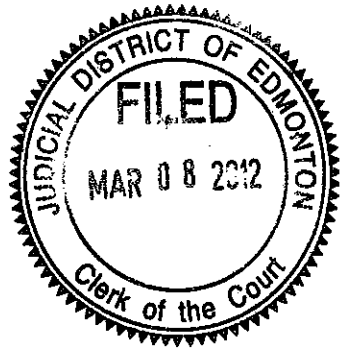
Clerk's stamp:



COURT FILE NUMBER	1103 14112
COURT OF QUEEN'S BENCH OF ALBERTA JUDICIAL CENTRE	EDMONTON

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

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

APPLICANTS	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust
DOCUMENT	**WRITTEN BRIEF OF THE SAWRIDGE FIRST NATION**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Parlee McLaws LLP #1500, 10180-101 Street Edmonton, Alberta T5J 4K1 Attention: Edward H. Molstad Telephone: (780) 423-8506 Fax: (780) 423-2870 File No: 64203-7/EHM

Chamberlain Hutchison
#155, 10403 – 122 Street
Edmonton, AB T5N 4C1

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

Department of Justice
300, 10423 – 101 Street
Edmonton, AB T5H 0E7

Attention: Jim Kindrake
Solicitors for the Minister of Aboriginal Affairs and Northern Development (Canada)

Davis LLP
#1201, 10060 Jasper Avenue
Edmonton, AB T5J 4E5

Attention: Priscilla Kennedy
Solicitors for June Kolosky and Aline Huzar

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

Attention: Marco Poretti
Solicitors for the Trustees for the 1985 Sawridge Trust

TABLE OF CONTENTS

INTRODUCTION

1. This application originates from proceedings seeking advice and direction of the court in respect to certain trust matters.

2. The Sawridge Indian Band, No. 19, now known as the Sawridge First Nation is a First Nation located in northern Alberta (the "Sawridge First Nation"). In the 1980's, three trusts were created for the benefit of the members of the Sawridge First Nation that are relevant in this matter (the "1982 Trust" the "1985 Trust" and the "1986 Trust").

3. By Order of Justice Thomas dated August 31, 2011, (the "Procedural Order") the trustees of the 1985 Trust (the "Sawridge Trustees") were directed to bring an application (the "Advice and Direction Application") to determine the following issues:

    a. To seek direction with respect to the definition of "Beneficiaries" contained in the 1985 Sawridge Trust, and if necessary to vary the 1985 Sawridge Trust to clarify the definition of "Beneficiaries".
    b. To seek direction with respect to the transfer of assets to the 1985 Sawridge Trust.

    Order of Justice D.R.G. Thomas, dated August 31, 2011, paragraph 1.

4. This application is brought by the Office of the Public Trustee ("Public Trustee") and is in respect to three issues:

    a. The appointment of the Public Trustee as litigation representative of minors who may be interested in the within proceedings;
    b. The payment of advance costs on a solicitor and his own client basis with exemption from liability for costs as conditions of any such appointment; and
    c. The relevance of intervening in the membership application process of the Sawridge First Nation and questioning on "membership" issues in these proceedings.

5. The Sawridge First Nation's submissions are in response to the Public Trustee's submissions on the relevance of the Sawridge First Nation's membership application process and criteria to the Advice and Direction Application. In particular, the Sawridge

First Nation makes submissions in response to the Public Trustee seeking direction that it may question witnesses on: i) the number of pending membership applications; ii) the details of membership criteria and who makes membership decisions; and iii) the steps taken to identify and fully ascertain the members of the class of beneficiaries.

PART I – STATEMENT OF FACTS

6. On April 15, 1982, Walter Patrick Twinn, former Chief of Sawridge First Nation, executed a Deed of Settlement establishing the 1982 Trust. The purpose of the 1982 Trust was to provide long-term benefits to members of the Sawridge First Nation and their descendants.

> Affidavit of Paul Bujold, dated August 30, 2011, paragraph 3.
> Affidavit of Paul Bujold, dated September 12, 2011, paragraph 9.

7. On April 17, 1982, the *Constitution Act, 1982*, along with the *Canadian Charter of Rights and Freedoms* (the "*Charter*") came into force. Section 15 of the *Charter*, the provisions dealing with equality, did not come into force until April 17, 1985 so that legislation could be adapted to comply with the new equality requirements.

> Affidavit of Paul Bujold, dated September 12, 2011, paragraph 13.

8. Following the passage of the *Charter*, the *Indian Act*, R.S.C. 1970, c. I-6 (the "*Pre-Charter Indian Act*") was amended by *Bill C-31*. The amendments in *Bill C-31* allowed for persons who had lost their Indian status to regain that status. With the passage of *Bill C-31*, the Sawridge First Nation believed there would be a substantial influx of new members into the Sawridge First Nation. Accordingly, the 1985 Trust was settled on April 15, 1985 for the purpose of preserving the assets of the Sawridge First Nation for the benefit of members as defined under the *Pre-Charter Indian Act*.

> Affidavit of Paul Bujold, dated September 12, 2011, paragraphs 14-15.
> Affidavit of Paul Bujold, dated August 30, 2011, paragraph 4.

9. The Sawridge Trustees are considering making distributions from the 1985 Trust at some date in the future. The Sawridge Trustees are concerned that the definition of

"Beneficiary" under the 1985 Trust could be discriminatory since the definition refers to provisions in the *Pre-Charter Indian Act*. Accordingly, the Sawridge Trustees are seeking an order under the Advice and Direction Application to resolve the issue of potential discrimination in the definition of "Beneficiary" of the 1985 Trust.

Affidavit of Paul Bujold, dated September 12, 2011, paragraphs 32-33.
Affidavit of Paul Bujold, dated August 30, 2011, paragraph 6.

10. The Sawridge Trustees have taken steps to notify potential beneficiaries of the 1985 Trust. These steps are detailed in the Affidavit of Paul Bujold, dated August 30, 2011, and include:
    a. A series of newspaper advertisements in Alberta, Saskatchewan, Manitoba and British Columbia for the purpose of collecting names of potential beneficiaries;
    b. Correspondence with a number of potential beneficiaries; and
    c. Creating a website to provide notice to beneficiaries and potential beneficiaries.

    Affidavit of Paul Bujold, dated August 30, 2011, paragraphs 7-9, 11, 13.

11. Due to the steps outlined above, the Sawridge Trustees have made a list of 194 beneficiaries and potential beneficiaries, with contact information of 190 of those persons.

    Affidavit of Paul Bujold, dated August 30, 2011, paragraph 11.

PART II – ISSUES

12. The Sawridge First Nation submissions relate to the following issues:

    a. Is the Sawridge First Nation membership processing and criteria relevant to the Advice and Direction Application?

    b. Is the Advice and Direction Application the proper forum for the membership issues raised by the Public Trustee to be addressed?

    c. Is there a conflict of interest in the dual roles of acting as a trustee of the 1985 Trust and determining membership applications of the Sawridge First Nation?

PART III – SUBMISSIONS OF LAW

a. Irrelevance of Membership Issues

13. The Sawridge First Nation submits that the First Nation's processing of applications and application criteria are not relevant to the Advice and Direction Application. The *Aberta Rules of Court* state how to determine when a matter is relevant to proceedings:

> When something is relevant and material
> 5.2(1) For the purposes of this Part, a question, record or information is relevant and material only if the answer to the question, or the record or information, could reasonably be expected
> (a) to significantly help determine one or more of the issues raised in the pleadings, or
> (b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings.
> (2) The disclosure or production of a record under this Division is not, by reason of that fact alone, to be considered as an agreement or acknowledgment that the record is admissible or relevant and material.

Alberta Rules of Court, Alta. Reg 124/2010, rule 5.2 [Tab 1 Sawridge First Nation Authorities]

Rozak Estate v. *Demas*, 2011 ABQB 239, paragraph 30. [Tab 2 Sawridge First Nation Authorities]

14. This matter originates from the Procedural Order. Paragraph 1 of the Procedural Order defines the issues of the Advice and Direction Application as follows:

> 1. An application shall be brought by the Trustees of the 1985 Sawridge Trust for the opinion, advice and direction of the Court

respecting the administration and management of the property held under the 1985 Sawridge Trust (hereinafter referred to as the "Advice and Direction Application"). The Advice and Direction Application shall be brought:

a. To seek direction with respect to the definition of "Beneficiaries" contained in the 1985 Sawridge Trust, and if necessary to vary the 1985 Sawridge Trust to clarify the definition of "Beneficiaries".

b. To seek direction with respect to the transfer of assets to the 1985 Sawridge Trust.

Order of Justice D.R.G. Thomas, dated August 31, 2011, paragraph 1.

15. The issues of the Advice and Direction Application do not touch on matters of membership processing or criteria of the Sawridge First Nation. Such matters of membership cannot significantly determine either of the above issues nor could such membership matters lead to evidence that would significantly determine a relevant issue.

16. At paragraph 92 of the Public Trustee's brief, the Public Trustee has submitted that the Sawridge Trustees seek direction from the Court in the identification of appropriate beneficiaries with reference to paragraph 14 of the Affidavit of Paul Bujold, dated August 30, 2011. This is incorrect. Paragraph 14 of the cited affidavit includes no mention the identification of appropriate beneficiaries:

14. The Trustees Seek this Court's direction in setting the procedure for seeking the opinion, advice and direction of the Court in regard to:

a. Determining the Beneficiaries for the 1985 Trust.

b. Reviewing and providing direction with respect to the transfer of the assets to the 1985 trust.

c. Making any necessary variations to the 1985 Trust or any other Order it deems just in the circumstances.

Affidavit of Paul Bujold, dated August 30, 2011, paragraph 14.

17. The Sawridge Trustees are seeking the identification by the Court of which definition of beneficiary is appropriate, not the identification of who may be a beneficiary as the Public Trustee states in paragraph 92 of their brief. At no point did the Sawridge Trustee seek assistance with identifying who might be a beneficiary under either the current definition or the proposed definition. Persons who are eligible or potentially eligible as a beneficiary under either definition are entirely identifiable and the Sawridge First Nation is fully capable of determining its membership and identifying members of the Sawridge First Nation. Assistance in that regard has not been sought, nor should it be imposed outside of reviewable error and through a judicial review.

Affidavit of Paul Bujold, dated September 12, 2011, paragraph 32.

18. At paragraph 91 of the Public Trustee's brief, the Public Trustee refers to the decision of *Barry* v. *Garden River Band of Ojibways* [1997] O.J. No. 2109 (C.A) ("*Barry*"), as authority for the point that the trustee of a fixed trust must determine the entire class of beneficiaries prior to making a distribution.

Barry v. *Garden River Band of Ojibways* [1997] O.J. No. 2109 (C.A) [Tab 3, Public Trustee Authorities]

19. *Barry* is distinguishable from the facts of the within matter. In *Barry*, a distribution of trust money was made that did not account for the potential beneficiaries that the Band knew of. The Band in *Barry* made a distribution at an arbitrary date and before the class of beneficiaries was properly ascertained. In contrast, the Sawridge Trustees have made no distribution in the within matter, nor is there an arbitrary date set to make such a distribution.

20. The Public Trustee ignores all the steps the Sawridge Trustees have taken to determine the entire class of beneficiaries. Although it is not relevant to the issues in the Advice

and Direction Application, the Sawridge Trustees have taken extensive steps to search for all potential beneficiaries.

Affidavit of Paul Bujold, dated August 30, 2011, paragraphs 7-9, 11, 13.

21. The Public Trustee submits that the membership issues are relevant and more efficiently dealt with as a part of the Advice and Direction Application. Challenges to the Sawridge First Nation's membership processing and membership criteria are a distraction to the important issues of the Advice and Direction Application. Any objection to the Sawridge First Nation's membership process and criteria by the Public Trustee are only appropriately addressed through a judicial review where the Court has facts and parties before it.

b. Improper Forum

22. The Procedural Order, specifically addresses the concern that the Advice and Direction Application not be used as an avenue to determine membership entitlements to the Sawridge First Nation.

> 3. Notice of the Advice and Direction Application on any person shall not be used by that person to show any connection or entitlement to rights under the 1982 Sawridge Trust or the 1985 Sawridge Trust, nor to entitle a person to being held to be a beneficiary of the 1982 Sawridge Trust or the 1985 Sawridge Trust, nor to determine or help to determine that a person should be admitted as a member of the Sawridge First Nation. Notice of the Advice and Direction Application is deemed only to be notice that a person may have a right to be a beneficiary of the 1982 Sawridge Turst or the 1985 Sawridge Trust and that the person must determine his or her own entitlement and pursue such entitlement.

Order of Justice D.R.G. Thomas dated August 31, 2011, paragraph 3.

23. The Public Trustee's pursuit of the membership issues in this application is an attempt to use the Advice and Direction Application for the purposes excluded in the Procedural Order. In paragraphs 22 – 32 of the Public Trustee's brief, the Public Trustee summarizes litigation connected to the Sawridge First Nation's membership process and criteria. This is an inappropriate as authorities should not be used as a means of "bootlegging" evidence since evidence adduced in one proceeding must still be properly adduced in another.

    R. v. *Levkovic*, 2010 ONCA 830, at paragraph 48. [Tab 3, Sawridge First Nation Authorities]

24. One of the decisions referred to by the Public Trustee, *Huzar* v. *Canada*, [1997] F.C.J. No. 1556, in paragraph 28 of the Public Trustee's brief is cited in regards to a judicial finding of fact related to the Sawridge First Nation's membership process and criteria. *Huzar* v. *Canada* was overturned on appeal by the Federal Court of Appeal in *Huzar* v. *Canada*, [2000] F.C.J. No. 873 ("*Huzar*"). *Huzar* was an application to strike out a Statement of Claim for failing to disclose a cause of action. The plaintiffs brought their action seeking a declaration of an entitlement to membership in the Sawridge First Nation. The Federal Court Trial Division only struck out one paragraph of the Statement of Claim and allowed the plaintiffs an opportunity to amend their pleadings. On appeal, the Federal Court of Appeal struck the entire claim finding:

> The paragraphs amending the statement of claim allege that the Sawridge Indian Band rejected the respondents' membership applications by misapplying the Band membership rules (paragraph 38), and claim a declaration that the Band rules are discriminatory and exclusionary, and hence invalid (paragraph 39).
>
> These paragraphs amount to a claim for declaratory or prerogative relief against the Band, which is a federal board, commission or other tribunal within the definition provided by section 2 of the Federal Court Act. By virtue of subsection 18(3) of that Act, declaratory or prerogative relief may only be sought against a

> federal board, commission or other tribunal on an application for judicial review under section 18.1 The claims contained in paragraphs 38 and 39 cannot therefore be included in a statement of claim...
>
> ...It is clear that until the Band's membership rules are found to be invalid, they govern membership of the Band and that the respondents have, at best, a right to apply to the Band for membership. Accordingly, the statement fo claim against the appellants, Walter Patrick Twinn, as Chief of the Sawridge Indian Band, and the Sawridge Indian Band, will be struck as disclosing no reasonable cause of action.

Huzar v. *Canada*, [2000] F.C.J. No. 873, paragraphs 2-3, 5. [Tab 4, Sawridge First Nation Authorities]

25. Further details regarding the application process are referred to in the Affidavit of Elizabeth Poitras, dated December 7, 2011. Not only does the Public Trustee improperly rely on findings of fact in other judicial proceedings, the Public Trustee is expressly dragging the Advice and Direction Application into precisely the matters contemplated in paragraph 3 of the Procedural Order quoted above.

26. Pursuant to section 18 of the *Federal Courts Act*, R.S.C. 1985, c.41, the Federal Court has exclusive original jurisdiction to order declaratory relief against any federal board, commission or other tribunal. As stated in *Huzar* by the Court of Appeal, the proper forum to seek such relief of a decision on membership by the Sawridge First Nation is through judicial review. Allowing the Public Trustee to raise issues related to membership processing and criteria in the Advice and Direction Application would drag the matter into issues of prerogative relief best dealt with in a judicial review where the Court has the proper facts and parties before it.

