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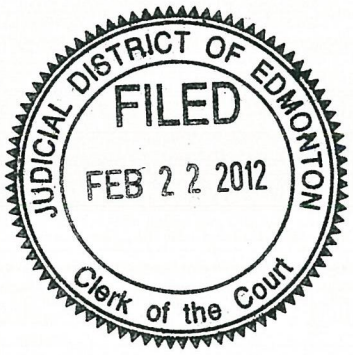

COURT FILE NUMBER: 1103 14112

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 1 OF 2

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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Attention: Mike McKinney

Solicitor for Sawridge First Nation

INTRODUCTION

1. The Sawridge Band is a First Nation located in Northern Alberta. Prior to the coming into effect of amendments to the *Indian Act* in 1985[1] (known as *Bill C-31*), the Sawridge Band established Trusts to hold significant portions of the Band's assets.[2] The goal of the Trusts was to protect the Band assets from the individuals that would be restored to Indian status and Band membership by *Bill C-31*. The 1985 Trust is the subject of the main application in this proceeding.

2. Once *Bill C-31* came into effect, the Sawridge Band was able to, and did, take control of its Band membership list.[3] The Sawridge Band then became involved in protracted litigation aimed primarily at excluding those individuals who regained registered Indian status and Band membership under Bill C-31.[4]

3. In 2011, the Trustees of the 1985 Sawridge Trust filed an application for advice and directions. The application seeks, *inter alia*, to: i.) vary the definition of beneficiary in the 1985 Trust to that of the 1986 Trust; ii.) seek the Court's advice on identification of beneficiaries; and iii.) to regularize the transfer of assets from the 1982 Trust to the 1985 Trust.

4. The variance of the definition of beneficiary would make all Sawridge Band members the only beneficiaries of the 1985 Trust. Both the history of the Sawridge membership litigation, and the evidence filed in the current application, suggest the Trustee's normal duty to ascertain and identify beneficiaries is heightened in this case. In particular, there is considerable information to suggest that there may be numerous pending applications for Sawridge Band membership and no information to demonstrate how that membership process is currently functioning.

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[1] *An Act to amend the Indian Act*, S.C. 1985, c.27

[2] The initial Trust, the 1982 Trust, has its assets rolled over into the 1985 Trust. A further- and separate trust- was established in 1986 [Affidavit of Paul Bujold, dated August 30, 2011]

[3] *Indian Act*, R.S.C. 1985, c. I-5, s.10, as enacted by S.C. 1985, c.27, s.4 [Tab 8, Public Trustee Authorities]

[4] For example see: *Sawridge Band* v. *Canada* [2009] F.C.J. No. 465 (C.A.), leave to appeal refused [2009] S.C.C.A. No. 248 [Tab 19, Public Trustee's Authorities]; *Sawridge Band* v. *Canada* [1995] F.C.J. 1013 (T.D.) [Tab 15, Public Trustee's Authorities]

5. Minors number among the beneficiaries, and potential beneficiaries, of the 1985 Trust. While not yet identified, it appears likely that minors are affected by at least some of the pending Sawridge membership applications.

6. The Sawridge Trustees have not appointed a representative to address the interests of the minors affected, or potentially affected, by the main application. The Public Trustee's review of this matter indicates the best interests of the minors dictates appointment of a litigation representative in this proceeding.

7. The Public Trustee is willing to take on the role of litigation representative, or in the alternative, assist in arranging for an appropriate litigation representative. If the Public Trustee is appointed, it will consent to the appointment only on appropriate terms and conditions. Key terms must address the costs of the minor's representation such that the taxpayers of Alberta are not left to bear the costs of a proceeding that relates primarily to the financial interests of one Alberta First Nation and its members.

8. If the Public Trustee is appointed as litigation representative, it also requires directions from the Court in relation issues of potential conflict of interest as between affected groups of minors and in relation to the scope of questioning in the main application.

PART I - STATEMENT OF FACTS

i. Background to the Bill C-31

9. For most of its history, the *Indian Act* based entitlement to Registered Indian status and band membership on descent through the male parent. This system of eligibility for Indian registration based on descent through the male line was in effect until *Bill C-31* was passed in 1985, in response to the equality commands of

the *Canadian Charter of Rights and Freedoms*, and a ruling of the United Nations Human Rights Committee.

