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 1 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 1

ALBERTA
RULES OF COURT

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Division 2
Litigation Representatives

Litigation representative required

2.11 Unless otherwise ordered by the Court, the following individuals or estates must have a litigation representative to bring or defend an action or to continue or to participate in an action, or for an action to be brought or to be continued against them:

(a) an individual under 18 years of age;

(b) an individual declared to be a missing person under section 7 of the *Public Trustee Act*;

(c) an adult who, in respect of matters relating to a claim in an action, lacks capacity, as defined in the *Adult Guardianship and Trusteeship Act*, to make decisions;

(d) an individual who is a represented adult under the *Adult Guardianship and Trusteeship Act* in respect of whom no person is appointed to make a decision about a claim;

(e) an estate for which no personal representative has obtained a grant under the *Surrogate Rules* (AR 130/95) and that has an interest in a claim or intended claim.

AR 124/2010 s2.11;122/2012

Information note

The rules for the appointment of a litigation representative would *not* apply if a personal representative of an estate had obtained a grant under the *Surrogate Rules*.

Types of litigation representatives and service of documents

2.12(1) There are 3 types of litigation representatives under these rules:

(a) an automatic litigation representative described in rule 2.13 *[Automatic litigation representatives]*;

(b) a self-appointed litigation representative under rule 2.14 *[Self-appointed litigation representatives]*;

(c) a Court-appointed litigation representative under rule 2.15 *[Court appointment in absence of self-appointment]*, 2.16 *[Court-appointed litigation representative]* or 2.21 *[Litigation representative: termination, replacement, terms and conditions]*.

(2) Despite any other provision of these rules, if an individual has a litigation representative in an action,

(a) service of a document that would otherwise be required to be effected on the individual must be effected on the litigation representative, and

(b) service of a document on the individual for whom the litigation representative is appointed is ineffective.

Information note

Litigation representatives are served with commencement documents in accordance with rule 11.7 *[Service on litigation representatives]*.

The Court may terminate, replace or impose terms and conditions on litigation representatives under rule 2.21 *[Litigation representative: termination, replacement, terms and conditions]*.

Automatic litigation representatives

2.13 A person is a litigation representative under these rules if the person has authority to commence, compromise, settle or defend a claim on behalf of an individual or an estate under any of the following:

(a) an enactment;

(b) an instrument authorized by an enactment;

(c) an order authorized under an enactment;

(d) a grant or an order under the *Surrogate Rules* (AR 130/95);

(e) an instrument, other than a will, made by a person, including, without limitation, a power of attorney or a trust.

Self-appointed litigation representatives

2.14(1) If an individual or estate who is required to have a litigation representative under rule 2.11 *[Litigation representative required]* does not have one, an interested person

(a) may file an affidavit in Form 1 containing the information described in subrule (2), and by doing so becomes the litigation representative for that individual or estate, and

(b) where an interested person has, or proposes to, become the litigation representative under clause (a) for an estate, the interested person must serve notice of the appointment in Form 2 on the beneficiaries and heirs at law of the deceased.

(2) The affidavit must include

(a) the interested person's agreement in writing to be the litigation representative,

(b) the reason for the self-appointment,

(c) the relationship between the litigation representative and the individual or estate the litigation representative will represent,

(d) a statement that the litigation representative has no interest in the action adverse in interest to the party the litigation representative will represent,

(e) if the litigation representative is an individual, a statement that the litigation representative is a resident of Alberta,

(f) if the litigation representative is a corporation, the place of business or activity of the corporation in Alberta, and

(g) an acknowledgment of potential liability for payment of a costs award attributable to or liable to be paid by the litigation representative.

(3) If a person proposes to become a self-appointed litigation representative for the estate of a deceased person, the affidavit referred to in subrule (2) must, in addition to the matters set out in subrule (2), disclose any of the following matters that apply:

(a) whether the estate has a substantial interest in the action or proposed action;

(b) whether the litigation representative has or may have duties to perform in the administration of the estate of the deceased;

(c) whether an application has been or will be made for administration of the estate of the deceased;

(d) whether the litigation representative does or may represent interests adverse to any other party in the action or proposed action;

(e) Repealed AR 143/2011 s2.

(4) A person proposing to become a self-appointed litigation representative has no authority to make or defend a claim or, without the Court's permission, to make an application or take any proceeding in an action, until the affidavit referred to in subrule (1)(a) is filed.

AR 124/2010 s2.14;143/2011

Information note

For the liability of a litigation representative to pay a costs award, see rule 10.47 *[Liability of litigation representative for costs]*.

Court appointment in absence of self-appointment

2.15(1) If an individual or estate who is required to have a litigation representative under rule 2.11 *[Litigation representative required]* does not have one, an interested person may, or if there is no interested person, a party adverse in interest must, apply to the Court for directions about the appointment of a litigation representative for that individual or estate.

(2) On an application under subrule (1), the Court may appoint a person as litigation representative.

Court-appointed litigation representatives in limited cases

2.16(1) This rule applies to an action concerning any of the following:

(a) the administration of the estate of a deceased person;

(b) property subject to a trust;

(c) the interpretation of a written instrument;

(d) the interpretation of an enactment.

(2) In an action described in subrule (1), a person or class of persons who is or may be interested in or affected by a claim, whether presently or for a future, contingent or unascertained interest, must have a Court-appointed litigation representative to make a claim in or defend an action or to continue to participate in an action, or for a claim in an action to be made or an action to be continued against that person or class of persons, if the person or class of persons meets one or more of the following conditions:

(a) the person, the class or a member of the class cannot be readily ascertained, or is not yet born;

(b) the person, the class or a member of the class, though ascertained, cannot be found;

(c) the person, the class or the members of the class can be ascertained and found, but the Court considers it expedient to make an appointment to save expense, having regard to all the circumstances, including the amount at stake and the degree of difficulty of the issue to be determined.

(3) On application by an interested person, the Court may appoint a person as litigation representative for a person or class of persons to whom this rule applies on being satisfied that both the proposed appointee and the appointment are appropriate.

Lawyer appointed as litigation representative

2.17(1) If the Court appoints a lawyer as the litigation representative for an individual referred to in rule 2.11(a) to (d), *[Litigation representative required]*, the Court may direct that the costs incurred in performing the duties of the litigation representative be borne by

(a) the parties or by one or more of them, or

(b) any fund in Court in which the individual for whom the litigation representative is appointed has an interest.

(2) The Court may give any other direction for repayment of costs or for an advance payment of costs as the circumstances require.

Approval of settlement

2.18(1) If a settlement is proposed in an action or claim described in rule 2.16 *[Court-appointed litigation representatives in limited cases]* and some of the persons interested in the settlement are not parties to the action but are persons who have the same interest as those who are parties to the action, and who assent to the settlement, the Court may approve the settlement and order that it binds the persons who are not parties if the Court is satisfied that

(a) the settlement will be for the benefit of those interested persons, and

(b) to require service on those persons would cause unreasonable expense or delay.

(2) The interested persons referred to in subrule (1) are bound by the Court's order unless the order is obtained by fraud or by non-disclosure of important facts.

Court approval of settlement, discontinuance, and abandonment of actions

2.19 Unless a litigation representative has express authority under an instrument, order or enactment to settle, discontinue or abandon an action, the litigation representative may do so only with the Court's approval.

Information note

Under rule 3.36(2) *[Judgment in default of defence and noting in default]*, a judgment in default of filing a statement of defence may be entered against a defendant represented by a litigation representative only with the Court's permission.

Money received by litigation representative

2.20(1) If as a result of an action a litigation representative receives money, other than under a costs award, that money must be paid into Court unless the Court otherwise orders or an enactment or instrument otherwise provides.

(2) A payment made to a litigation representative on account of money due to a party represented by the litigation representative, other than under a costs award, is not a valid discharge as against that party unless otherwise provided by an instrument, order or enactment.

Information note

Money paid into Court is subject to rules in Part 13 *[Technical Rules]* Division 7 *[Payment into Court and Payment out of Court]*.

Litigation representative: termination, replacement, terms and conditions

2.21 The Court may do one or more of the following:

(a) terminate the authority or appointment of a litigation representative;

(b) appoint a person as or replace a litigation representative;

(c) impose terms and conditions on, or on the appointment of, a litigation representative or cancel or vary the terms or conditions.

Service and filing of affidavits and other evidence in reply and response

3.11(1) If the respondent to an originating application intends to rely on an affidavit or other evidence when the originating application is heard or considered, the respondent must reply by serving on the originating applicant, a reasonable time before the originating application is to be heard or considered, a copy of the affidavit or other evidence on which the respondent intends to rely.

(2) The originating applicant may respond by affidavit or other evidence to the respondent's affidavit or other evidence and must

(a) serve the response affidavit or other evidence on the respondent a reasonable time before the originating application is to be heard or considered, and

(b) limit the response to replying to the respondent's affidavit or other evidence.

(3) If either the respondent or originating applicant does not give the other reasonable notice under this rule, and an adjournment is not granted,

(a) the party who did not give reasonable notice may not rely on the affidavit or other evidence unless the Court otherwise permits, and

(b) the Court may make a costs award against the party who did not give reasonable notice.

Application of statement of claim rules to originating applications

3.12 At any time in an action started by originating application the Court may, on application, direct that all or any rules applying to an action started by statement of claim apply to the action started by originating application.

Information note

See also rule 3.10 *[Application of Part 4 and Part 5]*.

Questioning on affidavit and questioning witnesses

3.13(1) The following persons may be questioned by a party adverse in interest:

(a) a person who makes an affidavit in support of an originating application;

(b) a person who makes an affidavit in response;

(c) a person who makes an affidavit in reply to a response.

(2) Subject to rule 3.21 *[Limit on questioning]*, a person may be questioned under oath as a witness for the purpose of obtaining a transcript of the person's evidence for use at the hearing of an originating application.

(3) A party may question a person whom the party is entitled to question under this rule by serving on the person an appointment for questioning.

(b) defer making a decision on who is liable to pay the costs of the application or proceeding until every party is served with notice of the date, time and place at which the Court will consider who is liable to pay the costs.

When costs award may be made

10.30(1) Unless the Court otherwise orders or these rules otherwise provide, a costs award may be made

(a) in respect of an application or proceeding of which a party had notice, after the application has been decided,

(b) in respect of a settlement of an action, application or proceeding, or any part of any of them, in which it is agreed that one party will pay costs without determining the amount, and

(c) in respect of trials and all other matters in an action, after judgment or a final order has been entered.

(2) If the Court does not make a costs award or an order for an assessment officer to assess the costs payable when an application or proceeding is decided or when judgment is pronounced or a final order is made, either party may request from an assessment officer an appointment date for an assessment of costs under rule 10.37 *[Appointment for assessment]*.

Court-ordered costs award

10.31(1) After considering the matters described in rule 10.33 *[Court considerations in making a costs award]*, the Court may order one party to pay to another party, as a costs award, one or a combination of the following:

(a) the reasonable and proper costs that a party incurred to file an application, to take proceedings or to carry on an action, or that a party incurred to participate in an application, proceeding or action, or

(b) any amount that the Court considers to be appropriate in the circumstances, including, without limitation,

(i) an indemnity to a party for that party's lawyer's charges, or

(ii) a lump sum instead of or in addition to assessed costs.

(2) Reasonable and proper costs under subrule (1)(a)

(a) include the reasonable and proper costs that a party incurred to bring an action;

(b) unless the Court otherwise orders, include costs incurred by a party

(i) in an assessment of costs before the Court, or

(ii) in an assessment of costs before an assessment officer;

(c) do not include costs related to a dispute resolution process described in rule 4.16 *[Dispute resolution processes]* or a judicial dispute resolution process under an arrangement described in rule 4.18 *[Judicial dispute resolution arrangement]* unless a party engages in serious misconduct in the course of the dispute resolution process or judicial dispute resolution process;

(d) do not include, unless the Court otherwise orders, the fees and other charges of an expert for an investigation or inquiry or the fees and other charges of an expert for assisting in the conduct of a summary trial or a trial.

(3) In making a costs award under subrule (1)(a), the Court may order any one or more of the following:

(a) one party to pay to another all or part of the reasonable and proper costs with or without reference to Schedule C *[Tariff of Recoverable Fees]*;

(b) one party to pay to another an amount equal to a multiple, proportion or fraction of an amount set out in any column of the tariff in Division 2 of Schedule C *[Tariff of Recoverable Fees]* or an amount based on one column of the tariff, and to pay to another party or parties an amount based on amounts set out in the same or another column;

(c) one party to pay to another party all or part of the reasonable and proper costs with respect to a particular issue, application or proceeding or part of an action;

(d) one party to pay to another a percentage of assessed costs, or assessed costs up to or from a particular point in an action.

(4) The Court may adjust the amount payable by way of deduction or set-off if the party that is liable to pay a costs award is also entitled to receive an amount under a costs award.

(5) In appropriate circumstances, the Court may order, in a costs award, payment to a self-represented litigant of an amount or part of an amount equivalent to the fees specified in Schedule C *[Tariff of Recoverable Fees]*.

(6) The Court's discretion under this rule is subject to any specific requirement of these rules about who is to pay costs and what costs are to be paid.

Costs in class proceeding

10.32 In a proceeding under the *Class Proceedings Act* or in a representative action, the Court, in determining whether a costs award should be made against the unsuccessful representative party, may take into account one or more of the following factors, in addition to any other factors the Court considers appropriate:

(a) the public interest;

(b) whether the action involved a novel point of law;

(2) If the amount of costs payable as originally assessed by the assessment officer has been paid and, after payment, is reduced on appeal, the judge hearing the appeal may order the return of the excess by the party who has received it and the order may be enforced as an order of the Court.

AR 124/2010 s10.45;163/2010

Division 3
Other Matters Related to Lawyers' Charges and Litigation Costs

Review and assessment under enactments

10.46(1) If an enactment requires or authorizes an amount to be considered, taxed, assessed or reviewed under these rules, a review officer or an assessment officer, as the circumstances require, must consider, tax, assess or review the amount

(a) in accordance with the enactment, and

(b) in accordance with any of these rules that apply or that can be applied or should be applied by analogy.

(2) If an enactment requires or authorizes both lawyers' charges and other costs of proceedings to be considered, taxed, assessed or reviewed under these rules, a review officer must perform the function

(a) in accordance with the enactment, and

(b) in accordance with any of these rules that apply or that can be applied or should be applied by analogy.

(3) A review officer or assessment officer acting under this rule has all the powers that the officer has in carrying out a review or an assessment of costs under this Part in addition to any powers that the officer has under the enactment.

(4) A decision of a review officer or an assessment officer may be appealed under rule 10.26 *[Appeal to judge]* or 10.44 *[Appeal to judge]*, as circumstances permit, and rule 10.27 *[Decision of the judge]* or 10.45 *[Decision of the judge]* applies as the case requires.

Liability of litigation representative for costs

10.47(1) A litigation representative for a plaintiff is liable to pay a costs award against the plaintiff.

(2) A litigation representative for a defendant is not liable to pay a costs award against the defendant unless

(a) the litigation representative has engaged in serious misconduct, and

(b) the Court so orders.

Information note

For rules about litigation representatives see Part 2 *[The Parties to Litigation]* Division 2 *[Litigation Representatives]*.

Recovery of goods and services tax

10.48(1) Unless the Court otherwise orders, a party entitled to costs in a costs award is entitled to recover the goods and services tax on those costs by providing a certificate in accordance with subrule (2) that is satisfactory to the assessment officer.

(2) The certificate must be in the form of an affidavit endorsed on, attached to or filed with the bill of costs stating that

(a) the person making the affidavit has personal knowledge of the facts stated,

(b) the party entitled to receive payment under the bill of costs, and not another party, will actually pay the goods and services tax on that party's costs,

(c) the goods and services tax will not be passed on to, or be reimbursed by, any other person, and

(d) the party entitled to receive payment under the bill of costs is not eligible for the goods and services tax input tax credit.

Division 4
Sanctions

Subdivision 1
Penalty

Penalty for contravening rules

10.49(1) The Court may order a party, lawyer or other person to pay to the court clerk a penalty in an amount determined by the Court if

(a) the party, lawyer or other person contravenes or fails to comply with these rules or a practice note or direction of the Court without adequate excuse, and

(b) the contravention or failure to comply, in the Court's opinion, has interfered with or may interfere with the proper or efficient administration of justice.

(2) The order applies despite

(a) a settlement of the action, or

(b) an agreement to the contrary by the parties.

TAB 2

Case Name:

Blueberry Interim Trust (Re)

Re: the Blueberry Interim Trust and the Blueberry Not-for-Profit Trust

[2012] B.C.J. No. 343

2012 BCSC 254

Docket: S083911

Registry: Vancouver

British Columbia Supreme Court
Vancouver, British Columbia

T.W. Bowden J.

Heard: November 7, 2011.
Judgment: February 21, 2012.

(32 paras.)

Counsel:

Counsel for the Petitioner, The Canada Trust Company:
R.M. Kyle.

Counsel for the Petitioners, the Trustees of the Blueberry Interim Trust and Blueberry Not-for-Profit Trust: E.J. Milton, Q.C.

Agent for four members of the Blueberry River First Nations Band as trustees of the Blueberry Interim Trust:
L. Hotte, (via video).

Counsel for the Respondent, The Public Guardian and Trustee of British Columbia: W. Branch, S.M. Precious, A. Francis.

Counsel for the Respondent, Blueberry River First Nations Chief and Council: K.D. Lee, M.M. Giltrow, S. Kearns.

Individual members of Blueberry River First Nations Band: Self-Represented, (via video).

Ruling on Interest and Costs

T.W. BOWDEN J.:--

Introduction

1 On July 22, 2011, this Court directed that minor beneficiaries of the Blueberry Interim Trust (the "Interim Trust"), who became entitled to distributions as members of the Blueberry Band, were entitled to interest on such distributions. The citation for that decision is *Blueberry Interim Trust (Re)*, 2011 BCSC 769. The following declaratory orders were made:

1) Minors who became entitled to distributions as members of the Blueberry Band were entitled to the payment of interest on those distributions calculated from the date of entitlement until the date of payment of such distributions; and
2) Interest payments owed to the minors may be paid out of the Interest Hold-Back (as described in the reasons for judgment) on a basis to be determined by the Court.

2 The parties have now spoken to the determination of the amount of interest payable to the minors and the costs in these proceedings, and these are my further orders.

Determination of Interest Payable

3 As the trust provisions do not contemplate the payment of interest on a distribution, the Trustees do not have the power to pay any amount as interest unless enabling orders are made by this Court. The trustees have asked the court for clear and precise directions as to how interest is to be calculated and paid to the minors who have attained or will attain the age of majority.

4 In deciding upon the approach to determine the amount to be paid to the minor beneficiaries when they reach the age of majority, this Court seeks to achieve fairness and equality in the treatment of all beneficiaries of the Interim Trust.

5 In my view, a different approach should be taken in relation to beneficiaries who have turned 19 years of age and received their distribution and those beneficiaries who have not yet reached the age of 19 and will receive their distribution in the future.

Former Minor Beneficiaries Who Are Now 19 Years of Age

6 There is no clear basis in law for the determination of a method of payment that would result in the fair and equal treatment of the minor beneficiaries in the circumstances of this case. The suggested methods of determining the amount payable are as follows:

1) Basing the amount on the actual return received on the undistributed funds.
2) By reference to the Consumer Price Index in Canada;
3) By reference to the *Court Order Interest Act*;
4) By reference to Rule 23-4(6) of the *Rules of Court*; and
5) The "money market" rate.

7 With respect to beneficiaries who attained the age of 19 prior to the date of this judgment, while a starting point might be to require the trustees to pay any amount received from the investment of the funds allocated to those beneficiaries but not distributed, all counsel agree that it would be impractical to account for the income that may have been earned on the funds prior to their distribution. It is therefore necessary to establish a notional basis for determining the additional amount that should now be paid out to such beneficiaries.

8 Although it is not an interest calculation per se, the use of the Consumer Price Index would mean that when a minor receives payment, the amount paid, together with their share of the distribution, would allow him or her to purchase the same basket of goods that could have been purchased with the amount originally allocated to them.

9 If the Consumer Price Index is applied to the amounts payable to the minor beneficiaries, the upper limit of the amount that would be paid to them is $5,017,759.

10 The *Court Order Interest Act* does not actually apply in the circumstances of this case. However, it does represent a statutory basis for determining interest before and after a judgment of the Court. In practice, pre-judgment interest is usually awarded based on the rate payable under Rule 23-4(6) which is 2% below the prime lending rate of the banker to the government on January 1 and July 1 in each year. Pre-judgment interest under the *Court Order Interest Act* is simple interest while interest under Rule 23-4(6) is compounded semi-annually on January 1 and July 1 each year.

11 Rule 23-4(6) is intended to compensate a party for the loss of use of funds paid into court if it is later determined that they were entitled to the funds. If this approach is taken, the upper limit of interest that could have accrued for the benefit of minors is $5,771,600.

12 Some representatives of the Blueberry Band made submissions by video link from Fort St. John. I understood their position to be that the rate used by the Public Guardian and Trustee for funds held in trust for minors where the amount exceeds $25,000, should be used. This is described as the "money market" rate and if applied in this case would result in a payment to the minors of about $9,167,500. I note that the Public Guardian and Trustee does not advocate the use of the Money Market rate in this case and submits that the more conservative rate determined under Rule 23-4(6) should be used. In my view, it would not be fair to all beneficiaries to use the Money Market rate for distributions to the minor beneficiaries.

13 Counsel for the Blueberry Band Council submits that the objective of fair and equal treatment can be achieved by applying the Consumer Price Index.

14 Counsel for the Public Guardian and Trustee submits that the rate derived from Rule 23-4(6) should be applied. He argues that the court is not seeking to address inflation but rather the non-payment of interest, which may or may not account for inflation.

15 In my view, the method that best achieves the goal of recognizing the time value of money to the beneficiaries who have already turned 19 and been paid their distribution without interest is a notional interest rate, and not the Consumer Price Index, which seeks to address the impact of inflation on the price of goods and services. In determining the rate of interest, it is my view that the rate in Rule 23-4(6) provides a notional rate that achieves fairness and equality among all beneficiaries. It is a conservative rate and therefore while it compensates the minors for the lost use of the money, it does not represent an unfair burden on the remaining beneficiaries. It is also my view that com-

pound interest more fairly compensates the minors on the basis how their funds would have been invested had they been invested prudently.

16 I also note that the amount that is expected to be payable applying the rate in Rule 23-4(6) is greater than the amount determined by applying the Consumer Price Index. Thus, the minors will also receive an amount in lieu of interest that addresses the inflation that has occurred since the allocations were made.

17 Accordingly, the interest payable to minors who have attained the age of 19 years prior to the date of this judgment shall be the rate specified in Rule 23-4(6), namely, the prime lending rate less 2% compounded semi-annually on January 1 and July 1 of each year applied to the amount allocated and paid to such beneficiaries from the Interim Trust and the Distribution Trusts I to VI and from the date of such allocation until the date of payment. In the event that the calculation of such interest results in a negative interest rate because the applicable prime rate is less than 2%, then a rate of .25% shall be applied by the Trustees.

18 The date of such distribution shall be deemed to be the date of the beneficiary's 19th birthday unless, after a review of their records, the Trustees of the Blueberry Interim Trust determine that the distribution occurred on a date other than their 19th birthday, or unless evidence is provided to Canada Trust within 90 days of the date of these directions that establishes that a beneficiary received his or her distribution on a day other than their 19th birthday in which event the actual date of distribution shall be used.

19 The interest payments shall be made from the funds held back by the Trustee of the Blueberry Interim Trust for that purpose.

Minor Beneficiaries Who Are Not Yet 19 Years of Age

20 With regard to minor beneficiaries who have not reached the age of 19 by the date of this judgment, and the evidence is that about 160 band members fall into this category, I have concluded that interest payments in the future should be based on the actual rate of return generated by the undistributed funds after the date of this judgment. I reached this conclusion because this approach is consistent with trust law principles that the trustees invest the undistributed funds prudently so as to receive a reasonable rate of return, which return should be allocated and paid to the beneficiaries properly entitled thereto. Prior to and until the date of this judgment, the rate of interest applied to undistributed funds held for this group of beneficiaries shall be the same as applied to the beneficiaries who have already turned 19, namely the rate specified in Rule 23-4(6) with a minimum rate of .25%.

21 As the distribution monies were transferred to the Blueberry Permanent Trust in February 2008, the Interim Trust is not in a position to generate any income on the distributions to fund interest payments to minors in the future. As noted by Canada Trust, the only interest being generated is on the Holdback funds, which is currently at a rate of 1.1 per cent. Once interest payments have been made to members who have turned 19 years of age, the amount of the Holdback will be significantly reduced. If the Trustees of the Interim Trust are required to pay interest based on the actual rate of return generated on the distribution funds held in the Blueberry Trust, it appears that there is a risk that there will be insufficient funds in the Holdback to pay interest to all of the minors in the future, particularly if the market rate of interest increases.

22 In order to properly address the future interest payment obligation, the Trustees of the Blueberry Permanent Trust should be included in these proceedings and given an opportunity to make submissions as to the transfer of the remaining funds of the Interim Trust to the Blueberry Trust and their obligations when making distribution to beneficiaries who subsequently reach the age of 19.

23 The inclusion of the trustees of the Blueberry Trust will also allow them to make submissions regarding their obligations in relation to the distribution directed by the Band Council on July 10, 2007, of $13,000 which was made from the Blueberry Permanent Trust and not from the Blueberry Interim Trust. After receiving appropriate notice, the trustees of the Blueberry Permanent Trust will be included in these proceedings. Following submissions, the Court will then make the appropriate orders binding all parties going forward.

24 To reflect the preceding reasons, the following orders are made regarding the payment of interest:

1) Beneficiaries who were minors at the time distributions were made, but who attained the age of majority before the date of this judgment, shall receive interest on their distribution at the rate prescribed in Rule 23-4(6), but in any event at a rate not less than .25%.
2) Interest payable to former minor beneficiaries who have received their distribution shall be calculated up to the date of the distribution that was made to them.
3) If after 90 days from the date of this judgment, the trustees of the Interim Trust have been unable to determine the date of a distribution which has been made to a former minor beneficiary and no evidence has been presented to the trustees of the Interim Trust that establishes that a distribution was made on a day other than their 19th birthday, then the date of distribution shall be deemed to be the 19th birthday of the minor beneficiary.
4) With respect to minor beneficiaries who have not attained the age of majority prior to the date of this judgment, interest shall be calculated on their distributions at the rate prescribed in Rule 23-4(6), but not less than .25%, until the date of this judgment, and thereafter such minor beneficiaries shall be entitled to the actual rate of return on the undistributed funds held in trust for each of them until such time as each minor beneficiary attains the age of 19 years and is paid their share of the distribution.
5) The trustees of the Interim Trust shall forthwith serve the trustees of the Blueberry Permanent Trust with a copy of the petition, the judgment of June 13, 2011, and this judgment, and in accordance with Rule 16-1(4) of the *Supreme Court Civil Rules*, the trustees shall have 21 days to respond to the petition, but only in respect of the following three issues:

    a. Whether the remaining funds in the Blueberry Interim Trust should be transferred to the Blueberry Permanent Trust after interest is paid out to the former minors who have already reached the age of majority, and after the payment of the costs of the parties as ordered by this Court;

b. Whether the trustees of the Blueberry Permanent Trust must pay out interest on distributions to those minors who have not yet reached the age of majority at the rate under Rule 23-4(6) until the date of this judgment and then at the actual rate of return on the funds from the date of this judgment until the date the funds are distributed to the beneficiaries when they attain the age of majority; and

c. Whether, with respect to the July, 2007 distribution from the Blueberry Permanent Trust, the trustees of the Blueberry Permanent Trust must pay interest to minor beneficiaries at the rate under Rule 23-4(6) to the date of this judgment and at the actual rate of return on the funds from the date of this judgment until the date the funds are distributed to the beneficiaries when they attain the age of majority.

Costs

25 The Trustees of the Interim Trust seek an award for costs on an indemnity basis for legal fees and disbursements of approximately $282,000. None of the parties oppose this order being made.

26 In *Geffin v. Goodman*, [1991] 2 S.C.R. 353, the Supreme Court of Canada said that the courts have long held that trustees are entitled to be indemnified for all costs, including legal costs, which they have reasonably incurred and which they have not recovered from any other person, out of the funds held by them unless they have acted unreasonably or for their own benefit. There is no suggestion that the trustees in this case have acted unreasonably in any respect or acted for their own benefit. In commencing the petition in this case, the trustees acted prudently in order to have the issues raised by the Public Guardian and Trustee dealt with by the court before transferring the monies held by the Blueberry Interim Trust to the Blueberry Permanent Trust.

27 I am prepared to order costs to the Trustees of the Interim Trust on an indemnity basis to be paid from the holdback amount, however, as these proceedings have not addressed the reasonability or fairness of the legal costs of the trustee, this order shall be subject to the rights of any beneficiary to have the legal accounts of the trustee taxed by a registrar.

28 With regard to the costs of the Public Guardian and Trustee, an order is sought pursuant to ss. 10 and 15 of the *Infants Act*, R.S.B.C. c. 223, that he recover his legal costs on an indemnity basis from the holdback amount.

29 The Public Guardian and Trustee also submits that his costs should be paid on a pro rata basis from the holdback for all minors and former minors who have benefitted from his intervention. The Public Guardian points out that the benefits that will flow to the minors from this Court's decision came about because of his concern that interest was not being paid on distributions to minors when they reached the age of majority. While his concern arose because of the children in his care, all minor beneficiaries of the Blueberry Interim Trust now stand to benefit.

30 One of the band members speaking by video from Fort St. John stated her opposition to the payment of the legal costs of the Public Guardian and Trustee, but provided no reasons for her opposition.

31 The Public Guardian's legal costs as of the date of the preparation of its submissions to this Court, which is indicated to be October 6, 2011, are $245,679.

32 In my view, the legal costs of the Public Guardian and Trustee were incurred as a result of proceedings in which it was necessary or expedient for the Public Guardian and Trustee to participate and the results are beneficial to all minor beneficiaries both past and future. I order that, following the taxation thereof, such legal costs be paid out of the holdback funds on a pro rata basis based upon the amount distributed to each beneficiary as a result of this decision.

T.W. BOWDEN J.

cp/e/qlrds/qljxr

TAB 3

Case Name:

Braid Builders Supply & Fuel Ltd. v. Genevieve Mortgage Corp.

Between
Braid Builders Supply & Fuel Ltd., B.A.C.M. Limited and Winters Pluming & Heating Ltd., (plaintiffs) respondents, and Genevieve Mortgage Corporation Limited, (defendant) appellant

[1972] M.J. No. 31

29 D.L.R. (3d) 373

17 C.B.R. (N.S.) 305

Manitoba Court of Appeal

Freedman C.J.M., Dickson and Hall JJ.A.

Heard: June 2, 1972.
Judgment: June 27, 1972.

(5 paras.)

Counsel:

P. Nurgitz, for the (plaintiffs) respondents, Braid and Winters.
L. Smordin, for the (plaintiff) respondent, B.A.C.M.
C.K. Tallin and G.M. Pullan, for the (defendant) appellant.
J.S. Lemont, for the Receiver, F.G. Patrick.

The judgment of the Court was delivered by

1 **DICKSON J.A.**:-- The disposition of this appeal does not present any difficulty if one bears in mind that a Receiver appointed by the Court is the Receives of the Court, not the Receiver of the parties who sought the appointment: Boehm v. Goodall (1911) 1 Cr. 155 followed by the British

Columbia Court of Appeal in Johnston v. Courtney, [1920] 2 W.W.R. 459. In the performance of his duties the Receiver is subject to the order and direction of the Court, not the parties. The parties do not control his acts nor his expenditures and cannot therefore in justice, be accountable for his fees or for the reimbursement of his expenditures. It follows that the Receiver's remuneration must come out of the assets under the control of the Court and not from the pocket of those who sought his appointment. This is subject, however, to the proviso that at the time of the appointment the Court may direct that one or other of the parties be responsible for such remuneration, as was done in Howell v. Dawson (1884) 13 Q.B.D. 67.