Federal Courts Act, R.S.C. 1985, c. 41, section 18. [Tab 5, Sawridge First Nation Authorities]

c. No Conflict of Interest

27. In paragraph 97v of the Public Trustee's brief, The Public Trustee submits that the dual role of certain Sawridge Trustees along with the role of determining membership applications of the Sawridge Frist Nation is a potential conflict of interest that makes the membership criteria and process relevant. The Sawridge First Nation submits that the Public Trustee's submissions on this point are devoid of merit for two reasons:

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

    b. Second, the Advice and Direction Application is the wrong forum to challenge the impartiality of the Sawridge First Nation's membership application process. If a conflict of interest exists as the Public Trustee is alleging the proper procedure for challenging the impartiality of membership decisions is through a judicial review where the Court has specific facts and parties before it.

PART IV – REMEDY SOUGHT

28. That the Public Trustee's Application be dismissed in respect to directing that the Public Trustee, or other parties, may question witnesses in the within proceedings on matters including:

    a. The number of pending Sawridge First Nation membership applications, including sufficient particulars to determine whether the pending application affects the interests of any minors;

    b. The details of the current Sawridge First Nation membership criteria and process, including but not limited to, who makes the membership decisions and the normal timeframes for making membership decisions; and

c. The steps taken to date by the Sawridge Trustees to look into the above, including steps taken to identify and fully ascertain the members of the class of minor beneficiaries.

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 8th DAY OF MARCH, 2012.

PARLEE MCLAWS LLP

PER: _____

EDWARD H. MOLSTAD
Solicitor for the Sawridge First Nation

PART V – LIST OF AUTHORITIES

1. *Alberta Rules of Court*, Alta. Reg 124/2010, rule 5.2.

2. *Rozak Estate* v. *Demas*, 2011 ABQB 239.

3. *R.* v. *Levkovic*, 2010 ONCA 830

4. *Huzar* v. *Canada*, [2000] F.C.J. No. 873.

5. *Federal Courts Act*, R.S.C. 1985, c. 41.

Part 5:
Disclosure of Information

Purpose of this Part

5.1(1) Within the context of rule 1.2 *[Purpose and intention of these rules]*, the purpose of this Part is

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

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

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

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

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

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

Information note

This Part does not apply to actions started by originating application unless the parties otherwise agree or the Court otherwise orders. See rule 3.10 *[Application of Part 4 and Part 5]*.

Division 1
How Information Is Disclosed

Subdivision 1
Introductory Matters

When something is relevant and material

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

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

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

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

2011 CarswellAlta 577, 2011 ABQB 239, [2011] A.W.L.D. 2964, [2011] A.W.L.D. 2962, [2011] A.W.L.D. 2961, 509 A.R. 337

2011 CarswellAlta 577, 2011 ABQB 239, [2011] A.W.L.D. 2964, [2011] A.W.L.D. 2962, [2011] A.W.L.D. 2961, 509 A.R. 337

Rozak Estate v. Demas

Brad Brogden, Administrator Ad Litem of the Estate of Brooklyn Alyssa Rozak, Plaintiff and Michael Demas, Carl Blashko, Darren Neilson, John Doe, Capital Health, operating a hospital known as The University of Alberta Hospital, Caritas Health Group, operating a hospital known as The Grey Nuns Hospital and the Governors of the University of Alberta, Defendants

Alberta Court of Queen's Bench

R.A. Graesser J.

Heard: February 23, 2011
Judgment: April 7, 2011
Docket: Edmonton 0503-17780

Counsel: Philip Kirman, for Plaintiff

David Hawreluk, Alison Archer, for Applicants, Kevin Neilson, Lara Ostolosky, Omar Din

Subject: Civil Practice and Procedure

Civil practice and procedure --- Discovery — Examination for discovery — Conduct of examination — Objecting and refusing to answer

Plaintiff took his late wife, B, to hospital because of concerns for her mental well-being and safety — Defendant doctors saw B and discharged her later that evening — B committed suicide shortly after — Plaintiff served statement of claim, and served amended statement of claim when he discovered that he had sued wrong doctor — Plaintiff then sought to amend amended statement of claim — Doctors applied to compel answers to objected-to undertakings, and while plaintiff was ordered to provide answers to two, master declined to order answers to rest — Doctors appealed — Plaintiff cross-appealed — Appeal allowed in part — Cross-appeal allowed in part — Master erred in law in declining to order plaintiff to answer four undertaking requests — However, scope of inquiries were further limited — Subject to privilege issues and relevance issues, it was appropriate to require plaintiff to inform himself as to steps taken on his behalf to identify individuals who may have been involved in B's treatment — Information

sought related to important issue in application — Requesting information from counsel was not onerous and would likely be significant in determining application.

Civil practice and procedure --- Discovery — Discovery of documents — Privileged document — Solicitor-client privilege

Plaintiff took his late wife, B, to hospital because of concerns for her mental well-being and safety — Defendant doctors saw B and discharged her later that evening — B committed suicide shortly after — Plaintiff served statement of claim, and served amended statement of claim when he discovered that he had sued wrong doctor — Plaintiff then sought to amend amended statement of claim — Doctors applied to compel answers to objected-to undertakings, and while plaintiff was ordered to provide answers to two, master declined to order answers to rest — Doctors appealed — Plaintiff cross-appealed — Appeal allowed in part — Cross-appeal allowed in part — Master erred in law in declining to order plaintiff to answer four undertaking requests — However, scope of inquiries were further limited — It was not improper to ask what steps solicitors took from time they were retained until relevant date — Plaintiff brought diligence into issue by applying to add doctors as defendants — Further, privilege was waived relating to answer of when plaintiff told his counsel that B was treated by male resident — Plaintiff waived privilege over that communication by putting his diligence into issue.

Civil practice and procedure --- Discovery — Discovery of documents — Privileged document — Documents prepared in contemplation of litigation

Plaintiff took his late wife, B, to hospital because of concerns for her mental well-being and safety — Defendant doctors saw B and discharged her later that evening — B committed suicide shortly after — Plaintiff served statement of claim, and served amended statement of claim when he discovered that he had sued wrong doctor — Plaintiff then sought to amend amended statement of claim — Doctors applied to compel answers to objected-to undertakings, and while plaintiff was ordered to provide answers to two, master declined to order answers to rest — Doctors appealed — Plaintiff cross-appealed — Appeal allowed in part — Cross-appeal allowed in part — Master erred in law in declining to order plaintiff to answer four undertaking requests — However, scope of inquiries were further limited — It was relevant to know what resources plaintiff had readily available, or what resources he obtained for purposes of determining appropriate parties, during relevant time frame — There was no valid objection to plaintiff being asked to enquire of his solicitors what resources they had in their offices to ascertain doctors' identities — If any materials were obtained for purpose of litigation, privilege was waived by plaintiff putting his due diligence in issue.

Cases considered by *R.A. Graesser J.*:

Alberta Treasury Branches v. Leahy (1999), 1999 ABQB 829, 1999 CarswellAlta 1027, (sub nom. *Alberta (Treasury Branches) v. Leahy)* 254 A.R. 263 (Alta. Q.B.) — referred to

Alberta Wheat Pool v. Estrin (1986), 1986 CarswellAlta 272, 49 Alta. L.R. (2d) 176, [1987] 2 W.W.R. 532, (sub nom. *Alberta Wheat Pool v. Dawson Resources Ltd. (No. 1))* 75 A.R. 348, 14 C.P.C. (2d) 242 (Alta. Q.B.) — referred to

Alberta Wheat Pool v. Estrin (1987), 17 C.P.C. (2d) xxxix (note) (Alta. C.A.) — referred to

Bland v. Canada (National Capital Commission) (1989), 29 F.T.R. 232, 1989 CarswellNat 170 (Fed. T.D.) — referred to

Blank v. Canada (Department of Justice) (2006), 2006 CarswellNat 2704, 2006 CarswellNat 2705, 47 Admin. L.R. (4th) 84,

40 C.R. (6th) 1, 2006 SCC 39, (sub nom. *Blank v. Canada (Minister of Justice)*) 352 N.R. 201, 270 D.L.R. (4th) 257, 51 C.P.R. (4th) 1, (sub nom. *Blank v. Canada (Minister of Justice)*) [2006] 2 S.C.R. 319 (S.C.C.) — referred to

Bruno v. Canada (Attorney General) (2003), 2003 CF 1281, 2003 CarswellNat 5030, 2003 FC 1281, 2003 CarswellNat 3375 (F.C.) — referred to

De Shazo v. Nations Energy Co. (2005), 48 Alta. L.R. (4th) 25, 2005 ABCA 241, 2005 CarswellAlta 957, 367 A.R. 267, 346 W.A.C. 267, 256 D.L.R. (4th) 502 (Alta. C.A.) — followed

Descôteaux c. Mierzwinski (1982), 1982 CarswellQue 13, [1982] 1 S.C.R. 860, 28 C.R. (3d) 289, 1 C.R.R. 318, 44 N.R. 462, 141 D.L.R. (3d) 590, 70 C.C.C. (2d) 385, 1982 CarswellQue 291 (S.C.C.) — referred to

Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd. (2008), 2008 CarswellAlta 1685, 459 A.R. 68, 97 Alta. L.R. (4th) 182, 2008 ABQB 671 (Alta. Master) — followed

Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co. (1981), 1981 CarswellAlta 267, [1981] 4 W.W.R. 760 (Alta. Q.B.) — referred to

Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co. (1992), 3 Alta. L.R. (3d) 210, [1992] 5 W.W.R. 531, 1992 CarswellAlta 86 (Alta. Q.B.) — referred to

Hudson Bay Mining & Smelting Co. v. Cummings (2006), 2006 MBCA 98, 2006 CarswellMan 295, 383 W.A.C. 75, 208 Man. R. (2d) 75, 272 D.L.R. (4th) 419, 51 Admin. L.R. (4th) 1, 36 C.P.C. (6th) 10, [2007] 4 W.W.R. 197 (Man. C.A.) — referred to

Marion v. Wawanesa Mutual Insurance Co. (2004), [2004] I.L.R. I-4317, 354 A.R. 12, 329 W.A.C. 12, 2004 ABCA 213, 2004 CarswellAlta 900, [2004] 9 W.W.R. 533, 27 Alta. L.R. (4th) 201, 11 C.C.L.I. (4th) 52 (Alta. C.A.) — referred to

Merck Frosst Canada Inc. v. Canada (Minister of Health) (1997), 1997 CarswellNat 2661, (sub nom. *Merck Frosst Canada Inc. v. Canada (Minister of National Health & Welfare)*) 146 F.T.R. 249, 80 C.P.R. (3d) 550 (Fed. T.D.) — considered

Moseley v. Spray Lakes Sawmills (1980) Ltd. (1996), 39 Alta. L.R. (3d) 141, 135 D.L.R. (4th) 69, 184 A.R. 101, 122 W.A.C. 101, 48 C.P.C. (3d) 221, 1996 CarswellAlta 345 (Alta. C.A.) — referred to

Petro Can Oil & Gas Corp. v. Resource Service Group Ltd. (1988), 59 Alta. L.R. (2d) 34, 32 C.P.C. (2d) 50, 90 A.R. 220, 1988 CarswellAlta 65 (Alta. Q.B.)

Petro Can Oil & Gas Corp. v. Resource Service Group Ltd. (1988), 32 C.P.C. (2d) xlvi (note) (Alta. C.A.) — referred to

Pritchard v. Ontario (Human Rights Commission) (2004), 2004 SCC 31, 2004 CarswellOnt 1885, 2004 CarswellOnt 1886, 12 Admin. L.R. (4th) 171, 47 C.P.C. (5th) 203, 72 O.R. (3d) 160 (note), 49 C.H.R.R. D/120, 2004 C.L.L.C. 230-021, [2004] 1

S.C.R. 809, 19 C.R. (6th) 203, 33 C.C.E.L. (3d) 1 (S.C.C.) — referred to

R. v. Card (2002), 2002 CarswellAlta 746, 2002 ABQB 537, 3 Alta. L.R. (4th) 92, 307 A.R. 277 (Alta. Q.B.) — referred to

R. v. Fosty (1991), [1991] 6 W.W.R. 673, (sub nom. *R. v. Gruenke)* 67 C.C.C. (3d) 289, 130 N.R. 161, 8 C.R. (4th) 368, 75 Man. R. (2d) 112, 6 W.A.C. 112, (sub nom. *R. v. Gruenke)* [1991] 3 S.C.R. 263, 7 C.R.R. (2d) 108, 1991 CarswellMan 206, 1991 CarswellMan 285 (S.C.C.) — referred to

Resortport Development Corp. v. Alberta Racing Corp. (2004), 2004 CarswellAlta 1880 (Alta. Q.B.) — referred to

Resortport Development Corp. v. Alberta Racing Corp. (2005), 2005 ABCA 49, 2005 CarswellAlta 143 (Alta. C.A.) — referred to

Smith v. Jones (1999), 132 C.C.C. (3d) 225, 169 D.L.R. (4th) 385, 22 C.R. (5th) 203, (sub nom. *Jones v. Smith)* 60 C.R.R. (2d) 46, (sub nom. *Jones v. Smith)* 236 N.R. 201, 1999 CarswellBC 590, 1999 CarswellBC 591, [1999] 1 S.C.R. 455, (sub nom. *Jones v. Smith)* 120 B.C.A.C. 161, (sub nom. *Jones v. Smith)* 196 W.A.C. 161, 62 B.C.L.R. (3d) 209, [1999] 8 W.W.R. 364, 1999 SCC 16 (S.C.C.) — referred to

True Blue Cattle Co. v. Toronto Dominion Bank (2004), 12 C.C.L.I. (4th) 256, 49 C.P.C. (5th) 153, 360 A.R. 117, 2004 ABQB 145, 2004 CarswellAlta 279 (Alta. Q.B.) — referred to

155569 Canada Ltd. v. 248524 Alberta Ltd. (1989), 99 A.R. 100, 1989 CarswellAlta 505 (Alta. Master) — referred to

Statutes considered:

Limitations Act, R.S.A. 2000, c. L-12

Generally — referred to

s. 3(1)(a) — considered

s. 6(1) — considered

s. 6(4)(b) — considered

s. 6(5)(b) — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68

R. 314(2) — considered

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

Generally — referred to

Pt. 5 — referred to

R. 6.7 — considered

R. 6.8 — referred to

APPEAL by doctors from decision regarding application to compel answers to undertakings; CROSS-APPEAL by plaintiff from decision regarding application to compel answers to undertakings.

***R.A. Graesser J.*:**

I. Introduction

1 This is an application by Drs. Neilson, Ostolosky and Din (the "doctors") by way of an appeal from the decision of Master Wachowich dated June 1, 2010 dismissing their application to compel the Plaintiff to answer certain objected-to undertakings from his examination for discovery. Mr. Brogden cross-appeals Master Wachowich's decision with respect to the two objected-to undertakings he was required to answer.

2 The application before Master Wachowich turned on relevance, solicitor - client privilege and solicitor's work product privilege.

II. Background

3 The Plaintiff is the widower of the late Brooklyn Alissa Rozak and is the Administrator Ad Litem of her estate.

4 Ms. Rozak had been admitted to the Grey Nuns Hospital in Edmonton on May 30, 2005 for psychiatric observation and treatment. She was discharged on June 3, 2005. Later that day, she was taken to the University of Alberta Hospital by her husband because of concerns for her mental well-being and safety.

5 At the University Hospital, she was initially seen by Dr. Neilson, an emergency doctor. He concluded that she should have a psychiatric consultation, and she was then seen by a resident, Dr. Din, and the staff psychiatrist, Dr. Ostolsky.

6 Following the psychiatric consultation, Ms. Rozak was discharged later that evening.

7 On June 5, 2005, Ms. Rozak committed suicide.

8 Mr. Brogden sought legal advice in August, 2005 and signed consents for the release of Ms. Rozak's medical records and information. Mr. Brodgen's counsel wrote the University Hospital on November 8, 2005 requesting patient files and records.

