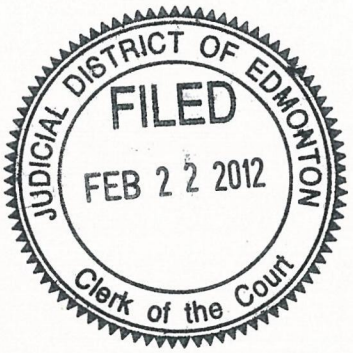
Clerk's Stamp:



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 PUBLIC TRUSTEE OF ALBERTA VOLUME 2 OF 2

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Attention: Mike McKinney

Solicitor for Sawridge First Nation

LIST OF AUTHORITIES

1. *Alberta Rules of Court*, Alta Reg 124/2010
2. *Araam Inc.* v. *Aman Building Corp.* [2011] A.J. No. 1097 (Q.B.)
3. *Barry* v. *Garden River Band of Ojibways* [1997] O.J. No. 2109 (C.A.)
4. *Deans* v. *Thachuk* [2005] A.J. No. 1421 (C.A.); [2005] S.C.C.A. No. 555 (S.C.C.)
5. *E.(Mrs.)* v. *Eve* [1986] 2 S.C.R. 388 (S.C.C.)
6. *Guaranty Trust Co. of Canada* v. *Hetherington* [1987] A.J. No. 148 (Q.B.)
7. *Huzar* v. *Canada* [1997] F.C.J. No. 1556 (Proth)
8. *Indian Act*, R.S.C. 1985
9. *L.C.* v. *Alberta (Metis Settlements Child and Family Services, Region 10)* [2011] A.J. No.84 (Q.B.)
10. *L.C.* v. *Alberta (Metis Settlements Child and Family Services, Region 10)* [2011] A.J. No.396 (Q.B.)
11. *McIvor* v. *Canada* [2007] B.C.J. No. 1259 (B.C.S.C.); varied [2009] B.C.J. No. 669 (B.C.C.A.)
12. *Myran et.al.* v. *The Long Plain Indian Band* [2002] M.J. No.44 (Q.B.)
13. *Polchies* v. *Canada* [2007] F.C.J. No. 667 (Proth.)
14. *Public Trustee Act* S.A. 2004, P-44.1
15. *Sawridge Band* v. *Canada* [1995] F.C.J. No. 1013 (F.C.C.)
16. *Sawridge Band* v. *Canada* [2003] F.C.J. No. 723 (T.D.)
17. *Sawridge Band* v. *Canada* [2004] F.C.J. No. 77 (C.A.)
18. *Sawridge Band* v. *Canada* [2005] F.C.J. No. 1857 (F.C.)
19. *Sawridge Band* v. *Canada* [2009] F.C.J. No. 465 (C.A.); [2009] S.C.C.A. No. 248 (S.C.C.)
20. *Sharben Holding Inc.* v. *Vancouver Airport Centre Ltd.* [2011] S.C.J. No. 23 (S.C.C.)
21. *Taylor* v. *Alberta's Teachers' Assn.* [2002] A.J. No. 1571 (Q.B)
22. *Thomlinson* v. *Alberta (Child Services)* [2003] A.J. No. 716 (Q.B)

Case Name:

McIvor v. Canada (Registrar, Indian and Northern Affairs)

Between
Sharon Donna McIvor, Charles Jacob Grismer,
Plaintiffs, and
The Registrar, Indian and Northern Affairs Canada,
The Attorney General of Canada, Defendants

[2007] B.C.J. No. 1259

2007 BCSC 827

[2007] 3 C.N.L.R. 72

158 A.C.W.S. (3d) 345

Vancouver Registry No. A941142

British Columbia Supreme Court
Vancouver, British Columbia

Ross J.

Heard: October 16 and November 10, 2006.
Judgment: June 8, 2007.

(351 paras.)

Aboriginal law -- Aboriginal rights -- Effect of legislation -- Federal -- Indian Act -- Status Indian -- The appellants challenged the constitutionality of registration provisions of Indian Act, alleging they violated ss. 15 and 28 of the Charter -- Appellants argued that impugned provisions were discriminatory, as they preferred descendents who traced their Indian ancestry along paternal lines over those who traced ancestry along maternal lines -- This resulted in denial of equal benefit of the law to certain individuals -- The court agreed, and the impugned provisions were held to violate ss. 15 and 28 of Charter, and could not be saved by s. 1 -- Court declared provisions to be of no force or effect -- Canadian Charter of Rights and Freedoms, 1982, ss. 1, 15, 28 -- Indian Act, ss. 6(1), 6(2).

Constitutional law -- Canadian constitution -- Aboriginal rights -- The appellants challenged the constitutionality of registration provisions of Indian Act, alleging they violated ss. 15 and 28 of the Charter -- Appellants argued that impugned provisions were discriminatory, as they preferred descendents who traced their Indian ancestry along paternal lines over those who traced ancestry along maternal lines -- This resulted in denial of equal benefit of the law to certain individuals -- The court agreed, and the impugned provisions were held to violate ss. 15 and 28 of Charter, and could not be saved by s. 1 -- Court declared provisions to be of no force or effect -- Canadian Charter of Rights and Freedoms, 1982, ss. 1, 15, 28 -- Indian Act, ss. 6(1), 6(2).

Constitutional law -- Canadian Charter of Rights and Freedoms -- Aboriginal rights -- Equality rights -- Equal benefit of the law -- The appellants challenged the constitutionality of registration provisions of Indian Act, alleging they violated ss. 15 and 28 of the Charter -- Appellants argued that impugned provisions were discriminatory, as they preferred descendents who traced their Indian ancestry along paternal lines over those who traced ancestry along maternal lines -- This resulted in denial of equal benefit of the law to certain individuals -- The court agreed, and the impugned provisions were held to violate ss. 15 and 28 of Charter, and could not be saved by s. 1 -- Court declared provisions to be of no force or effect -- Canadian Charter of Rights and Freedoms, 1982, ss. 1, 15, 28 -- Indian Act, ss. 6(1), 6(2).

The appellants challenged the constitutionality of ss. 6(1) and 6(2) of the Indian Act (Act), on the basis that the provisions dealing with the entitlement to register as an Indian were discriminatory and violated ss. 15 and 28 of the Canadian Charter of Rights and Freedoms (Charter). The challenge followed the Registrar's decision to refuse to register the appellants as Indians pursuant to the provisions of the Act. Under certain versions of the Indian Act, when an Indian woman married a non-Indian man, she lost her status as an Indian. Similarly, her children would not be entitled to register as Indians. However, when an Indian man married a non-Indian woman, his wife and children would be entitled to register as Indians. The appellants argued that attempts to remedy this situation through amendments to the Indian Act had failed, and that the registration provisions continued to prefer descendents who traced their Indian ancestry along the paternal line over those who traced their ancestry along the maternal line.

HELD: The impugned provisions of the Indian Act were declared unconstitutional, as they violated s. 15 and s. 28 of the Charter, and could not be saved by s. 1. Amendments that had been made over the years to the Act had not eliminated discrimination in relation to the registration procedure and the determination of status Indians. The registration provisions of the Act continued to prefer descendents who traced their Indian ancestry along paternal lines over those who traced their Indian ancestry along maternal lines. The provisions preferred male Indians who married non-Indians and their descendents, over female Indians who married non-Indians and their descendents. This differential treatment constituted discrimination on the basis of sex and marital status contrary to s. 15 and s. 28 of the Charter. The appellants sought an equal benefit of the law with respect to registration status, and to that s. 15 of the Charter applied. The discrimination was not justified under s. 1 of the Charter. The court found that the concept of "status" was a creation of the government. Thus, there were no competing interests nor was there a pressing and substantial objective that the government sought to fulfill by maintaining the discriminatory provisions. The court reviewed the history of the impugned legislation and recognized the importance of the ability to register under the Act to an applicant's identity, cultural heritage, and sense of belonging. The court rejected the re-

spondents' argument that the appellants were attempting to apply the Charter retroactively. The discrimination faced by the appellants did not take place until the respondents responded to the appellants' application for registration. The court refused the respondents' suggestion to suspend a declaration of invalidity for 24 months to allow the government to develop legislation consistent with the court's ruling. Rather, the court declared s. 6 of the Indian Act to be of no force or effect insofar as it authorized the differential treatment of Indian men and Indian women born prior to April 17, 1985, and matrilineal and patrilineal descendents born prior to April 17, 1985, in the conferring of Indian status.

Statutes, Regulations and Rules Cited:

An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42, S.C. 1869, c. 6

An Act to Amend the Indian Act, S.C. 1985, c. 27

An Act to Encourage the gradual Civilization of Indian Tribes in the Province and to amend the Laws respecting Indians, S. Prov. C. 1857, 20 Vict., c. 26, s. 1

Canadian Charter of Rights and Freedoms, 1982, s. 1, s. 15(1), s. 28

Indian Act, S.C. 1951, c. 29, s. 2(1)(g), s. 14.3

Indian Act, R.S.C. 1985, c. I-5, s. 6(1), s. 6(1)(a), s. 6(1) (b), s. 6(1)(c), s. 6(1)(d), s. 6(1)(e), s. 6(1)(f), s. 6(2)

Indian Act, S.C. 1951, c. 29, s. 2(1)(j), s. 11(e), s. 12(1)(b)

Counsel:

Counsel for the Plaintiffs: Robert W. Grant, Gwen Brodsky.

Counsel for the Defendants: Sarah P. Pike, Glynis Hart, Brett C. Marleau.

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ROSS J.:--

I. INTRODUCTION

1 In this action the plaintiffs, Sharon Donna McIvor ("Sharon McIvor"), and her son, Charles Jacob Grismer ("Jacob Grismer"), challenge the constitutional validity of ss. 6(1) and 6(2) of the ***Indian Act***, R.S.C. 1985, c. I-5 (the "***1985 Act***"). These provisions deal with entitlement to registration as an Indian, or status as it is frequently termed. The plaintiffs do not challenge any other provisions of the ***1985 Act***, and in particular, do not challenge the provisions relating to entitlement to membership in a band.

2 Under previous versions of the ***Indian Act***, the concept of status was linked to band membership and the entitlement to live on reserves. In addition, under previous versions of the ***Indian Act***, when an Indian woman married a non-Indian man, she lost her status as an Indian and her children were not entitled to be registered as Indians. By contrast, when an Indian man married a non-Indian woman, both his wife and his children were entitled to registration and all that registration entailed.

3 For years there were calls for an end to this discrimination. Eventually in 1985, the government introduced and parliament subsequently passed Bill C-31, ***An Act to Amend the Indian Act***, S.C. 1985, c. 27 ("***Bill C-31***"). Part of the purpose of the legislation was to eliminate what was acknowledged to be discrimination on the basis of sex from the criteria for registration. Another significant aspect of the amendments introduced as part of ***Bill C-31*** was that for the first time the issue of eligibility for registration or status was separated from the issue of membership in a band.

4 The plaintiffs submit that this remedial effort was incomplete and that the registration provisions introduced in ***Bill C-31*** that form the basis for registration in the ***1985 Act*** continue to discriminate contrary to ss. 15 and 28 of the ***Canadian Charter of Rights and Freedoms*** (the "***Charter***"). The plaintiffs submit that the registration provisions continue to prefer descendants who trace

their Indian ancestry along the paternal line over those who trace their Indian ancestry along the maternal line. The plaintiffs submit further that the provisions continue to prefer male Indians who married non-Indians and their descendants, over female Indians who married non-Indians and their descendants.

5 In this action the plaintiffs seek the following relief:

1. A declaration that section 6 of the ***1985 Act*** violates section 15(1) of the ***Charter*** insofar as it discriminates between matrilineal descendants and patrilineal descendants born prior to April 17, 1985, in the conferring of Indian status.
2. A declaration that section 6 of the ***1985 Act*** violates section 15(1) of the ***Charter*** insofar as it discriminates between descendants born prior to April 17, 1985, of Indian women who had married non-Indian men, and descendants of Indian men who married non-Indian women.
3. A declaration that section 6 of the ***1985 Act*** violates section 15(1) of the ***Charter*** insofar as it discriminates between descendants born prior to April 17, 1985, because they or their ancestors were born out of wedlock.
4. An order that the following words be read in to section 6(1)(a) of the ***1985 Act***: "or was born prior to April 17, 1985, and was a direct descendant of such a person".
5. In the alternative:

   An order that for the purposes of section 6(1)(a) of the ***1985 Act***, section 11(1)(c) and (d) of the ***Indian Act***, S.C. 1951, c. 29, as amended (the "***1951 Act***"), in force immediately prior to April 17, 1985 shall be read as though the words "male" and "legitimate" were omitted.

   And a further order that for the purposes of section 6(1)(a) of the ***1985 Act***, s. 12(1)(b) of the ***1951 Act*** in force immediately prior to April 17, 1985, shall be read as though it had no force and effect.

6. A declaration that the plaintiffs are entitled to register under s. 6(1)(a) of the ***1985 Act***.
7. ...
8. An order that the relief granted in this proceeding applies exclusively to registration under section 6 of the ***1985 Act*** and does not alter sections 11 and 12 of the ***1985 Act*** or any other provision defining entitlement to Band membership.

...

6 The defendants' response to the plaintiffs' claims can be organized around three principal themes:

(a) granting the relief sought by the plaintiffs would constitute an impermissible retroactive or retrospective application of the ***Charter*** in that it would

require the court to apply the ***Charter*** to pre-1985 legislation and to amend repealed provisions of prior versions of the ***Indian Act***;

(b) the plaintiffs suffered no injury. The only difference between the plaintiffs and Indians entitled to registration pursuant to s. 6(1)(a) of the ***1985 Act*** is in relation to the status of their children. There is no right to transmit Indian status, which is purely a matter of statute. Accordingly, there has been no denial of the plaintiffs' rights; and

(c) any infringement of the plaintiffs' rights is justified in light of the broad objectives of the 1985 amendments to the ***Indian Act*** which was a policy decision, made after extensive consultation, balancing the interests of all affected and which is entitled to deference.

7 For the reasons that follow, I have concluded that the registration provisions contained in s. 6 of the ***1985 Act*** discriminate on the basis of sex and marital status contrary to ss. 15 and 28 of the ***Charter*** and that such discrimination has not been justified by the government. The following conclusions form the crux of my decision:

(a) The plaintiffs' claim, properly understood, requires neither a retroactive nor a retrospective application of the ***Charter***. It is rather an application of the ***Charter*** to the present registration provisions of the ***Indian Act***.

(b) Although the concept "Indian" is a creation of government, it has developed into a powerful source of cultural identity for the individual and the Aboriginal community. Like citizenship, both parents and children have an interest in this intangible aspect of Indian status. In particular, parents have an interest in the transmission of this cultural identity to their children.

(c) The registration provisions of the ***1985 Act*** did not eliminate discrimination. The registration provisions contained in s. 6 continue to prefer descendants who trace their Indian ancestry along the paternal line over those who trace their Indian ancestry along the maternal line and continue to prefer male Indians who married non-Indians and their descendants, over female Indians who married non-Indians and their descendants. This preference constitutes discrimination on the basis of sex and marital status contrary to ss. 15 and 28 of the ***Charter***.

(d) This discrimination has not been justified by the government pursuant to s. 1 of the ***Charter***. In that regard, as part of the 1985 amendments, the government elected to sever the relationship between status and band membership. Status is now purely a matter between the individual and the state. There are no competing interests. No pressing and substantial objective has been identified with respect to the discriminatory provisions in the registration scheme.

II. LEGISLATIVE HISTORY

Early Legislation

8 The concept "Indian" is a creation of statute. Prior to the arrival of Europeans, the Aboriginal peoples who inhabited the region that would become Canada had their own forms of social organization with their own names by which to identify their social groups. Fundamental aspects of these forms of social organization included rules for the identification of members of the group, the transmission of membership status in the event of marriage and the transmission of membership status to descendants. These rules were diverse and often quite different from the forms of social organization of the colonists. For example, some Aboriginal societies were matrilineal. Among the Iroquois, descent and inheritance were transmitted through the female line. Post-marital residence was matrilocal: see *Indian Women and the Indian Act*, Standing Committee of Indian Affairs and Northern Development (the "Standing Committee"), September 13, 1982, testimony of Pauline Harper, President, Indian Rights for Indian Women at p. 4:33. In the Kwawkewith Nation of the west coast, inheritance followed a matriarchal line. A child took her mother's family name and inheritance: see Standing Committee, September 10, 1982, testimony of Donna Tyndell at p. 3:37.

9 In many Aboriginal societies woman exercised considerable political power. This too stood in contrast to the situation of women in the colonial societies at the time. For example, the Iroquois had a socio-political structure that took the form of a confederacy held together by a socio-political system of clans headed by women in a true matrilineal political and familial system. This clan system, which was inherently a matriarchal system of family government and political organization, was the foundation upon which a political system was built that created a democratic structure of government: see Standing Committee, September 13, 1982, testimony of Mary Two-Axe Earley, President Quebec Equal Rights of Indian Women at pg. 4:49; *Perspectives and Realities*, Vol. 4, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Supply and Services Canada, 1996) (the "*Royal Commission Report*"); and Sayers, MacDonald, Fiske, Newell, George and Cornett, *First Nations Women, Governance and the Indian Act: A Collection of Policy Research Reports* (Status of Women Canada's Policy Research Fund, November, 2001).

10 The report, Native Women and the Constitution: background paper presented to the Women and the Constitutional Conference by the Native Women's Association of Canada, September 6, 1980, noted at p. 3:

> Native people are the descendants of the original people of this land. Before the Europeans arrived, Native people called themselves by their own names using their own languages. Native people are not the descendants of one nation but rather of hundreds of sovereign nations that lived on this land before the Europeans. When treaties were signed, they were signed by one nation entering into agreements with another nation. But as history has shown, treaties were not honoured in this way. Instead, the federal government developed an attitude of paternalism and assimilation towards Native people, legislating a process of defining who is an Indian and who is not, and confining Native people to specific sections of land.

11 One of the profound developments introduced by colonialism was the creation of the concept of "Indian" which was the term created by the colonists to describe Aboriginal persons. Following settlement in Upper and Lower Canada and the creation of treaties with Aboriginal peoples, legislation was passed in relation to the Aboriginal peoples that the colonial powers had named "Indians". The first such statute was ***An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury***, S.C. 1850, c.

74 (the "***1850 Act***"). The ***1850 Act*** made reference to Indian and any person inter-married with any Indian.

12 Subsequent legislation contained evolving definitions of the term "Indian". With these definitions came situations of loss of status for Aboriginal women and their children. The legislation mirrored the colonial societies' attitudes toward women. These attitudes were embodied in both Napoleonic and British common law:

> Both Napoleonic and British common law, from which Canadian law derived, deprived married woman of legal personhood, independence, and equality. The traditional status of married women at law is summarized in Blackstone's famous aphorisms: "Husband and wife are one person and the husband is that one", and "The very being or legal existence of the woman is suspended during marriage."
>
> Upon marriage, a woman's property customarily passed to her husband. Monies she earned, gifts she was given, or property she inherited all belonged to her husband. A married woman had no right to contract or to make a will, nor could she sue or be sued independently.
>
> Marriage also resulted in a woman's physical person and her sexuality becoming her husband's property. He had the right to physically "correct" her, to rape her, to control her physical movement, and to determine her domicile and place of residence.
>
> Children were also entirely in the control of the husband, as he was the sole legal guardian of them, with the right to make all decisions regarding their care, discipline, and education.
>
> Married women assumed the names and nationalities of their husbands, and lost their own. The husband was responsible for any illegal actions of his wife. She could not testify in court against her husband, nor could she sue him for actions against her.
>
> A married woman could not divorce and only in extreme circumstances could she live apart from her husband. Her only basic legal right was to have her husband supply the necessities of life.
>
> (Day, Shelagh, "*The Charter and Family Law*" in E. Sloss ed., *Family in Canada: New Directions* (Ottawa: Canadian Advisory Council on the Status of Women, 1985) at p. 28 [references omitted]).

13 The involuntary loss of Indian status by Aboriginal women and children began with the passage in 1857 of ***An Act to Encourage the gradual Civilization of Indian Tribes in the Province and to amend the Laws respecting Indians***, S. Prov. C. 1857, 20 Vict., c. 26 (the "***1857 Act***"). The preamble of the ***1857 Act*** identifies the assimilation of the Indian people as the purpose of the enactment:

> WHEREAS it is desirable to encourage the progress of Civilization among the Indian Tribes in this Province, and the gradual removal of all legal distinctions between them and Her Majesty's other Canadian Subjects, and to facilitate the acquisition of property and of the rights accompanying it, by such Individual Members of the said Tribes as shall be found to desire such encouragement and to have deserved it: Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

14 Section 1 of the ***1857 Act*** provided that the ***1850 Act*** would apply to:

> Indians or persons of Indian blood or intermarried with Indians, who shall be acknowledged as members of Indian Tribes or Bands residing upon lands which have never been surrendered to the Crown (or which having been so surrendered have been set apart or shall then be reserved for the use of any Tribe or Band of Indians in common) and who shall themselves reside upon such lands, and shall not have been exempted from the operation of the said section, under the provisions of this Act; and such persons and such persons only shall be deemed Indians within the meaning of any provision of the said Act or of any other Act or Law in force in any part of this Province by which any legal distinction is made between the rights and liabilities of Indians and those of Her Majesty's other Canadian Subjects. (Emphasis added)

By this provision, the government assumed control over the determination of who was Indian.

15 The ***1857 Act*** provided for the enfranchisement of Indian men over the age of twenty-one who met certain specified criteria. Upon enfranchisement, the Indian men ceased to be Indians. So too did their wives and children.

16 One consequence of such legislation was the disruption of Aboriginal culture through the imposition of colonial concepts of social organization. Madam Justice L'Heureux-Dubé described this in ***Corbiere v. Canada (Minister of Indian and Northern Affairs)***, [1999] 2 S.C.R. 203 at para. 86 [***Corbiere***]:

> Legislation depriving Aboriginal women of Indian status has a long history. The involuntary loss of status by Aboriginal women and children began in Upper and Lower Canada with the passage of *An Act to encourage the gradual Civilization of the Indian Tribes in the Province, and to amend the Laws respecting Indians*, S. Prov. C. 1857, 20 Vict., c. 26. A woman whose husband "enfranchised" had her status removed along with his. This legislation introduced patriarchal concepts into many Aboriginal societies which did not exist before: see Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba* (1991), vol. 1, *The Justice Systems and Aboriginal People*, at pp. 476-79. As the Royal Commission stated in *Perspectives and Realities, supra*, at p. 26:
>
> > In the pre-Confederation period, concepts were introduced that were foreign to Aboriginal communities and that, wittingly or unwittingly, undermined Aboriginal cultural values. In many cases, the legislation displaced

> the natural, community-based and self-identification approach to determining membership - which included descent, marriage, residency, adoption and simple voluntary association with a particular group - and thus disrupted complex and interrelated social, economic and kinship structures. Patrilineal descent of the type embodied in the *Gradual Civilization Act*, for example, was the least common principle of descent in Aboriginal societies, but through these laws, it became predominant. From this perspective, the *Gradual Civilization Act* was an exercise in government control in deciding who was and was not an Indian.

17 With Confederation, s. 91(24) of the ***Constitution Act, 1867***, 30-31 Vict., c. 3 (U.K.) (the "***Constitution Act, 1867***") granted parliament exclusive legislative authority over "Indians and land reserved for Indians". After Confederation, Parliament first defined Indian in s. 15 of the 1868 statute, ***An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands***, S.C. 1868, c. 42 (31 Vict.), s. 15. (the "***1868 Act***"). Section 15 provided that the following persons and none other were to be considered Indians:

> *Firstly*. All persons of Indian blood, reputed to belong to the particular tribe, band or body of Indians interested in such lands or immoveable property, and their descendants;
>
> *Secondly*. All persons residing among such Indians, whose parents where or are, or either of them was or is, descended on either side from Indians or an Indian reputed to belong to the particular tribe, band or body of Indians interested in such lands or immoveable property, and the descendants of all such persons; And
>
> *Thirdly*. All women lawfully married to any of the persons included in the several classes hereinbefore designated; the children issue of such marriages, and their descendants.

18 Section 15 stated that only persons who met the statutory criteria were entitled to hold, use, or enjoy lands and property belonging to or appropriated to the use of bodies of Indians, tribes, or bands.

19 From that time forward, the Government of Canada has utilized the concept of the status Indian in relation to the exercise of its s. 91(24) powers.

20 The ***1868 Act*** was amended in 1869 by ***An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42***, S.C. 1869, c. 6. (32-33 Vict.) (the "***1869 Act***"). The ***1869 Act*** amended the definition of Indian in s. 15 of the ***1868 Act*** by adding a provision that any Indian woman marrying a non-Indian man lost her Indian identity. So too did the children of the marriage. The ***1869 Act*** also provided that when an Indian woman married an Indian man of a different tribe or band, she ceased to be a member of her own band or tribe and became a member of her husband's band or tribe. The children of the marriage became members of only the father's tribe or band.

21 The official explanation for the adoption of this policy was a concern about control over reserve lands and the need to prevent non-Indian men from gaining access to them. For example, the following correspondence is quoted in the *Royal Commission Report* at p. 27:

> Thus, in 1869 the secretary of state wrote to the Mohawks of Kahnawake regarding the marrying out provisions of the new legislation, stressing that the goal was preventing men not of Indian Blood having by marrying Indian women either through their Wives or Children any pretext for Settling on Indian lands.

And see Weaver, S., Report on Archival Research Regarding Indian Women & Status 1868 - 1869 (University of Waterloo, 1971).

22 The discriminatory treatment of Aboriginal women thus introduced into the legislation was summarized as follows in the *Royal Commission Report* at p. 28:

> In the relatively short period between the 1850 Lower Canada legislation and the 1869 *Gradual Enfranchisement Act*, it seems apparent that Indian women were singled out for discriminatory treatment under a policy that made their identity as Indian people increasingly dependent on the identity of their husbands. They were subject to rules that applied only to them as women and that can be summarized as follows: they could not vote in band elections; if they married an Indian man from another band, they lost membership in their home communities; if they married out by wedding a non-Indian man, they lost Indian status, membership in their home communities, and the right to transmit Indian status to the children of that marriage; if they married an Indian man who became enfranchised, they lost status, membership, treaty payments and related rights and the right to inherit the enfranchised husband's lands when he died. Despite strong objections, these discriminatory provisions were carried forward into the first *Indian Act* in 1876.

23 It is noteworthy that already objections were being made to such provisions by Aboriginal groups. For example, the *Royal Commission Report* cites the following in a footnote to the above quote:

> ... In 1872, the Grand Council of Ontario and Quebec Indians (founded in 1870) sent the minister in Ottawa a strong letter that contained the following passage:
>
> > They [the members of the Grand Council] also desire amendments to Sec. 6 of the Act of [18]69 so that Indian women may have the privilege of marrying when and whom they please, without subjecting themselves to exclusion or expulsion from their tribes and the consequent loss of property and rights they may have by virtue of their being members of any particular tribe. (NAC RG10, Red Series, Vol. 1934, file 3541)

24 The definition of Indian was modified in the ***Indian Act***, S.C. 1876, c. 18 (39 Vict.) (the "***1876 Act***"). Pursuant to s. 3 of the ***1876 Act*** the term Indian now meant:

> (a) any male person of Indian blood reputed to belong to a particular band;
> (b) the child of such person; and

(c) any woman who is or was lawfully married to such person.

25 The ***1876 Act*** continued the provision that any Indian woman marrying a non-Indian lost her Indian status and her band membership. The ***1876 Act*** also continued the provision that an Indian woman marrying an Indian man who belonged to a different band or tribe would lose the membership in her band and become a member of her husband's band or tribe. These provisions continued, essentially unchanged, until the enactment of the ***Indian Act***, S.C. 1951 c. 29 (the "***1951 Act***").

26 By virtue of these provisions, an Indian woman who married a man who was not a status Indian lost her Indian status. Her children did not acquire Indian status. By contrast, an Indian man who married a woman who was not a status Indian suffered no such fate. He retained his Indian status. Moreover, both his wife and any children of the union acquired Indian status.

27 The ***1951 Act*** created the Indian Register in which the name of everyone registered as an Indian was recorded. It also created the position of the Registrar, an officer of the Crown who was in charge of the Indian Register and who determined entitlement to registration in the Indian Register under the ***1951 Act***. The Indian Register consisted of Band Lists and General Lists. Those persons who were members of bands and entitled to be registered as an Indian were entered in the Band List for that band. The General List contained those people entitled to be registered as an Indian, but with no band affiliation.

28 Section 2(1)(g) of the ***1951 Act*** defined Indian as "a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian". Those persons entitled to be registered pursuant to the ***1951 Act*** were defined in ss. 11 and 12 which provided:

> 11. Subject to section twelve, a person is entitled to be registered if that person
>
> (a) on the twenty-sixth day of May, eighteen hundred and seventy-four, was, for the purposes of *An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, chapter forty-two of the statues of 1868, as amended by section six of chapter six of the statutes of 1869, and section eight of the chapter twenty-one of the statutes of 1874, considered to be entitled to hold, use or enjoy the lands and other immovable property belonging to or appropriated to the use of the various tribes, bands or bodies of Indians in Canada;
>
> (b) is a member of a band
>
> (i) for whose use and benefit, in common, lands have been set apart or since the twenty-sixth day of May, eighteen hundred and seventy-four have been agreed by treaty to be set apart, or
>
> (ii) that has been declared by the Governor in Council to be a band for the purposes of this Act;
>
> (c) is a male person who is a direct descendant in the male line of a male person described in paragraph (a) or (b);
>
> (d) is the legitimate child of

(i) a male person described in paragraph (a) or (b), or
(ii) a persons described in paragraph (c);

(e) is the illegitimate child of a female person described in paragraph (a), (b) or (d), unless the Registrar is satisfied that the father of the child was not an Indian and the Registrar has declared that the child is not entitled to be registered; or
(f) is the wife or widow of a person who is entitled to be registered by virtue of paragraph (a), (b), (c), (d) or (e).

12(1) The following persons are not entitled to be registered, namely,

(a) a person who

(i) has received or has been allotted half-breed lands or money scrip,
(ii) is a descendant of a person described in sub-paragraph (i),
(iii) is enfranchised, or
(iv) is a person born of a marriage entered into after the coming into force of this Act and has attained the age of twenty-one years, whose mother and whose father's mother are not persons described in paragraph (a), (b), (d), or entitled to be registered by virtue of paragraph (e) of section eleven, unless being a woman, that person is the wife or widow of a person described in section eleven, and

(b) a woman who is married to a person who is not an Indian.

29 Pursuant to s. 14 of the ***1951 Act***, a woman who was a member of a band ceased to be a member of that band if she married a person who was not a member of the band. If she married a man who was a member of another band, she became a member of his band.

30 Sections 11(e) and 12 of the ***1951 Act*** were amended by ***An Act to amend the Indian Act***, S.C. 1956, c. 40 (the "***1956 Act***") as follows:

3(1) Paragraph (e) of section 11 of the said Act is repealed and the following substituted therefor:

"(e) is the illegitimate child of a female person described in paragraph (1), (b) or (d); or".

(2) Section 12 of the said Act is amended by adding thereto, immediately after subsection (1) thereof, the following subsection:

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

(3) This section applies only to persons born after the coming into force of this Act.

4 Paragraph (b) of subsection (1) of section 12 of the said Act is repealed and the following substituted therefor:

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

31 The registration provisions contained in ss. 11 and 12 of the ***1951 Act*** as amended by the ***1956 Act*** remained virtually unchanged until the ***1985 Act*** came into force.

32 Opposition to these provisions however, continued to be expressed. For example, the final report of the *Royal Commission on the Status of Women* (Government of Canada, 1970) at para. 106 contained a recommendation that the ***Indian Act*** be amended "to allow an Indian woman upon marriage to a non-Indian to (a) retain her Indian status; and (b) transmit her Indian status to her children".

33 The intention of the legislature with respect to the registration provisions was addressed in ***Martin v. Chapman***, [1983] 1 S.C.R. 365, a decision dealing with the eligibility for registration of the illegitimate child of an Indian father. Madam Justice Wilson, writing for the majority, described this intent as follows at 370:

> It seems to me that the one thing which clearly emerges from ss. 11 and 12 of the Act is that Indian status depends on proof of descent through the Indian male line.