2 Mr. F.G. Patrick was appointed Receiver of all of the undertaking, property and assets of Redman Construction Limited (Redman) on March 30, 1970, at the nadir in the affairs of that Company. Work on the apartment block which Redman was constructing had stopped. The block was far from complete; creditors were clamouring for payment; subcontractors were removing equipment which was on-site but net installed. The secured creditor Genevieve Mortgage Corporation Limited (Genevieve) had begun mortgage sale proceedings the result of which, if carried to foreclosure, would wipe out the claims of unsecured creditors. There were unresolved questions of priorities between Genevieve and unsecured creditors: vide the judgment of this Court in Winnipeg Supply & Fuel Company Limited v. Genevieve Mortgagee Corporation Limited, [1972] 1 W.W.R. 651. It was desirable to vest someone with authority to complete construction if this were found to be feasible. In this confused and somewhat frenetic state of affairs the appointment of a Receiver was not a surprising development. Additionally, the evidence before the Court at that time indicated that if completed at an estimated additional cost of $669,000.00, the apartment block would have a sale value of $2,200,000.00 to $2,400,000.00. The secured claim of Genevieve amounted to $1,100,000.00. There was therefore premise of some equity from which unsecured creditors could recover at least part of their claims totalling $1,193,000.00.

3 When all the smoke had cleared, it turned out that the apartment block, sold in March 1972 in its incomplete state, realized only $1,035,000.00, which was less than Genevieve's mortgage claim. Hunt, J. therefore ordered that the fees of the Receiver and his counsel, totalling $20,000.00, and the disbursements of the Receiver, aggregating $25,000.00, be paid from the sale of an apartment block in Selkirk owned by Pedman, against which Genevieve had a, mortgage claim exceeding the value of the block. Genevieve concedes that $18,733.68 of the disbursements of the Receiver are properly payable out of the proceeds of the sale of the Selkirk property but contends that the balance of the disbursements, and all of the fees, should be borne by the three respondents who, on behalf of the unsecured creditors, brought the motion for the appointment of the Receiver.

4 Genevieve submits that the judgment appealed from is erroneous in several respects.

(1) The estimates of the value of Redman's assets were unrealistic. It is far too late to advance that argument. At the time of the appointment of the Receiver estimates of value were contained in an affidavit of Mr. W.G. Braid filed in support of the motion. Genevieve did not file affidavit evidence refuting these estimates; nor did it appeal the order of Hunt, J. appointing the Receiver. It is late in the day now to challenge the estimates. It may be that in light of what later transpired the estimates were sanguine but there were circumstances which may have affected the final sale price of the block. After the appointment of the Receiver a tender was received for the purchase of the block at $1,376,500.00, subject to financing. The financing could not be arranged due to a substantial increase in interest rates

shortly after the appointment of the Receiver. Also, the block stood vacant for a period of two years prior to sale. We are, unable to say that the estimates made in March 1970 were unrealistic. In any event, Hunt, J. was entitled to rely on them and did so.

(2) The Judge erred in holding that any action of the Receiver protected the property of Redman or resulted in any value being realized from the Selkirk property greater than Genevieve itself could have achieved. We would question the relevance of this contention, even if valid, as a consideration to be taken into account in determining by whom the fees of the Receiver are to be paid, particularly as the quantum of such fees has not been questioned. The contention is not valid. The Judge held that the Receiver did protect the property and that his actions did result in the sale of the Selkirk property at a price, apparently some $20,000.00, in excess of the amount which others, including Genevieve, were prepared to accepted, and there was evidence upon which such findings could be made.

(3) The Judge erred in charging the costs of the Receiver on property in which Redman had no equity. The argument is that a Receiver can only receive his remuneration and costs from property in which an equity remains. No authority was quoted in support of this proposition. There are cases to the contrary; Strapp v. Bull Sons & Co. Shaw v. School Board of London (1895) 2 Ch. 1; In re Glasdir Corner Mines Limited (1906) 1 Ch. 355. It would seem to us that if appellants argument is sound, one would be hard put to find anyone willing to be a Receiver; he would be denied recovery of his fees and disbursements out of property under his administration if the mortgage load borne by that property exceeded the value of the property. The true worth or property tinder administration can rarely be determine at the time of appointment. The Court itself has no funds from which to pay a Receiver. If his fees cannot be maid from assets under administration of the Court the Receiver would be in the untenable position of having to seek recovery from the creditor who, on behalf of all creditors, asked for the appointment. This could work a grave injustice on the Receiver and on the petitioning creditor. Why should the latter bear all of the costs in respect of an appointment made for the benefit of all creditors, including secured creditors, for the purpose of preserving the property? The argument also appears to proceed on the assumption that when property subject to a mortgage becomes of a value less than the mortgage debt against it, it ceases to belong to the debtor. Property of a debtor, whatever the amount of the mortgage debt against it, remains the property of the debtor until all steps have been taken in law to foreclose the interest of the debtor. All of the debtor's property under administration of the Court, and not rarely the equity of the debtor in that property is available by order of the Court to meet the fees and disbursements of a Receiver.

(4) The Receiver's costs should be borne by those at whose request he was appointed. This argument is largely repetitive and we would say only in response that the appointment is a Court appointment; when made, the appointee becomes an officer of the Court; his fees and disbursements in the absence of an order to the contrary become payable out of the assets subject to the administration of the Court.

5 The appeal is dismissed with costs to each Braid Builders Supply & Fuel Ltd. and B.A.C.M. Limited.

DICKINSON J.A.
Freedman C.J.M.
HALL J.A.

qp/s/qlcbk/qlpls

TAB 4

Indexed as:

Canada Trust Co. v. Ontario Human Rights Commission

Canada Trust Co., trustee for the Leonard Foundation v. Ontario Human Rights Commission; Royal Ontario Museum, Class of Persons Eligible to Receive Scholarships from the Leonard Foundation and Public Trustee

[1990] O.J. No. 615

74 O.R. (2d) 481

69 D.L.R. (4th) 321

37 O.A.C. 191

38 E.T.R. 1

20 A.C.W.S. (3d) 736

Action Nos. 586/87 and 622/87

Ontario
Court of Appeal

Robins and Tarnopolsky JJ.A. and Osler J. (ad hoc)

April 24, 1990.

Counsel:

Janet E. Minor, for Ontario Human Rights Commission, appellant.

Alan P. Shanoff and Francy B. Kussner, for Royal Ontario Museum, intervener.

H. Donald Guthrie, Q.C., and John W.R. Day, for Canada Trust Company, respondent.

William L.N. Somerville, Q.C., and Lindsay A. Histrop, for Class of Persons Eligible to Receive Scholarships from the Leonard Foundation, intervener.

Stan J. Sokol, for Public Trustee, intervener.

1 **ROBINS J.A.** (OSLER J. (ad hoc) concurring):-- The principal question in this appeal is whether the terms of a scholarship trust established in 1923 by the late Reuben Wells Leonard are now contrary to public policy. If they are, the question then is whether the cy-pres doctrine can be applied to preserve the trust.

2 The appeal is from the order of McKeown J. [reported (1987), 61 O.R. (2d) 75, 42 D.L.R. (4th) 263, 27 E.T.R. 193 (H.C.J.)] on an application under s. 60 of the Trustee Act, R.S.O. 1980, c. 512 and rules 14.05(2) [am. O. Reg. 711/89, s. 14] and (3) [am. O. Reg. 711/89, s. 15] of the Rules of Civil Procedure, O. Reg. 560/84, by the Canada Trust Company, as the successor trustee of a scholarship trust known as the Leonard Foundation, for the advice, opinion and direction of the court upon certain questions arising in the administration of the trust. The questions put before the court are as follows:

> 1. Are any of the provisions of, or the policy established under the Indenture made the 28th day of December, 1923 between Reuben Wells Leonard, Settlor of the First Part, and The Toronto General Trusts Corporation, Trustee of the Second Part (the "Indenture") set out in Schedule A hereunder void or illegal or not capable of being lawfully administered by the applicant The Canada Trust Company, successor trustee thereunder, and/or the General Committee and other committees referred to in the Indenture, by reason of
>
> (i) public policy as declared in the Human Rights Code, 1981 (the "Code");
> (ii) other public policy, if any;
> (iii) discrimination because of race, creed, citizenship, ancestry, place of origin, colour, ethnic origin, sex, handicap or otherwise; or
> (iv) uncertainty?
>
> 2. If the answer to any of the questions propounded above is in the affirmative with respect to any of the said clauses or policy, does the trust created by the Indenture fail in whole or in part and if so, who is entitled to the trust fund under the Indenture?
>
> 3. If the answer to any of the questions propounded in paragraph 1 above is in the affirmative with respect to any of the said clauses or policy, but the answer to question 2 is in the negative, is there a general charitable intention expressed in and by the Indenture such that the Court in the exercise of its inherent jurisdictions in matters of charitable trusts will direct that the trust be administered cy-pres?
>
> 4. If the answer to any of the questions propounded in paragraph 1 above is in the affirmative with respect to any of the said clauses or policy, but the answer to question 3 above is also in the affirmative, how should the Trustee and/ or the

General Committee and other committees referred to in the Indenture administer the trust?

5. Does the application form as employed in the administration of the trust constitute a publication, display or other similar representation that indicates the intention of the Trustee or of the General Committee or other committees administering the trust to infringe or to incite the infringement of rights under Part 1 of the Code?

6. If the answer to question 5 is in the affirmative, how should the Committee on Scholarships of The Leonard Foundation and its Honorary Secretary carry out the provisions of the Indenture which require an official application form to be submitted to the Honorary Secretary by a member of the General Committee on behalf of an applicant for a Leonard Scholarship?

3 McKeown J. found that the trust provisions were not invalid for any of the reasons set out in Question 1, which made it unnecessary for him to answer Questions 2, 3 and 4. He answered Question 5 in the negative, which made it unnecessary to answer Question 6.

4 The order has been appealed by two of the parties to the proceedings. The first appellant, the Ontario Human Rights Commission, takes the position that the learned weekly court judge should have declined to answer Questions 1(i), 1(iii) and 5 on the ground that these questions concern the applicability of the Human Rights Code, 1981, S.O. 1981, c. 53, and relate to matters within the exclusive primary jurisdiction of the Commission and, therefore, are not properly before the court.

5 The appellant, the Royal Ontario Museum (the ROM), has status in these proceedings as one of the charitable institutions named in the last will of Reuben Wells Leonard. Under this will, any amount that falls to be administered in the residuary estate is to be divided among certain individuals and charitable institutions as set out by the testator. The ROM's position on this appeal is that the scholarship trust violates public policy and fails completely. In its submission, the judge erred in not holding that the trust fund falls into the Leonard estate and must be distributed to the residual beneficiaries, including the ROM, in accordance with the provisions of the will.

6 The Public Trustee and the Class of Persons Eligible to Receive Scholarships from the Leonard Foundation are interveners in the case. They both support the judgment below and ask that the appeal be dismissed. However, should the court find that the terms of the scholarship trust violate public policy, the Public Trustee submits that the trust nonetheless has a valid charitable purpose and should not fail but should be applied cy-pres without the offending conditions. On the other hand, counsel for the Class of Persons Eligible to Receive Scholarships takes the position that if the trust violates public policy, it fails completely and is incapable of being applied cy-pres.

7 The respondent, Canada Trust Company (the trustee), takes no position other than to suggest that: (1) the court below had jurisdiction to hear the application, and (2) that the indenture in 1923 created a valid charitable trust and, should this court determine by reason of the Human Rights Code, 1981 or other grounds of public policy that the conditions are now void, then either (a) such conditions are merely malum prohibitum and the court should strike them out and leave the charitable trust to operate freed therefrom, or (b) a reference should be directed to apply the fund cy-pres.

THE ISSUES

8 The preliminary issue as to jurisdiction raised by the Ontario Human Rights Commission, can be disposed of very briefly. In my opinion, this application is properly before the court. I agree with McKeown J. and Tarnopolsky J.A. in this regard and have nothing to add to their reasons. On the remaining issues, while I agree with Tarnopolsky J.A. that the appeal must be allowed, my reasons for reaching that conclusion differ from those of my learned colleague.

9 The remaining issues, in my view, reduce themselves to these questions:

1. Do the provisions of the trust contravene public policy or are they void for uncertainty?
2. If the answer to that question is in the affirmative, can the doctrine of cy-pres be applied to save the trust?

10 Before considering these issues, I think it important to examine the trust and review the circumstances that compelled the trustee to launch this application for advice and direction.

THE FACTS

A. The trust document

11 By indenture dated December 28, 1923 (the indenture or trust document), Reuben Wells Leonard (the settlor) created a trust to be known as the Leonard Foundation (the trust or the scholarship trust or the Foundation). He directed that the income from the property transferred and assigned by him to the trust (the trust property or trust fund) be used for the purpose of educational scholarships to be called the Leonard Scholarships. The Canada Trust Company has been appointed successor trustee of the Foundation.

12 The indenture opens with four recitals which relate to the race, religion, citizenship, ancestry, ethnic origin and colour of the class of persons eligible to receive scholarships. These recitals read as follows:

> WHEREAS the Settlor believes that the White Race is, as a whole, best qualified by nature to be entrusted with the development of civilization and the general progress of the World along the best lines:
>
> AND WHEREAS the Settlor believes that the progress of the World depends in the future, as in the past, on the maintenance of the Christian religion:
>
> AND WHEREAS the Settlor believes that the peace of the World and the advancement of civilization depends very greatly upon the independence, the stability and the prosperity of the British Empire as a whole, and that this independence, stability and prosperity can be best attained and assured by the education in patriotic Institutions of selected children, whose birth and training are such as to warrant a reasonable expectation of their developing into leading citizens of the Empire:

> AND WHEREAS the Settlor believes that, so far as possible, the conduct of the affairs of the British Empire should be in the guidance of christian (sic) persons of British Nationality who are not hampered or controlled by an allegiance or pledge of obedience to any government, power or authority, temporal or spiritual, the seat of which government, power or authority is outside the British Empire. For the above reason the Settlor excludes from the management of, or benefits in the Foundation intended to be created by this Indenture, all who are not Christians of the White Race, all who are not of British Nationality or of British Parentage, and all who owe allegiance to any Foreign Government, Prince, Pope, or Potentate, or who recognize any such authority, temporal or spiritual.

13 The schools, colleges and universities in which the scholarships may be granted are described in the body of the Indenture in these terms:

> 2. The Schools, Colleges and Universities in which such Scholarships may be granted and enjoyed, are such one or more of Schools and Colleges in Canada and such one or more of Universities in Canada and Great Britain as the General Committee hereinafter described may from time to time in its absolute discretion select, but subject always to the requirements, terms and conditions concerning same as hereinbefore and hereinafter referred to and set out, and to the further conditions that any School, College or University so selected shall be free from the domination or control of adherents of the class or classes of persons hereinbefore referred to, whom the Settlor intends shall be excluded from the management of or benefits in the said Foundation ...
>
> . . . . .
>
> Provided further and as an addition to the class or type of schools above designated or in the Schedule "A" hereto attached, the term "School" may for the purposes of Scholarships hereunder, include Public Schools and Public Collegiate Institutes and High Schools in Canada of the class or type commonly known as such in the Province of Ontario as distinguished from Public Schools and Collegiate Institutes and High Schools (if any) under the control and domination of the class or classes of persons hereinbefore referred to as intended to be excluded from the management of or benefits in said Foundation, and shall also include a Protestant Separate School, Protestant Collegiate Institute or Protestant High School in the Province of Quebec.
>
> Provided further that in the selection of Schools, Colleges and Universities, as herein mentioned, preference must always be given by the Committee to the School, College or University, which, being otherwise in the opinion of the Committee eligible, prescribes physical training for female students and physical and military or naval training for male students.

(Emphasis added)

> who gave his money, when living, for the benefit of the community, would have desired that his mode of benefiting the community should be adhered to when a better could be found."
>
> Some vain and obstinate donors indeed might prefer to have their own way forever, whether that way should ultimately prove beneficial or not. But why should effect be given to such an unreasonable desire? A man is not allowed to control the disposition of property for private purposes beyond the period of perpetuities. He is permitted to devote his property in perpetuity to charitable purposes only because the public interest is supposed to be promoted by the creation of charities. The public interest is not promoted by the creation of a charity that by the lapse of time ceases to be useful. The founder of a charity should understand therefore that he cannot create a charity that shall be forever exempt from modification.

(Emphasis added)

See generally, Waters, Law of Trusts, at pp. 611-32 (a section entitled "Cy-pres: the Scheme-Making Power"); Power v. Nova Scotia (Attorney General) (1903), 35 S.C.R. 182; Re Fitzpatrick (1984), 6 D.L.R. (4th) 644, 16 E.T.R. 221, 27 Man. R. (2d) 284 (Q.B.); Re Tacon; Public Trustee v. Tacon, [1958] Ch. 447, [1958] 1 All E.R. 163, 102 Sol. Jo. 53 (C.A.); and Re Dominion Students' Hall Trust; Dominion Students' Hall Trust v. Attorney General, [1947] Ch. 183, 176 L.T. 224, 91 Sol. Jo. 100 (Ch. D.).

DISPOSITION

46 To give effect to these reasons, I would strike out the recitals and remove all restrictions with respect to race, colour, creed or religion, ethnic origin and sex as they relate to those entitled to the benefits of the trust and as they relate to the qualifications of those who may be members of the General Committee or give judicial advice and, as well, as they relate to the schools, universities or colleges in which scholarships may be enjoyed. (The provision according preferences to sons and daughters of members of the classes of persons specified in the trust document remains unaffected by this decision.) I would answer the questions posed as follows:

47 Q. 1(ii). Yes, the provisions of the trust which confine management, judicial advice, schools, universities and colleges and benefits on grounds of race, colour, ethnic origin, creed or religion and sex are void as contravening public policy.

48 Q. 1(i), (iii) and (iv). It is not necessary to answer these questions.

Q. 2. No.

Q. 3. Yes.

49 Q. 4. As before, but with the deletion of the discriminatory restrictions mentioned in the answer to Q. 1(ii).

50 QQ. 5 and 6. The application form should be changed in accordance with this decision.

51 In the result, I would allow the appeal, set aside the order of McKeown J., and issue judgment as aforesaid. The costs of the appeal and of the application before McKeown J. shall be paid to the parties on a solicitor-and-client basis out of the corpus of the trust.

TARNOPOLSKY J.A. (concurring in result):--

THE JUDICIAL HISTORY AND THE ISSUES

52 This case concerns appeals from the judgment of McKeown J., dated August 10, 1987 [reported 61 O.R. (2d) 75, 42 D.L.R. (4th) 263, 27 E.T.R. 193] upon an application, under s. 60 of the Trustee Act, R.S.O. 1980, c. 512 and rules 14.05(2) [am. O. Reg. 711/89, s. 14] and (3) [am. O. Reg. 711/89, s. 15] of the Rules of Civil Procedure, O. Reg. 560/84, by the Canada Trust Company, as the successor trustee under an indenture made on December 28, 1923, between one Reuben Wells Leonard, the settlor, and the Toronto General Trusts Corporation, the trustee, for advice and direction upon the following questions arising out of the administration of the trust created by the indenture:

> 1. Are any of the provisions of, or the policy established under the Indenture made the 28th day of December, 1923 between Reuben Wells Leonard, Settlor of the First Part, and The Toronto General Trusts Corporation, Trustee of the Second Part (the "Indenture") set out in Schedule A hereunder void or illegal or not capable of being lawfully administered by the applicant The Canada Trust Company, successor trustee thereunder, and/or the General Committee and other committees referred to in the Indenture, by reason of
>
> (i) public policy as declared in the Human Rights Code, 1981 (the "Code");
> (ii) other public policy, if any;
> (iii) discrimination because of race, creed, citizenship, ancestry, place of origin, colour, ethnic origin, sex, handicap or otherwise; or
> (iv) uncertainty?
>
> 2. If the answer to any of the questions propounded above is in the affirmative with respect to any of the said clauses or policy, does the trust created by the Indenture fail in whole or in part and if so, who is entitled to the trust fund under the Indenture?
>
> 3. If the answer to any of the questions propounded in paragraph 1 above is in the affirmative with respect to any of the said clauses or policy, but the answer to question 2 is in the negative, is there a general charitable intention expressed in and by the Indenture such that the Court in the exercise of its inherent jurisdictions in matters of charitable trusts will direct that the trust be administered cy-pres?
>
> 4. If the answer to any of the questions propounded in paragraph 1 above is in the affirmative with respect to any of the said clauses or policy, but the answer to question 3 above is also in the affirmative, how should the Trustee and/ or the

TAB 5

Case Name:

D.L. v. Alberta (Child, Youth and Family Enhancement Act, Director)

D.L. et al.
v.
Director (Child, Youth and Family Enhancement Act) et al.

[2012] S.C.C.A. No. 364

[2012] C.S.C.R. no 364

File No.: 34975

Supreme Court of Canada

Record created: September 20, 2012.
Record updated: January 21, 2013.

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Status:

Application for leave to appeal submitted to the Court January 21, 2013.

Counsel:

Lydia J. Bubel (Family Law Office - Edmonton, Alberta), for the motion.

Ryan Callioux (Department of Justice), contra.

Chronology:

1. Motion for a stay of execution dismissed September 20, 2012. Before: Fish, Rothstein and Moldaver JJ.

UPON APPLICATION by the applicants for an order staying the judgment of the Court of Appeal of Alberta (Edmonton), Number 1203-0209-AC, 2012 ABCA 275, dated September 19, 2012;

AND HAVING READ THE MATERIAL FILED;

IT IS HEREBY ORDERED THAT

The motion is dismissed without costs.

2. Application for leave to appeal:

FILED: November 19, 2012.
SUBMITTED TO THE COURT: January 21, 2013.
Before: Fish, Rothstein and Moldaver JJ.

e/qlhbb

TAB 6

Case Name:

Alberta (Child, Youth and Family Enhancement Act, Director) v. D.L.

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

[2012] A.J. No. 958

2012 ABCA 275

536 A.R. 207

Docket: 1203-0209-AC

Registry: Edmonton

Alberta Court of Appeal
Edmonton, Alberta

K.G. Ritter, F.F. Slatter and M.B. Bielby JJ.A.

Heard: September 19, 2012.
Oral judgment: September 19, 2012.
Filed: September 19, 2012.

(12 paras.)

Family law -- Child protection -- Protective agencies and institutions -- Types -- Government departments or agencies -- Supervision or guardianship -- Considerations -- Best interests of child -- Condition of child -- Required medical treatment -- Care and custody of child -- Medical and psychological treatment -- Practice and procedure -- Courts -- Jurisdiction -- Parens patriae power -- Statutory authority -- Appeals and judicial review -- Appeal by parents from chambers order dismissed -- Child, age two, remained in persistent coma -- Medical personnel unanimously agreed child would never regain consciousness due to irreversibility of condition -- Parents faced criminal charges in connection with child's injuries -- Director under Child, Youth and Family Enhancement Act sought directions regarding child's continued treatment -- Chambers judge was entitled to invoke parens patriae jurisdiction to order withdrawal from life support and provision of palliative

care -- No error in principle established, as judge carefully considered legal, moral and ethical issues and parents' religious views -- Child, Youth and Family Enhancement Act, s. 22.1(2).

Health law -- Health care professionals -- Treatment, authorization for -- Treatment of children -- Practice and procedure -- Courts -- Jurisdiction -- Appeal by parents from chambers order dismissed -- Child, age two, remained in persistent coma -- Medical personnel unanimously agreed child would never regain consciousness due to irreversibility of condition -- Parents faced criminal charges in connection with child's injuries -- Director under Child, Youth and Family Enhancement Act sought directions regarding child's continued treatment -- Chambers judge was entitled to invoke parens patriae jurisdiction to order withdrawal from life support and provision of palliative care -- No error in principle established, as judge carefully considered legal, moral and ethical issues and parents' religious views -- Child, Youth and Family Enhancement Act, s. 22.1(2).

Appeal by the parents from an order directing that their child be provided with palliative care and that life-extending treatment be withdrawn. The child, age two, was in pediatric intensive care in a persistent coma. Physicians unanimously agreed that the child's condition was irreversible, and that no further medical intervention was warranted, as the child would never regain consciousness. The parents of the child were charged with aggravated assault and other offences related to the child's injuries. They were unable to communicate with medical personnel or one another as a result of their incarceration. The father deposed that his religious beliefs precluded him from accepting the medical team's recommendation that the child be removed from life supporting technology. The Director under the Child, Youth and Family Enhancement Act obtained an apprehension order and applied for directions due to the likely delay in obtaining a permanent guardianship order. The parents challenged the judge's jurisdiction to grant the order under appeal. They argued that withdrawal of care was not within the scope of "essential treatment" described in s. 22.1(2) of the Act.

HELD: Appeal dismissed. Even if the parents were correct that withdrawing life sustaining treatment was not included in the essential treatment provision, there was a gap in the legislative scheme that entitled the judge to invoke her parens patriae jurisdiction. The exercise of that inherent jurisdiction was warranted when the best interests of the child were engaged. The judge made no error in principle that warranted appellate interference. The decision involved reflection and consideration of the legal, moral and ethical issues and the parents' religious beliefs. The medical condition of the child was such that the decision to provide palliative care would be the same, whether or not the parents were responsible for her injuries. Upon dismissal of the appeal, the parents applied for a further stay of the order pending their application for leave to appeal to the Supreme Court of Canada. A stay was refused, as the continued treatment of the child required invasive medical procedures and there were no legal issues of sufficient uncertainty that justified overriding the best interests of the child.

Statutes, Regulations and Rules Cited:

Child, Youth and Family Enhancement Act, RSA 2000, c. C-12, s. 22.1(2), s. 126.2

Supreme Court Act, RSC 1985, c. S-26, s. 65.1

Appeal From:

Appeal from the Order by The Honourable Madam Justice J.M. Ross. Dated the 14th day of September, 2012 (2012 ABQB 562, Docket: FL03-35163).

Counsel:

R.R. Callioux, for the Respondent.

L. Bubel, for the Appellant (D.L).

A.C. Kellett, for the Appellant (M.B.).

J.T. Quinn, for the Child (M).

Memorandum of Judgment

The judgment of the Court was delivered by

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

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

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

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

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

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

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

7 The appeal is therefore dismissed.

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

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

(application for a stay)

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

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

12 The application for a stay is dismissed.

F.F. SLATTER J.A.

cp/ln/e/qlcct/qlcas

TAB 7

Case Name:

E. (Mrs.) v. Eve

Eve, by her Guardian ad litem, Milton B. Fitzpatrick, Official Trustee, appellant;

v.

Mrs. E., Respondent; and Canadian Mental Health Association, Consumer Advisory Committee of the Canadian Association of the Mentally Retarded, The Public Trustee of Manitoba, and Attorney General of Canada, interveners.

[1986] S.C.J. No. 60

[1986] A.C.S. no 60

[1986] 2 S.C.R. 388

[1986] 2 R.C.S. 388

31 D.L.R. (4th) 1

71 N.R. 1

J.E. 86-1051

61 Nfld. & P.E.I.R. 273

13 C.P.C. (2d) 6

2 A.C.W.S. (3d) 42

File No: 16654.

Supreme Court of Canada

1985: June 4, 5 / 1986: October 23.

Present: Dickson C.J. and Beetz, Estey, McIntyre, Chouinard, Lamer, Wilson, Le Dain and La Forest JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR PRINCE EDWARD ISLAND

Courts -- Jurisdiction -- Parens patriae -- Scope of doctrine and discretion required for its exercise -- Whether or not encompassing consent for non-therapeutic sterilization of mentally incompetent person -- Chancery Act, R.S.P.E.I. 1951, c. 21, s. 3 -- Chancery Jurisdiction Transfer Act, S.P.E.I. 1974, c. 65, s. 2.

Family law -- Mentally incompetent person -- Application made for non-therapeutic sterilization of adult daughter by parent -- Whether or not court authorized to grant consent -- Whether or not authority to be found in statutes -- Whether or not authority flowing from parens patriae power -- Mental Health Act, R.S.P.E.I. 1974, c. M-9, am. S.P.E.I. 1976, c. 65, ss. 2(n), 30A(1), (2), 30B, 30L -- Hospitals Act, "Hospital Management Regulations", R.R.P.E.I., c. H-11, s. 48.

Human rights -- Disabled persons -- Mentally incompetent person -- Application made for non-therapeutic sterilization of adult daughter by parent -- Whether or not court authorized to grant consent -- Whether or not authority to be found in statutes -- Whether or not authority flowing from parens patriae power.

"Mrs. E." applied to the Supreme Court of Prince Edward Island for permission to consent to the sterilization of "Eve", her adult daughter who was mentally retarded and suffered from a condition making it extremely difficult to communicate with others. Mrs. E. feared Eve might innocently become pregnant and consequently force Mrs. E., who was widowed and approaching sixty, to assume responsibility for the child. The application sought: (1) a declaration that Eve was mentally incompetent pursuant to the Mental Health Act; (2) the appointment of Mrs. E. as committee of Eve; and (3) an authorization for Eve's undergoing a tubal ligation. The application for authorization to sterilize was denied, and an appeal to the Supreme Court of Prince Edward Island, in banco, was launched. An order was then made appointing the Official Trustee as Guardian ad litem for Eve. The appeal was allowed. The Court ordered that Eve be made a ward of the Court pursuant to the Medical Health Act solely to permit the exercise of the parens patriae jurisdiction to authorize the sterilization, and that the method of sterilization be determined by the Court following further submissions. A hysterectomy was later authorized. Eve's Guardian ad litem appealed.

Held: The appeal should be allowed.

The Mental Health Act did not advance respondent's case. This Act provides a procedure for declaring mental incompetency, at least for property owners. Its ambit is unclear and it would take much stronger language to empower a committee to authorize the sterilization of a person for non-therapeutic purposes. The Hospital Management Regulations were equally inapplicable. They are not aimed at defining the rights of individuals.

The parens patriae jurisdiction for the care of the mentally incompetent is vested in the provincial superior courts. Its exercise is founded on necessity -- the need to act for the protection of those who cannot care for themselves. The jurisdiction is broad. Its scope cannot be defined. It applies to many and varied situations, and a court can act not only if injury has occurred but also if it is apprehended. The jurisdiction is carefully guarded and the courts will not assume that it has been removed by legislation.

While the scope of the parens patriae jurisdiction is unlimited, the jurisdiction must nonetheless be exercised in accordance with its underlying principle. The discretion given under this jurisdiction is to be exercised for the benefit of the person in need of protection and not for the benefit of others. It must at all times be exercised with great caution, a caution that must increase with the seriousness of the matter. This is particularly so in cases where a court might be tempted to act because failure to act would risk imposing an obviously heavy burden on another person.

Sterilization should never be authorized for non-therapeutic purposes under the parens patriae jurisdiction. In the absence of the affected person's consent, it can never be safely determined that it is for the benefit of that person. The grave intrusion on a person's rights and the ensuing physical damage outweigh the highly questionable advantages that can result from it. The court, therefore, lacks jurisdiction in such a case.

The court's function to protect those unable to take care of themselves must not be transformed so as to create a duty obliging the Court, at the behest of a third party, to make a choice between two alleged constitutional rights -- that to procreate and that not to procreate -- simply because the individual is unable to make that choice. There was no evidence to indicate that failure to perform the operation would have any detrimental effect on Eve's physical or mental health. Further, since the parens patria jurisdiction is confined to doing what is for the benefit and protection of the disabled person, it cannot be used for Mrs. E.'s benefit.

Cases involving applications for sterilization for therapeutic reasons may give rise to the issues of the burden of proof required to warrant an order for sterilization and of the precautions judges should take with these applications in the interests of justice. Since, barring emergency situations, a surgical procedure without consent constitutes battery, the onus of proving the need for the procedure lies on those seeking to have it performed. The burden of proof, though a civil one, must be commensurate with the seriousness of the measure proposed. A court in conducting these procedures must proceed with extreme caution and the mentally incompetent person must have independent representation.