9 The University Hospital records were provided to counsel under cover of a November 14, 2005 letter. The records clearly show that "Dr. Neilson" requested a medical consultation from "Dr. Ostolosky" on June 3, 2005.

10 On the Outpatient Chart, there is a signature under "Doctor" but no printed name. Dr. Kevin Neilson has deposed that is his signature. Whether his signature is legible is in issue on the underlying application.

11 On a similar form in the records, there are notes and above "Consultant's Signature" is a signature and the printed name "Omar Din". Whether either the signature or printed name is legible is in issue on the underlying application.

12 A Statement of Claim was issued on June 1, 2007, naming Dr. Michael Demas, the University Hospital and the Grey Nuns Hospital. It was amended later that day to include Drs. Carl Blashko and Darren Neilson. The action has been since discontinued against Dr. Darren Neilson.

13 The Statement of Claim was not immediately served. It was served on the University Hospital on April 24, 2008 and on Dr. Darren Neilson on May 6, 2008.

14 Shortly after the University Hospital had been served, in-house counsel notified Mr. Brogden's counsel that the wrong Dr. Neilson had been sued. Dr. Darren Neilson was an emergency doctor at the Grey Nuns Hospital, and had no dealings at all with Ms. Rozak. Rather, his brother, Dr. Kevin Neilson, an emergency doctor at the University Hospital, was the emergency doctor who had seen Ms. Rozak on June 3, 2005.

15 Following that correspondence, Mr. Brogden's counsel had the Amended Statement of Claim served on Dr. Kevin Neilson on July 2, 2008, along with a letter advising Dr. Kevin Neilson of Mr. Brogden's intention to amend the Statement of Claim to substitute him for his brother Darren as a defendant.

16 On November 3, 2008, Dr. Ostolosky was served with the Amended Statement of Claim, along with a letter advising her of Mr. Brogden's intention to amend the Statement of Claim to add her as a defendant.

17 An application was filed on November 14, 2008 on behalf of Mr. Brogden to amend the Amended Statement of Claim by substituting Dr. Kevin Neilson for Dr. Darren Neilson and adding Dr. Ostolosky.

18 Mr. Brogden had Dr. Din served with the Amended Statement of Claim in mid-February, 2009 along with notice that he intended to add Dr. Din as a defendant.

19 Drs. Kevin Neilson, Ostolosky and Din have objected to the amendments to the Amended Statement of Claim and have raised the *Limitations Act*, R.S.A. 2000, Ch. L-12.

20 Mr. Brogden was cross-examined on his affidavit in support of his application for the amendments, and a number of undertakings were requested but refused.

21 Following the refusals, counsel for the doctors applied to compel answers to the objected-to undertakings. Master Wachowich gave oral reasons for decision and ordered that Mr. Brogden provide answers to two of the undertakings. He declined to order answers to the rest.

22 The doctors appeal the dismissal of some of the requested undertakings; Mr. Brogden cross-appeals with respect to the two he was required to answer. Over the course of preparing for this appeal, the parties have reduced the number of undertakings in dispute.

III. Standard of Review

23 The parties are agreed that the issues in the appeal are questions of law, and thus attract a correctness standard of review.

IV. Undertakings in Dispute

24 The following undertakings are the ones still in dispute:

Undertaking 6:	Advise if there was more information received or obtained to determine that Carl Blashko and Darren Neilson should be added as defendants prior to filing the Amended Statement of Claim.
Undertaking 8:	Make inquiries and determine what steps were taken on Brad Bogden's behalf to determine why Darren Neilson was named as defendant and what further determinations, if any, were made to confirm that he was properly named a defendant between June 4, 2005 and June 1, 2008.
Undertaking 9:	Make inquiries to determine what steps were taken on behalf of Brad Brogden between June 4, 2005 and June 1, 2008 to determine whether any other physician should be named as defendants in the lawsuit, particularly Dr. Ostolosky and Dr. Din.
Undertaking 10:	Make inquiries to determine whether or not there was anything preventing Brad Brogden's counsel from contacting the University of Alberta Hospital at any time between the time they were retained in August of 2005 until June 1, 2008 to ake inquiries with respect to the names of the physicians that were involved in caring for Ms. Rozak on June 3, 2005.
Undertaking 13:	Make inquiries of Brad Brogden's counsel as to what medical directories are available in their office and did have available in their office between August of 2005 and June 1, 2008.
Undertaking 16:	Make inquiries and determine when it was that Brad Bogden first advised counsel that he had a recollection of Ms. Rozak being seen by an intern or resident of the middle eastern descent.
Undertaking 22:	Make inquiries with Brad Bogden's counsel to determine if there was something preventing

him from determining or recognizing that there was a resident involved in Ms. Rozak's care at any point after they received the records on November 16, 2005.

25 The Master ordered answers to 13 and 16, and refused to order answers to 6, 8, 9, 10 and 22.

V. Issues

26 This appeal only deals with the objected-to undertakings, and not the underlying application to amend the Amended Statement of Claim.

27 The issues on this appeal relate to whether the undertakings may be directed on questioning on an affidavit, the relevance of the requested undertakings, and whether Mr. Brogden should be required to answer some or all of them having regard to solicitor and client privilege, as well as his solicitor's litigation and work product privilege.

28 Rule 6.7 deals with questioning. It provides:

> A person who makes an affidavit in support of an application or in response or reply to an application may be questioned, under oath, on the affidavit by a person adverse in interest on the application, and
>
> (a) rules 6.16 to 6.20 apply for the purposes of this rule, and
>
> (b) the transcript of the questioning must be filed by the questioning party.

29 Old Rule 314(2), which was in effect when the questioning took place, provided:

> The deponent may be required to attend in the same manner as a party being examined for discovery and the procedure on his examination is subject to the same Rules, so far as they are applicable, as the Rules that apply to the examination for discovery of party.

30 Having regard to the foundational rules, I see no purpose or basis to change the scope of questioning on an affidavit in support of an application: questions relevant and material to the underlying application will be permitted and if refused, will be ordered to be answered:

> *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*, [1981] 4 W.W.R. 760 (Alta. Q.B.), at paras. 4 and 6
>
> *155569 Canada Ltd. v. 248524 Alberta Ltd.* (1989), 99 A.R. 100 (Alta. Master) at paras. 11-13
>
> *Bland v. Canada (National Capital Commission)*, 1989 CarswellNat 170 (Fed. T.D.), at para. 16
>
> *Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.* (2008), 97 Alta. L.R. (4th) 182 (Alta. Master) at para. 5

31 Repetitive and abusive questions have never been allowed; questioning must now be both relevant and material to the application having regard to the narrowing of the scope of questioning generally from "touching the matters in question" to "relevant and material".

32 Nevertheless, to determine relevance and materiality, the issues on the underlying application must be reviewed.

VI. Undertakings on Questioning on Affidavits

33 The threshold issue on this application is whether (or the extent to which) an affiant may be required to undertake to provide further evidence or documents. There is much authority to suggest that an affiant may not be required to inform him or herself following the questioning on questions that could not be answered - following up on answers "I don't know".

34 *Merck Frosst Canada Inc. v. Canada (Minister of Health)*, 1997 CarswellNat 2661 (Fed. T.D.) (holds that "absence of knowledge is an acceptable answer; the witness cannot be required to inform him or herself" (at para. 4).

35 That is an often-quoted statement, and has been followed in *Alberta Treasury Branches v. Leahy*, 1999 CarswellAlta 1027 (Alta. Q.B.), and *Bruno v. Canada (Attorney General)*, 2003 CarswellNat 3375 (F.C.).

36 However, there are also a number of cases in Alberta where affiants have been require to inform themselves, and provide answers following the questioning.

37 The most detailed analysis of undertakings on questioning on affidavits is Master Prowse's decision in *Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.*, 2008 ABQB 671 (Alta. Master). He concluded at para. 5:

> After a review of the relevant case law, I have come to the conclusion that the court should be reluctant to direct that undertakings be provided by a party proffering a deponent who is unable to answer all questions put to the deponent during a cross-examination. It should be more difficult to have undertakings directed on a cross-examination than at examinations for discovery. Undertakings should only be directed on a cross-examination where:
>
> (a) the deponent has referred to information or documents in the affidavit, or could only have made the assertions contained in the affidavit after having reviewed the information or documents being sought, or
>
> (b) the undertakings relate to an important issue in the application, and the provision of such information:
>
> (i) would not be overly onerous, and
>
> (ii) would likely significantly help the court in the determination of the application.

38 I agree with his conclusions. The statement that an affiant cannot be required to inform him or herself is not the law in

Alberta. An affiant being questioned is in a similar position to that of a witness being cross-examined at trial. Witnesses are expected to have taken reasonable steps to inform him or herself as to the subject matter on which they are expected to testify. They are expected to bring with them all records in their possession or control which are relevant to the issues in the lawsuit. They may be cross-examined not only on their evidence in chief, but on any other matter within their knowledge.

39 One key difference is that witnesses at trial does not usually have the ability to inform themselves during cross-examination on questions they are unable to readily answer. That may work to their great disadvantage, as a witness who is unable to provide an answer to something reasonably expected to be in his or her knowledge may be seen as unprepared, unhelpful, unintelligent, or even untruthful.

40 Because questioning on affidavits generally takes place some time before the underlying application is heard, an affiant does have the opportunity to shore up his or her testimony by providing a further affidavit. Where the affiant has knowledge or access to knowledge which may be helpful to the other side, there is no policy reason to have a *bar* against requiring the affiant to obtain the answer for a question that was properly put to the affiant on questioning.

41 That being said, I am also in agreement with Master Prowse that the court should be slow to direct that an affiant be directed to inform him or herself after the questioning and provide further answers, and that generally witnesses being questioned on an affidavit are treated differently (i.e. with greater restraint as to undertakings) than witnesses being questioned under Part 5 of the New Rules of Court.

42 To be clear, therefore, I agree with the Master that there is no general prohibition against asking affiants for undertakings on questioning on their affidavits, but that the propriety of any undertaking sought is governed by the tests set out above.

43 This does not prevent an affiant or counsel on his or her behalf from agreeing to provide undertakings on a voluntary basis. As noted by the Master, it may be in the affiant's advantage to provide such information, as the information will be used on the underlying application. Giving undertakings, and complying with them, may avoid the underlying motion from failing for want of evidence.

44 I also agree with the Master's conclusion that the courts should be slower in requiring affiants to inform themselves than is the case with witnesses being questioned in the disclosure process under Part 5 of the New Rules.

45 Here, I am satisfied that, subject to privilege issues and relevance issues as to each inquiry requested, it is appropriate to require Mr. Brogden to inform himself as to steps taken on his behalf to identify the individuals who may have been involved in Ms. Rozak's treatment at the University Hospital.

46 In relation to this application, Mr. Brogden can only assert that he has been reasonably diligent in identifying the appropriate defendants by informing himself from his counsel as to what was done by them on his behalf. The information sought relates to an important issue in the application - the commencement date for the limitation period - and requesting the information from counsel is not onerous and would likely be significant in determining the application.

47 Thus both alternatives in the test in *Dow Chemical* are satisfied here.

VII. Relevance

48 It should be noted that the Plaintiff does not argue that the naming of Dr. Darren Neilson was a misnomer. The Plaintiff intended to sue someone else, not Dr. Darren Neilson, so this is not a case of mis-spelling the person's name.

49 The doctors are resisting the underlying application on the basis of the *Limitations Act*. There are two provisions in the *Limitations Act* which are brought into play: s. 3(1)(a) dealing with the basic two year limitation period from discovery of the cause of action, and sections 6(1) and 6(4)(1)(b) dealing with adding defendants to an existing lawsuit after the two year period has run.

50 S. 3(1)(a) provides:

> Subject to section 11, if a claimant does not seek a remedial order within
>
> (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
>
> (i) that the injury for which the claimant seeks a remedial order had occurred,
>
> (ii) that the injury was attributable to conduct of the defendant, and
>
> (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,

51 S. 6(1) states:

> Notwithstanding the expiration of the relevant limitation period, when a claim is added to a proceeding previously commenced, either through a new pleading or an amendment to pleadings, the defendant is not entitled to immunity from liability in respect of the added claim if the requirements of subsection (2), (3) or (4) are satisfied.

52 S. 6(4)(b) states:

> (b) the defendant must have received, within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in maintaining a defence to it on the merits.

53 Additionally, s. 6(5)(b) provides that:

> the defendant has the burden of proving that the requirement of subsection 3(b) or 4(b), if in issue, was not satisfied.

VIII. Onus and Arguments

54 As this is an application to add defendants, to which s. 6(4)(b) applies, the doctors acknowledge that the onus is on them to demonstrate that their identities were discoverable by Mr. Brogden *before* the dates identified below, citing *Resortport Development Corp. v. Alberta Racing Corp.*, 2004 CarswellAlta 1880 (Alta. Q.B.), at para. 3, aff'd 2005 ABCA 49 (Alta. C.A.).

55 The test for discoverability is set out in *De Shazo v. Nations Energy Co.*, 2005 ABCA 241 (Alta. C.A.):

> A cause of aciton arises for purposes of a limitation period when the material facts on which it (the cause of action) is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence. (At para. 26)
>
> . . .
>
> The claimant must know or have been reasonably able to discover that: (i) the injury occurred; (ii) the injury was attributable to the conduct of the defendant; and (iii) the injury warrants bringing a proceeding. (At para. 28)

56 In this case, there are different arguments with respect to each of the doctors:

Dr. Kevin Neilson

57 The Plaintiff argues that Dr. Neilson was served within two years from the discovery of an arguable cause of action against him. The University Hospital records only show "Dr. Neilson"; materials relied on by the Plaintiff for the purpose of preparing and issuing the Amended Statement of Claim showed only Dr. Darren Neilson as an emergency doctor in Edmonton. The first the Plaintiff learned of Dr. Kevin Neilson was a June 20, 2008 email from counsel for the doctors, who advised that "He (Dr. Darren Neilson) tells us that Dr. Kevin Neilson, however, was on shift. Darren believes that Kevin should be the named Defendant."

58 If June 20, 2008 is the appropriate date for the discoverability of Dr. Kevin Neilson's identity and involvement, the application to amend (November 14, 2008) was within the discoverability date.

59 Alternatively, if Dr. Kevin Neilson is to be treated as a party to be added after the limitation period has expired, the test is whether he learned of a possible claim against him within the appropriate limitation period, plus the time for service of the Amended Statement of Claim under the Rules of Court.

60 In the latter circumstance, the Amended Statement of Claim was issued on June 1, 2007. It had to be served (or renewed) before June 1, 2008. But using discoverability principles, the Plaintiff argues that the earliest commencement time would be November 16, 2005, the date the November 14, 2005 correspondence from the University Hospital enclosing Ms. Rozak's medical chart was received by Mr. Brogden's counsel. Thus, the Statement of Claim should have been issued and served on Dr. Kevin Neilson by November 16, 2008.

61 As such, even if the limitation period has expired, since Dr. Kevin Neilson had knowledge of the possible action against him on July 2, 2008, the application to add him as a defendant to the existing action is not barred by the *Limitations Act*.

62 Dr. Neilson argues that the limitation period began to run on June 4, 2005, the date of Ms. Rozak's death. Alternatively, he argues that Mr. Brogden has not established that he was reasonably diligent in obtaining the University Hospital's chart and in

determining that the Dr. Neilson referred to in it was Dr. Kevin Neilson and not Dr. Darren Neilson. He argues that his signature is clearly identifiable in the chart, and he is shown in the readily-available Alberta Health and Wellness Statement of Benefits Paid as having provided services to Ms. Rozak on June 3, 2005.

63 The Statement of Benefits Paid was not ordered until October 20, 2008, and was received by Mr. Brogden's counsel on November 12, 2008.

64 Dr. Neilson argues that the limitation period expired much before November 16, 2005 and that Mr. Brogden has not proven that he was reasonably diligent in obtaining records and determining the correct defendants to name in the Statement of Claim.