34 In summary, in relation to the matters at issue in this litigation, the following are the important developments in the history of the legislation leading up to the ***1985 Act***:

(a) the government created the concept of Indian and then used it as a general concept in relation to peoples of the First Nations in substitution for the First Nations' own identifications;
(b) the government endowed the concept of Indian with great significance in including in relation to such matters as band membership, the right to membership in communities, the right to live on reserve lands, and the right to treaty payment;
(c) the government assumed exclusive control over the identification of who was and was not entitled to be classified as an Indian; and
(d) the rules created by the government and embodied in the successive versions of the legislation, favoured descent through the male line and discriminated against women and those who traced their descent through the maternal line. In particular, if an Indian woman married a non-Indian man, she lost her status and her children were not entitled to be classified as In-

> dian. However, a man who married a non-Indian woman retained his status as an Indian. In addition, his wife acquired the status of Indian and his children were classified as Indian.

Early Challenges

35 The provisions of the ***1951 Act***, pursuant to which an Indian woman who married a man who was not a registered Indian would lose her Indian status, were challenged under the ***Canadian Bill of Rights***, S.C. 1960, c. 44 (the "***Bill of Rights***"), as a violation of the right to equality. In ***Attorney General of Canada v. Lavell***, [1974] S.C.R. 1349 [***Lavell***], the court, in dismissing the challenge, held that the ***Bill of Rights*** was not effective to render inoperative legislation passed by Parliament in discharge of its constitutional function under s. 91(24) of the ***Constitution Act, 1867***, and that equality before the law under the ***Bill of Rights*** meant equal treatment in the enforcement and application of the law. Mr. Justice Laskin, in dissent, however, described the provisions at issue as effecting a statutory excommunication or statutory banishment of Indian women and their children, a separation to which no Indian man who marries a non-Indian is exposed: see ***Lavell*** at 1386.

36 In 1976, Canada became a signatory to the International Covenant on Civil and Political Rights ("ICCPR") (adopted December 16, 1966, entry into force March 23, 1976) G.A. Res. 2200A (XXI) (accession by Canada 19 May 1976, Can. T.S. 1976 No. 47). Article 27 of the ICCPR provides:

> In those States in which ethnic, religions or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to process and practice their own religion, or to use their own language.

37 In 1975, following the Supreme Court of Canada's dismissal of the ***Lavell*** case under the ***Bill of Rights***, Sandra Lovelace, a Maliseet Indian who lost her Indian status upon marriage to a non-Aboriginal man, challenged the marrying out provision of the ***Indian Act*** under Article 27. On July 30, 1982, the United Nations Committee on Human Rights found Canada in violation of Article 27 of the ICCPR because it effectively denied Sandra Lovelace the right to access her culture, her religion and her language: see ***Lovelace v. Canada***, Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981) [***Lovelace UN***].

Movements for Reform

> We are stripped naked of any legal protection and raped by those who would take advantage of the inequities afforded by the Indian Act. We are raped because we cannot be buried beside the mothers who bore us and the fathers who begot us, although dogs from neighbouring towns are buried on our reserve land: because we are subject to eviction from the domiciles of our families and expulsion from the tribal roles; because we must forfeit any inheritance or ownership of property; because we are divested of the right to vote; because we are unable to pass our Indian-ness and the Indian culture that is engendered by a woman in her children: because we live in a country acclaimed to be one of the greatest cradles for democracy on earth, offering asylum to refugees while, within its borders, its

> native sisters are experiencing the same suppression that has caused these people to seek refuge by the great mother known as Canada.
>
> (Standing Committee, September 13, 1982, testimony of Mary Two-Axe Earley, President, Quebec Equal Rights for Indian Women, at p. 4:46.)

38 Whatever had been the attitude and motivations of previous generations, by the 1970's and through the 1980's successive federal governments recognised the need for reform of the provisions with respect to registration that discriminated against women and their descendants. The impetus toward reform of these provisions grew with the ***Charter***, and in particular, with the impending coming into force of s. 15 on April 17, 1985. In addition, successive federal governments undertook a re-evaluation of the relationship between the government and First Nations, and in particular, the role of the government in determining band membership.

39 These themes were mirrored in two major movements for reform within the First Nations. In the years leading up to the passage of ***Bill C-31*** in 1985, there were two major movements for reform of the ***Indian Act***. The first was the movement for women's rights that sought to eradicate the different treatment of men and women with respect to the determination of status pursuant to the ***Indian Act***. Arguing that the different treatment constituted discrimination, reformers pressed for the restoration of status to those who had lost status, and the amendment of the ***Indian Act*** to create a non-discriminatory scheme for the determination of status.

40 A second movement, which may be characterized as an Aboriginal rights movement, sought increased powers of self-government for bands. One argument advanced by advocates was that Aboriginal people had never given up their right to define their own membership. Accordingly, it was not for the federal government to decide on the terms of band membership, even for the purpose of effecting reform.

41 These two movements were to some degree at odds on the issue of reforms to the ***Indian Act*** concerning status as an Indian. For example, in 1982 Dr. David Ahenakew, National Chief of the Assembly of First Nations, testified that the bands must take control over all issues related to membership including reinstatement of women [Standing Committee, September 8, 1982, at p. 1:72]. Chief Sol Sanderson of the Federation of Saskatchewan Indians spoke about the conflict between group and individual rights which would occur if only the discrimination under s. 12(1)(b) was addressed:

> All we are saying is that if you deal with the individual right in isolation from the collective right, part of the collective right being the right of men and women to form their own governments and to determine their own policy on citizenship questions, that is part of the civil and political right issue that you are talking about under international standards. So you are taking away from it. By dealing with the one issue on a sex basis, you are discriminating against all Indians, never mind women, under those standards that you are citing to me now.
>
> (Standing Committee, September 8, 1982, at p. 1:89.)

See also the evidence of the Neskainlith Indian Band; Standing Committee September 20, 1982 at pp. 5:42-5:43, and the evidence of the Indian Association of Alberta; Standing Committee, September 20, 1982, at pp. 5:104-5:105.

42 The women's groups, while not opposed to increased self-government on the part of bands, including control over membership, argued that a prerequisite to any such reform must be a restoration of status to those who had been stripped of their status through the discriminatory provisions. For example, at hearings before the Standing Committee in 1982, the Native Women's Association of Canada recommended three changes and stated that they would support band control of membership if these three recommendations were adopted:

(a) the deletion or amendment of any section of the Indian Act which discriminates against Indian women on the basis of sex;
(b) the reinstatement of all Indian women who lost Indian status because of s. 12(1)(b) and the registration of their first-generation children; and the "de-listing" of all non-Indians who gained status through marriage; and
(c) the placement of the first-generation children of women who lost status, regardless of whether the mother is still living, on the band list of their mother's band.

(Standing Committee, September 20, 1982, pp. 5:121-122.)

43 Some of the representatives expressed a distrust of band governments. The representative of the United Native Nations, representing non-status Indians and Métis in British Columbia, gave the following testimony:

> We refuse vehemently to accept allowing present band governments to legislate rules regarding band membership. We totally reject band control in this instance, and the reason is this: At the present time you would only replace discrimination by the DIA with discrimination by Indian governments, band governments. The band governments are not the true governments of their people, because so many of their people are unable to vote in the elections or are unable to live anywhere near the reserves. The bands do not truly represent the tribes. And until all that is corrected and there is a true membership with a true mandate and real constituents, a government representing everyone who wants to be recognized, everyone who traces their lineage back to that tribe and who wants to be recognized, they should all be allowed to participate in voting; then band government would have some meaning and we would be less wary of allowing them to legislate any rules governing our lives.
>
> I just have a note here. We must be given a better route home. The route we have right now is impossible. Some people say you can go to your chief, you can go to your band; they will take you back. This is not so. The monetary problems of course are a very real reason. But I have lost my status and I want to go back home to my ancestral home, which is my mother's home, and which the Indian Act never provided me. Even when I was registered I was registered with my father's band, which I have no cultural ties with at all. I want to go home. I want to go to Kingcome Inlet some day when I retire. I would like that route to be one where I would not have to go home and beg someone, or lay a guilt trip on all my people back home to put me back on the band membership list. I could do that, but I would rather the way be easier, a better route home. That is what we want.

(Standing Committee, September 10, 1982, at p. 3:35.)

44 There were in addition, some First Nations groups that opposed the restoration of status of those women and their children who had lost status as a result of the provisions of the ***Indian Act***. The concern expressed was that restoration, given the numbers involved, would flood the bands with members, many of whom had little or no contact with the reserves. The result, it was argued, would be cultural genocide. For example, the representative of the Indian Association of Alberta expressed vehement opposition to ***An Act to amend the Indian Act*** ("***Bill C-47***"), a prior effort to amend the ***Indian Act***that died on the order paper, stating that "in attempting to bring about sexual equality [***Bill C-47***] will instead bring about cultural genocide": Minutes of Proceedings and Evidence of the Standing Committee respecting Bill C-47, June 28, 1984, p. 19:30.

45 The context in which this opposition was addressed, was the existing legislation in which entitlement to registration or status was linked to band membership and entitlement to live on a reserve.

46 Arguably, at least in part due to the complexity of the interaction of these forces, the process leading eventually to the passage of ***Bill C-31*** was particularly protracted. For example, in 1984 Minister Munro, speaking in relation to ***Bill C-47*** stated:

> The difficulty that has delayed presentation of this Bill is the same delay that has attended the work of both the sub-committee on the rights of Indian women and the special committee on Indian self-government; this is, we are dealing with a conflict between two deeply cherished ideas.
>
> On the one hand, there is the right of women to be treated equally with men; on the other hand, Indian bands want to be able to decide, without outside interference, who is and who is not a member of an Indian band. This latter position is recognized as being a key power of Indian nation governments.
>
> (Standing Committee, June 26, 1984 at p. 17:9.)

Process Leading to *Bill C-31*

47 The process that culminated in the 1985 amendments is summarized below.

48 In 1960, the federal government held a series of special hearings with First Nations associations in contemplation of amendments to the ***Indian Act***. The result of these meetings was the development of regional Indian Advisory Committees comprised of provincial and federal government officials who gathered for the purpose of encouraging dialogue between Indian communities and the government on Indian-related policy issues and legislation: Weaver, S., "Proposed Changes in the Legal Status of Canadian Women: The Collision of Two Social Movements" (Paper read at the 1973 Annual Meeting of the American Anthropological Association, November 30, 1973).

49 The *Royal Commission on the Status of Women* was established in February 1967 to inquire into and report upon the status of women in Canada and to recommend what steps might be taken by the Federal Government to ensure for women equal opportunities with men in all aspects of Canadian society. Among those groups presenting to the Royal Commission in 1968 was Equal Rights

for Indian Women, a group founded to protest the gender-biased sections in the ***Indian Act***: Standing Committee, March 26, 1985, testimony of Mary Two-Axe Earley, at p. 24:32

50 The Royal Commission released its report in 1970: *Royal Commission on the Status of Women* (Government of Canada, 1970). Recommendation 106 recommended "that the Indian Act be amended to allow an Indian woman upon marriage to a non-Indian to (a) retain her Indian status and (b) transmit her Indian status to her children."

51 In 1973, the Indian Association of Alberta, under the *aegis* of the National Indian Brotherhood ("NIB"), conducted a review of the ***Indian Act*** and outlined their goals for revisions. With respect to marriage to non-Indians, the report recommended that neither the non-Indian spouse nor the children of a "mixed" marriage should gain status or membership. Status Indians who married non-Indians would always retain status and membership, although they would not be able to live on reserve while married to the non-Indian: National Indian Brotherhood, "Report of Indian Act Study Team", October 31, 1974.

52 In 1974, Parliament, following requests for a more open and co-operative relationship between Indians and the government, established the Joint Sub-Committee of Cabinet and the National Indian Brotherhood on Indian Rights and Claims (the "Joint Committee"). This committee was to develop proposals for amendment of the ***Indian Act***. Among other things, the Joint Committee considered "the issue of Indian women losing their status when they marry non-Indian men". During the consideration of the issue of Indian women who had lost their entitlement to registration, the NIB emphasized the need to amend the ***Indian Act*** to provide bands with the right to control their own membership. The NIB withdrew from the Joint Committee in 1978, without any major progress being made on proposed amendments to the ***Indian Act***: see the Minutes of Joint Sub-Committee and the National Indian Brotherhood on Indian Rights and Claims, October 31, 1977, and Weaver, S., "The Joint Cabinet/National Indian Brotherhood Committee: A Unique Experiment in Pressure Group Relations" (University of Waterloo, 1982).

53 In August 1978 a report titled "*Indian Act Discrimination Against Sex*" was prepared for the Department of Indian Affairs and Northern Development ("DIAND"), and stated in part:

> INDIAN ACT: DISCRIMINATION AGAINST SEX
>
> I. INTRODUCTION
>
> The Indian Act, it is alleged, discriminates on the grounds of sex and is, therefore, contrary to the provisions of the Human Rights Act. Sections 12(1)(b) and 11(1)(b) apply in particular.
>
> II. PROPOSAL
>
> The object of this paper is to propose that discrimination on the grounds of sex in the Indian Act be eliminated by the following formulation:
>
> > Indians who marry non-Indians would remain entitled to be registered; their non-Indian spouses would not be entitled to be registered. Their children would be entitled to be registered if the parents of the Indian parent were both Indian.

54 A discussion paper prepared for the DIAND titled "*Revison to the Indian Act*" dated November 10, 1978, makes reference to the Cabinet commitment to end discrimination on the basis of sex in a revised ***Indian Act***.

55 In July 1979 the National Committee, Indian Rights for Indian Women ("IRIW") made a submission to the DIAND calling for:

> [T]he criteria for registration as a status Indian be that of any person who can establish that they are 1/4 or more by blood a Canadian Indian and that this blood line can be established through either mother or father or both.
>
> ("Some Proposed Changes to the Indian Act" (National Committee, Indian Rights for Indian Women, July 1999) at p. 3.)

56 The submission stated:

> While there is bound to be considerable resistance by some of the "Treaty Indians", it should be pointed out that under the existing Act, 1/4 blood is recognized as long as the blood line is established through the father. However, Section 12(1)(a)(iv) (so called double mother rule) would indicate that a person with less than 1/4 Indian blood, even when established through the father's line and whose father is a "Treaty Indian" should not be registered as a status or Treaty Indian. Clearly the recognition of a 1/4 blood line when established through the father, but nonrecognition when established through the mother is discriminatory on the basis of sex and cannot be acceptable for Canadian society.
>
> ("Some Proposed Changes to the Indian Act" (National Committee, Indian Rights for Indian Women, July 1999) at p. 4.)

57 In a July 27, 1979, letter, the Minister of Indian Affairs and Northern Development, Arthur Jake Epp, corresponded with Chiefs about a proposed revision to the ***Indian Act***stating:

> In recent months, as many Indians are aware, some proposals have been discussed about revising certain aspects of the present ***Indian Act*** without endangering the special relationship of Indians to the Federal Government. The basic principles for revision include:
>
> 1) the need to recognize Indian self-government and to develop a legislative base upon which bands, which choose to do so, can exercise responsibility for their own social, economic, cultural and political development;
> 2) the need for strengthened band control of Indian education;
> 3) bands should be able to continue to exercise some control over reserve land when it is surrendered for developmental purposes;
> 4) discrimination within the *Act* against Indian women should be eliminated;
> 5) certain outdated and unduly restrictive sections of the *Act* should be changed or removed.

58 The Minister was in the process of preparing amendments to the ***Indian Act*** with a view to eliminating discrimination and enhancing self-government. However, the Conservative Government lost a confidence vote on December 13, 1979, leading to an election on February 18, 1980, which returned Prime Minister Trudeau and the Liberal Government to power.

59 Revisions to the ***Indian Act*** aimed at eliminating discrimination however remained a priority of the new government. This intention was reflected in the remarks of both Prime Minister Trudeau and Minister Munro who in April 1980 addressed the National Conference of Indian Chiefs and Elders, which included representatives of both the NIB and the IRIW. Prime Minister Trudeau stated:

> When we address the subject of amending the *Indian Act*, one problem poses a real dilemma for the government. What should be done with those sections which deprive Indian women of status if they marry non-Indians?
>
> The government made a commitment to remove that discriminatory provision [s. 12(1)(b)] from the *Act*. That commitment has generated controversy among Indians, some of who believe band councils should be free to decide who has status and who has not.
>
> I hope we can soon reach an agreement which will respect the rights of both Indian women and band councils. I also hope that, in reaching that agreement, we will all welcome the involvement of the group known as "Indian Rights for Indian Women", which I am happy to see represented here tonight.
>
> (Notes for Remarks by the Prime Minister at a National Conference of Indian Chiefs and Elders, April 29, 1980.)

60 Due to mounting pressure to amend the ***Indian Act***, and despite an inability to gain consensus on what amendments should be made, Minister of Indian Affairs John Munro announced on July 24, 1980, that he was going to use a provision of the ***Indian Act*** to suspend the effect of s. 12(1)(b) when requested to do so by Band Councils, pending further legislative amendments. Section 4(2) of the ***Indian Act*** then in force allowed the Governor in Council to declare, by proclamation, that any portion of the ***Indian Act*** did not apply to any Indians or group or band of Indians: Press Release, "Government Ready to Lift Discrimination", July 24, 1980.

61 The Minister used s. 4(2) to declare, at a band's behest, that various parts of s. 12 of the ***Indian Act***, R.S.C. 1970, c. I-6 (the "***1970 Act***") did not apply to members of that band. As of July 1984, it appears that 107 of the approximately 580 bands in Canada had sought exemption from s. 12(1)(b) (the women marrying out clause) while 311 had sought exemption from s. 12(1)(a)(iv), (the double mother' clause): Draft DIAND Report, "The Potential Impacts of Bill C-47 on Indian Communities", November 2, 1984.

62 On October 9, 1981, Minister Munro presented a Memorandum to Cabinet (the "MC") dated September 25, 1981, entitled, "Amendments to Remove the Discriminatory Sections of the Indian Act". The MC dealt both with proposed amendments to remove discriminatory clauses in the ***Indian Act*** affecting future generations, as well as reinstatement for those who lost status as a result of the discriminating provisions. With respect to future generations, the MC proposed that children of

"mixed" marriages would have Indian status, but that children "with one parent and one grandparent on the Indian side who is not Indian" would not have status (para. 22(iii)).

63 In the following months, consideration was given to developing a process of consultation with the First Nations community about the proposed amendments. On August 3, 1982, the Cabinet Committee on Priorities and Planning, approved the Minister's recommendation and authorized the Minister "to refer the subject matter of Indian Band Government, in addition to the subject of the elimination of discrimination on the basis of sex in the Indian Act, to the Standing Committee on Indian Affairs and Northern Development for study", according to the proposed terms of reference: Minutes of Cabinet Committee on Priorities and Planning, August 3, 1982.

64 Then, on August 4, 1982, the House of Commons empowered the Standing Committee to study the provisions of the ***Indian Act*** and report to the House concerning how the ***Act*** might be amended to remove those provisions that discriminate against women on the basis of sex and to make recommendations with respect to improving the arrangements with respect to Band government on the reserves: House of Commons, Hansard, August 4, 1982.

65 In August, 1982, the DIAND published a report entitled "*The Elimination of Sex Discrimination from the Indian Act*". The report was prepared to serve as an information source in conjunction with the consultation process. The report states the problem as follows at p. 7:

> Who is an Indian is defined in the *Indian Act*. The *Act* defines Indians in terms of who has the right to use and benefit from reserve lands and Indian monies. Only those Indians who are members of a particular band have the right to reside on reserve land set apart for that band; have the right to share in the capital assets held for or by the band; have a voice in the decision-making process affecting band assets and a vote in the political institutions of the band.
>
> All band members are Indians. For all intents and purposes, all Indians are also band members (there are now approximately 80 Indians, out of approximately 300,000 who are not members of bands). The criteria for defining Indian status (and therefore membership in a band) discriminate on the basis of sex and marital status since they are based on a patrilineal and patrilocal system.

66 In furtherance of its new mandate, the Standing Committee created the "Sub-Committee on Indian Women and the Indian Act" (the "Sub-Committee"). The Sub-Committee heard from 41 witnesses on behalf of 27 groups, as well as from Minister Munro. These groups held divergent views as to how the proposed amendments to the ***Indian Act*** to remove those provisions that discriminate against women on the basis of sex' should be dealt with. For example, the Assembly of First Nations ("AFN") wanted band control over the reinstatement of women to band membership, while the Native Women's Association of Canada ("NWAC") wanted immediate reinstatement of all women who had lost membership before granting bands control over membership: see the Minutes of Proceedings and Evidence of the Sub-Committee on Indian Women and the Indian Act ("Sub-Committee Evidence"), September 8, 9, 10, 13 and 14, 1982, and the Sixth Report of the Sub-Committee ("Sub-Committee Report"), September 1982.

67 The Sub-Committee produced a final Report, which the Standing Committee adopted and presented to the House of Commons. A theme throughout the Report is the tension between those

who wanted to regain entitlement to registration and to band membership and the bands who wanted to gain increased control over their own membership: Sub-Committee Report, September 1982.

68 With respect to the question of restoring the entitlement of women who had become disentitled to Indian registration by marriage to non-Indians, the Sub-Committee Report recommended the passage of:

> amendments to the *Indian Act* that would permit Indian women and their first generation children who lost status under s. 12(1)(b) to regain their status immediately upon application and would require bands to re-admit such women and children to band membership after a period of 12 months from the date of application. Regardless of whether the mother is still living, these children will be placed on the band list of the mother's band.
>
> (Sub-Committee Report, September 1, 1982 at p. 36.)

69 The Report also noted that,

> Under reinstatement we are concerned about women who lost status and their children who may have formerly been on band lists. All descendants not otherwise mentioned would come under the provisions dealing with children of mixed marriages.
>
> (Sub-Committee Report, September 1, 1982 at p. 35.)

70 With respect to the future registration of children of mixed marriages', the Report recommended as follows:

> Your Sub-committee recommends that all first generation children of unions where only one parent is of Indian status, born after the date of enactment of the amendments recommended in this report, automatically becomes a member of the band of the Indian parent.
>
> Your Sub-committee recommends that further consideration of the question of status or band membership of descendants of children of these mixed marriages be undertaken by the Sub-committee on Indian self-government.
>
> (Sub-Committee Report, September 1, 1982 at p. 32.)

71 In September 1982, the Standing Committee established a sub-committee on Indian Self-Government. In December of that year the House of Commons created a higher level Special Committee on Indian Self-Government to act as a "Parliamentary Task Force" to review all legal and related institutional factors affecting the status, development, and responsibilities of Band Governments on Indian reserves: see Standing Committee Minutes, September 20, 1982; the Minutes of The Special Committee on Indian Self-Government, October 7, 1983; and the Minutes of the Special Committee on Indian Self-Government, October 20, 1983 ("Penner Report"). The Special Committee an Indian Self-Government produced its report, dated October 20, 1983, (the "Penner Report") in September 1983 after an extensive period of consultation including 60 public hearings.

72 Ultimately, the government introduced ***Bill C-47, An Act to amend the Indian Act***, in relation to the elimination of discrimination and "***Bill C-52***", the companion legislation, granting increased self-government to Indian bands. An election was called on June 29, 1984, leaving ***Bill C-47*** on the Senate order paper and ***Bill C-52*** on the order paper of the House of Commons: see the House of Commons Debates on ***Bill C-47***, June 29, 1984; ***Bill C-47*** as passed by the House of Commons, June 29, 1984; Senate Debates on ***Bill C-47***, June 29, 1984; ***Bill C-52***, First Reading, June 27, 1984; and the House of Commons Debates on ***Bill C-52***, June 29, 1984.

73 During the fall and winter of 1984, the new government headed by Prime Minister Mulroney, took up consideration of amendments to the ***Indian Act***. ***Bill C-31*** was introduced for First Reading on February 28, 1985. Minister of Indian Affairs and Northern Development, David Crombie, stated in introducing ***Bill C-31*** for Second Reading:

> ... today I am asking Hon. Members to consider legislation which will eliminate two historic wrongs in Canada's legislation regarding Indian people. These wrongs are discriminatory treatment based on sex and the control by Government of membership in Indian communities.
>
> (House of Commons Debates on Second Reading of Bill C-31, March 1, 1985 at 2644.)

74 Minister Crombie enunciated the principles upon which ***Bill C-31*** was based:

> The first principle is that discrimination based on sex should be removed from the *Indian Act*.
>
> The second principle is that status under the *Indian Act* and band membership will be restored to those whose status and band membership were lost as a result of discrimination in the *Indian Act*.
>
> The third principle is that no one should gain or lose their status as a result of marriage.
>
> The fourth principle is that persons who have acquired rights should not lose those rights.
>
> The fifth principle is that Indian First Nations which desire to do so will be able to determine their own membership.
>
> (House of Commons Debates on Second Reading of Bill C-31, March 1, 1985 at 2645.)

75 Minister Crombie spoke of the balance ***Bill C-31*** struck between the wishes of the two main interest groups:

> This legislation achieves balance and rests comfortably and fairly on the principle that those persons who lost status and membership should have their status and membership restored. While there are some who would draw the line there,

> in my view fairness also demands that the first-generation descendants of those who were wronged by discriminatory legislation should have status under the *Indian Act* so that they will be eligible for individual benefits provided by the federal Government. However, their relationship with respect to membership and residency should be determined by the relationship with the Indian communities to which they belong.
>
> ...
>
> While there may be other ways to reach these objectives, I have to reassert what is unshakeable for this Government with respect to this Bill. First, it must include removal of discriminatory provisions in the *Indian Act*; second, it must include the restoration of status and membership to those who lost status and membership as a result of those discriminatory provisions; and third, it must ensure that Indian First Nations who wish to do so can control their own membership. Those are the three principles which allow us to find balance and fairness and to proceed confidently in the face of any disappointment which may be expressed by persons or groups who were not able to accomplish 100 per cent of their own particular goals.
>
> (House of Commons Debates on Second Reading of Bill C-31, March 1, 1985, at 2645-2646.)

76 After the second reading, ***Bill C-31*** was referred by the House of Commons to the Standing Committee and by the Senate to the Senate Standing Committee on Legal and Constitutional Affairs ("SSCLA").

77 During his introductory comments to the Standing Committee Minister Crombie described how the Government had sought to strike a balance in ***Bill C-31***, as follows:

> As I stated in tabling the bill, and as I repeated elsewhere, three basic underlying principles are contained in Bill C-31; and I am committed to each of those three: first of all, the removal of discrimination from the *Indian Act*; secondly, recognition of band control of membership; and thirdly, the restoration of rights to those who lost them. These three principles form the core of the government's approach to this issue. In the future status will be determined by the federal government on a totally non-discriminatory basis. Sex and marital status will not affect an individual's entitlement to be registered. No one will gain or lose status as a result of marriage, and in general the only criterion for status will be that at least one parent is registered.
>
> The only role to be played by the federal government in the future, then, will be to determine Indian status. Federal registration of status has and will continue to be an indication of the special relationship between the Government of Canada and Indian people. In doing so, it will be a means of determining the eligibility for programs which the federal government offers to individual Indians. The recognition of band control of membership has long been demanded by Indian

people. Bill C-31 recognizes that bands are the only ones who should legitimately decide who is a band member. The bill provides that bands can assume control over membership if a majority of electors agree. The federal government will no longer have a role in membership unless bands do not act to assume control. Membership, therefore, will be determined by the bands themselves.

The third objective is the restoration of rights. This is essential if the bill is to pass the test of fairness. Approximately 22,000 people who directly lost status and membership as a result of the discrimination will have both status and band membership restored upon application. To do less would perpetuate a particularly blatant form of discrimination. Similarly, fairness demands that special recognition be given to first-generation descendants of those who directly lost status, and that is why this bill proposes that such people be entitled to first-time registration of status. As I stated on Friday last, I believe the bill constitutes a balanced approach to a complex issue, and above all, in my view it is fair to both the individuals and the bands.

Mr. Chairman, several people have expressed concerns regarding the treatment of first-generation descendants, and as I understand it, this concern is that these people who are entitled to status will in some way be second class if they do not receive automatic band membership through government legislation. This is not true with respect to Indian status. All registered Indians will have the same status. The difference will be in band membership, and the determination of band membership will be by the band.

It is true that first-generation descendants of restored people will not automatically have band membership. In this respect, they will be different from their cousins, but this goes back to the question of balance and fairness. Giving band membership automatically by government fiat to all first-generation descendants would make a mockery of band control, of band membership. That is why I firmly believe that drawing the line on first-generation registration for status is fair and reasonable.

It is rare for governments, in proposing amendments, to redress past wrongs. However, in this instance I think to not do so would be to fail in the test of fairness. What we are learning, however, is that in dealing with the effects of past wrongs it is not always possible to remove all the residue of that wrong without creating new injustices and new problems. This is the situation before us, and that is why I have dealt with it in the way I have.

Many spokespersons for bands and organizations have expressed concern that bands will be forced to accept large numbers of new members, and they fear that these people will flood the reserves which are already overcrowded, and I can understand their concern. I would like to remind them that the only people with the right to membership will be those who directly lost it. These people were

band members previously. In most cases they spent their formative years on the reserves, and fairness demands that they be given back what they lost.

(Minutes of Proceedings and Evidence of the Standing Committee, March 7, 1985, p. 12:7-12:9.)

78 In summary, with respect to the matters at issue in these proceedings the key elements of the government's intentions with respect to these amendments were:

(a) the federal government retained control over the determination of Indian status. This was to reflect and recognize the special relationship between Indian people and the Government of Canada;
(b) the issue of Indian status was separated from the issue of band membership. Control over band membership was given to bands. The only role of the federal government with respect to band membership in the future was with respect to those bands who chose not to assume control over their own membership; and
(c) status was to be determined on a "totally non-discriminatory basis". Sex and marital status would no longer affect an individual's entitlement to registration.

79 It is the plaintiffs' contention in these proceedings that the remedial efforts with respect to this last element were incomplete and that the registration provisions continue to discriminate on the basis of sex and marital status.

The *1985 Act* Registration Provisions

80 The ***1985 Act*** was proclaimed on June 28, 1985, but made retroactive to April 17, 1985, the date when s. 15 of the ***Charter*** came into effect. The ***1985 Act*** preserved all of the registration entitlements that existed prior to April 17, 1985, and established a new scheme of registration for those not previously entitled to be registered. Section 6 provides:

Persons entitled to be registered

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

(a) that person was registered or entitled to be registered immediately prior to April 17, 1985;
(b) that person is a member of a body of persons that has been declared by the Governor in Council on or after April 17, 1985 to be a band for the purposes of this Act;
(c) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(a)(iv), paragraph 12(1)(b) or subsection 12(2) or under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;

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

(e) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951,

(i) under section 13, as it read immediately prior to September 4, 1951, or under any former provision of this Act relating to the same subject-matter as that section, or

(ii) under section 111, as it read immediately prior to July 1, 1920, or under any former provision of this Act relating to the same subject-matter as that section; or

(f) that person is a person both of whose parents are or, if no longer living, were at the time of death entitled to be registered under this section.

Idem

(2) Subject to section 7, a person is entitled to be registered if that person is a person one of whose parents is or, if no longer living, was at the time of death entitled to be registered under subsection (1).

Deeming provision

(3) For the purposes of paragraph (1)(f) and subsection (2),

(a) a person who was no longer living immediately prior to April 17, 1985 but who was at the time of death entitled to be registered shall be deemed to be entitled to be registered under paragraph (1)(a); and

(b) a person described in paragraph (1)(c), (d), (e) or (f) or subsection (2) and who was no longer living on April 17, 1985 shall be deemed to be entitled to be registered under that provision.

