and equitable", the court should next turn to the testator's moral duties toward spouse and children. Where priorities among conflicting

claims must be established, claims which would have been recognized during the testator's life should generally take precedence over moral claims. As between moral claims, some may be stronger than others. Any moral duty should be assessed in the light of the deceased's legitimate concerns which, where the assets of the estate permit, may go beyond providing for the surviving spouse and children. A will is the exercise by the testator of his freedom to dispose of his property and is to be interfered with not lightly but only in so far as the statute requires.

In the present case the testator's only legal obligations during his life were toward his wife. Since the marriage was a long one and the appellant worked hard and contributed much to the assets she and her husband acquired, she would have been entitled to maintenance and a share in the family assets had the parties separated. The appellant's legal claims entitle her to at least half the estate and arguably to additional maintenance. Her moral claim to the funds set aside for old age is strong and indicates that an "adequate, just and equitable" provision for her requires giving her the bulk of the estate. The remaining moral claims are those of the two grown and independent sons, which cannot be put very high and are adequately met by the immediate gift awarded by the trial judge to each of them and a residuary interest in a portion of the property upon the appellant's death.

Cases Cited

Considered: Walker v. McDermott, [1931] S.C.R. 94; approved: Barker v. Westminster Trust Co. (1941), 57 B.C.R. 21; Re Michalson Estate, [1973] 1 W.W.R. 560; Granfield v. Williams (1981), 29 B.C.L.R. 150; Price v. Lypchuk Estate (1987), 11 B.C.L.R. (2d) 371; disapproved: Re Dawson Estate (1945), 61 B.C.R. 481; Re Hornett Estate (1962), 38 W.W.R. 385; Re Harding, [1973] 6 W.W.R. 229; referred to: Swain v. Dennison, [1967] S.C.R. 7; Re Livingston (1922), 31 B.C.R. 468; Re Hall (1923), 33 B.C.R. 241; Re Stigings (1924), 34 B.C.R. 347; Brighten v. Smith (1926), 37 B.C.R. 518; Bates v. Bates (1981), 9 E.T.R. 235 (B.C.S.C.), aff'd (1982), 11 E.T.R. 310 (B.C.C.A.); Barker v. Westminster Trust Co. (1941), 57 B.C.R. 21; Richards v. Person (1982), 34 B.C.L.R. 350 (S.C.), aff'd (1983), 49 B.C.L.R. 43 (C.A.); Pettkus v. Becker, [1980] 2 S.C.R. 834; Sorochan v. Sorochan, [1986] 2 S.C.R. 38; Peter v. Beblow, [1993] 1 S.C.R. 980; Moge v. Moge, [1992] 3 S.C.R. 813; Brauer v. Hilton (1979), 15 B.C.L.R. 116; Cowan v. Cowan Estate (1988), 30 E.T.R. 216 (B.C.S.C.), aff'd (1990), 37 E.T.R. 308 (B.C.C.A.); Nulty v. Nulty Estate (1989), 41 B.C.L.R. (2d) 343; Bell v. Roy Estate (1993), 75 B.C.L.R. (2d) 213.

Statutes and Regulations Cited

Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.).
Family Relations Act, R.S.B.C. 1979, c. 121.
Interpretation Act, R.S.B.C. 1979, c. 206, s. 7.
Wills Variation Act, R.S.B.C. 1979, c. 435, s. 2(1).

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Amighetti, Leopold. The Law of Dependants' Relief in British Columbia. Toronto: Thomson Professional Pub. Canada, 1991.
British Columbia. Law Reform Commission. Report on Statutory Succession Rights. Vancouver: Law Reform Commission of British Columbia, 1983.

APPEAL from a judgment of the British Columbia Court of Appeal (1992), 74 B.C.L.R. (2d) 211, 20 B.C.A.C. 218, 35 W.A.C. 218, 98 D.L.R. (4th) 717, 47 E.T.R. 221, affirming a decision of Paris J. granting the appellant's claim for relief under the Wills Variation Act. Appeal allowed.

Rhys Davies and Kerry D. Sheppard, for the appellant. Robin J. Stewart, for the respondent.

Solicitors for the appellant: Davis & Company, Vancouver.
Solicitors for the respondent: McLachlan Brown Anderson, Vancouver.

The judgment of the Court was delivered by

1 **McLACHLIN J.**:-- This case requires us to consider the principles to be applied to the British Columbia Wills Variation Act, R.S.B.C. 1979, c. 435.

2 Alex and Mary Tataryn were married for 43 years. He was a shoemaker; she worked as a waitress until 1975 and mainly in the home thereafter. Mr. and Mrs. Tataryn were industrious and frugal. Through their joint efforts, they amassed an estate valued at $315,264.69 which was held in Mr. Tataryn's name at the time of his death. This consisted of the house in which they lived, a rental property next door inherited from Mr. Tataryn's father, and $122,629.69 in the bank. Mrs. Tataryn also held $25,000 in her own name.

3 The Tataryns had two sons, John and Edward. From the time John was six years of age, his father disliked him. Over the years, Mr. Tataryn's dislike of his eldest son, which seems to have been partially related to certain religious convictions, grew in intensity and, ultimately, became obsessional. Nevertheless, Mrs. Tataryn "stuck up" for John and he continued to live in the home. Edward, on the other hand, lived across the continent in New Brunswick.

4 Mr. Tataryn did not wish to leave anything to John. He feared that if he left any of his estate to his wife in her own right, she would pass it on to John. He made a will leaving his wife a life estate in the matrimonial house. In addition, Mrs. Tataryn was made the beneficiary of a discretionary trust of the income from the residue of the estate, with the second son Edward as trustee. He was to apply the income in his discretion for her benefit, and was also given the power to encroach upon the capital of the estate. After her death, everything was to go to Edward. He left nothing to John. Alex Tataryn explained in Clause 4 of his will why he did this:

> I HAVE PURPOSELY excluded my son, JOHN ALEXANDER TATARYN, from any share of my Estate and purposely provided for my wife by the trust as set out above for the following reason: My wife MARY and my older son JOHN have acted in various ways to disrupt my attempts to establish harmony in the family. Since JOHN was 12 years old he has been a difficult child for me to raise. He has turned against me and totally ignored me for the last 15 years of his life. He has been abusive to the point of profanity; he has been extremely inconsiderate and has made no effort to reconcile his differences with me. He has never been open to discussion with a view to establishing ourselves in unity. My son

> EDWARD is respectable and I commend him for his warm attitude towards me, his honesty, and his co-operation with me.

5 Mr. and Mrs. Tataryn had not discussed the possibility of death. They thought they were both in good health and there was no need to talk about such things. Mrs. Tataryn knew that there was money in the bank for their old age:

> I knew he had money, but I never questioned him about it, and I thought, well, it is for our old age. I didn't care. I trusted my husband.

She stated:

> . . . we had an agreement that we were going to keep the house going and he was going to save for our old age, so we always used to put his money in the bank.

It therefore came as a shock to Mrs. Tataryn to learn that her husband had left everything to Edward, subject to her right to live in the house and Edward's right to provide money for her use from time to time. She testified:

> ... I always loved my husband and respected him, and I would never do anything wrong to him, and I did exactly what he wanted me to do, and I just can't understand this.

6 Mrs. Tataryn and John claimed against the estate under the Wills Variation Act. The trial judge, after a four-day trial, gave oral reasons for judgment in which he revoked the gift to Edward of the house next door and granted Mary Tataryn a life estate in it; directed that John and Edward each receive an immediate gift of $10,000 out of the residue of the estate; and directed that when Mary Tataryn died, the residue of the estate be divided one-third to John and two-thirds to Edward.

7 The Court of Appeal dismissed the appeal, but clarified that certain expenditures should be made from the residue and that the trustee's discretion to encroach upon the residue to make payments to Mary Tataryn should be "exercised in a manner that will ensure that she shall have a reasonable standard of living commensurate with the standard of living she had prior to the death of her husband" ((1992), 74 B.C.L.R. (2d) 211, at p. 221).

8 Mary Tataryn now appeals to this Court.

The Statute

9 By s. 2(1) of the Wills Variation Act, a testator has a duty to make adequate provision for the proper maintenance and support of a surviving spouse and children. If the testator fails to discharge this duty, the court may order for the claimant the provision from the estate that it considers "adequate, just and equitable in the circumstances". The full language of the subsection is:

> 2. (1) Notwithstanding any law or statute to the contrary, if a testator dies leaving a will which does not, in the court's opinion, make adequate provision for the proper maintenance and support of the testator's wife, husband or children, the court may, in its discretion, in an action by or on behalf of the wife, husband or children, order that the provision that it thinks adequate, just and equitable in

> the circumstances be made out of the estate of the testator for the wife, husband or children.

10 The statute, adopted in 1920, was modeled on New Zealand legislation. When the bill was introduced, the Attorney General, J. W. de B. Farris, described it as "one of the links in the Government's chain of social welfare legislation". The bill "was the direct result of lobbying by women's organizations with the final power given to them through women's enfranchisement in 1916" (Leopold Amighetti, The Law of Dependants' Relief in British Columbia (1991), at p. 12). It is recorded in the Journals of the Legislative Assembly of British Columbia that on proclamation of the Act, the Lieutenant-Governor said that it "will tend towards the amelioration of social conditions within the Province".

The Issue

11 The issue is whether the courts below erred in their interpretation of s. 2(1) of the Wills Variation Act. The law is unsettled as to precisely what considerations should govern a court faced with an application under this section. We are asked to clarify the principles applicable to the Act and determine whether, applying these principles to the facts in this case, the conclusion of the courts below can be sustained. For the purposes of this statute, an appellate tribunal is in the same position as the trial judge; deference to the findings of the trial judge is not required except on matters based on oral testimony: Swain v. Dennison, [1967] S.C.R. 7, at p. 12.