65 Essentially, his argument is that the limitation period expired on June 3, 2007. For the purposes of s. 6(4)(b) of the *Limitations Act*, Dr. Kevin Neilson would have had to have known about the possible claim before June 3, 2008. Mr. Brogden has not proven that he was reasonably diligent in obtaining the necessary information; thus there should be no extension of the June 3, 2007 limitation period. Thus, when Dr. Kevin Neilson learned of the possible claim against him on July 2, 2008, it was too late under s. 6(4)(b).

66 To succeed in adding Dr. Kevin Neilson, Mr. Brogden will have to establish that it was not unreasonable for him to have taken no steps to identify the doctors involved in Ms. Rozak's treatment at the University Hospital before July 2, 2005 and that the limitation period under s. 3(1)(a) commenced then or later.

Dr. Ostolosky

67 Mr. Brogden argues that the discoverability period for Dr. Ostolosky began to run on November 16, 2005 when the hospital records identifying her and her involvement were received by his counsel. Thus, so long as she had notice of the possible claim against her by November 16, 2008, the claim against her is not barred under the *Limitations Act*. Since she was served with the Amended Statement of Claim and was advised that Mr. Brogden intended to have her added as a defendant by letter of November 3, 2008, there is no limitations defence for her.

68 Dr. Ostolosky responds in similar fashion to Dr. Neilson: Mr. Brogden has not discharged the onus on him of showing reasonable diligence in obtaining the medical records and the relevant date should not be extended beyond the basic limitation period of June 3, 2005. That would have required notice to her by June 3, 2008. Since she did not receive notice until November 3, 2008, the application to add her as a defendant under s. 6(4)(b) of the *Limitations Act* must fail.

69 For Mr. Brogden to succeed in adding Dr. Ostolosky, Mr. Brogden will have to establish that it was not unreasonable for him to have taken no steps to identify the doctors involved in Ms. Rozak's treatment at the University Hospital before he consulted counsel in August, 2005 (two or so months after Ms. Rozak's death) *and* that it was not unreasonable for his counsel to take until November 16, 2005 to obtain the University Hospital chart or otherwise identify the doctors involved in her treatment. Essentially, that the limitation period under s. 3(1)(a) did not begin to run until November 16, 2005 or later.

Dr. Din

70 Mr. Brogden argues that Dr. Din's name and involvement could not reasonably be determined from the University Hospital chart, and his name does not appear on the Statement of Benefits Paid.

71 Mr. Brogden met him on June 3, 2005 when Dr. Din interviewed Ms. Rozak and (as confirmed on his cross-examination on September 15, 2009 that he was aware of the involvement of a white male emergency doctor and an East Indian or Middle Eastern male psychiatrist.

72 Mr. Brogden deposed in his affidavit sworn November 13, 2008 in support of his application to add Dr. Ostolosky as a defendant, that he did not then know the identity of the East Indian or Middle Eastern psychiatrist or resident. Attached to his affidavit was a request by his counsel to the University Hospital's counsel is a letter dated October 20, 2008 requesting the name of the "consultant's signature".

73 He argues that the discoverability period with respect to Dr. Din had not expired by October 20, 2008. While no formal application has been made to add Dr. Din as a defendant, that is not necessary because under s. 6(4)(b), he can still be added as a defendant. He had notice of the possibility of this action against him in mid-February, 2009 which was well within the limitation period, let alone any added service period.

74 Dr. Din's counsel argues that the limitation period against him expired on June 3, 2007. Mr. Brogden has not satisfied the onus on him of showing reasonable diligence in seeking out his identity and involvement. His involvement (but not necessarily his name) was known to Mr. Brogden on June 3, 2005 when they met. At the latest, discoverability for Dr. Din might run to November 16, 2005 when the hospital charts were provided to Mr. Brogden's counsel. The chart clearly identifies Dr. Din. Thus, the latest limitation period for Dr. Din would have expired on November 16, 2007. For s. 6(4)(b) of the *Limitations Act* to apply, he would have had to have had notice of the possible claim before November 16, 2007. Since he only had such notice in mid-February, 2009, the action is clearly barred against him and the application to add him under 6(4)(b) is doomed to fail.

75 For Mr. Brogden to succeed in adding Dr. Din, it appears that he will have to establish that it was not unreasonable for his counsel to have not identified Dr. Din from the University Hospital records provided to them on November 16, 2005, and further that it was not unreasonable for them to take no further steps to identify doctors involved in Ms. Rozak's treatment at the University Hospital until after mid-February, 2006 (despite Mr. Brogden's knowledge that an East Indian or Middle Eastern psychiatrist was involved). Essentially, that the limitation period under s. 3(1)(a) did not begin to run until mid-February, 2006 or later.

76 Mr. Brogden also has arguments that could lead to similar result as are argued with respect to Dr. Kevin Neilson and Dr. Ostolsky: that sufficient information was not learned about Dr. Din's involvement until late 2008 or even 2009 such that the period under s. 6(4)(b) has not yet run. For the purpose of this application, those arguments do not need to be dealt with.

77 Thus, the issues for Dr. Kevin Neilson are:

1. Whether the limitation period based on discoverability expired July 2, 2007 or later.

2. Has Dr. Neilson satisfied the onus on him that Mr. Brogden should, with reasonable diligence, have discovered that he had a possible cause of action against Dr. Kevin Neilson before July 2, 2005 (a month after Ms. Rozak's death and before he sought legal counsel in August, 2005)?

78 For Dr. Ostolovsky:

1. Whether the limitation period based on discoverability expired November 12, 2007 or later.

2. Has Dr. Ostolovsy satisfied the onus on her that Mr. Brogden should, with reasonable diligence, have discovered that he had a possible cause of action against Dr. Ostolovsky before November 12, 2005 (before Mr. Brogden's counsel received the University Hospital chart identifying Dr. Ostolovsky)?

79 For Dr. Din:

1. Whether the limitation period based on discoverability expired before mid-February, 2008.

2. Has Dr. Din satisfied the onus on him that Mr. Brogden should, with reasonable diligence, have discovered that he had a possible cause of action against Dr. Din before mid-February, 2006 (three months after the University Hospital chart with his signature and printed name was received by Mr. Brogden's counsel)?

80 It is reasonable to assume that Mr. Brogden left the identification of possible defendants to his counsel after August, 2005, so issues as to his diligence or reasonableness in trying to identify the correct defendants are really issues as to the diligence or reasonableness of his counsel. Thus the application and the evidence is destined to bump up against solicitor - client privilege and solicitor's work product privilege.

IX. Master's Decision

81 The essence of the Master's ruling is found at pages 2 and 3 of his decision:

Further comment from the BC Appellate Court in *Hodgkinson v. Simms* 1988 CarswellBC 437:

> If lawyers were entitled to dip into each other's briefs by means of the discovery process, the straightforward preparation of cases for trial would develop into a most unsatisfactory travesty of our present system.

In my view, there might be an appropriate case to allow for that type of questioning, but it would have to be a rather severe case, and it would have to be a situation where justice cried out for that type of inquiry to be answered. In this case, it is clear from the hospital record that Kevin Neilson should have been named as a defendant as should have Dr. Ostolosky and as should the resident. So in this case there is no obligation for Mr. Brogden in the context of a cross-examination on affidavit to answer undertakings, especially where, as her, it would require Mr. Brogden to inform himself of making inquiries of his counsel in order to provide the answer. In my vies, the Court should lean towards protecting the file of counsel for the plaintiff, and, as I say, in an appropriate case, it might be that the Court would rule otherwise.

Dealing now with the undertakings in question, I do not think it is necessary to go through them one by one. I have already indicated which way I am headed on this, so that undertaking number 6, 8, 9, and 10 do to have to be answered.

Undertaking 13 is to make inquiries of Brogden's counsel as to what medical directories are available in his lawyer's office. That does not go into the lawyer's brief. That is a straightforward matter, and I direct that that be provided.

Undertaking number 16 is to make inquiries and determine when it was that r. Brogden first advised counsel that he had a recollection of Ms. Rozak being seen by a male intern, a resident of Middle Eastern Descent. That is relevant material, and it shall be provided.

Eighteen is, my view, going into plaintiff's counsel's file or worse yet, asking him to ask his lawyer to provide an answer to that question, and that will not be provided.

Twenty-one, again it is asking Mr. Brogden to seek information from his counsel, and that will not be provided.

I should say a number of these matters for them not to be provided does not mean that the information sought is not available in one form or another to be provided to the Court should this matter proceed to trial or to summary judgment.

Twenty-two is make inquiries of Brogden's counsel to determine if there was something preventing him from determining or recognizing that there was a resident involved. I mean, again, that is asking the plaintiff to get information from the counsel. It is evident from the possible record that there was a resident involved, so the evidence is already there.

82 He determined that undertaking requests 6, 8, 9, 10 and 22 need not be answered because they involved solicitor's work product privilege, and he was not satisfied that such privilege had been waived.

83 With respect to undertaking requests 13 and 16, he directed that they be answered, on the basis of relevance.

X. Specific Undertakings Requests

84 The onus of showing that Mr. Brogden failed to exercise reasonable diligence in discovering the identities of the doctors involved lies on the doctors. It is also clear that knowledge as to what Mr. Brodgen knew and when he knew it would not be known to the doctors, and the only way of finding out such information would be to obtain it from him, or from persons acting on his behalf.

85 The issues of knowledge, diligence and timing are clearly relevant and material to the underlying application in a general way, and specifically with respect to those issues to those specific dates discussed above.

Undertaking 6

86 Request 6 seeks any more information received or obtained to determine that Carl Blashko and Darren Neilson should be added as defendants prior to filing the Amedned Statement of Claim.

87 Firstly, there is no issue regarding Dr. Blashko on the underlying application, so information regarding him is not relevant and need not be provided. As regards Dr. Darren Neilson, the relevant date for the purpose of the underlying application is July 2, 2005.

88 It may be that the plaintiff was not diligent in seeking counsel. It may be that counsel was not diligent in identifying the

doctors involved in Ms. Rozak's care at the University Hospital. But a statement of claim was issued within the time for the earliest possible limitation period to expire. Dr. Darren Neilson was therefore sued in time, although it is clear that there was no cause of action against him.

89 Therefore, the underlying application clearly involves s. 6(4)(b) of the *Limitations Act*, and the only relevant date for Dr. Kevin Neilson is July 2, 2005. Any lack of diligence after that date does not affect the outcome of the underlying application.

90 The undertaking which might be required to be answered would be "what information was received or determined that Darren Neilson should be added as a defendant prior to July 2, 2005". Because counsel was not retained until August, 2005, the answer to that undertaking would be solely in Mr. Brogden's knowledge, and he should be required to answer it.

Undertaking 8

91 Request 8 seeks information as to what steps were taken on Mr. Brogden's behalf to determine why Darren Neilson was named as a defendant.

92 As the answer to that question relates to a period long after July 2, 2005, I do not see any relevance to it and it need not be answered.

Undertaking 9

93 Request 9 seeks information as to what steps were taken on Mr. Brogden's behalf between June 4, 2005 and June 1 2008 to determine whether any other physician should be named as defendants in the lawsuit, particularly Dr. Ostolosky and Dr. Din.

94 The relevant date for Dr. Ostolosky is November 12, 2005. The relevant date for Dr. Din is mid-February, 2006.

95 If steps were taken on Mr. Brogden's behalf other than by or for his lawyers, that information should be provided as regards Dr. Ostolsky to November 12, 2005 and as to Dr. Din to February 15, 2006.

96 With respect to steps taken on Mr. Brogden's behalf by his counsel, solicitor-client privilege and solicitor's work product privilege are raised.

97 At the outset, I need not weigh into whether solicitor's work product privilege is or is not a subset of litigation privilege or a stand-alone privilege of lesser. Whether as a subset of litigation privilege or standing on its own, work product privilege has lesser standing than solicitor-client privilege. *Blank v. Canada (Department of Justice)*, 2006 SCC 39 (S.C.C.), *R. v. Card*, 2002 ABQB 537 (Alta. Q.B.), *Hudson Bay Mining & Smelting Co. v. Cummings*, 2006 MBCA 98 (Man. C.A.), *Moseley v. Spray Lakes Sawmills (1980) Ltd.* (1996), 39 Alta. L.R. (3d) 141 (Alta. C.A.), are to that effect.

98 Privilege can be waived by giving evidence of a privileged communication, or where a party, by his testimony or pleading voluntarily raises a defence or asserts a claim which makes information provided by his solicitor relevant. Selective waiver is not permitted:

Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co. [1992 CarswellAlta 86 (Alta. Q.B.)], 1992 CanLII 6132; *True Blue Cattle Co. v. Toronto Dominion Bank*, 2004 ABQB 145 (Alta. Q.B.), *Petro Can Oil & Gas Corp. v. Resource Service Group Ltd.*, [1988] A.J. No. 336 (Alta. Q.B.), aff'd (1988), 32 C.P.C. (2d) xlvi (note) (Alta. C.A.); *Alberta Wheat Pool v. Estrin*, [1986] A.J. No. 1165 (Alta. Q.B.), aff'd (1987), 17 C.P.C. (2d) xxxix (note) (Alta. C.A.); *Marion v. Wawanesa Mutual Insurance Co.*, 2004 ABCA 213 (Alta. C.A.).

99 Positions cannot be taken that are inconsistent with maintaining privilege; privilege on a particular issue or point cannot be waived selectively or unfairly.

100 I hasten to add that preservation and protection of solicitor client privilege (and to a lesser extent litigation privilege and solicitor's work product privilege) is important, and privilege should not be interfered with other than in the few exceptional circumstances recognized by the courts:

Pritchard v. Ontario (Human Rights Commission), 2004 SCC 31 (S.C.C.), *Descôteaux c. Mierzwinski*, [1982] 1 S.C.R. 860 (S.C.C.), *Smith v. Jones*, [1999] 1 S.C.R. 455 (S.C.C.), and *R. v. Fosty*, [1991] 3 S.C.R. 263 (S.C.C.).

101 Where the issue of diligence has been legitimately raised (as it has here because of the Plaintiff's application to add the doctors as defendants after the standard without-discoverability period of two years from the injury), the Plaintiff's diligence as well as his solicitor's diligence becomes relevant. As the only way the doctors have of testing such diligence is through cross-examination on Mr. Brogden's affidavit and seeking undertakings with respect to his counsel's actions (unless the doctors wanted to risk examining the Plaintiff's counsel under Rule 6.8 as their witness rather than through cross-examination), solicitor client privilege may well have to yield on issues relating to knowledge of doctors, and the diligence of the solicitors in informing that knowledge. It would be unfair to allow the plaintiff to essentially say "I didn't do anything, I left it all to my lawyers" and then refuse to say what the lawyers have told him they did, or even ask them about it.

102 That is not to say that the resulting waiver or loss of privilege extends to anything beyond diligence in discovering the identity of the doctors involved. Mr. Brogden's affidavits do not go beyond diligence issues, and anything beyond that would be irrelevant to the underlying application let alone being an unwarranted incursion into privilege.

103 In the context of the undertaking sought, as modified by me above, I do not see that it is improper to ask what steps the solicitors took from the time they were retained until the relevant date specified above. Mr. Brogden has brought diligence into issue by applying to add the doctors as defendants, and discoverability is necessary to extend the limitation period for suing each of the doctors to or beyond the relevant dates.

Undertaking 10

104 Request 10 seeks information as to whether there was anything preventing Mr. Brogden or anyone on his behalf from contacting the University Hospital to make inquiries as to the identities of the doctors who were involved in Ms. Rozak's care.

105 I see this as a question of diligence - was there some reason why Mr.Brogden's counsel did not contact the University Hospital or its solicitors to determine specifically which doctors were involved, particularly after receipt on November 16, 2005 of the University Hospital chart in which Dr. Kevin Neilson's signature, Dr. Ostolosky's name and Dr. Din's signature and printed name are found (legibility issues aside).