81 Pursuant to s. 6, the categories of persons entitled to registration as Indians are:

(1) 6(1)(a): persons who were registered or entitled to be registered prior to April 17, 1985;

(2) 6(1)(b): members of bands declared by the Governor in Council after April 17, 1985;

(3) persons who were previously removed or omitted from the Register or from a band list prior to September 4, 1951, because:

(a) s. 6(1)(c):

(i) their mothers and paternal grandmothers were Indians (Double Mother clause) [s. 12(a)(iv)];
(ii) women who had married non-Indians [s. 12(1)(b)];
(iii) illegitimate children of Indian women who had been protested out [s. 12(2)];
(iv) women who married non-Indians and were enfranchised or commuted, and their children [s. 12(1)(a)(iii) pursuant to an order under s. 109(2) or equivalent];

(b) s. 6(1)(d): men and women enfranchised on application [s. 12(1)(a)(iii) pursuant to an order under s. 109(1) or equivalent];
(c) s. 6(1)(e):

(i) men and women enfranchised after spending five years out of Canada without permission [s. 13];
(ii) men and women enfranchised after being admitted to the clergy, practicing medicine or law, or obtaining a university degree [s. 111];

(4) s. 6(1)(f): people whose parents are or were entitled to be registered under s. 6 when they died; and
(5) s. 6(2): people with one parent entitled to be registered under s. 6(1).

82 Section 6(1)(a) confirmed the registration of Indian men, their wives and descendants who, prior to 1985, fell within the definition of Indian under prior ***Indian Acts.*** Following the passage of the ***1985 Act***, and pursuant to s. 6, if someone entitled to registration pursuant to s. 6(1)(a) was married to someone who was not entitled to registration, their children would be entitled to registration pursuant to s. 6(1)(a) or s. 6(1)(f), depending on whether they were born before or after the coming into force of the ***1985 Act***. By contrast, the children of a person who was registered pursuant to s. 6(1)(c), would be registered pursuant to s. 6(2). If a person registered pursuant to s. 6(2) married a person not entitled to registration, their children would not be entitled to register as Indians. This is referred to as the "second generation cut-off". The following chart illustrates the operation of the second generation cut-off:

[Editor's note: Table 1 could not be reproduced online. Please contact Quicklaw Customer Service at 1-800-387-0899 or service@quicklaw.com and request the following document: 07bc1259.doc.]

83 Prior to the 1985 amendments, there was no distinction between Indian registration or status, and band membership, with the limited exception of those on the "General List" who were registered under the ***Indian Act***, but not members of any band. As of 1981, there were only approximately 80 people registered on the General List: see Beauregard, A., DIAND Briefing Note, June 22, 1981.

84 The 1985 amendments distinguished the concepts of registration and band membership. The rules governing registration are, as has been reviewed, set out in s. 6. The rules governing band membership are contained in ss. 10 and 11 of the ***1985 Act***. As stated at the outset, the plaintiffs do not bring any challenge with respect to the sections of the ***1985 Act*** dealing with band membership.

85 Pursuant to the 1985 amendments, entitlement to membership in a band does not follow automatically from Indian status. Section 10 of the ***1985 Act*** provides bands with the ability to assume control of their own membership. For example, under the ***1985 Act***, bands that assumed control of their membership in the period between April 17, 1985, and June 28, 1987, are not required to accept into their band all those entitled to registration under s. 6 of the ***1985 Act***. It is therefore possible to be registered as an Indian and not be a member of a band. The terms of the membership codes of some bands illustrate this separation of status and membership: see the *Royal Commission Report* at c. 2, p. 43, and Clatworthy, S., *Indian Registration, Membership and Population Changes in First Nations Communities* (Winnipeg, Four Directions Project Consultants, 2005) [***Clatworthy, 2005***].

86 As of December 31, 2002, more than one-third of all Indian bands had adopted their own rules for membership and approximately 28 percent of those Bands are applying membership rules that differ significantly from the rules governing registration. Many Bands elected to exclude Indians with s. 6(2) status from initial membership resulting in a population of registered Indians who do not possess band membership: ***Clatworthy, 2005*** at pp. 12 and 14. Some bands employ membership rules that provide Band membership to persons who do not have registration status: ***Clatworthy, 2005*** at pp. 24 and 33.

87 At present, nearly all of those who lack eligibility for Band membership are the descendants of women who lost their registration as a consequence of the prior ***Indian Act's*** rules concerning mixed marriages. Over the course of the next and future generation(s), the non-eligible population is expected to grow rapidly and to also include many individuals who are the descendants of current members: ***Clatworthy, 2005*** at p. 41.

III. THE PLAINTIFFS AND THE PROCEEDINGS

Genealogical Background

88 Sharon McIvor and Jacob Grismer are descendants of members of the Lower Nicola Indian Band. Prior to the passage of the ***1985 Act***, they understood that they could not be registered as Indians because they traced their Indian ancestry along the female line rather than the male line.

89 Sharon McIvor's maternal grandmother was Mary Tom. Ms. Tom was born in 1888. Mary Tom's parents, the Enalks, were both Indians and members of the Lower Nicola Band. Mary Tom was an Indian pursuant to the ***Indian Act*** in force when she was born, the ***Indian Act***, R.S.C. 1886, c. 43 (the "***1886 Act***"), and a member of the Lower Nicola Band. Sharon McIvor's maternal grandfather was Jacob Blankinship, who was a man with no First Nations ancestors, and who did not fall within the classification of Indian pursuant to any ***Indian Act***. Ms. Tom and Mr. Blankinship were never married. They lived in a common law relationship. Ms. Tom and Mr. Blankinship were the parents of Susan Blankinship, Sharon McIvor's mother.

90 Susan Blankinship was born on May 28, 1925. She died on October 30, 1972. Ms. Blankinship was never registered as an Indian under any ***Indian Act***. Sharon McIvor testified that her understanding growing up was that her mother was not entitled to be registered because of her non-Indian paternity. Ms. McIvor's father was Ernest McIvor, who was born April 5, 1925. Susan Blankinship and Ernest McIvor were never married. They lived in a common law relationship.

91 Ernest McIvor was of First Nations descent, but he was not registered as an Indian. Sharon McIvor testified that it was her understanding growing up that her father was not entitled to be registered. Ernest McIvor's mother was Cecelia McIvor. Cecelia McIvor was entitled to have been a member of a band. His father was Alexander McIvor, who was not of first Nations ancestry, and who was not registered as an Indian pursuant to any ***Indian Act***. Cecelia McIvor and Alexander McIvor were never married.

92 Sharon McIvor, was born on October 9, 1948. Prior to 1985, she was not registered as an Indian pursuant to any ***Indian Act***. It was her understanding that, prior to the 1985 amendments to the ***Indian Act***, she could not be registered as an Indian pursuant to the ***Indian Act*** in force at her birth or as amended. Ms McIvor testified that she did not apply for registration prior to the 1985 amendments to the ***Indian*** **Act** because it was her understanding that she was not eligible for registration.

93 Ms. McIvor married Charles Terry Grismer on February 14, 1970. Mr. Grismer was not of First Nations ancestry and he was not registered as an Indian pursuant to any ***Indian Act***. Upon her marriage to someone who was not entitled to be registered under the ***Indian Act***, Ms. McIvor lost entitlement to registration pursuant to the ***1951 Act***.

94 Charles Grismer and Sharon McIvor had three children, Jacob, born June 3, 1971; Jaime, born September 27, 1976; and Jordana, born February 6, 1983. The children could not be registered as Indians pursuant to the ***Indian Act*** then in force, because they were the legitimate children of an Indian mother and a non-Indian father.

95 Ms. McIvor has another son, Payikeesik Beatty-Smith. Ms. McIvor adopted Payikeesik by custom when he was born. He is a registered Indian and a member of the Montreal Lake Band in Saskatchewan.

96 At the outset of the action, Jaime and Jordana were also plaintiffs. However, on November 27, 2001, Teressa Nahanee, who is registered under s. 6(1)(a) of the ***1985 Act***, and Sharon McIvor, who was at that time registered under s. 6(2) of the ***1985 Act***, were granted an adoption order, as a result of which Jaime and Jordana were granted status under s. 6(1)(f) of the ***1985 Act***. Jaime and Jordana then withdrew from the action, by consent. Because of his age, Jacob Grismer was not eligible to be adopted.

97 On April 2, 1999, Jacob Grismer married Deneen Joy Simon, a woman with no First Nations ancestry. They are raising two children, Jason, born November 9, 1993, and Christopher, born November 15, 1991. The following chart is a summary of the plaintiffs' family tree.

[Editor's note: Table 2 could not be reproduced online. Please contact Quicklaw Customer Service at 1-800-387-0899 or service@quicklaw.com and request the following document: 07bc1259.doc.]

Proceedings Regarding Registration

98 On September 25, 1985, Sharon McIvor applied on her own behalf and on behalf of her children, including Jacob Grismer, to be registered as Indians pursuant to s. 6(1) of the ***1985 Act***. The application was made to the Registrar, the officer of the DIAND, who is in charge of the Indian Register [the "Register"] and the Band Lists maintained in DIAND, pursuant to the ***1985 Act***. This was the first application for registration made in relation to Ms. McIvor or her children.

Case Name:

McIvor v. Canada (Registrar, Indian and Northern Affairs)

Between
Sharon Donna McIvor and Charles Jacob Grismer, Respondents, (Plaintiffs), and
The Registrar, Indian and Northern Affairs Canada, The Attorney General of Canada, Appellants, (Defendants), and
Native Women's Association of Canada, Congress of Aboriginal Peoples, First Nations Leadership Council, West Moberly First Nations, T'Sou-ke Nation, Grand Council of the Waban-Aki Nation, the Band Council of the Abenakis of Odanak and the Band Council of the Abenakis of Wôlinak, Aboriginal Legal Services of Toronto, Intervenors

[2009] B.C.J. No. 669

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190 C.R.R. (2d) 249

[2009] 9 W.W.R. 613

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

91 B.C.L.R. (4th) 1

[2009] 2 C.N.L.R. 236

2009 CarswellBC 843

269 B.C.A.C. 129

Docket: CA035223

British Columbia Court of Appeal
Vancouver, British Columbia

M.V. Newbury, D.F. Tysoe and H. Groberman JJ.A.

Heard: October 14-17, 2008; written submissions,
October 31, November 14 and 20, 2008.
Judgment: April 6, 2009.

(166 paras.)

[Editor's note: Supplementary reasons for judgment were released April 1 and July 2, 2010. See [2010] B.C.J. No. 586 and [2010] B.C.J. No. 1309.]

!!ABR50 !!ABR245 !!CON890 !!CON975 !!ABR00 !!CON00

[QL:QLKEYWORDS/]

Aboriginal law -- Aboriginal status and rights -- Aboriginal status -- Entitlement to status -- Aboriginal descent or ancestry -- Constitutional issues -- Canadian Charter of Rights and Freedoms -- Aboriginal women -- Appeal by Crown from decision finding that s. 6 of Indian Act, which established a person's entitlement to be registered as Indian, violated Charter of Rights on basis of sex and marital status allowed -- Amendments to Act in 1985 were unconstitutional, as they accorded Indian status to children with one aboriginal parent, where that parent only had one parent who was aboriginal, provided that grandparent was male -- Same was not true if grandparent was female -- Sections 6(1)(a) and 6(1)(c) were declared of no force and effect -- Declaration suspended one year to allow Parliament time to amend legislation to make it constitutional.

Constitutional law -- Canadian Charter of Rights and Freedoms -- Equality rights -- Remedies for denial of rights -- Legislative remedies -- Temporary suspension of declaration of invalidity -- Appeal by Crown from decision finding that s. 6 of Indian Act, which established a person's entitlement to be registered as Indian, violated Charter of Rights on basis of sex and marital status allowed -- Amendments to Act in 1985 were unconstitutional, as they accorded Indian status to children with one aboriginal parent, where that parent only had one parent who was aboriginal, provided that grandparent was male -- Same was not true if grandparent was female -- Sections 6(1)(a) and 6(1)(c) were declared of no force and effect -- Declaration suspended one year to allow Parliament time to amend legislation to make it constitutional.

Appeal by the Crown from a trial decision finding that s. 6 of the Indian Act, which established the entitlement of a person to be registered as an Indian, violated the Charter of Rights on the basis of sex and marital status. Prior to 1985, neither of the appellants, McIvor and her son Grismer, had Indian status. After changes to the Indian Act in 1985, McIvor had status under s. 6(1)(c) of the Act, and Grismer had status under s. 6(2). Their claim was that Grismer should be given status equivalent to those who come under s. 6(1) of the statute, so that he would be able to pass on Indian status to his children despite the fact that his wife was non-Indian. The complaint was essentially that Grismer's children would have Indian status if his Indian status had been transmitted to him through his father rather than through his mother. The plaintiffs claimed that was ongoing discrimination on the basis of sex, which contravened s. 15 of the Charter. The trial judge found that the registration provisions contained in s. 6 of the 1985 Act discriminated on the basis of sex and marital status

contrary to ss. 15 and 28 of the Charter and that such discrimination had not been justified by the government. She declared s. 6 of no force and effect.

HELD: Appeal allowed. The 1985 legislation violated the Charter by according Indian status to children who had only one parent who was Indian (other than by reason of having married an Indian), where that parent was born prior to April 17, 1985, and where that parent in turn only had one parent who was Indian (other than by reason of having married an Indian), if their Indian grandparent was a man, but not if their Indian grandparent was a woman. The legislation would have been constitutional if it had preserved only the status that such children had before 1985. By according them enhanced status, it created new inequalities and violated the Charter. However, it was not appropriate for the Court to augment Grismer's Indian status, or grant such status to his children; there was no obligation on the government to grant such status. On the other hand, it would be entirely unfair for the Court to instantaneously deprive persons who had status since 1985 of that status as a result of a dispute between the government and the respondents. In the end, the decision as to how the inequality should be remedied was one for Parliament. Sections 6(1)(a) and 6(1)(c) were declared of no force and effect. However, the declaration was suspended for a period of 1 year, to allow Parliament time to amend the legislation to make it constitutional.

Statutes, Regulations and Rules Cited:

An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42, S.C. 1869, c. 6 (32-33 Vict.), s. 6

An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands, S.C. 1868, c. 42 (31 Vict.), s. 15

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 15, s. 28

Constitution Act, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 35(1), s. 35(4)

Indian Act, S.C. 1951, c. 29 (15 Geo. VI)., s. 10, s. 11(a), s. 11(b), s. 11(c), s. 11(d), s. 11(e), s. 11(f), s. 12(1)

Indian Act, R.S.C. 1985, c. I-5, s. 6, s. 12(1)(a)(iv)

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Anja P. Brown: Counsel for First Nations Leadership Council.

Christopher G. Devlin: Counsel for West Moberly First Nations.

Robert Janes: Counsel for T'Sou-ke Nation.

Peter R. Grant, David Schulze: Counsel for Grand Council of Waban-Aki Nation, Band Council of the Abenakis of Odanak and Band Counsel of the Abenakis of Wôlinak.

Kasari Govender: Counsel for Aboriginal Legal Services of Toronto.

[Editor's note: Corrigenda were released by the Court June 3 and July 13, 2009; the corrections have been made to the text and the corrigenda are appended to this document.]

Reasons for Judgment

The judgment of the Court was delivered by

1 H. GROBERMAN J.A.:-- This appeal concerns the constitutionality of s. 6 of the *Indian Act*, R.S.C. 1985, c. I-5, which establishes the entitlement of a person to be registered as an Indian. The plaintiffs argue that the provisions of that section violate the *Canadian Charter of Rights and Freedoms* because they discriminate on the basis of sex and marital status. While the remedy they seek is complex, the plaintiffs' major claim is that Mr. Grismer should be entitled to transmit Indian status to his children, despite the fact that his father was non-Indian and his wife is non-Indian.

2 The plaintiffs were successful at trial, though the order of the trial judge has been stayed pending appeal. The reasons of the trial judge, Ross J., are indexed as 2007 BCSC 827. She delivered supplementary reasons on remedy, which are indexed as 2007 BCSC 1732.

3 In these reasons for judgment, unless the context indicates a different usage, I will use the term "Indian" to mean a person entitled to registration as an Indian under the *Indian Act*, which I will refer to as "Indian status". I will use the term "non-Indian" to mean a person not entitled to such status.

Overview

4 Prior to the coming into force of the current legislation in 1985, the *Indian Act* treated women and men quite differently. An Indian woman who married a non-Indian man ceased to be an Indian. An Indian man who married a non-Indian woman, on the other hand, remained an Indian; his wife also became entitled to Indian status.

5 Children who were the product of a union of an Indian and a non-Indian were non-Indian if their father was non-Indian. On the other hand, the legitimate children of an Indian father were Indian, subject only to the "Double Mother Rule", which provided that if a child's mother and paternal grandmother did not have a right to Indian status other than by virtue of having married Indian men, the child had Indian status only up to the age of 21.

6 The old provisions had been heavily criticized prior to 1985, and there was a strong movement to amend them. Unfortunately, there was considerable controversy over what ought to replace them. With the coming into force of s. 15 of the *Charter* on April 17, 1985, the need to amend the law took on new urgency, as it was clear that the then-existing regime discriminated on the basis of sex.

7 The current system of entitlement to Indian status was enacted by *An Act to amend the Indian Act*, S.C. 1985, c. 27, s. 4. The amending *Act* received Royal Assent on June 28, 1985, but was deemed (by virtue of s. 23 of the *Act*) to have come into force on April 17, 1985, the date on which s. 15 of the *Charter* took effect.

8 On its face, the current system makes no distinction on the basis of sex. From April 17, 1985 on, no person gains or loses Indian status by reason of marriage. A child of two Indians is an Indian. A child who has one Indian parent and one non-Indian parent is entitled to status unless the Indian parent also had a non-Indian parent. In sum, the current legislation does away with distinctions between men and women in terms of their rights to status upon marriage, and in terms of their rights to transmit status to their children and grandchildren.

9 There is little doubt that the provisions of the *Indian Act* that existed prior to the 1985 amendments would have violated s. 15 of the *Charter* had they remained in effect after April 17, 1985. Equally, it is clear that if the current provisions had always been in existence, there could be no claim that the regime discriminates on the basis of sex. The difficulty lies in the transition between a regime that discriminated on the basis of sex and one that does not.

10 The 1985 legislation was enacted only after extensive consultation. It represents a *bona fide* attempt to eliminate discrimination on the basis of sex. For the most part, the legislation was prospective in orientation; it did not go so far as to grant Indian status to everyone who had an ancestor who had lost status under earlier discriminatory provisions. It did, however, reinstate Indian status to women who had lost their status by marrying non-Indians. It also reinstated status to certain other persons, including those who lost it by virtue of the Double Mother Rule.

11 Subject to these, and a few other statutory exceptions, a person's entitlement to Indian status (or lack thereof) prior to April 17, 1985 subsisted after the coming into force of the new legislation. The plaintiffs argue that in using the former regime as the starting point for determining the status, the government effectively continued a discriminatory regime. They say that that continuation violates s. 15 of the *Charter*.

12 The defendants argue that the *Charter* cannot be applied retrospectively, and that it was therefore sufficient for Parliament to enact a regime that was non-discriminatory going forward. They claim that the government was not required to enact legislation that sought to undo all of the effects of legislation that had been in place for over one hundred years. Indeed, they say, the new legislation is generous in reinstating the right to Indian status to certain groups of people; it goes further than necessary in trying to redress past wrongs.

13 The analysis of the issue is made more difficult by the fact that the provisions governing Indian status are complex. The system was not a static one before 1985, and the manner in which illegitimate children and those of partial Indian heritage have been treated varied over time. There are, as well, provisions of the *Indian Act* that allow the government to exempt particular bands from particular provisions of the *Act*, and those provisions were frequently used after 1980. I will, as necessary, refer to particular changes and exemptions to the *Indian Act* that have a bearing on the issues at bar.

Legislative History Prior to the 1985 Amendments

14 Historically, members of First Nations in Canada were subject to special disqualifications as well as special entitlements. Not surprisingly, it became necessary, even prior to Confederation, to enact legislation setting out who was and who was not considered to be an Indian. In 1868, the first post-confederation statute establishing entitlement to Indian status was enacted. Section 15 of *An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, S.C. 1868, c. 42 (31 Vict.) provided as follows:

> 15. For the purpose of determining what persons are entitled to hold, use or enjoy the lands and other immoveable property belonging to or appropriated to the use of the various tribes, bands or bodies of Indians in Canada, the following persons and classes of persons, and none other, shall be considered as Indians belonging to the tribe, band or body of Indians interested in any such lands or immoveable property:
>
> *Firstly*. All persons of Indian blood, reputed to belong to the particular tribe, band or body of Indians interested in such lands or immoveable property, and their descendants;
>
> *Secondly.* All persons residing among such Indians, whose parents were or are, or either of them was or is, descended on either side from Indians or an Indian reputed to belong to the particular tribe, band or body of Indians interested in such lands or immoveable property, and the descendants of all such persons; And
>
> *Thirdly.* All women lawfully married to any of the persons included in the several classes hereinbefore designated; the children issue of such marriages, and their descendants.

15 This early legislation, then, treated Indian men and women differently, in that an Indian man could confer status on his non-Indian wife through marriage, while an Indian woman could not confer status on her non-Indian husband. It appears that one rationale for this distinction was a fear that non-Indian men might marry Indian women with a view to insinuating themselves into Indian bands and acquiring property reserved for Indians.

16 In 1869, the first legislation that deprived Indian women of their status upon marriage to non-Indians was passed. Section 6 of *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42*, S.C. 1869, c. 6 (32-33 Vict.) amended s. 15 of the 1868 statute by adding the following proviso:

> Provided always that any Indian woman marrying any other than an Indian shall cease to be an Indian within the meaning of this Act, nor shall the children issue of such marriage be considered as Indians within the meaning of this Act; Provided also, that any Indian woman marrying an Indian of any other tribe, band or body shall cease to be a member of the tribe, band or body to which she formerly belonged, and become a member of the tribe, band or body of which her husband is a member, and the children, issue of this marriage, shall belong to their father's tribe only.

17 The traditions of First Nations in Canada varied greatly, and this new legislation did not reflect the aboriginal traditions of all First Nations. To some extent, it may be the product of the Victorian mores of Europe as transplanted to Canada. The legislation largely parallels contemporary views of the legal status of women in both English common law and French civil law. The status of

a woman depended on the status of her husband; upon marriage, she ceased, in many respects for legal purposes, to be a separate person in her own right.

18 The general structure of 1869 legislation was preserved in the first enactment of the *Indian Act*, as S.C. 1876, c. 18 (39 Vict.). This statute added further bases for the loss of Indian status, including provisions whereby an illegitimate child of an Indian could be excluded by the Superintendent General of Indian Affairs.

19 Substantial changes in the regime were introduced in the *Indian Act*, S.C. 1951, c. 29 (15 Geo. VI). The statute created an "Indian Register". Sections 10-12 of the *Act* defined entitlement to registration as an Indian:

> 10. Where the name of a male person is included in, omitted from, added to or deleted from a Band List or a General List, the names of his wife and his minor children shall also be included, omitted, added or deleted, as the case may be.
> 11. Subject to section twelve, a person is entitled to be registered if that person
>
> (a) on the twenty-sixth day of May, eighteen hundred and seventy-four, was, for the purposes of *An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands,* chapter forty-two of the statutes of 1868, as amended by section six of chapter six of the statutes of 1869, and section eight of chapter twenty-one of the statutes of 1874, considered to be entitled to hold, use or enjoy the lands and other immovable property belonging to or appropriated to the use of the various tribes, bands or bodies of Indians in Canada,
> (b) is a member of a band
>
> (i) for whose use and benefit, in common, lands have been set apart or since the twenty-sixth day of May, eighteen hundred and seventy-four have been agreed by treaty to be set apart, or
> (ii) that has been declared by the Governor in Council to be a band for the purposes of this Act,
>
> (c) is a male person who is a direct descendant in the male line of a male person described in paragraph (a) or (b),
> (d) is the legitimate child of
>
> (i) a male person described in paragraph (a) or (b), or
> (ii) a person described in paragraph (c),
>
> (e) is the illegitimate child of a female person described in paragraph (a), (b) or (d), unless the Registrar is satisfied that the father of the child was not an Indian and the Registrar has declared that the child is not entitled to be registered, or
> (f) is the wife or widow of a person who is entitled to be registered by virtue of paragraph (a), (b), (c), (d) or (e).

12. (1) The following persons are not entitled to be registered, namely,

(a) a person who

(i) has received or has been allotted half-breed lands or money scrip,
(ii) is a descendant of a person described in subparagraph (i),
(iii) is enfranchised, or
(iv) is a person born of a marriage entered into after the coming into force of this Act and has attained the age of twenty-one years, whose mother and whose father's mother are not persons described in paragraph (a), (b), (d), or entitled to be registered by virtue of paragraph (e) of section eleven, unless, being a woman, that person is the wife or widow of a person described in section eleven, and

(b) a woman who is married to a person who is not an Indian.

20 Apart from one amendment in 1956, this legislation survived intact until the 1985 legislation. The 1956 amendment made a change in the manner in which the registration of an illegitimate child could be nullified. It allowed the council of the band to which a child was registered, or any ten electors of the band, to file a written protest against the registration of the child on the ground that the child's father was not an Indian. The Registrar was then required to investigate the situation, and to exclude the child if the child's father was determined to be a non-Indian.

21 For the purposes of this litigation, then, there were three significant features of the legislation that immediately pre-dated the coming into force of s. 15 of the *Charter*: First, a woman lost her status as an Indian if she married a non-Indian. On the other hand, an Indian man retained his status if he married a non-Indian, and his wife also became entitled to status.

22 Second, a child born of a marriage between an Indian and a non-Indian was an Indian only if his or her father was an Indian. The rules for illegitimate children were more complex - if both parents were Indians, the child was an Indian. If only the father was an Indian, the child was non-Indian, and if only the mother was an Indian, the child was an Indian, but subject to being excluded if a protest was made.

23 Finally, from 1951 onward, where an Indian man married a non-Indian woman, any child that they had was an Indian. If, however, the Indian man's mother was also non-Indian prior to marriage, the child would cease to have Indian status upon attaining the age of 21 under the Double Mother Rule.

Growing Discontent with the Status Regime

24 The statutory provisions for determining Indian status were, from the beginning, at odds with the aboriginal traditions of some First Nations. By the last half of the twentieth century, they were also at odds with broader societal norms. The idea that women did not have separate personal identities from their husbands was increasingly recognized as offensive. Further, the personal hardship many Indian women faced upon losing their Indian status and band membership was severe. Some First Nations also objected to the Double Mother Rule, considering that those with Indian

blood brought up in an Indian culture should remain Indians even if they had only one grandparent of Indian descent.

25 There was widespread dissatisfaction with the rules governing Indian status. As outlined by the learned trial judge, numerous studies and reports criticized the contemporary legislation. There were also legal challenges to it. The Supreme Court of Canada narrowly upheld the legislation in *A.G. Canada v. Lavell*, [1974] S.C.R. 1349, holding that the provisions of the *Canadian Bill of Rights* did not allow it to declare such a law inoperative.

26 In 1981, in *Lovelace v. Canada*, Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) at 166, the United Nations Human Rights Committee considered arguments that the *Indian Act* violated provisions of the International Covenant on Civil and Political Rights. Ms. Lovelace had lost her Indian status in 1970 on marrying a non-Indian. The marriage eventually broke down, and Ms. Lovelace wished to return to live on reserve, but was denied the right to do so because she no longer had Indian status. The Committee found the denial to be unreasonable in the particular situation of the case, and to violate the applicant's rights to take part in a minority culture.

27 By the early 1980s, it was clear that the legislative scheme for determining Indian status needed to be changed. There was, however, considerable difficulty in finding a new scheme to replace the old one. There was simply no consensus among First Nations groups as to who should be reinstated to Indian status, and as to what the future rules governing status should be. Some groups were fearful that a sudden reinstatement to status of a large number of persons might overwhelm the resources available to Indian bands, or dilute traditional First Nations culture. In addition, there was a strong movement among First Nations groups to seek a level of control over band membership. Pressures aimed at a higher degree of self-government made it difficult for the government of the day to impose a new regime by legislation.

28 It is unnecessary to detail all of the various positions taken by different aboriginal and governmental groups. The trial judge has discussed many of the various movements, government studies, and reports, and has reproduced some of their arguments and rhetoric in her judgment, particularly at paragraphs 38 to 77.

29 While the debate continued, the then-Minister of Indian Affairs and Northern Development offered, in July of 1980, to have proclamations issued under s. 4 of the *Indian Act* to exempt bands, at their request, from particular provisions of the *Act*. While the record does not contain complete evidence of the take-up rate on the Minister's offer, it does appear to have been significant, particularly with respect to s. 12(1)(a)(iv) (the Double Mother Rule) and, to a lesser extent, with respect to s. 12(1)(b) (the provision under which a woman who married a non-Indian lost her status - I will refer to this as the "Marrying Out Rule").

30 In its First Report to the Parliamentary Standing Committee on Indian Affairs and Northern Development (quoted in the Standing Committee's Sixth Report to Parliament, September 1, 1982), the Sub-committee on Indian Women and the Indian Act reported that by July of 1982, some 285 Indian bands had requested exemptions from the Double Mother Rule and 63 had requested exemptions from the Marrying Out Rule. A draft report from the Department of Indian Affairs and Northern Development entitled "The Potential Impacts of Bill C-47 on Indian Communities" (November 2, 1984) stated that by July 1984, out of a total of about 580 bands in Canada, 311 (54%) had sought exemption from the Double Mother Rule, and 107 (18%) had sought exemption from the Marrying Out Rule.

31 In an attempt to bring the *Indian Act* into compliance with s. 15 of the *Charter* without causing turmoil for First Nations, the government eventually brought forward compromise legislation. In introducing the legislation for second reading in the House of Commons, the then-Minister of Indian Affairs and Northern Development outlined five principles on which the legislation was based (Hansard, March 1, 1985, at p. 2645):

> The legislation is based on certain principles, which are the cornerstones that John Diefenbaker identified. The first principle is that discrimination based on sex should be removed from the Indian Act.
>
> The second principle is that status under the Indian Act and band membership will be restored to those whose status and band membership were lost as a result of discrimination in the Indian Act.
>
> The third principle is that no one should gain or lose their status as a result of marriage.
>
> The fourth principle is that persons who have acquired rights should not lose those rights.
>
> The fifth principle is that Indian First Nations which desire to do so will be able to determine their own membership.

32 Section 6 of the *Indian Act*, R.S.C. 1985, c. I-5 remains as it was amended in 1985. It reads as follows:

> 6(1) Subject to section 7, a person is entitled to be registered if
>
> (a) that person was registered or entitled to be registered immediately prior to April 17, 1985;
> (b) that person is a member of a body of persons that has been declared by the Governor in Council on or after April 17, 1985 to be a band for the purposes of this Act;
> (c) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(a)(iv), paragraph 12(1)(b) or subsection 12(2) or under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;
> (d) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(1), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;

(e) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951,

(i) under section 13, as it read immediately prior to September 4, 1951, or under any former provision of this Act relating to the same subject-matter as that section, or

(ii) under section 111, as it read immediately prior to July 1, 1920, or under any former provision of this Act relating to the same subject-matter as that section; or

(f) that person is a person both of whose parents are or, if no longer living, were at the time of death entitled to be registered under this section.

(2) Subject to section 7, a person is entitled to be registered if that person is a person one of whose parents is or, if no longer living, was at the time of death entitled to be registered under subsection (1).

(3) For the purposes of paragraph (1)(f) and subsection (2),

(*a*) a person who was no longer living immediately prior to April 17, 1985 but who was at the time of death entitled to be registered shall be deemed to be entitled to be registered under paragraph (1)(a); and

(*b*) a person described in paragraph (1)(c), (d), (e) or (f) or subsection (2) and who was no longer living on April 17, 1985 shall be deemed to be entitled to be registered under that provision.

33 Section 6(1)(a) is a key provision. It preserves the status of all persons who were entitled to status immediately prior to the 1985 amendments. The plaintiffs say that the section violates s. 15 of the *Charter* by incorporating, by reference, the discriminatory regime that existed before 1985.

34 Other key provisions are ss. 6(1)(c) and 6(2). Section 6(1)(c) restores the status of (among others) people who were disqualified from status under the Marrying Out Rule and the Double Mother Rule. Section 6(2) applies what is known as the "Second Generation Cut-off". It extends Indian status to a person with one Indian parent, but, significantly, does not allow such a person to pass on Indian status to his or her own children unless those children are the product of a union with another person who has Indian status.

The Plaintiffs

35 The plaintiffs are a mother and son. Prior to 1985, neither had Indian status. Today, Ms. McIvor has status under s. 6(1)(c) of the *Indian Act*, and Mr. Grismer has status under s. 6(2). Their claim is that Mr. Grismer should be given status equivalent to those who come under s. 6(1) of the statute, so that he is able to pass on Indian status to his children despite the fact that his wife is non-Indian.