Discussion

The Language of the Act

12 The language of the Wills Variation Act is very broad. The court must determine whether the testator has made "adequate provision" for his spouse and children. If it concludes he or she has not, the court "may, in its discretion, ... order ... the provision that it thinks adequate, just and equitable in the circumstances".

13 I do not interpret the section as imposing two different tests. The court must ask itself whether the will makes adequate provision and if not, order what is adequate, just and equitable. These are two sides of the same coin.

14 The words "adequate, just and equitable" may be interpreted in different ways. At one end of the spectrum, they may be confined to what is "necessary" to keep the dependants off the welfare rolls. At the other extreme, they may be interpreted as requiring the court to make an award consistent with the lifestyle and aspirations of the dependants. Again, they may be interpreted as confined to maintenance or they may be interpreted as capable of extending to fair property division. Complicating these questions are the issues of the weight to be placed on the "right" of the testator to dispose of his estate as he chooses -- i.e., testamentary autonomy -- and the equities as between the beneficiaries: spouses and children. Different courts, applying a variety of approaches to these questions, have, over time, arrived at different interpretations of the meaning of "adequate, just and equitable".

15 Whatever the answers to the specific questions, this much seems clear. The language of the Act confers a broad discretion on the court. The generosity of the language suggests that the legislature was attempting to craft a formula which would permit the courts to make orders which are just in the specific circumstances and in light of contemporary standards. This, combined with the rule that a statute is always speaking (Interpretation Act, R.S.B.C. 1979, c. 206, s. 7), means that the

Act must be read in light of modern values and expectations. What was thought to be adequate, just and equitable in the 1920s may be quite different from what is considered adequate, just and equitable in the 1990s. This narrows the inquiry. Courts are not necessarily bound by the views and awards made in earlier times. The search is for contemporary justice.

The Interests Protected

16 The two interests protected by the Act are apparent. The main aim of the Act is adequate, just and equitable provision for the spouses and children of testators. The desire of the legislators who conceived and passed it was to "ameliorat[e] ... social conditions within the Province". At a minimum this meant preventing those left behind from becoming a charge on the state. But the debates may also be seen as foreshadowing more modern concepts of equality. The Act was passed at a time when men held most property. It was passed, we are told, as "the direct result of lobbying by women's organizations with the final power given to them through women's enfranchisement in 1916". There is no reason to suppose that the concerns of the women's groups who fought for this reform were confined to keeping people off the state dole. It is equally reasonable to suppose that they were concerned that women and children receive an "adequate, just and equitable" share of the family wealth on the death of the person who held it, even in the absence of demonstrated need.

17 The other interest protected by the Act is testamentary autonomy. The Act did not remove the right of the legal owner of property to dispose of it upon death. Rather, it limited that right. The absolute testamentary autonomy of the 19th century was required to yield to the interests of spouses and children to the extent, and only to the extent, that this was necessary to provide the latter with what was "adequate, just and equitable in the circumstances." And if that testamentary autonomy must yield to what is "adequate, just and equitable", then the ultimate question is, what is "adequate, just and equitable" in the circumstances judged by contemporary standards. Once that is established, it cannot be cut down on the ground that the testator did not want to provide what is "adequate, just and equitable".

The Jurisprudence -- Need or Something More?

18 The early cases equated what was "adequate, just and equitable in the circumstances" with what was required to support or "maintain" the spouse and children of the testator: Re Livingston (1922), 31 B.C.R. 468; Re Hall (1923), 33 B.C.R. 241; Re Stigings (1924), 34 B.C.R. 347; Brighten v. Smith (1926), 37 B.C.R. 518. As McPhillips J.A. put it in Brighten v. Smith (at p. 523):

> If ... the husband or the wife should be in need, ... the relationship that exists calls upon the husband or the wife to remember it and make provision, otherwise we should have the husband or the wife, ... becoming a public charge upon the country.

This approach is consistent with the view of duties between husband and wife prevailing in the 1920s. For example, on marriage breakup the husband was generally required to support or "maintain" the wife and no more. She had no claim on his property. It is hardly surprising that the judges of the time interpreted the Act in terms of need or what was required to maintain the spouse.

19 This Court rejected the need-maintenance approach to the Act in Walker v. McDermott, [1931] S.C.R. 94. At issue was the right of an independent child to share in an estate which the testator had left entirely to his wife. This Court upheld the trial judge's decision to award the child

$6,000 of the $25,000 estate, overruling the Court of Appeal's decision that all should go to the wife. Duff J. (as he then was), speaking for the majority, enunciated the following test (at p. 96):

> What constitutes "proper maintenance and support" is a question to be determined with reference to a variety of circumstances. It cannot be limited to the bare necessities of existence. For the purpose of arriving at a conclusion, the court on whom devolves the responsibility of giving effect to the statute, would naturally proceed from the point of view of the judicious father of a family seeking to discharge both his marital and his parental duty; and would of course (looking at the matter from that point of view), consider the situation of the child, wife or husband, and the standard of living to which, having regard to this and the other circumstances, reference ought to be had.

Walker v. McDermott may be seen as recognizing that the Act's ambit extended beyond need and maintenance. As Amighetti, supra, puts it (at p. 36), "the award in Walker v. McDermott can be supported only on the basis that the court interpreted the Act as a vehicle for redistribution of the capital of the estate".

20 It may be noted that the need-maintenance rationale would not have permitted the court to recognize the claim of an independent adult child, as was done in Walker v. McDermott. The obvious question arose; if the British Columbia legislature had wished to confine the power of the court to order testamentary changes to need and maintenance, why had it not excluded adult independent children as was done, for example, in Alberta? This would have left the courts with three choices: (1) replace the need-maintenance test with a more generous test; (2) create two tests -- need-maintenance for spouses and dependent children and something more generous for adult independent children; or (3) read the British Columbia Act as confined to spouses and dependent children. The fact that the Act lumped spouses and children together militated against the two-test approach, and the absence of words limiting claims to dependent children undercut the alternative of confining the Act to spouses and dependent children. Thus it is not surprising that the Court in Walker v. McDermott adopted a broader test, sometimes called the "moral duty" approach.

21 The decisions of lower courts after Walker v. McDermott follow two lines. The majority, in keeping with the philosophy of Walker, affirmed the principle that spouses and children were entitled to an equitable share of the estate even in the absence of need. "Moral duty" became the watchword: Barker v. Westminster Trust Co. (1941), 57 B.C.R. 21 (C.A.); Re Michalson Estate, [1973] 1 W.W.R. 560 (B.C.S.C.); Granfield v. Williams (1981), 29 B.C.L.R. 150 (C.A.). This line of authority culminated in Price v. Lypchuk Estate (1987), 11 B.C.L.R. (2d) 371. Lambert J.A., speaking for the majority, stated (at p. 380):

> There is a further question about whether all the issues raised by s. 2(1) of the Act can be determined by economic considerations alone, or whether moral considerations must also be weighed. The answer to that question is now settled. Moral considerations are relevant.
>
> ...

> In my opinion, the very structure of the Act makes it clear that the legislative scheme contemplates that the concept of moral duty is an essential element in the working of the Act. [Emphasis added.]

22 A second, weaker line of authorities followed the old view that the testator's wishes could be disturbed only on the basis of need: Re Dawson Estate (1945), 61 B.C.R. 481 (S.C.); Re Hornett Estate (1962), 38 W.W.R. 385 (B.C.S.C.); Re Harding, [1973] 6 W.W.R. 229 (B.C.S.C.). These authorities found a defender in Amighetti, supra. In his view, the purpose of the Act was the modest one of preventing spouses and children from becoming charges on the state. It is essentially a welfare document. Subject to the obligation to care for the needs of his spouse and children, the testator's right to dispose of his property as he sees fit remains absolute. In Amighetti's view, this interpretation is mandated by the plain words and history of the Act. The early cases got it right when they confined the revisionary powers of the court to cases of need. Walker v. McDermott, on the other hand, erred in "attribut[ing] to the Act a meaning and function clearly beyond that defined by the early British Columbia cases and the capabilities of the Act" (pp. 36-37).

23 It has been suggested that this Court ought to replace the "judicious father and husband" test it set out in Walker v. McDermott and return to the needs-based analysis which prevailed in the early years of the Act. With great respect to the arguments to the contrary, I am not persuaded that we should do so.

24 First, I cannot agree that the wording of the Act suggests a strict needs-based test. As noted above, the wording is broad and capable of embracing changing conceptions of what is "adequate, just and equitable". The Act does not mention need. Moreover, if need were the touchstone, the failure to exclude independent adult children from its ambit presents difficulty. Nor, as will be discussed in greater detail below, do the words of the statute suggest a test devoid of judicial discretion, as witnessed by the express references to "discretion" and what is "adequate, just and equitable in the circumstances" (emphasis added).

25 Nor can I agree that the history of the Act suggests that the only reason for its passage was to prevent persons becoming a charge on the state. While the Act certainly was intended to serve this minimum function, there is nothing to suggest that the women's groups who lobbied for it or the legislators who adopted it intended that it be confined to cases of need.

26 The remaining argument is that Walker v. McDermott extends the Act beyond its capabilities. Again with respect, I cannot agree. This argument is founded on the proposition that the Walker test introduces too much uncertainty into the law. Amighetti states (at p. 56):

> The final result, in any given case, is completely at the discretion of the presiding judge as he or she alone considers the facts and makes a judgement, doubtless influenced by his or her own perception of what is fair and right. We are thus regressing to the unacceptable "time when Equity was interpreted by the length of the 'Chancellor's foot'..."