> Affidavit of Paul Bujold, dated September 12, 2011, Exhibit F, *An Act to amend the Indian Act*, S.C. 1985, c. 27- *"Bill C-31"*

10. A key feature of the historical *Indian Act* provisions that *Bill C-31* sought to address was the past loss of Registered Indian status and Band membership by Indian women who had married non-status men. Under those historical provisions, a registered Indian woman lost her Indian status when she married a non-Indian male, and the couple's children were not entitled to be registered as Indians. As Band membership was an attribute of being a registered Indian, the woman and her children were also excluded from Band membership. This exclusion was permanent, surviving even the widowhood or divorce of the woman who had "married out". Losing Registered Indian status for marrying out was sometimes referred to as being "enfranchised".

11. Women who lost their Registered Indian status before 1985 for "marrying out" were restored to status by *Bill C-31*. These women, and any children they had with their non-Indian husbands, could be registered as Indians pursuant to s.6 of the *Indian Act*, enacted by *Bill C-31*.[5]

12. *Bill C-31* also created, for the first time, a conceptual and administrative separation between Indian registration and Band membership. Both before and after *Bill C-31*, the Government of Canada administers the central Indian registry, and determines eligibility to be registered as an Indian, in accordance with the statutory criteria.

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[5] *Indian Act*, R.S.C. 1985, c. I-5, s.6 [Tab 8, Public Trustee Authorities]

13. Before *Bill C-31*, the Government of Canada also maintained all Band lists, and determined Band membership on the basis of its statutory and administrative rules about parentage and marriage. After *Bill C-31*, this dual role for Canada continued with respect to many Bands. However, *Bill C-31* also gave Bands the option of taking control of their membership by establishing their own membership codes.

14. Prior to the passage of *Bill C-31*, there was considerable controversy within many First Nations over, *inter alia,* questions of whether the women who had "married out" should be accepted as back into the community and as Band members. After *Bill C-31* came into effect, there were numerous challenges before the Courts regarding Band membership and the equality rights issues raised by the history of enfranchisement and the attempted solution of *Bill C-31*.[6]

15. In providing for Bands to take control of their own membership lists, however, *Bill C-31* enacted a major protection for the women who could now regain their Registered Indian status. Section 10(4) of the amended *Indian Act*, provides that a Band membership code cannot deny membership to an "acquired rights" individual.[7] The provisions were designed to assure Band membership to the women who were regaining the Indian status they had lost upon marrying out.

ii. Sawridge Band's Response to Bill C-31

a. Establishment of Trusts

16. The Sawridge Band was a vocal opponent of the provisions that restored Band membership to these women. The Band eventually became involved in litigation

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[6] See for example, *McIvor* v. *Canada* [2007] B.C.J. No. 1259 (B.C.S.C.) ; varied [2009] B.C.J. No. 669 (B.C.C.A.) [Tab 11, Public Trustee Authorities]

[7] *Indian Act*, R.S.C. 1985, c. I-5, s. 10 [Tab 8, Public Trustee Authorities]

challenging the constitutionality of Bill C-31 that continued for more than 20 years.[8]

17. In 1982, the Sawridge Band created the Sawridge Band Trust ("the 1982 Trust") and various properties belonging to the Band, but informally held in trust for it by its then Chief Walter Twinn and two Band Councillors, Walter Felix Twinn and George Twinn, were transferred to the 1982 Trust. Walter Twinn was the settlor of the 1982 Trust and Walter, Walter Felix and George Twinn were named as the first Trustees.

> Affidavit of Paul Bujold, dated September 12, 2011, paras. 6-11 and Exhibit A [Declaration of Trust, Sawridge Band Trust, April 15th, 1982]

18. The 1982 Declaration of Trust was made April 15, 1982, two days before the coming into force of the *Canadian Charter of Rights and Freedoms* on April 17, 1982. The Declaration required the Trustees to exclude from any benefit "any member of the Band who transfers to another Indian Band, or has become enfranchised (within the meaning of these terms in the *Indian Act*.)"