36 The plaintiffs' family tree is somewhat complex - I will describe it first, and then provide a brief table, which may assist in understanding its details.

Case Name:

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

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

[2002] M.J. No. 44

2002 MBQB 48

162 Man.R. (2d) 166

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

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

Docket: CI 00-03-00047

Manitoba Court of Queen's Bench
Portage la Prairie Centre

Clearwater J.

February 1, 2002.

(43 paras.)

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

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

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

Statutes, Regulations and Rules Cited:

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

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

Please see list of Cases Cited

and Statutes appended to this document.

SCHEDULE "A"

43

Statutes, Texts, and Case Law

Statutes

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

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

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

Texts

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

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

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

Black's Law Dictionary (6th ed.)

Case Law

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

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

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

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

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

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

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

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

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

Case Law Submitted by the Trustees

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

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

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

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

Counsel:

Diane H. Stevenson and Lindy J.R. Choy, for the applicants ("the Trustees").
Michael D. Werier and Darcie C. Yale, for these respondents ["the Band" and (or) "the First Nation"].
G. Patrick S. Riley and Tamara D. McCaffrey, for these respondents ("the Objectors").
John Fergusson, on a watching brief for the Public Trustee of Manitoba.
Paul S. Claire, on a watching brief for Her Majesty the Queen in Right of Canada as represented by the Minister of Indian Affairs and Northern Development ("Canada").

CLEARWATER J.:--

THE PROCEEDING

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

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

2 In their application the Trustees seek:

(a) the opinion, advice and direction of the Court on a question respecting the management and administration of the Long Plain First Nation Trust, and more particularly, whether Article 9.1(a)(i) of the Trust Deed restricts the Trustees from investing in non-public corporations and/or private business ventures; and

(b) such further and other relief as this Honourable Court may deem just.

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

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

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

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

or, as a minimum, until the maximum amount of reserve land contemplated in the settlement agreement has been acquired.

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

DECISION

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

BACKGROUND

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

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

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

(i) concurrent with the execution of the settlement agreement, the First Nation and the initial Trustees would enter into and execute the Trust Deed (Schedule "A" to the settlement agreement) and establish a "Trust Capital Account" pursuant to the Trust Deed;

(ii) as agreed by Canada, the First Nation, and the initial Trustees, the Trust Capital Account was established and the settlement funds were paid into the account to be used and administered by the Trustees during the term of

could have clearly and easily done so.

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

36 What is or is not negligent in any particular circumstance can only be determined upon a specific analysis of the facts and the steps taken by a trustee in arriving at his/her conclusion as to whether to invest in a particular investment. Clearly, the higher the risk with any particular investment, the higher the degree of care that must be taken. The responsibilities of administering a trust such as this are great; the pressures on the Trustees, particularly in a relatively small community or constituency such as exists here, are and will continue to be tremendous as regards the investment and use of these funds during the term of the Trust. These Trustees are specifically empowered to obtain professional advice and assistance and, in my opinion, with this power comes a corresponding duty (at least generally); that is, wherever possible the professional advice must be and be seen to be independent and expert. At the end of the day the honest belief of the Trustees that any particular investment (particularly high risk investment) may be in the best interests of the eligible members of the First Nation (because of expected "spin off" or otherwise) may well not be sufficient to avoid liability if the appropriate independent professional advice is not obtained and properly considered. The primary purpose of the settlement and the Trust is the acquisition of a minimum amount of land with discretion to acquire significantly more land up to the maximum acreage for the benefit of future generations. Keeping in mind that the Trustees are elected for terms of up to four years (articles 11 and 12) and are subject to replacement by other trustees whose views may not coincide with their views as to the amount of land to be acquired (over the minimum acreage), any investments made by the Trustees of the Trust Capital Account (whether in private or public corporations or businesses) must, in my view, always be made with a view to a profit on the investment [and not simply to create economic "spin-offs" that other interested parties may (quite properly) desire in advance of termination of the Trust].

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

> ... Whatever the width of that power, whether at one extreme it is restricted to the legal list or at the other it includes any investment they in their absolute discretion select, trustees must only exercise prudence in their selection, but choose with a view to a balance of income return and security of the capital. Trustee powers are discretions which are fiduciary; unless instructed by the instrument to the contrary, trustees have no option, therefore, but to select each

> investment they make with impartiality in mind.
>
> However, as we have seen, it has been assumed for over one hundred and fifty years that, if a trustee invests in authorised investments, he thereby demonstrates impartiality, and in practice the legal list has been associated with prudence. It is only in recent years, with the now widely recognised effect of inflation and the constant decline of currency values, that trustees have come to realise the true dimensions of their investment task. Prudence lies in a mixture of carefully chosen debt securities and common stock with the proportions of each being regularly reassessed. ...

COSTS

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

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

> The Trustees may select criteria for determining and pay the costs associated with an application by any Tribal Member commenced for the purpose of determining an issue of jurisdiction, authority, negligence or breach of trust or fiduciary duty of the Trustees or Council under this Agreement and the Trustees shall pay the costs incurred by a Tribal Member of any legal proceeding commenced by that member which results in a finding that the Trustees or Council have exceeded their power, breached a duty, made an improper or unauthorized expenditure of Trust Property or have acted negligently in the management of Trust Property.

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

41 Clearly, it was never intended (and it would not be just) to require the Trustees to pay some other third party's costs every time some dissident eligible member or otherwise interested party seeks the assistance of the courts. Having said that, given the history of the administration of this

Trust by the Trustees since its inception and the fact that the current Trustees (and the Band, as represented by its current chief and councillors) have considered (and may well consider in the future) investing the Trust Capital in something other than guaranteed investment certificates or similar low risk investments, the importance of the issue to all eligible members of the First Nation, including those unborn members, infants, and others not able to represent themselves, is such that the First Nation and the Objectors should also have their costs paid on a reasonable solicitor and own client basis.

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

CLEARWATER J.

cp/e/qlemo

Case Name:

Polchies v. Canada

Between
Christopher K.J. Polchies, Calista Polchies and Crystal Polchies, Plaintiffs, and
Her Majesty the Queen, Defendant, and
Cynthia Polchies, Emmanuel Polchies and the Oromocto Indian Band, Third Parties

[2007] F.C.J. No. 667

[2007] A.C.F. no 667

2007 FC 493

2007 CF 493

[2007] 3 C.N.L.R. 242

157 A.C.W.S. (3d) 459

312 F.T.R. 196

Docket T-715-03

Federal Court
Fredericton, New Brunswick

Tabib, Prothonotary

Heard: October 23, 24 and 25, 2006.
Judgment: May 4, 2007.

(87 paras.)

Government law -- Crown -- Actions by and against Crown -- Breach of statutory duty -- Action for damages for breach of trust, breach of fiduciary duty, breach of statutory duty and breach of duty of principles of honour of the Crown -- Plaintiffs' mother received plaintiff's share of settlement funds

in 1983 in action against Crown -- Funds never paid to plaintiffs by mother -- Action dismissed -- Claims by Christopher and Crystal statute barred -- Any duty owed by Crown or Band to plaintiffs was discharged when amounts were received by plaintiffs' legal guardian -- No fiduciary duty on part of Crown to intervene to protect plaintiffs' interest in distribution funds paid to their legal guardian on their behalf established.

Limitation of actions -- Time -- When time begins to run -- Discoverability -- General -- Action for damages for breach of trust, breach of fiduciary duty, breach of statutory duty and breach of duty of principles of honour of the Crown -- Plaintiffs' mother received plaintiff's share of settlement funds in 1983 in action against Crown -- Funds never paid to plaintiffs by mother -- Action dismissed -- Claims by Christopher and Crystal statute barred -- Very latest time at which cause of action must have accrued was when they reached age of majority in 1993 and 1996 respectively.

Wills, estates and trusts law -- Trusts -- The trustee -- Duties of -- Fiduciary -- Action for damages for breach of trust, breach of fiduciary duty, breach of statutory duty and breach of duty of principles of honour of the Crown -- Plaintiffs' mother received plaintiff's share of settlement funds in 1983 in action against Crown -- Funds never paid to plaintiffs by mother -- Action dismissed -- Any duty owed by Crown or Band to plaintiffs was discharged when amounts were received by plaintiffs' legal guardian -- No fiduciary duty on part of Crown to intervene to protect plaintiffs' interest in distribution funds paid to their legal guardian on their behalf established.

Action for damages for breach of trust, breach of fiduciary duty, breach of statutory duty and breach of duty of principles of honour of the Crown -- Plaintiffs were Indians -- Band involved in dispute with defendant Crown -- Dispute settled in 1983 and plaintiffs' mother received their share of settlement funds as plaintiffs were minors at time -- Funds deposited in parents' bank account in 1983 -- No evidence as to what happened to funds -- Plaintiffs claimed they never received their share of funds from parents -- Plaintiff Calesta reached age of majority in 2002 and commenced action in 2003 -- Plaintiffs Christopher and Crystal alleged that they only discovered cause of action when being told in 2000 and 2002, respectively, details of payment of settlement funds -- HELD: Action dismissed -- Claims by Christopher and Crystal statute barred -- Calesta's claim not statute barred -- Both Christopher and Crystal knew of material fact of per capita distribution of settlement monies well before they reached age of majority -- Details of how funds owed to them were paid, and to whom, would have been discovered by them by exercise of reasonable diligence -- Knowing of distribution, they ought to have requested status or closure of any trusts in their name when they reached age of majority -- Very latest time at which cause of action must have accrued was when they reached age of majority in 1993 and 1996 respectively -- Even if claims not statute barred, any duty or responsibility owed by Crown or Band to plaintiffs was discharged when appropriate amounts were received by plaintiffs' legal guardian -- Crown had no duty to exercise powers under s. 52 of Indian Act to direct manner in which plaintiffs' distribution shares were to be administered or to administer funds herself -- Plaintiffs had not established existence of fiduciary duty on part of Crown to intervene to protect plaintiffs' interest in distribution funds paid to their legal guardian on

their behalf -- Principles of honour of Crown not engaged in case -- Plaintiffs did not establish they did not receive benefit of funds as use of funds was unknown and thus failed to establish any damages suffered.

Statutes, Regulations and Rules Cited:

Children's Law Act, R.S.N.L. 1990 c. C-13, s. 59

Children's Law Act, S.N.W.T. 1997 c. 14, s. 49

Children's Law Reform Act, R.S.O. 1990, c. C-12,

Family Relations Act, R.S.B.C. 1996, c. 128, s. 25, s. 27

Federal Courts Act, s. 39

Guardianship of Children Act, R.S.N.B. 1973, c. G-8, s. 2(1), s. 5(a), s. 5(b)

Indian Act, R.S.C. 1985, c. I-5, s. 52, s. 64, s. 64(1), s. 88

Interpretation Act, R.S.C. c. I-21

Limitation of Actions Act, R.S.B. 1973, c. L-8, s. 7, s. 18

Minor's Property Act, S.A. 2004, c. M-18.1

Quebec Civil Code, R.S.Q. 1991, c. 64, s. 178

Counsel:

Joseph J. Wilby, for the Plaintiffs.

Jonathan Tarlton, for the Defendant.

Daniel Theriault, for the Third Party Oromocto Indian Band.

REASONS FOR JUDGMENT

1 TABIB, PROTHONOTARY:-- In the late spring and summer of 1983, the Oromocto Indian Band settled a dispute with the Federal Crown, and resolved to distribute most of the proceeds of this settlement to all the members of the Band on a per capita basis. Christopher, Calesta and

Crystal Polchies were minors at the time. The Band paid out their share of the distribution to their mother, Cynthia Polchies, who deposited the funds in her and her husband's joint bank account.

2 It is not clear whether the monies were spent, and if so, how much and for what purposes. At any rate, the Polchies children claim to never have received their share of the distribution from their parents. They are therefore bringing the present action, claiming that the Crown is liable to them for the payment of these monies, as well as interest thereon and punitive damages, on the basis of breach of trust, breach of fiduciary duty, breach of statutory duty and breach of the duty or principles of "honour of the Crown".

3 The Crown denies any liability to the Plaintiffs, and to the extent it were to be held liable, seeks contribution and indemnity from Cynthia and Emmanuel Polchies, the Plaintiffs' parents, and from the Band, whom they contend had the primary responsibility to the Plaintiffs to ensure that monies belonging to the children were paid or kept in trust.

The Facts

4 The circumstances giving rise to this action are set out below. The facts as recited appear mostly from the agreed statement of facts prepared by the parties, although I have supplemented them with details and explanations found in documents admitted at trial.

5 The Plaintiffs are siblings. Christopher Polchies was born on May 30, 1974, Crystal Polchies was born on April 18, 1977, and Calesta Polchies was born on March 14, 1983. The Third Party Defendants, Cynthia and Emmanuel Polchies, are the parents of the Plaintiffs and were their legal guardians until they reached the age of majority, which under the law of New Brunswick was 19 years of age. The Plaintiffs and their parents are "Indians" as defined in the *Indian Act*, R.S.C. 1985, c. I-5.

6 The Third Party Defendant, Oromocto Indian Band (the "Band") is a band as defined in the *Indian Act*.

7 The Plaintiffs and their parents are members of the Band and reside on the reserve. Christopher Polchies lived with his parents at 25 Woolamooktook Street until he reached the age of majority. Both Calesta and Crystal Polchies moved out when they reached 18 years of age, having otherwise always lived with their parents at that same address.

8 In 1952-1953, the Government of Canada (hereinafter "the Crown") established what is now known as Canadian Forces Base Gagetown. For that purpose, the Crown acquired, mainly by expropriation, a large area of land in New Brunswick. Part of the reserve of the Band was in that area and on May 15, 1953, the Band surrendered the affected area. The Band later alleged that there were irregularities in the 1953 surrender and claimed compensation from the Crown. During the period 1982-1983, the Band and the Crown entered into negotiations to resolve this dispute.

9 The Band Council at the time included Emmanuel Polchies, who was Chief and lead negotiator for the Band.

10 A meeting was held in March 1983 between representatives of the Crown and of the Band and their respective legal counsel, at which an agreement was reached to settle the Band's claim, whereby the Band would receive $2,550,000.00 as compensation for the 1953 surrender. The agreement provided that the funds be allotted as follows: $1,000,000.00 would go to the Band's Capital account, $1,507,000.00 would go to the Band's Revenue account, both held in the consolidated revenue fund by the Crown, and $43,000.00 would be returned to the Crown as repayment of a loan advanced during negotiations.

11 On March 24, 1983, the Band Council passed a Band Council Resolution ("BCR") 424, which requested that the Minister of Indian Affairs (the "Minister") hold a referendum on May 25, 1983 to determine if a majority of the electors of the Band approved the agreement. The agreement was overwhelmingly approved in that referendum.

12 On April 5, 1983, pending the referendum, the Band held a meeting to determine what to do with the settlement funds. The outcome of the meeting was that all Band members in attendance were in favour of distributing the settlement monies amongst each Band member.

13 Pursuant to sub-section 64(1) of the *Indian Act*, monies held by the Crown for Bands as "Capital" monies can only be disbursed upon the Band's consent and the authorization of the Minister, and of these funds, only fifty percent may be authorized to be distributed to the Band's members. "Revenue" monies are not subject to such restrictions. Furthermore, by Order-In-Council dated May 14, 1974, the Band had obtained control over its Revenue monies, such that transfer of these monies to it for the purpose of distribution was not subject to discretionary approval by the Minister.

14 To give effect to the Band members' wish for per capita distribution of all settlement monies available for that purpose, the Band Council passed BCR 433 on July 13, 1983. That resolution requested the Department of Indian Affairs to transfer from the Band's Revenue account to a bank account set up by the Band for that purpose (the Band's "Land Claim Account"), the sum of $1,507,000.00, and from the Band's Capital account to the Band's Land Claim Account the sum of $500,000.00 (representing fifty percent of the $1,000,000.00 portion of the settlement designated as Capital monies).

15 Shortly beforehand, members of another band had commenced an action in the New Brunswick Court of Queen's Bench asserting entitlement to a share of the Oromocto Band's settlement, and on July 4, 1983, the Court had ordered the Crown to withhold fifteen percent of the settlement funds pending resolution of that action.

16 Giving effect to both BCR 433 and the July 4, 1983 Order of the Court, the Crown transferred to the Band's Land Claim Account the sum of $450,000.00 from Capital monies and $1,274,500.00

from Revenue monies, being the amounts requested by the Band less the Court-imposed holdback. The Band thus had the total amount of $1,699,500.00 in its Land Claim Account for distribution.

17 On or around July 22, 1983, the Band issued from that account cheques to cover per capita distributions of $10,056.21 for each of the Band's 169 members, including minors. On a pro-rated basis, $2,514.79 of the distribution came from Capital monies and $7,541.42 from Revenue.

18 The distribution shares of Cynthia, Emmanuel, Christopher, Calesta and Crystal Polchies were paid by a single cheque in the amount of $50,281.05 payable to Cynthia Polchies.

19 On July 20, 1983, the Band Council adopted a resolution whereby it requested the Crown to authorize disbursement of a further $300,800.00 from the Capital monies, to pay $55,800.00 in lawyers' and consultants' fees for the settlement negotiations, $15,000.00 for certain land improvements, and payments in the amount of $150,000.00 to Chief Emmanuel Polchies and $40,000.00 to each of the two Band councillors "as compensation for their efforts in concluding the land claim".

20 The Minister, pursuant to his authority under section 64 of the *Indian Act*, approved only the disbursements for consultants' and lawyers' fees and for land improvements, specifically denying the requested disbursement for compensation to the Band Council members.

21 Nevertheless, on July 25, 1983, Chief Polchies and one of the councillors issued cheques to themselves and the other councillor on the Band's Land Claim Account, for those same amounts.

22 Obviously, these last cheques brought the total amount of the cheques drawn from the Land Claim Account to $230,000.00 more than had been deposited in it, leaving over 20 Band members who had delayed in cashing their cheques unable to obtain payment. By the end of August 1983, the Chief's and councillors' actions were brought to light.

23 By October 1983, bank accounts held by Chief Polchies had been attached in proceedings related to allegations of misappropriation by Chief Polchies. Chief Polchies was convicted of theft for his part in these events in May 1984. Execution ensued against the bank accounts in the summer of 1985; $81,688.42 was recovered from the $150,000.00 taken by Chief Polchies. The two other councillors, for their part, repaid all but $15,680.45 of the amounts they received.

24 In 1989, the New Brunswick Court of Queen's Bench finally removed all restrictions arising from the Order of July 4, 1983, making the fifteen percent holdback available for distribution.

25 At a public meeting held in July 1989, the Band members expressed support for the holdback to be likewise distributed amongst Band members. BCR 601, dated August 25, 1989, and authorized by the Crown, gave effect to that desire, authorizing $402,622.95 to be disbursed to the Band for the purpose of per capita distribution. The distribution affected 165 members, for individual distributions of $2,440.13 for each Band member.

26 Again, the shares of the distribution belonging to minors were paid out by the Band to the parents of the children, in this case, Cynthia Polchies, for the three Plaintiffs.

The issues

27 The issues raised in this action can be summarized as follows:

- Are the claims of any or all of the Plaintiffs barred by limitation or laches?
- Did the Crown, the Band or the Plaintiffs' parents have a duty to the Plaintiffs, under statute or at law, with respect to the payment and management of monies payable to them as minors? If so, what is the nature and extent of that duty, and was it breached?
- What, if any, are the damages suffered by the Plaintiffs as a result of any breach of duty established?

The evidence and findings of fact

28 In addition to the uncontested facts set out above, the evidence adduced at trial revealed the following:

29 The Plaintiffs admit that their mother did receive all amounts to which they were entitled pursuant to the distribution of the settlement monies. There is, however, no evidence at all as to what exactly happened with that money after the cheque was deposited in the family's bank account in 1983. Both Christopher Polchies and Mark Sabattis, their neighbour, testified that shortly after the Plaintiffs' mother received the proceeds of the distribution, in the summer of 1983, the family made several improvements to its lifestyle: The house was renovated and a snowmobile, a "three-wheeler", a new car and a new truck were purchased. The costs of all this is unknown, nor is it known whether it was paid for with the distribution cheque, the monies misappropriated by Emmanuel Polchies, or other assets of the family.

30 No evidence was led as to the family's standard of living, both before or after the distribution, as to the parents' assets or bank accounts, or their sources of income, if any. All the Plaintiffs however admitted to having always been properly clothed, fed and housed, and that their recreational and medical requirements were met.

31 All three Plaintiffs deposed in affidavits received at the trial that, had they known they were to receive some $11,000.00 on reaching majority, they would have had more interest in school and higher education, and would have pursued higher education. However, Christopher Polchies testified at trial that he did finish his secondary education, and that he understood post-secondary education would be funded by the Band or the Crown; he did apply to university a few years after high school, but was not admitted due to his grades. He later benefited from training funded by the Band to obtain a certification as Addiction Counsellor offered through the University of Moncton. Both Calesta and Crystal Polchies left school without completing their twelfth grade. Both had their

first child before they reached twenty years of age, Crystal Polchies admitting that she did not have the time after the birth of her first child to continue her schooling.

32 All three Plaintiffs were aware, growing-up, that their father, having once been Chief, was charged with a criminal offence. Christopher Polchies, who was nine years old at the time of the settlement, was also aware of the fact of the settlement and of the distribution. He claims to have learned the details of the payment in respect of the minors' shares only in 2000, from his father. Crystal and Calesta Polchies became aware of the settlement in their teens (which I take it refers to the period between 13 and 17 years of age), but only learned of the details of the payment of the minors' shares when told of them by their father and/or brother in 2002.

33 I find that the settlement of the land claim and the distribution of per capita shares amongst the Band members, including the fact that the children's shares were paid out to the parents as legal guardians, were matters of immediate public knowledge amongst the residents of the reserve throughout the period from 1983 to at least 1989. Knowledge would have remained in the memories of the residents of the reserve well after that. The Band had a small membership (approximately 170 including minors and off-reserve members). All Band members living on reserve and with the right to vote, numbering only 53, were consulted in a referendum as to the acceptance of the settlement in 1983. Each time a distribution was made or anticipated, and this happened at least three times in that period, at least one public meeting was convened to discuss the manner of distribution. Finally, of course, knowledge was imparted from the very fact of the distribution, as all adult members received their cheque and that all parents received, as guardians, the shares of some 72 children, both in 1983 and in 1989. Some of these parents set up trusts to hold their children's monies. Accordingly, in the period between 1983 and 2002, in addition to the two general distributions, at least some young Band members would have received the benefits of these trusts upon turning eighteen or nineteen. It is further worthy of note that the Plaintiffs' parents were themselves, not only aware of the distribution, but of the possibility that the Crown could have taken steps to force the children's shares into trusts. Chief Polchies himself alluded to the possibility of parents suing the Crown on behalf of their children for the Crown's failure to institute trusts for them, at a public meeting held on November 9, 1987, at which Cynthia Polchies was also in attendance.

34 Thus, and even though I accept that the Plaintiffs might not have realized that their mother had received their share of the distribution on their behalf in 1983 and 1989, I conclude from the evidence as a whole that they did know, as they were growing up, that the proceeds of the settlement with the Crown had been distributed amongst all Band members. From that knowledge, they should have known or realized that as Band members, they were entitled to their share; had they simply enquired to their parents or to the Band's Council, they would have easily discovered the details as to the dates, amounts, and manner of payment of their own shares.

35 The evidence at trial reveals that as early as March 23, 1983, the Band's membership favoured the distribution per capita of as much of the settlement proceeds as was available. Ms. Audrey Stewart, an official from the Department of Indian and Northern Development, attended at a March

23, 1983 meeting, with the Band's Council and other Band members, and provided information to the Band as to what portions of the settlement could be distributed, and how portions payable to children could be paid. It appears that Ms. Stewart explained her current understanding of the general policies of the Crown with respect to distribution of Capital monies to minors, to the effect that Capital monies paid to minor children would be held by the Crown in a trust fund, earning interest until the child is 21. Ms. Stewart however advised that this information was subject to verification, as she was not an expert on the matter. Ms. Stewart's recollection was to the effect that the members present were opposed to the minors' monies being held in trust by the Crown; it was felt that Indian parents could be trusted with money for their children and that the establishment of trusts would be disrespectful to them. Mark Sabattis and John Sacobie, Band councillors, had similar recollections, and confirmed that the consensus was the same at the public meeting held on April 5, 1983, where the majority of Band members, including Cynthia and Emmanuel Polchies, attended.

36 Shortly before these discussions took place, the Crown had issued Circular H-12, containing internal guidelines as to the processes and procedures applicable to authorization of disbursements from Bands' Capital accounts. Ms. Stewart transmitted a copy of that Circular to the Band Council in the spring of 1983. Section 6 of that document applies particularly to per capita distributions, and provides, in its general principles, that per capita distributions in respect of minors are to be held in trust by the Crown until the minor reaches the age of majority, but that payments of up to $3,000.00 per year could be made to a parent or guardian having custody of the child upon written request (paragraph 6(2)(e))[1]. In addition, the Circular contemplates that the Crown could permit a Band to administer the distribution itself, in accordance with any procedure agreed between them (paragraph 6(2)(j)).[2]

37 It seems clear to me that this is precisely what happened in this case. The Band, as a whole, objected to any suggestion that minors' shares be administered or put in trust by the Crown, as would have happened had the Crown itself administered the distribution from the Capital monies. To avoid this, the Band's resolution BCR 433 specifically requested that the monies for distribution, from both the Revenue account and from the Capital account, be transferred to the Band for distribution by the Band. To this, the Crown clearly agreed, asking only that the Band provide it with a list of recipients and amounts paid to each. If the Band or any parent wished that trust funds be maintained by the Crown, a request merely had to be made. None was ever made.

38 This is to be contrasted with the procedure adopted by the Crown when, in 1985, the Band sought the release of further funds from the Band's Capital account to pay for the outstanding distribution cheques of some 25 Band members that could not be honoured by reason of the misappropriation of the Land Claim Account's funds. On that occasion -- and it seems that the Crown had let the Band know that it would not otherwise approve the disbursement -- the Band's BCR 471 requested the distribution be made directly by the Crown to the affected Band members. The Crown then followed Circular H-12 and constituted trusts to hold all minors' monies, subject to the right of custodial parents/guardians to request a maximum of $3,000.00 per child each fiscal

year.

39 When it came to the final distribution of the portion of the settlement held back by Court Order, in July 1989, the Band Council held a meeting, at which 44 voting members attended. It was confirmed at that meeting that BCR 433, calling for the transfer of all available Revenue and Capital monies for the purpose of per capita distribution by the Band, was still valid to authorize transfer by the Crown to the Band for distribution. As a result, BCR 601 was adopted, requesting transfer of monies now available to the Band for per capita distribution by the Band. By letter dated September 1, 1989, the Minister approved the resolution, confirming that the transfer to the Band would be made pursuant to BCR 433.

40 Finally, I should note here that neither Cynthia nor Emmanuel Polchies gave evidence at trial, either on their own behalf or as called by another party. They were not represented, did not file a defence to the counterclaim and so far as I am aware, did not attend at the trial.

Analysis

Limitation and Laches

41 All parties are *ad idem* that, through the application of section 39 of the *Federal Courts Act*, it is New Brunswick's *Limitation of Actions Act*, R.S.B. 1973, c. L-8 that governs the limitation period for the Plaintiffs' action herein. Sections 7 and 18 of the *Limitation of Actions Act* read as follows:

> "**7.** No action grounded on accident, mistake or other equitable ground of relief shall be brought but within six years from the discovery of the cause of action."
>
> "**18**. Where a person entitled to bring an action is at the time the cause of action accrues a minor, mental defective, mental incompetent or of unsound mind, the period within which such action shall be brought shall be six years, or two years from the date when such person becomes of full age, or of sound mind, as the case may be, whichever is the longer."
>
> * * *
>
> "**7.** Toute action fondée sur un accident, une erreur ou autre motif de recours reconnu en *equity* se prescrit par six ans à compter de la découverte de la cause d'action."
>
> "**18.** Lorsqu'une personne ayant le droit d'intenter une action est mineure, déficiente mentale, incapable mentale ou privée de raison à la date où la cause d'action prend naissance, une telle action se prescrit par six ans, ou par deux ans à

compter de la date à laquelle cette personne atteint sa majorité ou devient saine d'esprit, selon le cas, le plus long de ces deux délais étant pris en considération."

42 Likewise, all parties are in agreement that the cause of action, as pleaded, arose out of the release of the Plaintiffs' distribution shares to their mother.

43 As Calesta Polchies reached the age of majority on March 14, 2002 and instituted this action on August 12, 2003, her action is clearly timely, whatever the date of the accrual of the cause of action or of the "discovery" might be. It is in respect of Christopher and Crystal Polchies that the issue of limitation arises. The Plaintiffs submit that the cause of action was only discovered by them when each of them were told of the details of the payments, being 2000 for Christopher and 2002 for Crystal Polchies, such that their action was instituted well before the 6 year limitation. The Crown, however, fixes the discovery of the cause of action in relation to, at best, the knowledge of the Plaintiffs' legal guardians, or at worst, to the time at which the children "ought to have discovered" the material facts with the exercise of reasonable diligence. According to the Crown, this latter was the time at which they became aware of the distribution itself, or at the very least, the time at which they reached the age of majority and would have been entitled to seek closure of any minor trust account that could have been set up to receive their share. Both Christopher and Crystal Polchies reached majority more than 6 years prior to the issuance of the statement of claim: Christopher, in 1993, and Crystal in 1996.

44 The applicable provision in this matter is section 18 of the *Limitation of Actions Act*, to the exclusion of section 7. Although it is true that this is an action grounded on equitable grounds of relief, the provisions of section 18 apply specifically to cases where the cause of action accrues to a minor or other legally incompetent person, without distinction as to the relief claimed or the nature of the cause of action. Under the maxim *generalia specialibus non derogant*, the specific provisions of section 18 displace and override the general provisions of section 7 when the cause of action accrues to a minor (see also *Guignard v. Paulin*, [1992] N.B.J. No. 23).

45 The distinction may seem academic, since the starting point of the six-year period is in both cases based on the principles of discoverability: In the case of section 7, the common-law principle is explicitly recognized by the wording of the section, which fixes the beginning of the limitation period to the time of "the discovery of the cause of action"; in the case of section 18, the principles of discoverability also govern, but as an interpretative principle, to determine the time at which the cause of action is deemed to accrue. Still, the distinction is in my view important, as it confirms the direct application in this case of the discoverability principles, as they have been set out in established case law, without need to question whether a different or more subjective construction should be given to the word "discovery," as used in section 7, when it is applied to minors.

46 The Supreme Court has recently reaffirmed that the discoverability rule "is generally applicable where the commencement of the limitation period is related by the legislation to the arising or accrual of the cause of action (*Ryan v. Moore*, [2005] S.C.J. No. 38, 2005 SCC 38, at par.

[24]). Section 18 of the *Limitation of Actions Act* expressly relates the commencement of one of the possible limitation periods to the accrual of the cause of action. In *Ryan v. Moore*, the Supreme Court also again repeated the well known formulation of the rule:

> "[22] The discoverability principle provides that a cause of action arises for the purpose of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the Plaintiff by the exercise of reasonable diligence."

(emphasis mine)

47 As I have found, both Christopher and Crystal Polchies knew of the material fact of the per capita distribution of settlement monies well before they reached the age of majority. The details of how the funds owed to them were paid, and to whom, would have been discovered by them by the exercise of reasonable diligence: they merely had to ask their parents or the Band council. Knowing of the distribution, they ought, in any event, to have requested the status or closure of any trusts in their name when they reached the age of majority; had they done so, they would have found out whether such trusts existed and if they didn't, have been put to enquiry as to the details of the payments.

48 Thus, while it is arguable that Christopher and Crystal Polchies' cause of action accrued much earlier, I find that the very latest time at which this cause of action must have accrued was when they reached the age of majority, in 1993 and 1996 respectively, and that their action is accordingly time-barred.

49 Of course, if I am wrong, the analysis and conclusions reached below with respect to Calesta Polchies' claim would equally have applied to Christopher and Crystal Polchies' claim. I have, for greater certainty, proceeded to analyse the claims as if none of the Plaintiffs' claims were prescribed.