106 As regards Dr. Kevin Neilson, the question is irrelevant as the relevant date for him had passed before counsel was retained.

107 As regards Dr. Ostolosky, the relevant date is November 12, 2005. In my view, the undertaking should be answered with respect to her to November 12, 2005. My view on privilege is the same as with requested undertaking 9.

108 As regards Dr. Din, the relevant date is February 16, 2006, and the undertaking should be answered with respect to him to February 16, 2006.

109 Any times after February 16, 2006 are simply not relevant to the application to amend.

Undertaking 13

110 In request 13, the doctors seek information as to what materials were available to Mr. Brogden's counsel between August, 2005 and June 1, 2008 (when the Amended Statement of Claim was issued). Mr. Brogden objects to this as it is part of his solicitor's work product.

111 Firstly, as with the other undertaking requests, times after February 16, 2006 are not relevant to the application to amend. So the time frame is in any event narrowed to August, 2005 to February 16, 2006. Diligence is in issue. It seems to me that it is relevant to know what resources the plaintiff (or his counsel) actually had readily available to them, or obtained for the purposes of determining the appropriate parties, during this relevant time frame. Certainly the doctors are free to argue what sources of information *might* have been available to the plaintiff or his counsel, but it is clearly relevant to know what information they actually *had*.

112 Mr. Brogden's counsel has already advised that they had the 2005 Canadian Medical Directory in their offices and that they consulted it regarding Dr. Darren Neilson. There are issues relating to his identity, as well as whether Dr. Din's identity is ascertainable from the University Hospital Chart. I see no valid objection to Mr. Brogden being asked to enquire of his solicitors what resources they had in their offices to ascertain doctors' identities during this period.

113 As to privilege, if any materials were obtained for the purpose of this litigation in this period, privilege has been waived by the plaintiff putting his due diligence in issue. If materials (such as directories) are simply part of counsel's library, I do not see that it could be claimed that they were obtained for the dominant purpose of this litigation. In that regard, I do not see the request as being any more objectionable than asking if counsel had the Western Weekly Reports or the Supreme Court Reports in their offices. They may be there for litigation purposes generally, but no one file specifically. It would be difficult to see how a "dominant purpose" test for privilege could be met.

114 The requested undertaking should be answered, but limited to the period ending February 16, 2006.

Undertaking 16

115 In request 16, the doctors want to know when Mr. Brogden told his counsel that Ms. Rozak had been treated by a male

resident or intern of East Indian or Middle Eastern descent. This was objected to on the basis of the answer being a protected solicitor-client communication.

116 Doubtless the question goes to the a well-protected area: communications between solicitor and client for the purpose of giving and receiving legal advice. However, in my view the privilege relating to the answer has been waived by the issue of due diligence in determining Dr. Din's involvement and identity being brought into issue by Mr. Brogden. If the answer relates to a period after February 16, 2006, the specific date or circumstances need not be disclosed as being irrelevant. But if such a disclosure was made before February 16, 2006, the doctors are entitled to know that.

117 22 The doctors want to know why Dr. Din's involvement and identity were not recognized by counsel following receipt of the University Hospital records on November 16, 2005. Ordinarily, what was done with the records, or how they were interpreted, would be the subject of work product privilege. In some cases, obtaining records would be included in that privilege. That would not apply here, however, as the records were obtained from one of the parties to the lawsuit.

118 Again, because Mr. Brogden's diligence is in issue, any privilege relating to the records as to that issue has been waived. The doctors are entitled to know why Dr. Din's identity and involvement were not recognized after November 16, 2005, and whether there were any impediments to following up on the records until at least February 16, 2006.

XI. Conclusion

119 In the end, I find that the learned Master erred in law in declining to order that Mr. Brogden inform himself from counsel and advise as to undertaking requests 6, 9, 10 and 22. The answers to those requests fall within the exceptions to privilege - whether solicitor and client or litigation privilege or work product privilege. Number 8 need not be answered, but on the basis of relevance rather than privilege.

120 I agree with the Master's conclusion on Number 13.

121 While I agree with his decision on Number 16, he did not deal with privilege. The question was clearly relevant, but the response strikes directly at solicitor-client communications and would clearly be privileged but for waiver. As noted above, Mr. Brogden waived privilege over that communication by putting his diligence into issue.

122 I also agree with the Master's comment that "the Court should lean towards protecting the file of counsel". Privilege is an essential part of our legal system, and must be protected, subject to waiver and the very limited exceptions described in the case law.

XII. Costs

123 Despite the fact that I have directed that all but one of the requested undertakings be answered, I have in all cases limited the scope of the inquiries. The doctors sought information for periods much later than is relevant on the application to amend. I thus view the result as having mixed success for both sides: the plaintiff has to provide more information than he was prepared to, and the doctors will receive less information than they sought.

124 As a result, costs of this application, and the application before the Master, should be in the cause.

Appeal allowed in part; cross-appeal allowed in part.

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2010 CarswellOnt 9252, 2010 ONCA 830, 103 O.R. (3d) 1, 271 O.A.C. 177, 264 C.C.C. (3d) 423, 81 C.R. (6th) 376, 223 C.R.R. (2d) 261

2010 CarswellOnt 9252, 2010 ONCA 830, 103 O.R. (3d) 1, 271 O.A.C. 177, 264 C.C.C. (3d) 423, 81 C.R. (6th) 376, 223 C.R.R. (2d) 261

R. v. Levkovic

Her Majesty the Queen (Appellant) and Ivana Levkovic (Respondent)

Ontario Court of Appeal

Doherty, Armstrong, David Watt JJ.A.

Heard: March 8, 2010
Judgment: December 7, 2010
Docket: CA C49523

Proceedings: reversing *R. v. Levkovic* (2008), 2008 CarswellOnt 5744, 235 C.C.C. (3d) 417, 178 C.R.R. (2d) 285 (Ont. S.C.J.)

Counsel: Brian McNeely, Gillian Roberts for Appellant

Delmar Doucette, Jessica Orkin for Respondent

Subject: Criminal; Constitutional

Criminal law --- Charter of Rights and Freedoms — Life, liberty and security of person [s. 7] — Principles of fundamental justice — Vagueness

Accused was charged with concealing dead body of child under s. 243 of Criminal Code — She was arraigned and pleaded not guilty — Immediately after arraignment and plea, accused launched constitutional challenge to s. 243 of Code alleging overbreadth and vagueness — Trial judge rejected claim of overbreadth, but concluded that accused's right to life, liberty and security of person was breached due to vagueness of phrase "child died before...birth", and severed word "before" from s. 243 — Crown appealed — Appeal allowed — For trial judge, critical issue was whether ordinary person would understand scope

of risk of criminal liability concerning term "child" as it applied to period before birth — Trial judge applied overly demanding standard of vagueness and failed to properly consider case law in reaching his decision — Neither Canadian Charter of Rights and Freedoms nor vagueness doctrine required absolute certainty in legislation through language used — Section 243 of Code laid down area of risk that gave fair notice to persons of boundaries of criminal liability, and limited discretion of police in enforcement of legislation — Impugned portion of s. 243 could not be separated from its context and subjected to microscopic scrutiny — Provision required proof of knowledge of character of subject-matter disposed of, and purpose or intention of concealment of birth, and such provision that rendered investigation of death of individual less difficult formed integral part of statutory scheme — Section 243 was not void for vagueness.

Criminal law --- Charter of Rights and Freedoms — Life, liberty and security of person [s. 7] — Principles of fundamental justice — Overbreadth.

Cases considered by *David Watt J.A.*:

Blencoe v. British Columbia (Human Rights Commission) (2000), 2000 SCC 44, 2000 CarswellBC 1860, 2000 CarswellBC 1861, 3 C.C.E.L. (3d) 165, (sub nom. *British Columbia (Human Rights Commission) v. Blencoe)* 38 C.H.R.R. D/153, 81 B.C.L.R. (3d) 1, 190 D.L.R. (4th) 513, [2000] 10 W.W.R. 567, 23 Admin. L.R. (3d) 175, 2000 C.L.L.C. 230-040, 260 N.R. 1, (sub nom. *British Columbia (Human Rights Commission) v. Blencoe)* 77 C.R.R. (2d) 189, 141 B.C.A.C. 161, 231 W.A.C. 161, [2000] 2 S.C.R. 307 (S.C.C.) — considered

Canada v. Pharmaceutical Society (Nova Scotia) (1992), 15 C.R. (4th) 1, (sub nom. *R. v. Nova Scotia Pharmaceutical Society)* 93 D.L.R. (4th) 36, (sub nom. *R. v. Nova Scotia Pharmaceutical Society)* [1992] 2 S.C.R. 606, (sub nom. *R. v. Nova Scotia Pharmaceutical Society)* 43 C.P.R. (3d) 1, (sub nom. *R. v. Nova Scotia Pharmaceutical Society)* 74 C.C.C. (3d) 289, (sub nom. *R. v. Nova Scotia Pharmaceutical Society)* 10 C.R.R. (2d) 34, (sub nom. *R. v. Nova Scotia Pharmaceutical Society (No. 2))* 139 N.R. 241, (sub nom. *R. v. Nova Scotia Pharmaceutical Society (No. 2))* 114 N.S.R. (2d) 91, 1992 CarswellNS 15, 313 A.P.R. 91, 1992 CarswellNS 353 (S.C.C.) — referred to

Canada (Human Rights Commission) v. Taylor (1987), 37 D.L.R. (4th) 577, 29 C.R.R. 222, 78 N.R. 180, 9 C.H.R.R. D/4929, (sub nom. *Taylor v. Canadian Human Rights Commission)* [1987] 3 F.C. 593, 1987 CarswellNat 191, 1987 CarswellNat 191F (Fed. C.A.) — considered

Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General) (2004), 2004 SCC 4, 2004 CarswellOnt 252, 2004 CarswellOnt 253, 315 N.R. 201, 183 O.A.C. 1, 70 O.R. (3d) 94 (note), (sub nom. *Canadian Foundation for Children v. Canada)* [2004] 1 S.C.R. 76, 115 C.R.R. (2d) 88, 16 C.R. (6th) 203, 46 R.F.L. (5th) 1, 234 D.L.R. (4th) 257, 180 C.C.C. (3d) 353 (S.C.C.) — referred to

Chaoulli c. Québec (Procureur général) (2005), 130 C.R.R. (2d) 99, 2005 SCC 35, 2005 CarswellQue 3276, 2005 CarswellQue 3277, 254 D.L.R. (4th) 577, (sub nom. *Chaoulli v. Canada (Attorney General))* 53 C.H.R.R. D/1, (sub nom. *Chaoulli v. Quebec (Attorney General))* 335 N.R. 25, (sub nom. *Chaoulli v. Canada (Attorney General))* [2005] 1 S.C.R. 791 (S.C.C.) — referred to

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Danson v. Ontario (Attorney General) (1990), 43 C.P.C. (2d) 165, 73 D.L.R. (4th) 686, [1990] 2 S.C.R. 1086, 50 C.R.R. 59, 41 O.A.C. 250, 112 N.R. 362, 1990 CarswellOnt 366, 74 O.R. (2d) 763 (note), 1990 CarswellOnt 1004 (S.C.C.) — considered

New Brunswick (Minister of Health & Community Services) v. G. (J.) (1999), 66 C.R.R. (2d) 267, 50 R.F.L. (4th) 63, 216 N.B.R. (2d) 25, 552 A.P.R. 25, [1999] 3 S.C.R. 46, 7 B.H.R.C. 615, 1999 CarswellNB 305, 1999 CarswellNB 306, 244 N.R. 276, 177 D.L.R. (4th) 124, 26 C.R. (5th) 203 (S.C.C.) — referred to

Public School Boards' Assn. (Alberta) v. Alberta (Attorney General) (1999), 1999 CarswellAlta 1382, 89 Alta. L.R. (3d) 1, [1999] 3 S.C.R. 845, 180 D.L.R. (4th) 670, [2001] 5 W.W.R. 1 (S.C.C.) — referred to

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R. v. Bain (1992), 10 C.R. (4th) 257, [1992] 1 S.C.R. 91, 69 C.C.C. (3d) 481, 87 D.L.R. (4th) 449, 133 N.R. 1, 51 O.A.C. 161, 7 C.R.R. (2d) 193, 1992 CarswellOnt 66, 1992 CarswellOnt 981 (S.C.C.) — referred to

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Rodriguez v. British Columbia (Attorney General) (1993), 1993 CarswellBC 1267, 82 B.C.L.R. (2d) 273, 85 C.C.C. (3d) 15, 107 D.L.R. (4th) 342, [1993] 3 S.C.R. 519, 17 C.R.R. (2d) 193, 24 C.R. (4th) 281, 158 N.R. 1, 34 B.C.A.C. 1, 56 W.A.C. 1, [1993] 7 W.W.R. 641, 1993 CarswellBC 228 (S.C.C.) — referred to

Ruffo c. Québec (Conseil de la magistrature) (1995), (sub nom. *Ruffo v. Conseil de la magistrature)* 190 N.R. 1, (sub nom. *Ruffo v. Conseil de la magistrature)* [1995] 4 S.C.R. 267, 35 Admin. L.R. (2d) 1, 1995 CarswellQue 183, 1995 CarswellQue 184, (sub nom. *Ruffo v. Conseil de la magistrature)* 130 D.L.R. (4th) 1, (sub nom. *Ruffo v. Conseil de la magistrature)* 33 C.R.R. (2d) 269 (S.C.C.) — referred to

Suresh v. Canada (Minister of Citizenship & Immigration) (2002), 2002 SCC 1, 37 Admin. L.R. (3d) 159, [2002] 1 S.C.R. 3, 2002 CarswellNat 7, 2002 CarswellNat 8, 18 Imm. L.R. (3d) 1, 208 D.L.R. (4th) 1, 281 N.R. 1, 90 C.R.R. (2d) 1 (S.C.C.) — considered

U.N.A. v. Alberta (Attorney General) (1992), [1992] 3 W.W.R. 481, 89 D.L.R. (4th) 609, 71 C.C.C. (3d) 225, 135 N.R. 321, 92 C.L.L.C. 14,023, 1 Alta. L.R. (3d) 129, 13 C.R. (4th) 1, 125 A.R. 241, 14 W.A.C. 241, [1992] 1 S.C.R. 901, 9 C.R.R. (2d) 29, [1992] Alta. L.R.B.R. 137, 1992 CarswellAlta 10, 1992 CarswellAlta 465 (S.C.C.) — referred to

Winko v. Forensic Psychiatric Institute (1999), (sub nom. *Winko v. British Columbia (Forensic Psychiatric Institute))* [1999] 2 S.C.R. 625, (sub nom. *Winko v. Forensic Psychiatric Institute (B.C.))* 241 N.R. 1, (sub nom. *Winko v. British Columbia (Forensic Psychiatric Institute))* 63 C.R.R. (2d) 189, 1999 CarswellBC 1266, 1999 CarswellBC 1267, (sub nom. *Winko v. British Columbia (Forensic Psychiatric Institute))* 135 C.C.C. (3d) 129, (sub nom. *Winko v. Forensic Psychiatric Institute (B.C.))* 124 B.C.A.C. 1, (sub nom. *Winko v. Forensic Psychiatric Institute (B.C.))* 203 W.A.C. 1, 25 C.R. (5th) 1, (sub nom. *Winko v. British Columbia (Forensic Psychiatric Institute))* 175 D.L.R. (4th) 193 (S.C.C.) — referred to

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 7 — considered

s. 15 — referred to

Criminal Code, 1892, S.C. 1892, c. 29

Generally — referred to

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

s. 221(1) — referred to

s. 223(1) — considered

s. 223(2) — considered

s. 233 — considered

s. 237 — considered

s. 242 — considered

s. 243 — considered

APPEAL by Crown from judgment reported at *R. v. Levkovic* (2008), 2008 CarswellOnt 5744, 235 C.C.C. (3d) 417, 178 C.R.R. (2d) 285 (Ont. S.C.J.), finding that words "died before...birth" in s. 243 of *Criminal Code* were unconstitutionally vague.