27 This criticism is value-neutral. It does not support the adoption of a needs-maintenance approach. It merely suggests that there must be some yardstick, be it need or some other, by which courts might measure the terms "adequate, just and equitable". From time to time courts following Walker v. McDermott have attempted to suggest ways of rendering the task under the Act more predictable. In Bates v. Bates (1981), 9 E.T.R. 235 (B.C.S.C.), Lander L.J.S.C. (as he then was)

used actuarial evidence to determine what was adequate, just and equitable. In Barker v. Westminster Trust Co. (1941), 57 B.C.R. 21, O'Halloran J.A. found assistance in the standards for distribution of assets where there is no will, a test rejected by the Court of Appeal in Bates v. Bates (1982), 11 E.T.R. 310. In Richards v. Person (1982), 34 B.C.L.R. 350 (S.C.), Taylor J. used the provisions of the Family Relations Act, R.S.B.C. 1979, c. 121, for distribution of assets on marital separation as a guide, only to be told by the Court of Appeal that this was an improper consideration: (1983), 49 B.C.L.R. 43.

28 If the phrase "adequate, just and equitable" is viewed in light of current societal norms, much of the uncertainty disappears. Furthermore, two sorts of norms are available and both must be addressed. The first are the obligations which the law would impose on a person during his or her life were the question of provision for the claimant to arise. These might be described as legal obligations. The second type of norms are found in society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards. These might be called moral obligations, following the language traditionally used by the courts. Together, these two norms provide a guide to what is "adequate, just and equitable" in the circumstances of the case.

29 The first consideration must be the testator's legal responsibilities during his or her lifetime. The desirability of symmetry between the rights which may be asserted against the testator before death and those which may be asserted against the estate after his death has been noted by the dissenting member of the British Columbia Law Reform Commission in its 1983 report on the Act, Report on Statutory Succession Rights (Report No. 70). Mr. Close argues (at p. 154):

> A person is under a legal duty to support his or her spouse and minor children. If this duty is not observed then it may be enforced through the courts. That a testator's estate should, therefore, be charged with a duty similar to that borne by the testator in his lifetime is not troublesome.

It follows that maintenance and property allocations which the law would support during the testator's lifetime should be reflected in the court's interpretation of what is "adequate, just and equitable in the circumstances" after the testator's death.

30 The legal obligations on a testator during his or her lifetime reflect a clear and unequivocal social expectation, expressed through society's elected representatives and the judicial doctrine of its courts. Where provision for a spouse is in issue, the testator's legal obligations while alive may be found in the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp), family property legislation and the law of constructive trust: Pettkus v. Becker, [1980] 2 S.C.R. 834; Sorochan v. Sorochan, [1986] 2 S.C.R. 38; Peter v. Beblow, [1993] 1 S.C.R. 980. Maintenance and provision for basic needs may be sufficient to meet this legal obligation. On the other hand, they may not. Statute and case law accepts that, depending on the length of the relationship, the contribution of the claimant spouse and the desirability of independence, each spouse is entitled to a share of the estate. Spouses are regarded as partners. As L'Heureux-Dubé J. wrote in Moge v. Moge, [1992] 3 S.C.R. 813, at p. 849:

> ... marriage is, among other things, an economic unit which generates financial benefits .... The [Divorce] Act reflects the fact that in today's marital relationships, partners should expect and are entitled to share those financial benefits.

The legal obligation of a testator may also extend to dependent children. And in some cases, the principles of unjust enrichment may indicate a legal duty toward a grown, independent child by reason of the child's contribution to the estate. The legal obligations which society imposes on a testator during his lifetime are an important indication of the content of the legal obligation to provide "adequate, just and equitable" maintenance and support which is enforced after death.

31 For further guidance in determining what is "adequate, just and equitable", the court should next turn to the testator's moral duties toward spouse and children. It is to the determination of these moral duties that the concerns about uncertainty are usually addressed. There being no clear legal standard by which to judge moral duties, these obligations are admittedly more susceptible of being viewed differently by different people. Nevertheless, the uncertainty, even in this area, may not be so great as has been sometimes thought. For example, most people would agree that although the law may not require a supporting spouse to make provision for a dependent spouse after his death, a strong moral obligation to do so exists if the size of the estate permits. Similarly, most people would agree that an adult dependent child is entitled to such consideration as the size of the estate and the testator's other obligations may allow. While the moral claim of independent adult children may be more tenuous, a large body of case law exists suggesting that, if the size of the estate permits and in the absence of circumstances which negate the existence of such an obligation, some provision for such children should be made: Brauer v. Hilton (1979), 15 B.C.L.R. 116 (C.A.); Cowan v. Cowan Estate (1988), 30 E.T.R. 216 (B.C.S.C.), aff'd (1990), 37 E.T.R. 308 (B.C.C.A.); Nulty v. Nulty Estate (1989), 41 B.C.L.R. (2d) 343 (C.A.). See also Price v. Lypchuk Estate, supra, and Bell v. Roy Estate (1993), 75 B.C.L.R. (2d) 213 (C.A.) for cases where the moral duty was seen to be negated.

32 How are conflicting claims to be balanced against each other? Where the estate permits, all should be met. Where priorities must be considered, it seems to me that claims which would have been recognized during the testator's life -- i.e., claims based upon not only moral obligation but legal obligations -- should generally take precedence over moral claims. As between moral claims, some may be stronger than others. It falls to the court to weigh the strength of each claim and assign to each its proper priority. In doing this, one should take into account the important changes consequent upon the death of the testator. There is no longer any need to provide for the deceased and reasonable expectations following upon death may not be the same as in the event of a separation during lifetime. A will may provide a framework for the protection of the beneficiaries and future generations and the carrying out of legitimate social purposes. Any moral duty should be assessed in the light of the deceased's legitimate concerns which, where the assets of the estate permit, may go beyond providing for the surviving spouse and children.

33 I add this. In many cases, there will be a number of ways of dividing the assets which are adequate, just and equitable. In other words, there will be a wide range of options, any of which might be considered appropriate in the circumstances. Provided that the testator has chosen an option within this range, the will should not be disturbed. Only where the testator has chosen an option which falls below his or her obligations as defined by reference to legal and moral norms, should the court make an order which achieves the justice the testator failed to achieve. In the absence of other evidence a will should be seen as reflecting the means chosen by the testator to meet his legitimate concerns and provide for an ordered administration and distribution of his estate in the best interests of the persons and institutions closest to him. It is the exercise by the testator of his freedom to dispose of his property and is to be interfered with not lightly but only in so far as the statute requires.

Application of the Test to This Case

34 I turn first to the legal responsibilities which lay on the testator during his life. His only legal obligations were toward Mrs. Tataryn. While they had not crystallized, since the parties were living together at the time of death, they nevertheless existed. The testator's first obligation was to provide maintenance for Mrs. Tataryn. But his legal obligation did not stop there. The marriage was a long one. Mrs. Tataryn had worked hard and contributed much to the assets she and her husband acquired. There are no factors, such as incompetence, negating her entitlement. Under the Divorce Act and the Family Relations Act she would have been entitled to maintenance and a share in the family assets had the parties separated. At a minimum, she must be given this much upon the death of her spouse.

35 I turn next to the moral claims on the testator. The highest moral claim arises from the fact that Mrs. Tataryn has outlived her husband and must be provided for in the "extra years" which fate has accorded her. This is not a legal claim in the sense of a claim which the law would have enforced during the testator's lifetime. It is, however, a moral claim of a high order on the facts of this case. Mr. and Mrs. Tataryn regarded their estate as being there to provide for their old age. It cannot be just and equitable to deprive Mrs. Tataryn of that benefit simply because her husband died first. To confine her to such sums as her son may see fit to give her, as the testator proposed, fails to recognize her deserved and desirable independence and constitutes inadequate recognition of her moral claim.

36 The remaining moral claims on the testator are those of the two grown and independent sons. The testator gave nothing to one, everything to the other, subject to his provision of money to Mrs. Tataryn. The moral claims of the sons cannot be put very high. There is no evidence that either contributed much to the estate.

37 The "legal claims" of Mrs. Tataryn entitle her to at least half the estate and arguably to additional maintenance. Additionally, her "moral claim" to the funds set aside for old age is strong. These claims indicate that an "adequate, just and equitable" provision for her requires giving her the bulk of the estate. The moral claim of the sons is adequately met by the immediate gift of $10,000 awarded by the trial judge to each of them and a residuary interest in a portion of the property upon the death of Mrs. Tataryn. It may be noted that neither son contested the trial judge's order giving John a portion of the estate.

Disposition

38 I would allow the appeal and substitute the following order for that of the trial judge:

1. To Mrs. Tataryn:

   (a) Title to the matrimonial home; (b) A life interest in the rental property; (c) The entire residue of the estate after payment of the immediate gifts to the sons.

2. To each son: an immediate gift of $10,000;
3. Upon the death of Mrs. Tataryn: the rental property to be divided between John and Edward in the shares suggested by the trial judge for division of the residue, being one-third to John and two-thirds to Edward.

4. Costs from the estate.

qp/d/hbb/DRS/DRS/qlana

TAB 27

Case Name:

Taylor v. Alberta Teachers' Assn.

Between
Roger Taylor and Sandra Denney, on their own behalf,
and on behalf of all those persons entitled to
receive benefits or payments, now or in the future,
from the Alberta Teachers' Association Office Staff
Pension Plan, plaintiffs, and
The Alberta Teachers' Association, defendant

[2002] A.J. No. 1571

2002 ABQB 554

Action No. 9603 13948

Alberta Court of Queen's Bench
Judicial District of Edmonton

Sanderman J.

Heard: April 24, 2002.
Judgment: June 3, 2002.

(45 paras.)

Practice -- Persons who can sue and be sued -- Individuals and corporations, status or standing -- Class actions, members of class, consent of -- Discovery -- Examination, persons who may be examined -- Examination, range of -- Questions about legal issues -- Costs -- Time to award costs -- Costs in trust proceedings -- Payable out of trust fund.