Cases Cited

Considered: X (a minor), Re, [1975] 1 All E.R. 697; D (a minor), Re, [1976] 1 All E.R. 326; Eberhardy, Matter of, 307 N.W.2d 881 (Wis. 1981); Grady, In re, 426 A.2d 467 (N.J. 1981); Hayes, Guardianship, Matter of, 608 P. 2d 635 (Wash. 1980); referred to: Cary v. Bertie (1696), 2 Vern. 333, 23 E.R. 814; Morgan v. Dillon (Ire.) (1724), 9 Mod. R. 135, 88 E.R. 361; Beall v. Smith (1873), L.R. 9 Ch. 85; Beverley's Case (1603), 4 Co. Rep. 123 b, 76 E.R. 1118; Wellesley v. Duke of Beaufort (1827), 2 Russ. 1, 38 E.R. 236; Wellesley v. Wellesley (1828), 2 Bli. N.S. 124, 4 E.R. 1078; Beson v. Director of Child Welfare (Nfld.), [1982] 2 S.C.R. 716; Re S. v. McC (orse. S.) and M; W. v. W., [1972] A.C. 24; P (a minor), In re (1981), 80 L.G.R. 301; B (a minor), Re (1982), 3 F.L.R. 117; K and Public Trustee, Re (1985), 19 D.L.R. (4th) 255; Buck v. Bell, 274 U.S. 200 (1927); Tulley, Guardianship of, App., 146 Cal.Rptr. 266 (1978); Hudson v. Hudson, 373 So.2d 310 (Ala. 1979); Eberhardy's Guardianship, Matter of, 294 N.W.2d 540 (Wis. 1980); Stump v. Sparkman, 435 U.S. 349 (1978); C.D.M., Matter of, 627 P. 2d 607 (Alaska 1981); A. W., Matter of, 637 P. 2d 366 (Colo. 1981); Terwilliger, Matter of, 450 A.2d 1376 (Pa. 1982); Wentzel v. Montgomery General Hospital, Inc., 447 A.2d 1244 (Md. 1982); Moe, Matter of, 432 N.E.2d 712 (Mass. 1982); P.S. by Harbin v. W.S., 452 N.E.2d 969 (Ind. 1983); Sallmaier, Matter of, 378 N.Y.S.2d 989 (1976); A. D., Application of, 394 N.Y.S.2d 139 (1977); Penny N., In re, 414 A.2d 541 (N.H.

1980); Quinlan, Matter of, 355 A.2d 647 (N.J. 1976); J. v. C., [1970] A.C. 668; Strunk v. Strunk, 445 S.W.2d 145 (Ky. 1969).

Statutes and Regulations Cited

Act for the Relief of the Suitors of the High Court of Chancery, 15 & 16 Vict., c. 87, s. 15 (U.K.)
Act to authorize the appointment of a Master of the Rolls to the Court of Chancery, and an Assistant Judge of the Supreme Court of Judicature in this Island, 11 Vict., c. 6 (P.E.I.)
Act to provide for the care and maintenance of idiots, lunatics and persons of unsound mind, 15 Vict., c. 36 (P.E.I.)
Canadian Charter of Rights and Freedoms, ss. 7, 15(1).
Chancery Act, R.S.P.E.I. 1951, c. 21, s. 3.
Chancery Jurisdiction Transfer Act, S.P.E.I. 1974, c. 65, s. 2.
Hospitals Act, R.S.P.E.I. 1974, c. H-11, s. 16.
Hospitals Act, "Hospital Management Regulations", R.R.P.E.I., c. H-11, s. 48.
Mental Health Act, R.S.P.E.I. 1974, c. M-9, as amended by S.P.E.I. 1974, c. 65, ss. 2(n), 30A(1), (2), 30B, 30L.
Sexual Sterilization Act, R.S.A. 1970, c. 341, rep. S.A. 1972, c. 87.
Sexual Sterilization Act, R.S.B.C. 1960, c. 353, s. 5(1), rep. S.B.C. 1973, c. 79.

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Lachance, Denise. "In re Grady: The Mentally Retarded Individual's Right to Choose Sterilization," 6 Am. J.L. & Med. 559 (1981).
McIvor, Craig L. "Equitable Jurisdiction to Order Sterilizations," 57 Wash. L.R. 373 (1982).
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Ross, Deborah Hardin. "Sterilization of the Developmentally Disabled: Shedding Some Myth-Conceptions," 9 Fla. St. U.L. Rev. 599 (1981).
Sherlock, Richard K. and Robert D. Sherlock. "Sterilizing the Retarded: Constitutional, Statutory and Policy Alternatives," 60 N.C.L. Rev. 943 (1982).
Theobald, Sir Henry Studdy. The Law Relating to Lunacy. London: Stevens and Sons Ltd., 1924.

APPEAL from a judgment of the Prince Edward Island Court of Appeal (1980), 27 Nfld. & P.E.I.R. 97, 74 A.P.R. 97, with addendum (1981), 28 Nfld. & P.E.I.R. 359, 97 A.P.R. 359, 115 D.L.R. (3d) 283, allowing an appeal from a judgment of McQuaid J. dismissing an application for consent to the sterilization of a mentally incompetent person. Appeal allowed.

Eugene P. Rossiter, for the appellant.
Walter McEwen, for the respondent.
B.A. Crane, Q.C., for the intervener the Canadian Mental Health Association.
David H. Vickers, Harvey Savage and S. D. McCallum, for the intervener the Consumer Advisory Committee of the Canadian Association for the Mentally Retarded.

M. Anne Bolton, for the intervener The Public Trustee of Manitoba.
E.A. Bowie, Q.C., and B. Starkman, for the intervener the Attorney General of Canada.

Solicitors for the appellant: Scales, Jenkins & McQuaid, Charlottetown.
Solicitors for the respondent: Campbell, McEwen & McLellan, Summerside.
Solicitors for the intervener Canadian Mental Health Association: Gowling & Henderson, Ottawa.
Solicitors for the intervener Canadian Association for the Mentally Retarded: Vickers & Palmer, Victoria.
Solicitor for the intervener The Public Trustee of Manitoba: The Public Trustee of Manitoba, Winnipeg.
Solicitor for the intervener Attorney General of Canada: Roger Tasse, Ottawa.

The judgment of the Court was delivered by

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

Background

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

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

16(k)) does not so much authorize the performance of an operation as direct that none shall be performed in the absence of appropriate consents, except in cases of necessity. The enumerated consents and necessity are at law valid defences in certain circumstances to a suit for battery that might be brought as a result of an unauthorized operation. So, for the purposes of managing the workings of the hospital, the regulations require that these consents be signed. They do not purport to regulate the validity of the consents; this is otherwise governed by law. Indeed, I rather doubt that the Act empowers the making of regulations affecting the rights of the individual, particularly a basic right involving an individual's physical integrity. For in the absence of clear words, statutes are, of course, not to be read as depriving the individual of so basic a right. In a word, the intent of the regulations is to provide for the governance of hospitals, not human rights.

30 In summary, MacDonald J. appears to have been right in doubting that the trial judge had properly addressed the threshold question of whether Eve was incompetent. In truth, however, these questions of possible statutory power only amounted to a preliminary skirmish. Argument really centred on the question of whether a superior court, as successor to the powers of the English Court of Chancery could, in the exercise of its parental control as the repository of the Crown's jurisdiction as parens patriae, authorize the performance of the operation in question here. It is to that issue that I now turn.

Parens Patriae Jurisdiction -- Its Genesis

31 There appears to have been some uncertainty in the courts below and in the arguments presented to us regarding the courts' wardship jurisdiction over children and the parens patriae jurisdiction generally. For that reason, it may be useful to give an account of the parens patriae jurisdiction and to examine its relationship with wardship.

32 The origin of the Crown's parens patriae jurisdiction over the mentally incompetent, Sir Henry Theobald tells us, is lost in the mists of antiquity; see H. Theobald, The Law Relating to Lunacy (1924). De Prerogativa Regis, an instrument regarded as a statute that dates from the thirteenth or early fourteenth century, recognized and restricted it, but did not create it. Theobald speculates that "the most probable theory [of its origin] is that either by general assent or by some statute, now lost, the care of persons of unsound mind was by Edw. I taken from the feudal lords, who would naturally take possession of the land of a tenant unable to perform his feudal duties"; see Theobald, supra, p. 1.

33 In the 1540's, the parens patriae jurisdiction was transferred from officials in the royal household to the Court of Wards and Liveries, where it remained until that court was wound up in 1660. Thereafter the Crown exercised its jurisdiction through the Lord Chancellor to whom by letters patent under the Sign Manual it granted the care and custody of the persons and the estates of persons of unsound mind so found by inquisition, i.e., an examination to determine soundness or unsoundness of mind.

34 Wardship of children had a quite separate origin as a property right arising out of the feudal system of tenures. The original purpose of the wardship jurisdiction was to protect the rights of the guardian rather than of the ward. Until 1660 this jurisdiction was also administered by the Court of Wards and Liveries which had been created for the purpose.

35 When tenures and the Court of Wards were abolished, the concept of wardship should, in theory, have disappeared. It was kept alive, however, by the Court of Chancery, which justified it as an aspect of its parens patriae jurisdiction; see, for example, Cary v. Bertie (1696), 2 Vern. 333, at

p. 342, 23 E.R. 814, at p. 818; Morgan v. Dillon (Ire.) (1724), 9 Mod. R. 135, at p. 139, 88 E.R. 361, at p. 364. In time wardship became substantively and procedurally assimilated to the parens patriae jurisdiction, lost its connection with property, and became purely protective in nature. Wardship thus is merely a device by means of which Chancery exercises its parens patriae jurisdiction over children. Today the care of children constitutes the bulk of the courts' work involving the exercise of the parens patriae jurisdiction.

36 It follows from what I have said that the wardship cases constitute a solid guide to the exercise of the parens patriae power even in the case of adults. There is no need, then, to resort to statutes like the Mental Health Act to permit a court to exercise the jurisdiction in respect of adults. But proof of incompetence must, of course, be made.

37 This marks a difference between wardship and parens gatriae jurisdiction over adults. In the case of children, Chancery has a custodial jurisdiction as well, and thus has inherent jurisdiction to make them its wards; this is not so of adult mentally incompetent persons (see Beall v. Smith (1873), L.R. 9 Ch. 85, at p. 92). Since, however, the Chancellor had been vested by letters patent under the Sign Manual with power to exercise the Crown's parens patriae jurisdiction for the protection of persons so found by inquisition, this difference between the two procedures has no importance for present purposes.

38 By the early part of the nineteenth century, the work arising out of the Lord Chancellor's jurisdiction became more than one judge could handle and the Chancery Court was reorganized and the work assigned to several justices including the Master of the Rolls. In 1852 (by 15 & 16 Vict., c. 87, s. 15 (U.K.)) the jurisdiction of the Chancellor regarding the "Custody of the Persons and Estates of Persons found idiot, lunatic or of unsound Mind" was authorized to be exercised by anyone for the time being entrusted by virtue of the Sign Manual.

39 The current jurisdiction of the Supreme Court of Prince Edward Island regarding mental incompetents is derived from the Chancery Act which amalgamated a series of statutes dealing with the Court of Chancery, beginning with that of 1848 (11 Vict., c. 6 (P.E.I.)) Section 3 of The Chancery Act, R.S.P.E.I. 1951, c. 21, substantially reproduced the law as it had existed for many years. It vested in the Court of Chancery the following powers regarding the mentally incompetent:

> ... and in the case of idiots, mentally incompetent persons or persons of unsound mind, and their property and estate, the jurisdiction of the Court shall include that which in England was conferred upon the Lord Chancellor by a Commission from the Crown under the Sign Manual, except so far as the same are altered or enlarged as aforesaid.

By virtue of the Chancery Jurisdiction Transfer Act, S.P.E.I. 1974, c. 65, s. 2, the jurisdiction of the Chancery Court was transferred to the Supreme Court of Prince Edward Island. It will be obvious from these provisions that the Supreme Court of Prince Edward Island has the same parens patriae jurisdiction as was vested in the Lord Chancellor in England and exercised by the Court of Chancery there.

Anglo-Canadian Development

40 Since historically the law respecting the mentally incompetent has been almost exclusively focused on their estates, the law on guardianship of their persons is "pitifully unclear with respect to some basic issues"; see P. McLaughlin, Guardianship of the Person (Downsview 1979), p. 35. De-

spite this vagueness, however, it seems clear that the parens patriae jurisdiction was never limited solely to the management and care of the estate of a mentally retarded or defective person. As early as 1603, Sir Edward Coke in Beverley's Case, 4 Co. Rep. 123 b, at pp. 126 a, 126 b, 76 E.R. 1118, at p. 1124, stated that "in the case of an idiot or fool natural, for whom there is no expectation, but that he, during his life, will remain without discretion and use of reason, the law has given the custody of him, and all that he has, to the King" (emphasis added). Later at the bottom of the page he adds:

> 2. Although the stat. says, custodiam terrarum, yet the King shall have as well the custody of the body, and of their goods and chattels, as of the lands and other hereditaments, and as well those which he has by purchase, as those which he has as heirs by the common law.

At 4 Co. Rep. p. 126 b, 76 E.R. 1125, he cites Fitzherbert's Natura Brevium to the same effect. Theobald (supra, pp. 7-8, 362) appears to be quite right when he tells us that the Crown's prerogative "has never been limited by definition". The Crown has an inherent jurisdiction to do what is for the benefit of the incompetent. Its limits (or scope) have not, and cannot, be defined.

41 The famous custody battle waged by one Wellesley in the early nineteenth century sheds some light on the exercise of the king's parens patriae jurisdiction by the Lord Chancellor. Wellesley (considered an extremely dissolute and objectionable father due to his philandering ways and vulgar language, in spite of his "high" birth), waged a lengthy court battle to gain custody of his children following the death of his estranged wife who had entrusted the care of the children to members of her family. In Wellesley v. Duke of Beaufort (1827) 2 Russ. 1, 38 E.R. 236, Lord Eldon, then Lord Chancellor, in discussing the jurisdiction of the Court of Chancery, touched upon the King's parens patriae power at 2 Russ. 20, 38 E.R. 243. He there made it clear that "it belongs to the King, as parens patriae, having the care of those who are not able to take care of themselves, and is founded on the obvious necessity that the law should place somewhere the care of individuals who cannot take care of themselves, particularly in cases where it is clear that some care should be thrown round them". He then underlined that the jurisdiction has been exercised for the maintenance of children solely when there was property, not because of any rule of law, but for the practical reason that the court obviously had no means of acting unless there was property available.

42 The discussion on appeal to the House of Lords (Wellesley v. Wellesley (1828), 2 Bli. N.S. 124, 4 E.R. 1078) is also instructive. Far from limiting the jurisdiction to children, Lord Redesdale there adverted to the fact that the court's jurisdiction over children had been adopted from its jurisdiction over mental incompetents. He noted that "Lord Somers resembled the jurisdiction over infants, to the care which the Court takes with respect to lunatics, and supposed that the jurisdiction devolved on the Crown, in the same way"; 2 Bli. N.S. at p. 131, 4 E.R. at p. 1081. The jurisdiction, he said, extended "as far as is necessary for protection and education"; 2 Bli. at p. 136, 4 E.R. at p. 1083. It continues to this day, and even where there is legislation in the area, the courts will continue to use the parens patriae jurisdiction to deal with uncontemplated situations where it appears necessary to do so for the protection of those who fall within its ambit; see Beson v. Director of Child Welfare (Nfld.), [1982] 2 S.C.R. 716.

43 It was argued before us, however, that there was no precedent where the Lord Chancellor had exercised the parens patriae jurisdiction to order medical procedures of any kind. As to this, I would say that lack of precedent in earlier times is scarcely surprising having regard to the state of

medical science at the time. Nonetheless, it seems clear from Wellesley v. Wellesley, supra, that the situations in which the courts can act where it is necessary to do so for the protection of mental incompetents and children have never been, and indeed cannot, be defined. I have already referred to the remarks of Lord Redesdale. To these may be added those of Lord Manners who, at Bli. pp. 142-43, and 1085, respectively, expressed the view that "It is ... impossible to say what are the limits of that jurisdiction; every case must depend upon its own circumstances."

44 Reference may also be made to Re X (a minor), [1975] 1 All E.R. 697, for a more contemporary description of the parens patriae jurisdiction. In that case, the plaintiff applied to Latey J. for an order making a fourteen year old girl who was psychologically fragile and high strung a ward of the court and for an injunction prohibiting the publication of a book revealing her father's private life which, it was felt, would be grossly damaging psychologically to her if she should read it. Latey J. issued the wardship order and the injunction requested. In speaking of his jurisdiction in the matter, he had this to say, at p. 699:

> On the first of the two questions already stated, it is argued for the defendants, first, that because the wardship jurisdiction has never been involved in any case remotely resembling this, the court, though theoretically having jurisdiction, should not entertain the application, but bar it in limine. I do not accept that contention. It is true that this jurisdiction has not been invoked in any such circumstances. I do not know whether they have arisen before or, if they have, whether anyone has thought of having recourse to this jurisdiction. But I can find nothing in the authorities to which I have been referred by counsel or in my own researches to suggest that there is any limitation in the theoretical scope of this jurisdiction; or, to put it another way, that the jurisdiction can only be invoked in the categories of cases in which it has hitherto been invoked, such as custody, care and control, protection of property, health problems, religious upbringing, and protection against harmful associations. That list is not exhaustive. On the contrary, the powers of the court in this particular jurisdiction have always been described as being of the widest nature. That the courts are available to protect children from injury whenever they properly can is no modern development.
>
> (Emphasis added.)

Latey J. then cited a passage from Chambers on Infancy (1842), p. 20 that indicates that protection may be accorded against prospective as well as present harm. The passage states in part:

> And the Court will interfere not merely on the ground of an injury actually done, or attempted against the infant's person or property; but also if there be any likelihood of such an occurrence, or even an apprehension or suspicion of it.

45 The Court of Appeal disagreed with Latey J.'s exercise of discretion, essentially because he had failed to consider the public interest in the publication of the book, and accordingly reversed his order. The court, however, did not quarrel with his statement of the law. Thus Lord Denning, M.R., at p. 703 had this to say:

> No limit has ever been set to the jurisdiction. It has been said to extend 'as far as necessary for protection and education': see Wellesley v Wellesley by Lord

> Redesdale. The court has power to protect the ward from any interference with his or her welfare, direct or indirect.

Roskill L.J., also reinforced the broad ambit of the jurisdiction. He said, at p. 705:

> I would agree with counsel for the plaintiff that no limits to that jurisdiction have yet been drawn and it is not necessary to consider here what (if any) limits there are to that jurisdiction. The sole question is whether it should be exercised in this case. I would also agree with him that the mere fact that the courts have never stretched out their arms so far as is proposed in this case is in itself no reason for not stretching out those arms further than before when necessary in a suitable case.

Sir John Pennycuick at p. 706 agreed:

> ... the courts, when exercising the parental power of the Crown, have, at any rate in legal theory, an unrestricted jurisdiction to do whatever is considered necessary for the welfare of a ward. It is, however, obvious that far-reaching limitations in principle on the exercise of this jurisdiction must exist. The jurisdiction is habitually exercised within those limitations.

At p. 707 he added:

> Latey J's statement of the law is I think correct, but he does not lay sufficient emphasis on the limitations with which the courts should exercise this jurisdiction.

46 It will be observed from the remarks of Sir John Pennycuick, as well as the words emphasized in Latey J.'s judgment, that the theoretically unlimited nature of the jurisdiction, to which I have also previously referred, has to do with its scope. It must, of course, be used in accordance with its informing principles, a matter about which I shall have more to say.

47 In recent years, the English courts have extended the jurisdiction to cases involving medical procedures. In Re S. v. McCorse. S. and M.; W. v. W., [1972] A.C. 24, the House of Lords, relying in part on its protective jurisdiction over infants, approved of a blood test being taken of a husband and his wife and a child with a view to determining the paternity of the child.

48 The court's jurisdiction to sanction the non-therapeutic sterilization of a mentally handicapped person arose before Heilbron J. of the Family Division of the English High Court of Justice in Re D (a minor), [1976] 1 All E.R. 326, a case that bears a considerable resemblance to the present. D, a girl, was born with a condition known as Sotos Syndrome, the symptoms of which include accelerated growth during infancy, epilepsy, clumsiness, an unusual facial appearance, behavioural problems including aggressiveness, and some impairment of mental functions that could result in dull intelligence or more serious mental retardation. D displayed these various symptoms, although she was not as seriously retarded as some children similarly afflicted. She possessed a dull normal intelligence. She was sent to an appropriate school but did not do well partly because of behavioural problems. When she was ten, however, she was sent to a school specializing in children with learning difficulties and associated behavioural problems. She then showed marked improvement in her academic skills, social competence and behaviour.

actual interests and preferences of the mental incompetent. This, it is thought, recognizes her moral dignity and right to free choice. Since the incompetent cannot exercise that choice herself, the court does so on her behalf. The fact that a mental incompetent is, either because of age or mental disability, unable to provide any aid to the court in its decision does not preclude the use of the substituted judgment test.

71 The respondent submitted that this test should be adopted in this country. As in the case of the best interests test, various guidelines have been developed by the courts in the United States to ensure the proper use of this test.

Summary and Disposition

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

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

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

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

76 I have no doubt that the jurisdiction may be used to authorize the performance of a surgical operation that is necessary to the health of a person, as indeed it already has been in Great Britain and this country. And by health, I mean mental as well as physical health. In the United States, the courts have used the parens patriae jurisdiction on behalf of a mentally incompetent to authorize chemotherapy and amputation, and I have little doubt that in a proper case our courts should do the

same. Many of these instances are related in Strunk v. Strunk, 445 S.W.2d 145 (Ky. 1969), where the court went to the length of permitting a kidney transplant between brothers. Whether the courts in this country should go that far or as in Quinlan permit the removal of life-sustaining equipment, I leave to later disposition.

77 Though the scope or sphere of operation of the parens patriae jurisdiction may be unlimited, it by no means follows that the discretion to exercise it is unlimited. It must be exercised in accordance with its underlying principle. Simply put, the discretion is to do what is necessary for the protection of the person for whose benefit it is exercised; see the passages from the reasons of Sir John Pennycuick in Re X, at pp. 706-07, and Heilbron J. in Re D, at p. 332, cited earlier. The discretion is to be exercised for the benefit of that person, not for that of others. It is a discretion, too, that must at all times be exercised with great caution, a caution that must be redoubled as the seriousness of the matter increases. This is particularly so in cases where a court might be tempted to act because failure to do so would risk imposing an obviously heavy burden on some other individual.

78 There are other reasons for approaching an application for sterilization of a mentally incompetent person with the utmost caution. To begin with, the decision involves values in an area where our social history clouds our vision and encourages many to perceive the mentally handicapped as somewhat less than human. This attitude has been aided and abetted by now discredited eugenic theories whose influence was felt in this country as well as the United States. Two provinces, Alberta and British Columbia, once had statutes providing for the sterilization of mental defectives; The Sexual Sterilization Act, R.S.A. 1970, c. 341, repealed by S.A. 1972, c. 87; Sexual Sterilization Act, R.S.B.C. 1960, c. 353, s. 5(1), repealed by S.B.C. 1973, c. 79.

79 Moreover, the implications of sterilization are always serious. As we have been reminded, it removes from a person the great privilege of giving birth, and is for practical purposes irreversible. If achieved by means of a hysterectomy, the procedure approved by the Appeal Division, it is not only irreversible; it is major surgery. Here, it is well to recall Lord Eldon's admonition in Wellesley's case, supra, at 2 Russ. p. 18, 38 E.R. p. 242, that "it has always been the principle of this Court, not to risk the incurring of damage to children which it cannot repair, but rather to prevent the damage being done". Though this comment was addressed to children, who were the subject matter of the application, it aptly describes the attitude that should always be present in exercising a right on behalf of a person who is unable to do so.

80 Another factor merits attention. Unlike most surgical procedures, sterilization is not one that is ordinarily performed for the purpose of medical treatment. The Law Reform Commission of Canada tells us this in Sterilization, Working Paper 24 (1979), a publication to which I shall frequently refer as providing a convenient summary of much of the work in the field. It says at p. 3:

> Sterilization as a medical procedure is distinct, because except in rare cases, if the operation is not performed, the physical health of the person involved is not in danger, necessity or emergency not normally being factors in the decision to undertake the procedure. In addition to its being elective it is for all intents and purposes irreversible.

As well, there is considerable evidence that non-consensual sterilization has a significant negative psychological impact on the mentally handicapped; see Sterilization, supra, at pp. 49-52. The Commission has this to say at p. 50:

> It has been found that, like anyone else, the mentally handicapped have individually varying reactions to sterilization. Sex and parenthood hold the same significance for them as for other people and their misconceptions and misunderstandings are also similar. Rosen maintains that the removal of an individual's procreative powers is a matter of major importance and that no amount of reforming zeal can remove the significance of sterilization and its effect on the individual psyche.
>
> In a study by Sabagh and Edgerton, it was found that sterilized mentally retarded persons tend to perceive sterilization as a symbol of reduced or degraded status. Their attempts to pass for normal were hindered by negative self perceptions and resulted in withdrawal and isolation rather than striving to conform ....
>
> The psychological impact of sterilization is likely to be particularly damaging in cases where it is a result of coercion and when the mentally handicapped have had no children.

81 In the present case, there is no evidence to indicate that failure to perform the operation would have any detrimental effect on Eve's physical or mental health. The purposes of the operation, as far as Eve's welfare is concerned, are to protect her from possible trauma in giving birth and from the assumed difficulties she would have in fulfilling her duties as a parent. As well, one must assume from the fact that hysterectomy was ordered, that the operation was intended to relieve her of the hygienic tasks associated with menstruation. Another purpose is to relieve Mrs. E. of the anxiety that Eve might become pregnant, and give birth to a child, the responsibility for whom would probably fall on Mrs. E.

82 I shall dispose of the latter purpose first. One may sympathize with Mrs. E. To use Heilbron J.'s phrase, it is easy to understand the natural feelings of a parent's heart. But the parens patriae jurisdiction cannot be used for her benefit. Its exercise is confined to doing what is necessary for the benefit and protection of persons under disability like Eve. And a court, as I previously mentioned, must exercise great caution to avoid being misled by this all too human mixture of emotions and motives. So we are left to consider whether the purposes underlying the operation are necessarily for Eve's benefit and protection.

83 The justifications advanced are the ones commonly proposed in support of non-therapeutic sterilization (see Sterilization, passim). Many are demonstrably weak. The Commission dismisses the argument about the trauma of birth by observing at p. 60:

> For this argument to be held valid would require that it could be demonstrated that the stress of delivery was greater in the case of mentally handicapped persons than it is for others. Considering the generally known wide range of post-partum response would likely render this a difficult case to prove.

84 The argument relating to fitness as a parent involves many value-loaded questions. Studies conclude that mentally incompetent parents show as much fondness and concern for their children as other people; see Sterilization, supra, p. 33 et seq., 63-64. Many, it is true, may have difficulty in coping, particularly with the financial burdens involved. But this issue does not relate to the benefit of the incompetent; it is a social problem, and one, moreover, that is not limited to incompetents.

TAB 8

Case Name:

Horse Lake First Nation v. Horseman

Between
Horse Lake First Nation, as represented by its chief and council, Chief Dion Horseman and Councillors Dean Horseman, Rick Horseman, Priscilla Horseman and Peter Joachim, applicants/plaintiffs, and Faye Horseman, Charlotte Lynn Horseman, Norma Horseman, Francis Cross also known as Francis Parsons, Judy Belcourt, Gail Belcourt and Mavis Bellerose, defendants/respondents

[2003] A.J. No. 179

2003 ABQB 114

[2003] 8 W.W.R. 457

17 Alta. L.R. (4th) 78

337 A.R. 22

[2003] 2 C.N.L.R. 180

121 A.C.W.S. (3d) 649

Action No. 0303 01739

Alberta Court of Queen's Bench
Judicial District of Edmonton

Lee J.

Heard: January 29 and 31, 2003.
Judgment: February 5, 2003.

(71 paras.)

Indians, Inuit and Metis -- Rights -- Federal or provincial human rights legislation -- Effect of Constitution Act -- Constitution Act, 1982, s. 35, interpretation -- Civil rights -- Canadian Charter of Rights and Freedoms -- Application of, persons protected -- Injunctions -- Particular matters -- Nuisance -- Harassment or invasion of privacy.

Application by Horse Lake Firs Nation, the Band Chief and various members of the Band Council for a restraining order against the Horseman defendants. The applicants also sought a determination of whether the Canadian Charter of Rights and Freedoms applied to the dispute. Horse Lake brought an action to put a stop to what it alleged was a prima facie trespass by the Horseman defendants. The Horseman defendants asserted that they had a Charter right to freely express themselves, which included the right to post signs and demand forensic audits and mandatory drug testing of the Chief and Council. The Horseman defendants had been occupying the Band Administration offices. Horse Lake alleged that this disruption had a prejudicial effect on the membership of the Band as a whole.

HELD: Application allowed. The Horseman defendants were prohibited from harassing or interfering with the applicants at the Band Council Office and their individual residences. On an interim basis, the court held that the Charter applied to Aboriginal Reservations and Bands and protected freedom of expression with respect to Band Council members. The communal property was owned and operated for the benefit of all members of the Band, including the Horseman defendants. The Horseman defendants were engaging in an apparent expression of discontent and protest over what they perceived as improper actions by the Chief and Band Council with respect to the administration of funds. There had been no violence, threat of violence or any damage to property. The Horseman defendants enjoyed the rights of peaceful demonstration and lawful protest and were permitted to share the foyer in the front of the Band Council Office as long as they did not interfere with persons entering and leaving the building, or with normal business and office processes.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, ss. 2(b), 2(d), 32.
Constitution Act, s. 35(4).
Labour Relations Act, s. 3.

Counsel:

Heather L. Treacy, for the plaintiffs.

MEMORANDUM OF DECISION

1 **LEE J.**:-- On January 29, 2003 I issued a Memorandum of Decision in this matter in which some of the background to this matter is set out. These Reasons for Judgment deal with a number of issues that the Court has raised with the Applicants in this matter arising out of proceedings that took place on January 30, 2003 and January 31, 2003.

2 Further to these issues raised by the Court, Counsel for the Applicants' have provided me with two additional Supplementary Affidavits of Band Manager Corey Battrick sworn on January 30 and 31, 2003 that answer a number of the questions that I had asked of counsel for the Applicants.

3 These Supplementary Affidavits provide greater details as to some of the prejudicial effects that the disruption by these seven named Respondents has on the members of the Horselake First Nation ["HLFN"] as a whole, and also outline possible ulterior motives or improper motivation on behalf of some or all of the group.

4 According to the Applicants one of the Respondents was defeated as a Councillor in the last election, and all of the Respondents are first cousins of the defeated Chief.

5 Finally the Supplementary Affidavits and additional submissions provide greater detail as to the present alleged improper actions of the Respondents, their possible serious and negative effects on individuals in the Band, and on the Band's outside reputation in the Northern Alberta business and general community.

6 In the words of their counsel, the HLFN is a very "entrepreneurial" Band, operating a million-dollar-a-year tree clearing business, and a three-million-dollar-a-year pipeline construction business, in addition to their substantial oil and gas holdings.

THE RIGHTS OF THE HLFN VERSUS THE RIGHT OF FREEDOM OF EXPRESSION

7 The Court is specifically concerned with whether or not there is a connection between the Respondents' Charter rights to freely express themselves versus the Applicants' common law rights to stop what appears to be a prima facie trespass.

8 It is my view that the Respondents have been attempting to express themselves with respect to some serious issues that they believe exist within the Band by their posting of signs and in their demands for "forensic audits", and "mandatory drug testing for Chief and Council".

9 Counsel for the Band submits that the Charter does not apply to this Indian Reservation/Aboriginal Band situation.

10 Counsel for the Applicants cites Section 32 of the Charter which reads as follows:-

> This Charter applies
>
> (a) To the Parliament and Government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territory;
> (b) To the Legislature and government of each Province in respect of all matters within the authority of the Legislature of each Province.