***David Watt J.A.*:**

1 Since July 1, 1893, concealing the dead body of a child has been an indictable offence in Canada. The definition of the offence has always declared it to be immaterial whether the child died before, during or after birth.

2 On September 18, 2008, a judge of the Superior Court of Justice decided that the words "died before ... birth" in s. 243 of the *Criminal Code* are unconstitutionally vague. In the result, he severed the preposition "before" from the section, leaving it to read in its material part "whether the child died during or after birth".

3 The prosecutor acknowledged that he could not establish either the cause or the time of death, thus he offered no evidence in support of the allegation contained in the indictment. The trial judge acquitted Ms. Levkovic.

4 This appeal requires us to determine whether the trial judge was correct in his conclusion that the "before birth" reference was unconstitutionally vague.

5 For reasons that I will develop, I am satisfied that the offending phrase "before ... birth" is neither unconstitutionally vague nor otherwise constitutionally infirm. I would allow the appeal, set aside the acquittal and order a new trial.

The Background

6 The circumstances[FN1] underlying the prosecution and its procedural history can be stated in brief terms.

The Discovery of the Body

7 On April 5, 2006, an apartment building superintendent in Mississauga was cleaning a recently-vacated apartment unit. He noticed an abandoned bag on the balcony. At first, he thought that the bag contained wet rags that he could simply toss down the garbage chute.

8 The superintendent felt something inside the bag. He opened it and looked. Wrapped in towels was the lifeless body of a "baby". The superintendent called the police.

The Post-mortem Findings

9 Advanced decomposition of the body precluded optimal pathological assessment. The body was that of a female child at or near a full-term gestation. The pathologist could not determine the cause of death, or whether the child had died before, during or after birth.

The Acknowledgement of the Respondent

10 On April 9, 2006, after extensive media coverage of the superintendent's discovery, the respondent went to a local police station. There, in a highly emotional state, she acknowledged that the child was hers. In a later police interview, the respondent said that she had fallen while alone in the apartment. The baby was born there. She put the baby in the bag and left the bag on the balcony.

The Procedure Followed

11 The respondent was arraigned and pleaded not guilty to a count that alleged that she:

... within a two hundred and forty eight day period, last, past and ending on or about the 5th day of April, 2006 at the City of Mississauga in the Central West Region, unlawfully did dispose of the dead body of a child with intent to conceal the fact that she had been delivered of it by concealing it on the property of 285 North Service Road, Mississauga, contrary to section 243 of the Criminal Code of Canada.

12 Immediately after arraignment and plea, the constitutional challenge to s. 243 of the *Criminal Code* began. The prosecutor adduced no evidence. Defence counsel made no admissions. The respondent had waived the preliminary inquiry. There, the prosecutor undertook not to pursue any suggestion that the deceased child had been born alive.

13 The constitutional challenge proceeded under ss. 7 and 15 of the *Charter*. Among the deficiencies identified in s. 243 were overbreadth and vagueness. The respondent sought a declaration of invalidity to the extent of the breach and dismissal of the indictment because it failed to allege an offence known to law.

The Ruling of the Trial Judge

14 The trial judge gave lengthy reasons. He rejected the challenge under s. 15, as well as the claim of overbreadth under s. 7. But he concluded that the respondent's s. 7 interest, which was implicated by the prospect of imprisonment on conviction, was breached because of the vagueness of the phrase, "child died before ... birth", in the section. In the result, the trial judge severed the word "before" from s. 243.

The Grounds of Appeal

15 The Attorney General contends that the trial judge erred in concluding that the reference "child died before ... birth" was unconstitutionally vague and in granting the remedy of severance for the infringement. The Attorney General seeks a determination of constitutionality and an order for a new trial.

Analysis

16 At the outset of the hearing of this appeal, the parties skirmished about the extent of the appellant's reliance on reports of several prosecutions at the Old Bailey in London for infant homicide and concealment of birth. The appellant also complained about the adequacy of the factual record in the Superior Court and about the judge's decision to let the challenge proceed in the absence of any evidence, agreed statement of facts or applicable admissions. The issues are related and require determination before the constitutional integrity of s. 243 may be approached.

The Preliminary Issue: The Adequacy of the Factual Record

17 After the parties had finished their submissions before the trial judge, but before he had rendered his decision on the constitutional issue, researchers in England released online reports of nearly 200,000 cases tried at the Old Bailey, the Central Criminal Court in London, between 1674 and 1913. Among the reported cases were many involving prosecutions for infant homicide and for concealment of birth.

18 Among the several Books of Authorities the appellant has filed for use on this appeal are two volumes of "Old Bailey cases". These materials, which were not provided to the trial judge, are relied upon to demonstrate the "actual workings of the English Criminal Law".

The Positions of the Parties

19 The appellant says that the reports of the Old Bailey cases reveal several features about the origins and application of the concealment offence. These features are of service in demonstrating errors in the analysis and ultimate conclusion of the trial judge.

20 The appellant points out that the Old Bailey cases negate any link between the concealment offence and the former crime of abortion, thus rebut any suggestion that the abortion cases can inform the content of the concealment offence or that the concealment offence was enacted to buttress the crime of abortion. Further, the authorities demonstrate that the concealment offence was *not* enacted to punish women for having sex outside the bonds of marriage.

21 According to the appellant, these authorities reveal that juries were eager to acquit young women of both child homicide and concealment of birth on virtually any pretext. Accidental death and lack of proven "disposal", "concealment" or birth were frequently successful defences.

22 Further, the authorities make it clear that investigations of and prosecutions for the concealment crime invariably include case-specific medical evidence and at or near full term children. In the event of conviction, the sentences imposed tend to be either noncustodial or short-term imprisonment dominated by rehabilitative sentencing principles.

23 In the result, the appellant says, these authorities indicate the very limited role the phrase "child died before ... birth" has had in the operation of the provision, thereby the error in its use to found a determination of unconstitutionality.

24 The respondent takes no issue with reliance upon the Old Bailey cases as persuasive legal precedent, but resists the more expansive use that the appellant seeks to make of them.

25 At the outset, the respondent points out that the authorities upon which the appellant relies are edited reports. They rehearse the arguments advanced and record the conclusion of the court, usually a trial judge, but contain minimal reference to the evidence adduced at trial. They cannot form the basis for judicial notice, nor can they be utilized as adjudicative, social or legislative facts in the determination of the constitutional issue.

26 To the appellant's more general complaint that the trial judge was wrong to proceed with the constitutional challenge in the complete absence of evidence, the respondent reminds us that the prosecutor at trial was content to proceed on this basis. It follows, the respondent submits, that the appellant, absent an application to adduce fresh evidence, must take the record as it exists and ought not to be permitted to expand it indirectly by attempting to make evidentiary use of the Old Bailey cases.

The Governing Principles

27 The preliminary issues raised in this case invite recall of the principles governing the extent of factual foundation required to determine the constitutionality of legislation and those that define the limits of judicial notice.

The Need For An Adequate Factual Foundation

28 It is difficult to understate the importance of a factual basis in constitutional challenges: *R. v. Mills*, [1999] 3 S.C.R. 668 (S.C.C.), at para. 38; *R. v. DeSousa*, [1992] 2 S.C.R. 944 (S.C.C.), at p. 954. Two kinds of facts are involved:

- legislative facts
- adjudicative facts

Danson v. Ontario (Attorney General), [1990] 2 S.C.R. 1086 (S.C.C.), at p. 1099.

29 Adjudicative facts concern the immediate parties to the prosecution. They respond to the query "Who did what to whom, where, when, how and with what intent or motive?": *Danson* at p. 1099. Adjudicative facts are specific to the case being prosecuted, thus must be established by evidence that is relevant, material and admissible: *Danson* at p. 1099; *Mills* at para. 38.

30 Legislative facts help to establish the purpose and background of legislation, including the social, economic and cultural context in which the legislation was enacted. Of necessity, these facts are of a more general nature. The admissibility requirements for legislative facts are less rigorous than those that govern adjudicative facts: *Danson* at p. 1099; *Mills* at para. 38.

31 Social facts are cousins of legislative facts. Each is relevant to the reasoning process and may involve policy considerations: *R. v. Spence*, [2005] 3 S.C.R. 458 (S.C.C.), at para. 58. Evidence of social facts is social science research engaged to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a specific case: *Spence* at para. 57.

32 In this case, the respondent brought her constitutional challenge immediately after arraignment and plea. The hearing followed over three days. The trial judge reserved his decision on the challenge. No evidence was adduced in support of the allegations contained in the indictment. Four and one-half months later, the trial judge released his reasons in response to the constitutional challenge. The prosecutor gave a brief summary of the nature of his case, offered no evidence in support of it, and invited the trial judge to acquit the respondent. The trial judge did so.

33 It is well-settled that, as a general rule, a trial judge is entitled to reserve judgment on any application made at the outset of trial proceedings until the end of the case. In other words, the judge may decline to rule on the application until all the evidence has been heard: *DeSousa* at p. 954. The decision whether to rule on the application at the outset, or to await the introduction and conclusion of the evidence, rests within the discretion of the trial judge: *DeSousa* at p. 954.

34 The exercise of this discretion is informed by two policy considerations: the policy that discourages adjudication of constitutional challenges without a factual foundation and the policy that enjoins fragmentation of criminal proceedings by interlocutory proceedings that take on a life of their own: *DeSousa* at p. 954. Both of these policies favour disposition of the application at the end of the evidence in the case: *DeSousa* at p. 954. A trial judge should not depart from these policies in the absence of a strong reason for doing so: *DeSousa* at p. 954.

35 Sometimes it will be more economical to decide constitutional questions before proceeding to trial on the evidence relied upon in support of the allegations. Within this exception to the general rule may be an apparently meritorious *Charter* challenge of the law under which an accused is charged that does *not* depend on facts to be elicited during the trial: *DeSousa* at p. 955; *Mills* at para. 37.

The Scope and Role of Judicial Notice

36 It is the reality in many *Charter* challenges that the social or legislative facts are likely to prove dispositive: *Spence* at para. 64. While the limits of judicial notice outside the realm of adjudicative facts are inevitably somewhat elastic, the application of the doctrine, which dispenses with the need for formal proof of facts that are clearly uncontroversial or beyond reasonable dispute, is not unprincipled: *Spence* at para. 63; *R. c. Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209 (S.C.C.), at para. 226.

37 It is also worth reminder that simply labelling an issue as one involving a "social fact" or a "legislative fact" does not afford a court *carte blanche* to put aside the need to examine the trustworthiness of the "facts" sought to be judicially noticed. Neither may counsel bootleg "evidence in the guise of authorities": *Spence* at para. 58; *Public School Boards' Assn. (Alberta) v. Alberta (Attorney General)*, [1999] 3 S.C.R. 845 (S.C.C.), at para. 3.

The Principles Applied

38 The appellant advanced a tepid submission that the trial judge erred in embarking on the constitutional challenge to s. 243 without a satisfactory evidentiary foundation for the claim.

39 I would not give effect to this submission for several reasons.

40 First, the authorities that insist upon an adequate factual foundation to ground a constitutional challenge recognize equally that the general rule is not inflexible or intolerant of exception in individual cases: *DeSousa* at p. 954; *Mills* at para. 38. To some extent, the nature of the challenge advanced, the interest at stake and the likelihood or improbability that the evidence to be adduced at trial would assist the resolution of the issue are of importance in determining whether the immediate challenge will be permitted or determined: *DeSousa* at p. 955; *Mills* at para. 41.

41 Second, counsel at trial agreed on the procedure followed. To be more specific, the prosecutor did not ask the trial judge to reserve his decision on the constitutional challenge until the conclusion of the evidence adduced at trial. Nor did counsel for the respondent at trial suggest that evidence should have been heard or an Agreed Statement of Facts be filed to provide a factual foundation or context for the challenge.

42 Third, the challenge here was directed principally at the language of the offence-creating provisions. The liberty interest implicated was the prospect of imprisonment on conviction. The flaw alleged was that the prohibition was overbroad and void for vagueness, *not* as it applied to the respondent, but in its general operation.

43 Finally, as it turned out, when the prosecutor summarized his evidence after the trial judge's ruling, what could have been established may not have advanced the inquiry into constitutionality significantly at all events.

The Old Bailey Authorities and Judicial Notice

44 The Old Bailey authorities were not put before the trial judge although they became available while the trial judge had his decision under reserve. As legal precedents, the decisions are of persuasive value, their influence significantly attenuated by their brevity and minimal factual content.

45 To the extent the appellant seeks to rely on these precedents to advance a claim that judicial notice should be taken of certain social or legislative facts, the submission is misplaced.

46 Although we apply the requirements of judicial notice less stringently to the admission of legislative facts than to adjudicative facts, we must nevertheless proceed cautiously to take judicial notice, even as "legislative facts", of things that are reasonably open to dispute, particularly when they relate to matters that could be dispositive of the challenge: *Danson* at p. 1099; *R. v. Find*, [2001] 1 S.C.R. 863 (S.C.C.), at paras. 48-49; *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571 (S.C.C.), at para. 28.

47 A court may equip itself to take judicial notice of some material fact that is capable of immediate and accurate demonstration by resort to readily available sources of indisputable accuracy: *Find* at para. 48; *Spence* at para. 53. I have been unable to find any precedent, however, to support a claim that "readily accessible sources of indisputable accuracy" include incomplete or edited reports of prior judicial proceedings.

48 To permit prior judicial precedent to ground a claim of judicial notice of an adjudicative or legislative fact in a later prosecution would permit a party, in effect, to sidestep the traditional rules governing the introduction and testing of evidence, to dilute the standard required for judicial notice of facts and to substitute precedent for proof. This use of authority harkens back to the protest of Mahoney J.A. in *Canada (Human Rights Commission) v. Taylor*, [1987] 3 F.C. 593 (Fed. C.A.), at p. 608 against "bootlegging evidence in the guise of authorities": *Public School Boards' Assn. (Alberta)* at para. 3.

49 The Old Bailey cases are of persuasive value as legal precedents. They may assist in elucidating the essential elements of the concealment of childbirth offence and in attributing meaning to certain terms used in the statute, but not defined there. Further, they may shed some light on the purpose underlying the creation of the offence. But they have no evidentiary value.

50 The preliminary issues set to one side, it is time to turn to the merits of the appeal.

The First Ground: Is s. 243 Void for Vagueness?

51 The principal complaint of the appellant is that the trial judge erred in holding that the language "child died before ... birth" was void for vagueness and in remedying the constitutional deficiency by striking the word "before" from s. 243.

The Reasons of the Trial Judge

52 The trial judge described the *actus reus* of the offence of s. 243 as disposal of the remains of a child after birth or delivery. He concluded that the terms "birth" and "delivered", as used in the section, did *not* include compelled child-birth at any stage of gestation by an induced abortion. Concealment of pregnancy was not part of the *actus reus*.

53 The trial judge then examined the *mens rea* of the offence — the intent to conceal the fact of a birth. He concluded that the *mens rea* did not include the intent to conceal pregnancy.

54 According to the trial judge, the legislative purpose underlying the enactment of the predecessor of s. 243 included the protection of a vulnerable segment of society, unborn children, and effective investigation of suspicious infant death.

55 For the trial judge, the critical issue was whether the term "child", as it applied to the period before birth, provided an intelligible standard in that it gave fair notice to ordinary persons of the scope of risk of criminal liability and it avoided the potential for arbitrary enforcement.

56 The trial judge bemoaned the absence of expert evidence about fetal viability, medical consensus about the meaning of live birth and of the ability of forensic pathologists to determine the cause of infant deaths. These were not subjects about which the trial judge considered that he could take judicial notice.

57 The trial judge considered the "chance of life" standard proposed by the prosecutor. He noted that the degree of probability involved in the standard was unclear and could be determined in any of several ways. The absence of any coherent, unambiguous meaning for "child before birth" rendered the provision void for vagueness according to the trial judge.