Application by the representative plaintiffs Taylor and Denney against the defendant Alberta Teachers' Association for their costs of the action on a solicitor and client basis on an ongoing basis. Taylor and Denney were representative plaintiffs in a class action against the Association seeking an injunction and an order directing the Association to account for its actions in using monies from a pension fund to pay administrative costs. There were approximately 150 members in the class. The cost of continuing the litigation had become prohibitive for them. Notice of the requests had not been given to all members of the class. Individual relief was not being sought in the action. The Association applied for an order allowing it to examine persons entitled to receive benefits from the

pension plan other than Taylor, who had minimal personal knowledge and for an order compelling Taylor to re-attend for discovery to answer certain questions objected to and undertakings refused. Denney had not yet been examined.

HELD: Taylor and Denney's application was allowed and the Association's application was allowed in part. Giving notice to class members to allow them to opt out of the litigation was meaningless in this action as the opting out by any class member could not change the potential outcome or affect the individual rights of someone choosing to opt out. It was appropriate for costs to be paid from the pension fund as the litigation concerned an issue central to the management of the fund and was not, in theory, adversarial litigation. The Association's application to examine someone else was premature as Denney had not yet been examined. It was entitled to answers from Taylor on questions that were not pure questions of law.

Statutes, Regulations and Rules Cited:

Alberta Rules of Court, Rules 42, 601(1).

Counsel:

Elizabeth M. Regan and Julie C. Lloyd, for the plaintiffs.
Greg A. Harding, Q.C. and Monica M. Bokenfohr, for the defendant.

MEMORANDUM OF DECISION

1 **SANDERMAN J.**:-- Mr. Taylor and Ms. Denney are the named representatives in a class action brought on behalf of individuals entitled to receive benefits from a pension plan. They seek injunctive relief and an order directing the defendant to account for its actions. Damages are not sought by the plaintiffs. They allege that the defendant has used monies from a pension fund to pay administrative costs. They claim that this is inappropriate and should stop. They ask for reimbursement in relation to the funds used for this purpose.

2 During the past year, the parties have been working diligently towards obtaining an early trial date. It is in the best interests of all to have this matter resolved as quickly as possible. This litigation has been under case management. Collectively, the parties filed three Notices of Motion seeking specific relief. These Notices of Motion were set to be heard on April 24, 2002.

3 In addition to the three matters scheduled the defendant brought a further application. The defendant objected to me hearing the plaintiff's requests that the costs of this action be paid from the pension plan until notice of the request was given to all members of the class.

4 The defendant urged me to insure that all class members had notice of the impending application in relation to costs. The purpose of giving notice is to insure the fair conduct of the proceedings. Members of the class can make an individual decision whether or not they want to be part of the action. They can determine the benefits and risks that might accrue to them by staying in the lawsuit. They are placed in a position where they can make informed decisions. They can take steps to protect their interests as they see fit. A transparency is brought to the conduct of the proceedings

that would not be present absent the notice. Members put on notice can take steps to guarantee the adequacy of the representation brought on their behalf.

5 There is no statute in this province that governs class actions. Rule 42 of the Alberta Rules of Court allows for this type of lawsuit. This Rule states:

> Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all.

6 In the absence of legislation governing this type of action, the court must fill the void under its inherent power to settle the rules of practice and procedure in relation to disputes that may arise during the litigation. The court is charged with the responsibility of striking a balance between efficiency and fairness. As a general rule, all potential class members should be informed of the existence of the lawsuit, of the common issues that the lawsuit seeks to resolve, and of the right of each class member to opt out (Western Canadian Shopping Centres Inc. v. Dutton [2001] 2 S.C.R. 534).

7 There are exceptions to this general rule. Although there is no legislation in this province governing class actions, the Alberta Law Reform Institute has prepared a report in relation to this topic. I have been directed to this report, to legislation in other provinces, and to reports from Law Reform Commissions in other provinces. A common theme in the reports and legislation is apparent. The supervising court is given the discretion to dispense with notice to all members of the class if it is considered proper to do so. This is one of those cases. Notice is given to a class member so that individual can decide whether or not to opt out of the lawsuit. In certain cases the right to opt out is meaningless. It is meaningless, as a practical matter, if the member would be affected by a decision of the court notwithstanding an informed decision to opt out.

8 If the plaintiffs are successful in this action, the remedy obtained will be an order directing the defendant to repay administrative costs withdrawn from the plan and to stop this activity in the future. The opting out by any class member or group of members could not change this potential outcome or affect the individual rights of someone choosing to opt out.

9 Individual relief is not sought in this action. Giving notice to class members to allow them to opt out of the litigation is meaningless in this case.

10 Notice is given to class members so that they can judge for themselves the adequacy of the representation that the class is receiving. In this case, notice is not necessary for that purpose. The individuals affected by this litigation are small in number. The litigation has been in existence for over five years. Informal discussions in the work place and meetings called to discuss the litigation have generally kept most members of the class informed as to developments.

11 Adequacy of representation does not appear to be a real concern. The matter is efficiently moving to trial where both sides of the issue will be clearly placed before the court. Giving notice at this time would slow the progress made by counsel in advancing the litigation and would add nothing to the concept of fairness. This is clearly one of those cases where notice need not be given to all class members at this time. This situation would change if there is a material change in the circumstances of the case. If a serious settlement proposal was made by the defendant that required consideration by the plaintiffs then it would be necessary to notify all class members. For the purposes of these applications, it is not necessary.

12 The plaintiffs ask for their costs in this action, on a solicitor and client basis, payable from the Alberta Teachers Association Office Staff Pension Plan Fund forthwith and on an ongoing basis, as incurred. The class that is represented by the nominal plaintiffs is a small class. There are approximately 150 members. They are not high wage earners. The cost of continuing the litigation has become prohibitive for them. Certain members of the class have indicated that they can no longer contribute to the ongoing legal costs. The nominal plaintiffs fear that if the litigation is not funded by the pension plan then it will have to cease. The plaintiffs urge the court to grant their request as they feel that this litigation is important to the class and the imbalance in financial resources should not determine its outcome.

13 There is no doubt that the defendant is in a much better position to fund the lawsuit. Impecuniosity on the part of a party involved in this type of litigation is not enough to establish the grounds for making such an order. It is merely a factor that has to be taken into consideration but is not overly significant in determining the success of the application.

14 The defendant strenuously objects to the payment of costs from the fund. The defendant feels that to make such an award in this case would be entirely inappropriate. To order costs now would fetter the discretion of the judge hearing the trial. The defendant claims that in this adversarial litigation the normal rules in relation to costs should apply and that that determination cannot be made until the issue has been decided at trial.

15 The defendant claims that the plaintiffs' allegation of a breach of a fiduciary duty is clearly indicative of the adversarial nature of the litigation. The defendant suggests that the plaintiffs will not be able to prove the allegations contained in the Statement of Claim and that they should be responsible for costs. The defendant claims that if it is successful in the litigation the granting of the relief requested would frustrate the defendant in its efforts to claim its costs. This is the major concern of the defendant.

16 The defendant argues that the collective ability of the class to fund the litigation has not been exhausted. If the litigation is so important to the class, its members should be able to come up with the resources to continue the action. The defendant argues that the plaintiff cannot show that any financial difficulty being encountered by the class comes as a result of the actions of the defendant.

17 In addition to this, the defendant firmly suggests that its conduct toward the plaintiffs in this litigation is not blameworthy and therefore would not attract such discretionary relief. For all of these reasons, the defendant asks that this application be dismissed.

18 It is not unusual in pension litigation, for the costs at trial, to be made payable out of the pension fund, regardless of the success of the parties. This is often seen, although such an order is not mandatory. In certain circumstances, a court can make an order granting the costs requested by the plaintiffs. All of the factors surrounding the lawsuit must be considered in determining whether it is fair to contemplate making such an order.

19 A fundamental consideration is the motivation behind the lawsuit. I do not share the defendant's view that this litigation is so adversarial in nature. In theory, the litigation should be non-adversarial.

20 The members belonging to the plan are asking the court to interpret a course of action followed by the defendant. They seek a declaration as to whether the action was permissible or prohib-

ited. If permissible, the defendant can continue to do what it has been doing. If prohibited, it must desist and repay funds to the plan.

21 If the defendant sought the same declaration from the court before embarking upon this course of action, I doubt very much whether the defendant would have characterized the litigation as adversarial.

22 This is litigation that should be non-adversarial. It has been brought by the plaintiffs, in essence, on behalf of the pension plan to determine how it will be run in the future. The litigation is not being advanced for the personal benefit of the nominal plaintiffs.

23 This non-adversarial litigation being brought by individuals on behalf of the pension plan is proving to be a financial hardship. Litigation is costly. Certainly, the conduct of the defendant is not blameworthy and the substantial costs incurred cannot be attributed to this.

24 A review of the totality of the circumstances surrounding this litigation makes it clear that it would be fair to grant the relief requested by the plaintiffs.

25 This is an appropriate case for costs to be paid from the pension fund as this litigation concerns an issue central to the management of the fund. This is not adversarial litigation, in theory, even though the defendant characterizes it as such and has defended vigorously. The principals stated in Buckton v. Buckton [1907] Ch. 406 and referred to with approval in many subsequent cases are applicable to this litigation. Therefore, the wide discretion authorized by Rule 601(1) of the Alberta Rules of Court is engaged and the relief sought by the plaintiffs is granted.

26 The defendant feels somewhat frustrated by the answers it received from Roger Taylor, one of the two named representatives of the class, at his Examination for Discovery in relation to the litigation. He has been examined on two occasions. The defendant is somewhat perplexed that his knowledge in relation to matters dealing with the pension plan is limited. His personal knowledge is minimal and he has done little to inform himself in relation to pertinent developments.