11 Notwithstanding this argument, I believe that the Charter does apply to Aboriginal Reservations and Bands, and the Charter would protect freedom of expression with respect to Band Council matters. I am however open to be persuaded otherwise.

12 With respect to freedom of expression, the situation in the case at bar is analogous to the situation as described in Cadillac Fairview Corp. Ltd. v. R.W.D.S.U., [1989] O.J. No. 2291, and the

recent Supreme Court of Canada decision in retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd. [2002] S.C.J. No. 7.

13 In Cadillac Fairview Corp. Ltd. v. R.W.D.S.U., the Union began organizing the employees of Eaton's employed at the Eaton Centre in March, 1984. At that time Eaton's employed more than 3,000 employees at that location, of whom more than one half were part-time employees. The Eaton Centre was owned by way of leasehold interest by T.E.C.. T.E.C., in turn, was owned, 60% by Cadillac Fairview, 20% by the Toronto-Dominion Bank and 20% by Eaton's. Eaton's was a tenant of T.E.C. as were the other merchants in the Centre. The property was managed on behalf of T.E.C. by Cadillac Fairview. The positions of these two companies on the appeal was identical.

14 At the beginning of the organizational campaign, both Eaton's employees and non-employee organizers distributed literature to employees on Eaton's premises. Eaton's subsequently took objection to what it characterized as the Union's "unauthorized entry" into its store, and its "unauthorized solicitation" of employees during working hours. In May 1984, Eaton's expressly denied the Union access or entry into its store premises, and put the Union on notice that any further attendance by its representatives or agents to encourage or solicit Union support would be regarded as a violation of the Trespass to Property Act, R.S.O. 1980, c. 511. In light of the company's threat to press charges, the Union suspended further in-store organizing attempts.

15 A feature of the Eaton's store was that none of the employee access points to the store premises abut public property. Instead, all access points were within the private property of the Eaton Centre. There were two main employee entrances, one through the St. James Mews at the northwest corner of the mall and the other, much more popular one, at the north side of the store off what is referred to as "two-below" in the mall.

16 In the summer of 1984, the Union began stationing its organizers outside the entrance to Eaton's at the two-below level before the store opened in the morning and after it closed in the evening. The organizers communicated with employees by distributing literature to them and greeting them as they entered and left the store at that level. The two-below level was used at those times almost exclusively by employees of Eaton's and this activity did not interfere with or obstruct public pedestrian traffic.

17 Cadillac Fairview objected to the presence of union organizers in the mall and, in particular, to the use of the two-below level for organizational purposes. It appears that Cadillac Fairview has a general "no-solicitation" policy applicable to all of the shopping centres it manages.

18 The Ontario Court of Appeal held that if employees are to exercise their rights in Section 3 of the Labour Relations Act to join a trade union of their choice and to participate in its lawful activities, they must have reasonable access to the Union and opportunities for organizational activity. It also concluded that the Ontario Labour Relations Board made no jurisdictional error in its decision and remedy, notwithstanding that in the result the appellants' property rights were infringed. It held that the Board acted throughout within the scope of its statutory authority and did not exercise its powers in a patently unreasonable manner.

19 The principles in the Cadillac Fairview case are further updated by a very recent decision by the Supreme Court of Canada involving Pepsi-Cola, supra, in a similar situation.

20 The facts of Pepsi-Cola are described in paragraphs 4 and 5 as follows:-

> [paragraph]4 The Union gained certification as bargaining agent for the employees of a bottling plant and delivery facility in Saskatchewan. Their collective agreement had expired, and negotiations broke down. The employer, Pepsi-Cola, locked out its employees and the employees walked out on the strike. The lockout and strike were legal under the Trade Union Act. The conflict quickly grew bitter. At the news of the lockout, several employees took control of the warehouse, office and yard. They disabled trucks, blocked entrances and threatened management. Security guards left the scene in fear for their safety. An interim injunction was issued against the Union's acts of trespass, intimidation and nuisance. Pepsi-Cola then regained control of its facilities and resumed business, using management personnel and substitute labour brought in from Calgary and Winnipeg.
>
> [paragraph]5 The following week, as Pepsi-Cola tried to resume deliveries to its clients, some of the Union members attempted to prevent the movement of trucks, interfere with deliveries, discourage the management and the substitute work force, and dissuade customers from carrying on business with Pepsi-Cola. Protests and picketing spread to "secondary" locations, where Union members and supporters engaged in a variety of activities. They picketed certain retail outlets, thus preventing the delivery of Pepsi-Cola's products and dissuading the store staff from accepting delivery; they carried placards in front of a hotel where members of the substitute labour force were staying; and they convened outside the homes of some of Pepsi-Cola's management personnel and chanted slogans, screamed insults, and uttered threats of harm.

21 On May 16, 1997 the Saskatchewan Court of Appeal granted an interlocutory injunction ordering the Union to vacate and refrain from trespassing at Pepsi-Cola's Saskatoon premises, and also prohibited the Union from obstructing or blocking access to those premises or attempting to intimidate Pepsi-Cola's employees, customers, or anyone else entering or leaving the Pepsi-Cola premises.

22 On May 23, 1997 another Justice of the Saskatchewan Court of Queen's Bench enlarged the previous injunction restraining picketing for example at the residence of employees, or intimidating or threatening or obstructing those employees and their vehicles. This second Order effectively prohibited the Union from engaging in picketing at secondary locations.

23 The Union appealed these parts of the Order on the basis that it breached the strikers right to freedom of expression and association under Sections 2(b) and 2(d) of the Canadian Charter of Rights and Freedoms.

24 The Saskatchewan Court of Appeal allowed the Union's appeal in part, but upheld the part of the injunction which prevented the Union from congregating at the residences of Pepsi-Cola employees, as these activities were found to amount to tortious conduct. However the part of the Order that restrained the Union from picketing at any location other than Pepsi-Cola premises was quashed, therefore allowing the Union to engage in peaceful picketing at secondary locations.

25 At page 230 of the Saskatchewan Court of Appeal decision which is reported at (1998), 167 D.L.R. (4th) 220, Cameron J.A. went on to note that "picketing constitutes an exercise of the fundamental freedom of expression which can only be circumscribed by laws, whether statutory, regu-

latory, or common, that accord with the constitutional norms" of the Charter. He held that given that the Province of Saskatchewan had not imposed any statutory restriction on picketing, this form of collective expression remained lawful in principle, and courts could restrain it only when it was accompanied by a specific tort such as trespass, nuisance, intimidation, breach of contract or defamation.

26 The Supreme Court of Canada in a unanimous decision held that secondary picketing is generally lawful unless it involves tortious or criminal conduct; and that the wrongful action model best balances the interests at stake in a way that conforms to the fundamental values reflected in the Canadian Charter of Rights and Freedoms, as it allows for a proper balance between traditional common law rights and Charter values.

27 Counsel for the HLFN has supplied the Court in this regard with the case of R. v. James-Davies, [1988] A.J. No. 835 a decision of the Alberta Provincial Court dealing with the issue of whether picketing unlawfully obstructed or interfered with the lawful use of property. Oliver A.C.J. of the Provincial Court applied R.W.D.S.U. v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573.

28 I conclude that given that the James-Davies case deals with the criminal law context, and that the Dolphin Delivery case has been updated by the Pepsi-Cola case by the Supreme Court of Canada.

29 Counsel for the Applicants has also submitted for my review the case of Re British Columbia Government Employees' Union [1985] B.C.J. No. 1939. In this case the British Columbia Government Union during a labour dispute with their employers attempted to restrict access to certain courthouses in British Columbia.

30 Chief Justice McEachern [as he then was] of the Supreme Court of British Columbia upon seeing and learning of the picketing issued an injunction on his own motion restraining the Union from further picketing in any courthouses in the Province of British Columbia. The British Columbia Court of Appeal considered the Union's appeal from this Order, which was based in part on the then newly created Charter of Rights and Freedoms.

31 I conclude that this type of case is also distinguishable from the case at bar because courts have inherent jurisdiction to maintain their authority and to prevent abuses of its processes. The actions of the Union were in "contempt"of the Court, although even in this regard there is a more recent decision in R. v. Gillespie [2000] M.J. No. 218. Gillespie is a decision of a five-person Manitoba Court of Appeal panel which in a three-to-two judgment placed certain restrictions on the courts to control the actual buildings in which they are situated in.

32 Nevertheless the clear distinction between the courthouse cases and the case at bar is that in the case at bar I am dealing with communal property that is owned and operated for the benefit of all members of the Band, including the seven members of the Band that have been named as dissident Respondents. I conclude that these seven members of the Band are engaging in an apparent expression of discontent and protest over what they perceive as some improper actions of the Chief and Band Council with respect to the administration of funds, as evidenced by their demands for a "forensic audit" and for "mandatary drug testing of the Chief and Council".

33 Their protest then is symbolic and designed to call attention to certain problems that they perceive in the administration of the Band, and in the distribution of Band monies.

34 The affidavit evidence before me does not indicate that the seven Respondents have compelled or reserved exclusive possession of the Band Council offices for themselves. The Band Council administration, on the advice of the Tribal Council Police Force, have not entered the premises to avoid any further confrontations, even though they have access to the premises if they so desire.

35 There has been no violence, or threat of violence, nor has there been any damage to property that can be attributable to this group of Respondents who have a right to freedom of expression generally.

36 There may be a prima facie case of trespass made out at common law if the Respondents are occupying the actual office premises to the exclusion of all others without consent or authority.

37 This however can be easily remedied by removing the Respondents to the public for entrance foyer area of this building, and restricting their presence in this area to normal working hours, on the proviso that there would be no interference with the ongoing business and other operations of the HLFN, nor any interference with or blocking or obstruction of the Band administration entrance or entry by members of the Band to the building.

38 I issued just such an Order on January 31, 2003 and included a police enforcement clause authorizing the Lesser Slave Regional Police to enforce this Order. The Order can be reviewed on 48 hours notice in an emergency situation, or in any event in 30 days on the specified date of February 28, 2003.

39 Either as a result of, or during the consideration of this Order, the seven named Respondents voluntarily vacated the Band Administration Offices as was hoped for. However because the underlying problems have never been resolved, the Applicants still request that the Order remain in place in any event, and I am prepared to do so on the same basis as outlined above. Additionally the Order will contain provisions whereby the Respondents are restrained from harassing or interfering with the named applicants both at the Band Council Office as well as their individual residences.

PREEMPTIVE COSTS ORDER

40 As part of the conclusion of this stage of the court hearings in this matter I have put counsel for the Applicants on notice that I will be considering the issue of whether or not the Court should appoint counsel at the expense of the Applicants for these seven Respondents should this matter proceed further on its scheduled resumption date of February 28, 2003. In this regard I have been advised by the Applicants that the Respondents have no lawyer.

41 Before delving into the issue of whether or not the Court should appoint counsel for the seven named Respondents, assuming that they wish to proceed with this matter, the Court will have to consider the complexity of the issues involved in balancing the possible Charter rights of the Respondents, in particular their rights of freedom of expression versus the rights of the Applicants.

42 Assuming then that the Respondents wish to have counsel to pursue this matter, an assessment will have to be made of the Respondents income and financial assets to determine if they have the ability to fund counsel privately, as well as the availability of Legal Aid for them.

43 Counsel for the Applicant objects to any consideration of funding by the HLFN of what it has submitted are the illegal activities of the Respondents who have brought this matter onto themselves as a result of their improper actions.

44 This is of course the matter ultimately that must be decided, but there are a number of general precedents in analogous situations where the Court has in the appropriate circumstances funded the legal costs of parties such as these Respondents on an exceptional basis.

45 It is now commonplace in matrimonial/family law matters that one party who has the greater financial resources advance some or all of the legal fees of the opposing spouse or party, even though clearly the funding party sees little or no merit in the opposing parties claims.

46 Even before the statutory authority that now exists in this regard to order such funding, the Court applied its inherent jurisdiction. This was discussed by our Court of Appeal in McDonald v. McDonald, [1998] A.J. No. 802, 1998 ABCA 241, when it referred to the interim costs rule as being historically based on the Court's inherent jurisdiction as described in for example Brown v. Brown (1920) 16 Alta L.R. 88 [S.C.A.D.].

47 Similar provisions and practices are commonplace as well in the funding of estate challenges by dissident beneficiaries or by outside parties, which challenges the executors are administrators of the estate also believe are frivolous and without merit.

48 There may be an argument that can be made that in the case at bar the HLFN holds not only a fiduciary duty to the seven named Respondents, but to all 410 members of the Band, who would be adversely affected by an order for perspective costs.

49 In that regard pension plan cases such as CASAW Local 1 .v. Alcan Smelters and Chemicals Ltd. (2001) 198 D.L.R. (4th) 504 and Turner v. Telecommunication Workers Pension Plan (2000) 197 D.L.R. (4th) 533 are relevant and instructive because in those cases, as in the case at bar, the costs will be paid out from the financial resources of the group as a whole.

50 While the results of the two cases cited below differ in terms of the ultimate decision as to whether or not to fund the hostile litigation, the principles as described in paragraphs 15 and 16 of the Turner case supra are relevant to the case at bar:-

> [paragraph] 15 ...In England, there is more jurisprudence directly on point. In addition to McDonald, we were referred to Alsop Wilkinson (a firm) v. Neary [1995] 1 All E.R. 431 (Ch.), where the trustees under an inter vivos settlement were defendants in an action brought by the settlor's creditors impeaching the trust. The trustees sought a pre-emptive costs order. The Court [page 541] stated that in cases of hostile litigation, four considerations were relevant - the strength of the applicant's case; the likely order for costs at trial; the justice of the application; and "any special circumstances". (At 437, citing Re Biddencare, [1994] 2 B.C.L.C. 160 (Ch. Div.) a dispute between the liquidator of a company and its creditors.) The trustees' application in Alsop failed on all four grounds. On the question of the likely order at trial, Lightman J. commented that "...the usual order in such hostile litigation will be that the trustees (if they actively defend and lose) will have to pay their own and the other party's costs and (as this is a case of a trust dispute) will not be entitled to an indemnity or lien from the trust fund" (at 437).
>
> [paragraph] 16 However, a different result was reached in Re National Grid Company plc Group of the Electricity Supply Pension Scheme (Ch. Div. Dated

May 2, 1997), LEXIS. At issue in National Grid was a proposal by an employer to allocate to itself 70 percent of a large actuarial surplus in a pension fund, leaving the balance to fund benefit improvements. The applicants challenged the lawfulness of the proposal and argued that the whole surplus should be applied to the improvement of pension benefits - a position with which the Pensions Ombudsman had agreed. Thus, as Rimer J. noted at the end of his reasons, the litigation was at least prima facie for the benefit of all plan members, although some were opposed to the bringing of the action. He referred as well to the four factors enunciated in Biddencare and allowed the application notwithstanding his characterization of the case as "hostile". The Court reasoned that the applicants had a "good arguable case", as conceded by the defendants; that the proceeding was akin to the type of case in which, as illustrated by McDonald, a pre-emptive order could be made; and that:

> As to whether justice is likely to be better served by making the order rather than by refusing it, I consider that the considerations in favour of making it outweigh those against doing so. The appeals involve substantial sums of money. The questions raised are potentially quite difficult and it is obviously desirable that the applicants should have the opportunity to be properly represented before the court so that their arguments may be put. [At 4.]

51 In Alsop Wilkinson (a firm) v. Neary and Others [1995] 1 All E.R. 431 at 347 it was held that "The Court has an exception jurisdiction in hostile litigation to make an order at an early stage in the proceedings regarding the ultimate incident of costs." At page 347 the Chancery Division in Alsop Wilkinson stated that in making such an order the Court would consider the strength of the parties case, the likely order as to costs at trial, the justice of the application, and any special circumstances.

52 In the case at bar it is difficult for the court to assess some of these or all of these factors at this early stage of the litigation, however it could be argued that the interests of justice and the special circumstances could call for pre-emptive order for costs out of the $120,000,000.00 land claims settlement trust funds, assuming that there was any basis by which these trust funds could be connected to the call for a "forensic audit" and to the strong criticism of the Respondents of the Chief and Band Council.

53 If this were the case for example, and the litigation was concerned with whether the trust funds were being properly managed, and assuming that the Charter did apply to the Band Council, the resolution of these issues could benefit all Band members, because all Band members have an interest in ensuring that the trust funds are properly administered.

54 The issue of trust funds and their administration was dealt with in Hockin v. Bank of British Columbia [1989] B.C.J. No. 835 where the British Columbia Supreme Court noted that "Where the advice of the Court on the correct interpretation of a trust is made necessary by the language in which the trust was established, a party seeking the Court's advice may recover it's expense from the trust fund. See also Re Lotzkar Estate (1965) 51 W.W.R. 99, and Buckton v. Buckton (1907) 2 Ch. 406."

55 Furthermore it seems at this point that the Band counsel has taken a strong position on the issue(s), and is not remaining neutral, which as a trustee they probably have an obligation to do.

56 Another way of looking at this matter is that the fact that the litigation may be hostile should not prevent an order for preventive costs here because despite the opposite positions taken by the Applicants and the Respondents in this matter, the ultimate issue may well be the terms of the Bands trust obligations to all Band members. In this regard counsel for the Applicants have already pointed out that seven Band members whose numbers would be increased by their family members, out of a total of 410 Band members is a relatively small group, and that the Chief and Band Council owe a fiduciary duty to all Band members, not just the seven Band members and their families.

57 In Bentall Corp. v. Canada Trustco [1996] B.C.J. No. 1760 the British Columbia Supreme Court held that both parties should have their reasonable costs paid from the trust fund, even though only three percent of the plan members objected to the variation of the plan. It stated as follows at paragraphs 55 to 56:-

> In my opinion this is an appropriate case for the trustee and the dissident members to obtain their costs from the fund. This litigation concerned issues of the construction of the trust, interpretation of the guiding statute and a difficult question of whether a variation should be accepted. Even though I acceded to the Petitioners' application to vary the trust, I do not consider this dispute to be adverse litigation between parties claiming rights to a fund where one party alleged improper conduct on the part of the other. The issues in this petition were more closely connected with the administration of the trust.

CONCLUSION

58 I have concluded that the Supreme Court of Canada in the Pepsi-Cola case has clearly set out that there are certain rights of protest and freedom of expression that apply in the case at bar. Those rights of peaceful demonstration and lawful protest allow the respondents in this matter to share the foyer [known as the mud room area] in the front of the Band Council Office during normal business hours, as long as there is no interference with persons coming and leaving the building, as long as there is no interference with the normal business and office processes that take place within the Band Council Office, and as long as there is no improper harassment of the Chief and Band Councillor anywhere.

59 The only prohibited activities of these Respondents during their so-called occupation of the building may have been the fact that they committed a prima facie trespass when they entered into the building proper and subjected it to the exclusion of others without any authority, which caused a [significant] disruption of the normal operations of the HLFN.

60 Since this transgression has now ended peacefully, the Order that I have put in place with a police enforcement clause which will be served on the Respondents personally should make everyone's rights and obligations clear.

61 If there is any further emergent application, the matter can be brought back to me on 48 hours notice. Otherwise it will be returned on a date certain, namely February 28, 2003, which is approximately one month hence from the date this application was last heard by me.

62 I have invited counsel for the Applicants to provide me once again with more case authority and analysis on the issue of whether the Charter applies to Native Band councils, and whether there should be any pre-emptive order for costs paid on a one-time basis to these Respondents to allow them to effectively have this Order reviewed.

63 While counsel made some very general submissions the day after these issues were raised with her, I have provided a further opportunity for counsel if they wish to provide more argument in this regard. This Memorandum should also assist counsel in further outlining and specifying the arguments and the issues herein. If anything arises as a result of this Memorandum that counsel wishes to further address, she may do so on or before February 28, 2003 by way of written submissions.

64 My interim conclusion with respect to the Charter is that the Charter does apply to Native Band councils on Reservations. Generally speaking the Charter applies to government bodies, and all bodies that are governmental in nature, but I acknowledge that it does not apply to disputes between private citizens.

65 In Townsend v. Canada (1994) 74 F.T.R. 21, the Court held that the Charter was limited to Parliament and Legislatures and the executive and administrative branches of government exercising statutory authority, common law or Crown prerogatives. The Charter has been held to apply to provincial commission of inquiry: Starr v. Ontario (Commissioner of Inquiry) (1990) 64 D.L.R. (4th) 285, but it does not apply to condominium boards: Condominium Boards: Condominium Plan No. 931 0520 v. Smith (1999) 24 R.P.R. (3d) 76, 239 A.R. 319.

66 Since condominium boards, and quite often provincial boards have authority to make by-laws, it is not the authority to make the by-laws, but the source of the authority that attracts the requirement that a body comply with the Charter. Accordingly whether a Native Band Council functioning on an Indian Reservation must comply with the Charter could depend on where the Council gets it's authority to enact laws or to govern.

67 In this regard Section 35(4) of the Constitution Act 1982 recognized existing Aboriginal and Treaty rights which allow Bands to have authority over members, as well as recognizing land claim agreements. It would seem strange then that this recognition or transfer of Aboriginal and Treaty rights would not include a recognition and transfer of Charter rights.

68 The Charter has been found to apply to the very newest arrivals on Canadian soil at the very moment they come ashore, often surreptitiously and illegally, as decided by the Supreme Court of Canada in Singh v. M.E.I., [1985] 1 S.C.R. 177. It would indeed be ironic if the Charter applied to the newest arrivals on Canadian soil from the moment they illegally get here, yet not apply to the very first Canadians who have been here the longest, even if the answer is that the case at bar involves a non-governmental matter.

69 As for the pre-emptive costs order, the normal rule is that costs follow the event, and that only the successful party is entitled to it's costs at the conclusion of the case. While costs are in the discretion of the Court, this discretion is to be exercised in a judicious manner.

70 However there are limited circumstances in which a pre-emptive costs order can be considered, and if it is necessary to deal with this matter on February 28, 2003 and following, further analysis can be then done.

71 Counsel for the Applicants have until Friday, February 7, 2003 to make any further submissions they wish to make in these matters to the Court, and this matter will be heard again on February 28, 2003.

LEE J.

cp/e/nc/qw/qlmmm/qlcas

TAB 9

Case Name:

L.C. v. Alberta (Metis Settlements Child & Family Services, Region 10)

Between
L.C., E.M.P. by Her Next Friend L.C., D.C. by His Next Friend L.C. and C.C. by Her Next Friend L.C., Plaintiff, and Her Majesty the Queen In Right of Alberta and Metis Settlements Child & Family Services, Region 10, Defendants, and D.L., Proposed Next Friend

[2011] A.J. No. 396

2011 ABQB 236

Docket: 0703 10836

Registry: Edmonton

Alberta Court of Queen's Bench
Judicial District of Edmonton

R.A. Graesser J.

Heard: March 30, 2011.
Judgment: April 6, 2011.
Released: April 7, 2011.

(26 paras.)

Wills, estates and trusts law -- Mental incompetency -- Guardianship -- Public trustee -- Powers of court -- Legal proceedings -- Representation of incompetents -- Guardians ad litem -- Application by Public Trustee to rescind or vary order requiring it to help select, retain and pay for litigation representative for plaintiff allowed -- Plaintiff was currently represented by her mother, who could not longer act for her -- Public Trustee was not represented when order was made -- No Act authorized court to make such an order against Public Trustee without its consent -- Public Trustee should have been notified and allowed to make submissions -- Order varied to quash requirement to pay, and request Public Trustee's help in selecting litigation representative, rather than requiring it to help.

Statutes, Regulations and Rules Cited:

Public Trustee Act, R.S.A, s. 6, s. 6(3), s. 6(4)

Counsel:

Robert P. Lee, for the Plaintiff.

Peter Barber and G. Allan Meikle, Q.C., Alberta Justice Civil Litigation, and, Ward K. Branch, Branch McMaster, for the Defendants.

Denise Lightning, Proposed Next Friend, for the Third Party.

[Editor's note: Supplemental reasons for judgment were released April 6, 2011. See [2011] A.J. No. 397.]

Memorandum of Decision

R.A. GRAESSER J.:--

Nature of Application

1 In my decision ***L.C. v. Alberta (Metis Settlements Child & Family Services, Region 10)***, 2011 ABQB 42, I directed the Public Trustee to retain and pay for a litigation representative for E.M.P. I followed what I considered to be the process described in ***Thomlinson v. Alberta (Child Services)***, 2003 ABQB 308 and in ***V.B. v. Alberta (Minister of Children's Services)***, 2004 ABQB 788.

2 I also directed that the Public Trustee and Mr. Lee on behalf of E.M.P. attempt to agree on a litigation representative, failing which I would appoint one.

3 Mr. Weir, on behalf of the Public Trustee, has applied under s. 6 of the *Public Trustee Act*, R.S.A. 2004, c. P-44.1 to rescind or vary those portions of my decision relating to the Public Trustee.

Background

4 E.M.P. is a plaintiff in this action, presently represented by her mother, L.C. For various reasons, L.C. is unwilling or unable to continue to act as E.M.P.'s litigation representative. Mr. Lee applied on her behalf to have Denise Lightning appointed as a compensated litigation representative, without liability for costs should there be any cost orders against E.M.P.

5 I concluded that E.M.P. required a litigation representative, but found that Ms. Lightning was in a potential conflict of interest. The Public Trustee had been appointed as next friend for an infant plaintiff in ***Thomlinson*** and in ***V.B.***, and I was told that the Public Trustee had appointed (and paid and indemnified) independent litigation representatives for several children subject to Permanent Guardianship Orders who have claims against the Alberta Government similar to E.M.P.'s claims. I concluded that E.M.P. should be in no worse situation than children under PGO's in regard to their claims against the Alberta Government, and thus made various orders involving the Public Trustee.

6 The Public Trustee was not represented on the previous application as no relief was sought against it in the various motions before me in October, 2010.

7 The matter came back to me partly because Mr. Lee and the Public Trustee's office have been unable to agree on a litigation representative for E.M.P., but also because the Public Trustee was concerned that a precedent had been set whereby the Court could order the Public Trustee to act as litigation representative for a child or person under a disability, including requiring the Public Trustee to retain, pay for and indemnify an independent litigation representative for a child or person under a disability where such person has a claim against the Alberta Government and the Public Trustee may be perceived to be in a conflict of interest.

8 Mr. Weir referred me to s. 6 of the *Public Trustee Act*. It provides:

> **(1)** The Public Trustee is under no duty to act in a capacity, perform a task or function or accept an appointment by reason only of being empowered or authorized to do so.
>
> **(2)** Subject to subsection (3), a court may appoint the Public Trustee to act in a capacity or to perform a task or function only if the Public Trustee consents to the appointment and to the terms of the appointment.
>
> **(3)** If an Act expressly authorizes a court to direct the Public Trustee to act in a particular capacity or to perform a particular function, the court may appoint the Public Trustee to act in the capacity or to perform the task or function only if the Public Trustee has been given a reasonable opportunity to make representations regarding the proposed appointment.
>
> **(4)** The Public Trustee may apply to have the court rescind or vary the terms of an appointment made contrary to subsection (2) or (3), and on the application the court may either rescind the appointment or vary its terms in a manner to which the Public Trustee consents.

9 Mr. Weir's position on the present application was that while the Public Trustee is prepared to consent to playing a role in assisting with the selection of an appropriate litigation representative for E.M.P., it is not willing to pay for the services of the litigation representative or have the representative monitored by or report to it.

10 Essentially, the Public Trustee argues that I had no authority to direct the Public Trustee to act and I had no authority to order the Public Trustee to pay for the litigation representative's services or to pay any advance costs under an ***Okanagan***-type order for legal services provided to the litigation representative.

11 Mr. Lee, on behalf of E.M.P. took no position on my jurisdiction in relation to the Public Trustee, but wanted to make sure that a litigation representative was still going to be appointed and paid for pursuant to my January decision. He also expressed concerns about the Public Trustee's involvement in the selection process for a litigation representative, because of the appearance of conflict on the Public Trustee's part.

Analysis

12 Having reviewed s. 6 of the *Public Trustee Act*, which I did not consider in relation to my January decision, I find myself in agreement with Mr. Weir's submissions on the orders I made affecting the Public Trustee.

13 There is no Act authorizing the court to direct the Public Trustee to act in the fashion I did, so s. 6(3) is of no application. Even if it were, no order should have been made without affording the Public Trustee the opportunity to make submissions regarding any such appointment.

14 In a situation like this where the Public Trustee is authorized to act, but not obliged to do so, the proper course would have been to have notified the Public Trustee of the application to allow him to appear and make representations, or to make any order affecting the Public Trustee subject to the Public Trustee consenting, or making submissions to the court as to any requested terms or conditions.

15 I am satisfied that no order affecting the Public Trustee in this matter should have been made that was not subject to the Public Trustee's consent.

16 Further, I am satisfied that in situations where the Public Trustee is not a defendant, there is no jurisdiction to order that it pay for the services of an independent litigation representative, or for advance costs in favour of the plaintiff. The Public Trustee may consent to either or both situations in appropriate circumstances, but there is no basis for either of these to be ordered over the Public Trustee's objection.

17 The summary in my January decision indicated that the litigation representative's services and the advance costs were to be paid for by the Crown. However, the body of the decision suggests that it is the Public Trustee who should be paying for the litigation representative and the advance costs for counsel.

18 The summary accurately states what was in my jurisdiction to order, and to the extent the body of the decision indicates that it is the Public Trustee who is to pay, I am satisfied that was in error.

19 I hasten to add that the error was of my doing. The application before me was for Ms. Lightning's appointment, and I directed the Public Trustee's involvement on my own initiative. There was no reason for counsel to consider involving the Public Trustee on the application, or bringing s. 6 to my attention.

20 When I determined that the Public Trustee's involvement was appropriate, I should have re-convened the application on notice to the Public Trustee, or made any order subject to the Public Trustee's consent and right to make submissions as to terms and conditions.

21 Despite Mr. Lee's concerns about the appearance of conflict if the Public Trustee is involved in any way in the selection of the litigation representative, I do not share his concerns. The role I directed for the Public Trustee was to be involved in the process, not to appoint the litigation representative himself. Under my earlier order, no litigation representative could be appointed without Mr. Lee's agreement, or failing agreement, his ability to make representations to the Court as to a suitable litigation representative. Any concerns over conflicts on the part of the Public Trustee were balanced by Mr. Lee's role in the process and the ultimate determination being made by the Court in the event of disagreement between Mr. Lee and the Public Trustee. The Public Trustee has significant experience in the representation of children and familiarity with persons with skills in advising children and making decisions in the best interests of the child.

22 I am also of the view that in a situation such as this, it would be inappropriate to leave the appointment of a litigation representative to counsel for the child. Counsel is not a guardian and should not have sole power of appointment. The involvement of an independent person is necessary to ensure the representative will act in the best interests of the child, and not the best interests of appointing counsel.

Conclusion

23 The Public Trustee's application under s. 6(4) of the Public Trustee Act is granted. The Public Trustee is not obliged to pay for a litigation representative for E.M.P., nor is it obliged to pay any advance costs for E.M.P.'s counsel.

24 My order is varied to request but not direct the Public Trustee's involvement in the selection process for a litigation representative for E.M.P.

25 Mr. Weir has indicated that the Public Trustee has consented to assist in the selection process, so no further order is necessary.

26 There will be no costs for any party on this application.

R.A. GRAESSER J.

cp/e/qlcct/qlvxw/qlvxw

TAB 10

Case Name:

L.C. v. Alberta (Metis Settlements Child & Family Services, Region 10)

Between
L.C., E.M.P. by Her Next Friend L.C., D.C. by His Next Friend L.C. and C.C. by Her Next Friend L.C., Plaintiff, and Her Majesty the Queen In Right of Alberta and Metis Settlements Child & Family Services, Region 10, Defendants, and D.L., Proposed Next Friend

[2011] A.J. No. 84

2011 ABQB 42

509 A.R. 72

Docket: 0703 10836

Registry: Edmonton

Alberta Court of Queen's Bench
Judicial District of Edmonton

R.A. Graesser J.