58 The conclusion of the trial judge seems rooted in three paragraphs of his lengthy reasons:

> [212] Although flexibility of interpretation and application of statutory terminology is not necessarily synonymous with vagueness, and recognizing the critical role of the judiciary in interpreting legislators' intent, I am unable to determine from the record in this case, the respondent's submissions, or review of the history of s. 243 and its predecessor enactments, a coherent, unambiguous meaning of "child" in the context of death before birth. In these circumstances, in my view, it is for Parliament, not the courts, to decide the appropriate definitional interpretation.
>
> [213] Albeit in a different context, the words of Wilson J. in *Morgentaler*, at 563, are apposite here — this is a matter best left to "the informed judgment of the legislature which is in a position to receive guidance on the subject from all the relevant disciplines". A legislature could of course prohibit the disposition of product of *any* still or life-birth with the concealment intent, or define "the standard for prohibited conduct in terms of gestational age" (*Fitzpatrick*, at 571) using a conclusive or rebuttable presumption respecting the fetus' capacity for live-birth. Or, as in s. 223(1), a

definitional attempt of 'chance of life' could be crafted narrowing the ambiguity attaching to the interpretation of the commencement point for post-natal life.

[214] In the result, the applicant has established that the impugned words are unconstitutionally vague and therefore inconsistent with the principles of fundamental justice already reviewed.

The Positions of the Parties

59 The appellant says that the trial judge applied the wrong test for vagueness. He substituted a more onerous standard than the law requires. The threshold for finding a statutory provision void for vagueness is very high. The only provisions that warrant a finding of unconstitutionality on this ground are those that are truly unintelligible. Section 243 is not so lacking in precision that it fails to provide sufficient guidance for legal debate.

60 It is the appellant's position that to provide fair notice of an area of risk does *not* require absolute precision in the language used. What is essential is that the statute provide reasonable notice to persons that their conduct approaches an area of risk. But the trial judge demanded more. He seems to have concluded that the offence-creating provision was unconstitutionally vague because *he* could not determine a coherent, unambiguous meaning for "child" in the context of a death that occurred before the child was born.

61 The appellant contends that the terms of s. 243 also permit fair enforcement of the prohibition. The language used consists principally of readily definable terms that identify an area of risk. They include a fault element. That medical experts may be required to assist in determining whether a prosecution should be undertaken is not an indicium of vagueness.

62 The appellant further faults the trial judge for failing to take into account the *mens rea* component of the offence in determining whether the allegation of unconstitutional vagueness should prevail. Its inclusion clarifies the reach and limits the effect of the prohibition, ensuring that inadvertent breaches are not criminal nor is conduct undertaken in good faith within the prohibition's sweep.

63 The appellant argues that the trial judge erred in his approach to an application of the "chance of life" standard of *R. v. Berriman* (1854), 6 Cox C.C. 388 (Eng. Assizes). The trial judge should have received expert evidence on the viability issue and not relied on decisions in dated abortion cases to conclude that viability was a medical not a legal concept. He failed to analyze *Berriman* on its own merits and as a legal test. In the result, the trial judge's conclusion that the physical maturity test of *Berriman* was unworkably vague reflects error.

64 To determine whether the phrase "child died before ... birth" is unconstitutionally vague requires consideration of several factors including the purpose of the provision, the governing legal principles, the operation of the law in practice, the surrounding statutory provisions and the policies underlying the vagueness doctrine. This analysis compels the conclusion that s. 243 is not unconstitutionally vague.

65 The respondent says that the trial judge got it right.

66 In this case, the respondent argues, her liberty and security interests were implicated in two different ways. Not only may a conviction result in a sentence of imprisonment, but her personal autonomy, as a female, to make fundamental life choices, including whether to disclose the natural end of her pregnancy, implicated her liberty interest under s. 7. The dual nature of her s. 7 interests affected is a contextual factor affecting the vagueness analysis and one that demands greater, rather than lesser precision in the language of the prohibition.

67 The respondent submits that the appellant's reliance on *mens rea* as a factor negating what is otherwise a hopelessly vague statute is misplaced. The offending language is a component of the *actus reus*. Vagueness in the *actus reus* of necessity spills over to *mens rea* because of the requirement that an accused's conduct be intentional, wilfully blind or reckless with respect to the elements of the *actus reus*.

68 The respondent takes issue with the appellant's complaint about the failure of the trial judge to receive any evidence on the challenge. The prosecutor at trial, together with the appellant's trial counsel, agreed to proceed in the absence of the evidence. The trial judge had the authority to require the parties to adduce evidence, but no one asked him to do so. He can scarcely be faulted for proceeding with the challenge in accordance with the positions of the parties.

69 The respondent says that the trial judge treated *Berriman* as a legal test. He examined whether s. 243, as interpreted through *Berriman*, provided a basis for coherent judicial interpretation and identified a solid core of meaning. He found the results of the analysis inherently ambiguous, thus impermissibly vague.

70 The respondent also takes issue with the appellant's reliance on police, prosecutorial and judicial discretion as factors in the vagueness analysis. It is no answer to a claim of vagueness that charges may not be laid, prosecuted or result in convictions. None of these factors respond to the impermissible vagueness of the statutory language.

The Governing Principles

71 The submissions of the parties and the lengthy reasons of the trial judge ranged over a great many issues, medical, legal and philosophical. For my part, I prefer to concentrate my discussion of the governing principles on the terms of the offence created by s. 243 of the *Criminal Code*, the s. 7 *Charter* interests of liberty and security of the person, and the related, yet discrete doctrines of vagueness and overbreadth and their influence on the constitutionality of s. 243. Along the way, I will examine the decision in *Berriman*.

The Offence of Child Concealment

72 Child concealment has a venerable lineage as a crime in Canada. As it approaches its 120th anniversary of residence in the *Criminal Code*, child concealment has changed little: a few words moved around, but nothing of importance for our purposes. Its current place is s. 243 of the *Criminal Code*. Its current terms are these:

> 243. Every one who in any manner disposes of the dead body of a child, with intent to conceal the fact that its mother has been delivered of it, whether the child died before, during or after birth, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

73 The essential elements of this offence include an *actus reus*, the disposal of a dead body of a child, and a *mens rea* that extends beyond the intentional commission of the *actus reus* to include the specific or ulterior intent to conceal the fact that the mother has been delivered of the child.

74 The *actus reus* or external circumstances of the offence require the prosecutor to prove beyond a reasonable doubt

i. that what the accused did amounted to a *disposal*;

ii. that the subject-matter of which the accused disposed was a *dead* body; and

iii. that the dead body was that of a *child.*

Inclusion of the clause, "whether the child died before, during or after birth", would seem to render immaterial the time during the birth process at which the child died.

75 The core elements of the *actus reus* — disposal, dead body and child — are not defined in the section, nor elsewhere in the *Criminal Code*. The term "newly-born child", which is of significance for the offence of infanticide defined in s. 233, means a person under the age of one year. Section 223(1) defines when a child becomes a human being, thus when killing a child may form the basis for a prosecution of murder or manslaughter. Section 223(2) declares it to be homicide when a person causes injury to a child before or during its birth as a result of which a child dies after becoming a human being.

76 The fault element or *mens rea* in the crime of child concealment consists of the intentional disposal of the dead body of a child. Proof of knowledge of the character of the object disposed of is also essential to the prosecutor's case. But there is more: the prosecutor must also prove that in disposing of the dead body of a child, the accused intended to conceal the fact that the child's mother had been delivered of the child.

77 Section 243 is *not* enacted in gender-specific terms. Unlike ss. 233 and 237 (infanticide) and 242 (neglect to obtain assistance in childbirth), the principal in the offence of s. 243 is *not* restricted to a "female person".

The* Berriman *Standard

78 To provide meaning for the term "child" as it is used in "the child died before ... birth" in s. 243 the prosecutor invoked the standard articulated by Erle J. in his charge to the jury in *Berriman.*

79 In *Berriman* rumours were afloat in Ms. Berriman's neighbourhood that she had given birth to a child. What fuelled the suspicion, apparently, was Ms. Berriman's gradual enlargement, followed by a sudden recovery of "her usual form". A police officer paid a visit to Ms. Berriman, confronted her about her recent delivery and suggested that she had either murdered or concealed the birth of her child. Berriman's response formed a substantial part of the prosecutor's case against her, along with evidence about recovery of some calcined bones of a child of seven to nine months gestation.

80 Erle J. left the case to the jury, instructing them in these terms:

> This offence cannot be committed unless the child had arrived at that stage of maturity at the time of birth, that it might have been a living child. It is not necessary that it should have been born alive, but it must have reached a period when, but for some accidental circumstances, such as disease on the part of itself or of its mother, it might have been born alive. There is no law which compels a women to proclaim her own want to chastity, and if she had miscarried at a time when the foetus was but a few months old, and therefore could have had no chance of life, you could not convict her upon this charge. No specific limit can be assigned to the period when the chance of life begins, but it may, perhaps, be safely assumed that under seven months the great probably is that the child would not be born alive.

Berriman at p. 390.

81 In *Berriman*'s case, as under s. 243, the offence can be committed even if the child was not born alive. To determine whether a child not born alive comes within the prohibition, *Berriman* postulates a "chance of life" standard. Without a chance of life, a foetus would not be a "child". Erle J. rejected any specific limit at which a chance of life begins, but considered it a safe assumption that "under seven months the great probably [*sic*] is that the child would not be born alive".

Liberty and Security of the Person

82 Among other things, s. 7 guarantees to everyone the right to liberty and to security of the person. To be constitutionally sound, any infringement of either right must be in accordance with the principles of fundamental justice.

83 The term "liberty" includes freedom from physical restraint. Thus, any law that imposes a penalty of imprisonment, whether mandatory or discretionary, deprives a person of liberty. It follows that such a law must conform to the principles of fundamental justice to be constitutionally valid: *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486 (S.C.C.), at pp. 515, 529; *Reference re ss. 193 & 195.1(1)(c) of the Criminal Code (Canada)*, [1990] 1 S.C.R. 1123 (S.C.C.), at pp. 1140, 1215 (Prostitution Reference); *R. v. Swain*, [1991] 1 S.C.R. 933 (S.C.C.); and *Malmo-Levine* at para. 84.

84 But, "liberty" is not restricted to freedom from physical restraint. The term also applies when a law prevents an individual from making "fundamental personal choices": *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 (S.C.C.), at paras. 49 and 54.

85 The phrase "security of the person" in s. 7 includes control over a person's body, extending beyond health and safety: *Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76 (S.C.C.), at para. 3; *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (S.C.C.); *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 (S.C.C.); *New Brunswick (Minister of Health & Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 (S.C.C.), at paras. 61 and 116. See also, *Chaoulli c. Québec (Procureur général)*, [2005] 1 S.C.R. 791 (S.C.C.); and *Blencoe* at para. 98.

Vague Laws

86 Vague laws violate the principles of fundamental justice. If a vague law causes or amounts to a deprivation of a person's life, liberty or the security of his or her person, the law offends s. 7 of the *Charter*.

87 Vague laws offend two fundamental values of our legal system. They do not provide *fair notice* of what is prohibited, thus making compliance with the law difficult. Further, they do not provide *clear standards* for those entrusted with their enforcement to enforce them. As a result, vague laws contribute or lead to arbitrary enforcement.

88 Several principles emerge from the authorities that have considered complaints of constitutional infringement based on vagueness.

89 First, merely because a statute is broad and far reaching in its facial scope does not mean that it is unconstitutionally vague. What is crucial is whether a court examining the provision can give sensible meaning to its terms: *Prostitution Reference* at p. 1160.

90 Second, an offence need not be codified in statutory form to survive a vagueness challenge, although statutes may tend to provide greater precision than the ever-evolving common law: *U.N.A. v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901 (S.C.C.), at p. 933.

91 Third, inclusion in a statute of a term that has been the subject of debate and conflicting views as used in predecessor statutes does not render the provision void for vagueness, at least where the legislature has sufficiently delineated the area of risk and the terms of the debate: *Canada v. Pharmaceutical Society (Nova Scotia)*, [1992] 2 S.C.R. 606 (S.C.C.), at p. 657.

92 Legislation that is very broad and general may withstand scrutiny for vagueness provided its scope is reasonably delineated so that legal debate can occur about the application of the provision to the peculiar circumstances of an individual case: *R. v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031 (S.C.C.), at para. 70; *Winko v. Forensic Psychiatric Institute*, [1999] 2 S.C.R. 625 (S.C.C.), at paras. 68-69.

93 Despite its frequent engagement by litigants who mount constitutional challenges, vagueness has been rarely applied by courts to strike down federal or provincial legislation. The governing principles have been narrowly defined, essentially rejecting vagueness where judicial interpretation of the provision is possible: *R. v. Lindsay* (2009), 245 C.C.C. (3d) 301 (Ont. C.A.), at para. 22; *Canadian Pacific* at para. 79. The threshold for the application of the vagueness doctrine is relatively high: *Lindsay* at para. 22; *Winko* at para. 68.

94 By their very nature, laws must cover myriad sets of circumstances. This acknowledgement of the self-evident or intuitive grasp of the obvious, makes it impossible to draft laws that precisely foresee each case that might arise. The situation is further complicated by the ambiguity and imprecision inherent in almost any word in either of our official languages: *Winko* at para. 68; *R. v. Devries* (2009), 95 O.R. (3d) 721 (Ont. C.A.), at paras. 35-36.

95 To imbue the rule against vagueness with some content, it is perhaps best to return to the core values the rule protects: fair notice to citizens and corresponding limitations on law enforcement discretion. A law is unconstitutionally vague if it fails

i. to give *fair notice* about the conduct prohibited by the law; or

ii. to impose *real limitations* on the discretion of those charged with enforcement.

Suresh v. Canada (Minister of Citizenship & Immigration), [2002] 1 S.C.R. 3 (S.C.C.), at paras. 80-99.

96 What seems clear from the authorities is that the constitutional standard of precision that the vagueness doctrine demands cannot be very exacting. We cannot require a law to ascend to a standard of precision to which neither its subject-matter nor the language in which it is expressed lend themselves: *Pharmaceutical Society (Nova Scotia)* at pp. 606, 642; *Ruffo c. Québec (Conseil de la magistrature)*, [1995] 4 S.C.R. 267 (S.C.C.), at paras. 111-12. We do not and cannot require absolute certainty or laboratory precision: *Prostitution Reference* at pp. 1122 and 1156. Just because the law may be open to more than one interpretation does not offend vagueness principles: vagueness is only constitutionally terminal if the law cannot, even with judicial interpretation, provide meaningful standards of conduct: *Prostitution Reference* at pp. 1157-1161; *Pharmaceutical Society (Nova Scotia)* at pp. 606 and 626-27.

97 It is not enough to engage the vagueness doctrine that a provision is subject to interpretation, or that there are cases that will land close to the line: *Cochrane v. Ontario (Attorney General)* (2008), 92 O.R. (3d) 321 (Ont. C.A.), at para. 38.

Overbreadth

98 Overbreadth is a discrete ground upon which a law may be constitutionally unsound. It is related to vagueness because both overbreadth and vagueness emanate from a common source — a lack of legislative precision in the means used to accomplish the legislative objective: *R. v. Heywood*, [1994] 3 S.C.R. 761 (S.C.C.), at p. 792; *Lindsay* at para. 16.

99 Overbreadth refers to a law that restricts liberty more than is necessary to accomplish its purpose. Overbreadth is established only where the adverse effect of the legislation on individuals subject to it is grossly disproportionate to the state interest that the legislation seeks to protect or achieve: *Lindsay* at para. 21; *Heywood* at p. 792. The "grossly disproportionate" standard accords substantial elbow room to the legislature's assessment of the risk to public safety and the need for the law under siege: *Lindsay* at para. 21; *Malmo-Levine* at para. 143; *Cochrane* at para. 31.