> Affidavit of Paul Bujold, dated September 12, 2011, Exhibit A, para. 6 [Declaration of Trust, Sawridge Band Trust, April 15th, 1982]

19. In his affidavit, the Chief Executive Officer of the Sawridge Trusts, Paul Bujold, acknowledges that the Sawridge Band created a new Trust, the 1985 Trust, as it became apparent that the government would be amending the *Indian Act* in a manner that was expected to increase the number of individuals included in the membership list of the Sawridge First Nation. In essence, the definition of beneficiary in the 1985 Trust included all persons who on April 15, 1982 would qualify as members of the Sawridge Band under the *Indian Act* as it stood at that

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[8] *Sawridge Band* v. *Canada* [2009] F.C.J. No. 465 (C.A.), leave to appeal refused [2009] S.C.C.A. No. 248 [Tab 19, Public Trustee's Authorities]; *Sawridge Band* v. *Canada* [1995] F.C.J. 1013 (T.D.) [Tab 15, Public Trustee's Authorities]

time, and would exclude those who became Band members by reason of amendments to the *Indian Act* made after that time. Candidly, Mr. Bujold states that "The 1985 Trust effectively "froze" the definition of beneficiaries according to the legislation as it existed prior to *Bill C-31*." The approximate value of the net assets of the 1985 Trust as at December 31, 2010 is over $70 million.

Affidavit of Paul Bujold, dated September 12, 2011, paras. 15, 17-18, 27, 29-31.

20. The definition of beneficiaries in the 1986 Trust, created August 15, 1986, is "all persons who at that time qualify as members of the Sawridge Indian Band under the laws of Canada in force from time to time including, without restricting the generality of the foregoing, the membership rules and customary laws of the Sawridge Indian Band as the same may exist from time to time to the extent that such membership rules and customary laws are incorporated into, or recognized by, the laws of Canada."

Affidavit of Paul Bujold, September 12, 2011, ex. K, para. 2(a)

21. Mr. Bujold says that the Trustees have determined that maintaining the definition of beneficiaries in the 1985 Trust is potentially discriminatory because it allows non-members of the Sawridge Band to be beneficiaries but would exclude from beneficiary status members of the Sawridge Band who acquired membership by reason of *Bill C-31*. He reports that the Trustees wish to amend the definition in the 1985 Trust "such that a beneficiary is defined as a member of the Nation, which is consistent with the definition of "Beneficiaries" in the 1986 Trust."

Affidavit of Paul Bujold, dated September 12, 2011, paras. 29, 31-33.

b. Sawridge Band Membership Litigation

22. In addition to creating the Trusts, and taking control of its Band membership list, the Sawridge Band began complex litigation in January 1986, which would continue until 2009, in which it challenged the constitutionality of *Bill C-31*.[9]

23. Catherine Twinn, one of the Sawridge Trustees, was solicitor of record for the Sawridge Band.[10] At various times in the history of the litigation, Bertha L'Hirondelle – another Sawridge Trustee – served as Chief of the Sawridge Band and was the named applicant on the Court papers and proceedings in the case.[11]

24. In the course of that litigation, Canada sought, and obtained, a mandatory interlocutory injunction requiring Sawridge to register the names of eleven "acquired rights" individuals on the Sawridge Band list.[12]

25. In the trial level decision on the injunction, the Court found s.10(4) of the amended *Indian Act* prevented Sawridge from enacting any provision in its own membership code that would exclude these eleven people and anyone else in their position. The Court of Appeal decision upholding the injunction makes a number of important observations about the Sawridge membership code and process. It refers to the membership rules' "onerous application requirements", and provides a sketch of those requirements:

> *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*

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[9] *Sawridge Band* v. *Canada* [2009] F.C.J. No. 465 (C.A.), leave to appeal refused [2009] S.C.C.A. No. 248 [Tab 19, Public Trustee's Authorities]

[10] *Sawridge Band* v. *Canada* [2003] F.C.J. No. 723 (T.D.) at para. 35 [Tab 16, Public Trustee Authorities]

[11] *Sawridge Band* v. *Canada* [2003] F.C.J. No. 723 (T.D.) [Tab 16, Public Trustee Authorities]; aff'd *Sawridge Band v. Canada* [2004] F.C.J. No. 77 (C.A.) [Tab 17, Public Trustee Authorities]