Duties regarding minors' property

50 Pursuant to section 88 of the *Indian Act*, the laws of general application in a province apply to Indians in that province, unless otherwise provided for by federal legislation or treaties. With the exception of section 52 of the *Indian Act*, which will be further considered below, there appears to be no federal legislation, regulation or treaty providing for guardianship of minors or the administration of their property; at any rate, the parties have not drawn my attention to any such legislative instrument, whether emanating from Parliament or from the Band Council.

51 Before considering whether the *Indian Act* or the status of the Plaintiffs as Indians modifies or creates specific duties regarding the administration of their property, it is appropriate to consider the

laws generally applicable to minors' property in New Brunswick.

52 The relevant and applicable sections of the *Guardianship of Children Act*, R.S.N.B. 1973, c. G-8 read as follows:

> "**2.**(1) Subject to section 3, the parents of a child are joint guardians of the child and may jointly appoint in writing another person or persons to be guardian or guardians of their child."
>
> "**5.** Except as limited by the terms of his appointment, a guardian established or appointed under this Act
>
> *(a)* has, subject to an order of custody issued by a court of competent jurisdiction, the right to the custody of the child and to control his education and upbringing, and
>
> *(b)* shall exercise care and management of all property belonging to or intended for the use and benefit of the child that is not otherwise held in trust for his benefit, but a guardian established or appointed under this Act has no power to sell, convey or encumber such property except as authorized by The Court of Queen's Bench of New Brunswick or any judge thereof,
>
> and where guardians are to act jointly or a guardian is to act jointly with a surviving parent, the rights and duties conferred by this section shall, subject to the paramount right of the surviving parent to custody of the child, be shared jointly."
>
> * * *
>
> "**2.**(1) Sous réserve de l'article 3, les parents d'un enfant sont cotuteurs de l'enfant et peuvent par écrit nommer conjointement une ou plusieurs autres personnes comme tuteur ou tuteurs de leur enfant."
>
> "**5.** Sous réserve des limitations fixées par les termes de sa nomination, un tuteur établi ou nommé en vertu de la présente loi

> *a)* possède le droit de garder l'enfant et de diriger son éducation ainsi que la façon dont il est élevé, sous réserve d'une ordonnance de garde rendue par un tribunal compétent, et
>
> *b)* doit prendre soin et exercer la gestion des biens appartenant à l'enfant ou destinés à l'usage ou au bénéfice de ce dernier et non détenus par ailleurs en fiducie pour son bénéfice, mais un tuteur établi ou nommé en vertu de la présente loi n'a pas le pouvoir de vendre, céder ou grever ces biens sans l'autorisation de la Cour du Banc de la Reine du Nouveau-Brunswick ou d'un juge de cette Cour,
>
> et lorsque des tuteurs doivent exercer une cotutelle ou qu'un tuteur doit exercer la cotutelle avec le parent survivant, les droits et les fonctions que confère le présent article doivent être exercés conjointement, compte tenu du droit suprême de garde de l'enfant que possède le parent survivant."

53 Thus, under the general laws of New Brunswick, the Plaintiffs' parents were their legal guardians and had the obligation to care for and manage monies they received on behalf of their children. The effect of these provisions is that the payment of the children's distribution shares to their mother as one of their legal guardians was lawful and constituted due payment of the monies to the children. This is to be contrasted with the situation that currently exists in several other provinces or territories, where parents are not automatically deemed in law to be the guardians of their children's property, and where certain statutes even specifically provide that payment of debts owed to children, over certain amounts, may not lawfully be made to their parents as discharge of the obligation.[3]

54 The Plaintiffs rely on the case of *Williams v. Squamish Band*, [2003] F.C.J. No. 65, 2003 FCT 50, as establishing the existence of a fiduciary duty on the part of the debtor of a monetary obligation to a child to consider the child's best interest in deciding how to disburse monies belonging to him. In *Williams*, payments were made by the band to the plaintiff's grandmother, who, although his primary caregiver, was not his legal guardian. The payments made by the band in that case could therefore not stand as payments to the child; they were payments of monies belonging to a child, made to a third party. In the apparent absence of a legal guardian authorized to receive the funds on the child's behalf, and considering that the custodial arrangements for the child appeared to have been sanctioned by the band council, it is hardly surprising that the band would have been impressed with trust and fiduciary responsibilities with regards to the disbursement of these funds. The case does not in my view illustrate or establish the existence of a duty owed by the debtor of a monetary obligation due to a child to make any provision as to the future care or management of the funds during the child's minority, either as part of lawful payment or after it is made.

55 Indeed, there is an important distinction to be made between the duties that arise in the course of the distribution and payment process and those that attach to the administration of the monies once they become the minors' property, either as an entitlement or as monies paid and received.

56 Whenever a distribution of monies among a group of persons is undertaken by another person, whether it be by the Crown, the Band or any other entity or person, a trust is created whereby that person is required to ensure that the monies set aside for distribution are properly kept, and distributed fairly, to the appropriate recipients. For example, in *Barry et al. v. Garden River Band of Ojibways*, 33 O.R. (3d) 782; [1997] O.J. No. 2109, circumstances were very similar to the ones at bar, but the basis of the plaintiffs' claim was that they had not been included in the distribution list; the Ontario Court of Appeal in that case described the creation of the trust as follows:

> "It would appear from the above that the sum of $1 million being part of the $1,339,150 paid under the settlement agreement, is not strictly a trust fund because it was to be paid into the revenue account of the Band where it could be used for the purposes of the Band generally, subject only to the regulations which set out accountability requirements. There was no requirement in the settlement agreement that the fund was to be distributed to the members of the Band and certainly there was no requirement that it be distributed by a certain date. At some later time, the Band decided on December 17 and 18, 1987 as the dates for the per capita distribution. There was no clear evidence presented at trial explaining why these dates were selected. Accordingly, while the funds were not the subject-matter of a trust when they were delivered to the Band Council, when the Band Council resolved to make a per capita distribution, and to set aside $1 million for that purpose, in our view a trust was created. The Band Council was under a duty to ensure that the distribution was carried out in accordance with trust principles."

(emphasis mine)

57 However, the trust or fiduciary obligations created as a result of the decision to make or approve a per capita distribution and the administration thereof are limited to the process of the distribution itself: preserving the funds pending completion of the process, identifying all intended recipients and preserving the rights of potential claimants, ensuring that payment is effected to the intended recipient, obtaining receipts, maintaining records and audit trails, etc. Where the distribution includes minor children, the duty of ensuring that payment is effected to the intended recipient encompasses the duty to ensure that the payment to the child is lawful and made in accordance with applicable legislation so as to effectively discharge the payment obligation. The "duty" if any, of providing for the care and administration of the funds once the child's entitlement is established or the money is paid out is an altogether different duty, which goes beyond the

mechanics of ensuring lawful payment of the funds to the child. In order to rely on the existence of such a duty, the Plaintiffs need to establish another, more immediate fiduciary relationship, or point to a specific duty created by law. Insofar as concerns any duty or responsibility that the Crown or the Band may have had to the Plaintiffs as a result of their authorization or administration of the distribution, I am satisfied that that duty was discharged when the appropriate amounts were received by the Plaintiffs' legal guardian.

58 As I have determined that the duties owed to the Plaintiffs arising from the decision and administration of the distribution were discharged, it is not necessary for me to determine how these responsibilities fell to be allocated as between the Crown and the Band. However, to the extent it is useful to do so, I would conclude that, with respect to funds from the Band's Revenue account, responsibilities rested entirely with the Band Council. With respect to Capital monies, the ultimate authority to approve the use of the monies for the purposes of per capita distribution having rested with the Crown pursuant to section 64 of the *Indian Act*, the Crown also had a duty to take steps to ensure that the distribution would be made to those entitled to it. In the circumstances, the Crown chose to delegate the administration of the distribution to the Band Council. In seeking and accepting the responsibilities of administering the distribution of the Capital monies, the Band Council became the trustee for the Band members entitled to the distribution and also owed these duties to them. Whether the Crown acted reasonably in delegating its responsibilities to the Band is not an issue that arises here, as I have found that the Band did properly discharge its obligation to pay to the Plaintiffs their share of the distribution.

Section 52 of the *Indian Act*

59 The Plaintiffs construe section 52 of the *Indian Act* as giving rise to both a statutory and a fiduciary duty on the part of the Minister to ensure that property of minor Indians is properly administered, and in the circumstances of this case, to exercise its discretion by creating a trust in which to hold these monies.

60 Section 52 reads as follows:

> "52. The Minister may administer or provide for the administration of any property to which infant children of Indians are entitled, and may appoint guardians for that purpose."
>
> * * *
>
> "52. Le ministre peut administrer tous biens auxquels les enfants mineurs d'Indiens ont droit, ou en assurer l'administration, et il peut nommer des tuteurs à cette fin."

61 The use of the word "may" in section 52 necessarily implies the existence of discretion and the Courts will not interpret "may" as requiring the exercise of power in all circumstances. The permissive character of the word "may" is confirmed by section 11 of the *Interpretation Act*, R.S.C.

c. I-21, which provides that "the expression "shall" is to be construed as imperative and the expression "may" as permissive".

62 Of course, notwithstanding the *Interpretation Act*, there remain instances where a power conferred with the expression "may" will be interpreted as imparting an imperative or mandatory exercise of that power (see discussion and cases cited in Coté, Pierre André, *The Interpretation of Legislation in Canada* (3rd ed.), Carswell, at pp. 234-235). However, none of these circumstances are present here: section 52 does not assign a judicial or quasi-judicial jurisdiction to the Minister, there is no right conferred by section 52 to Indian children to have their property administered upon the satisfaction of certain conditions, and neither the context, legislative history, or purpose of the statute or possible negative consequence intended to be avoided would justify construing the discretion conferred by section 52 as imposing a duty to act on the Minister. On the contrary, since the discretion conferred on the Minister by section 52 can be triggered by the simple existence of two conditions (the existence of property to which infant children of Indians are entitled and the fact that they reside on a reserve), it would create an absurd result to say that the Minister must administer or provide for the administration of all property of all Indian children residing on reserves.

63 It further bears reiterating that in the province of New Brunswick, as in several other Canadian provinces[4], the law establishes the parents of minor children as guardians for both custody purposes and for the purposes of the care and management of their property. All provinces further have established legislation governing the appointment of guardians or trustees to children's property, so that even without the exercise of the Minister's discretion pursuant to section 52 of the *Indian Act*, property of Indian infants is not left without any means of protection.

64 I therefore conclude that the Minister had no duty to exercise the powers conferred upon him by section 52 of the *Indian Act* to direct the manner in which the Plaintiffs' distribution shares were to be administered or to administer same himself.

65 Of course, had the Minister exercised its discretion to administer or provide for the administration of the Plaintiffs' monies, it is likely that a fiduciary relationship would have been created in respect of such acts as might have been taken by the Minister. However, in the absence of any exercise of the Minister's power under section 52 and in light of my conclusion that the Minister had no duty to act under section 52, I cannot see how a fiduciary relationship could be said to arise merely as a result of the Minister's potential ability to act.

Other basis for the creation of a fiduciary duty

66 It seems that the Plaintiffs are invoking a variety of circumstances, other than merely section 52 of the *Indian Act*, to assert that a fiduciary relationship did arise between the Crown and the Plaintiffs whereby the Crown would have been bound to exercise its powers pursuant to section 52 to institute trusts for their benefit. The Plaintiffs' arguments in that respect are not clearly articulated, but rely variously on the Plaintiffs' status as "Indians in general and minors in

particular", on the fact that the distribution monies arose out of the settlement of a land or surrender of land claim, and on facts which, the Plaintiffs contend, were known by the Crown as making it virtually certain that their share of the distribution would be stolen or would not be spent in their best interest.

67 I will turn to this last element first. The Plaintiffs have argued that judicial notice can be taken of the fact that "many in the native community have never earned a reputation for financial rectitude", and that the Crown was "cognizant of the casual attitude towards money adopted by some in the native community", in effect, suggesting that Indian parents in general or at least the parents of the Oromocto Band, cannot be expected to properly discharge the legal duties they owe to their children when it comes to the care and management of their children's property. Not only is the suggestion inherently offensive, but no evidence has been led to support it. It is certainly not a notion of which the Court can or will take judicial notice. In fact, the only evidence led in this trial as to what any parent in the Band actually did with its child's share was the evidence of Mark Sabattis, who testified that he and "some of the parents" put their children's share of the distribution in trusts. There is strictly no evidence as to what any of the other parents did with the money, including, as will be further discussed below, the Plaintiffs' own parents.

68 There is of course evidence on record that many band members, including Chief Polchies and the other councillors, appeared to renege on the financial commitments the Band had made with its advisors, and of course, there is the Chief and councillors' misappropriation of monies. Yet, sharp business dealings or even misappropriation of monies cannot be a predicator of any person's ability or good faith intention to carry-out or to meet his obligations to his own children. Indeed, the Plaintiffs did not appear to consider their father's actions in the summer of 1983 to have been blameworthy, as they all considered the criminal charges brought against him to have been unfair.

69 The Plaintiffs have therefore not proven that there existed any circumstances, or that the Crown knew of any circumstances, from which a reasonable person would conclude that it was likely that the Plaintiffs' parents -- or any parent on the Oromocto reserve -- would be incapable or unwilling to properly care for and manage their children's property.

70 I next turn to the Plaintiffs' argument that a fiduciary duty would arise as a result of their status as Indians in general and minors in particular. As was held by the Supreme Court of Canada in *Wewaykum Indian Band v. Canada*, [2002] S.C.J. No. 79, 2002 SCC 79, a fiduciary duty cannot exist in a factual vacuum. It must be identifiable and arise from a specific set of facts "in relation to specific Indian interests". Liability can only exist upon identification of a "cognizable Indian interest, and the Crown's undertaking of discretionary control in relation thereto in a way that evokes responsibility "in the nature of a private law duty"" (*Wewaykum*, supra, at par. 81 and 85). There is no specific or cognizable Indian interest arising solely as a result of a person's status as a minor of Indian ancestry or status, or from such a person's rights regarding personal property. Aboriginal status alone does not create a fiduciary relationship, as recognized by the Supreme Court in *Gladstone v. Canada*, [2005] 1 S.C.R. 325, [2005] S.C.J. No. 20; 2005 SCC 21, at par. [23]:

> "Although the Crown in many instances does owe a fiduciary duty to aboriginal people, it is the nature of the relationship, not the specific category of actor involved, that gives rise to a fiduciary duty. Not every situation involving aboriginal people and the Crown gives rise to a fiduciary relationship. See *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, at para. 18, *per* McLachlin C.J. The provisions of the *Fisheries Act* dealing with the return of things seized are of general application. I agree with the trial judge and the Court of Appeal that the respondents' aboriginal ancestry alone is insufficient to create the duty in these circumstances."

71 Finally, the Plaintiffs' argument to the effect that a fiduciary relationship arises here by virtue of the distribution funds' origin as Capital monies or as the proceeds of the settlement of a land claim also fails. There may well be a fiduciary duty on the part of the Crown in the management of Indian monies -- and I need not determine here the circumstances in which it might arise or its extent -- but that is not the point. The Plaintiffs here are not suing the Crown on behalf of a band or group of Indians on the basis of mismanagement of Indian monies; they are suing as individuals for the Crown's alleged failure to take measures to take control and protect monies they personally became entitled to pursuant to a distribution. To the extent some of these monies originally were designated as "Capital" monies or monies representing the Band's interest in reserve lands, the Crown may have had a duty, pursuant to section 64 of the *Indian Act* or even a common law fiduciary duty, to ensure that these monies were properly administered, and used or disbursed in the Band's interest. That duty, as mentioned above, may also have extended to ensuring that when a per capita distribution was authorized, the distribution would go to those entitled thereto. But once the distribution was properly authorized and effected, the monies ceased to be Capital monies of the Band and became personal property of the persons entitled thereto. The Plaintiffs provided no support for the proposition that Capital monies are somehow impressed with a special status that would follow them beyond their legitimate disbursement and into the hands of their recipients, entitling the funds to special protection under the law.

72 I will finally note here that the Plaintiffs at the trial have made much of the Band's and the Crown's agreement to designate a large proportion of the settlement amount as Revenue monies, which the Plaintiffs contend was contrary to section 62 of the *Indian Act*. (Under section 62, all monies derived from the sale of surrendered lands or capital assets are deemed to be Capital funds). Leaving aside the lack of evidence from which any determination of this issue could be made, it remains that the allocation and the designation of the funds were approved by referendum and by ministerial decision. The lawfulness of that decision was not challenged by judicial review. Pursuant to the principles set out in *Canada v. Grenier*, [2006] 2 F.C.R. 287; [2005] F.C.J. No. 1778, the validity and lawfulness of the ministerial decision can simply not be attacked or put in issue in the context of an action.

73 Thus, I find that the Plaintiffs have not established the existence of a fiduciary duty on the part of the Crown, either in statute or by operation of law, to intervene to protect the Plaintiffs' interest in

the distribution funds paid to their legal guardian on their behalf.

Honour of the Crown

74 In the memorandum of fact and law submitted to the Court by the Plaintiffs at the opening of the trial, the Plaintiffs discourse at length on the principle of the honour of the Crown and how it has been broadened in recent decisions from its early uses as a tool for treaty interpretation. Yet the Plaintiffs articulate no cogent argument as to what, in the circumstances of this case, gives rise to special duties on the part of the Crown in order for the honour of the Crown to be upheld, and how the breach of these duties might establish or help establish a cause of action. In none of the cases cited by the parties has a breach of the principles of honour of the Crown been held to constitute an independent cause of action. The Plaintiffs do not explain how this concept, which was originally and remains mostly used as an aid to the interpretation of treaties and legislative provisions protecting treaty and aboriginal rights, informs the rights of individuals to the protection of their personal property.

75 The Plaintiffs do reach back to the origins of the distributed funds as a settlement of a land dispute to somehow trigger the application of the honour of the Crown principles, but for the same reasons as stated above in respect of the creation of a fiduciary duty, it is of no assistance to them.

76 Also, the Plaintiffs cite the Crown's actions in recovering the funds misappropriated by Chief Polchies from funds allegedly co-mingled with the Plaintiffs' money as high handed and unfair, sullying the honour of the Crown.

77 I fail to see how the Crown's actions to recover these funds, which actions were taken at the behest of the Band Council and for the express purpose of protecting the interests of the Band as a group, can be said to be contrary to the honour of the Crown. Furthermore, having found that the Crown was not a trustee of the Plaintiffs' money and had no fiduciary or statutory duty to take steps to protect same, I cannot see how the possibility of any prejudice to the Plaintiffs from these lawful proceedings could give rise to liability on the part of the Crown. Finally, I note that the funds recovered by the Crown were seized in legal proceedings as being Chief Polchies' own property. To the extent any of the Plaintiffs' money had been co-mingled with the funds in the accounts seized, a fact which has not been established, the Plaintiffs' parents, as their legal guardians, had the right and duty to assert the Plaintiffs' ownership of the funds at the time of the seizure and execution; the Crown had neither the right nor the duty to assert the Plaintiffs' rights for them.

78 I therefore find that the principles of honour of the Crown are not engaged in the circumstances of this matter, and even had they been engaged, that the Crown did not act in a manner that was other than fair.

Damages

79 Even had there been any basis upon which to find that the Crown, or the Band as third party

defendant, had any duties to the Plaintiffs and had breached same, no relief could be granted to the Plaintiffs on the evidence adduced at trial.

80 The Plaintiffs are not requesting the payment of the distribution monies as an unpaid debt to them. They admit that the monies were paid to their mother, as their legal guardian. Their claim is for damages arising from alleged breaches of duty on the part of the Crown. As such, they had to establish that, as a result of the Crown's alleged breaches, they suffered damage. They claim that they suffered damage because they did not receive their share of the distribution, or more precisely, that they did not receive the benefit of their share of the distribution.

81 I have already held that, at law, payment of the Plaintiffs' share to their mother was payment to them and that their parents owed them a direct statutory duty to properly care for and manage their funds. Accordingly, in order to recover anything from the Defendant, the Plaintiffs also had to establish that they did not receive the benefit of these funds and that this was caused by their parents' mismanagement of the funds and failure to use them in the Plaintiffs' best interests. That evidentiary burden rested squarely on the Plaintiffs. However, there is simply no evidence as to what happened with the Plaintiffs' money after it was deposited in their parents' joint bank account. For all the evidence shows, the money could have been used to purchase valuable securities, it could have been invested, it could have been used to keep a roof over the heads of the Plaintiffs, clothes on their bodies and food in their bellies throughout their formative years, or it could still be in the Polchies' joint bank account.

82 The Plaintiffs' case is build on the assumption that their share of the distribution was sitting, co-mingled with their parents' monies, in their parents' joint bank account in October 1983, that this joint bank account was then seized by the Crown, and that their money was taken in repayment of their father's theft. Yet, there is no evidence to support that assumption. The bank records of their parents' joint account were not produced; Cynthia and Emmanuel Polchies were not called to testify; there is therefore no evidence that the monies remained in the joint account. The identification number of the joint account is nowhere in evidence; there is evidence that two bank accounts in the name of Emmanuel Polchies, bearing specified numbers, were seized, but there is no evidence to the effect that the joint account was one of the two named accounts seized. There is evidence that the Polchies made major purchases in the summer of 1983; but there is no evidence of the costs of these purchases, and they occurred at a time where Emmanuel Polchies had possession of an additional $150,000 to the $50,000 paid to Cynthia Polchies. Only $80,000 were recovered from Emmanuel Polchies' bank accounts; what became of the other $120,000 the family received in July? Was it spent in that summer of 1983? Was it spared the seizure for being in a different account? Was it invested? There is no evidence either way.

83 The Plaintiffs' memorandum of fact and law states that "Their parents had the means to feed, cloth and house the Plaintiffs without recourse to their share of the distribution", yet there is no evidence of this: no evidence of their assets, source of income or occupation; no evidence of their spending other than in the summer of 1983.

84 Finally, the Plaintiffs did not even testify or bring any evidence to the effect that they have asked their parents to remit to them -- or even account for -- their share of the distribution, and that they have been refused.

85 The Plaintiffs have failed to prove that they did not receive their share of the distribution or the benefit thereof, or that they have suffered any loss from the remittance of these funds to their mother.

Conclusion

86 For the reasons above, I find that the actions of Christopher and Crystal Polchies are barred by limitation, that the Band and the Crown fulfilled their duty to the Plaintiffs when they paid their shares to their mother, that neither the Band nor the Crown owed a duty to the Plaintiffs to ensure that these monies, once paid, were properly cared for and managed, and that the Plaintiffs, in any event, have failed to establish that they have suffered any damage as a result of the Crown's or the Band's conduct.

87 The Plaintiffs' action therefore fails, and it is not necessary to deal with the substance of the Band's positive grounds of defence to the Crown's third party claim.

TABIB, PROTHONOTARY

cp/e/qlaim/qlmxt/qltxp/qljxl

1 Section 6(2)(e) of H-12 provides that: "Bands not making per capita distributions on a monthly basis as described in (d) may throughout the year declare occasional per capita distributions. Upon approval of an occasional per capita distribution, payments representing the distribution of per capita shares in respect of minors, mental incompetents and adoptees will be made to individual accounts established by the Department for such individuals. Upon written request by a parent or guardian payments not exceeding $3,000 in any fiscal year may be made from the account of a minor to the head of the household shown on the band list as being the parent or guardian of the minor, if the minor is in the care and custody of the parent or guardian."

2 Section 6(2)(j) provides that: "The Minister or his delegate may grant approval to specific bands to administer per capita distribution payments in accordance with procedures agreed upon by the Minister and the Band Council."

3 *Children's Law Act*, R.S.N.L. 1990 c. C-13, s. 59; *Children's Law Act*, S.N.W.T. 1997 c. 14,

s. 49; *Minor's Property Act*, S.A. 2004, c. M-18.1.

4 *Quebec Civil Code*, R.S.Q. 1991, c. 64, s. 178 and following; *Family Relations Act*, R.S.B.C. 1996, ch. 128, s. 25 and 27; *Children's Law Reform Act*, R.S.O. 1990, c. C-12, s. 50 (up to $10,000); *Children's Law Act*, ss. 1997 c. C-8.2, sections 30 and 32.

Province of Alberta

PUBLIC TRUSTEE ACT

Statutes of Alberta, 2004
Chapter P-44.1

Current as of October 1, 2011

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Note

All persons making use of this consolidation are reminded that it has no legislative sanction, that amendments have been embodied for convenience of reference only. The official Statutes and Regulations should be consulted for all purposes of interpreting and applying the law.

Regulations

The following is a list of the regulations made under the *Public Trustee Act* that are filed as Alberta Regulations under the Regulations Act

	Alta. Reg.	*Amendments*
Public Trustee Act		
Public Trustee General	241/2004	*8/2005, 67/2005, 24/2006, 164/2010*
Public Trustee Investment	24/2006	*259/2007, 227/2008*
Transitional (Applications Made in Conformity with the Dependent Adults Act; Certificates of Incapacity)	218/2009	

(j) "represented adult" means

(i) a represented adult as defined in the *Adult Guardianship and Trusteeship Act*, and

(ii) an incapacitated person.

2004 cP-44.1 s1;2008 cA-4.2 s150

Part 1
Office of the Public Trustee

Appointment of Public Trustee

2(1) The Lieutenant Governor in Council shall appoint a person to be Public Trustee.

(2) In accordance with the *Public Service Act*, there may be appointed any other persons as employees in the office of the Public Trustee as are necessary.

(3) The Minister may designate a person to act temporarily as Public Trustee if

(a) the person appointed under subsection (1) is unable to carry out the duties of the Public Trustee, or

(b) there is a vacancy in the position of Public Trustee.

(4) A designation under subsection (3) remains in effect until

(a) it is terminated by the Minister, or

(b) a person is appointed under subsection (1).

Corporation sole

3 The Public Trustee is a corporation sole under the name Public Trustee.

Delegation

4 The Public Trustee may in writing delegate to an employee or class of employee in the office of the Public Trustee any of the Public Trustee's powers, duties or functions.

Public Trustee functions

5 The Public Trustee may act

(a) as personal representative of a deceased person,

(b) as trustee of any trust or to hold or administer property in any other fiduciary capacity,

(c) to protect the property or estate of minors and unborn persons, and

(d) in any capacity in which the Public Trustee is authorized to act

(i) by an order of the Court, or

(ii) under this or any other Act.

Public Trustee not required to act

6(1) The Public Trustee is under no duty to act in a capacity, perform a task or function or accept an appointment by reason only of being empowered or authorized to do so.

(2) Subject to subsection (3), a court may appoint the Public Trustee to act in a capacity or to perform a task or function only if the Public Trustee consents to the appointment and to the terms of the appointment.

(3) If an Act expressly authorizes a court to direct the Public Trustee to act in a particular capacity or to perform a particular function, the court may appoint the Public Trustee to act in the capacity or to perform the task or function only if the Public Trustee has been given a reasonable opportunity to make representations regarding the proposed appointment.

(4) The Public Trustee may apply to have the court rescind or vary the terms of an appointment made contrary to subsection (2) or (3), and on the application the court may either rescind the appointment or vary its terms in a manner to which the Public Trustee consents.

Part 2
Particular Functions of the Public Trustee

Division 1
Missing Persons and Unclaimed Property

Court may declare persons to be missing

7(1) If satisfied that after reasonable inquiry a person cannot be located, the Court, on application, may by order

(4) The cost to the Public Trustee of anything done under this section is recoverable from the estate and is a first charge against the property of the estate.

Summary disposition of small estates

13(1) If a person dies and the person's estate consists only of personal property that does not exceed in value the prescribed amount and no person has been granted probate or administration in Alberta, the Public Trustee, without obtaining a grant of administration, may

(a) take possession of the deceased person's property,

(b) dispose of articles of personal use in any manner the Public Trustee considers appropriate,

(c) sell property not disposed of under clause (b) and apply the proceeds toward payment of amounts due and debts incurred for the burial of the deceased, and

(d) do all things necessary to complete the administration of the estate.

(2) A document in the prescribed form advising that the Public Trustee is administering the estate of a deceased person pursuant to this section is conclusive proof that the Public Trustee is the administrator of the estate.

Public Trustee's priority to grant in certain cases

14(1) In this section, "person under legal disability" means

(a) a minor, or

(b) a represented adult for whom the Public Trustee is trustee.

(2) Notwithstanding any other enactment, where a person dies anywhere leaving property in Alberta and a person under legal disability has an interest in the estate,

(a) the Public Trustee has the same priority to a grant of administration of the estate that the person would have if he or she were an adult of full legal capacity, and

(b) notwithstanding clause (a), the Public Trustee has priority to a grant of administration over any person who is not a resident of Alberta if

Monitoring trustee of trust for minors

20 The Public Trustee has no duty to monitor any trustee unless appointed to do so by a trust instrument under section 21 or by the Court under section 22.

Monitoring trustee for minors

21(1) A trust instrument may expressly appoint the Public Trustee to monitor the trustee on behalf of minor beneficiaries, including minor beneficiaries who have a contingent interest in the trust property.

(2) The duties of the Public Trustee when appointed by a trust instrument to monitor a trustee on behalf of minor beneficiaries are as follows:

(a) as soon as practicable after receiving notice that the trust has come into effect, to obtain and review

(i) a copy of the trust instrument,

(ii) an inventory of the trust's assets as of the date the trust came into effect, and

(iii) any other document or information that may be prescribed;

(b) at prescribed intervals, to obtain from the trustee the prescribed statements or information regarding the trust and to review them;

(c) if so provided by the trust instrument, to obtain from the trustee audited financial statements for the trust at intervals stipulated by the trust instrument, and to review them;

(d) to take any action referred to in subsection (5) that the Public Trustee determines to be necessary to protect the interests of the minor beneficiaries;

(e) to perform such additional duties as may be prescribed.

(3) If a trust instrument has appointed the Public Trustee to monitor a trustee, the trustee must provide the Public Trustee with the documents and information referred to in subsection (2) or requested by the Public Trustee under subsection (5)(a).

(4) The purpose of a review under subsection (2) is for the Public Trustee to determine, based on information provided by the trustee, whether the trustee appears to be

(a) keeping adequate records of the trustee's administration of the trust,

(b) avoiding dealings with trust property in which the trustee's self-interest conflicts with the trustee's fiduciary duties, and

(c) dealing with trust property in accordance with the trust instrument.

(5) If the Public Trustee is unable to make a determination described in subsection (4) or determines that the trustee appears not to be carrying out one or more of the duties referred to in subsection (4), the Public Trustee may do any one or more of the following:

(a) request the trustee to provide any documents or information that the Public Trustee may require to make the determination;

(b) request the trustee to take any action that the Public Trustee considers necessary for the trustee to carry out a duty referred to in subsection (4);

(c) apply to the Court for an order appropriate to protect the interests of the minor beneficiaries.

(6) If the Public Trustee is appointed by a trust instrument to monitor a trustee, the Public Trustee

(a) has no duty to question or interfere with a decision or action of the trustee that appears to be in accordance with the trust instrument,

(b) has no duty to question information provided to the Public Trustee by the trustee unless there is an obvious omission, error or inconsistency in the information provided, and

(c) owes no duty to any beneficiary of the trust other than a minor.

(7) The Public Trustee's duty to monitor the trustee terminates when there are no longer any minor beneficiaries of the trust.

(8) The duties of the Public Trustee under this section arise only when the Public Trustee has received evidence satisfactory to the Public Trustee that the trust has come into effect.

(9) The Court, on application, may terminate the Public Trustee's duty to monitor a trustee under this section if in the Court's opinion

it is not in the best interest of the minor beneficiaries for the Public Trustee to monitor the trustee.

(10) The Public Trustee may provide to a person who was formerly a minor beneficiary of a trust monitored by the Public Trustee a copy of any statement or information provided to the Public Trustee under this section by the trustee.

(11) If the Public Trustee is appointed by a trust instrument to monitor a trustee on behalf of minor beneficiaries, the Public Trustee is entitled to be paid, and the trustee is authorized to pay, the prescribed fee out of the trust property.

(12) If the Public Trustee is monitoring a trustee at the time this subsection comes into force, subsections (2) to (10) apply as if the Public Trustee had been appointed under this section.

Court directives to monitor trustee for minors

22(1) The Court, on application, may by order direct the Public Trustee to monitor on behalf of minor beneficiaries a trustee appointed by

(a) a trust instrument, or

(b) an order of the Court.