Heard: October 19-22, 2010.
Judgment: January 24, 2011.
Released: January 25, 2011.

(97 paras.)

Civil litigation -- Civil procedure -- Parties -- Representation of -- Children or incompetent persons -- Litigation guardian or next friend -- Class or representative actions -- Procedure -- Costs -- Particular orders -- Application by LC for appointment of next friend for her minor daughter EMP, payment for next friend's services and advance costs allowed in part -- LC commenced action on her behalf and as next friend for EMP -- Proposed class action involved number of persons affected by invalid temporary care orders -- LC unable, for health or other reasons, to continue to actively participate in action -- Public Trustee should appoint next friend for EMP and pay costs -- Next

friend should not be same lawyer representing LC due to potential conflict of interest -- Advanced costs justified for EMP but not for LC.

Application for the appointment of a next friend for EMP, the plaintiff LC's minor daughter, for payment for the next friend's services and for advance costs. The plaintiff LC commenced this lawsuit on her behalf and as next friend for her children as a result of EMP's apprehension by the Director pursuant to a temporary care order. The Director failed to file a service plan within 30 days rendering EMP's continued apprehension unlawful. This action was now the intended action to be a proposed class action for a number of persons affected by invalid temporary care orders. LC, for health or other reasons, was unwilling or unable to continue to instruct counsel and actively participate in the action. LC had granted a power of attorney to counsel who also agreed to represent EMP as next friend. LC intended to carry on the action by her attorney under a power of attorney. A lawyer unrelated to EMP had agreed to act as next friend for EMP but only if she was paid at her regular hourly rate and was exempted from liability for costs.

HELD: Application allowed in part. EMP was in need of a next friend for the purposes of this litigation, and LC was unable and unwilling to act. There were potential conflict issues between EMP and her mother which made it important that EMP had an independent next friend or litigation representative. The attorney for her mother should thus not also act as next pf friend to EMP in this action. The Public Trustee's office should be involved in the selection of a next friend as that office had considerable expertise and experience in such matters. It was appropriate to exempt EMP's next friend/ litigation representative from liability for costs in this action in relation to EMP's individual action. LC was unable to pay for the services of an independent next friend for EMP. It was appropriate that the Public Trustee pay for EMP's services as next friend at rates to be approved by the Public Trustee. LC had limited means and was unable to afford to pay for a lawyer for herself or for EMP. EMP's claim was prima facie meritorious and the issues in her claim transcended her individual interests. The conditions for advance costs had been satisfied. The court was not satisfied that the mother's claim was prima facie meritorious. Her application for advance costs was thus dismissed.

Statutes, Regulations and Rules Cited:

Rules of Court, Rule 2.17(1), Rule 2.17(2)

Counsel:

Robert P. Lee, for the Plaintiff.

Peter Barber and G. Allan Meikle, Q.C., Alberta Justice Civil Litigation, and, Ward K. Branch, Branch McMaster, for the Defendants.

Denise Lightning, Proposed Next Friend, for the Third Party.

Memorandum of Decision

R.A. GRAESSER J.:--

Nature of Application

1 This decision follows a case management conference from October 19 - 22, 2010 which dealt with a number of applications in this proposed class action. The relevant background to this application has been set out in ***L.C. v. Alberta (Metis Settlements Child & Family Services, Region 10)***, 2011 ABQB 12.

2 This decision will deal with the following:

1. Appointment of a next friend (litigation representative) for E.M.P. (L.C.'s daughter);
2. Appointment of a next friend (litigation representative) for L.C.;
3. Payment for next friend's services as next friend/litigation representative;
4. Relieving next friend from liability for costs; and
5. Payment of counsel for services relating to regularizing pleadings (mini-***Okanagan*** application).

Background

3 L.C. commenced this lawsuit on her behalf and as next friend for her children E.M.P., D.C. and C.C. E.M.P. remains a minor, and is in her mother's care. D.C. attained adulthood after this lawsuit was started, and died shortly thereafter. The status of his estate's continuing involvement in this lawsuit is uncertain. C.C. attained adulthood after this lawsuit was started. The status of her continuing involvement is unclear.

4 E.M.P. was apprehended by the Director of Child & Family Services under a Temporary Guardianship Order ("TGO"). It is alleged that the Director failed to file a service plan within the 30 days following the date of the TGO, rendering the TGO a nullity and her continued apprehension unlawful. L.C. claimed damages on her own behalf, as well as on behalf of E.M.P. and her other two children.

5 Through a series of events chronicled in my decision in this matter, 2011 ABQB 12, Mr. Lee advised that this action is now the intended action to be a proposed class action for a number of classes or subclasses of persons affected by invalid TGO's. Until shortly before the application in October, 2010, this action had been stayed as another lawsuit was being put forward as the proposed class action. When that other lawsuit fell away as the proposed class action, this action appeared to be the most appropriate, at least for the children who had been kept in government custody after their TGO's had become a nullity, and for the parents or guardians of such children.

6 The application in October, 2010, proceeded under the old Rules of Court; hence the use of the old "next friend" terminology.

7 This action has several impediments to proceeding:

1. L.C., for health or other reasons, is unwilling or unable to continue to act as next friend for her daughter E.M.P.;
2. L.C., for health or other reasons, is unwilling or unable to continue to instruct counsel and actively participate in the action;

3. No one has stepped forward to act as next friend for E.M.P. other than Denise Lightning, a lawyer, who is not related to E.M.P. and is essentially a stranger to her;
4. Denise Lightning will only act as next friend for E.M.P. if she is compensated at her regular hourly rate for providing services for E.M.P. and so long as she is granted immunity from liability for costs in the action;
5. L.C.'s need for a next friend is unclear, and the application as it related to her was adjourned pending resolution of medical issues;
6. Mr. Lee, as counsel, advises that he is unwilling to continue to act as counsel in this action unless he is provided with advance costs, following the principles in ***British Columbia (Minister of Forests) v. Okanagan Indian Band,*** 2003 SCC 71 and ***Little Sisters Book and Art Emporium v.Canada (Commissioner of Customs and Revenue)***, [2007] 1 S.C.R. 38.

8 Mr. Lee advised in December, 2010 that Denise Lightning was no longer seeking to be appointed next friend for L.C. as L.C. had granted Ms. Lightning a power of attorney to deal with this action for her. The position taken by Mr. Lee on the application was that L.C. was unable to deal with the stresses of the litigation either for herself or for her daughter E.M.P., so a next friend was necessary for both of them. Mr. Lee's position on the application was that there was a different standard of incapacity for the appointment of a next friend from the standard for the appointment of a guardian or trustee under the *Adult Guardianship and Trusteeship Act*, S.A. 2008 c. A-4.2.

9 I permitted a psychologist, Les Block, to testify over the objections of the Crown, but I adjourned the cross-examination and Ms. Lightning's application for appointment as next friend for L.C. so that Mr. Block could produce his file and L.C. could produce relevant medical records. L.C. failed to do either of those things within the time ordered, and I was advised at a case management conference on December 8, 2010 that the application for the appointment of a next friend for L.C. was being abandoned because of Ms. Lightning being granted a power of attorney for L.C.

10 The Crown has asked to see the power of attorney and the details of the arrangements for Ms. Lightning, but those have yet to be produced.

11 Mr. Lee's position at this stage is that L.C. lacks the capacity to instruct counsel and be directly involved in the litigation either for herself or for E.M.P., but that she has the necessary mental capacity to appoint an attorney.

Present Positions of Parties

E.M.P.

12 L.C. still wishes to proceed with the appointment of Ms. Lightning as next friend for E.M.P., an order requiring the Crown to pay Ms. Lightning for those services, an order exempting Ms. Lightning from liability for costs for E.M.P., and advance costs so that Mr. Lee can amend the pleadings in this action and ready it for a class certification action.

Crown

13 The Crown seeks dismissal of all outstanding applications.

14 As to the appointment of Ms. Lightning as next friend for E.M.P., the Crown argues that if L.C. is competent to grant a power of attorney, she is competent to continue to act as next friend for E.M.P. A lack of competence cannot be presumed, because there is no evidence from her as to her

incapacity or unwillingness to act. The Crown cites ***C.H.S. v Alberta (Director of Child Welfare)***, 2008 ABQB 620, where Thomas J. refused to appoint a stranger as next friend for C.H.S.'s children because there was no evidence from C.H.S. that C.H.S. was unable or unwilling to act as next friend.

15 At para. 22 of that decision, Thomas J. stated:

> A more important factor in this case is that the Plaintiff children already have a next friend, namely their mother C.H.S. It is of significance to me that no affidavit has been sworn by C.H.S. to indicate either that she is no longer willing to act as the next friend of her children, or that she consents to Ms. Venne being substituted as the next friend for her children. This is troubling, particularly given the statements by the counsel for the Plaintiffs over the course of various case management meetings indicating his difficulties in communicating with and receiving instructions from C.H.S. who seems reluctant to continue to pursue the claims in this Action. It may be that C.H.S. no longer wishes to act as the next friend for her children, but would rather prefer someone else to represent their interests in this lawsuit. However, there is very little, if any, evidence before me to indicate that this is the case. In any event, I decline to make such a finding. In the absence of a proper evidentiary basis to explain why C.H.S. can no longer act as the next friend for her children, I am not able to conclude in these circumstances that it would be appropriate to appoint Ms. Venne as the replacement next friend of the children of C.H.S.

16 The Crown submits that there are great similarities between C.H.S.'s circumstances and L.C.'s circumstances. As such, the Crown submits that L.C. should continue to be E.M.P.'s next friend.

17 The Crown argues that L.C.'s refusal with my orders to produce Les Block's files and her relevant medical records should disentitle her to any presumption that she lacks the ability to act as next friend for E.M.P.

18 The Crown maintains its position that neither L.C. nor E.M.P. has established proper circumstances for any advance costs order under the ***Okanagan*** principles.

Analysis

1. Next friend for E.M.P.

19 Similar to the situation in ***C.H.S.***, Mr. Lee has taken the position in this action since the early fall of 2010 that L.C. was not able to provide him with instructions in this action, either on her behalf or on E.M.P.'s behalf. That inability has been described as an emotional problem dealing with the lawsuit, and an ongoing fear of the government, especially in relation to her continued custody of E.M.P. She has not provided any affidavit evidence as to her inability or unwillingness to act as next friend for E.M.P. No documentation resigning as next friend or seeking a replacement has been filed by her.

20 Those matters have been dealt with in representations by her counsel, Mr. Lee, as well as in the affidavit of Denise Lightning filed with respect to her application to be appointed as next friend. The Crown cross-examined Ms. Lightning on her affidavit before the October, 2010 applications

were heard. The Court also heard evidence from Les Block on the point of Ms. Lightning's difficulties in dealing with the litigation, although that evidence was not tested by cross-examination, nor were his or other medical records of L.C. produced to the Crown.

21 There is no requirement under old Rule 58 or new Rules 2.11(a) or 2.14(1) that the next friend be a parent or guardian of child. New Rule 2.14(1) dealing with litigation representatives speaks of an "interested person", although that term is not defined in the Rules of Court. It is a defined term in the new *Adult Guardianship and Trustee Act* (not necessarily a relative or friend) but I am not aware of any definition of an interested person as it relates to an infant. I see no reason, however, to interpret the words differently for the purposes of the Rules of Court than under the *Adult Guardianship and Trustee Act.* There was nothing in the old Rules of Court dealing with the resignation or replacement of an existing next friend or litigation representative.

22 It is unclear as to the status of the defendant in an action to object to someone's appointment or replacement as a next friend or litigation representative. Because the next friend/litigation representative is generally responsible for the costs of the action, a defendant might in appropriate circumstances seek security for costs. A defendant might object to the appointment of a next friend/litigation representative who has been declared to be a vexatious litigator under the *Judicature Act*, R.S.A. 2000, c. J-2, or where the next friend/litigation representative might be in a conflict of interest *vis-a-vis* the defendant. But otherwise, it is not clear to me that it is any of the defendant's business who the next friend is.

23 Where the next friend is not the parent or guardian of the child, the parent or guardian certainly has the status to object. In appropriate cases, the Public Trustee could step in (or be appointed by the Court), and as noted by Thomas J. in ***C.H.S.*** (*supra*) at para. 29, the Court's *parens patriae* power allows the Court to protect the interests of those who cannot protect themselves.

24 I do not read ***C.H.S.*** as requiring that there be a formal resignation signed by the existing next friend, or that the parent or guardian or existing next friend, before a new next friend can be appointed. There may be circumstances where the replacement of an existing next friend is sought, over the objections of the existing next friend. Or the existing next friend may have become disabled, or disappeared, or otherwise unable to carry on. That is the situation argued here.

25 What Thomas J. says in ***C.H.S.*** is that there needs to be a proper evidentiary foundation to make an order. This is an interlocutory order in the action, so hearsay is permissible. There does not appear to have been any evidence at all in ***C.H.S.*** as to her capacity or status.

26 I am satisfied that the representations of Mr. Lee are fully supported by the affidavit evidence of Ms. Lightning: that E.M.P. is in need of a next friend for the purposes of this litigation, and that L.C., for whatever reason, is unable and unwilling to act. Ms. Lightning does not need L.C.'s consent to act as next friend/litigation representative for E.M.P. In the absence of an objection from L.C., Ms. Lightning as an "interested person" can step forward. I did not consider the incomplete testimony of Mr. Block on this issue as it was not necessary to have medical evidence for the purpose of the application as it relates to E.M.P.

27 Of course, Ms. Lightning has not opted to self-appoint under old Rule 58 or new Rule 2.14, as she wants to be paid and she wants to be exempted from liability for costs. The only way those things can happen is if they are ordered by the Court.

28 In ***R. v. W.A.***, 2000 CanLII 28193 (ABQB), Ritter J. (as he then was) dealt with the background of the appointment of next friends. In that case, he concluded that the plaintiff needed a next friend, but determined that the proposed next friend was not appropriate. He ruled that either the Public Trustee could appoint an independent next friend, or he would select one from names provided to him.

29 Ritter J. subsequently ordered that the next friend appointed by him be relieved from liability of costs and that the next friend's fees be paid by the Defendant Government.

30 A similar order was made by Macklin J. in ***T.W. v. Her Majesty the Queen***, Alberta Queen's Bench Action Number 0203 19700.

31 In ***Thomlinson v. Alberta (Child Services)***, 2003 ABQB 308, Brooker J. held that the old rules permitted a stranger to be appointed as next friend for a child. After reviewing the history of the appointment of next friends, Brooker J. held at paras. 107 and 108 that where the parent or guardian does not consent to act as next friend, it is open for the court to appoint the Public Trustee. But where the Public Trustee declines to act (such as because of a conflict of interest), a willing stranger could be appointed. He stated at para. 109 that such an appointment would be appropriate in situations in which "an infant's interests might not otherwise be represented."

32 ***Thomlinson*** is also some authority that the Court has the power to relieve a next friend other than the Public Trustee from liability for costs (at para. 119) although Brooker J. declined to do so in that case.

33 In ***V.B. v. Alberta (Minister of Children's Services)***, 2004 ABQB 788, Slatter J. (as he then was) considered applications for the appointment of next friends for three child plaintiffs who were under PGOs. Slatter J. agreed that the children's mother could not commence the action as the Public Trustee is the children's sole trustee because of the PGOs.

34 In such circumstances, he held at para. 29:

> "In summary, the procedure to be followed in the case of a child in care who potentially has a cause of action against someone should be roughly as follows:
>
> (a) A person who discovers information suggesting that a child in care has a cause of action has a moral obligation, and in some cases a legal obligation, to bring that information to the attention of the Public Trustee and a director of Child Welfare.
> (b) If the information has an air of reality to it, the Public Trustee has an obligation under the Act to:
>
> (i) investigate the claim to see if it has sufficient merit, and is of sufficient value, to justify proceedings on behalf of the child, and
> (ii) ascertain whether the prosecution of the claim would be in the best interests of the child.
>
> This inquiry could be made in consultation with the director, and might be done by the Public Trustee's office or outside counsel, as the circumstance require.

(c) If the action is found to be of merit, and its prosecution in the best interests of the child, then the Public Trustee has a duty to see that it is prosecuted in a reasonable way:

(i) in most cases the Public Trustee would commence proceedings himself, as the trustee of the child.

(ii) it is unclear whether in some cases the Public Trustee might seek and nominate a third party to sue as next friend of the child, for example where the Public Trustee thought that the action presented a conflict of interest that could not be handled adequately by internal controls. In such cases the Public Trustee would in any event continue to play a role in monitoring the litigation and the next friend.

(d) The Public Trustee as trustee, or the next friend, would then be required to retain and instruct counsel to prosecute the action.

(e) At any stage of the proceedings the Public Trustee or the next friend could consult with the child and other family members, but the conduct of the litigation is not under the control of the child or the family.

(f) The Court retains a supervisory jurisdiction over the whole process. The Public Trustee or the next friend could apply for advice and directions where appropriate. Any interested person could apply to the Court for a review of decisions made during the conduct of the litigation, to ensure that the best interests of the child are paramount."

35 Here, there is no PGO and there is no trustee for E.M.P. Her mother, L.C. is her sole guardian. In this case, it is not necessary to involve the Public Trustee if someone else who is suitable is willing to act. That is especially important here as the Government (for whom the Public Trustee works) is the main defendant (similar to the situation in ***W.A.***)

36 I need not deal with the situation under the Rules of Court where an existing next friend wishes to withdraw and be replaced and there is another willing next friend ready to step up. That might well be done under the new Rules of Court without Court order, even as to the amendment of pleadings, so long as pleadings have not closed. Here, Ms. Lightning seeks her appointment by way of Court order, and on terms. When the application was made in October, such an appointment could have been made by Court order, following ***Thomlinson***. Starting November 1, 2010, under Rule 2.15, the Court clearly has the power to appoint a litigation representative in circumstances where there a party requiring a litigation representative does not have one.

37 In the result, the Court had the power to appoint a stranger as next friend for E.M.P. before November 1, 2010, and certainly has the power to do so thereafter.

2. Is Ms. Lightning a Suitable Next Friend for E.M.P.?

38 The Crown cited a number of cases in support of its arguments that Ms. Lighting should not be appointed next friend.

39 In ***Gronnerud (Litigation Guardian of) v. Gronnerud Estate***, [2002] 2 S.C.R. 417, the Supreme Court considered the Saskatchewan Rules of Court regarding the removal and replacement of the litigation representative of a defendant adult. The Saskatchewan Rules are different from the

Alberta Rules (both old and new). The old Alberta Rules made no provision for the removal and replacement of a next friend; the new Rules do in R. 2.21. Regardless of the differences, I am satisfied that under the old Rules, the Crown had the jurisdiction (at least under *parens patriae*) to remove and replace an infant's next friend. The test for replacement is set out in **Gronnerud** at para 18-20: the best interests of the child. At paragraph 2 the Court held:

> The ***Szwydky***[1] criteria provided guidance in defining the "best interests" test set out in Rule 49. The third criterion, that of "indifference" to the result of the legal proceedings, essentially means that the litigation guardian cannot possess a conflict of interest *vis-à-vis* the interests of the disabled person. Indifference by a litigation guardian requires that the guardian be capable of providing a neutral, unbiased assessment of the legal situation of the dependent adult and offering an unclouded opinion as to the appropriate course of action. In essence the requirement of indifference on the part of a litigation guardian is a prerequisite for ensuring the protection of the best interests of the dependant adult. A litigation guardian who does not have a personal interest in the outcome of the litigation will be able to keep the best interests of the dependant adult front and centre, while making decisions on his or her behalf. Given the primacy of protecting the best interests of disabled person, it is appropriate to require such disinterest on the part of a litigation guardian.

40 ***Bowes v. Gauvin***, 2001 ABCA 206, dealt with custody and guardianship. There, the Court of Appeal held at paragraph 9:

> Therefore the respondents' claim for guardianship and custody fell squarely within the test enunciated by this court in ***D. (W.) v. P. (G.)*** (1984), 54 A.R. 161 (Alta C.A.) at para. 14 [hereinafter ***D.(W.)***], leave to appeal to S.C.C. refused [1984] 6 W.W.R. lxiii (S.C.C.)]:
>
> > While there is some confusion on the point in the authorities, I understand the rule to be that a stranger to a child - including a governmental agent - cannot wrest custody from the lawful guardian of the child without first demonstrating that the lawful guardian has either abandoned or neglected the child, or without offering other commanding reasons. But, in a contest between two recognized guardians, the person who can offer superior parenting will prevail. The first is the "fitness" rule; the second is the "best interests" rule.
>
> The court concluded that in the case of a competition between a legal stranger and a legal guardian, the appropriate test is not the best interests of the child, but rather, the fitness test.

41 While the case is of limited relevance here, I note there is evidence (albeit hearsay) and representations from counsel that L.C. is unwilling to give instructions to counsel, effectively leaving E.M.P. with counsel but no way of instructing him. That cannot be in her best interests.

42 I do not read ***W.A.*** as holding that a next friend can only be a stranger where no family member is capable of being next friend. In any event, that is in my view only relevant where there is a conflict between competing candidates seeking to be appointed next friend. That is not the case here.

43 If Ms. Lightning had self-appointed under the old Rules of Court (if that could have been done without Court order in the face of an existing next friend), the Crown might only have been able to argue as to conflict of interest issues. But she did not self-appoint. Instead, she seeks payment as next friend/litigation representative and exemption from liability for costs. The Crown certainly has the status to respond to those issues, as it is the Crown from whom Ms. Lightning seeks payment, and it is the Crown that might be deprived of a cost remedy if the lawsuit is eventually unsuccessful against it.

3. Terms and Conditions on Appointment

44 The Crown also argue that there is no precedent for a next friend to be compensated by the opposing party, citing ***Crothers v. Simpson Sears Ltd.*** (1988), 59 Alta. L.R. (2d) 1 (C.A.) and ***Salamon v. Alberta (Minister of Education)***, [1991] A.J. No. 922, 1991 CarswellAlta 199.

45 This argument is contradicted by the orders of Ritter J. In ***W.A.*** and Macklin J. in ***T.W.*** referenced above.

46 Here, the Crown does not argue that Ms. Lightning is not a suitable person to be next friend. L.C. has raised no objections to Ms. Lightning acting in this capacity and of course has appointed Ms. Lightning to be her attorney under a power of attorney. But since Ms. Lightning has sought appointment by the Court (and seeks favourable terms from the Court), the Court must be satisfied that her appointment would be in E.M.P.'s best interests.

47 Ms. Lightning has no experience with class actions, although she does have experience with Child Welfare matters. Her experience with civil litigation and Charter litigation (which this action might best be described as) is unclear.

48 It appears clear that she is attorney for L.C. and as such owes a duty of loyalty to L.C. She is undoubtedly in a fiduciary relationship to L.C. L.C.'s interests and E.M.P.'s interests in the action and in the intended class action are not identical. E.M.P. is now being put forward as the potential representative plaintiff for the "failure to file" child plaintiffs. It is not clear to me that it is in E.M.P.'s best interests to head up a class action, or be involved in an action with her mother and potentially her siblings' claims, as opposed to having her own, stand-alone damage action, or being in a child-only class action.

49 There are potential conflict issues between E.M.P. and her mother which make it important that E.M.P. have an independent next friend or litigation representative. I realize that parents are often next friends for their children in actions where the parents may be plaintiffs in their own right. But those are situations where the parents will self-appoint and not look to the Courts to make the appointment. Where the Court is required to make the appointment, different considerations apply. Appointing a next friend or litigation representative who is already a parent's attorney under a power of attorney may put the next friend or litigation representative in an impossible position if there is a conflict between the parent's and the child's interests.

50 As a result, while I conclude that E.M.P. requires a next friend/litigation representative, that person should not be Ms. Lightning. This decision has nothing to do with Ms. Lightning; rather it is founded on concerns for potential conflicts between the mother's interests and the daughter's interests. The appointee should make decisions for E.M.P. based solely on E.M.P.'s interests without reference to L.C.'s or anyone else's interests.

3. Who should be E.M.P.'s next friend/litigation representative?

51 I do not see that the Crown should have a say or input into who should be appointed next friend or litigation representative for E.M.P., subject only to any concerns over possible conflicts of interest with the Crown. Following the logic in ***W.A.***, the next friend or litigation representative should be someone reasonably agreeable to both counsel for E.M.P., Mr. Lee, and the Public Trustee. Even though the Public Trustee is not E.M.P.'s trustee, I consider it appropriate that it be the Public Trustee's office that is involved in the selection of a next friend. That office has considerable expertise and experience in such matters.

52 If counsel are unable to agree on an appropriate next friend/litigation representative within 30 days from the date of this decision, each of Mr. Lee and the Public Trustee should submit the name of at least one candidate along with the information required by Rule 2.14(2)(a),(c),(d) and (e), together with a brief statement of the candidate's qualifications, and I will make an appointment so long as I find one of those candidates appropriate.

4. Exemption from liability for costs

53 Where the Court is of the opinion that a next friend/litigation representative is necessary for a child and the person appointed is essentially a stranger to the child and is in the nature of a professional advisor rather than being a parent or guardian, there is a strong case to be made for protecting the person from personal liability for costs.

54 In ***T.W.***, I was advised by counsel that an independent lawyer was appointed to act as next friend for the infant plaintiffs, and the next friend was indemnified against liability for costs by the Public Trustee. Here, it would be inappropriate to appoint the Public Trustee as next friend or litigation representative because the defendant is the Crown and there may be at least an appearance of a conflict of interest on the part of the Public Trustee in advising for or against suing the Crown.

55 Ritter J. and Brooker J. recognized the power of the Court to exempt a next friend from liability for costs in ***W.A.*** and ***Thomlinson***, respectively, and I consider that this is an appropriate case to grant such exemption for E.M.P.'s next friend/litigation representative. This is a highly unusual step, as it leaves the Defendants in this action without any effective cost remedy in the event they are successful in defending against E.M.P.'s claims.

56 In this case, however, I consider the fact that the Defendants are Alberta government entities. E.M.P. appears to have a *prima facie* case for liability on her existing statement of claim: she was apprehended by the Director; a TGO was granted in favour of the Director; the Director failed to file a care plan for E.M.P. within 30 days from the granting of the TGO; and E.M.P. remained in the Director's care despite the TGO becoming a nullity under ***T.S. v. Alberta (Director of Child Welfare)***, 2002 ABCA 46. The nature and extent of E.M.P.'s damages (if any) are unclear.

57 The Court of Appeal ruled in ***C.H.S. v. Alberta (Child, Youth and Family Enhancement Act, Director)***, 2010 ABCA 15, that there may also be *Charter* claims arising out of the Director's

"failure to file" for affected children and their parents or guardians. Those claims have not yet been added to E.M.P.'s claim against the Defendants.

58 And having regard to the number of children and others affected by the Director's failure to file care plans and the other types of claims discussed in my decision at 2011 ABQB 12, a next friend or litigation representative will have to decide whether it is in E.M.P.'s best interests to convert her action into a proposed class action.

59 Considering these various matters, I am of the view that it is appropriate to exempt E.M.P.'s next friend/litigation representative from liability for costs in this action in relation to E.M.P.'s individual action. This exemption would not apply to liability for costs as a representative plaintiff or proposed representative plaintiff if the action is converted to a proposed class action and the next friend/litigation representative determines that it is in E.M.P.'s best interests to have him or her be put forward as representative plaintiff. It is premature to consider whether a next friend might be granted an exemption from liability for costs as a representative plaintiff in a class action.

5. Payment for the Next Friend/Litigation Representative

60 As determined in ***W.A.*** and ***Thomlinson***, and as has apparently been the case for T.W.'s children and one of M.B.'s grandchildren who have recently become permanent wards of the Director, the independent next friend was entitled to be paid for his or her services as next friend by the Public Trustee. The evidence before me satisfies me that L.C. is unable to pay for the services of an independent next friend or litigation representative for E.M.P. I consider it appropriate that the Public Trustee pay for E.M.P.'s services as next friend at rates to be approved by the Public Trustee.

61 New Rule 2.17(1) provides that the Court may require the defendant to pay the costs of a litigation representative for a child. I do not interpret that Rule as limiting the Court's ability to appoint someone other than the Public Trustee as a child's litigation representative, at the Public Trustee's cost, or to require the Public Trustee to pay the reasonable costs of a child's litigation representative where it is not appropriate for the Public Trustee to act as litigation representative.

6. Funding for Counsel for E.M.P.

62 This is the ***Okanagan*** aspect of the applications. It is interesting to note that new Rule 2.17(2) permits a court-appointed litigation representative to apply for advance costs.

63 The Public Trustee has retained counsel for T.W.'s children and M.B.'s grandson. It has been represented to me that counsel will be paid for advice, but if an action is to be actively pursued on their behalves, contingency arrangements would have to be made with counsel, as the Public Trustee does not generally fund litigation costs for plaintiff children.

64 Were E.M.P. to be under the care of the Director, the Public Trustee would be paying for her next friend and for her lawyer, to the point of pursing an action. Her claim arises out of her apprehension by the Director and his alleged failure to follow his statutory responsibilities, just like the claims of T.W.'s children and M.B.'s grandson. I do not see it as an unreasonable burden on the Crown to put E.M.P. in the same situation as other children who faced similar treatment by the Crown and who are now wards of the Crown. The evidence before me is that L.C. has limited means and is unable to afford to pay for a lawyer for herself or for E.M.P.

65 ***Okanagan*** held that advance costs are appropriate and may be ordered in certain limited circumstances:

35 Based on the foregoing overview of the case law, the following general observations can be made. The power to order interim costs is inherent in the nature of the equitable jurisdiction as to costs, in the exercise of which the court may determine at its discretion when and by whom costs are to be paid....

36 There are several conditions that the case law identifies as relevant to the exercise of this power, all of which must be present for an interim costs order to be granted. The party seeking the order must be impecunious to the extent that, without such an order, that party would be deprived of the opportunity to proceed with the case. The claimant must establish a *prima facie* case of sufficient merit to warrant pursuit. And there must be special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate. These requirements might be modified if the legislature were to set out the conditions on which interim costs are to be granted, or where courts develop criteria applicable to a particular situation where interim costs are authorized by statute (as is the case in relation to s. 249(4) of the Ontario *Business Corporations Act*; see *Organ, supra*, [1992] O.J. No. 2111 at p. 213). But in the usual case, where the court exercises its equitable jurisdiction to make such costs orders as it concludes are in the interests of justice, the three criteria of impecuniosity, a meritorious case and special circumstances must be established on the evidence before the court.

39 One factor to be borne in mind by the court in making this determination is that in a public law case costs will not always be awarded to the successful party if, for example, that party is the government and the opposing party is an individual *Charter* claimant of limited means. Indeed, as the *B. (R.)* case, [1995] 1 S.C.R. 315, demonstrates, it is possible (although still unusual) for costs to be awarded in favour of the unsuccessful party if the court considers that this is necessary to ensure that ordinary citizens will not be deterred from bringing important constitutional arguments before the courts. Concerns about prejudging the issues are therefore attenuated in this context since costs, even if awarded at the end of the proceedings, will not necessarily reflect the outcome on the merits. Another factor to be considered is the extent to which the issues raised are of public importance, and the public interest in bringing those issues before a court.

40 With these considerations in mind, I would identify the criteria that must be present to justify an award of interim costs in this kind of case as follows:

1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial -- in short, the litigation would be unable to proceed if the order were not made.
2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests

of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.

3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

> 41 These are necessary conditions that must be met for an award of interim costs to be available in cases of this type. The fact that they are met in a particular case is not necessarily sufficient to establish that such an award should be made; that determination is in the discretion of the court. If all three conditions are established, courts have a narrow jurisdiction to order that the impecunious party's costs be paid prospectively. Such orders should be carefully fashioned and reviewed over the course of the proceedings to ensure that concerns about access to justice are balanced against the need to encourage the reasonable and efficient conduct of litigation, which is also one of the purposes of costs awards. When making these decisions courts must also be mindful of the position of defendants. The award of interim costs must not impose an unfair burden on them. In the context of public interest litigation judges must be particularly sensitive to the position of private litigants who may, in some ways, be caught in the crossfire of disputes which, essentially, involve the relationship between the claimants and certain public authorities, or the effect of laws of general application. Within these parameters, it is a matter of the trial court's discretion to determine whether the case is such that the interests of justice would be best served by making the order.