[12] *Sawridge Band* v. *Canada* [2003] F.C.J. No. 723 (T.D.) [Tab 16, Public Trustee Authorities]; aff'd *Sawridge Band v. Canada* [2004] F.C.J. No. 77 (C.A.) [Tab 17, Public Trustee Authorities]

> *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.* [13]

26. The findings in the Court of Appeal decision also indicate that there were many individuals who had expressed an interest in becoming a members of the Band:

> *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.*[14]

27. There was never a ruling on the merits of the Sawridge Band's challenge to *Bill C-31*, which was dismissed over procedural issues. However, another Bill C-31 case, *McIvor*, effectively eliminated any possibility of a successful constitutional challenge to the provisions restoring membership to the women who married out.[15]

28. In another proceeding, brought by an individual seeking Band membership, the Federal Court also made note of aspects of the Sawridge membership process that may raise potential issues in the within application:

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[13] *Sawridge Band* v. *Canada* [2003] F.C.J. No. 723 (T.D.) [Tab 16, Public Trustee Authorities]; aff'd *Sawridge Band v. Canada* [2004] F.C.J. No. 77 (C.A.) at para. 12 and 33 [Tab 17, Public Trustee Authorities]

[14] *Sawridge Band v. Canada* [2004] F.C.J. No. 77 (C.A.) at para. 34 [Tab 17, Public Trustee Authorities]

[15] *McIvor* v. *Canada* [2007] B.C.J. No. 1259 (B.C.S.C.) ; varied [2009] B.C.J. No. 669 (B.C.C.A.) [Tab 11, Public Trustee Authorities]

i. Since 1985, the Sawridge Band received "more than two hundred", indeed "hundreds of" applications for membership ;
ii. None of the applications had been put forward to the Sawridge Band membership for approval;
iii. Chief and Council had never read any of the completed 42 page membership application questionnaires;
iv. In the time period relevant to the case, only 2 individuals had actually been accepted as members of Sawridge, both sisters of the late Chief Walter Twinn.[16]

iii. *Sawridge Band Membership Criteria and Process*

29. In addition to the information that can be gleaned about the Sawridge membership criteria and process from decisions in other proceedings, affiants in this proceeding have reported that submitted membership applications are not being dealt with by the Sawridge Band in a timely manner.

Affidavit of Aline Elizabeth Huzar, dated November 30, 2011, para. 13.
Affidavit of Elizabeth Poitras, dated December 7, 2011, para. 5-16.

30. A current copy of the Sawridge Band membership code and application are appended to the Affidavit of Elizabeth Poitras. From these documents, it does not appear that the Sawridge Band has a clearly articulated set of criteria for membership which could be applied by a neutral and objective third party. The membership questionnaire touches on a broad range of topics. Many appear aimed at subjective concepts such as character, habits, behavior and aspirations. The relationship between many questions in the questionnaire to an individual's entitlement to membership is unclear.

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[16] *Huzar et. al.* v. *Sawridge Indian Band et. al.* [1997] F.C.J. 1556 (Pronth.) at para. 7 [Tab 7, Public Trustee Authorities]

Affidavit of Elizabeth Poitras, dated December 7, 2011, Exhibit C +D.

31. It appears that the decision about who will be a member of the Sawridge Band, and thus a beneficiary of the Trusts, is a decision left to Chief and Council on the basis of extremely broad discretion, guided by no fixed and definite criteria. It also appears that there may be real issues as to the functionality of the membership process, as it is not clear that membership applications are even being processed on a regular basis.

32. Within the context of this application, it cannot be ignored that at least one Trustee (the status of the other Trustees is unknown) is also a member of Chief and Council. As discussed more fully below, it is also significant that the Chief and Council, who decide membership entitlements and thus beneficiary status, are beneficiaries of the Trusts, by reason of their membership in the Sawridge Band.

33. Despite the complex background to Sawridge Band membership, and the proposed beneficiary definition depending entirely on membership, the Sawridge Trustees have not filed any substantial evidence in relation to the Sawridge membership criteria or process, which might have allayed the concerns arising from the vagueness of the definition, broad discretion, the onerous membership application, Chief and Council's dual role of beneficiary and decision-maker, and lack of role clarity for those members of Chief and Council who are also Trustees.