27 Consequently, the defendant seeks an order allowing it to examine and discover other persons entitled to receive benefits or payments from the pension plan. The defendant has provided a list of current or former employees who served on the pension plan committee at different times. The defendant believes that the knowledge possessed by some of these individuals in relation to decisions made at important times that affected the administration of the pension plan far exceeds the knowledge possessed by Mr. Taylor. That is a valid belief having regard to some of his answers. That is the basis for the defendant's desire to examine them.

28 If that application is not successful, the defendant desires to have Mr. Taylor either removed as a named representative of the class and that someone with greater knowledge be substituted in his place or designated as an additional named representative. The thrust of the application made by the defendant is to be able to examine someone who has knowledge of the decisions that were made that brought changes to the administration of the plan. The defendant claims that it is fundamental to its defence to be able to examine such a person. Paragraph 20 of the Statement of Defence is pointed to. It states:

> At all material times, the Plaintiffs were fully aware of the matters alleged in the Statement of claim, acquiesced in the matters of which they now complain thereby causing the Defendant to believe that the Plaintiffs had no objection to its

> conduct and consequently the Defendant has been prejudiced. The Plaintiffs are guilty of prolonged, inordinate and inexcusable delay in bringing this action and in seeking the relief claimed herein. In the circumstances, the Defendant claims that the Plaintiffs are estopped or barred by laches from claiming the alleged or any relief against the Defendant.

29 The plaintiffs' reply that the request being made by the defendant is premature. They point to the fact that the second named representative, Ms. Denney has yet to be examined. The knowledge possessed by her and revealed upon her examination may alleviate some of the frustration felt by the defendant. Her examination is scheduled for the latter part of the month of June.

30 The test that has to be met by the defendant in convincing the court to grant the application to examine class members other than the representatives has been set out by Chief Justice McLaughlin in Western Canadian Shopping Centres Inc. v. Dutton [2000] S.C.J. No. 63. Speaking for the Supreme Court of Canada at para. 59 she stated:

> One of the benefits of a class action is that discovery of the class representatives will usually suffice and make unnecessary discovery of each individual class member. Cases where individual discovery is required of all class members are the exception rather than the rule. Indeed, the necessity of individual discovery may be a factor weighing against allowing the action to proceed in representative form.
>
> I would allow the defendants to examine the representative plaintiffs as of right. Thereafter, examination of other class members should be available only by order of the court, upon the defendants showing reasonable necessity.

31 The defendant must show reasonable necessity before its application can be seriously considered. The scheme envisioned by Chief Justice McLaughlin is that the examination of the representative plaintiffs as of right will take place. Only after that has been completed would one be able to determine whether it is required to examine other class members. Ms. Denney's examination must be completed before this question can be answered. The application is premature.

32 If the extent of the information possessed by Ms. Denney is similar to that of Mr. Taylor, the position taken prematurely by the defendant on this application would be strengthened immeasurably. Hopefully, her knowledge far exceeds that of Mr. Taylor.

33 I have been directed to the Alberta Law Reform Institute Final Report on class actions that was released in December of 2000. At page 119 of that report the Alberta Law Reform Institute came to a conclusion in relation to a class member's duty to inform themself. The report states:

> Our conclusion is that for discovery purposes, a representative plaintiff should be treated like a plaintiff in an ordinary proceeding. Individual class members should not be treated as corporate officers or employees of the representative plaintiff unless the representative plaintiff is a corporation and they are in fact officers or employees of that corporate representative plaintiff. On discovery, the representative plaintiff might be compelled to make inquiries of individual class members but would not be under a duty to inform themself.

34 The Institute's analysis was thorough. The conclusion reached is supportable. Still, it would certainly be prudent for Ms. Denney to make the appropriate inquiries of individual class members in relation to areas where her knowledge is deficient before she appears for her Examination for Discovery. If her knowledge is lacking, I would be prepared to direct that the defendant be able to select two individuals from the list of former and current employees who have served on the pension plan committee for additional examination. Some thought and consideration should always go into the determination of who can adequately fill the roll of a representative plaintiff in a class action in order to avoid the necessity of examining additional members.

35 The defendant seeks an order compelling Mr. Taylor to re-attend at an Examination For Discovery to answer certain questions objected to and undertakings refused or taken under advisement. Mr. Taylor was examined by counsel for the defendant on January 23, 2002 and February 15, 2002. Certain questions were not answered. The defendant wants answers to those questions. The pleadings filed by the parties determine the scope of what is relevant and material during the examination process.

36 Justice Perras said in D'Elia v. Danssereau, [2000] A.J. No. 731 (Q.B.) at para.17:

> Any analysis to determine the propriety of disputed questions on oral discovery must start by examining the pleadings. Henceforth, the pleadings will be of considerable importance in focusing the issues which in turn will give meaning to materiality and relevance of oral discovery in terms of ascertaining the facts. So in my view, relevant questions will be those questions having regard to the pleadings that elicit facts that are in issue or facts that make facts in issue, more probable than not.

37 The amended Statement of Claim filed by the plaintiffs alleges that the pension plan is a trust. It is further alleged that the actions of the defendant had the effect of revoking the trust in the absence of an express reservation of power allowing it to do so. As a result of this activity, the members of the plan had their interest in the plan and the benefits flowing from membership altered. A remedy is sought based on these allegations.

38 It is clear that the plaintiffs claim that a trust in which they had an interest has been affected by the operation of the pension plan by the defendant. The defendant wants to be able to question Mr. Taylor in relation to the nature of the trust in existence and facts surrounding its operation during certain periods of time. The defendant seeks a clear identification of certain documents.

39 The plaintiff objects to answering most of these questions on the grounds that the question asked is a question of law and therefore forbidden. In addition certain questions are objected to on the basis of relevance. Reliance is placed upon the decision of Can-Air Services Ltd. v. British Aviation Insurance Co. [1988] A.J. No. 1022 (Alta. C.A.). The passages relied upon are found in the words of Cote J.A. He stated:

> On what facts do you rely..."does not ask for facts which the witness knows or can learn. Nor does it ask for facts which may exist. Instead it makes the witness choose from some set of facts, discarding those upon which he does not "rely" and naming only those on which he does "rely". The questioner here does not really dispute much the same interpretation of its question. (I will call it "the questioner".)

> Because the question demands a selection, it demands a product of the witness' planning. How he is to select is unclear. He may have to decide what evidence is then available or is legally admissible. The question really asks how his lawyer will prove the plea.
>
> ...
>
> Another fundamental rule is that an examination for discovery may seek only facts, not law: Turta v. C.P.R. (1951) 2 W.W.R. (ns) 628, 63102 (Alta.); cf. Curlett v. Can. Fire Ins. Co. [1938] 3 W.W.R. 357 (Alta.). These questions try to evade that rule by forcing the witness to think of the law applicable or relied upon, then use it to perform some operation (selecting facts),and then announce the result.

40 I am of the belief that the plaintiff wants to apply this authority in much too rigid a fashion. A more balanced approach is found in the decision of Justice Hugessen in Montana Band v. Canada (T.D.) [2000] 1 F.C. 267. At paragraph 23 he stated:

> There is of course no question that examination on discovery is designed to deal with matters of fact. "Pure" questions of law are obviously an improper matter to put to a deponent. It is likewise with argumentative questions and questions which ask a party to state what evidence it proposes to lead at trial. But the line is rarely clear or easy to draw. Questions may mix fact and law or fact and argument; they may require the deponent to name a witness; they may still be proper. So too, questions relating to facts which may have legal consequences or which may themselves be the consequence of the adoption of a certain view of the law are nonetheless questions of fact and may be put on discovery.

41 Continuing on at para. 27 he stated:

> In my view, the proper approach is to be flexible. Clearly the kinds of questions which were aptly criticized in Can-Air, supra, note 5, can easily become abusive. On the other hand a too rigid adherence to the rules therein laid down is likely to frustrate the very purpose of examination on discovery. While it is not proper to ask a witness what evidence he or she has to support an allegation, it seems to me to be quite a different thing to ask what facts are known to the party being discovered which underlie a particular allegation in the pleadings. While the answer may have a certain element of law in it, it remains in essence a question of fact. Questions of this sort may be essential to a discovery for the purposes of properly defining the issues and avoiding surprise; if the pleadings do not state the facts upon which an allegation is based then the party in whose name that pleading is filed may be required to do so.

42 A flexible as opposed to an overly rigid approach should be applied to matters of this sort. It is against this backdrop that I view the application of the defendant. I have had an opportunity to review the transcript of the Examination for Discovery and have had an opportunity to place the

questions objected to in a proper context. The defendant, in its materials, seeks answers to certain questions. The plaintiff's materials set out the objections raised.

43 Of the first set of questions addressed by the defendant, four should be answered. Questions 1, 3, 21, and 23 should be answered. These are not pure questions of law. The other questions in this group need not be answered as valid objections have been raised. The undertakings relating to this series of questions need not be answered. Valid objections have been raised.

44 Of the remaining outstanding questions, five have to be answered. Questions 5, 7, 10, 11, and 13 should be answered by Mr. Taylor. These are proper questions. The remaining questions need not be answered. The other undertakings need not be fulfilled.

45 Hopefully, the examination of Ms. Denney will proceed without difficulty and this matter can move one step closer to trial. The need for an early trial is obvious. This matter should not be allowed to remain unsettled between the parties. There is an obvious common interest to have the trial of this matter proceed.