66 In ***Deans v. Thachuk***, (2005) 376 A.R. 326 (C.A.), the Court of Appeal reversed the chambers judge's refusal to order advance costs from the defendant pension fund [[2004] A.J. No. 470]. The Court of Appeal concluded that the three-part ***Okanagan*** test was to be applied.

67 In considering whether the case involved the "special circumstances" necessary to warrant advance funding, the Court approved ***Townsend v. Florentis***, [2004] O.T.C. 313 (S.C.J.) at paras. 56-57:

> "The third test set out by LeBel J. is whether there are special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of the court's power is appropriate. In ***Okanagan*** itself, the special circumstances were that the issues were of profound importance to the people of B.C. and their determination would be a major step towards resolving problems in the relationship of Aboriginals and the Crown. I do not suggest that such an extreme example is the measure to use in every case, but, recalling that the circumstances must be special, that the class is narrow, and that the exercise of the power is extraordinary, it is clear that there must exist some factor which decisively lifts the applicant's case out of the generality of cases. The existence of issues going beyond the interests of the parties alone would seem to be one possible example of the minimum required.

> Concerns about access to justice and the desirability of mitigating severe inequality between litigants feature prominently in the rare cases where interim costs are awarded. However, by definition, impecuniosity alone is not enough: it is but one of the three criteria. The mere 'levelling of the playing field', although an admirable objective, would deprive the Third Test of any real meaning, and substitute a form of judicial legal aid, available in any case involving impecunious parties. The principles developed in the administration of Family Law Rule 24(12) include the levelling of the playing field, but one must remember that these rules are dealing with a very special relationship."

68 Mr. Lee also referred to ***Lloyd v. Imperial Oil Ltd.***, 2001 ABQB 407, ***Vancouver (City) v. Ward***, 2010 SCC 27, ***B.(R.) v. Children's Aid Society of Metropolitan Toronto***, 1992 CanLII 2831 (O.N.C.A.), and ***Alberta (Child, Youth and Enhancement, Director) v. B.M.***, 2009 ABCA 258. It is not necessary for me to discuss or review those cases in these reasons.

69 The Crown argues that the "rare and exceptional" or "extraordinary" circumstances required to be shown for advance costs are not present here, citing ***Okanagan, Little Sisters*** and ***Reference re: Criminal Code, s. 293***, 2010 BCSC 517.

70 The Crown agrees that the three part ***Okanagan*** test is the correct test to apply.

71 It cites ***W.A. v. St. Andrew's College (O.N.S.C.)***, 2008 CanLII 3234, where plaintiffs in a proposed class action involving allegations of child sexual abuse sought immunity in advance from possible costs. Such immunity was denied as being premature (at best).

72 That case is not helpful here. The Plaintiff seeks advance costs, not immunity.

73 The Plaintiff might be required to repay any advance costs (and fees paid to the next friend) in the discretion of the eventual trial judge.

74 Further, the Crown's arguments that the ***Okanagan*** tests have not been satisfied are not persuasive. I am satisfied on the evidence before me as to the necessary level impecuniousity for both E.M.P. and L.C. Few individuals can afford to undertake litigation against the Government other than on a contingency arrangement. There is no such arrangement here.

75 I do not require the same level of detail of impecuniosity as was required in ***R. v. Black Pine Enterprises Ltd.***, 2001 BCSC 1849, ***R. v. Malik***, [2003] B.C.J. 2167 (S.C.), ***R. v. Rain***, (1994) 25 Alta. L.R. (3d) 1 (C.A.) or ***R. v. Chan***, 2000 ABQB 728, to make that finding. These are all cases seeking *Rowbottom* fundings, which applies different tests.

76 I also do not consider that the issues involved have been resolved by ***T.S.*** and the subsequent amendments to the applicable legislation. I do not see that any case has addressed an affected child's or parent's entitlement to damages in ***T.S.*** circumstances. I certainly do not hear the Crown saying that entitlement is conceded and only individual assessments of damages are required.

77 Further, advance costs might be ordered at any state of the litigation, for any stage of the litigation.

78 The Crown's concerns over appropriate checks and balances on any advance costs are answered by the limited scope of the services for which advance costs are being sought. As well, the next friend/litigation representative or the Crown (as payor) can always have any solicitor's account taxed. A process for review and taxation (if necessary) could be built into any order.

Decision

79 I am satisfied that in this case, the three conditions for advance costs have been made out:

1. E.M.P. is unable to pay for legal fees to pursue this claim;
2. Her claim is *prima facie* meritorious; and
3. The issues in her claim transcend her individual interests, they are of public importance, and they have not been resolved in previous cases.

80 There is a public interest in understanding the Director's actions and inactions in E.M.P.'s and similar situations. Government action should be scrutinized by an informed public. E.M.P.'s claims raise a serious public interest having regard to the decision in T.S. and subsequent legislative responses or reactions to that decision. All other litigation involving similar claims has been stayed, and there has been no resolution of the issues raised in this action as it presently stands, or as it may be amended to accord with the Court of Appeal's directions in this case and in ***C.H.S.***

81 It is difficult to think of circumstances more compelling for advance costs to assist person such as E.M.P. to obtain legal advice. She is still a child; she has a *prima facie* meritorious claim against the Crown; her claim arose while she was a temporary ward of the state; the Crown was at the time in a fiduciary relationship to her; her claim arose out of the alleged breach by the Director of clear duties under his home legislation; her claim arose after the Alberta Court of Appeal had issued a strong ruling on the point in issue; and the Crown (through the Public Trustee) is paying for children in similar situations to get legal advice if they are now permanent wards of the state.

82 E.M.P.'s next friend/litigation representative should be able to consult counsel and obtain legal advice as to the merits of E.M.P.'s claims, and various strategies as to how best to advance such claims. The reasonable legal fees and disbursements of such counsel should be paid by the Crown through to any amendment to E.M.P.'s Statement of Claim to comply with the Court of Appeal's decision in this action and in ***C.H.S.***, as well as amendments to convert E.M.P.'s claim to a proposed class action (if applicable).

83 At the point of completion of these amendments, and any amendments necessary to convert E.M.P.'s claim to a proposed class action, payment for any ongoing legal fees and disbursements (including any application for certification) should be readdressed.

84 The advance cost award herein does not include any payment for past services; it is intended only to take E.M.P.'s action from where it is now to such time as the pleadings are regularized and put in order so that a certification application (if that is what is determined to be in E.M.P.'s best interests) can be brought.

Funding for Counsel for L.C.

85 The mini-***Okanagan*** application was brought on behalf of L.C. as well. The Statement of Claim has not yet been amended to make it consistent with the Court of Appeal's decision in this action, ***L.C. v. Alberta***, 2010 ABCA 14, and in ***C.H.S.*** (supra). What is required is to plead the *Charter* issues that the Court of Appeal held were "loosely made out", as well as to convert the action on L.C.'s behalf to a proposed class action, if that is still her intent.

86 L.C. is now intending to carry on the action by her attorney under a power of attorney. It is not clear to me how the mechanics of that will work and I expect there will be issues raised at case

management in that regard. But at the present time, Ms. Lightning has made arrangements with L.C. so that a next friend or litigation representative is not required.

87 The evidence satisfies me that L.C. is financially unable at this stage to pursue the litigation either on her own or as the representative plaintiff for a class action. Mr. Lee has advised that he is not able to continue on as counsel without ongoing payment; no satisfactory contingency arrangement has been entered into between Mr. Lee and L.C. There is also evidence that Mr. Lee has attempted unsuccessfully to attract co-counsel for the proposed "failure to file" class action.

88 So for the purposes of this mini-***Okanagan*** application, the first of the three tests has been made out.

89 Is L.C.'s claim *prima facie* meritorious? That is a difficult question at this stage. The precise *Charter* argument has not been plead. From the discussion of the issue in the Court of Appeal in this action and in ***C.H.S.***, there was no comment on the merits of such allegations. Those proceedings arose out of an application to strike, so the merits of the claims were irrelevant to the decision. There is nothing in the claim alleging that E.M.P. was wrongly apprehended by the Director or that the TGO was improperly obtained. L.C.'s claim is apparently that her *Charter* rights were violated because the Director failed to prepare a timely and adequate care plan to reunite E.M.P. with L.C. and the rest of her family, as well as by the Director failing to return E.M.P. to her when the TGO became a nullity (because of his failure to file a care plan in time).

90 At this stage, I cannot conclude that L.C.'s *Charter* claim is *prima facie* meritorious. It may well be arguable, but that does not make it meritorious. I am not satisfied that the second part of the ***Okanagan*** test has been made out.

91 The third part of the test - do L.C.'s claims transcend her individual interests, are they of public importance, and they have been resolved in previous cases - requires analysis. As with E.M.P.'s claim, there is a public interest in understanding and scrutinizing the Director's actions and inactions in this and similar situations. There is certainly a public interest in understanding the Director's actions following the Court of Appeal decision in ***T.S.*** and subsequent legislative changes. *Charter* rights and allegations of breaches of *Charter* rights are often of public concern beyond the interests of the directly affected party. These issues have not been resolved in any other litigation.

92 However, different considerations apply for L.C. than with E.M.P. L.C. was owed very different duties by the Crown. Until it can be established that her *Charter* claims are *prima facie* meritorious (which will require some analysis of the facts in the context of the pleadings specifically putting forward the *Charter* claims) the public interest aspect cannot be properly analyzed.

93 I realize that there is a Catch-22 argument here: L.C. cannot afford to amend her pleadings so that a *prima facie* case can be argued in support of her application for advance costs to amend her pleadings. But advance costs under ***Okanagan*** are an extremely rare occurrence. In my view, a party does not satisfy the tests under ***Okanagan*** by saying "I have a meritorious claim, the precise nature of which will be described in the statement of claim. Give me advance costs so I can commence the action." A plaintiff may be able to come forward and allege facts and law that demonstrate a *prima facie* meritorious claim. But that has not happened here. L.C.'s *Charter* arguments and any facts to support them are presently too vague.

94 Without a more thorough description of L.C.'s *Charter* claims, I cannot conclude that the public interest component of ***Okanagan*** has been satisfied either.

95 L.C.'s application for advance costs is dismissed at this stage. Amended pleadings or additional facts may satisfy the ***Okanagan*** tests for subsequent proceedings.

Summary

1. E.M.P. is in need of a next friend/litigation representative.
2. Denise Lightning is not appropriate to be a Court-appointed next friend/litigation representative because she is attorney for L.C. under a power of attorney and might be placed in conflict situations;
3. An appropriate next friend/litigation representative should be agreed between Mr. Lee and the Public Trustee;
4. The next friend/litigation representative is entitled to be paid for such service by the Crown;
5. E.M.P. is entitled to advance costs from the Crown to obtain advice on her action against the Crown and to amend her pleadings to conform to the Court of Appeal decision in this matter and in ***C.H.S.*** as well as to convert it to a proposed class action (if determined to be appropriate by the next friend/litigation representative);
6. E.M.P. may reapply for further advance costs once the pleadings have been amended;
7. L.C. is not entitled to advance costs from the Crown at this stage of the litigation.

Costs

96 E.M.P. has been substantially successful on her application for the appointment of a next friend/litigation representative, as well as for some advance costs from the Crown. She should get one set of costs relating to the four day application in October. I would attribute half of the time and materials for that application to her claims and the other half to her mother's.

97 L.C. abandoned her application for the appointment of a next friend after the application was over and she has been unsuccessful in her application for advance costs. She is responsible to the Crown for one set of costs relating to her involvement in the October application.

R.A. GRAESSER J.

cp/e/qlcct/qlvxw/qlcas/qljxr/qlcas

1 ***Szwydky v. Magiera***, (1988), 71 Sask.R. 273 (Q.B.).

TAB 11

Case Name:

Long Plain First Nation Trust (Trustees of) v. Long Plain Indian Band

IN THE MATTER OF an application for the opinion, advice or direction of the Court with respect to the interpretation and administration of the Long Plain First Nation Trust
And IN THE MATTER OF Section 84(1) of The Trustee Act, R.S.M. 1987, c. T160
Between
Thomas Myran, Curtis Assiniboine, Max Merrick, Kirt Prince, Michael Paluk, and Betty Meeches Myran, in their capacities as Trustees of the Long Plain First Nation Trust, applicants, and
The Long Plain Indian Band (also known as the Long Plain First Nation), as represented by its Chief and Councillors: Dennis Meeches, Steve Prince, Bobbie Peters, Marvin Daniels, and Mary Perswain, respondents, and
Peter Yellowquill, Sheila Yellowquill, Kathy Laporte, Vanessa Laporte, Denise Overton, Louis Daniels, and Doreen Myran Peterson, respondents

[2002] M.J. No. 44

2002 MBQB 48

162 Man.R. (2d) 166

43 E.T.R. (2d) 266

112 A.C.W.S. (3d) 185

Docket: CI 00-03-00047

Manitoba Court of Queen's Bench
Portage la Prairie Centre

Clearwater J.

February 1, 2002.

(43 paras.)

Trusts -- Administration -- Powers of trustee -- Discretionary power re payment out of trust funds -- Investment of trust funds -- Power to deviate from terms of trust -- Directions from court.

Application made by the Trustees of the Long Plain First Nation Trust for the opinion, advice and direction of the Court in regard to their management and administration of the Trust. The Treaty Land Entitlement Settlement Agreement and the Trust Deed were executed on August 3, 1994 as part of a land settlement claim between Canada and the First Nation. A Trust Capital Account was established pursuant to the Trust Deed. The settlement funds were paid into the account to be used and administered by the Trustees during the term of the Trust. The Trust would terminate on December 31st, 2019 at which time the remaining proceeds of the Trust would be paid to the beneficiary, the First Nation. The Trust Deed provided for a minimum of 4,169 acres to be acquired and set apart as reserve for the use and benefit of the First Nation. The Trust Deed provided the Trustees with a broad discretion to make investments from the Trust. The Trustees and the First Nation submitted that, subject to the Trust Deed, they were authorized to invest the settlement funds in "non-public corporations and/ or private business ventures". Those objecting submitted that such investments were prohibited by the terms of the Trust Deed. They contended that the investment powers of the Trustees were limited to those types of investments and securities, which were reasonably free from risk and most likely to ensure the continuing growth of the Trust Capital Account during the entire term of the Trust.

HELD: Application allowed. The Trustees were authorized, subject to meeting an appropriate standard of care in making any particular investment, to invest the Trust Capital in non-public corporations and/or private business ventures. These investments were within the discretion of the Trustees according to the terms of the Trust Deed. There was nothing in the settlement agreement or Trust Deed that contained specific restrictions as to the type of instruments that could be acquired as an investment. In addition, section 68 of the Trustee Act conferred Trustees with broad powers of investment. The broad powers under the Act were in addition to the specific powers conferred by the Trust Deed.

Statutes, Regulations and Rules Cited:

Manitoba Queen's Bench Rules, Rules 5.03, 14.05(2)(c).

Trustee Act, R.S.M. 1987, c. T160 ss. 1, 68(1), 68(2), 69(1)(a), 69(1)(b), 69(1)(c), 72(1), 72(2)(a), 72(2)(b), 73(1)(a), 73(1)(b), 73(2), 73(3), 74(1)(a), 74(1)(b), 74(1)(c), 74(1)(d), 74(1)(e), 74(1)(f)(i), 74(1)(f)(ii), 74(2), 74(3), 75(a), 75(b).

Please see list of Cases Cited

and Statutes appended to this document.

SCHEDULE "A"

43

Statutes, Texts, and Case Law

Statutes

The Trustee Act, R.S.M. 1987, c. T160

The Trustee Act, R.S.B.C. 1996, chap. 464 (s. 15) - re trustee authorized investments

Manitoba Queen's Bench Rule 14.05(2)(c)

Texts

D.W.M. Waters, Law of Trusts in Canada (2nd ed., 1984)

The Canadian Encyclopedic Digest (Western) (3rd ed.), pp. 144-172 to 144-175 ("Powers of Investment")

Ruth Sullivan, Driedger on the Construction of Statutes (3rd ed., 1994)

Black's Law Dictionary (6th ed.)

Case Law

Warren v. Chapman, [1984] 5 W.W.R. 454 (Man. Q.B.); [1985] 4 W.W.R. 75 (Man. C.A.) - re interpretation principles

Eli Lilly & Co. v. Novopharm Ltd.; Eli Lilly & Co. v. Apotex Inc., [1998] S.C.J. No. 59

Toronto-Dominion Bank v. Leigh Instruments Ltd. (Trustee of), [1999] O.J. No. 3290 (Ont. C.A.)

Tod v. Tod Estate, [2001] M.J. No. 469 (Man. Q.B.)

Re Rayner (Rayner v. Rayner), [1900-3] All E.R. Rep. 107 (Eng. C.A.)

Re Lloyd, [1949] O.R. 473-487 (Ont. Superior Ct.)

In Re McEacharn's Settlement Trusts. Hobson v. McEacharn, [1939] 1 Ch. 858

R. v. McDonnell, [1935] 1 W.W.R. 175 (Alta. C.A.)

Canadian & Foreign Securities Co. v. Minister of National Revenue, [1972] C.T.C. 391 (Fed. Ct. - Trial Div.)

Case Law Submitted by the Trustees

Gisborne et al. v. Gisborne et al., [1877] 2 A.C. 300 (House of Lords)

Kmiec v. Kmiec (1991), 45 E.T.R. 94 [Ont. Ct. of Justice (General Div.)]

Paterson (Attorney of) v. Paterson Estate (1996), 109 Man.R. (2d) 294 (Man. Q.B.)

Cheadle v. Mayotte (1995), 7 E.T.R. (2d) 167 94 [Ont. Ct. of Justice (General Div.)]

Counsel:

Diane H. Stevenson and Lindy J.R. Choy, for the applicants ("the Trustees").
Michael D. Werier and Darcie C. Yale, for these respondents ["the Band" and (or) "the First Nation"].
G. Patrick S. Riley and Tamara D. McCaffrey, for these respondents ("the Objectors").
John Fergusson, on a watching brief for the Public Trustee of Manitoba.

Paul S. Claire, on a watching brief for Her Majesty the Queen in Right of Canada as represented by the Minister of Indian Affairs and Northern Development ("Canada").

CLEARWATER J.:--

THE PROCEEDING

1 The Trustees seek the opinion, advice, and direction of this court respecting their management and administration of the Long Plains First Nation Trust ("the Trust"), pursuant to Manitoba Queen's Bench Rule 14.05(2)(c) and s. 84(1) of The Trustee Act, R.S.M. 1987, c. T160 ("the Act"). Section 84(1) of the Act reads:

> A trustee, guardian, or personal representative, may, without the institution of an action, apply to the court in the manner prescribed by rules of court, for the opinion, advice, or direction, of the court on any question respecting the management or administration of the trust property or the assets of his ward or his testator or intestate.

2 In their application the Trustees seek:

> (a) the opinion, advice and direction of the Court on a question respecting the management and administration of the Long Plain First Nation Trust, and more particularly, whether Article 9.1(a)(i) of the Trust Deed restricts the Trustees from investing in non-public corporations and/or private business ventures; and
> (b) such further and other relief as this Honourable Court may deem just.

3 The answer to this question [whether the Trustees may or may not invest the settlement funds ("the Trust Capital"), to the extent that these funds have not yet been used to purchase land as contemplated by the First Nation's Treaty Land Entitlement Settlement Agreement ("the settlement agreement") and the Trust Deed, supra, in "non-public corporations and/or private business ventures"] depends upon the correct interpretation of the Trust Deed. Any issues as to whether the Trustees "should" as opposed to whether they "may" invest in any particular corporation or business venture is, in my respectful opinion, not a question that should be answered by this court in this type of proceeding. It is not the function of the courts to bless any particular investment or type of investment in advance; at least not under these instruments.

4 When this proceeding started, the court directed wide-ranging publication and service of notice of it with a view to ensuring notice to all eligible members of the Band, whether currently resident on the reserve lands near Portage la Prairie or elsewhere. This included service on the Public Trustee of Manitoba as to any infants, currently unborn eligible members of the Band, and eligible members who may not be competent, all of whom appear to have an interest in the administration of this Trust (being the ultimate beneficiaries of the land settlement payments). The court also directed service on Canada, as Canada negotiated the settlement agreement with the Band and paid the settlement funds directly into trust in accordance with the express terms of the settlement agreement and the Trust Deed, which was a schedule to (and required by) the settlement agreement.

5 Canada took no position and made no submissions on the issue. The Public Trustee of Manitoba, having satisfied herself that the interests of its potential constituency were adequately and properly represented in the positions advanced by Mr. Riley and Ms McCaffrey for the Objectors, made no submissions on the issues. I am satisfied that the interests of all eligible members were well represented by counsel for the Objectors.

6 The Trustees and the respondent First Nation submit that the Trustees are authorized (subject always to meeting the appropriate standard of care imposed on them by the Trust Deed and the law) to invest the unused Trust Capital in these types of ventures from time to time. The Objectors submit that any such investments are prohibited by the terms of the Trust Deed; that is, the investment powers of the Trustees are limited, with respect to the Trust Capital Account, to those types of investments and (or) securities which are reasonably free from risk and most likely to ensure continuing growth of the Trust Capital Account during the entire term of the Trust (25 years) or, as a minimum, until the maximum amount of reserve land contemplated in the settlement agreement has been acquired.

7 All interested parties agreed that this issue should be determined by this court on the basis of the admissible affidavit evidence and any cross-examinations conducted on those affidavits.

DECISION

8 For the following reasons, I have concluded that the Trustees are authorized (subject always to meeting the appropriate standard of care in making any particular investment) to invest the Trust Capital in non-public corporations and/or private business ventures; that is, such investments are within the discretion of the Trustees according to the terms of the Trust Deed.

BACKGROUND

9 The Treaty Land Entitlement Settlement Agreement and the Trust Deed in question (which is a schedule to the settlement agreement) were finalized and executed on August 3, 1994. Both documents are comprehensive written agreements prepared with the assistance and advice of counsel and executed by the parties. The recitals and definition sections in each document concisely (and, in my view, clearly) summarize and express the intent and purpose of the settlement agreement and the accompanying Trust Deed. The subjective views of the parties as expressed in any affidavits filed in this proceeding are, in my opinion, irrelevant and inadmissible in the face of the clear and unambiguous language used.

10 The First Nation was one of the signatories to a treaty made between Her Majesty the Queen in Right of Great Britain (Canada being the successor to Her Majesty) on or about August 3, 1871. Her Majesty promised to set aside and reserve sufficient lands along or near the Assiniboine River in the vicinity of what was then known as "Long Plain" (about 20 miles from the current site of Portage la Prairie), such that each family of five (or in that proportion for larger or smaller families) would be furnished with 160 acres. Currently the First Nation consists of approximately 3,000 eligible members (many of whom are not living at or near the current reserve lands south and west of Portage la Prairie).

11 In summary, Canada paid $16.5 million to the First Nation to settle its land entitlement claims on the following conditions:

First Nation and St. Theresa Point First Nation on March 14, 1994] and to Exs. "A" and "B" to his February 26 affidavit [settlement agreements (and trust deeds) made with the Wasagamack First Nation and The Red Sucker Lake First Nation, also on March 14, 1994]. I appreciate that the interpretation of the Trust Deed before me is not in any way dependent upon the correct interpretation of other trust deeds made at other times with other parties. Nevertheless, each of these four trust deeds, all negotiated as part of treaty land settlement claims between Canada and those First Nations for the same general purposes, contain the following definition of "Authorized Investments":

> "Authorized Investments" means the following types of investments which the Trustees are authorized to purchase with the Trust Property:
>
> (a) debt instruments issued or guaranteed by the Government of Canada, a province of Canada or a municipality of Canada;
> (b) debt instruments including Bankers' acceptance issued or guaranteed by any of the chartered banks or licensed trust company;
> (c) commercial paper issued by a corporation rated R-1 or A-1 by the Dominion Bond Rating Services or Canada Bond Rating Services up to a maximum of fifteen (15%) percent of the value of the Trust Property; or
> (d) corporate bonds rated A or better by the Dominion Bond Rating Service or the Canada Bond Rating Services up to a maximum of fifteen (15%) percent of the value of the Trust Property;

34 This reinforces, at least to some extent, the conclusion that I have reached (supra) to the effect that if the signatories to the settlement agreement and the Trust Deed in the proceeding before me intended to restrict or limit the Trustees' powers of investment as now urged by the Objectors, they could have clearly and easily done so.

35 As I indicated at the outset of these reasons (para. [3]), to the extent that the Trustees (or any of the parties) seek, in this application, assistance or guidance from the court with respect to any particular proposed investment, this court should not make any such broad determinations. Those issues would have to be decided after hearing all relevant and admissible evidence. My comments which follow, with respect to questions raised during submissions concerning the duty of care owed by trustees in circumstances such as this, are obiter.

36 What is or is not negligent in any particular circumstance can only be determined upon a specific analysis of the facts and the steps taken by a trustee in arriving at his/her conclusion as to whether to invest in a particular investment. Clearly, the higher the risk with any particular investment, the higher the degree of care that must be taken. The responsibilities of administering a trust such as this are great; the pressures on the Trustees, particularly in a relatively small community or constituency such as exists here, are and will continue to be tremendous as regards the investment and use of these funds during the term of the Trust. These Trustees are specifically empowered to obtain professional advice and assistance and, in my opinion, with this power comes a corresponding duty (at least generally); that is, wherever possible the professional advice must be and be seen to be independent and expert. At the end of the day the honest belief of the Trustees that any particular investment (particularly high risk investment) may be in the best interests of the eligible members of the First Nation (because of expected "spin off" or otherwise) may well not be sufficient to avoid liability if the appropriate independent professional advice is not obtained and properly con-

sidered. The primary purpose of the settlement and the Trust is the acquisition of a minimum amount of land with discretion to acquire significantly more land up to the maximum acreage for the benefit of future generations. Keeping in mind that the Trustees are elected for terms of up to four years (articles 11 and 12) and are subject to replacement by other trustees whose views may not coincide with their views as to the amount of land to be acquired (over the minimum acreage), any investments made by the Trustees of the Trust Capital Account (whether in private or public corporations or businesses) must, in my view, always be made with a view to a profit on the investment [and not simply to create economic "spin-offs" that other interested parties may (quite properly) desire in advance of termination of the Trust].

37 The Trustees would do well to heed the advice of Prof. D.W.M. Waters in his text, Law of Trusts in Canada (2nd ed., 1984), where, in discussing the choice of investments by trustees and the exercise of their discretion, he states, at p. 819:

> ... Whatever the width of that power, whether at one extreme it is restricted to the legal list or at the other it includes any investment they in their absolute discretion select, trustees must only exercise prudence in their selection, but choose with a view to a balance of income return and security of the capital. Trustee powers are discretions which are fiduciary; unless instructed by the instrument to the contrary, trustees have no option, therefore, but to select each investment they make with impartiality in mind.
>
> However, as we have seen, it has been assumed for over one hundred and fifty years that, if a trustee invests in authorised investments, he thereby demonstrates impartiality, and in practice the legal list has been associated with prudence. It is only in recent years, with the now widely recognised effect of inflation and the constant decline of currency values, that trustees have come to realise the true dimensions of their investment task. Prudence lies in a mixture of carefully chosen debt securities and common stock with the proportions of each being regularly reassessed. ...

COSTS

38 The Trust Deed specifically provides (articles 5.7, 5.8, and 5.9) for the payment of costs of applications or proceedings such as this; to the extent possible, the costs are to be paid from the Trust Expense Account. I have no hesitation in ordering that the Trustees' costs, on a reasonable solicitor and own client basis, should be paid from the Trust (from the Trust Expense Account to the extent possible).

39 The question of the costs of the other parties to this proceeding is more problematical. Article 5.9 reads:

> The Trustees may select criteria for determining and pay the costs associated with an application by any Tribal Member commenced for the purpose of determining an issue of jurisdiction, authority, negligence or breach of trust or fiduciary duty of the Trustees or Council under this Agreement and the Trustees shall pay the costs incurred by a Tribal Member of any legal proceeding commenced by that member which results in a finding that the Trustees or Council have ex-

> ceeded their power, breached a duty, made an improper or unauthorized expenditure of Trust Property or have acted negligently in the management of Trust Property.

40 This provision, at least on an initial reading, by permitting the Trustees to select criteria for the payment of costs and requiring the Trustees to pay the costs of a tribal member when there is a finding that the Trustees or the First Nation have exceeded their powers or made an improper or unauthorized expenditure of trust property (or have acted negligently), raises a preliminary issue as to whether (and to what extent) the Objectors' (and perhaps even the First Nation's) costs should be paid from the trust property.

41 Clearly, it was never intended (and it would not be just) to require the Trustees to pay some other third party's costs every time some dissident eligible member or otherwise interested party seeks the assistance of the courts. Having said that, given the history of the administration of this Trust by the Trustees since its inception and the fact that the current Trustees (and the Band, as represented by its current chief and councillors) have considered (and may well consider in the future) investing the Trust Capital in something other than guaranteed investment certificates or similar low risk investments, the importance of the issue to all eligible members of the First Nation, including those unborn members, infants, and others not able to represent themselves, is such that the First Nation and the Objectors should also have their costs paid on a reasonable solicitor and own client basis.

42 I directed service on the Public Trustee of Manitoba and Canada at the outset of this proceeding. It was necessary for them to initially instruct counsel to attend before me (or perhaps even before Bryk J. or any other judge who may have had occasion to deal with preliminary matters). My recollection is that, very early on in the proceeding, Canada made a decision not to take any position or make any submissions. Similarly, the Public Trustee of Manitoba, at some point relatively early on, made a decision not to file materials and to rely (to the extent that she was interested) on counsel for the Objectors to articulate the position of her constituency. If the Public Trustee of Manitoba and Canada are unable to agree between themselves and the other parties as to what costs, if any (and on what scale), should be paid to them, I will hear further submissions from all interested parties on this limited issue.

CLEARWATER J.

cp/e/qlemo

TAB 12

Case Name:

Nazarewycz v. Dool

Between
Jerezy Nazarewycz, Appellant (Respondent), and
Lawrence William Dool and Cyril Fred Dool, Respondents (Applicants)

[2009] A.J. No. 189

2009 ABCA 70

176 A.C.W.S. (3d) 68

46 E.T.R. (3d) 159

448 A.R. 1

2009 CarswellAlta 252

2 Alta. L.R. (5th) 36

[2009] 7 W.W.R. 636

Dockets: 0701-0117-AC, 0701-0190-AC, 0701-0191-AC

Registry: Calgary

Alberta Court of Appeal
Calgary, Alberta

C.D. O'Brien, P.A. Rowbotham JJ.A., C.L. Kenny J. (ad hoc)

Heard: February 11, 2009.
Judgment: March 3, 2009.

(101 paras.)

Civil litigation -- Civil procedure -- Disposition without trial -- Discontinuance -- Costs -- Particular orders -- Solicitor and client or substantial indemnity -- For improper conduct -- Particular

circumstances -- After discontinuance of action -- Appeals -- Grounds for review -- Reasonable apprehension of bias -- Appeal by executor from orders varying prior order in estate proceedings allowed -- Challenge to will discontinued by cousins of executor after obtaining orders replacing executor and ordering proof of will -- Discontinuance granted without costs, executor restored, and formal proof not required -- Judge who made subsequent order reinstating administrator, ordering formal proof, and awarding costs against executor and counsel personally demonstrated bias against executor and counsel -- Prior order restored -- Cousins entitled to solicitor and client costs because executor protracted proceedings by not providing information during proceedings.

Wills, estates and trusts law -- Executors and administrators -- Actions against -- Grant of probate or letters of administration -- Proof of will in solemn form -- Removal and suspension -- Appeal by executor from orders varying prior order in estate proceedings allowed -- Challenge to will discontinued by cousins of executor after obtaining orders replacing executor and ordering proof of will -- Discontinuance granted without costs, executor restored, and formal proof not required -- Judge who made subsequent order reinstating administrator, ordering formal proof, and awarding costs against executor and counsel personally demonstrated bias against executor and counsel -- Prior order restored -- Cousins entitled to solicitor and client costs because executor protracted proceedings by not providing information during proceedings.