34. Further, there is no evidence before this Court to show what, if any, inquiries the Sawridge Trustees have made in relation to identifying and locating all members of the class of beneficiaries who will be affected by the proposed definition change. The absence of such evidence is of particular concern given that it appears the Sawridge Trustees are aware of the existence of pending membership applications.

Affidavit of Paul Bujold, dated August, 30, 2011, para 10

iv. *History of the Main Application*

35. The Sawridge Trustees began proceedings in November 2011 to seek an order varying the definition of beneficiary in the 1985 Trust to adopt the same definition as the 1986 Trust. The Sawridge Trustees recognize that the 1985 Trust definition of beneficiary is at risk of being invalid due to discrimination.

Affidavit of Paul Bujold, dated September 12, 2011, para 32-33

36. The Sawridge Trustees first brought this matter before Justice Thomas on August 31, 2011. The Affidavit filed in support of that application indicated that the Sawridge Trustees were seeking advice and direction on matters including determining the Beneficiaries of the 1985 Trust.

37. Justice Thomas' order required, *inter alia*, that the Public Trustee be served with the Sawridge Trustee's application. However, neither the Public Trustee, nor any other individual, has been appointed as litigation representative for the affected, or potentially affected, minors at this point in time.

38. The Sawridge Trustees have identified 31 dependant children of the existing Sawridge Members. Of the 31, 23 qualify as beneficiaries of the 1985 Trust under the current definition. The 8 remaining minors do not currently qualify as beneficiaries of the 1985 Trust. It is the Public Trustee's understanding that the proposed definition change will remove beneficiary status from some minors who are now beneficiaries, while conferring it upon others.

Affidavit of Paul Bujold, dated September 30, 2011, para. 4

39. The materials filed to date in the main application raise many questions about other individuals who may potentially be entitled to beneficiary status, but currently fail to provide the answers a Court may ultimately need access to in order to address the issues relating protection of minors interests in relation to the 1985 Trust.

PART II - ISSUES

40. Should the Public Trustee be appointed as litigation representative for the minors affected by the within proceeding?

41. Can the Public Trustee act for all groups of minors at this time?

42. What are the appropriate terms and conditions for the appointment of the Public Trustee as litigation representative in this case?

43. Are the Sawridge Band membership criteria and process relevant and material to the within proceeding?

PART III – SUBMISSIONS OF LAW

A. The Appointment of the Public Trustee as Litigation Representative

44. The main application filed by the Sawridge Trustees clearly has the potential to affect interests of minors, as the Trustees themselves recognize. The materials filed by the Trustees identify 31 minors as affected in some way. There are also outstanding membership applications that are likely to affect the interests of minors.

45. The history of the Sawridge membership litigation strongly suggests there is a need for a particular emphasis on the Sawridge Trustee's duty to definitively

ascertain the identity of all beneficiaries. Given the information about membership applications being left undecided for lengthy periods in the past, it would be prudent to proceed on the basis that there may be undecided membership applications affecting the interests of minors and make inquiries into said pending membership applications. This is particularly important given the Trustees intention to proceed to distribute trust assets.

> *Barry* v. *Garden River Band of Ojibways* [1997] O.J. No.2109 (C.A.) para. 38 [Tab 3, Public *Trustee* Authorities]
> Affidavit of Paul Bujold, dated August, 30, 2011
> Affidavit of Paul Bujold, dated September 12, 2011, para. 4 and 35

i.) Authority of the Court to Appoint Litigation Representative

46. Pursuant to Rule 2.11, any minors affected by the main application must have a litigation representative in order to participate in the application. On application, the Court has the power to appoint such representative.

> *Alberta Rules of Court*, Alta Reg 124/2010, Rule 2.11, Rule 2.15 [Tab 1, Public Trustee Authorities]

47. Under Rule 2.16, where the issue before the Court relates to property that is the subject of a trust or interpretation of a written instrument, a person or class of persons who may have an interest must have a Court appointed litigation representative if, *inter alia*, the class cannot be readily ascertained (or is unborn) or the class can be ascertained but the Court determines it is expedient to make an appointment to save expense, having regard to matters including the amount at stake and the complexity of the issues

> *Alberta Rules of Court*, Alta Reg 124/2010, Rule 2.16 [Tab 1, Public Trustee Authorities]

48. Where a litigation representative is required, and no interested person has applied, normally the party adverse to the individual in need of a litigation representative must apply for directions on the appointment of a litigation representative. The Sawridge Trustees have not filed such an application nor have the parties or individuals notified by the Sawridge Trustees. In any event, on application the Court has authority to appoint a litigation representative.