SANDERMAN J.

cp/i/nc/qlmmm

TAB 28

Case Name:

Thomlinson v. Alberta (Child Services)

Between
Ray Thomlinson and Robert P. Lee, applicants, and Her Majesty the Queen in Right of Alberta, Iris Evans, Minister of Child Services, the Public Trustee and Her Majesty the Queen in Right of the Province of Alberta on behalf of the respondents 439 John Does being minors, respondents

[2003] A.J. No. 716

2003 ABQB 308

335 A.R. 85

Action No. 0201-06274

Alberta Court of Queen's Bench
Judicial District of Calgary

Brooker J.

Heard: August 1, 2002.
Judgment: April 10, 2003.
Filed: April 11, 2003.

(153 paras.)

Practice -- Pleadings -- Striking out pleadings -- Declaratory actions -- Grounds, lack of jurisdiction (incl. alternative remedy) -- Applications and motions -- Applications -- Originating applications, form -- Disposition, application to proceed as action -- Dismissal of, grounds.

Application by Child Services to strike the originating notice of Lee and Thomlinson on the basis that the Court lacked jurisdiction to deal with the issues. Lee's application alleged that 439 unidentified minors were mistreated while in the protective care of Child Services and sought, among other things, a declaration that the minors were entitled to legal representation, an appointment allowing him to represent them, an order directing the Government of Alberta to pay all legal fees and expenses incurred in bringing the application, an order for production of material arising from the al-

leged mistreatment, and advice and direction relating to his compensation. Lee stated that he had contacted the Public Trustee but had declined to act on behalf of the minors on the basis that it would create a conflict of interest.

HELD: Application dismissed. Although the court did not have jurisdiction to grant the relief requested under Rule 410(e), there was jurisdiction to make the orders requested under parens patriae jurisdiction. There was no evidence yet presented upon which to determine whether the Court would exercise its discretion to engage that jurisdiction. In an action brought by way of statement of claim, the Court had the jurisdiction to control its own process, to appoint or permit a next friend who was a stranger in the case, to relieve him of the responsibility for costs, to order production of documents, and to direct that the Government be liable for the costs of the action in the appropriate circumstances. It was appropriate to continue Lee and Thomlinson's claims as a statement of claim, in which case the Court had jurisdiction to grant the types of relief claimed. Lee and Thomlinson were to draft an appropriate statement of claim and apply for interim relief and directions thereunder.

Statutes, Regulations and Rules Cited:

Alberta Rules of Court, Rules 58, 60, 129, 129(1), 129(1)(a), 129(1)(b), 129(1)(d), 129(2), 129(3), 267, 409, 410, 410(e), 560, 600(3).

Child Welfare Act, ss. 2, 2(a), 2(b), 2(c), 3(3), 3(3)(b), 3(3)(c), 128, 128(1)(a).

Freedom of Information and Protection of Privacy Act, s. 3.

Judicature Act, s. 8.

Counsel:

Virgins M. May, Q.C., for the applicants.
Sheila C. McNaughtan, for the respondents.

REASONS FOR JUDGMENT

BROOKER J.:--

INTRODUCTION

1 The Applicant, Robert Lee, has commenced an action by way of Originating Notice. He alleges that 439 unidentified minors ("the minors") were maltreated while in the protective care of Child Services. He is seeking, among other things: a declaration that these minors are entitled to legal representation; an appointment allowing him to represent them as next friend; an order directing the Respondent Government of Alberta ("the Government") to pay all legal fees and expenses incurred in bringing the application and all other actions taken in relation to this litigation; a production order relating to all relevant material arising from the alleged maltreatment; and advice and direction relating to the compensation of the Applicant as next friend. The Applicant takes the position that without the relief requested these minors will be unable to exercise their legal right to seek compensation for the alleged maltreatment.

2 Before addressing those issues, however, the Respondents have brought this preliminary application to strike the Originating Notice, pursuant to Rule 129, alleging that this Court does not have the requisite jurisdiction to deal with the issues raised by the Applicant. Accordingly, this decision addresses the issue of the court's jurisdiction to grant the relief requested by the Applicant in his Originating Notice; not the substantive issue of whether the relief should be granted. I should note that I have used the term "Applicant" to refer to Lee and the term "Respondent" to refer to the Government throughout this decision, as they are in the substantive action, although the Government is the party making this preliminary application to have the claim struck.

FACTS AND EVIDENCE

1. General

3 The Applicant filed two affidavits in support of his position. The Respondents state that, at this stage and for the purposes of this Application, the issue is purely jurisdictional. Specifically, they frame the issue as being whether the relief can be granted, rather than whether it should be granted. Accordingly, they have not submitted any evidence on this application. Indeed, the matter proceeded before me on the basis that I must determine this preliminary, jurisdictional issue first.

4 The Children's Advocate Annual Report 2000-2001 states:

> According to the Ministry of Children's Services electronic Child Welfare Information System (CWIS), during the fiscal year April 1, 2000 to March 31, 2001 there were 439 recorded substantiated investigations of maltreatment of young people either in "out of home" care or "in home" care but receiving child welfare services. *These are SUBSTANTIATED allegations of maltreatment of children and youth known to the Ministry who have been found to be in need of protection.* [Emphasis in original.]

5 On April 16, 2002, an article appeared in the Calgary Herald wherein Iris Evans, Minister of Child Services at that time, reportedly indicated that 52 minors who were in care were identified as having been physically or sexually abused. Eighteen were in foster care at the time and the remaining 34 were abused in their own home while Child Welfare was providing services to their families.

6 The Children's Advocate's Annual Report 2000-2001 states further, at page 24:

> So who should help young people in the Child Welfare system to exercise their legal rights where there is a cause of action? Should it be the Public Trustee? They have declined such involvement. Should it be the Office of Children's Advocate ? The Children's Advocate reports to the Minister and it would clearly be a conflict for the Children's Advocate to be party to a lawsuit against the Minister and the crown.

7 The Report goes on to recommend that the Government develop an independent review process to consider such claims and award compensation where appropriate.

8 The Applicant deposes that he contacted the Public Trustee personally about acting as next friend to these minors and the Public Trustee declined to act on the basis that it has a conflict of interest in actions against the Government.

Position of the Parties

96 The Applicant submits that the Court does have the jurisdiction to appoint a stranger as a next friend. In support of that proposition he relies on Ms. R. v. W.A. (2000), 290 A.R. 380 (Q.B.) wherein the Court appointed a stranger as a next friend to an individual of unsound mind.

97 The Applicant submits further that the Government cannot refuse to disclose the identities of the minors and then rely on the fact that they are unidentified in order to deny them the appointment of a next friend.

98 The Respondents argue that Ms. R. v. W.A. is distinguishable on the basis that in Ms. R. there was a known cause of action and the plaintiff's family was involved in the litigation. Additionally, they point out that the plaintiff in that case was identified and the court was, thus, able to make an assessment as to whether there was a need for a next friend.

99 They suggest that in this case the Court does not have the necessary information upon which to determine if a next friend is actually required and it is not the role of a next friend to decide whether she should bring an action on behalf of infants wholly unknown to her. For instance, they state that it is questionable whether the minors have a cause of action. They submit that allowing a stranger to decide that she should act on behalf of a child does not respect the right of the actual parent or guardian to make decisions on behalf of the infant. They also point out that some of these minors may have already reached the age of majority.

100 Finally, the Respondents argue that, by granting this application and appointing the Applicant as next friend, this Court would be opening the door for the appointment of anyone with no legitimate interest to investigate, prosecute, litigate and settle allegations concerning any number of Government operations. This, the Respondents argue, is not the function of the courts.

Analysis

101 The history of the office of next friend is succinctly canvassed in Vano v. Canadian Coloured Cotton Mills Co. (1910) 21 O.L.R. 144 at paras 13 to 14:

> At the common law an infant could only sue by his guardian: Hargr. Co. Ltd. 135 b n.(1). The Statue of Westminster the First, i.e. (1275) 3 Edw. I, by ch. 48, in cases in which a guardian or chief lord had made an infeoffment of the ward's land to the disinheritance of the heir, gave the heir his assise of novel disseisin against the guardian and the tennant, and if, for certain reasons the infant could not sue his assise, then one of his next friends (un de ses procheins amys) might. The Statute of Westminster the Second i.e., (1285) 13 Edw. I, by ch. 15 extended this right to the case of all infants who might be "eloined" (elongati). It was by analogy to the provisions of these statutes that "in all cases where a party cannot sue for himself, the Court employs a prochein amy as its officer to conduct the suit for him, and no appointment or subsequent confirmation by the party is requisite. It is, in fact, almost the same thing as appointing an attorney; the law, if we may so speak, appoints an attorney to act on behalf of the infant:" per Alderson B., in Morgan v. Thorne (1841), 7 M. & W.400, at 409. The designation "prochein amy" was long used in the common law Courts. The practise was for the intended "prochein amy" to appear with the infant with a Judge in Chambers; or a petition was lodged to the Judge on behalf of the infant asking for the ap-

> pointment of the person named as his "prochein amy". The intended "prochein amy" had to give a written consent, verified by affidavit. Thereupon the Judge granted his fiat, upon which a rule or order was drawn up in the King's Bench by the clerk of the Rules, or in the Common Pleas the Judge made his order for admission: Tidd's Practice, vol. 1, pp. 95sqq.; Tidd's Supp. 2, p. 5 In the Exchequer the King's Bench practice was followed: 2 Archibold's Practice, 7th ed., p. 889.
>
> In the Court of Chancery, it does not seem to have been the practice to take out an order appointing a next friend. "Any person may institute a suit on behalf of an infant:" Daniell's Ch. Practice, 3d ed. , p. 75; Story's Eq. PI., sec. 57. While the infant could still as at the common law sue in the common law Courts by his guardian, that practice does not seem to have ever obtained in equity - though this is doubtful: see Story's note 3 to sec. 58. By the statute if 1852, 15 & 16 Vict. ch. 86 (Imp.), it was provided that before the name of any person could be used in Chancery as next friend, he must sign a written authority to the solicitor for that purpose (sec. 11) - this provision now appears in our Con. Rule 198,[below] - the consent of the infant was never necessary: Wortham v. Pemberton (1845), 9 Jur. 291. The terminology of the common law Courts whereby this officer was called a "prochein amy" was gradually assimilated until the chancery name, "next friend", became universal.