Appeal by Nazarewycz from two orders varying a prior order in estate proceedings. Nazarewycz was the executor of his aunt's will, which had been challenged by his cousins-by-marriage. The cousins obtained an order replacing Nazarewycz as executor with Canada Trust as administrator, and requiring the will to be proven in solemn form. Nazarewycz was not forthcoming in providing information and documentation to permit the order to proceed, but the cousins fell into ill health and poor financial circumstances and decided to discontinue their application. An order was issued allowing them to discontinue their action and awarding the cousins, Nazarewycz and Canada Trust their costs from the estate. Pursuant to this order, Nazarewycz was no longer required to formally prove the will. Subsequently, the order was changed by a judge who concluded Nazarewycz's counsel had conducted himself in an inappropriate manner and that Nazarewycz had stonewalled the proceedings. Apparently disregarding the prior order, the judge in an oral judgment reinstated Canada Trust as administrator, ordered the will proven in solemn form, and ordered costs against Nazarewycz and his counsel personally. The judge refused to recuse himself from further dealings with the estate. He filed the transcript of the proceedings with the Law Society and threatened to find Nazarewycz in contempt if the costs orders and proof of the will were not dealt with forthwith. The judge later issued a written order in which he negatively commented about prior dealings with counsel for Nazarewycz and suggested that Nazarewycz consult with another lawyer.

HELD: Appeal allowed. The orders had to be set aside. Nazarewycz was denied a fair hearing and demonstrated a reasonable apprehension of bias. The judge's comments about past dealings with Nazarewycz's lawyer and his suggestion that new counsel be retained undermined confidence that any further representations made by counsel would be fairly heard. The award of costs personally against Nazarewycz and his counsel was inappropriate given that it was not made on notice to the parties or pursuant to any application. The issue of costs was not remitted to the Court of Queen's Bench because of the undue delay and excessive costs that had already been incurred. The cousins were entitled to their costs of the discontinued action because they were able to satisfy the court there was a basis for a trial on issues of testamentary capacity, undue influence, and suspicious cir-

cumstances. Their health and financial problems constituted special circumstances justifying relieving them of any cost consequences of the discontinuance. Nazarewycz's uncompromising position forced Canada Trust and the cousins to labour in their efforts to gather relevant information, unnecessarily protracting and complicating the proceedings. The cousins were awarded their solicitor and client costs, including the costs of the appeal, from the estate, to be taxed at a later time. Canada Trust was also entitled to its costs.

Statutes, Regulations and Rules Cited:

Alberta Rules of Court, Rule 601

Appeal From:

Appeal from the Orders by The Honourable Mr. Justice P. M. Clark Dated January 10, 2007, June 15, 2007 and June 27, 2007 Filed on June 15 and 27, 2007 (2007 ABQB 12, Docket: ES01-099495).

Counsel:

E. W. Halt, Q.C. as agent for C. M. Smith, for the Appellant.

B. J. Kickham, Q.C., M.P. Nicholson, for the Respondents.

A. Moulton, for Canada Trust Company.

Memorandum of Judgment

The following judgment was delivered by

THE COURT:--

Introduction

1 The tangled proceedings before this Court arise from an application to discontinue an action without costs. The respondents, Lawrence William Dool and Cyril Fred Dool (the Dools), commenced proceedings challenging the last will of Katherine Dool, their late aunt by marriage. Prior to discoveries and trial, and by reason of their deteriorating health and financial circumstances, the Dools determined to no longer participate in the proceedings and withdrew their objection to formal proof of the will. The subsequent application of the Dools to discontinue their action prompted the three orders, consecutively made by the surrogate judge, which are the subject of this appeal.

Background Facts

2 Katherine Dool (sometimes, the deceased) died at 79 years of age in November 2001. The appellant, Jerezy Nazarewycz (Nazarewycz), was her nephew by blood and was named as executor of the deceased's last will, made on July 17, 1998 (the 1998 will). At the same time, the deceased also executed a "springing" Power of Attorney, appointing Nazarewycz as her attorney, as well as a Personal Directive.

them. However, upon our examination of the entirety of the record, the chambers judge, prior to the grant of his first order on January 10, 2007, had made remarks such as to give rise to the appearance both of a loss of impartiality between the parties and prejudgment of issues.

75 The chambers judge's criticism that counsel was ill prepared and uncivil, and reporting his conduct to the Law Society, did not of itself give rise to a reasonable apprehension of bias. As stated in *McCullough*, a judge is entitled to make reasonable criticism of counsel's conduct. Judges are also entitled to make a complaint to the governing professional body if they perceive a lawyer's conduct is deserving of review: *G.(M.G.) v. T.(C.E.)* (1994), 98 B.C.L.R. (2d) 102, [1994] B.C.J. No. 2119 (C.A.).

76 However, in the oral judgment of November 17,2006, and repeated in the written judgment of January 2007, the chambers judge's criticisms of counsel's behaviour and comment that it was not pleasant having counsel appear before him were not limited to the present proceedings, but included counsel's previous appearances before the chambers judge. His suggestion to the appellant that he consult with new counsel undermined confidence that any further representations made by that counsel in the further course of the proceedings would be fairly heard and dealt with. Further, the court's determination to cite the appellant for contempt and to award costs jointly against him and his counsel, all without notice or argument and initiated by the chambers judge, added to the perception of prejudgment and unfairness. This is especially so as during the November proceedings when counsel for the appellant attempted to challenge and to question the appellant's alleged non-compliance with a court order, the chambers judge cut short any explanation and advised he would respond on behalf of respondent's counsel [AB 409]. These remarks and directions, without notice or opportunity for argument, gave rise to an appearance that he was predisposed against the appellant and his counsel, and had prejudged certain issues.

77 It should be added that the comments, criticisms and directions made on November 17,2006, were all made at an interim stage when the judge was preparing his written reasons. The remarks were said to be "expressly subject to the decision that will be in written form" [AB 395]. It seems evident that the chambers judge had made up his mind and had determined to move forward with his judgment, including dealing with the matters that had never been raised and with respect to which counsel had no opportunity to make submissions.

78 An unfortunate aspect of this matter is that some of the criticisms made by the chambers judge of the appellant and his counsel, as well as many of the directions given by the court at that time, apparently were made because he overlooked the Bensler order, which had varied the earlier Mason order. As a result, some of the comments were unfair, and directions were made that were inappropriate. As earlier noted, no party in the appeal proceedings has sought to uphold the re-appointment of Canada Trust and related directions given by the court. No doubt, the overlooking of the order contributed to the criticisms of the appellant and his counsel and compounded the apprehension of bias and unfair treatment.

B. Costs of Proceedings

79 Having set aside the order of the chambers judge, we would ordinarily return the parties to the Court of Queen's Bench for a fresh hearing before a different judge. However, there has already been undue delay in determination of the costs applications, and disproportionate legal expenses have been incurred. The parties have requested this Court to make the decision regarding costs and it seems practicable that we do so.

80 The appellant recognizes that any award of costs is discretionary, but submits that the discretion must be exercised judicially and with regard to proper principles. The gist of his argument is that the Dools made allegations of wrongful conduct on his part. More specifically, that the allegations against him were of undue influence and "possibly fraud". The appellant submits that these were serious allegations and that since they were never established by the Dools, their failure to do so should attract costs: *Stevens v. Crawford*, [2000] A.J. No. 515, 264 A.R. 219, Supplementary Reasons at paras. 53-81.

81 However, we have concluded, not unlike the chambers judge, that there are special circumstances in this estate litigation, which provide a proper basis both for permitting the Dools to discontinue the action without costs and which also entitle them to recover the legal costs incurred by them in participating in the litigation. We will explain.

82 We start with an examination of the Mason order made on October 9, 2002 upon the request of the Dools that formal proof of the 1998 will be required. The allegations that are now complained of by the appellant predate that order. Mason J. had before him the affidavit evidence, not only of the Dools, but also of the appellant and Ihor Broda, who prepared the 1998 will and attended to its execution.

83 The Mason order not only required the will be proved in solemn form, it appointed Canada Trust as administrator, and directed it to propound the 1998 will. Moreover, the direction was that Canada Trust would conduct the proceedings with both Nazarewycz and the Dools to be respondents in the formal proof of the will proceedings. The order directed Nazarewycz to account, and placed responsibility both on Canada Trust and the Dools to ensure the accuracy of the accounts. No appeal was taken from the order.

84 It is correct to point out, as did the appellant, that the Mason order does not determine the merits of the issues directed by the court, namely, those of testamentary capacity, undue influence and suspicious circumstances. However, the Mason order demonstrates that the Dools had met the threshold test and satisfied the court that there was a reasonable evidentiary basis for directing that those issues be tried.

85 No further pleadings issued following the Mason order. Rather, the parties pursued issues of accounting and disclosure, all as directed by that order. Canada Trust took the prudent position that it would not proceed with the trial of the issues until it received the accounting and disclosures directed by the court. This invites no criticism as it was necessary to have those materials in order to prepare for further proceedings and to further assess these issues.

86 The desire to discontinue, which in these circumstances involved the withdrawal by the Dools of their objection to the 1998 will, did not arise from unfavourable rulings in the litigation, which cast doubt either upon the credibility or the reasonableness of their earlier allegations. There was no determination that the allegations were without merit, nor does the discontinuance imply that challenge to the 1998 will was doomed to failure or otherwise illegitimate. In such circumstances, the court may properly relieve a plaintiff from payment of costs upon discontinuance: *Canadian Mortgage Investment Co. v. Teel (No. 2)*, [1923] 1 D.L.R. 576, [1922] A.J. No. 78 (Alta. S.C.A.D.) at para. 7.

87 Health and other personal issues can also constitute special circumstances such as to relieve a plaintiff from costs upon a discontinuance. Dickson J. of the Saskatchewan Queen's Bench did so on the basis of health in *Donlevy v. Donlevy*, 1999 SKQB 154, 191 Sask.R. 152 at paras. 10-12:

> The respondent cannot be regarded as being a successful litigant in this action. The issue was not adjudicated in his favour. The litigation process was stopped short of adjudication by the petitioner's illness.
>
> Counsel then asserts that the petitioner raised ill-conceived and high-handed allegations of character and conduct against the respondent. His desire to answer these allegations have placed upon him an emotional and financial burden. Because discontinuance has deprived him of the opportunity to answer, counsel suggests the Court should infer that the petitioner discontinued her claim because it lacked merit. He then presents case authorities supporting the principle that losing litigants must bear the costs of unmeritorious litigation.
>
> I cannot get beyond counsel's invitation to infer that the petitioner discontinued her claim because she thought it lacked merit. She swears she discontinued because of her mental health. She presented medical evidence of her fragile state. I am asked to ignore that evidence and speculate that she discontinued her claim for the reason suggested by counsel, raised by his inference alone and unsupported by evidence. Her claim has not been adjudged unmeritorious. It has only been denounced as such by counsel. That is not sufficient for me to exercise my discretion in favour of his client. There will be no order for costs.

88 Here the evidence of the Dools as to their deteriorating health has not been disputed. This special circumstance explaining their desire to discontinue, coupled with the Mason order justifying both the reasonableness in bringing the action and their subsequent participation therein, serves as a basis not only to relieve them from costs but additionally to make an award of costs in their favour.

89 We take into account that costs in estate litigation have traditionally been approached somewhat differently than those in general litigation. This difference was noted and explained by Johnstone J. in *Popke v. Bolt*, 2005 ABQB 861, 342 A.R. 220 at para. 22:

> Historically, estate litigation has been treated somewhat differently. Courts have often ordered that the costs of both parties be paid from the estate. The reasoning is twofold. First, where the conduct of the deceased whose will is in dispute (the "testator") necessitates the litigation, it is reasonable to require the testator, through his estate, to pay. However, a substantial link must exist between the testator's actions and the actual need for litigation: *Holzel v. Mjeda* (2000), 269 A.R. 30, 2000 ABQB 549 (Alta. Q.B.) at para. 31. Second, society has an interest in ensuring that only valid wills are probated, and that property is distributed in accordance with their terms. Parties who seek the court's assistance in these matters should not be deterred by the cost of litigation: Brian A. Schnurr, *Estate Litigation*, 2d ed. vol. 2 (Scarborough, Ont.: Thomson Carswell, 1994) at 19-2.

90 Ian M. Hull in his article "Costs in Estate Litigation" (1998) 18 E.T.R. (2d) 218, discusses principles governing the allocation of costs when a will is challenged, and attempts to identify those circumstances in which costs will be paid out of the assets of the estate. He indicates that in circumstances which warrant an investigation, the estate may be expected to bear the costs at least down to

the stage where sufficient information is gathered to assess the merits of the case. He comments at 223-224:

> Now that the will challenger has had the opportunity to review the productions, to examine those parties propounding the will, to interview witnesses and to examine the solicitor who drew the will, the investigation stage of the proceedings is probably complete.
>
> It is at this stage in the proceedings that the party challenging the will must carefully assess the strengths and weaknesses of the case before proceeding further.
>
> ...
>
> The question of when the will challenger may start to be exposed to an adverse order as to costs is a nice one indeed. However, up to this point in the proceedings, provided they have been carefully conducted with some dignity, a strong argument could be put forward to the court that costs up to this stage should be paid out of the assets of the estate on a solicitor and client basis, even if the proceedings are abandoned.

91 In the case before us, Mason J. had determined that the circumstances required an investigation, and the Dools were in the process of carrying out the directions of the court when their personal circumstances overtook their abilities to carry on with the litigation.

92 There is an additional factor to be considered, namely, the manner in which Nazarewycz responded to the proceedings. While he made Ihor Broda, the solicitor who prepared the will, available to be interviewed at a relatively early stage, for the most part, the accounting and other disclosures had to be pried out of the appellant. His position was uncompromising and forced Canada Trust and the Dools to labour in their efforts to gather relevant information. It may be that the appellant was under no obligation to be forthcoming and cooperative; however, it should not be surprising in such circumstances that the proceedings became protracted and expensive.

93 In *Weiner v. Elman* (2001), 43 E.T.R. (2d) 163, [2001] O.J. No. 4940 (Ont. S.C.J.), the testator's daughters applied to remove their Notice of Objection to Probate in relation to their late mother's will. The respondent, their father, cross-applied for solicitor and client costs. The court held that the respondent had forced the daughters to file a Notice of Objection because the respondent had refused to provide them with any information about their late mother's estate, and made every effort to stonewall their inquiries. The litigation that resulted was contentious and had caused great stress that, in the words of the court, had "torn the family apart". As such, the daughters sought to discontinue. Citing the respondent's uncooperative conduct, the court dismissed his cross-motion for solicitor and client costs. Further, even though the daughters had not requested any costs, the court awarded them. Similar considerations are applicable in this appeal.

94 For the reasons expressed above, we have concluded that the Dools are entitled to discontinue and otherwise withdraw from their further participation in the litigation, without payment of costs. We further find that they are entitled to be indemnified by the estate for their solicitor and client costs from October 9, 2002 (the date of the Mason order) to and including June 27, 2007 (the date of the last chambers order).

95 The chambers judge fixed the solicitor and client costs of the Dools in the amount of $36,835.73 for the period from October 9, 2002 to June 15, 2007. The court, of course, has a discretion to make a lump sum award pursuant to r. 601 of the *Alberta Rules of Court*.

96 However, we have set aside the order of the chambers judge awarding the lump sum costs. Further, we observe that the lump sum appears to have been fixed without explanation as to its quantum and without affording the party to be charged the right to tax the costs or otherwise to make representations as to the quantum.

97 In these circumstances, we are not prepared to grant a lump sum. Failing agreement by the parties as to quantum, the Dools will be entitled to recover their solicitor and client costs on a full indemnification basis in an amount as taxed by the taxing officer.

98 The situation of Canada Trust is the same. It was acting at all times pursuant to court orders and is entitled to its costs of administration, including legal expenses, on a solicitor and client basis. As the order of the chambers judge directing and fixing the costs incurred by Canada Trust following the Bensler order (March 1, 2006) have been set aside, we direct that it shall be entitled to recover these costs in an amount either as agreed or taxed.

C. Costs of the Appeal

99 We are mindful that the appellant has succeeded in setting aside the three orders of the chambers judge. However, we have reached the same conclusion on the issue of the costs of the appeal. At root, the court found that it was reasonable for the Dools to challenge the 1998 will, and their subsequent participation as respondents in the proceedings was reasonably conducted. Personal considerations beyond their control led them to withdraw before there was any determination on the merits. In these circumstances, it is appropriate that the estate should bear the costs. One of the incidents of the litigation was the re-appointment of Canada Trust. Its participation was initiated by the court out of its concern to protect the estate. The estate must likewise bear its costs.

100 The Dools and Canada Trust are therefore entitled to recover their solicitor and client costs of the appeal, on a full indemnity basis, from the estate in amounts as agreed or taxed.

D. Conclusion

101 The appeal is allowed in that the orders of the chambers judge dated January 10, June 15, and June 27, 2007 are each set aside. However, the respondent Dools and Canada Trust are each entitled to costs from the estate, as directed above. The matter is referred back to a new surrogate judge for continuation of estate administration, including any further directions arising out of this judgment.

C.D. O'BRIEN J.A.
P.A. ROWBOTHAM J.A.
C.L. KENNY J. (AD HOC)

cp/e/qlcct/qlpwb/qlaxw/qlhcs/qlaxr/qlmxl/qljyw

TAB 13

Case Name:

Penney Estate v. Resetar

RE: Estate of Christine Anne Penney, Deceased, deVries Estate Trustee During Litigation, and Resetar et al

[2011] O.J. No. 490

2011 ONSC 575

64 E.T.R. (3d) 316

2011 CarswellOnt 744

Court File No. CV-08-2131-EA

Ontario Superior Court of Justice

E.R. Kruzick J.

January 26, 2011.

(23 paras.)

Counsel:

Justin de Vries, Solicitor for Estate Trustee during Litigation.

Tracey Marie Resetar (nee Foster), Self-represented.

Anne McGrath, for The Children's Lawyer.

COSTS ENDORSEMENT

E.R. KRUZICK J.:--

Background

1 Ms. Foster (Tracey Marie Resetar) sought leave to appeal the order of Richetti J. made on April 9, 2010. On July 21, 2010, I dismissed the motion for leave.

2 The Estate Trustee during Litigation (ETDL) and the Litigation Guardian, the Office of the Children's Lawyer (OCL), were successful on the leave motion and now seek costs.

3 Following my order counsel for the ETDL and the OCL made submissions in writing on costs. No submissions or material was received from Ms. Foster on the issue of costs as sought.

Jurisdiction

4 The court's jurisdiction to order costs is found in s. 131(1) of the *Courts of Justice Act,* R.S.O. 1990, c. C.43, as amended (CJA). Rule 57.01(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended sets out the factors to be considered.

5 Rule 57.01(1) reads:

> In exercising its discretion under section 131 of the *Courts of Justice Act*, to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or contribute made in writing,
>
> (0.a) the principle of indemnity, including where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
> (0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
>
> (a) the amount claimed and the amount recovered in the proceeding;
> (b) the apportionment of liability;
> (c) the complexity of the proceeding;
> (d) the importance of the issues;
> (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
> (f) whether any step in the proceeding was,
>
> (i) improper, vexatious or unnecessary, or
> (ii) taken through negligence, mistake or excessive caution;
>
> (g) a party's denial of or refusal to admit anything that should have been admitted;
> (h) whether it is appropriate to award any costs or more than one set of costs where a party,
>
> (i) commenced separate proceedings for claims that should have been made in one proceeding or,
> (ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and

(i) Any other matter relevant to the question of costs.

Submissions

6 In this case it is submitted that counsel for the ETDL and OCL had no alternative but to respond to the motion for leave. They were in the end successful.

7 Bills of costs were submitted by the ETDL and the OCL. Inclusive of disbursements and HST, the ETDL seeks $20,931.15 by way of partial indemnity and $27,123.80 by way of full indemnity. The OCL seeks full indemnity of $10,408.19.

8 It is submitted that costs as sought are fair and reasonable. Counsel for the ETDL agreed to act in the matter at a reduced hourly rate and those reduced rates are reflected in the bills as filed.

9 I am satisfied that the partial indemnity costs as set out in the Bill of Costs have been calculated according to the suggested rates found in the "Information for the Profession" as set in the introduction to R. 57.

10 It is submitted by counsel that if there is no payment or a shortfall, costs should be paid out of the estate on a full indemnity basis.

Analysis

11 I agree with the submissions of counsel as made on the issue of costs.

12 In *McDougald Estate v. Gooderham* (2005), 255 D.L.R. (4th) 435 (C.A.) the Court held:

> The practice of the English courts, in estate litigation, is to order the costs of all parties to be paid out of the estate where the litigation arose as a result of the actions of the testator, or those with an interest in the residue of the estate, or where the litigation was reasonably necessary to ensure the proper administration of the estate. See *Mitchell v Gard* (1863), 3 Sw. & Tr. 275, 164 E.R. 1280 and *Spiers v English*, [1907] P. 122. Public policy considerations underlie this approach: It is important that courts give effect to valid wills that reflect the intention of competent testators. Where the difficulties or ambiguities that give rise to the litigation are caused, in whole or in part, by the testator, it seems appropriate that the testator, through his or her estate, bear the costs of their resolution. If there are reasonable grounds upon which to question the execution of the will or the testator's capacity in making the will, it is again in the public interest that such questions be resolved without cost to those questioning the will's validity.
>
> Traditionally, Canadian courts of first instance have followed the approach of the English courts. While the principle was that costs of all parties were ordered payable out of the estate if the dispute arose from an ambiguity or omission in the testator's will or other conduct of the testator, or there were reasonable grounds upon which to question the will's validity, such cost awards became virtually automatic.
>
> However, the traditional approach has been - in my view, correctly - displaced. The modern approach to fixing costs in estate litigation is to carefully scrutinize the litigation and, unless the court finds that one or more of the public policy

considerations set out above applies, to follow the costs rules that apply in civil litigation.

13 Unless the matter fits with the two enumerated exceptions: (a) the litigation arose as a result of the actions of the testator; or (b) the litigation was reasonably necessary to ensure the proper administration of the estate, the unsuccessful party pays.

14 Here I hold that neither exception applies. Pursuant to *McDougald Estate v. Gooderham*, I am of the view the usual rules as in civil litigation should apply. The motion for leave was not necessitated by the actions of the testator and nor to ensure the proper administration of the Estate. I find the application had nothing to do with the on-going administration of the Estate.

15 The reply to the motion for leave was appropriate and necessary to fully respond to the motion.

16 This court has the jurisdiction to award full indemnity costs. Rule 57.01(4) states that "[n]othing in this rule [Rule 57] or Rules 57.02 to 57.07 affects the authority of the court under section 131 of the Courts of Justice Act, ... to award costs in an amount that represents full indemnity".

17 Full indemnity costs are appropriate and often necessary in the context of estate litigation. In *Jung v Lee Estate* (2007), 39 E.T.R. (3d) 111, 2007 CarswellBC 2904 (Ont. S.C.), the court stated as follows:

> If the cause of the litigation originated from the conduct or error of the testator (i.e., unclear working or validity of the will), then the costs of all parties will generally be paid from the estate on a full indemnity basis....
>
> Underlying the above structure is the acknowledgement that probate actions are unlike other actions. They are meant to discern the true intentions of one who is deceased, and give effect to them if possible. Such actions occupy a special status: *Atchison v Inkster* (1983), 47 B.C.L.R. 222, 15 E.T.R. 1 (B.C.C.A).

18 In *The Estate of John Johannes Kaptyn* (December 4, 2008, unreported), Lederer J. awarded costs on a full indemnity basis. He held:

> This is an Estate matter. As a general rule and in this case in particular, problems with a Will can be said to arise from the actions, omissions, instructions and decisions of the Testator. The Trustees are to put in place by the Will to represent the Estate. They are not here out of choice, hence, it is reasonable that they are not to be "out-of-pocket". They should be paid on a full indemnity scale. Here, Jonathan and Jason carried the weight of supporting the Will. They too should be paid on a full indemnity scale.

I apply that reasoning here.

19 Counsel should not be paying for the litigation out of their pockets. If estate trustees or estate trustees during litigation are expected to bear their own costs during the course of litigation, not only would they refuse to be appointed, estate trustees and estate trustees would also be reluctant to bring proceedings to advance the due administration of the estate and protect the interest of the beneficiaries.

20 In the end, the ETDL and the OCL are entitled to their cost on a full indemnity basis.

Disposition

21 I order the ETDL and the OCL be fully indemnified for their costs in the amounts of $27,123.80 and $10,408.19 respectively.

22 The payment shall be made as follows:

(i) Ms. Foster to pay to the ETDL the amount of $20,931.50 on or before February 21, 2011 and to the OCL the amount of $10, 408.19;
(ii) The Estate shall pay to the ETDL on account of costs the sum of $6,192.65.

23 If no payment is made, or there is a shortfall resulting from this order, I may be addressed in writing.

E.R. KRUZICK J.

cp/e/qlafr/qlvxw/qlced/qlana

TAB 14

Case Name:

Poitras v. Sawridge Band

Between
Walter Patrick Twinn, the Council of the Sawridge Band and the Sawridge Band, Appellants, and
Elizabeth Bernadette Poitras, Respondent, and
Her Majesty the Queen in right of Canada, as represented by The Minister of Indian Affairs and Northern Development, Respondent

[2012] F.C.J. No. 193

[2012] A.C.F. no 193

2012 FCA 47

428 N.R. 282

Docket A-280-10

Federal Court of Appeal
Ottawa, Ontario

Evans, Pelletier and Stratas JJ.A.

Heard: February 8, 2012.
Oral judgment: February 8, 2012.

(13 paras.)

Aboriginal law -- Communities and governance -- Membership in community -- Appeal by First Nations Band and others from order declaring that matter of plaintiff's membership in Band was a moot issue dismissed -- Decision followed dismissal of Band's challenge, in another action, to amendments to Indian Act on basis that Band was constitutionally entitled to determine membership -- Band could have provided more evidence and made more submissions, but closed its case knowing that its challenge would not succeed -- Decision rendered issue in present action moot.

Civil litigation -- Civil procedure -- Appeals -- Moot issues -- Appeal by First Nations Band and others from order declaring that matter of plaintiff's membership in Band was a moot issue dis-

missed -- Decision followed dismissal of Band's challenge, in another action, to amendments to Indian Act on basis that Band was constitutionally entitled to determine membership -- Band could have provided more evidence and made more submissions, but closed its case knowing that its challenge would not succeed -- Decision rendered issue in present action moot.

Constitutional law -- Canadian constitution -- Aboriginal peoples -- Appeal by First Nations Band and others from order declaring that matter of plaintiff's membership in Band was a moot issue dismissed -- Decision followed dismissal of Band's challenge, in another action, to amendments to Indian Act on basis that Band was constitutionally entitled to determine membership -- Band could have provided more evidence and made more submissions, but closed its case knowing that its challenge would not succeed -- Decision rendered issue in present action moot.

Appeal by Twinn, the council of the Sawridge Band, and the Band itself from an order declaring moot the issue of Poitras' membership in the Band. Poitras was the plaintiff in the present action, claiming membership in the Band. The Band defended in part on the basis that it had a constitutional right to determine who was a Band member. Poitras' action was stayed pending the outcome of another Federal Court action in which the Band was challenging amendments to the Indian Act, advancing the same argument that it was constitutionally empowered to determine its membership. That action was dismissed. A case management conference in Poitras' action was then held, to determine the impact of the other decision on her action. The case management judge ordered that the issue of Poitras' membership had been rendered moot.

HELD: Appeal dismissed. The appellants failed to show any reversible error on the case management judge's part warranting the re-litigation of the constitutional issues raised by the Band. The record showed that the appellants deliberately decided to close their case in the related action, knowing they could have called more evidence and made further submissions. They knew a dismissal would result when they closed their case.

Statutes, Regulations and Rules Cited:

Constitution Act, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 35

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

Appeal from an order of the Honourable Mr. Justice Hugessen dated July 22, 2010, Docket No. T-2655-89.

Counsel:

Philip P. Healey, for the Appellant.

Kevin Kimmis, for the Respondent, Her Majesty the Queen in Her Right of Canada as represented by the Minister of Indian and Northern Development.

The judgment of the Court was delivered by

1 **STRATAS J.A.** (orally):-- This is an appeal against the Order dated July 27, 2010 made by a case management judge in the Federal Court (Justice Hugessen). The case management judge ordered that an issue central to an action (the "main action") has become moot.

2 The circumstances giving rise to the Order are as follows.

3 Some time ago, the respondent, Ms. Poitras, started the main action against the appellant Band, claiming membership in it. The Band defended, in part, on the basis that it had a right under section 35 of the *Constitution Act, 1982* to determine who was a member of the Band.

4 The main action was stayed pending the outcome of another action that the Federal Court regarded as being closely related (the "closely related action"). In the closely related action, the Band was challenging amendments to the *Indian Act*, advancing the same argument, namely that it had a right under section 35 of the *Constitution Act, 1982* to determine who was a member of the Band. That action had a long history, including a retrial. In the end result, the closely related action was dismissed: *Sawridge Band v. The Queen*, 2008 FC 322, aff'd 2009 FCA 123.

5 With the dismissal of the closely related action, what was to become of the main action and the issue of Ms. Poitras' membership in the Band? To determine this, the Federal Court issued a notice of status review concerning the main action.

6 As a result of the status review, a case management conference in the Federal Court was held. There, the issue of mootness was discussed, having been raised in the submissions filed.

7 The case management judge's Order followed. The case management judge ordered that the issue of Ms. Poitras' membership in the Band was moot.

8 In this Court, the appellants appeal that Order.

9 The appellate standard of review applies. The appellants must show that the Order is vitiated either by legal error or by palpable and overriding error on some issue of fact or fact-based discretion. In reviewing the exercise of discretion in this case, it must also be borne in mind that this is an Order made by a case management judge who had managed the main action and the closely related action for many years and, as a result, possessed great familiarity with the factual issues and history of the matters: *Sawridge Band v. Canada*, 2001 FCA 338 at paragraph 11, [2002] 2 F.C. 346.

10 In our view, the appellants have not shown any reversible error on the part of the case management judge that would warrant permitting the Band to relitigate the constitutional issues.

11 There can be circumstances which can prompt the Court to exercise its discretion to allow relitigation, notwithstanding the doctrines of issue estoppel and abuse of process: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77.

12 But there is nothing in the record of this case showing that the appellants offered to the case management judge any such circumstances. Indeed, the record shows that the appellants deliberately decided, for reasons known to them, to close their case in the closely related action knowing they could have called more evidence and made further submissions. They knew that a dismissal would result after they closed their case. See *Sawridge Band v. Canada*, 2008 FC 322 at paragraphs 10-21 and 60.

13 For the foregoing reasons, we shall dismiss the appeal and direct the parties to return to the current case management judge to bring the pleadings into line with the issues that remain in light of this Court's decision.

STRATAS J.A.

cp/e/qlecl/qljxr/qlecl/qlced

TAB 15

Case Name:

Primo Poloniato Grandchildren's Trust (Trustee of) v. Browne

IN THE MATTER OF the Primo Poloniato Grandchildren's Trust
Between
The Canada Trust Company, Trustee of the Primo Poloniato Grandchildren's Trust, Applicant (Respondent), and Russell Browne, John Mori Jr., Andrea L. Mori-Mickus, Laura Lee, Marla L. Ashmore, Teresa O'Neil, Michael Poloniato, Kristen Wiley, Brandon Ashmore, and The Children's Lawyer on behalf of the minors, Rachel Browne, Hailey Browne, Michelle Wiley, Jessica Ashmore, Julia Mickus, Robert Mickus, Olivia Mickus, John Mickus, Marissa Lee, Erica Lee and on, behalf of the unborn and unascertained beneficiaries of the Primo Poloniato, Grandchildren's Trust,
Respondents (Appellant/Respondents)

[2012] O.J. No. 5772

2012 ONCA 862

Docket: C53262

Ontario Court of Appeal
Toronto, Ontario

K.N. Feldman, J.M. Simmons and E.A. Cronk JJ.A.