    Alberta Rules of Court, Alta Reg 124/2010, Rule 2.15 [Tab 1, Public Trustee Authorities]

49. In addition to the authority granted under the above-noted rules, the Court of Queen's Bench also has an inherent *parens patriae* jurisdiction that enables it to address matters including protection of minors' property. This broad jurisdiction supports the Court in making the orders necessary in this proceeding to protect the interests of presently ascertained, and as yet unascertained, minor beneficiaries or potential beneficiaries.

    E.(Mrs.) v. Eve, [1986] 2 S.C.R. 388 (S.C.C.) at paras. 34-35 [Tab 5, Public Trustees Authorities]

50. The Respondent, the Minister of Aboriginal Affairs and Northern Development, has the discretion to administer property on behalf of the minors who are Registered Indians under s. 52 of the *Indian Act*. The Minister has not, at this juncture, stepped forward to assert a position on behalf of affected or potentially affected minors and does not seek status as a litigation representative for the minors.

    Indian Act, R.S.C. 1985, c. I-5, s.52 [Tab 8, Public Trustee Authorities]

51. However, the wording of s. 52 does not clearly indicate that jurisdiction would arise before an entitlement to property is established. The present case invites consideration of the question of which minors may be entitled to Band membership, and thus beneficiary status. The Public Trustee's mandate is broader than that conferred by s. 52 of the *Indian Act* and as such the Public Trustee may be in a better position to represent the interests of the affected minors in this matter.

52. At this time, the Public Trustee is not aware that any other individual or entity that has expressed a willingness or interest in acting as the litigation representative for the minors affected by the main application.

ii. The Need for an Independent Representative

53. As is apparent from the statement of facts, this is a unique case with a background that suggests a need for litigation representative who is an independent third party.

54. The terms of the proposed new definition for the 1985 Trust will make individuals, who are recognized and accepted as Sawridge Band members, beneficiaries of the 1985 Trust. Chief and Council of the Sawridge Band, the body that decides membership entitlements, are all members of the Sawridge Band and would all be beneficiaries of the 1985 Trust. The parents of any minor beneficiaries, based on the Sawridge Band membership code, will almost certainly be Sawridge Band members and beneficiaries, or potential beneficiaries.

55. The greater the number of Band members, the more dilute the interest in the Trust of any one beneficiary. In these circumstances, another beneficiary cannot objectively represent the interests of affected minors, particularly so when the application raises issues of entitlement to beneficiary status.

56. As it does not appear any Sawridge Band member could bring the necessary level of objectivity to the role of litigation representative, this is not an appropriate case to consider appointment of the parents, an adult Sawridge Band member, or the Sawridge Trustees to represent the interests of the affected minors.

> *L.C.* v. *Alberta (Métis Settlements Child & Family Services, Region 10)* [2011] A.J. No. 84 (Q.B.) para 39 [Tab 9, Public Trustee Authorities]

57. The need for an independent and objective third party to act as litigation representative is also supported by the potential for the Sawridge Trustees themselves to be perceived as having overlapping roles.

58. The current trustees of the 1985 Trust are Bertha L'Hirondelle, Clara Midbo, Catherine Twinn, Roland C. Twinn and Walter Felix Twin.

> Affidavit of Paul Bujold, dated September 12, 2011, para.3.

59. Roland Twinn is the son of one of the original settlors of the 1985 Trust, and the initiator of the Sawridge Bill C-31 litigation, Walter Twinn. Roland Twinn is currently the Chief of Sawridge Band, and as such would participate on Chief and Council to make decisions on Sawridge Band membership applications. He continued the pursuit of the Sawridge Bill C-31 litigation during his tenure as Chief. He was also to be called as a witness in support of the Sawridge Band's position in the Bill C-31 litigation.[17] He is a Sawridge Band member and a beneficiary of the Trust.