(2) Unless otherwise provided by an order directing the Public Trustee to monitor a trustee, the duties of the Public Trustee under the order are the same as if the Public Trustee had been appointed to monitor the trustee by a trust instrument under section 21.

(3) An order directing the Public Trustee to monitor a trustee must not impose duties beyond what the Public Trustee would have had if appointed to monitor by a trust instrument under section 21 unless the Public Trustee has consented to the terms of the direction.

(4) The fee payable to the Public Trustee for monitoring a trustee when directed by the Court to do so is the same as would have been payable if the Public Trustee had been appointed to monitor by a trust instrument under section 21, unless an order imposing duties beyond what the Public Trustee would have had if appointed to monitor by a trust instrument specifies a higher fee.

(3) If the Public Trustee establishes a pooled investment fund, the Public Trustee must have a written policy as to when the Public Trustee will consider investing a client's money in the fund.

(4) The Public Trustee may invest a client's money in a pooled investment fund only if the investment is in accordance with the policy established under subsection (3).

Part 4
General

Application to Court

39 An application under this Act may be made by any person the Court considers appropriate to make the application.

Public Trustee fees and expenses

40(1) The Public Trustee

(a) may charge a client a fee that the Public Trustee considers to be reasonable for any service, including legal services, that the Public Trustee provides to the client or for a task or function performed by the Public Trustee for the benefit of the client, and

(b) is entitled to recover from a client any expense reasonably incurred by the Public Trustee on the client's behalf.

(2) The Public Trustee may charge and recover fees and expenses

(a) before or after providing a service or incurring an expense, or

(b) periodically while providing services under an ongoing relationship with a client.

(3) The Public Trustee may recover a fee or expense that is chargeable to a client by deducting it from the client's guaranteed account or as otherwise permitted by law.

(4) The Court may review any fee charged to a client by the Public Trustee under this section.

Legal costs

41 Unless otherwise provided by an enactment, where the Public Trustee is a party to or participates in any matter before a court,

Indexed as:

Sawridge Band v. Canada

Between
Walter Patrick Twinn suing on his own behalf and on behalf of all other members of the Sawridge Band,
Wayne Roan suing on his own behalf and on behalf of all other members of the Ermineskin Band,
Bruce Starlight suing on his own behalf and on behalf of all other members of the Sarcee Band, plaintiffs, and
Her Majesty the Queen, defendant, and
Native Council of Canada, Native Council of Canada (Alberta) and Non-Status Indian Association of Alberta, interveners

[1995] F.C.J. No. 1013

[1995] A.C.F. no 1013

[1996] 1 F.C. 3

[1996] 1 C.F. 3

[1995] 4 C.N.L.R. 121

56 A.C.W.S. (3d) 780

Action No. T-66-86

Federal Court of Canada - Trial Division
Edmonton, Alberta* and Ottawa, Ontario**

Muldoon J.

Heard: *September 20, 22 - 24, 27 - 29, 1993
*October 4 - 7, 12 - 15, 18 - 22, 25 - 29, 1993
*November 1 - 5, 1993
**November 15 - 19, 22 - 26, 29 - 30, 1993
**December 1 - 3, 6 - 9, 13, 1993
**March 14 - 18, 21 - 25, 28 - 31, 1994
**April 1, 12 - 15, 18 - 22, 25, 1994

Judgment: July 6, 1995

(124 pp.)

Indians -- Nations, tribes and bands -- Bands -- Membership -- Whether rules imposed by Indian Act violated Band's right to determine own membership.

This was an application by an Indian band for a declaration that sections 8 to 14.3 of the Indian Act were inconsistent with section 35 of the Constitution Act. The provisions dealt with the maintenance of Band lists and rules for being included as a Band member. One of the objections was that the provisions eliminated the rule that permitted an Indian husband to bring his non-Indian wife onto a reserve but which forbade an Indian wife from bringing her non-Indian husband into the Band. The applicant claimed that the amendments eliminated the Band's right to determine its membership and imposed additional members on the Band, even if such membership was objected to by the Band.

HELD: Application dismissed. The aboriginal and treaty rights which permitted an Indian husband to bring his non-Indian wife onto a reserve but which forbade an Indian wife from bringing in her non-Indian husband were extinguished by section 35(4) of the Constitution Act. This provision exacted equality of rights between males and females, no matter what rights or responsibilities may have pertained in earlier times. The impugned legislation could be supported by section 15 of the Charter of Rights and Freedoms, if not for section 25 of the Charter but section 35(4) was an Indian provision in an otherwise anti-racist constitution and it spoke deliberately and specifically to the diminution of past inequalities between Indian men and women. Thus, the 1985 amendment was validated, possibly by section 15 of the Charter and definitely by section 35(4). The plaintiffs' submission that the Royal Proclamation of 1763 gave them the right to define their own membership was rejected. The Proclamation specifically excluded the territory where the plaintiffs' ancestors roamed and therefore did not deal with their constitutional rights, since the proclamation did not speak of aboriginal rights in a vacuum. The plaintiffs' right to determine their members was extinguished by the Indian Act of 1876. If there was any infringement of the plaintiffs' rights under section 2(d) of the Charter it was justified on the grounds of equality in section 15 of the Charter and the equality of the sexes, contained in section 28 of the Charter.

Statutes, Regulations and Rules Cited:

Act providing for the organization of the Department of the Secretary of State for Canada, and for the management of Indian and Ordnance Lands, S.C. 1868, c. 42, ss. 6, 15, 17.
Act for the gradual enfranchisement of Indians, the better management of Indian Affairs, and to extend the provisions of the Act 31st Victoria, c. 42, S.C. 1869, c. 6, ss. 3, 6, 19.
Canadian Charter of Rights and Freedoms, 1982, ss. 1, 2(d), 15, 25, 28.
Constitution Act, 1867, s. 91(24).
Constitution Act, 1930.
Constitution Act, 1982, ss. 35, 35(1), 35(4).
Constitution Act, 1982, c. 11 (U.K), s. 35.
Indian Act, 1876, S.C. 1876, c. 18, ss. 3, 4, 5, 11, 12, 13, 15, 16, 20, 25, 26, 27.
Indian Act, 1880, S.C. 1880, c. 28.
Indian Act, 1951, S.C. 1951, c. 29.

Indian Act, R.S.C. 1985, c. I-5, ss. 2(1), 4, 4.1, 5, 6, 7, 8, 9, 10, 11, 12, 12(1)(b), 13, 13.1, 13.2, 13.3, 14, 14.1, 14.2, 14.3, 88, 90(1)(b).
Royal Proclamation of 1763, R.S.C. 1985, Appendix II, No. 1.
Rupert's Land Act, 1868, 31-32 Vict., c. 105.

Counsel:

Catherine Twinn and Martin Henderson and Phil Healey, for the plaintiffs.
Dogan D. Ackman, for the defendant.
Eugene Meehan, the intervenor for Native Council of Canada.
Jon Faulds and Tom O'Reilly, the intervenor for Native Council of Canada (Alberta).
Terrence P. Glancy, the intervenor for Non-Status Indian Association of Alberta.

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1 **MULDOON J.**:-- This is a constitutional case, in which the plaintiffs sue for a declaration that key provisions of an Act of Parliament are inconsistent with parts of section 35 of the Constitution of Canada, and in particular, as enacted by the Constitution Act, 1982, Schedule B to the Canada Act 1982 (U.K.), Chap. 11. Notice was duly served on the attorney general of each province (the Attorney General of Canada already being engaged on the defendant's behalf) in accordance with section 57 of the Federal Court Act, R.S.C. 1985, Chap. F-7 and Rule 1101. No provincial attorney general applied for leave to intervene herein, nor for leave to file a memorandum of facts and law and to appear by counsel and take part in the hearing.

2 Three interveners were, however, permitted to participate in this case with nearly the full plenitude of a party's rights, status and privileges. They were admitted to such status by order of Mr. Justice McNair, pronounced September 14, 1989 (doc. 96). At trial, the plaintiffs moved to evict the three interveners, but for the reasons given then, the plaintiffs' motion was dismissed, with costs, to consist of a counsel fee payable in favour of the defendant and each of the three interveners in any event of the cause.

3 At trial the plaintiffs also moved the Court to take a view - necessarily a mute, silent and uncommunicative view, for no sworn witnesses were proposed to accompany the Court - on two reserves, the Westbank in British Columbia and the Sarcee (or Tsuu Tina) in Alberta. In addition, the plaintiffs sought to adduce the testimony, on Commission, of a witness who was said to be 85 years of age, and who declined to travel by aeroplane. That compendious motion, also for reasons expressed at the trial, was dismissed on October 18, 1993, with costs to the defendant and interveners in any event of the cause.

4 The plaintiffs had recently before the trial dismissed their counsel of record, the latest of several, before engaging the counsel who ultimately did appear and conduct the plaintiffs' case. The Court ruled that the trial was to proceed nearly on schedule with little delay, because that switching of lawyers was the plaintiffs' own doing and they were not to be permitted to make ashes of the pre-trial case-management efforts of Messrs. Justices McNair and Cullen. Accordingly, the plaintiffs' new trial lawyers, having known what they were getting into, were obliged to carry on with only minimal delay.

5 As it turns out, the delay which has now occurred has been largely caused by innumerable flaws in the technological marvel which was engaged, with personnel, to produce trial transcripts and exhibits' images with the speed of summer lightning on an electronic computerized monitor screen. This delay, from the Court's point of view, has been unavoidable. The old-fashioned way would have been faster.

THE LEGISLATION

6 The plaintiffs' grievance is stated to reside in an Act of Parliament: 33-34 Elizabeth II, An Act to amend the Indian Act, S.C. 1985, Chap. 27, (the 1985 amendment). Section 4 of that 1985 amendment is particularly noticed in enacting new sections 8, 9, 10, 11 and 12 in the Indian Act, R.S.C. 1985, Chap. I-5.[1] Because some of these provisions refer to earlier ones, and because there is an interrelationship with concurrently enacted and repealed provisions, the Court deems it convenient and not unreasonable to spill the ink necessary to set out the pertinent provisions, keeping in mind that they must find their validity, if at all, not only on the uncontested ground of the constitutional division of national and provincial powers, but also in accordance with section 35 of the 1982 constitution as mentioned at the outset of these reasons. In some instance, the repealed provision is recited (appearing in italics) just ahead of the bold-face provision of the 1985 amendment called Bill C-31 by some. Ordinary type is utilized for unamended surviving pre-Bill C-31 provisions:

> 2. (1) In this Act
>
> "band" means a body of Indians
>
> (a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after the 4th day of September 1951,
> (b) for whose use and benefit in common, moneys are held by Her Majesty, or
> (c) declared by the Governor in Council to be a band for the purposes of this Act;
>
> "Band List" means a list of persons that is maintained under section 8 by a band or in the Department;
>
> *** *** ***
>
> "Indian" means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian;
>
> "Indian Register" means the register of persons that is maintained under section 5;
>
> "member of a band" means a person whose name appears on a Band List or who is entitled to have his name appear on a Band List;

*** *** ***

"Registrar" means the officer in the Department who is in charge of the Indian Register and the Band Lists maintained in the Department;

*** *** ***

4. (1) A reference in this Act to an Indian does not include any person of the race of aborigines commonly referred to as Inuit.

(2) The Governor in Council may by proclamation declare that this Act or any portion thereof, except sections 37 to 41, shall not apply to

(a) any Indians or any group or band of Indians, or
(b) any reserve or any surrendered lands or any part thereof,

and may by proclamation revoke any such declaration. [Repealed R.S.C. 1985 (1st Supp.), c. 32, s. 2]

(2) The Governor in Council may by proclamation declare that this Act or any portion thereof, except sections 5 to 14.3 or sections 37 to 41, shall not apply to

(a) any Indians or any group or band of Indians, or
(b) any reserve or any surrendered lands or any part thereof,

and may by proclamation revoke any such declaration.

(2.1) For greater certainty, and without restricting the generality of subsection (2), the Governor in Council shall be deemed to have had the authority to make any declaration under subsection (2) that the Governor in Council has made in respect of section 11, 12 or 14, or any provision thereof, as each section or provision read immediately prior to April 17, 1985.

(3) Sections 114 to 123 and, unless the Minister otherwise orders, sections 42 to 52 do not apply to or in respect of any Indian who does not ordinarily reside on a reserve or on lands belonging to Her Majesty in right of Canada or a province. R.S. 1970, c. I-6, s. 4; S.C. 1984, c. 40, s. 37; R.S.C. 1985 (1st Supp.), c. 32, s. 2.

4.1 A reference to an Indian in the definitions "band", "Indian moneys" and "mentally incompetent Indian" in section 2 or a reference to an Indian in *** [various provisions listed] *** shall be deemed to include a reference to any person who is entitled to have his name entered in a Band List and whose name has been entered therein. [Repealed R.S.C. 1985 (4th Supp.), c. 48, s. 1]

4.1 A reference to an Indian in any of the following provisions shall be deemed to include a reference to any person whose name is entered in a Band List and who is entitled to have it entered therein: the definitions "band", "Indian moneys" and "mentally incompetent Indian" in section 2, subsections 4(2) and (3) and 18(2), sections 20 and 22 to 25, subsections 31(1) and (3) and 35(4), sections 51, 52, 52.2 and 52.3, subsections 58(3) and 61(1), sections 63 and 65, subsections 66(2) and 70(1) and (4), section 71, paragraphs 73(g) and (h), subsection 74(4), section 84, paragraph 87(1)(a), section 88, subsection 89(1) and paragraph 107(b). R.S.C. 1985 (1st Supp.), c. 32, s. 3; R.S.C. 1985 (4th Supp.), c. 48, s. 1.

5. An Indian Register shall be maintained in the Department, which shall consist of Band Lists and General Lists and in which shall be recorded the name of every person who is entitled to be registered as an Indian. [Repealed R.S.C. 1985 (1st Supp.), c. 32, s. 4] R.S. 1970, c. I-6, s. 5.

5. (1) There shall be maintained in the Department an Indian Register in which shall be recorded the name of every person who is entitled to be registered as an Indian under this Act.

(2) The names in the Indian Register immediately prior to April 17, 1985 shall constitute the Indian Register on April 17, 1985.

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

(4) The Indian Register shall indicate the date on which each name was added thereto or deleted therefrom.

(5) The name of a person who is entitled to be registered is not required to be recorded in the Indian Register unless an application for registration is made to the Registrar. R.S. 1970, c. I-6, s. 5; R.S.C. 1985 (1st Supp.), c. 32, s. 4.

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

(a) that person was registered or entitled to be registered immediately prior to April 17, 1985;

(b) that person is a member of a body of persons that has been declared by the Governor in Council on or after April 17, 1985 to be a band for the purposes of this Act;

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

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

(e) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951,

(i) under section 13, as it read immediately prior to September 4, 1951, or under any former provision of this Act relating to the same subject-matter as that section, or

(ii) under section 111, as it read immediately prior to July 1, 1920, or under any former provision of this Act relating to the same subject-matter as that section; or

(f) that person is a person both of whose parents are or, if no longer living, were at the time of death entitled to be registered under this section.

(2) Subject to section 7, a person is entitled to be registered if that person is a person one of whose parents is or, if no longer living, was at the time of death entitled to be registered under subsection (1).

(3) For the purposes of paragraph (1)(f) and subsection (2),

(a) a person who was no longer living immediately prior to April 17, 1985 but who was at the time of death entitled to be registered shall be deemed to be entitled to be registered under paragraph (1)(a); and

(b) a person described in paragraph (1)(c), (d), (e) or (f) or subsection (2) and who was no longer living on April 17, 1985 shall be deemed to be entitled

to be registered under that provision. R.S. 1970, c. I-6, s. 6; R.S.C. 1985 (1st Supp.), c. 32, s. 4; R.S.C. 1985 (4th Supp.), c. 43, s. 1.

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

(2) The Indian Register shall indicate the date on which each name was added thereto or deleted therefrom. [Repealed R.S.C. 1985 (1st Supp.), c. 32, s. 4] R.S. 1970, c. I-6, s. 7.

7. (1) The following persons are not entitled to be registered:

(a) a person who was registered under paragraph 11(1)(f), as it read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as that paragraph, and whose name was subsequently omitted or deleted from the Indian Register under this Act; or

(b) a person who is the child of a person who was registered or entitled to be registered under paragraph 11(1)(f), as it read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as that paragraph, and is also the child of a person who is not entitled to be registered.

(2) Paragraph (1)(a) does not apply in respect of a female person who was, at any time prior to being registered under paragraph 11(1)(f), entitled to be registered under any other provision of this Act.

(3) Paragraph (1)(b) does not apply in respect of the child of a female person who was, at any time prior to being registered under paragraph 11(1)(f), entitled to be registered under any other provision of this Act. R.S. 1970, c. I-6, s. 7; R.S.C. 1985 (1st Supp.), c. 32, s. 4.

8. The band lists in existence in the Department on the 4th day of September 1951 shall constitute the Indian Register, and the applicable lists shall be posted in a conspicuous place in the superintendent's office that serves the band or persons to whom the List relates and in all other places where band notices are ordinarily displayed. [Repealed R.S.C. 1985 (1st Supp.), c. 32, s. 4] R.S. 1970, c. I-6, s. 8.

8. There shall be maintained in accordance with this Act for each band a Band List in which shall be entered the name of every person who is a member of that Band. R.S. 1970, c. I-6, s. 8; R.S.C. 1985 (1st Supp.), c. 32, s. 4.

9. (1) Within six months after a list has been posted in accordance with section 8 or within three months after the name of a person has been added to or deleted from a Band List or a General List pursuant to section 7

*** [the band council, electors, adult named on list, or person concerned] ***

may, by notice in writing to the Registrar, containing a brief statement of the grounds therefor, protest the inclusion, omission, addition, or deletion, as the case may be, of the name of that person, and the onus of establishing those grounds lies on the person making the protest.

(2) Where a protest is made to the Registrar under this section he shall cause an investigation to be made into the matter and shall render a decision, and subject to a reference under subsection (3), the decision of the Registrar is final and conclusive.

(3) Within three months from the date of a decision of the Registrar under this section,

(a) the council of the band affected by the Registrar's decision, or
(b) the person by or in respect of whom the protest was made,

may, by notice in writing, request the Registrar to refer the decision to a judge for review, and thereupon the Registrar shall refer the decision, together with all material considered by the Registrar in making his decision,

*** *** ***

(4) The judge * * * shall inquire into the correctness of the Registrar's decision, and for such purposes may exercise all the powers of a commissioner under Part I of the Inquiries Act; the judge shall decide whether the person in respect of whom the protest was made is, in accordance with this Act, entitled or not entitled, as the case may be, to have his name included in the Indian Register, and the decision of the judge is final and conclusive.

(5) Not more than one reference of a Registrar's decision in respect of a protest may be made to a judge under this section.

(6) Where a decision of the Registrar has been referred to a judge for review under this section, the burden of establishing that the decision of the Registrar is erroneous is on the person who requested that the decision be so referred. [Re-

pealed R.S.C. 1985 (1st Supp.), c. 32, s. 4] R.S. 1970, c. I-6, s. 9; S.C. 1974-75-76, c. 48, s. 25; S.C. 1978-79, c. 11, s. 10; S.C. 1984, c. 41, s. 2.

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

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

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

(4) A Band List maintained in the Department shall indicate the date on which each name was added thereto or deleted therefrom.

(5) The name of a person who is entitled to have his name entered in a Band List maintained in the Department is not required to be entered therein unless an application for entry therein is made to the Registrar. R.S. 1970, c. I-6, s. 9; S.C. 1974-75-76, c. 48, s. 25; S.C. 1978-79, c. 11, s. 10; S.C. 1984, c. 41, s. 2; R.S.C. 1985 (1st Supp.), c. 32, s. 4.

10. Where the name of a male person is included in, omitted from, added to or deleted from a Band List or a General List, the names of his wife and his minor children shall also be included, omitted, added or deleted, as the case may be. [Repealed R.S.C. 1985 (1st Supp.), c. 32, s. 4] R.S. 1970, c. I-6, s. 10.

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

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

(a) after it has given appropriate notice of its intention to do so, establish membership rules for itself; and
(b) provide for a mechanism for reviewing decisions on membership.

(3) Where the council of a band makes a by-law under paragraph 81(1)(p.4) bringing this subsection into effect in respect of the band, the consents required under subsections (1) and (2) shall be given by a majority of the members of the band who are of the full age of eighteen years.

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

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

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

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

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

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

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

(10) A band may at any time add to or delete from a Band List maintained by it the name of any person who, in accordance with the membership rules of the

band, is entitled or not entitled, as the case may be, to have his name included in that list.

(11) A Band List maintained by a band shall indicate the date on which each name was added thereto or deleted therefrom. R.S. 1970, c. I-6, s. 10; R.S.C. 1985 (1st Supp.), c. 32, s. 4.

11. (1) Subject to section 12, a person is entitled to be registered if that person

(a) on the 26th day of May 1874 was, for the purposes of An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands, being chapter 42 of the Statutes of Canada, 1868, as amended by section 6 of chapter 6 of the Statutes of Canada, 1869, and section 8 of chapter 21 of the Statutes of Canada, 1874, considered to be entitled to hold, use or enjoy the lands and other immovable property belonging to or appropriated to the use of the various tribes, bands or bodies of Indians in Canada;

(b) is a member of a band

(i) for whose use and benefit, in common, lands have been set apart or since the 26th day of May 1874, have been agreed by treaty to be set apart, or

(ii) that has been declared by the Governor in Council to be a band for the purposes of this Act;

(c) is a male person who is a direct descendent in the male line of a male person described in paragraph (a) or (b);

(d) is the legitimate child of

(i) a male person described in paragraph (a) or (b), or

(ii) a person described in paragraph (c);

(e) is the illegitimate child of a female person described in paragraph (a), (b), or (d); or

(f) is the wife or widow of a person who is entitled to be registered by virtue of paragraph (a), (b), (c), (d), or (e).

(2) Paragraph (1)(e) applies only to persons born after the 13th day of August 1956. [Repealed R.S.C. 1985 (1st Supp.), c. 32, s. 4] R.S. 1970, c. I-6, s. 11.

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

(a) the name of that person was entered in the Band List for that band, or that person was entitled to have it entered in the Band List for that band, immediately prior to April 17, 1985;
(b) that person is entitled to be registered under paragraph 6(1)(b) as a member of that band;
(c) that person is entitled to be registered under paragraph 6(1)(c) and ceased to be a member of that band by reason of the circumstances set out in that paragraph; or
(d) that person was born on or after April 17, 1985 and is entitled to be registered under paragraph 6(1)(f) and both parents of that person are entitled to have their names entered in the Band List or, if no longer living, were at the time of death entitled to have their names entered in the Band List.

(2) Commencing on the day that is two years after the day that an Act entitled An Act to Amend the Indian Act, introduced in the House of Commons on February 28, 1985, is assented to, or on such earlier day as may be agreed to under section 13.1, where a band does not have control of its Band List under this Act, a person is entitled to have his name entered in a Band List maintained in the Department for the band

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

(3) For the purposes of paragraph (1)(d) and subsection (2),

(a) a person whose name was omitted or deleted from the Indian Register or a band list in the circumstances set out in paragraph 6(1)(c), (d) or (e) and who was no longer living on the first day on which the person would otherwise be entitled to have the person's name entered in the Band List of the band of which the person ceased to be a member shall be deemed to be entitled to have the person's name so entered; and
(b) a person described in paragraph (2)(b) shall be deemed to be entitled to have the person's name entered in the Band List in which the parent referred to in that paragraph is or was, or is deemed by this section to be, entitled to have the parent's name entered.

(4) Where a band amalgamates with another band or is divided so as to constitute new bands, any person who would otherwise have been entitled to have his name entered in the Band List of that band under this section is entitled to have

his name entered in the Band List of the amalgamated band or the new band to which that person has the closest family ties, as the case may be. R.S. 1970, c. I-6, s. 11; R.S.C. 1985 (1st Supp.), c. 32, s. 4; R.S.C. 1985 (4th Supp.), c. 43, s. 2.

12. (1) The following persons are not entitled to be registered, namely,

(a) a person who

(i) has received or has been allotted half-breed lands or money scrip,

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

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

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

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

(3) The Minister may issue to any Indian to whom this Act ceases to apply, a certificate to that effect.

(4) Subparagraphs (1)(a)(i) and (ii) do not apply to a person who

(a) pursuant to this Act is registered as an Indian on the 13th day of August 1958, or
(b) is a descendant of a person described in paragraph (a) of this subsection.

(5) Subsection (2) applies only to persons born after the 13th day of August 1956. [Repealed R.S.C. 1985 (1st Supp.), c. 32, s. 4] R.S. 1970, c. I-6, s. 12.

12. Commencing on the day that is two years after the day that an Act entitled An Act to amend the Indian Act, introduced in the House of Commons on Feb-

ruary 28, 1985, is assented to, or on such earlier day as may be agreed to under section 13.1, any person who

(a) is entitled to be registered under section 6, but is not entitled to have his name entered in the Band List maintained in the Department under section 11, or
(b) is a member of another band,

is entitled to have his name entered in the Band List maintained in the Department for a band if the council of the admitting band consents. R.S. 1970, c. I-6, s. 12; R.S.C. 1985 (1st Supp.), c. 32, s. 4.

13. Subject to the approval of the Minister and, if the Minister so directs, to the consent of the admitting band,

(a) a person whose name appears on a General List may be admitted into membership of a band with the consent of the council of the band, and
(b) a member of a band may be admitted into membership of another band with the consent of the council of the latter band. [Repealed R.S.C. 1985 (1st Supp.), c. 32, s. 4] R.S. 1970, c. I-6, s. 13.

13. Notwithstanding sections 11 and 12, no person is entitled to have his name entered at the same time in more than one Band List maintained in the Department. R.S. 1970, c. I-6, s. 13; R.S.C. 1985 (1st Supp.), c. 32, s. 4.

13.1 (1) A band may, at any time prior to the day that is two years after the day that an Act entitled An Act to amend the Indian Act, introduced in the House of Commons on February 28, 1985, is assented to, decide to leave the control of its Band List with the Department if a majority of the electors of the band gives its consent to that decision.

(2) Where a band decides to leave the control of its Band List with the Department under subsection (1), the council of the band shall forthwith give notice to the Minister in writing to that effect.

(3) Notwithstanding a decision under subsection (1), a band may, at any time after that decision is taken, assume control of its Band List under section 10. R.S.C. 1985 (1st Supp.), c. 32, s. 4.

13.2 (1) A band may, at any time after assuming control of its Band List under section 10, decide to return control of the Band List to the Department if a majority of the electors of the band gives its consent to that decision.

(2) Where a band decides to return control of its Band List to the Department under subsection (1), the council of the band shall forthwith give notice to the Minister in writing to that effect and shall provide the Minister with a copy of the Band List and a copy of all the membership rules that were established by the band under subsection 10(2) while the band maintained its own Band List.

(3) Where a notice is given under subsection (2) in respect of a Band List, the maintenance of that Band List shall be the responsibility of the Department from the date on which the notice is received and from that time the Band List shall be maintained in accordance with the membership rules set out in section 11. R.S.C. 1985 (1st Supp.), c. 32, s. 4.

13.3 A person is entitled to have his name entered in a Band List maintained in the Department pursuant to section 13.2 if that person was entitled to have his name entered, and his name was entered, in the Band List immediately before a copy of it was provided to the Minister under subsection 13.2(2), whether or not that person is also entitled to have his name entered in the Band List under section 11. R.S.C. 1985 (1st Supp.), c. 32, s. 4.

14. A woman who is a member of a band ceases to be a member of that band if she marries a person who is not a member of that band, but if she marries a member of another band, she thereupon becomes a member of the band of which her husband is a member. [Repealed R.S.C. 1985 (1st Supp.), c. 32, s. 4] R.S. 1970, c. I-6, s. 14.

14. (1) Within one month after the day an Act entitled An Act to Amend the Indian Act, introduced in the House of Commons on February 28, 1985, is assented to, the Registrar shall provide the council of each band with a copy of the Band List for the band as it stood immediately prior to that day.

(2) Where a Band List is maintained by the Department, the Registrar shall, at least once every two months after a copy of the Band List is provided to the council of a band under subsection (1), provide the council of the band with a list of the additions to or deletions from the Band List not included in a list previously provided under this subsection.

(3) The council of each band shall, forthwith on receiving a copy of the Band List under subsection (1), or a list of additions to and deletions from its Band List under subsection (2), post the copy or the list, as the case may be, in a conspicuous place on the reserve of the band. R.S. 1970, c. I-6, s. 14; R.S.C. 1985 (1st Supp.), c. 32, s. 4.

14.1 The Registrar shall, on inquiry from any person who believes that he or any person he represents is entitled to have his name included in the Indian Register or a Band List maintained in the Department, indicate to the person making the inquiry whether or not that name is included therein. R.S.C. 1985 (1st Supp.), c. 32, s. 4.

14.2 (1) A protest may be made in respect of the inclusion or addition of the name of a person in, or the omission or deletion of the name of a person from, the Indian Register, or a Band List maintained in the Department, within three years after the inclusion or addition, or omission or deletion, as the case may be, by notice in writing to the Registrar, containing a brief statement of the grounds therefor.

(2) A protest may be made under this section in respect of the Band List of a band by the council of the band, any member of the band or the person in respect of whose name the protest is made or that person's representative.

(3) A protest may be made under this section in respect of the Indian Register by the person in respect of whose name the protest is made or that person's representative.

(4) The onus of establishing the grounds of a protest under this section lies on the person making the protest.

(5) Where a protest is made to the Registrar under this section, the Registrar shall cause an investigation to be made into the matter and render a decision.

(6) For the purposes of this section, the Registrar may receive such evidence on oath, on affidavit or in any other manner, whether or not admissible in a court of law, as the Registrar, in his discretion, sees fit or deems just.

(7) Subject to section 14.3, the decision of the Registrar under subsection (5) is final and conclusive. R.S.C. 1985 (1st Supp.), c. 32, s. 4.

14.3 (1) Within six months after the Registrar renders a decision on a protest under section 14.2,

(a) in the case of a protest in respect of the Band List of a band, the council of the band, the person by whom the protest was made, or the person in respect of whose name the protest was made or that person's representative, or

(b) in the case of a protest in respect of the Indian Register, the person in respect of whose name the protest was made or that person's representative,

may, by notice in writing, appeal the decision to a court referred to in subsection (5).

(2) Where an appeal is taken under this section, the person who takes the appeal shall forthwith provide the Registrar with a copy of the notice of appeal.

(3) On receipt of a copy of a notice of appeal under subsection (2), the Registrar shall forthwith file with the court a copy of the decision being appealed together with all documentary evidence considered in arriving at that decision and any recording or transcript of any oral proceedings related thereto that were held before the Registrar.

(4) The court may, after hearing an appeal under this section,

(a) affirm, vary or reverse the decision of the Registrar; or
(b) refer the subject-matter of the appeal back to the Registrar for reconsideration or further investigation.

*** *** ***

7 The matters in issue focus primarily on the 1985 amendments' sections 11 and 12, by contrast with their repealed predecessors, but there is significance to be perceived in the other recited provisions and their schematic purport, as will be expressed.

8 The plaintiffs would not have brought this action, no doubt, had they been in favour of how, they assert, it operates. Their complaints are defined by them, and rejected by the defendant and the interveners, in respective detailed pleadings.

THE PLEADINGS

9 Paragraph 13 of the amended statement of claim [st. of cl.] alleges that the statutes of Parliament prior to the recognition and affirmation of existing aboriginal and treaty rights on April 17, 1982 (with a few unstated limited exceptions) confirmed Indians' rights to determine their bands' members and did not impose additional members on the bands. The attorney-general's defence, however, denies all that, and avers those allegations are contrary to the explicit provisions of the successive Indian Acts and to the executive decisions made pursuant to that legislation. Then, the interveners, described by counsel for the Native Counsel of Canada [NCC] as les "exclusées" [sic], pleaded, as follows:

NCC's Statement of Intervention [st. of int.]

13. With respect to paragraph 13 of the Statement of Claim, the NCC denies the allegations contained therein.

Native Council of Canada (Alberta)'s [NCC(A)]'s st. of int.