Heard: April 11, 2012.
Judgment: December 7, 2012.

(112 paras.)

Wills, estates and trusts law -- Trusts -- Administration -- Trust funds -- Encroachment on capital -- Express trusts -- Termination, revocation and variation -- Variation of trusts -- The trustee -- Duties of -- Distribution of assets -- Appeal by Children's Lawyer from interpretation of trust deed as varied dismissed -- Grantor's original intention was to provide income to grandchildren and capital to great-grandchildren, but trust was later varied -- Judge interpreted trust deed as varied as requiring trustee to pay income beneficiaries a set level of income regardless of whether such income was trust income or an encroachment on capital assets, and as relieving Trustee from duty to maintain

even hand between income and capital beneficiaries -- Judge interpreted trust deed as varied in accordance with proper principles and in manner it was understood by beneficiaries.

Appeal by the Children's Lawyer on behalf of minor, unborn and unascertained beneficiaries of the Primo Poloniato Grandchildren's Trust from the interpretation of certain terms of the Trust. Poloniato set up the trust in 1980. His seven grandchildren were the income beneficiaries and their grandchildren were the capital beneficiaries of the Trust. The principal asset of the trust was shares in a private investment company controlled by the Trust. The value of the Trust had fluctuated over the years and at its peak was worth in excess of $130 million. The Trust was to accumulate income until the earlier of October 1, 2001, or the death of Poloniato's first grandchild at which time the Trust would split into seven equal sub-trusts for each grandchild, the income of which would be paid to each grandchild during his lifetime, after which the capital would be payable to each grandchild's issue as designated by the grandchild. Because the Trust grew beyond the expectations of the parties, it was varied in 1988 to provide the grandchildren with an increasing percentage of the Trust's income each year from 1988 to 2001, unless one of the grandchildren died before 2001. The Trust was varied again in 1997 to provide for a method of calculating the annual income each grandchild would receive from the Trust based on the rate of return of the Trust's investments. A market downturn since 2002 resulted in the Trust having to sell capital assets to meet its obligations to the income beneficiaries. Canada Trust, the trustee, obtained a report on the expected life of the Trust. Assuming the maintenance of the distributions of yearly income and taxes as current levels, the Trust was likely to be expended within 18 to 20 years. The trustee sought the court's directions as to whether it was required to maintain such distributions or whether it had discretion in this regard. The court interpreted the Trust deed as varied to require the trustee to make the percentage distributions to the income beneficiaries in spite of the downturn in the market and its effect on the capital value of the trust. He concluded that the Trust deed as varied to provide the trustee with a discretion in respect of the management of distributions of cash dividends from the holding company to the trust, which extended to causing the holding company to distribute sufficient income to the trust to meet the annual distribution requirements to the income beneficiaries. He further found that the variations to the trust deed did away with any duty on the trustee's part to maintain an even hand between the income beneficiaries and the capital beneficiaries as there was never any intention by the parties to restrict the amounts distributed to income beneficiaries from the holding company to the income earned by the company. Finally, he concluded that while this conflicted with Poloniato's original intent, Poloniato's original intent was no longer relevant given the variations to the trust deed that took place over the years with the consent of the beneficiaries. The Children's Lawyer appealed from the decision arguing that the judge ignored trust principles and failed to take into account the proper factual matrix in interpreting the terms of the trust deed as varied.

HELD: Appeal dismissed. The judge interpreted the trust deed as varied in accordance with proper trust principles and in the way it was understood and intended by all of the consenting parties and by the approving court at the time.

Statutes, Regulations and Rules Cited:

Variation of Trusts Act, R.S.O. 1990, c. V.1, s. 2

Appeal From:

On appeal from the order of Justice Laurence A. Pattillo of the Superior Court of Justice, dated October 5, 2011, with reasons reported at 2011 ONSC 731.

Counsel:

Earl A. Cherniak, Q.C. and Cynthia B. Kuehl, for the appellant.

Archie J. Rabinowitz, David Lobl, and Jeremy C. Millard, for the respondent Canada Trust Company.

Mark Abradjian, Christopher R. Durdan and Brad Wiseman, for the respondents John Mori Jr., Marla L. Ashmore and Teresa O'Neil.

[Editor's note: A correction was released by the Court December 14, 2012; the change has been made to the text and the correction is appended to this document.]

The judgment of the Court was delivered by

K.N. FELDMAN J.A.:--

INTRODUCTION

1 The Children's Lawyer brings this appeal on behalf of the minor, unborn and unascertained beneficiaries of the Primo Poloniato Grandchildren's Trust (the "Trust"). The Trust was settled in October 1980 by Primo Poloniato, the founder of Primo Foods Ltd., in favour of his grandchildren (the income beneficiaries) and their issue, his great-grandchildren (the capital beneficiaries). The Trust's principal asset is shares in 679312 Alberta Ltd. (the "Holding Company"), a private investment company controlled by the Trust. While the value of the Trust has fluctuated over the years, at its peak it was worth in excess of $130 million.

2 Since its inception, the Trust has been varied with court approval twice - in December 1988 and again by a deed of arrangement, dated December 1997, which was approved in March 1998. Both variations were made based on the agreement and consent of all parties, including the Children's Lawyer (in 1988, the Official Guardian) on behalf of minor, unborn and unascertained beneficiaries.

3 The application that gives rise to this appeal was brought by Canada Trust, the Trust's current trustee, for the court's advice and direction to clarify the trustee's obligations under the Trust agreement as varied by the 1997 trust deed (the "Trust Deed as Varied"). That variation changed the nature of the Trust to a "percentage trust" or a "unitrust". It allowed the trustee to have a freer hand to make investments within the Holding Company in order to maximize the value of the Trust for the benefit of all beneficiaries, without concern as to whether those investments were income-producing or growth-oriented.

4 The Trust Deed as Varied provides that the income beneficiaries receive a fixed percentage of the net fair market value of a defined percentage of the Trust's assets as their distribution each year. This provides the income beneficiaries with a guaranteed annual income, allowing them to be able to plan their spending priorities and obligations with confidence. As a percentage trust, if the income-producing investments chosen by the trustee do not produce sufficient income to make the

distributions, the trustee may sell equities or other capital investments held by the Holding Company in order to generate sufficient funds to make the percentage payments to the income beneficiaries.

5 For the residuary capital beneficiaries, the benefit of the 1997 variation is that the trustee may invest in equities and other appreciating assets, which will ultimately be available for the capital beneficiaries, rather than being constrained by the obligation to earn income and preserve capital.

6 The 1997 variation application was based on accounting projections of the future value of the Trust that were prepared by Ernst & Young based on past market performance. Those projections saw the value of the Trust continue to increase over time.

7 Unfortunately, because economic conditions since 2001 have resulted in lower than expected investment returns, the trustee has had to continue to sell a significant portion of the underlying assets owned by the Holding Company in order to make the annual percentage distributions to the income beneficiaries, resulting in an ongoing depletion of the value of the Trust as a whole.

8 The application judge interpreted the Trust Deed as Varied to require the trustee to make the percentage distributions to the income beneficiaries in spite of the downturn in the market and its effect on the capital value of the Trust.

9 The Children's Lawyer appeals from the application judge's decision, arguing that the application judge ignored trust principles and failed to take into account the proper factual matrix in interpreting the terms of the Trust Deed as Varied. Counsel submits that the effect of the decision is to erode the interests of the capital beneficiaries to the point of elimination, which could not have been what was intended when the 1997 variation received court approval.

10 For the reasons that follow, I would dismiss the appeal. In my view, the application judge interpreted the Trust Deed as Varied in accordance with proper trust principles and in the way it was understood and intended by all the consenting parties and by the approving court at the time.

FACTS

11 Mr. Poloniato, who died in 1984, had seven grandchildren. All are now of full age and capacity. At the time of the application there were 12 great-grandchildren, six of full age and capacity and six minors.

12 The Trust was settled as part of an estate freeze. Initially, the Trust held the growth shares of Primo Foods through an Ontario numbered company. Upon Mr. Poloniato's death, the shares were sold and the proceeds were invested in securities and near cash equivalents, which are now held by the Holding Company.

13 Under the original terms of the Trust, income from the Trust would be accumulated until the earlier of the expiration of 21 years from the settling of the Trust, or the death of the settlor's first grandchild (the latter defined as the "Time of Division"). At the Time of Division, the Trust would be split equally into sub-trusts for each grandchild then living or who had issue living. Subsequent to the Time of Division, the income from each sub-trust would be paid to each grandchild during his or her lifetime and, on the death of the grandchild, the capital of each sub-trust would be payable to one or more of the grandchild's issue as designated by him or her pursuant to a power of appointment. The trustee was given no specific power to encroach on capital.

14 By the mid-1980s, the value of the Trust had grown significantly. The grandchildren, who were the income beneficiaries, sought earlier access to some of the income from the Trust to assist them in addressing their immediate financial needs and to prepare them for the anticipated receipt of a large sum of money beginning in October 2001 (the expiration of 21 years from the settlement of the Trust).

15 In December 1988, the court approved a trust variation that accelerated payment of income to the income beneficiaries beginning in 1988 and continuing to 2001. The variation sought by the trustee was consented to by all the adult beneficiaries and the Official Guardian.

16 The main elements of the 1988 variation (also referred to as the Settlement) were the following:

* The income beneficiaries became entitled to receive 1/7 of the "gross annual income" of the Trust in 1988 and an increasing percentage each year up to 1/3 of the gross annual income for the years 1998, 1999 and 2000; the distributable income was to be paid to those grandchildren alive in each of those years, divided in equal shares *per capita*.
* From January 1, 2001 onwards on an annual basis, all the net income from the Trust fund was to be divided in equal shares *per capita* among the grandchildren.
* The trustee was permitted to encroach on capital to a maximum of $200,000 for each family unit for the benefit of the great-grandchildren.
* The income beneficiaries released their power of appointment in respect of their capital interests under the Trust so that every one of their issue (all the great-grandchildren) would be equal capital beneficiaries.

17 Some problems arose following the 1988 variation, including uncertainty about the meaning of the term "gross annual income". Also, the grandchildren (the income beneficiaries) wanted to receive a predictable annual amount of money so that they could plan and live knowing what amount would be available each year. Finally, because by 1997 the equity markets were performing very well while interest rates were in decline, it was felt that both classes of beneficiaries were losing out on overall returns because of the investment restrictions on the trustee regarding the need for income-producing assets. The trustee was not able to maximize the value of the Trust at a time when there were significant growth opportunities in the market for those with a more unconstrained investment mandate.

18 According to an affidavit on the motion to approve the 1997 variation sworn by Mike Ruf, a trust officer of the then trustee, National Trust Company, the second variation in 1997 was meant to resolve the interpretive issue, to give the trustee more discretion as to the management of the investments, and to make distributions to income beneficiaries more predictable.

19 Among other things, the 1997 variation was designed as a percentage trust or a unitrust, a new type of trust that had been recommended by the Ontario Law Reform Commission's *Report on the Law of Trusts* (Ministry of the Attorney General, 1984). The percentage trust or unitrust would allow the trustee to use a balanced portfolio strategy of investing. Paragraph 26 of the Ruf affidavit explains:

> The principal advantage of the revised method of distribution is that it will enable the Trustee to adopt a balanced portfolio strategy which most likely in the longer term will provide the greatest asset base for the capital beneficiaries, being the minor children and unborn issue of the Grandchildren.

20 As counsel for the trustee at the time of the 1997 variation, Mr. Martin Rochwerg explained in his evidence on this application that the advantage of a percentage trust is that it allows the trustee to invest for maximum returns, regardless of whether they result in capital gains or income. The total growth is then split between the income and capital beneficiaries on a specified percentage basis. He explained further that the interests of the income and capital beneficiaries would therefore be "in tandem", because they would "either both benefit or they both lose." The effect of the conversion to a percentage trust was that the income beneficiaries were no longer entitled to receive income from the Trust; instead they would receive a fixed amount of money from the Trust each year, based on a percentage formula that included mandatory minimum and maximum limits.

21 Prior to the approval of the 1997 variation, a "no-tax" ruling was sought and obtained from Revenue Canada (now the Canada Revenue Agency or "CRA"). By letter of June 1997 addressed to Revenue Canada, Mr. Rochwerg enclosed a memorandum that explained the reasons for the proposed variation and that addressed the issue whether the proposed variation would result in a disposition of a capital interest for tax purposes.

22 One of the points covered in the memorandum was the legal requirement that the arrangement be for the benefit of minors and unborn and unascertained beneficiaries, who, in this case, were the capital beneficiaries. The memorandum opined that the court would not approve the proposed arrangement on behalf of those beneficiaries if the result was that their interest would be diminished. In this case, the benefit to the capital beneficiaries was said to come "primarily from the Trustee being freed from restrictions on investing so that the Trustee [could] adopt an investment policy which will further enhance the value of the Trust."

23 After some back and forth between the CRA and the Trust's advisors, the CRA granted an advance tax ruling based on the facts as set out in the ruling letter, which included the following paragraph:

> 10. In no event will the annual distribution [to the Income Beneficiaries] be less than the previous year's distribution. Where it is determined that the amount to be distributed based on the formula is less than the previous year's distribution, the current year's distribution will be adjusted to the amount of the prior year's distribution. The new system will also provide that the current year's distribution cannot exceed 115% of the previous year's distribution. *The Deed of Arrangement will also limit income distributions in any one year to the amount of cash dividends the Trust receives from [the] Holding Company in that year, ensuring there will be no encroachment on capital of the Trust on behalf of the Income Beneficiaries*. These provisions will have the effect of providing the Income Beneficiaries with a stable annual income, and ensuring some growth to the Capital Beneficiaries. In determining the appropriate Distribution Percentage (70%) for the years 2001 and onward, various asset mixes were tested and compared with the results using a rigid asset mix. Rates of return for the last 10 years were used in these projections. Provided these rates of return are a reasonable indica-

> tion of future rates of return, the new formula will provide an after-tax increase for the Capital Beneficiaries and should also provide a slightly greater after-tax return for the Income Beneficiaries over the longer term. [Emphasis added.]

24 The basis for selecting 70 per cent in setting the Yearly Income to be distributed to income beneficiaries starting in 2002, which was the amount recommended and accepted as part of the arrangement, was explained in the Ruf affidavit at para. 23. The distribution percentages of 25 per cent for 1997 and 33-1/3 per cent for 1998-2000 were the same as in the Trust deed as varied in 1988, which he refers to as the Settlement. He then states: "In all years thereafter the Distribution Percentage represents a reduction of 30% from that set out in the Settlement." This was because the Settlement provided that, beginning in 2001, the trustee was to administer the Trust Fund's annual income by dividing 100 per cent of the net income among the grandchildren on a *per capita* basis. Therefore, a 70 per cent distribution represented a 30 per cent reduction from what they would have received under the Settlement.

25 The CRA ruling required that income distributions be in the form of cash dividends paid by the Holding Company to the Trust in any year in order to ensure that there would be no encroachment on the capital of the Trust (the shares of the Holding Company). On that basis, the CRA was prepared to give the ruling that "[t]here will not be a disposition of any income or capital interest in the Trust as a result of the proposed transactions". This ruling was needed in order to implement the proposed 1997 variation without adverse tax consequences.

26 The Children's Lawyer consented to the 1997 variation on behalf of the capital beneficiaries who were unable to consent, namely those who were minor, unborn or unascertained persons.

27 Ernst & Young had prepared a number of calculations for the purpose of advising on the proposed variation, including a comparison of the projected capital using the then existing portfolio mix of 70 per cent debt and 30 per cent equities, and comparing that to an asset mix of 70 per cent equities and 30 per cent debt. Those calculations, which were provided to the Children's Lawyer, showed an expected benefit to the capital beneficiaries of approximately $2 million after five years and $12 million after ten years.

28 In a 1996 letter to the Children's Lawyer explaining the background to the proposal, Mr. Rochwerg summarized five benefits of the proposed variation for the capital beneficiaries. It would: 1) increase growth from better investment performance; 2) reduce costs of administration; 3) address the issue of 21-year planning to reduce imminent tax liability; 4) impose a cap on the income entitlement that would leave more growth for the capital beneficiaries; and 5) accelerate the use of significant tax-free and refundable tax amounts.

29 This letter also explained the concept of the percentage trust that had been endorsed in 1984 by Ontario's Law Reform Commission in its *Report on the Law of Trusts*. The percentage trust allows the trustee to invest to increase the overall value of the trust and to allocate funds to the income or capital beneficiaries without regard to whether those funds themselves are income or capital of the trust. In that regard, the *Report* recommended that the percentage payment to the income beneficiaries come first from the annual income, and if insufficient, then from capital: p. 303.

30 Justice Donna Haley, a Superior Court judge with significant expertise in wills and trusts, approved the 1997 variation. In her endorsement, she found that the proposed variation was in the best interests of the great-grandchildren as they would benefit "both directly as capital beneficiaries

and by the certainty of income provided by the variation to their parents who are all grandchildren under the trust".

31 Commenting on the context in which the 1997 variation application was made, the application judge below observed that at the time, interest rates were declining and capital markets were heating up. "It was anticipated by all parties", he noted, "that the rates of return which had been historically achieved on the assets of the Holding Company would be equalled or exceeded in the future."

32 However, a few years after the 1997 variation was approved, it transpired that investment returns were not consistently as strong as predicted, which has had a significant effect on the Trust and its value.

33 The application judge further observed:

> [A] decrease in market performance of the Trust's assets has resulted in the calculation of Yearly Income in each year being less than the Yearly Income which was paid to the income beneficiaries in 2002. Because the definition of "Yearly Income" in clause 0.1(g) of the Trust Deed as Varied provides that the Yearly Income cannot be less than the prior year's Yearly Income, the result has been that the amount the Trust has distributed to the income beneficiaries for each year after 2002 has been the 2002 amount.

In order to be able to pay the Yearly Income to the income beneficiaries as required, the trustee was obliged to cause the Holding Company to sell assets.

34 In 2003, the trustee commissioned a report on the expected life of the Trust, assuming distributions were maintained at then current levels. The report indicated that, depending on investment returns, the capital of the Trust would be expended in 18 to 20 years.

35 The respondent income beneficiaries rely on a more recent report obtained by the trustee in 2007 that estimates that the projected value of the Trust in 2022 could be about $90 million depending on investment returns.

36 Because of the concerns of the trustee, the Children's Lawyer and other beneficiaries that the minimum annual percentage distributions to the income beneficiaries were depleting the Trust capital, the trustee applied to the court for direction on the extent of the trustee's discretion not to make the minimum percentage distributions to the income beneficiaries in order to preserve the value of the Trust corpus for the capital beneficiaries.

37 In particular, the trustee wanted to know whether it retained a duty to maintain an even hand between the income and capital beneficiaries in managing Trust distributions, and therefore a discretion to stop making the prescribed percentage payments to the income beneficiaries that were eroding the value of the Trust.

APPLICATION JUDGE'S DECISION AND REASONS

38 The application judge provided detailed reasons explaining his interpretation of the Trust Deed as Varied. The relevant provisions of the Trust deed are set out in the Appendix to these reasons.

103 However, in a percentage trust, the trustee's duty is not to obtain a large income yield while preserving the capital but, instead, to increase the size of the entire trust for the benefit of both classes of beneficiaries. This includes increasing the capital rather than preserving it, and therefore involves an investment strategy that may include more risk. Because in a percentage trust the trustee is investing to increase the entire value of the trust to benefit all, the issue is not whether the trustee's even hand duty is ousted in respect of the management of the trust's investments. What is disputed is whether the duty has been ousted in respect of the obligation of the trustee to make distributions to the beneficiaries.

104 The role of the even hand duty in the administration of a percentage trust was addressed in the Law Reform Commission's *Report on the Law of Trusts*. That *Report* recommends that when trustees administer a percentage trust, they continue to maintain an even hand in the periodic valuation of the trust and when making the distributions. Specifically, the *Report* states at p. 303:

> We therefore recommend that the revised [Trustee] Act should contain a provision to the effect that, where trustees are expressly directed by the trust instrument to hold trust assets "on percentage trusts", they shall value the assets periodically and, instead of any income arising from the assets, pay to the person who would otherwise be the income beneficiary a percentage of that valuation in each year of the valuation period. *In so doing, trustees should be required to maintain an even hand between income and capital beneficiaries.* [Emphasis added.][1]

105 There is no clear explanation as to what the Commission means when it says that the trustees should maintain an even hand when valuing the assets and making the annual percentage payment to the income beneficiaries. My interpretation is that the Commission contemplates a periodic review and, if necessary, a re-set of the percentage payable to income beneficiaries, based on the value of the trust assets and on the even hand rule.

106 The problem here is that in the Trust Deed as Varied, the percentage payable to the income beneficiaries is based on a fixed formula for determining the "Applicable Percentage" and the amount to be paid can never go below the highest amount previously paid in a year. That is why the trustee continues to be obliged to cause the Holding Company to sell assets, if necessary, to meet the obligation to the income beneficiaries, despite the effect on the Trust corpus.

107 To the extent the Trust Deed as Varied sets forth a minimum annual payment to the income beneficiaries, the even hand duty on the trustee has been ousted, implicitly, by the words and intended operation of the Trust Deed as Varied. The application judge made no error in making that finding.

Conclusion

108 The experience of this Trust has reinforced the need for percentage trusts to be drafted with specific safeguard mechanisms in place that will allow the trustee to review and revise the annual percentage payable to the income beneficiaries based on the changing value of the trust to ensure that one set of beneficiaries is not favoured over the other. Commentators on the percentage trust concept have recommended including a "force majeure" clause to protect against unforeseen anomalies: see for example, Anne Werker, "The Percentage Trust - Uniting the Objectives of the Life

Tenant and Remainderperson in Total Return Investing by Trustees" (Paper delivered at the Law Society of Upper Canada's 8th Annual Estates and Trusts Summit, November 30, 2005), p. 251.

109 Two options would be to include a clause providing for a periodic reset by the trustee of the percentage payable to income beneficiaries, or an option for the trustee to apply to the court for advice and directions on such a reset.

110 It is also clear that the material provided to the court in support of a variation application seeking to convert a trust into a percentage trust must include not only upside projections but also potential downside projections that take into account a possible future market downturn. This will give the approving court the basis to include the appropriate safeguards that will ensure, to the extent possible, that the variation will in fact continue to be for the benefit of the future capital beneficiaries.

111 However, there are no such provisions in this Trust Deed as Varied. The trustee is obliged to continue to make the minimum percentage distributions provided by its terms.

DISPOSITION OF THE APPEAL

112 For these reasons, I would dismiss the appeal. In the circumstances of this case, I would award full indemnity costs in accordance with their Bills of Costs to each of the parties, payable out of the estate. To the Children's Lawyer, $116,855.13; to the trustee, $145,061.32; to the respondents on the appeal, $122,473.29, all inclusive of disbursements and H.S.T.

K.N. FELDMAN J.A.

J.M. SIMMONS J.A.:-- I agree.

E.A. CRONK J.A.:-- I agree.

TAB 16

Province of Alberta

PUBLIC TRUSTEE ACT

Statutes of Alberta, 2004
Chapter P-44.1

Current as of October 1, 2011

Office Consolidation

Alberta Queen's Printer
5th Floor, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

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

Note

All persons making use of this consolidation are reminded that it has no legislative sanction, that amendments have been embodied for convenience of reference only. The official Statutes and Regulations should be consulted for all purposes of interpreting and applying the law.

Regulations

The following is a list of the regulations made under the *Public Trustee Act* that are filed as Alberta Regulations under the Regulations Act

	Alta. Reg.	*Amendments*
Public Trustee Act		
Public Trustee General	241/2004	*8/2005, 67/2005, 24/2006, 164/2010, 227/2011*
Public Trustee Investment	24/2006	*259/2007, 227/2008*
Transitional (Applications Made in Conformity with the Dependent Adults Act; Certificates of Incapacity)	218/2009	

(j) "represented adult" means

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

(ii) an incapacitated person.

2004 cP-44.1 s1;2008 cA-4.2 s150

Part 1
Office of the Public Trustee

Appointment of Public Trustee

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

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

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

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

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

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

(a) it is terminated by the Minister, or

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

Corporation sole

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

Delegation

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

Public Trustee functions

5 The Public Trustee may act

(a) as personal representative of a deceased person,

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

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

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

(i) by an order of the Court, or

(ii) under this or any other Act.

Public Trustee not required to act

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

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

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

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

Part 2
Particular Functions of the Public Trustee

Division 1
Missing Persons and Unclaimed Property

Court may declare persons to be missing

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

Notice of applications regarding property of missing person

9(1) The Public Trustee must be given notice of any application to a court regarding property to which an order under section 7 applies or property that is in the Public Trustee's possession under section 8.

(2) Subsection (1) does not apply to applications governed by the *Administration of Estates Act*.

Expenditure to locate missing person

10 The Public Trustee may expend any portion of property held by the Public Trustee under section 7 or 8 for the purpose of attempting to locate the person who is entitled to the property.

Unclaimed property

11(1) This section applies

(a) where the Public Trustee is holding property under section 7 or 8, or

(b) where the Public Trustee is holding property otherwise than under section 7 or 8 and, after making reasonable inquiry, cannot determine whether any person is entitled to the property,

but does not apply to property held by the Public Trustee under section 270 of the *Companies Act*.

(2) Subject to sections 7(2) and (4) and 8(3), (4) and (5), the Public Trustee must hold the property for at least 10 years

(a) after the date of the order declaring the person to be a missing person if the Public Trustee is holding the property under section 7, or

(b) in any other case, after the date that the Public Trustee publishes a notice in the prescribed form in The Alberta Gazette that the Public Trustee is holding the property.

(3) At the expiration of the period referred to in subsection (2),

(a) if the property held by the Public Trustee is money, the Public Trustee may transfer the money to the General Revenue Fund, or

(b) if the property held by the Public Trustee is not money, the Public Trustee may by sale or otherwise convert the

property into money and transfer the money to the General Revenue Fund.

(4) When the Public Trustee transfers money to the General Revenue Fund under subsection (3), the Public Trustee must publish a notice in the prescribed form in The Alberta Gazette.

(5) If at any time after money is transferred to the General Revenue Fund under subsection (3) a person makes a claim to the money and

(a) in the case of a person declared missing under section 7, the Court determines that the claimant is entitled to the money, or

(b) in any other case, the Minister is satisfied that the claimant is entitled to the money,

the Minister may pay the money out of the General Revenue Fund to the Public Trustee.

(6) Where the money is paid to the Public Trustee under subsection (5), the Public Trustee shall pay the money to the person who is entitled to the money, but no interest is payable on the money in respect of the period after it was transferred to the General Revenue Fund under subsection (3).

(7) If there is a conflict between this section and the *Unclaimed Personal Property and Vested Property Act*, this section prevails.

2004 cP-44.1 s11;2007 cU-1.5 s74

Division 2
Estates of Deceased Persons

Interim administration

12(1) If a deceased person's personal representative or next of kin has not taken possession of the deceased person's property, the Public Trustee may take possession of the property.

(2) After taking possession of property under subsection (1), the Public Trustee has the powers of an administrator until a person is granted probate or administration.

(3) Subsection (2) does not authorize the Public Trustee

(a) to dispose of any property unless in the Public Trustee's opinion the estate might otherwise suffer a loss, or

(b) to distribute any property of the estate.

(4) The cost to the Public Trustee of anything done under this section is recoverable from the estate and is a first charge against the property of the estate.

Summary disposition of small estates

13(1) If a person dies and the person's estate consists only of personal property that does not exceed in value the prescribed amount and no person has been granted probate or administration in Alberta, the Public Trustee, without obtaining a grant of administration, may

(a) take possession of the deceased person's property,

(b) dispose of articles of personal use in any manner the Public Trustee considers appropriate,

(c) sell property not disposed of under clause (b) and apply the proceeds toward payment of amounts due and debts incurred for the burial of the deceased, and

(d) do all things necessary to complete the administration of the estate.

(2) A document in the prescribed form advising that the Public Trustee is administering the estate of a deceased person pursuant to this section is conclusive proof that the Public Trustee is the administrator of the estate.

Public Trustee's priority to grant in certain cases

14(1) In this section, "person under legal disability" means

(a) a minor, or

(b) a represented adult for whom the Public Trustee is trustee.

(2) Notwithstanding any other enactment, where a person dies anywhere leaving property in Alberta and a person under legal disability has an interest in the estate,

(a) the Public Trustee has the same priority to a grant of administration of the estate that the person would have if he or she were an adult of full legal capacity, and

(b) notwithstanding clause (a), the Public Trustee has priority to a grant of administration over any person who is not a resident of Alberta if

Monitoring trustee of trust for minors

20 The Public Trustee has no duty to monitor any trustee unless appointed to do so by a trust instrument under section 21 or by the Court under section 22.

Monitoring trustee for minors

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

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

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

(i) a copy of the trust instrument,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(9) The Court, on application, may terminate the Public Trustee's duty to monitor a trustee under this section if in the Court's opinion

it is not in the best interest of the minor beneficiaries for the Public Trustee to monitor the trustee.

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

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

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

Court directives to monitor trustee for minors

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

(a) a trust instrument, or

(b) an order of the Court.

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

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

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

(3) If the Public Trustee establishes a pooled investment fund, the Public Trustee must have a written policy as to when the Public Trustee will consider investing a client's money in the fund.

(4) The Public Trustee may invest a client's money in a pooled investment fund only if the investment is in accordance with the policy established under subsection (3).

Part 4
General

Application to Court

39 An application under this Act may be made by any person the Court considers appropriate to make the application.

Public Trustee fees and expenses

40(1) The Public Trustee

(a) may charge a client a fee that the Public Trustee considers to be reasonable for any service, including legal services, that the Public Trustee provides to the client or for a task or function performed by the Public Trustee for the benefit of the client, and

(b) is entitled to recover from a client any expense reasonably incurred by the Public Trustee on the client's behalf.

(2) The Public Trustee may charge and recover fees and expenses

(a) before or after providing a service or incurring an expense, or

(b) periodically while providing services under an ongoing relationship with a client.

(3) The Public Trustee may recover a fee or expense that is chargeable to a client by deducting it from the client's guaranteed account or as otherwise permitted by law.

(4) The Court may review any fee charged to a client by the Public Trustee under this section.

Legal costs

41 Unless otherwise provided by an enactment, where the Public Trustee is a party to or participates in any matter before a court,

(a) the costs payable to the Public Trustee, and the client, party or other person by whom the costs are to be paid, are in the discretion of the court, and

(b) the court may order that costs payable to the Public Trustee are to be paid out of and are a charge on an estate.

Crown liability for judgment

42(1) No action lies against the Crown for any claim arising out of an act or omission of the Public Trustee, but if a judgment is obtained against the Public Trustee in respect of any act or omission of the Public Trustee, the judgment, to the extent that it is not paid by a transfer from the common fund under section 35(1), is deemed to be a judgment against the Crown in right of Alberta and the amount of the judgment shall be paid out of the General Revenue Fund.

(2) Any money recovered from a third party in respect of money paid out of the General Revenue Fund under subsection (1) shall be paid into the General Revenue Fund.

Loan to Public Trustee

43 The Lieutenant Governor in Council on the recommendation of the Minister of Finance may authorize the Minister of Finance to advance from time to time to the Public Trustee by way of loan from the General Revenue Fund any sums of money that are considered necessary for the administration of estates being administered by the Public Trustee under this Act.

Access to and use of information regarding clients

44(1) In this section, "potential client" means a person in respect of whom the Public Trustee is conducting inquiries that are likely to lead to that person becoming a client of the Public Trustee.

(2) Subject to subsection (3), if the Public Trustee requires any personal, financial or health-related information or record regarding a client or potential client to effectively carry out a task, duty or function relating directly to the client or potential client, the Public Trustee may compel a person, including a public body as defined in the *Freedom of Information and Protection of Privacy Act*, who has possession of the information or record to provide it to the Public Trustee.