102 Rule 58 provides for a next friend and states simply: "An infant may sue or counterclaim by his next friend." The only requirement of a next friend, in accordance with the Rules, is that she sign and file a written consent allowing the use of her name as next friend.

103 Ms. R. dealt with an application for a next friend in the context of Rule 60 which deals with an adult person of unsound mind. The application there was commenced on behalf of Ms. J., one of the plaintiffs, who was alleged to be incapable of dealing with the matter on her own behalf. It was also alleged that there were no members of her family who could act as next friend. It was proposed that a lawyer who was a member of the plaintiffs' lawyer's firm be appointed as next friend.

104 The Court found that Ms. J. suffered from post traumatic stress disorder and was not acting in her best interests because of her illness. It concluded that she was of unsound mind for the purposes of Rule 60 and that the appointment of a next friend was appropriate.

105 The Court found further that the proposed next friend was inappropriate and stated that if the Public Trustee was to become involved it should engage an independent third party to act as the plaintiffs next friend or alternatively, that someone independent of all of the litigants be selected.

106 Ms. R. is distinguishable from the present case in that, among other things, the Applicant here is seeking to bring an action on behalf of individuals wholly unknown to him. That case does, however, demonstrate that it is not necessary for the litigant to have a relationship with the proposed next friend.

107 Ideally a parent or guardian would consent to act as next friend. Where a parent is not interested in acting as next friend or does not have the financial resources to act in the capacity of next friend, it is open to the court to appoint the Public Trustee: Salomon v. Alberta (Minister of Education) (1991), 120 A.R. 298 (C.A.) application for leave to appeal to S.C.C. dismissed without rea-

sons [1991] S.C.C.A. No. 535. Here, however, the Public Trustee has declined to act. Neither of the parties has presented any authority to the effect that the court has the jurisdiction to compel the Public Trustee to act as next friend where there is a good reason for it having declined to do so. In this regard also see: Starkman v. Starkman, [1964] 2 O.R. 99 (H. C.). In my view the obvious conflict of interest that arises here provides such a reason.

108 There is nothing in Rule 58 which precludes the court from appointing a willing stranger as a next friend. Further, the authorities demonstrate that appointing a next friend to represent the interests of an infant unknown to him or her would not be inconsistent with the history of the office of next friend. Nor is the infant's consent to the appointment required.

109 Finally, the fact that an appointment does not appear to have been made previously in circumstances where the plaintiff's identity is unknown, does not militate against making such an order for the first time. That being said, I agree with the Respondent's that the role of a next friend is not generally to decide if she should bring an action on behalf of an infant that is a stranger to her. However, I cannot agree that there may not be circumstances wherein such an order may be appropriate.

110 In light of the above factors, together with the fact that no authority was presented tome indicating that this court lacked the authority to make such an order, I find that this Court does have the jurisdiction to appoint a willing stranger as next friend to an unknown plaintiff in the appropriate circumstances. Although I would not presume to enumerate a list of the circumstances wherein an appointment of a willing stranger may be appropriate, I would suggest that situations in which an infant's interests might not otherwise be represented may well qualify.

111 I would note that where the circumstances permit and a willing stranger is appointed as next friend, the parents, guardians or any other interested adult could later apply to be substituted as the next friend.

(ii) Next Friend not Responsible for Costs

Position of the Parties

112 The Respondents point out, on the authority of Salomon, that the primary functions of a next friend include ensuring that the action is in the best interests of the child and to pledge her liability to the costs of the action.

Analysis

113 One of the primary functions of a next friend is to answer for costs: Crothers v. Simpson Sears Ltd. (1988), 59 Alta. L.R. (2d) 1 (C.A.).

114 In Salamon the plaintiffs were infants and the next friend was their father. The father, although not a lawyer, also purported to act as the children's counsel. The Court noted that it is trite that in superior court a party may either represent themselves or be represented by a member of the Law Society. The father did not object to another next friend being appointed who could, in turn, appoint counsel. The father was unable to appoint counsel due to his impecunious circumstances.

115 The Court noted that one of the functions of a next friend is to pledge his costs in the cause. As the mother had an income, she was appointed next friend in substitution of the father. The Court directed that the Public Trustee assume the role of next friend if the mother failed to act.

116 In Saccon (Litigation Guardian of) v. Sisson (1992), 9 C.P.C. (3d) 383 (Ont. Ct. G.D.) a mother brought an action in her own name and as the litigation guardian on behalf of her children. The mother failed to comply with an order requiring her to post costs. The Court substituted the Official Guardian as the litigation guardian.

117 Where a statutory body is compelled to act as next friend it is doubtful that it would be responsible for costs. In White v. Rutter and Pacific Press Limited (1988), 28 B.C.L.R. (2d) 385, the British Columbia Court of Appeal stated, at 389:

> In my opinion, if the Public Trustee was exposed to costs in all cases where actions brought by him failed to succeed, he might well be deterred from carrying out his statutory duty on behalf of the patient [under the Patient's Property Act] For example, in the case on appeal, while the action was brought in good faith and was not frivolous, if the Public Trustee had known that he would be exposed to payment of costs, he might well have decided not to bring the action. In my view it cannot be in the public interest to deter a statutory agent from carrying on his duties by exposing him to an order for costs.

118 Thus, it appears that there are circumstances in which a next friend, albeit a statutory body acting involuntary, will not be responsible for costs.

119 The next friend's responsibility for costs appears to have developed as a matter of policy, namely that the defendant should have someone to look to for costs. Where that policy is not viable, as in the case of statutory bodies, one may deviate from the practice. As there are no Rules preventing the court from making a direction to the effect that a next friend not be personally responsible for costs, and as costs are a matter within the court's discretion, I cannot see any reason why the court would be precluded from making such an order, in the right circumstances. As I am not concerned here with the merits of the substantive application, but only with whether the court possesses the jurisdiction to make an order of this nature, I will not comment on whether such an order would be appropriate in these circumstances. I am satisfied, however, that this Court does have the jurisdiction to make such an order.

(iii) Interim, Full Indemnity Costs Against the Government

Position of the Parties

120 The Applicant argues that the Court has the jurisdiction to award pre-litigation costs pursuant to Rule 600(3) and that this may be done on a full indemnity basis on the basis set out in Jackson v. Trimac Industries Ltd. (1993), 8 Alta. L.R. (3d) 403 (Q.B.), varied (1994), 20 Alta. L.R. (3d) 117 (C.A.).

121 He also points out that, s. 128 of the Act states:

> 128(1) The minister shall pay
>
> (a) The costs incurred for the care and maintenance of a child who is in the custody of a director or under the guardianship of a director.

The Applicant argues that this provision must include the pursuit of the child's legal rights and the fact that the Government may be the focus of the claim by the child cannot allow the Government to avoid this responsibility

122 The Respondents argue that there is no jurisdiction to award costs for an intended claim, which they submit this is. They also state that the process of investigating allegations in order to assess if a claim should be brought, does not constitute a "proceeding" for the purposes of the Rules relevant to cost awards. They submit that this is tantamount to asking the Government to set up a government funded, private inquiry into Alberta Children's Services and that it is not the role of this Court to assist in such an undertaking.

123 They argue further that costs are best addressed at the end of a proceeding, particularly where full indemnity costs are sought. Awarding costs at the close of the proceedings, the Respondents argue, allows the court to assess the facts of the case in order to determine if full-indemnity costs are appropriate. They also point out that awarding either interim or full indemnity costs are very rare events, particularly in cases where the court is being asked to pre-determine an issue: Organ v. Barnett (1992), 11 O.R. (3d) 210 (Gen Div.). They also cite Bullions v. Christensen Estate, [1999] A.J. No. 770 (Q.B.) for the proposition that in exercising discretion to award interim costs, the court will consider whether it is clear that there is a case of sufficient merit to warrant pursuit and whether the plaintiff is in such financial circumstances that she will be unable to pursue the claim unless interim costs are awarded.

124 Finally, the Respondents remind the Court that having a party pay for its own legal costs ensures that the party will conduct the litigation in a reasonable manner: Herman v. Delong, (1999), 253 A.R. 9 (Q.B.); and R.H.J. (Re) (1998), 235 A.R. 358 (Q.B.)

Analysis

125 Rule 600(3) gives the Court the jurisdiction to award costs at any stage of the proceedings.

126 In Organ the plaintiffs brought a motion for an order for interim costs in a fixed amount, representing legal and other professional fees incurred up to the date of trial, in addition to the estimated cost of funding the litigation at trial. In that case E. MacDonald J. stated at p. 215:

> . . . I am satisfied that the court does have a general jurisdiction to award interim costs in a proceeding, and that such a jurisdiction is not limited exclusively to matrimonial cases. In my view, however, such an exercise of jurisdiction is limited to very exceptional cases and ought to be narrowly applied, especially when the court is being asked to essentially pre-determine an issue, in addition to being asked to provide funding for anticipated legal costs to the end of the trial.

127 There the Court declined to award interim costs on the basis that the plaintiffs admitted that they were not impecunious.

128 Similarly, the Court in Bullions found that it had the requisite jurisdiction to award interim costs under Rule 600(3). As to when the discretion to award such costs ought to be exercised the Court prescribed a two part test: 1) where it is clear that the plaintiff has a case of sufficient merit to pursue the action; and 2) where the plaintiff is in such financial circumstances that he will be unable to pursue the claim unless interim costs are awarded.