(d) With respect to Paragraph 13 of the [st. of cl.], the NCC(A) states that statutes of * * * Parliament * * * prior to the entrenchment of [the stated rights] violated the rights of Indians by stripping aboriginal peoples of their statutory Indian status and membership in the Bands, while in other cases extending statutory Indian status and Band membership to individuals who were not aboriginal people.

Non-Status Indian Association of Alberta's [NSIAA's] st. of int.

8. With respect to paragraph 13 * * * the consequences of marriage between an Indian and a non-Indian were different for men and women. To the extent of that difference, the historical record does not support:

A. the allegation that there was no imposition of members upon an Indian band without consent;
B. the difference in treatment of men and women as an aboriginal right;
C. the difference in treatment of men and women as a treaty right.

10 Paragraph 14 of the statement of claim alleges as follows:

14. With the enactment of an Act entitled An Act to Amend the Indian Act, S.C., 1985, c.27 (the "1985 Amendment") Parliament attempted unilaterally to require Indian bands to admit certain persons to membership. The 1985 Amendment imposes members on a band without the necessity of consent by the council of the band or the members of the band itself and, indeed, imposes such persons on the band even if the council of the band or the membership objects to the inclusion of such persons in the band. This exercise of power by Parliament was unprecedented in the predecessor legislation.

11 The defendant avers in answer to the effect that he denies the allegation expressed in the last sentence and asserts that the 1985 amendment speaks for itself and further regarding the plaintiffs' paragraph 14, that section 91 head 24 of the Constitution Act, 1867 accords Parliament exclusive authority to legislate, and it did legislate the criteria and conditions of band membership, as well as the circumstances in which entitlement can be acquired, held, lost, revoked, regained or restored without the consent of bands or band councils.

12 To the defendant's statements, the plaintiffs replied and joined issue (certified record: tab 4, page 2, paragraphs 2 and 3):

2. With respect to paragraphs 5(b), 11, 12 and 14 the Plaintiffs say that their existence as Indians, Tribes and Bands, living in organized societies, long preceded any statute of the Parliament of Canada or treaty and that no such statute or treaty extinguished the right of such societies to determine their own membership.

3. With respect to the said paragraphs, the Plaintiffs further say that by the effect of the treaties in issue the reserve lands of the Plaintiff bands were set aside for the exclusive use of the Indians interested therein and that at no time prior to the enactment of the legislation now in issue did the Parliament of Canada enact legislation having the purpose or the effect of abrogating or limiting the rights conferred by the said treaties.

13 The interveners, each in its own st. of int., made these assertions:

NSIAA:

9. With respect to paragraphs 14 and 15 of the Statement of Claim, paragraphs 14, 15, 15(a), 15(b), and 15(c) of the Statement of Defence, and paragraphs 4, 5 and 6 of the Reply and Joinder of Issue, it is the position of the Association that:

A. the revisions to the Act by the 1985 amendment, were consistent with the legislative history of the Act and its predecessor legislation;
B. with respect to the Plaintiff Sarcee Band and those on whose behalf the Association speaks, the number of persons with acquired rights is small, and those conditionally entitled to become members are subject to the jurisdiction of the Sarcee Band to determine who shall be members pursuant to the provisions of its Band Membership Code.

NCC(A):

(e) With respect to Paragraph 14 of the Statement of Claim, the NCC(A) states that by the 1985 Amendment, Parliament attempted to correct injustices and wrongs resulting from the application of the Indian Act prior to the 1985 Amendment, and at the same time to enable Indian Bands to practice a greater degree of self-government.

NCC:

14. With respect to paragraph 14 of the Statement of Claim, the NCC denies that the exercise of power referred to by the Plaintiffs was unprecedented in the previous legislation.

14 The plaintiffs' reply states that the aboriginal people, their predecessors existed "in organized societies" and that state "long preceded any statute" of Parliament. The defendant's counsel has urged that "tribes and bands" are terms conferred by euro-Canadians, and he preferred to designate such units as "encampments" and "camps". That explains the form of the defendant's admission first recorded in trial transcript volume 6 [TT6] at pages 615 and 618. Mr. Akman, for the defendant, is recorded thus:

> MR. AKMAN: No, My Lord. If I can assist my friend [Mr. Healey] greatly, and I'm very pleased to do so, to the extent their position is that these camps in which they lived is synonymous with organized society, then we are quite happy to accept the proposition that these camps constituted organized societies. * * *
>
> (TT6, p. 615)

> * * * I said we admit that these organized camps were organized societies. The word "society" can mean anything; it means in this case an organized camp, that's it.
>
> (TT6, p. 618)

15 Reference to the defendant's admission, which is on an even plane with written pleadings, was made on at least a dozen more occasions during the trial and, of course, such admission is accordingly referred to in the trial transcript on those occasions.

CONCERNS ABOUT 1985 AMENDMENTS IN TESTIMONY

16 The foregoing review of the pleadings on how the 1985 amendment operated or was foreseen to operate, was reflected in the testimony of various witnesses. Perhaps the Court ought not to have permitted such speculative testimony, but it was not wholly inappropriate to hear from an elderly aboriginal witness who was called and permitted to give "oral history", despite the rule against hearsay. Sophie Makinaw testified through the very excellent oral interpretation services of Harold Cardinal whom the Court praises and thanks for his manifestly first-rate, proficient and dedicated services. Mrs. Makinaw's testimony here is taken not for predictive accuracy, but for the purpose of demonstrating the plaintiffs' worst fears about the practical operation of the 1985 amendments. Mrs. Makinaw's answer was a long one, and is here only slightly abridged.

> Now, when we look at this situation, it's got to be clear that we're not talking about only the woman who left our reserve [since 1951] returning to our communities. Those women now have their children, and in some cases they have their grandchildren. And in many cases if they return to our reserves, they will want to come back with their husbands; they will want their husbands to return with them.
>
> I want to talk specifically about the white husband in this instance. It is not clear that the white husband is going to be able to accept our ways and live the way we are. It may be that the white man who comes to live on our reserve will want to impose his own values, his ways which he is familiar with on us, on our communities, and I haven't really thought yet, I haven't had time to really try and determine what all the consequences of this possibility might be.
>
> One of the problems that we're even now encountering and that's going to be aggravating if large numbers of people come back to our reserves is the fact that even now our reserves are getting over populated. I take, for example, my own situation where I live on a quarter of land, and in that quarter of land we already have five homes. My son occupies another quarter, and in that quarter there are already three homes. We're looking at a situation, even as the situation stands where we're over populated, there may be as a consequence of the pressure that builds up from that situation a lot of conflict, a lot of aggravation. It's not that we don't want conflict, we don't want aggravation, but that may be the consequence

Case Name:

Sawridge Band v. Canada

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

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

[2003] A.C.F. no 723

2003 FCT 347

2003 CFPI 347

[2003] 4 F.C. 748

[2003] 4 C.F. 748

232 F.T.R. 54

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

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

Docket T-66-86A

Federal Court of Canada - Trial Division
Toronto, Ontario

Hugessen J.

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

(40 paras.)

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

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

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

Statutes, Regulations and Rules Cited:

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

Counsel:

Martin J. Henderson, Lori A. Mattis, Catherine Twinn and Kristina Midbo, for the plaintiffs.

E. James Kindrake and Kathleen Kohlman, for the defendant.
Kenneth S. Purchase, for the intervener, Native Council of Canada.
P. Jon Faulds, for the intervener, Native Council of Canada (Alberta).
Michael J. Donaldson, for the intervener, Non-Status Indian Association of Alberta.
Mary Eberts, for the intervener, Native Women's Association of Canada.

REASONS FOR ORDER AND ORDER

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

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

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

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

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

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

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

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

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

7 Second, in the unusual and perhaps unique circumstances of this case, I accept the submission that since I am dealing with a motion seeking an interlocutory injunction, the well-known three part test established in such cases as Manitoba (Attorney General) v. Metropolitain Stores (MTS) Ltd, [1987] 1 S.C.R. 110 and R J R Macdonald v. Canada (Attorney General), [1994] 1 S.C.R. 311 should in effect be reversed. The universally applicable general rule for anyone who contests the constitutionality of legislation is that such legislation must be obeyed unless and until it is either stayed by court order or is set aside on final judgment. Here, assuming the Crown's allegations of non-compliance are correct, the plaintiff Band has effectively given itself an injunction and has chosen to act as though the law which it contests did not exist. I can only permit this situation to continue if I am satisfied that the plaintiff could and should have been given an interlocutory

injunction to suspend the effects of C-31 pending trial. Applying the classic test, therefore, requires that I ask myself if the plaintiff has raised a serious issue in its attack on the law, whether the enforcement of the law will result in irreparable harm to the plaintiff, and finally, determine where the balance of convenience lies. I do not accept the proposition that because the injunction sought is of a mandatory nature, the test should in any way be different from that set down in the cited cases. (See Ansa International Rent-A-Car (Canada) Ltd. v. American International Rent-A-Car Corp., [1990] F.C.J. No. 514; 32 C.P.R. (3d) 340.)

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

9 Thirdly, I reject the proposition put forward by the plaintiff that would deny the Court the power to issue the injunction requested because the Crown has not alleged a cause of action in support thereof in its statement of defence. The Court's power to issue injunctions is granted by section 44 of the Federal Court Act and is very broad. Interpreting a similar provision in a provincial statute in the case of Canadian Pacific Ltd. v. Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation, [1996] 2 S.C.R. 495, the Supreme Court said at page 505:

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

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

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

12 Finally, the plaintiff argued strongly that the women in question have not applied for membership. This argument is a simple "red herring". It is quite true that only some of them have applied in accordance with the Band's membership rules, but that fact begs the question as to

whether those rules can lawfully be used to deprive them of rights to which Parliament has declared them to be entitled. The evidence is clear that all of the women in question wanted and sought to become members of the Band and that they were refused at least implicitly because they did not or could not fulfil the rules' onerous application requirements.

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

14 I start by setting out the principal relevant provisions.

> 2.(1) "member of a band" means a person whose name appears on a Band List or who is entitled to have his name appear on a Band List.
>
> 5. (1) There shall be maintained in the Department an Indian Register in which shall be recorded the name of every person who is entitled to be registered as an Indian under this Act.
>
> ...
>
> (3) The Registrar may at any time add to or delete from the Indian Register the name of any person who, in accordance with this Act, is entitled or not entitled, as the case may be, to have his name included in the Indian Register.
>
> ...
>
> (5) The name of a person who is entitled to be registered is not required to be recorded in the Indian Register unless an application for registration is made to the Registrar.
>
> 6. (1) Subject to section 7, a person is entitled to be registered if
>
> ...
>
> (c) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(a)(iv), paragraph 12(1)(b) or subsection 12(2) or under subparagraph 12(1)(a)(iii) pursuant to an order made under sub-section 109(2), as each provision read immediately prior to April 17, 1985, or under any

former provision of this Act relating to the same subject-matter as any of those provisions;

...

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

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

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

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

...

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

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

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

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

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

...

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

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

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

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

(a) give notice to the band that it has control of its own membership; and

(b) direct the Registrar to provide the band with a copy of the Band List maintained in the Department.

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

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

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

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

...

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

(2) Commencing on the day that is two years after the day that an Act entitled An Act to amend the Indian Act, introduced in the House of Commons on February 28, 1985, is assented to, or on such earlier day as may be agreed to under section 13.1, where a band does not have control of its Band List under this Act, a person is entitled to have his name entered in a Band List maintained in the Department for the band

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

(b) if that person is entitled to be registered under paragraph 6(1)(f) or subsection 6(2) and a parent referred to in that provision is entitled to have his name entered in the Band List or, if no longer living, was at the time of death entitled to have his name entered in the Band List.

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

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

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

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

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

(i) is lawfully resident on the reserve; or

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

...

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

...

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

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

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

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

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

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

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

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

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

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

27 Although it deals specifically with Band Lists maintained in the Department, section 11 clearly distinguishes between automatic, or unconditional, entitlement to membership and conditional entitlement to membership. Subsection 11(1) provides for automatic entitlement to

certain individuals as of the date the amendments came into force. Subsection 11(2), on the other hand, potentially leaves to the band's discretion the admission of the descendants of women who "married out."

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

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

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

> This legislation achieves balance and rests comfortably and fairly on the principle that those persons who lost status and membership should have their status and membership restored. While there are some who would draw the line there, in my view fairness also demands that the first generation descendants of those who were wronged by discriminatory legislation should have status under the Indian Act so that they will be eligible for individual benefits provided by the federal Government. However, their relationship with respect to membership and residency should be determined by the relationship with the Indian communities to which they belong.
>
> [Debates, supra at 2645]

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

> ... I have to reassert what is unshakeable for this Government with respect to the Bill. First, it must include removal of discriminatory provisions in the Indian Act; second, it must include the restoration of status and membership to those who lost status and membership as a result of those discriminatory provisions; and third, it must ensure that the Indian First Nations who wish to do so can control their own membership. Those are the three principles which allow us to find

> balance and fairness and to proceed confidently in the face of any disappointment which may be expressed by persons or groups who were not able to accomplish 100 per cent of their own particular goals.
>
> This is a difficult issue. It has been for many years. The challenge is striking. The fairest possible balance must be struck and I believe it has been struck in this Bill. I believe we have fulfilled the promise made by the Prime Minister in the Throne Speech that discrimination in the Indian Act would be ended.
>
> [Debates, supra at 2646]

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

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

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

> We are both aware that Parliament intended that those persons listed in paragraph 6(1)(c) would at least initially be part of the membership of a Band which maintains its own list. Read in isolation your membership rules would appear to create a prerequisite to membership of lawful residency or significant commitment to the Band. However, I trust that your membership rules will be read in conjunction with the Act so that the persons who are entitled to reinstatement to Band membership, as a result of the Act, will be placed on your Band List. The amendments were designed to strike a delicate balance between the right of individuals to Band membership and the right of Bands to control their membership. I sponsored the Band control of membership amendments with a strongly held trust that Bands would fulfill their obligations and act fairly and

reasonably. I believe you too feel this way, based on our past discussions.

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

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

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

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

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

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

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

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

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

ORDER

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

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

HUGESSEN J.

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

Case Name:

Sawridge Band v. Canada

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

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

[2004] A.C.F. no 77

2004 FCA 16

2004 CAF 16

[2004] 3 F.C.R. 274

[2004] 3 R.C.F. 274

316 N.R. 332

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

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

Docket A-170-03

Federal Court of Appeal
Calgary, Alberta

Rothstein, Noël and Malone JJ.A.

Heard: December 15 and 16, 2003.

Judgment: January 19, 2004.

(61 paras.)

Counsel:

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

The judgment of the Court was delivered by

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

HISTORY

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

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

> 12. (1) The following persons are not entitled to be registered, namely,

(a) a person who

...

(iii) is enfranchised, or

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

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

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

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

* * *

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

a) une personne qui, selon le cas :

...

(iii) est émancipée,

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

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

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

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

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

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

...

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

...

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

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

* * *

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

...

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

...

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

...

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

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

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

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

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

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

ISSUES

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

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

APPELLANTS' SUBMISSIONS

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

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

ARE THE APPELLANTS COMPLYING WITH THE INDIAN ACT?

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

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

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

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

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

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

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

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

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

...

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

* * *

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

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

...

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

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

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

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

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

10(4) Membership rules established by a band under this section may not deprive

> any person who had the right to have his name entered in the Band List for that band, immediately prior to the time the rules were established, of the right to have his name so entered by reason only of a situation that existed or an action that was taken before the rules came into force.
>
> (5) For greater certainty, subsection (4) applies in respect of a person who was entitled to have his name entered in the Band List under paragraph 11(1)(c) immediately before the band assumed control of the Band List if that person does not subsequently cease to be entitled to have his name entered in the Band List.
>
> * * *
>
> 10(4) Les règles d'appartenance fixées par une bande en vertu du présent article ne peuvent priver quiconque avait droit à ce que son nom soit consigné dans la liste de bande avant leur établissement du droit à ce que son nom y soit consigné en raison uniquement d'un fait ou d'une mesure antérieurs à leur prise d'effet.
>
> (5) Il demeure entendu que le paragraphe (4) s'applique à la personne qui avait droit à ce que son nom soit consigné dans la liste de bande en vertu de l'alinéa 11(1)c) avant que celle-ci n'assume la responsabilité de la tenue de sa liste si elle ne cesse pas ultérieurement d'avoir droit à ce que son nom y soit consigné.

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

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

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

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

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

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

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament (Elmer A. Driedger, Construction of Statutes, 2d ed. (Toronto: Butterworths, 1983) at 87).

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

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

> [24] It is unfortunate that the awkward wording of subsections 10(4) and 10(5) does not make it absolutely clear that they were intended to entitle acquired rights individuals to automatic membership, and that the Band is not permitted to create pre-conditions to membership, as it has done. The words "by reason only of" in subsection 10(4) do appear to suggest that a band might legitimately refuse membership to persons for reasons other than those contemplated by the provision. This reading of subsection 10(4), however, does not sit easily with the other provisions in the Act as well as clear statements made at the time regarding the amendments when they were enacted in 1985.
>
> [25] The meaning to be given to the word "entitled" as it is used by paragraph 6(1)(c) is clarified and extended by the definition of "member of a band" in section 2, which stipulates that a person who is entitled to have his name appear on a Band List is a member of the Band. Paragraph 11(1)(c) requires that, commencing on April 17, 1985, the date Bill C-31 took effect, a person was

entitled to have his or her name entered in a Band List maintained by the Department of Indian Affairs for a band if, inter alia, that person was entitled to be registered under paragraph 6(1)(c) of the 1985 Act and ceased to be a member of that band by reason of the circumstances set out in paragraph 6(1)(c).

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

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

...

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

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

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

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

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

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

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

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

> [12] Finally, the plaintiff argued strongly that the women in question have not applied for membership. This argument is a simple "red herring". It is quite true

> that only some of them have applied in accordance with the Band's membership rules, but that fact begs the question as to whether those rules can lawfully be used to deprive them of rights to which Parliament has declared them to be entitled. The evidence is clear that all of the women in question wanted and sought to become members of the Band and that they were refused at least implicitly because they did not or could not fulfil the rules' onerous application requirements.

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

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

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

THE INJUNCTION APPLICATION

Standing

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

38 I cannot accept the appellants' arguments. The Crown is the respondent in an application to have validly enacted legislation struck down on constitutional grounds. It is seeking an injunction, not only on behalf of the individuals denied the benefits of that legislation but on behalf of the public interest in having the laws of Canada obeyed. The Crown, as represented by the Attorney General, has traditionally had standing to seek injunctions to ensure that public bodies, such as an Indian band council, follow the law (see Robert J. Sharpe, Injunctions and Specific Performance, looseleaf (Aurora, ON: Canada Law Book, 2002) at paragraph 3.30; Ontario (Attorney General) v.

Ontario Teachers' Federation (1997), 36 O.R. (3d) 367 at 371-72 (Gen. Div.)). Having regard to the Crown's standing at common law, statutory authority, contrary to the appellants' submission, is unnecessary. Hugessen J. was thus correct to find that the Crown had standing to seek the injunction.

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

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

The Test for Granting an Interlocutory Injunction

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

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

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

Serious Question

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

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

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

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

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

Irreparable Harm

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

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

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

51 Further, the individuals who have been denied membership in the appellant band are aging and, at the present rate of progress, some are unlikely ever to benefit from amendments that were adopted to redress their discriminatory exclusion from band membership. The public interest in preventing discrimination by public bodies will be irreparably harmed if the requested injunction is denied and the appellants are able to continue to ignore their obligations under Bill C-31, pending a determination of its constitutionality.

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

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

Balance of Convenience

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

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

56 On the other hand, the Sawridge Band will suffer little or no damage by admitting nine elderly ladies and one gentleman to membership (the Court was advised that one of the eleven individuals

had recently died). It is true that the Band is being asked to take the positive step of adding these individuals to its Band List but it is difficult to find hardship in requiring a public body to follow a law that, pending an ultimate determination of its constitutionality, is currently in force. Even if the Band provides the individuals with financial assistance on the basis of their membership, that harm can be remedied by damages against the Crown if the appellants subsequently succeed at trial. Therefore, as Hugessen J. found, the balance of convenience favours granting the injunction.

CONCLUSION

57 The appeal should be dismissed.

COSTS

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

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

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

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

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

cp/e/qw/qlklc/qlhcs

Case Name:

Sawridge Band v. Canada

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

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

[2005] A.C.F. no 1857

2005 FC 1476

2005 CF 1476

275 F.T.R. 1

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

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

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

Federal Court
Edmonton, Alberta

Russell J.

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

(325 paras.)

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

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

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

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

HELD: Motion allowed. Evidence relating to customs and practices of other aboriginal groups, and the effects of legislative amendments on these other groups, was not admissible. Evidence dealing with aboriginal self-government generally, and dealing with the general North American experience in dealing with aboriginal issues was not admissible. The court was to review the will-says and rule on whether or not they were admissible according to these guidelines. In borderline cases, the Band

was to be given the benefit of the doubt. While there was nothing wrong with the Band using court process to gain legal recognition for its rights, such a broad-based objective was not contemplated by the present pleadings. The Band was not permitted to change the process dictated by the court, because the court's orders were made as a result of the Band's conduct. The court had already made it clear it did not accept the Band's open-ended approach, but the Band was acting as if the court had approved of it. The only incident of self-government at issue was the right to determine membership. The Band was not permitted to assert a right to political sovereignty as a basis for the right to determine membership. Until the Band asked the court to vary the time limits for serving the will-says and witness lists, those identified after the deadline were not admissible. The Band was not required to show how each witness's evidence referred back to the pleadings. The Band was permitted to introduce new witnesses who had something new to add regarding the issues before the court. The Band was not permitted to add witnesses that were not on a previous witness list. Oral history evidence was admissible where it otherwise complied with court orders.

Statutes, Regulations and Rules Cited:

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

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

Indian Act

Counsel:

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

Catherine Twinn, for the plaintiffs.

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

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

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

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

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

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REASONS FOR ORDER AND ORDER

RUSSELL J.:--

THE MOTION

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

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

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

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

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

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

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

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

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

BACKGROUND

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

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

12 The first trial took place in 1993 and 1994 before Muldoon J. who reached a judgment and issued reasons in 1995.

13 The Plaintiffs appealed that decision and the Federal Court of Appeal ordered a new trial on the basis that the reasons of Muldoon J. gave rise to a reasonable apprehension of bias.

pleadings.

Also, she was not a witness identified on the September 15, 2004 list.

This witness should not be called.

5. ARLENE TWINN

Once again, in the case of this witness, the Plaintiffs show they can clearly state her connection to Sawridge and convey the gist of what she will actually say.

I can see that some of the issues (i.e. those to do with defending her family's reputation) have a questionable relevance to the issues in the pleadings. But the main thrust of her proposed evidence has to do with the impact of Bill-C31 on Sawridge. In this regard, she may well have something to say that will assist the Court on an issue raised in the pleadings.

This is not to suggest, however, that relevance and/or other objections cannot be raised if she appears at the trial. But those matters can be dealt with at trial.

This witness may be called.

6. BRUCE STARLIGHT

Elder Bruce Starlight is a member of the T'suu T'ina Nation and is a significant witness for that Plaintiff. His will-say covers a lot of ground.

Generally speaking, his will-say appears to meet the disclosure requirements set by the Court. In addition, much of what he intends to say appears to be relevant to issues raised in the pleadings.

There will be arguments, no doubt, concerning relevance and admissibility on some issues, but I am inclined to leave those to be raised at the trial.

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

7. BERTHA L'HIRONDELLE

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

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

8. CHRIS SHADE

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

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

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

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

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

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

9. CHESTER BRUISED HEAD

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

Mr. Bruised Head may be called.

10. CLARA MIDBO

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

Ms. Midbo may be called.

11. CLIFFORD CARDINAL

This witness has already been excluded because he was added to the list after September 15, 2004. He should not be called without further leave of the Court.

It is difficult to see from the will-say how Mr. Cardinal could help the Court in relation to the

This witness should not be called.

35. RODNEY BIG CROW

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

This witness may be called.

36. RICHARD DAVIS

Mr. Davis is another witness who wishes to voice his support for general recognition legislation "that acknowledges and recognizes First Nations' jurisdiction" and speak to general issues that are not in the pleadings. On the other hand he also has something to say about the pre-contact life of the Cree of Lesser Slave Lake, although there is little that could be called detail.

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

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

This witness may be called.

37. REGINALD BLACK PLUME

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

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

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

This witness may be called.

38. ROLAND TWINN

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

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

The witness may be called.

39. ROSE LABOUCAN

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

This witness should not be called.

40. SAMMY SIMONS

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

This witness may be called.

41. REGENA CROWCHILD

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

This witness may be called.

42. JOSEPH WILLIER

Once again, with Elder Willier I can see that the Crown makes many objections and it is not immediately apparent from his will-say how some of the topics he raises can be related to the pleadings. However, I think that the Plaintiffs require the benefit of the doubt with this witness and any objections can be handled in ways I have indicated with other witnesses.

Elder Willier may be called.

43. JOE MCKAY

Mr. McKay's proposed evidence is of a general nature and goes well beyond what the pleadings contemplate and the issues raised in this law suit require.

This witness should not be called.

Case Name:

Sawridge Band v. Canada

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

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

[2009] A.C.F. no 465

2009 FCA 123

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

391 N.R. 375

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

Federal Court of Appeal
Ottawa, Ontario

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

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

(17 paras.)

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

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

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

Appeal From:

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

Counsel:

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

Catherine M. Twinn, for the Appellants.

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

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

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

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

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

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

The judgment of the Court was delivered by

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

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

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

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

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

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

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

8 In November of 2005 Justice Russell made an order permitting the appellants to call 24 of their 57 potential lay witnesses, but prohibiting them from calling the other 33 because of various failures to comply with the will-say orders (2005 FC 1476). The appellants' appeal of that order was dismissed (2006 FCA 228, application for leave to appeal dismissed, February 8, 2007).

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

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

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

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

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

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

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

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

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

SHARLOW J.A.

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

Case Name:

Sawridge Band v. Canada

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

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

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

File No.: 33219

Supreme Court of Canada

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

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Status:

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

Catchwords:

Civil procedure -- Discovery -- Courts -- Judges -- Did the learned trial judge deprive the Applicants of their right to a fair hearing and determination of their Constitutional rights by prohibiting the Applicants from leading relevant evidence, notably oral history evidence, unless it had been reduced to writing and provided to the Crown in advance of trial? -- Did the learned trial judge err in issuing an order striking all 25 of the Applicants' lay witnesses, notably First Nations Elders, eight of whom had already testified at trial?- Would the trial judge's extraordinarily harsh, unfounded, and insulting statements against the Applicants raise a reasonable apprehension of bias in the mind of the right-thinking and informed observer?

Case Summary:

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

Counsel:

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

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

Chronology:

1. Application for leave to appeal:

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

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

Procedural History:

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

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

e/qlhbb

** Preliminary Version **

Case Name:

Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.

Sharbern Holding Inc., Appellant;
v.
Vancouver Airport Centre Ltd., Larco Hospitality Management Inc., MM&R Valuation Services Inc. doing business as HVS International -- Canada, and HVS International -- Canada, Respondents.

[2011] S.C.J. No. 23

[2011] A.C.S. no 23

2011 SCC 23

[2011] 2 S.C.R. 175

[2011] 2 R.C.S. 175

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82 C.C.L.T. (3d) 1

416 N.R. 1

EYB 2011-190358

[2011] 7 W.W.R. 1

2011 CarswellBC 1102

2011EXP-1577

J.E. 2011-871

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

18 B.C.L.R. (5th) 1

5 R.P.R. (5th) 1

81 B.L.R. (4th) 1

File No.: 33280.

Supreme Court of Canada

Heard: October 6, 2010;
Judgment: May 11, 2011.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

(178 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Real property law -- Condominiums -- Developers -- Obligations of -- Disclosure statement -- Appeal by Sharbern Holding from decision overturning trial judge's decision that developer breached its fiduciary duty to investors of hotel and materially misrepresented its conflict of interest and its agreements with owners of another hotel dismissed -- Developer built and marketed two hotels -- Agreement provided investors of one hotel with guarantee in exchange for higher fees -- Compensation differences were not disclosed to investors and investors suffered loss -- Trial judge erred in concluding that developer was liable for misrepresentation -- Under s. 75 of Real Estate Act, developer could only be liable if it was found to have made material false statements -- Trial judge erred in finding that information was material.

Tort law -- Fraud and misrepresentation -- Negligent misrepresentation (Hedley Byrne principle) -- Nature and extent of duty of care -- Particular relationships -- Fiduciary relationship -- Appeal by Sharbern Holding from decision overturning trial judge's decision that developer breached its fiduciary duty to investors of hotel and materially misrepresented its conflict of interest and its agreements with owners of another hotel dismissed -- Trial judge erred in law in concluding that developer was liable for misrepresentation under common law of negligent misrepresentation -- Trial judge erred by not considering whether VAC breached the standard of care -- As there was no evidence capable of supporting a finding of breach of standard of care, her finding under the common law of negligent misrepresentation could not stand.

Appeal by Sharbern Holding from the decision overturning the trial judge's decision that the respondent developer, Vancouver Airport Centre Ltd. ("VAC"), breached its fiduciary duty to the investors of a hotel and materially misrepresented its conflict of interest and its agreements with the owners of another hotel. VAC developed and marketed two hotels on the same property, a Marriott hotel and a Hilton hotel. Purchasers of strata lots in each hotel entered into separate Hotel Asset Management Agreements with VAC, whereby VAC was given exclusive management of the hotel. There were differences in the financial arrangements offered to the purchasers of each hotel. VAC offered purchasers in the Marriott hotel a gross operating guarantee, while no guarantee was provided to purchasers in the Hilton hotel. In addition, VAC was entitled to a monthly management fee and an incentive management fee under the agreement entered into with the purchasers in the Marriott hotel. VAC's monthly management fee with for the Hilton was lower than for the Marriott. While the Hilton Disclosure Statement disclosed that VAC was currently developing the Marriott hotel, it did not disclose the compensation differences as between the Hilton and Marriott owners. The Hilton did not perform as well as the Marriott and the Hilton owners incurred losses. Sharbern represented a class of investors who purchased strata lots in the Hilton hotel from VAC. Sharbern claimed that VAC was liable for failing to disclose details about differences in the financial arrangements given to the Hilton owners, and those given to purchasers of strata lots in the adjacent Marriott hotel. Sharbern alleged that the differences resulted in an undisclosed conflict of interest in that they created an incentive for VAC to favour the Marriott over the Hilton in its operation and management of the two hotels. The trial judge concluded that there was a conflict of interest. She found that VAC negligently misrepresented the absence of a conflict of interest and the nature of the agreements between VAC and the Marriott owners, and that the misrepresentations were material and were relied upon by the owners. She also found that VAC breached its fiduciary duty towards the Hilton owners. The Court of Appeal overturned the trial judge's findings with respect to misrepresentation, deemed reliance and breach of fiduciary duty. The first question was whether VAC was liable for alleged misrepresentations contained in the offering memorandum and disclosure statement that VAC used to sell the Hilton strata lots. The second was whether VAC was liable for breach of fiduciary duty when it acted as manager of the Hilton under an agreement entered into between VAC and the Hilton Owners.