The Relevance of Prosecutorial and Judicial Discretion

100 A claim of unconstitutionality, whether advanced as vagueness, overbreadth or otherwise, is not answered by reliance on prosecutorial or judicial discretion to confine its application: *R. v. Nguyen*, [1990] 2 S.C.R. 906 (S.C.C.), at p. 924; *R. v. Lavallee, Rackel & Heintz*, [2002] 3 S.C.R. 209 (S.C.C.), at para. 45; *R. v. Bain*, [1992] 1 S.C.R. 91 (S.C.C.), at pp. 103-104.

The Principles Applied

101 On the basis of a constitutional challenge advanced immediately after arraignment and plea, unsupported by any evidence, admissions or agreed statement of fact, the trial judge found a portion of a statutory provision almost 120 years old

was unconstitutionally vague. The remedy he chose was to strike out a single word, "before", from the provision. In my view, the trial judge erred in his determination of unconstitutionality. He applied an overly demanding standard of vagueness and failed to properly apply the decision in *Berriman* in reaching his conclusion.

The Statutory Framework

102 Section 243 is the second of two indictable offences grouped under the heading, *Neglect in Childbirth and Concealing Dead Body.* The concealment offence has been part of our *Criminal Code* since our first *Criminal Code* came into force on July 1, 1893.

103 The concealment offence is one of several offences and related provisions that govern conduct that occurs prior to, contemporaneous with and subsequent to childbirth and involves the death of a child or disposal of the child's dead body.

104 As a general rule, homicide requires the death of a human being: *Criminal Code*, s. 222(1). But under s. 223(2) of the *Criminal Code,* a person commits homicide if they cause injury to a child before or during birth as a result of which the child dies after becoming a human being.

105 A foetus is not a "human being" or "person" for the purposes of the law of homicide: *R. v. Sullivan*, [1991] 1 S.C.R. 489 (S.C.C.), at p. 502. A child becomes a human being, thus their death may be the subject of a prosecution for unlawful homicide, when the child has completely proceeded, in a living state, from the body of its mother. It is of no moment whether the child has breathed, has an independent circulation or has been severed from the navel string: *Criminal Code*, s. 223(1).

106 A mother who fails to obtain assistance in childbirth commits an offence under s. 242 of the *Criminal Code*.

107 As a matter of law, proof of a crime of unlawful homicide is not foreclosed because the body of the deceased cannot be found, but a dead body is an indispensible aid to completion of the prosecutor's proof. A dead body assists in proving the fact and cause of death, in turn, whether the death was natural or caused by a human agency. In some cases, the body may assist in establishing the identity of the killer.

108 The purpose of s. 243 is to facilitate state investigation of infant death. By enacting a criminal prohibition against concealment of the dead body of a child, s. 243 preserves crucial evidence.

109 Concealment of the dead body impedes, in some cases prevents, timely forensic examination of the body. In turn, timely forensic examination of the dead body helps to determine when and how death occurred. A determination of when and how death occurred often assists in establishing whether the death attracts criminal liability.

110 Concealment of the dead body of a child rends the nexus or link between child and mother. The ineluctable effect of such a severance is the elimination of a valuable source of information about the circumstances in which death occurred, thereby whether criminal liability will attach and to whom.

The Meaning of "Child"

111 In many cases, post-mortem examination of the remains will yield an opinion about cause of death and the relationship between death and the birth process. In other cases, like this, the state of the remains will not permit an informed medical opinion about either subject.

112 The *Criminal Code* declares when a child becomes a human being. When a child has completely proceeded, in a living state, from the body of its mother, the child becomes a human being for the purposes of the *Criminal Code*. It is of no consequence for *Criminal Code* purposes whether the child has breathed, has an independent circulation, or remains attached to the navel string. This transition into a human being is of signal importance for the law of homicide. But for the first year of life, at least so far as the *Criminal Code* is concerned, the new "human being" remains a child, a "newly-born child".

113 The *Criminal Code* offers no assistance about the meaning of "child" otherwise than in the transition from child to human being. In other words, the *Criminal Code* does not help us about when a foetus becomes a child for the purpose of determining whether certain conduct involving the child will attract criminal liability.

114 The test that *Berriman* proposes, a chance of life standard, marks the outer boundary of when a foetus becomes a child for the purpose of the concealment offence at common law. Under *Berriman*, for a foetus to become a child, the foetus must have reached a period when, but for some accidental circumstances, such as disease, it might have been born alive. The standard is one of viability. Under *Berriman* a foetus becomes a child when it reaches a stage in its development from which it might grow into a human being, given proper care.

115 For the purposes of establishing liability for an offence under s. 243 in cases involving death before birth or those in which the time of death in relation to birth is unclear, a foetus becomes a child when it (the foetus) has reached a stage in its development when, but for some external event or other circumstances, it would likely have been born alive.

116 To determine whether the disposal was of the "dead body of a child", the trier of fact must consider all the circumstances. In the usual course, the trier of fact's decision will be informed by expert medical evidence about the course of the pregnancy, fetal age and viability, and the cause of death. In some instances, there may also be evidence about the conduct of the child's mother and others during the course of the pregnancy and at times contemporaneous with the death of the child. The examples given are intended as illustrative not as exhaustive of the evidence that might be adduced.

The Vagueness Standard

117 The trial judge concluded that part of s. 243 was void for vagueness because he could not determine a coherent unambiguous meaning for the term "child" in the context of a death that occurred before the child's birth.

118 Neither the *Charter* nor the vagueness doctrine require that the statute provide absolute certainty in its application by the language it uses. Legal rules only provide a framework, a behavioural guide. They do so by approximation, by delineating a risk zone. We can expect no more of them. Certainty is achieved only where the law is actualized by a competent authority: *Pharmaceutical Society (Nova Scotia)* at p. 638.

119 Language is not a scientific instrument, an exact tool. It cannot be argued that an enactment can and must provide

enough guidance to predict the legal consequences of any given course of conduct in advance, else it be shunted to the sidelines, a constitutional casualty. An enactment must enunciate some boundaries, which create an area of risk: *Pharmaceutical Society (Nova Scotia)* at p. 639.

120 Section 243, guided by the principles described in *Berriman* in the present context, lays down an area of risk that gives fair notice to persons of the boundaries of criminal liability and limits the discretion of police in enforcing the legislation. We must be wary of using the doctrine of vagueness to prevent or impede state action in furtherance of valid social objects, by requiring a law to ascend to a level of precision to which its subject-matter fails to lend itself: *Pharmaceutical Society (Nova Scotia)* at p. 642.

121 The portion of s. 243 upon which the trial judge focused here cannot be uprooted from its context and subjected to microscopic scrutiny. This offence requires proof of *knowledge* of the character of the subject-matter disposed of, the dead body of a child, together with a *purpose*, or ulterior intention, of concealment of the birth. It is one of several offences, fatal offences against the person, that enjoin conduct that causes or contributes to the death of another. A provision that renders investigation of death less difficult forms an integral part of this statutory scheme.

122 It is also worth reminder that a crime consists of an *actus reus* and a *mens rea*. Each may have several components. To determine whether the definition of a crime is impermissibly vague requires a consideration of the enactment as a whole, including its *mens rea*. It is the provision as a whole that must define an area of risk, provide fair notice and curtail law enforcement discretion, not each individual noun, adjective, adverb, verb or preposition. And that, in my view, s. 243 does.

Overbreadth

123 The trial judge rejected the respondent's claim that inclusion of the words "child died before ... birth" rendered s. 243 constitutionally infirm on the basis of overbreadth. Although the submission was not pressed in argument before us, I agree with the conclusion reached by the trial judge. The inclusion of the impugned words does not overshoot the purpose of the prohibition by including within it conduct beyond what is necessary to achieve the purpose for which the section was enacted.

Conclusion

124 In the result, I am satisfied that the trial judge erred in striking out the word "before" in s. 243 on the ground of vagueness when it was used in the clause "the child died before ... birth". Section 243 is not void for vagueness in this or in any other respect.

125 For these reasons, I would allow the appeal, declare s. 243 constitutionally valid and order a new trial.

Doherty J.A.:

I agree.

Armstrong J.A.:

I agree.

Appeal allowed.

FN1 These circumstances are taken from the prosecutor's remarks after the ruling on constitutionality. No evidence was adduced at trial.

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Indexed as:

Huzar v. Canada

Between
Her Majesty the Queen, in right of Canada, Department of Indian and Northern Affairs Canada and Walter Patrick Twinn, as Chief of the Sawridge Indian Band and the Sawridge Indian Band, defendants (appellants), and
Aline Elizabeth Huzar, June Martha Kolosky, William Bartholomew Mcgillivray, Margaret Hazel Anne Blair, Clara Hebert, John Edward Joseph McGillivray, Maurice Stoney, Allen Austin McDonald, Lorna Jean Elizabeth McRee, Frances Mary Tees, Barbara Violet Miller (née McDonald), plaintiffs (respondents)

[2000] F.C.J. No. 873

[2000] A.C.F. no 873

258 N.R. 246

Docket A-326-98

Federal Court of Appeal
Toronto, Ontario

Décary, Sexton and Evans JJ.

Heard: June 13, 2000.
Oral judgment: June 13, 2000.

(6 paras.)

Practice -- Pleadings -- Striking out pleadings -- Grounds, failure to disclose a cause of action or defence -- Actions, commencement of -- Choice of method of commencement of proceedings.

Appeal by the defendants from a decision allowing the plaintiffs' motion to amend their statement of claim and dismissing the defendants' motion to strike the statement of claim as disclosing no reasonable cause of action. It was conceded that without the proposed amending paragraphs, the statement of claim disclosed no reasonable cause of action.

HELD: Appeal allowed. The motions judge erred in law. The proposed amending paragraphs amounted to a claim for declaratory relief against the Band, which was a federal board, commission or other tribunal within the meaning of the Federal Court Act. Such relief could only be sought on an application for judicial review under that Act, and could not be included in a statement of claim. Accordingly, the statement of claim was struck as disclosing no reasonable cause of action.

Statutes, Regulations and Rules Cited:

Federal Court Act, ss. 2, 18(3), 18.1.

Counsel:

Philip P. Healey, for the defendants (appellants).
Peter V. Abrametz, for the plaintiffs (respondents).

The judgment of the Court was delivered orally by

1 **EVANS J.**:-- This is an appeal against an order of the Trial Division, dated May 6th, 1998, in which the learned Motions Judge granted the respondents' motion to amend their statement of claim by adding paragraphs 38 and 39, and dismissed the motion of the appellants, Walter Patrick Twinn, as Chief of the Sawridge Indian Band, and the Sawridge Indian Band, to strike the statement of claim as disclosing no reasonable cause of action.

2 In our respectful opinion, the Motions Judge erred in law in permitting the respondents to amend and in not striking out the unamended statement of claim. The paragraphs amending the statement of claim allege that the Sawridge Indian Band rejected the respondents' membership applications by misapplying the Band membership rules (paragraph 38), and claim a declaration that the Band rules are discriminatory and exclusionary, and hence invalid (paragraph 39).

3 These paragraphs amount to a claim for declaratory or prerogative relief against the Band, which is a federal board, commission or other tribunal within the definition provided by section 2 of the Federal Court Act. By virtue of subsection 18(3) of that Act, declaratory or prerogative relief may only be sought against a federal board, commission or other tribunal on an application for judicial review under section 18.1. The claims contained in paragraphs 38 and 39 cannot therefore be included in a statement of claim.

4 It was conceded by counsel for the respondents that, without the proposed amending paragraphs, the unamended statement of claim discloses no reasonable cause of action in so far as it asserts or assumes that the respondents are entitled to Band membership without the consent of the Band.

5 It is clear that, until the Band's membership rules are found to be invalid, they govern membership of the Band and that the respondents have, at best, a right to apply to the Band for membership. Accordingly, the statement of claim against the appellants, Walter Patrick Twinn, as Chief of the Sawridge Indian Band, and the Sawridge Indian Band, will be struck as disclosing no reasonable cause of action.

6 For these reasons, the appeal will be allowed with costs in this Court and in the Trial Division.

EVANS J.

cp/d/qlndn

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eral Court — Trial Division or the Exchequer Court of Canada; and

(*b*) any question of law, fact or mixed law and fact that the Crown and any person have agreed in writing shall be determined by the Federal Court, the Federal Court — Trial Division or the Exchequer Court of Canada.

tion de première instance de la Cour fédérale;

b) toute question de droit, de fait ou mixte à trancher, aux termes d'une convention écrite à laquelle la Couronne est partie, par la Cour fédérale — ou l'ancienne Cour de l'Échiquier du Canada — ou par la Section de première instance de la Cour fédérale.

Conflicting claims against Crown

(4) The Federal Court has concurrent original jurisdiction to hear and determine proceedings to determine disputes in which the Crown is or may be under an obligation and in respect of which there are or may be conflicting claims.

Demandes contradictoires contre la Couronne

(4) Elle a compétence concurrente, en première instance, dans les procédures visant à régler les différends mettant en cause la Couronne à propos d'une obligation réelle ou éventuelle pouvant faire l'objet de demandes contradictoires.

Relief in favour of Crown or against officer

(5) The Federal Court has concurrent original jurisdiction

(*a*) in proceedings of a civil nature in which the Crown or the Attorney General of Canada claims relief; and

(*b*) in proceedings in which relief is sought against any person for anything done or omitted to be done in the performance of the duties of that person as an officer, servant or agent of the Crown.

Actions en réparation

(5) Elle a compétence concurrente, en première instance, dans les actions en réparation intentées :

a) au civil par la Couronne ou le procureur général du Canada;

b) contre un fonctionnaire, préposé ou mandataire de la Couronne pour des faits — actes ou omissions — survenus dans le cadre de ses fonctions.

Federal Court has no jurisdiction

(6) If an Act of Parliament confers jurisdiction in respect of a matter on a court constituted or established by or under a law of a province, the Federal Court has no jurisdiction to entertain any proceeding in respect of the same matter unless the Act expressly confers that jurisdiction on that court.

Incompétence de la Cour fédérale

(6) Elle n'a pas compétence dans les cas où une loi fédérale donne compétence à un tribunal constitué ou maintenu sous le régime d'une loi provinciale sans prévoir expressément la compétence de la Cour fédérale.

R.S., 1985, c. F-7, s. 17; 1990, c. 8, s. 3; 2002, c. 8, s. 25.

L.R. (1985), ch. F-7, art. 17; 1990, ch. 8, art. 3; 2002, ch. 8, art. 25.

Extraordinary remedies, federal tribunals

18. (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

(*a*) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(*b*) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (*a*), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

Recours extraordinaires : offices fédéraux

18. (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :

a) décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;

b) connaître de toute demande de réparation de la nature visée par l'alinéa *a*), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.

Extraordinary remedies, members of Canadian Forces

(2) The Federal Court has exclusive original jurisdiction to hear and determine every application for a writ of *habeas corpus ad subjiciendum*, writ of *certiorari*, writ of prohibition or writ of *mandamus* in relation to any member of the Canadian Forces serving outside Canada.

Recours extraordinaires : Forces canadiennes

(2) Elle a compétence exclusive, en première instance, dans le cas des demandes suivantes visant un membre des Forces canadiennes en poste à l'étranger : bref d'*habeas corpus ad subjiciendum*, de *certiorari*, de prohibition ou de *mandamus*.

Remedies to be obtained on application

(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

Exercice des recours

(3) Les recours prévus aux paragraphes (1) ou (2) sont exercés par présentation d'une demande de contrôle judiciaire.

R.S., 1985, c. F-7, s. 18; 1990, c. 8, s. 4; 2002, c. 8, s. 26.

L.R. (1985), ch. F-7, art. 18; 1990, ch. 8, art. 4; 2002, ch. 8, art. 26.

Application for judicial review

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

Demande de contrôle judiciaire

18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

Time limitation

(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

Délai de présentation

(2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

Powers of Federal Court

(3) On an application for judicial review, the Federal Court may

(*a*) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(*b*) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

Pouvoirs de la Cour fédérale

(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

Grounds of review

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

(*a*) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

(*b*) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

Motifs

(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :

a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;

b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;