129 In Organ, Burrows J. relied on the Court of Appeal's Judgment in Jager v. Jager Industries, [1995] A.J. No. 358, wherein it applied the same test. In Jager the Court awarded a fixed amount of interim costs and noted that the party against whom the order was made could pay those costs without undue hardship.

130 As stated in Jackson v. Trimac, full indemnity costs ought only to be awarded in the rarest of circumstances.

131 Accordingly, I am satisfied that this Court has the jurisdiction to make an interim order for indemnity costs where it can be shown that the action is meritorious, the claim will not be pursued absent an order for costs and the circumstances are exceptional.

132 I acknowledge that awarding costs at the end of an action encourages the parties to act in a responsible manner. However, as stated by Hutchinson J. in Jackson v. Trimac: "The key words are 'essential to and arising within the four corners of the litigation'. " I would also note the Court of Appeal's comments in Jager that at the end of the proceedings the party who received costs must account for them.

133 As above the Respondents argue that this is only an intended proceeding and as such is not a "proceeding" in which costs may be awarded. If I find that the court has the jurisdiction to grant the relief sought and convert the Originating Notice to a statement of claim, there will, at that stage, be a "proceeding" and this argument will be moot.

134 Whether a court can award costs in an action for pre-action investigation is unclear and is better left for determination by the trial judge.

(iv) Pre -Action Discovery

135 The Applicant states that he is entitled to pre-action discovery on the basis of the Court's inherent jurisdiction and section 8 of the Judicature Act, R.S.A. 2000, c. J-2. He also relies on Alberta (Treasury Branches) v. Leahy (1999), 74 Alta. L.R. (3d) 210 (Q.B.); and Brett (Public Trustee of) v. Associated Cab (Red Deer) Ltd. (1991), 79 Alta. L.R. (2d) 391 (Q.B.). He suggests that the inherent jurisdiction of the Court ought to be exercised in cases such as the present where the Government, by failing to disclose the identity of the minors, is effectively denying them access to justice.

136 Alternatively, the Applicant argues that, as this action has been commenced by originating notice, this is not a request for pre-action discovery.

137 The Respondents argue that none of the Rules relied on by the Applicants, namely parts 13 and 25 and Rule 267, permit discovery prior to commencement of a legal proceeding. The Respondents submit further that the Rules do not provide for discovery in order to determine the identity of prospective Plaintiffs. They also suggest that, outside of litigation, the dissemination of information of this nature is governed by FOIP.

138 Regarding this last submission the Applicant points out that s. 3 of FOIP states that it ". . . does not affect the power of any court or tribunal to compel a witness to testify or to compel the production of documents. . ."

Analysis

139 The court's inherent jurisdiction was discussed in Alberta (Treasury Branches) v. Leahy, wherein Mason J. stated at para. 8:

> In essence every court has unlimited power over its own processes in order to secure the most "just, expeditious, and least expensive determination of civil proceedings".

140 Additionally s. 8 of the Judicature Act states:

> 8. The Court in the exercise of its jurisdiction in every proceeding pending before it has the power to grant and shall grant, either absolutely or on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to which any of the parties thereto may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, so that as far as possible all matters in controversy between the parties can be completely determined and all multiplicity of legal proceedings concerning those matters avoided.

141 Specifically in the context of document production, Moore C.J. found in Brett (Public Trustee) at para. 5, that:

> The inherent jurisdiction of the Court to control its own process empowers the Court to compel production of documents.

142 Clearly on the basis of the above authorities this Court enjoys the jurisdiction to compel document production. I find further, again in accordance with Brett, that the court has the jurisdiction to compel such disclosure in the face of a statutory provision to the contrary. In this case, however, as the Applicant has pointed out, s. 3 of FOIP allows for such production in the context of litigation.

143 While it is doubtful that this Court has jurisdiction to order pre-action discovery, that argument is moot if these proceedings are directed to proceed by statement of claim.

4. Policy Considerations

Position of the Parties

144 The Respondents submit that it is not the role of this Court to conduct an inquiry into Government actions. Rather they argue the proper role of the court in civil matters is to deal with real disputes between real parties. In that regard they cite Brown.

145 Further, if the Court were to entertain this claim, the Respondents argue that it would be tantamount to instigating a public inquiry of Alberta Children's Services. They also fear that it could lead to the appointment of endless individuals to investigate and prosecute claims in which they have no interest.

Analysis

146 Although I generally agree with position put forward by the Respondents, in my view such considerations can only be determined in the context of the known circumstances of a particular

case. In the present instance these concerns cannot be thoughtfully considered at this juncture. Rather, they are more properly dealt with in considering the merits of the substantive applications.

CONCLUSION

147 This is a preliminary application brought by the Respondents to strike the Originating Notice commenced by the Applicant, on the basis that the court does not have jurisdiction to grant the relief claimed in that Originating Notice.

148 For the reasons set out above, I find that the Court is unable to grant the relief requested under Rule 410(e).

149 However, I have also found above that there is jurisdiction to make the orders requested under the parens patriae jurisdiction, but that there is no evidence yet presented upon which to determine whether the Court would exercise its discretion to engage that jurisdiction.

150 Finally, I find that, in an action brought byway of statement of claim, the court has under its inherent jurisdiction to control its own process, the jurisdiction generally to appoint or permit a next friend who is a stranger in the case, to relieve him of the responsibility for costs, to order document production and to direct that the Government be liable for the costs of the action in the appropriate circumstances. Thus, as discussed above, the court does have the jurisdiction to grant the types of relief claimed by the Applicant.

151 Accordingly, given the unique circumstances of this case where the Public Trustee and the Children's Advocate appear to be unwilling or unable to pursue these potential claims against the Respondents, rather than striking the Originating Notice, I find that, in the interests of justice, it is more appropriate to continue this matter as a statement of claim under the authority of Rule 560 in order that the merits of substantive application can be fully canvassed and determined.

152 Obviously, the Applicant will need to draft an appropriate statement of claim in this regard incorporating the items of relief which he is seeking in this motion. Further I would expect it will be necessary for him to bring interlocutory applications for interim relief and directions. Therefore, I will remain case management judge of this proceeding.

153 The preliminary application by the Respondents to strike the proceeding is dismissed. Counsel may apply to the court for such further directions as may be required, including any direction as to the costs of this preliminary application.

BROOKER J.

cp/s/qw/qlmmm/qlcas/qlbxr

1 Rule 129 states:

> 129(1) The court may at any stage of the proceedings order to be struck out or amended any pleading in the action, on the ground that
>
> (a) it discloses no cause of action or defence, as the case may be, or

(b) it is scandalous, frivolous or vexatious, or
(c) it may prejudice, embarrass or delay the fair trial of the action, or
(d) it is otherwise an abuse of the process of the court, and may order the action to be stayed or dismissed or judgement to be entered accordingly.

(2) No evidence shall be admissible on an application under clause (a) of subrule (1).

(3) This Rule, so far as applicable, applies to an originating notice and a petition.

TAB 29

Case Name:

Twinn v. Poitras

Walter Twinn, Council of the Sawridge Band and the Sawridge Band

v.

Elizabeth Bernadette Poitras, Her Majesty the Queen in Right of Canada as represented by The Minister of Indian Affairs and Northern Development

[2012] S.C.C.A. No. 152

[2012] C.S.C.R. no 152

File No.: 34760

Supreme Court of Canada

Record created: April 10, 2012.
Record updated: July 19, 2012.

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Status:

Application for leave to appeal dismissed with costs (without reasons) July 19, 2012.

Catchwords:

Civil procedure -- Case management -- Mootness -- Aboriginal law -- Band membership -- Whether the principles of fairness dictate that leave should be granted -- Whether access to justice concerns dictate that leave should be granted -- Whether concerns about recognition and implementation of the constitution dictate that leave should be granted -- Whether leave should be granted because this decision potentially implicates the independence of the judiciary.

Case Summary:

In 1989, the respondent, Elizabeth Poitras, started an action against the Sawridge Band claiming membership in the Band. The Sawridge Band defended, in part, on the basis that it had a right under

section 35 of the Constitution Act, 1982 to determine its membership. The action was stayed pending the outcome of another action that the Federal Court regarded as being closely related, in which the Band was challenging amendments to the Indian Act and was advancing the same arguments. The closely related action was dismissed: Sawridge Band v. The Queen, 2008 FC 322, 319 F.T.R. 217, aff'd 2009 FCA 123, 391 N.R. 375 (leave to appeal to the S.C.C. refused). With the dismissal of the closely related action, the Federal Court issued a notice of status review and a case management conference was held to discuss what was to become of Ms. Poitras' action and, in particular, the issue of her membership in the Band. During the conference, the issue of mootness was discussed, having been raised in the submissions filed.

The Federal Court case management judge ordered that the issue of whether Elizabeth Poitras was a member of the Sawridge Band was moot. The Federal Court of Appeal dismissed the applicants' appeal.

Counsel:

Philip Healey (Aird & Berlis LLP), for the motion.

Terence P. Glancy, contra.

Chronology:

1. Application for leave to appeal:

FILED: April 10, 2012.
SUBMITTED TO THE COURT: June 4, 2012.
DISMISSED WITH COSTS: July 19, 2012 (without reasons).
Before: LeBel, Abella and Cromwell JJ.

The application for leave to appeal is dismissed with costs to the respondent Her Majesty the Queen in Right of Canada.

Procedural History:

Judgment at first instance: Case management judge ordering issue of Band membership, moot.
Federal Court, Hugessen J., July 22, 2010.

Judgment on appeal: Applicants' appeal, dismissed.
Federal Court of Appeal, Evans, Pelletier and Stratas
JJ.A., February 8, 2012.
2012 FCA 47; [2012] F.C.J. No. 193.

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