HELD: Appeal dismissed. The trial judge erred in law in concluding that VAC was liable for misrepresentation, either under the statutory cause of action found in the Real Estate Act, or under the common law of negligent misrepresentation. Under s. 75 of the Real Estate Act, VAC could only be liable if it was found to have made material false statements to Sharbern, and could not rely on the defence contained in the section. The trial judge erred in law with respect to the materiality of the alleged false statements. Information was material if there was a substantial likelihood that a reasonable investor would consider the fact as having significantly altered the total mix of available information. The judge erred in treating the conflict of interest as inherently material, reversing the burden of proof of materiality from the plaintiff to the defendant, and failing to consider all of the evidence relevant to the determination of materiality. She further erred in not considering the statutory defence which would avail to the benefit of VAC, as VAC led evidence to show that it subjectively believed and had reasonable grounds for believing that the compensation differences

were not material. As for the common law of negligent misrepresentation, the trial judge erred by not considering whether VAC breached the standard of care. As there was no evidence capable of supporting a finding of breach of standard of care, her finding under the common law of negligent misrepresentation could not stand. With respect to the question of whether VAC was liable for breach of fiduciary duty, although VAC, as manager of the Hilton, had fiduciary obligations to Sharbern, Sharbern did not discharge its onus of proving a breach of fiduciary duty. A fiduciary was required to disclose material facts and information, and conflicts of interest. VAC's position of conflict in managing both the Hilton and the Marriott hotels had already been disclosed to Sharbern. The trial judge again failed to consider all the relevant evidence on the issue of materiality that was before her, and Sharbern did not adduce evidence to support a finding that the different financial arrangements constituted material facts or information beyond what had already been disclosed by VAC.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, R.S.B.C. 1996, c. 50,

Real Estate Act, R.S.B.C. 1996, c. 397, s. 66, s. 66(1), s. 66(3)(a), s. 66(3)(c), s. 75, s. 75(2)(a), s. 75(2)(b), s. 75(2)(b)(viii)

Real Estate Development Marketing Act, S.B.C. 2004, c. 41, s. 22(3), s. 22(5)

Securities Act, R.S.B.C. 1996, c. 418, s. 45(2)(5), s. 74(2) (4), S. 131

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

Commercial law -- Property -- Disclosure statements -- Company developing and marketing two hotels on the same property -- Purchasers of strata units in each hotel entering into differing agreements with the developer -- Purchasers of Hilton units not informed of different financial arrangements offered to purchasers of the Marriott units -- Hilton not performing as expected and owners of Hilton units incurring losses -- Whether developer liable for misrepresentation under B.C. Real Estate Act for material false statements -- Whether developer able to avail itself of statutory defence -- Whether deemed reliance under Real Estate Act was rebuttable -- Real Estate Act, R.S.B.C. 1996, c. 397, s. 75.

Torts -- Negligent misrepresentation -- Disclosure statements -- Company developing and marketing two hotels on the same property -- Purchasers of strata units in each hotel entering into differing agreements with the developer -- Purchasers of Hilton units not informed of different

financial arrangements offered to purchasers of Marriott units -- Hilton not performing as expected and owners of Hilton units incurring losses -- Whether developer liable for negligent misrepresentation under common law.

Fiduciary duty -- Agent -- Company developing and marketing two hotels on the same property -- Purchasers of strata units in each hotel entering into differing agreements with the developer -- Purchasers of Hilton units not informed of different financial arrangements offered to purchasers of Marriott units -- Developer entering into non-competition agreements with owners of Marriott units on behalf of the owners of Hilton units without prior consent -- Hilton not performing as expected and owners of Hilton units incurring losses -- Whether developer owed a fiduciary duty to the owners of Hilton units -- If so, whether developer was in breach of its fiduciary duty.

Court Summary:

The respondent developer Vancouver Airport Centre Ltd. ("VAC") was incorporated for the purpose of developing and marketing two hotels on the same property: a Marriott hotel and a Hilton hotel. The two hotels were essentially identical and were joined by a concourse of shops and other amenities. Purchasers of strata lots in each hotel entered into separate Hotel Asset Management Agreements with VAC. The two hotels were marketed and developed at different times, resulting in differences in the financial arrangements offered to the purchasers of each hotel. VAC offered purchasers in the Marriott hotel a guarantee and VAC was entitled to a monthly management fee of a percentage of the gross rental revenue as well as an incentive management fee. VAC did not offer purchasers in the Hilton hotel a guarantee, and VAC's monthly management fee for the Hilton was lower than for the Marriott. The Hilton Disclosure Statement did not disclose the differences in financial arrangements as between the Hilton Owners and the Marriott Owners. The Hilton Owners incurred losses.

S represents a class of investors who purchased strata lots in the Hilton hotel from VAC. S claimed that VAC was liable for failing to disclose details about differences in the financial arrangements given to the Hilton Owners, and those given to the Marriott Owners. S alleged that the differences resulted in an undisclosed conflict of interest in that they created an incentive for VAC to favour the Marriott over the Hilton in its operation and management of the two hotels.

The trial judge concluded that the undisclosed differences in financial arrangements gave rise to at least a potential conflict of interest, particularly in view of the potential for common management of the two hotels. She then concluded that VAC negligently misrepresented both the absence of an actual or potential conflict of interest and the nature of the agreements between VAC and the Marriott Owners and found both misrepresentations material. While her reasons were not entirely clear, it appears she found VAC liable both under common law and under the *Real Estate Act*. The trial judge concluded that under the *Real Estate Act*, the investors were deemed to rely on material misrepresentations by VAC and that such deemed reliance was a non-rebuttable presumption. The trial judge also found that in its capacity as manager, VAC was a fiduciary of the Hilton Owners,

that a conflict existed with respect to VAC's interests as between the Hilton and the Marriott, and that VAC was liable for breach of fiduciary duty because it did not disclose that conflict. She also found that VAC was liable for breach of fiduciary duty as manager.

The Court of Appeal allowed VAC's appeal. The appellate court found that the details of the financial arrangements between the two hotels were not material. As to breach of fiduciary duty, the Court of Appeal determined that there was no breach by VAC.

Held: The appeal should be dismissed.

Both the *Securities Act* and the *Real Estate Act* governed VAC's disclosure obligations. VAC's disclosure obligations were limited to disclosing specific prescribed matters. VAC issued one document that combined the two acts' requirements: the Hilton Disclosure Statement.

S claims that VAC is liable for misrepresentations found in the Hilton Disclosure Statement which resulted in the non-disclosure of a material conflict of interest leading to two potential causes of action: one under s. 75 of the *Real Estate Act*, and the other at common law under the tort of negligent misrepresentation.

Under the *Real Estate Act*, a material false statement in a disclosure statement will result in the developer being liable to investors for any resulting loss they may have sustained. However, s. 75 also contains a defence which provides that if the developer had reasonable grounds to believe and did believe that the material false statement was true, it would not be liable.

A materiality standard is a legislated and regulatory balancing between too much and too little disclosure. The jurisprudence has recognized that it is not in the interests of investors to be buried in trivial information that will impair decision making. The *Real Estate Act* does not define what is meant by the term "material" when it is used in the context of the "material false statement" required for liability under s. 75. Information is material if there is a substantial likelihood that it would have been considered important by a reasonable investor in making his or her decision to invest. In other words, information is material if there is a substantial likelihood that its disclosure would have been viewed by the reasonable investor as having significantly altered the total mix of information made available. Materiality is a question of mixed law and fact, and except in those cases where common sense inferences are sufficient, the party alleging materiality must provide evidence in support of that contention. In carrying out a materiality assessment, a court must first look at the information disclosed to investors at the time they made their investment decision. The next step is to consider the omitted information against the backdrop of what was disclosed. As part of this second step, a court may consider contextual evidence which helps to explain, interpret, or place the omitted information in a broader factual setting, provided it is viewed in the context of the disclosed information. Investors' behaviour evidence is relevant to the materiality assessment. Evidence of common knowledge or, depending upon the circumstances, knowledge specific to particular investors would also be admissible. Nonetheless, in considering the question of materiality, the predominant focus is on the disclosed and omitted information.

The trial judge erred in law with respect to assessing the materiality of the alleged false statements in three ways. First, once she had determined that the differences in financial arrangements created a potential or actual conflict of interest, she found that there was an obligation to disclose them as if they were inherently material. This approach misinterprets the statutory requirement as well as the test for materiality. While it is true that in certain situations, common sense inferences will be sufficient to establish materiality, in this case, there was evidence to support the opposite inference that the omitted information was not material in the context of what had already been disclosed. Therefore, a more detailed analysis of the evidence constituting the total mix of information was required in order to make a determination about what a reasonable investor would have considered significant.

Second, the trial judge erred by reversing the burden of proof of materiality from the plaintiff to the defendant. Once the trial judge was satisfied that S had proven the existence of a conflict of interest, she turned to VAC to show why it was not material. The result was that she made the determination that the conflict of interest was material without requiring S to satisfy its burden, as plaintiff, of proving materiality.

Third, the trial judge erred when she failed to consider all of the evidence relevant to the determination of materiality. Relevant evidence was available concerning the general economic climate at the time the strata lots were sold, the financial arrangements offered to Hilton Owners, the disclosure made by VAC of common management and risk factors, and the limited extent of VAC's ability to act upon the differences in financial arrangements in its own interests. There was also evidence of the conduct of fully informed investors, either prior to making their investment decisions or subsequent to their investment, when they had learned of the guarantee given to the Marriott Owners. This evidence was relevant to the trial judge's materiality assessment.

While S was not required to prove that investors would not have purchased the Hilton strata lots had they known about the differences in financial arrangements, it did have the burden of proving materiality, on a balance of probabilities. S failed to adduce evidence to prove the materiality of the differences in financial arrangements.

Even if VAC were shown to have made a material false statement, the statutory defence contained in s. 75(2)(b)(viii) of the *Real Estate Act* would preclude VAC from being found liable under s. 75(2). To rely on the defence, VAC had to show that it subjectively believed the representations it made were true and that it objectively had reasonable grounds for such a belief. The statutory defence does not appear to have been considered by the trial judge. Evidence of common industry practices and of VAC's limited practical means and incentives to prefer the Marriott hotel over the Hilton hotel indicates that VAC subjectively believed, and objectively had reasonable grounds to believe, that it was making true statements when it did not disclose the details of the differences in financial arrangements and represented in the Hilton Disclosure Statement that it had entered into agreements with the Marriott that were similar in form and substance to those governing the Hilton and that it was not aware of any existing or potential conflicts of interest.

The presumption of deemed reliance under the *Real Estate Act* was rebuttable when it could be proven, on a balance of probabilities, that the investor had knowledge of the misrepresented or omitted facts or information at the time the investor made the purchase. While the *Real Estate Act* did not expressly provide for a rebuttable presumption, the use of the word "deemed" does not always result in a conclusive, non-rebuttable presumption. It is the purpose of the statute that must be examined in order to determine if the presumption is rebuttable.

VAC is also not liable for the tort of negligent misrepresentation. The trial judge did not consider whether VAC breached the standard of care. S's failure to demonstrate how VAC breached the standard of care is fatal to its common law claim.

Although VAC, as manager of the Hilton, had fiduciary obligations to S, S did not discharge its onus of proving a breach of fiduciary duty. The nature and scope of the fiduciary duty owed by VAC must be assessed in the context of the contract giving rise to those duties. When VAC was acting as an issuer, its relationship with S was not fiduciary in nature. However, when VAC began acting as S's agent under the Hotel Asset Management Agreement, a fiduciary relationship arose. However, VAC's position of conflict in managing both the Hilton and the Marriott hotels had already been disclosed to S.

The disclosure obligations with respect to VAC's fiduciary duty are different from the disclosure obligations under the *Real Estate Act*. As a fiduciary, VAC was obligated to disclose any material facts or information, such as if there was a substantial risk that VAC's fiduciary relationship with the Hilton Owners would be materially and adversely affected by VAC's own interests or by VAC's duties to another. VAC's statutory duty was simply to disclose to investors certain prescribed information, without making material false statements. It is also necessary to inquire whether circumstances changed during the course of the fiduciary relationship such as to require VAC to make additional disclosure and obtain renewed consent.

S did not adduce evidence to establish that the different financial arrangements constituted material facts or information beyond what had already been disclosed by VAC. S also failed to establish the materiality of the non-competition agreement implemented by VAC to prevent the Hilton and Marriott hotels from undercutting each others' room rates. The evidence before the trial court could not support a finding that VAC was liable for a breach of fiduciary duty either for failing to disclose the differences in financial arrangements or in implementing the non-competition policy.

Cases Cited

Discussed: *Kerr v. Danier Leather Inc.*, 2007 SCC 44, [2007] 3 S.C.R. 331; *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976), rev'g 512 F.2d 324 (1975); *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87; **referred to:** *Sparling v. Royal Trustco Ltd.* (1984), 6 D.L.R. (4) 682, aff'd [1986] 2 S.C.R. 537; *Harris v. Universal Explorations Ltd.* (1982), 17 B.L.R. 135; *Inmet Mining Corp. v. Homestake Canada Inc.*, 2003 BCCA 610, 189 B.C.A.C. 251; *Gerstle v. Gamble-Skogmo, Inc.*, 478 F.2d 1281 (1973); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Basic Inc. v. Levinson*, 485

U.S. 224 (1988); *Maple Leaf Foods Inc. v. Schneider Corp.* (1998), 42 O.R. (3d) 177; *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634; *St. Peter's Evangelical Lutheran Church v. Ottawa*, [1982] 2 S.C.R. 616; *R. v. Loxdale* (1758), 1 Burr. 445, 97 E.R. 394; *Nova, an Alberta Corp. v. Amoco Canada Petroleum Co.*, [1981] 2 S.C.R. 437; *Frame v. Smith*, [1987] 2 S.C.R 99; *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247; *McGuire v. Graham* (1908), 11 O.W.R. 999; *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631.

Statutes and Regulations Cited

Class Proceedings Act, R.S.B.C. 1996, c. 50.

Real Estate Act, R.S.B.C. 1996, c. 397, ss. 66, 75.

Real Estate Development Marketing Act, S.B.C. 2004, c. 41, ss. 22(3), (5).

Securities Act, R.S.B.C. 1996, c. 418, ss. 45(2)(5), 74(2)(4), 131.

Authors Cited

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Canadian Securities Administrator. *National Policy 51-201 Disclosure Standards*, July 12, 2002.

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Reynolds, F. M. B. *Bowstead and Reynolds on Agency*, 17 ed. London: Sweet & Maxwell, 2001.

United States. Securities and Exchange Commission. SEC Staff Accounting Bulletin: No. 99 -- "Materiality", August 12, 1999 (online: www.sec.gov/interps/account/sab99.htm).

Waters' Law of Trusts in Canada, 3 ed. by Donovan W. M. Waters, Mark R. Gillen and Lionel D. Smith. Toronto: Thomson Carswell, 2005.

History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (Ryan, Chiasson and Smith JJ.A.), 2009 BCCA 224, 57 B.L.R. (4) 1, 93 B.C.L.R. (4) 256, 271 B.C.A.C. 116, 458 W.A.C. 116, [2009] B.C.J. No. 1007 (QL), 2009 CarswellBC 1337, allowing an appeal against a decision of Wedge J., 2007 BCSC 1262, 38 B.L.R. (4) 171, [2007] B.C.J. No. 1845 (QL), 2007 CarswellBC 1948, with supplementary reasons, 2008 BCSC 245 (CanLII). Appeal dismissed.

Counsel:

Stephen R. Schachter, *Q.C.*, and *Geoffrey B. Gomery*, for the appellant.

Peter A. Gall, *Q.C.*, *Donald R. Munroe*, *Q.C.*, *M. Ali Lakhani* and *Edward Iacobucci*, for the respondents.

Solicitors for the appellant: Nathanson, Schachter & Thompson, Vancouver.

Solicitors for the respondents: Heenan Blaikie, Vancouver.

[Editor's note: An errata was published by the Court May 20, 2011. The corrections have been incorporated in this document and the text of the errata is appended to the end of the judgment.]

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(3) Distinguishing the Misrepresentation and Fiduciary Duty Claims

144 When VAC issued the Hilton Disclosure Statement, it was acting in its role as a developer/issuer, and was not an agent of Sharbern. As issuer, its relationship with Sharbern was not fiduciary in nature. An issuer and investor in these circumstances deal with each other in an arm's length commercial relationship characterized by self interest.

145 However, when VAC began acting as Sharbern's agent under the Hotel Asset Management Agreement, a fiduciary relationship arose.

146 It is important to recognize that these are two distinct relationships that happen to be between the same parties: a non-fiduciary issuer-investor relationship, and a fiduciary principal-agent relationship. Therefore, although the underlying factual basis of the issuer-investor misrepresentation issue and the principal-agent fiduciary duty issue are largely the same, the two issues constitute distinct causes of action arising at different *times*. The misrepresentation claim is related to VAC's disclosures made when it was the developer of the Hilton hotel and issuer of the Hilton Disclosure Statement. The breach of fiduciary duty claim is related to VAC's activities when it began acting as an agent and managed the Hilton hotel.

(4) Disclosing the Compensation Differences

147 The question to be answered here is whether VAC breached its fiduciary duty to Sharbern and the other Hilton Owners while acting as their hotel asset manager, by failing to disclose the Compensation Differences and obtaining the informed consent of the Hilton Owners.

148 A breach of fiduciary duty would occur if the undisclosed Compensation Differences were material or placed VAC into a conflict of interest to which Sharbern had not consented. This is because equity "forbids trustees and other fiduciaries from allowing themselves to be placed in ambiguous situations ... that is, in a situation where a conflict of interest and duty might occur" (D. W. M. Waters, M. Gillen and L. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 914). As M. Ng writes, in *Fiduciary Duties: Obligations of Loyalty and Faithfulness* (loose-leaf), at p. 2-10:

> Where fiduciaries put themselves in a position where their own interests or those of others may conflict with their duty to their principal, they will be required to disclose all material information regarding the transaction in order to obtain their principal's informed consent as to their acting despite the conflict.

149 Sharbern submits that the question of whether VAC breached its fiduciary duty to avoid undisclosed conflicts of interest was "one of consent" (A.F., at para. 54). That is, Sharbern argues that the Court must ask whether VAC "made sufficient disclosure, in the [Hilton Disclosure Statement], of the facts pertaining to its conflict of interest that investors purchasing under the [Hilton Disclosure Statement] must be taken to have consented to the conflict" (*ibid.*). Sharbern's

position is premised upon the assumption that the Compensation Differences constituted a material fact or information beyond what had already been disclosed. If that were true, then the onus would fall on VAC, as fiduciary, to prove that it had received the informed consent of the Hilton Owners with respect to the Compensation Differences: *McGuire v. Graham* (1908), 11 O.W.R. 999 (C.A.), at pp. 999-1000.

150 However, the materiality of the Compensation Differences must first be established. This is because "[n]ot every self-interested act by a fiduciary conflicts with his fiduciary duties; otherwise, he could never do anything for his own benefit" (*Waters'*, at p. 914). As stated by F.M.B. Reynolds in *Bowstead and Reynolds on Agency* (17th ed. 2001), at para. 6-057, "[t]he duty does not completely prohibit the adoption of a position or the entering into of transactions in which such a conflict might occur; it rather prohibits doing so without disclosure of all material facts to the principal so as to obtain his consent" (emphasis added). Here, the principal had consented to the agent's conflict of interest -- to act for other principals competing in the same market -- and knew that the agent would be simultaneously acting in the interests of the principal and competitors. The first question that Wedge J. ought to have asked, therefore, was whether the Compensation Differences constituted a material fact or information beyond what had already been disclosed, such as to impose a fiduciary duty upon VAC to disclose their particulars.

151 The standard for identifying when a conflict of interest exists in a fiduciary context was discussed by this Court in *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631. There, Binnie J. dealt with conflicts of interest arising out of the solicitor-client fiduciary relationship. He set out the following standard for identifying when a lawyer is in a position of conflict of interest:

> I adopt, in this respect, the notion of a "conflict" in s. 121 of the *Restatement Third, The Law Governing Lawyers* (2000), vol. 2, at pp. 244-45, as a "substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person". [Emphasis added; para. 31]

152 The essential first step was for the court to determine if the Compensation Differences constituted material facts or information beyond what had already been disclosed, thereby giving rise to a fiduciary duty for VAC to disclose them and obtain consent. In this regard, VAC submits that "[a]ll of the evidence on the issue of materiality that [it] adduced, and that the trial judge disregarded, was therefore as relevant to determining the existence of a conflict of interest as it was to determining whether [it] had made a misrepresentation in the [Hilton Disclosure Statement]" (R.F., at para. 106).

153 This is essentially correct, except for one qualification. It must be remembered that the fiduciary duty issue is distinct from the misrepresentation issue. The materiality evidence and analysis carried out with respect to Sharbern's claim that VAC made material false statement

Case Name:

Taylor v. Alberta Teachers' Assn.

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

[2002] A.J. No. 1571

2002 ABQB 554

Action No. 9603 13948

Alberta Court of Queen's Bench
Judicial District of Edmonton

Sanderman J.

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

(45 paras.)

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

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

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

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

Statutes, Regulations and Rules Cited:

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

Counsel:

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

MEMORANDUM OF DECISION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

41 Continuing on at para. 27 he stated:

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

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

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

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

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

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

SANDERMAN J.

cp/i/nc/qlmmm

Case Name:

Thomlinson v. Alberta (Child Services)

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

[2003] A.J. No. 716

2003 ABQB 308

335 A.R. 85

Action No. 0201-06274

Alberta Court of Queen's Bench
Judicial District of Calgary

Brooker J.

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

(153 paras.)

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

Application by Child Services to strike the originating notice of Lee and Thomlinson on the basis that the Court lacked jurisdiction to deal with the issues. Lee's application alleged that 439 unidentified minors were mistreated while in the protective care of Child Services and sought, among other things, a declaration that the minors were entitled to legal representation, an

appointment allowing him to represent them, an order directing the Government of Alberta to pay all legal fees and expenses incurred in bringing the application, an order for production of material arising from the alleged mistreatment, and advice and direction relating to his compensation. Lee stated that he had contacted the Public Trustee but had declined to act on behalf of the minors on the basis that it would create a conflict of interest.

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

Statutes, Regulations and Rules Cited:

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

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

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

Judicature Act, s. 8.

Counsel:

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

REASONS FOR JUDGMENT

BROOKER J.:--

INTRODUCTION

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

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

FACTS AND EVIDENCE

1. General

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

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

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

5 On April 16, 2002, an article appeared in the Calgary Herald wherein Iris Evans, Minister of Child Services at that time, reportedly indicated that 52 minors who were in care were identified as having been physically or sexually abused. Eighteen were in foster care at the time and the

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

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

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

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

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

Analysis

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

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

> Alderson B., in Morgan v. Thorne (1841), 7 M. & W.400, at 409. The designation "prochein amy" was long used in the common law Courts. The practise was for the intended "prochein amy" to appear with the infant with a Judge in Chambers; or a petition was lodged to the Judge on behalf of the infant asking for the appointment of the person named as his "prochein amy". The intended "prochein amy" had to give a written consent, verified by affidavit. Thereupon the Judge granted his fiat, upon which a rule or order was drawn up in the King's Bench by the clerk of the Rules, or in the Common Pleas the Judge made his order for admission: Tidd's Practice, vol. 1, pp. 95sqq.; Tidd's Supp. 2, p. 5 In the Exchequer the King's Bench practice was followed: 2 Archibold's Practice, 7th ed., p. 889.
>
> In the Court of Chancery, it does not seem to have been the practice to take out an order appointing a next friend. "Any person may institute a suit on behalf of an infant:" Daniell's Ch. Practice, 3d ed. , p. 75; Story's Eq. PI., sec. 57. While the infant could still as at the common law sue in the common law Courts by his guardian, that practice does not seem to have ever obtained in equity - though this is doubtful: see Story's note 3 to sec. 58. By the statute if 1852, 15 & 16 Vict. ch. 86 (Imp.), it was provided that before the name of any person could be used in Chancery as next friend, he must sign a written authority to the solicitor for that purpose (sec. 11) - this provision now appears in our Con. Rule 198,[below] - the consent of the infant was never necessary: Wortham v. Pemberton (1845), 9 Jur. 291. The terminology of the common law Courts whereby this officer was called a "prochein amy" was gradually assimilated until the chancery name, "next friend", became universal.

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

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

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

105 The Court found further that the proposed next friend was inappropriate and stated that if the

Public Trustee was to become involved it should engage an independent third party to act as the plaintiffs next friend or alternatively, that someone independent of all of the litigants be selected.

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

107 Ideally a parent or guardian would consent to act as next friend. Where a parent is not interested in acting as next friend or does not have the financial resources to act in the capacity of next friend, it is open to the court to appoint the Public Trustee: Salomon v. Alberta (Minister of Education) (1991), 120 A.R. 298 (C.A.) application for leave to appeal to S.C.C. dismissed without reasons [1991] S.C.C.A. No. 535. Here, however, the Public Trustee has declined to act. Neither of the parties has presented any authority to the effect that the court has the jurisdiction to compel the Public Trustee to act as next friend where there is a good reason for it having declined to do so. In this regard also see: Starkman v. Starkman, [1964] 2 O.R. 99 (H. C.). In my view the obvious conflict of interest that arises here provides such a reason.

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

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

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

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

(ii) Next Friend not Responsible for Costs

Position of the Parties

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

Analysis

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

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

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

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

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

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

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

119 The next friend's responsibility for costs appears to have developed as a matter of policy,

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

(iii) Interim, Full Indemnity Costs Against the Government

Position of the Parties

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

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

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

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

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

123 They argue further that costs are best addressed at the end of a proceeding, particularly where full indemnity costs are sought. Awarding costs at the close of the proceedings, the Respondents argue, allows the court to assess the facts of the case in order to determine if full-indemnity costs are appropriate. They also point out that awarding either interim or full indemnity costs are very rare events, particularly in cases where the court is being asked to pre-determine an issue: Organ v.

Barnett (1992), 11 O.R. (3d) 210 (Gen Div.). They also cite Bullions v. Christensen Estate, [1999] A.J. No. 770 (Q.B.) for the proposition that in exercising discretion to award interim costs, the court will consider whether it is clear that there is a case of sufficient merit to warrant pursuit and whether the plaintiff is in such financial circumstances that she will be unable to pursue the claim unless interim costs are awarded.

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

Analysis

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

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

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

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

128 Similarly, the Court in Bullions found that it had the requisite jurisdiction to award interim costs under Rule 600(3). As to when the discretion to award such costs ought to be exercised the Court prescribed a two part test: 1) where it is clear that the plaintiff has a case of sufficient merit to pursue the action; and 2) where the plaintiff is in such financial circumstances that he will be unable to pursue the claim unless interim costs are awarded.

129 In Organ, Burrows J. relied on the Court of Appeal's Judgment in Jager v. Jager Industries, [1995] A.J. No. 358, wherein it applied the same test. In Jager the Court awarded a fixed amount of interim costs and noted that the party against whom the order was made could pay those costs without undue hardship.

130 As stated in Jackson v. Trimac, full indemnity costs ought only to be awarded in the rarest of circumstances.

131 Accordingly, I am satisfied that this Court has the jurisdiction to make an interim order for

indemnity costs where it can be shown that the action is meritorious, the claim will not be pursued absent an order for costs and the circumstances are exceptional.

132 I acknowledge that awarding costs at the end of an action encourages the parties to act in a responsible manner. However, as stated by Hutchinson J. in Jackson v. Trimac: "The key words are 'essential to and arising within the four corners of the litigation'. " I would also note the Court of Appeal's comments in Jager that at the end of the proceedings the party who received costs must account for them.

133 As above the Respondents argue that this is only an intended proceeding and as such is not a "proceeding" in which costs may be awarded. If I find that the court has the jurisdiction to grant the relief sought and convert the Originating Notice to a statement of claim, there will, at that stage, be a "proceeding" and this argument will be moot.

134 Whether a court can award costs in an action for pre-action investigation is unclear and is better left for determination by the trial judge.

(iv) Pre -Action Discovery

135 The Applicant states that he is entitled to pre-action discovery on the basis of the Court's inherent jurisdiction and section 8 of the Judicature Act, R.S.A. 2000, c. J-2. He also relies on Alberta (Treasury Branches) v. Leahy (1999), 74 Alta. L.R. (3d) 210 (Q.B.); and Brett (Public Trustee of) v. Associated Cab (Red Deer) Ltd. (1991), 79 Alta. L.R. (2d) 391 (Q.B.). He suggests that the inherent jurisdiction of the Court ought to be exercised in cases such as the present where the Government, by failing to disclose the identity of the minors, is effectively denying them access to justice.

136 Alternatively, the Applicant argues that, as this action has been commenced by originating notice, this is not a request for pre-action discovery.

137 The Respondents argue that none of the Rules relied on by the Applicants, namely parts 13 and 25 and Rule 267, permit discovery prior to commencement of a legal proceeding. The Respondents submit further that the Rules do not provide for discovery in order to determine the identity of prospective Plaintiffs. They also suggest that, outside of litigation, the dissemination of information of this nature is governed by FOIP.

138 Regarding this last submission the Applicant points out that s. 3 of FOIP states that it ". . . does not affect the power of any court or tribunal to compel a witness to testify or to compel the production of documents. . ."

Analysis

139 The court's inherent jurisdiction was discussed in Alberta (Treasury Branches) v. Leahy,

wherein Mason J. stated at para. 8:

> In essence every court has unlimited power over its own processes in order to secure the most "just, expeditious, and least expensive determination of civil proceedings".

140 Additionally s. 8 of the Judicature Act states:

> 8. The Court in the exercise of its jurisdiction in every proceeding pending before it has the power to grant and shall grant, either absolutely or on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to which any of the parties thereto may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, so that as far as possible all matters in controversy between the parties can be completely determined and all multiplicity of legal proceedings concerning those matters avoided.

141 Specifically in the context of document production, Moore C.J. found in Brett (Public Trustee) at para. 5, that:

> The inherent jurisdiction of the Court to control its own process empowers the Court to compel production of documents.

142 Clearly on the basis of the above authorities this Court enjoys the jurisdiction to compel document production. I find further, again in accordance with Brett, that the court has the jurisdiction to compel such disclosure in the face of a statutory provision to the contrary. In this case, however, as the Applicant has pointed out, s. 3 of FOIP allows for such production in the context of litigation.

143 While it is doubtful that this Court has jurisdiction to order pre-action discovery, that argument is moot if these proceedings are directed to proceed by statement of claim.

4. Policy Considerations

Position of the Parties

144 The Respondents submit that it is not the role of this Court to conduct an inquiry into Government actions. Rather they argue the proper role of the court in civil matters is to deal with real disputes between real parties. In that regard they cite Brown.

145 Further, if the Court were to entertain this claim, the Respondents argue that it would be tantamount to instigating a public inquiry of Alberta Children's Services. They also fear that it could lead to the appointment of endless individuals to investigate and prosecute claims in which they have no interest.

Analysis

146 Although I generally agree with position put forward by the Respondents, in my view such considerations can only be determined in the context of the known circumstances of a particular case. In the present instance these concerns cannot be thoughtfully considered at this juncture. Rather, they are more properly dealt with in considering the merits of the substantive applications.

CONCLUSION

147 This is a preliminary application brought by the Respondents to strike the Originating Notice commenced by the Applicant, on the basis that the court does not have jurisdiction to grant the relief claimed in that Originating Notice.

148 For the reasons set out above, I find that the Court is unable to grant the relief requested under Rule 410(e).

149 However, I have also found above that there is jurisdiction to make the orders requested under the parens patriae jurisdiction, but that there is no evidence yet presented upon which to determine whether the Court would exercise its discretion to engage that jurisdiction.

150 Finally, I find that, in an action brought byway of statement of claim, the court has under its inherent jurisdiction to control its own process, the jurisdiction generally to appoint or permit a next friend who is a stranger in the case, to relieve him of the responsibility for costs, to order document production and to direct that the Government be liable for the costs of the action in the appropriate circumstances. Thus, as discussed above, the court does have the jurisdiction to grant the types of relief claimed by the Applicant.

151 Accordingly, given the unique circumstances of this case where the Public Trustee and the Children's Advocate appear to be unwilling or unable to pursue these potential claims against the Respondents, rather than striking the Originating Notice, I find that, in the interests of justice, it is more appropriate to continue this matter as a statement of claim under the authority of Rule 560 in order that the merits of substantive application can be fully canvassed and determined.

152 Obviously, the Applicant will need to draft an appropriate statement of claim in this regard incorporating the items of relief which he is seeking in this motion. Further I would expect it will be necessary for him to bring interlocutory applications for interim relief and directions. Therefore, I will remain case management judge of this proceeding.

153 The preliminary application by the Respondents to strike the proceeding is dismissed. Counsel may apply to the court for such further directions as may be required, including any direction as to the costs of this preliminary application.

BROOKER J.

cp/s/qw/qlmmm/qlcas/qlbxr

1 Rule 129 states:

> 129(1) The court may at any stage of the proceedings order to be struck out or amended any pleading in the action, on the ground that
>
> (a) it discloses no cause of action or defence, as the case may be, or
> (b) it is scandalous, frivolous or vexatious, or
> (c) it may prejudice, embarrass or delay the fair trial of the action, or
> (d) it is otherwise an abuse of the process of the court, and may order the action to be stayed or dismissed or judgement to be entered accordingly.
>
> (2) No evidence shall be admissible on an application under clause (a) of subrule (1).
>
> (3) This Rule, so far as applicable, applies to an originating notice and a petition.