60. Catherine Twinn is the widow of the late Chief Walter Twinn. She was a key member of the legal team on the Sawridge Bill C-31 litigation for decades. She is a Sawridge Band member and a beneficiary of the trust.

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[17] *Sawridge* v. *Canada* [2005] F.C.J. No. 1857 (T.D.) pg.99 [Tab 18, Public Trustee Authorities]

61. Clara Midbo is the sister of the late Chief Walter Twinn. She was one of the only Bill C-31 women who were restored to Band membership prior to the 2003 Federal Court injunction. Her children have been restored to Sawridge Band membership when other acquired rights women's children have not. She is a Sawridge Band member and a beneficiary of the trust. Ms. Midbo was to be a witness called in support of the Sawridge Band's position in the Bill C-31 litigation.[18]

Affidavit of Elizabeth Poitras, dated December 7, 2011, para. 11

62. Walter Felix Twin is a Sawridge Band member and beneficiary of the trust. At the time the Trust was created, he was also a Sawridge Band Councillor.

63. Bertha L'Hirondelle is the sister of the late Chief Walter Twinn. She was another one of the only Bill C-31 women who was restored to Band membership prior to the 2003 Federal Court injunction. Her children have been restored to Sawridge Band membership when other acquired rights women's children have not. Ms. L'Hirondelle is a past Chief of the Sawridge Band and was the named representative of the Sawridge Band in the Bill C-31 litigation. She was also to be called a witness in support of the Sawridge Band's position in the Bill C-31 litigation.[19]

Affidavit of Elizabeth Poitras, dated December 7, 2011, para. 11

64. The Sawridge Trustees, as fiduciaries, are subject to the highest possible standard of good faith. Indeed, it is respectfully submitted it is in the best interests, not only of the affected minors, but of the Sawridge Trustees themselves to ensure

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[18] *Sawridge* v. *Canada* [2005] F.C.J. No. 1857 (T.D.) pg. 90 [Tab 18, Public Trustee Authorities]
[19] *Sawridge* v. *Canada* [2005] F.C.J. No. 1857 (T.D.) pg. 89 [Tab 18, Public Trustee Authorities]

there is independent representation of the minors so as to avoid any ambiguity in the Sawridge Trustee's role or potential for an appearance of conflict of interest.

> *Sharbern Holding Inc.* v. *Vancouver Airport Centre Ltd.* [2011] S.C.J. No. 23 (S.C.C.) para. 148 [Tab 20, Public Trustee Authorities]

65. Even an appearance of bias or conflict of interest is enough to create a need for independent representation of the minors. Further, this is one of the Public Trustee's areas of jurisdiction in relation to monitoring trusts on behalf of minors. Pursuant to s. 21 of the *Public Trustee Act*, the Public Trustee may determine, *inter alia,* whether trustees are dealing with trust property where self interest could be said to conflict with the trustee's duties.

> *Public Trustee Act,* S.A. 2004, P-44.1, s.21 [Tab 14, Public Trustee Authorities]

66. As such, the Public Trustee submits that there are grounds, and the Court has clear jurisdiction, to appoint an objective and independent litigation representative for the affected minors in this proceeding. The Public Trustee is willing to step forward to play that role, subject to the appointment being made on appropriate terms and conditions.

67. If terms and conditions of appointment acceptable to the Public Trustee cannot be arrived at, the Public Trustee would be willing to provide assistance in locating a qualified litigation representative.

B. Appropriate Terms and Conditions of Appointment

68. When the Court determines that a litigation representative should be appointed, it has broad discretion to impose appropriate terms and conditions on the appointment.

Alberta Rules of Court, Alta Reg *124*/2010, Rule 2.21(c) [Tab 1, Public Trustee Authorities]

69. Under the *Public Trustee Act*, the Public Trustee has the discretion to act to protect the property or estate of minors and unborn persons. However, the Public Trustee has no obligation to act and must consent to the terms and conditions of a Court appointment to act , including acting as a litigation representative.

Public Trustee Act, S.A. 2004, P-44.1, s.5, 6 and 20 [Tab 14, Public Trustee Authorities]

L.C. v. *Alberta (Metis Settlements Child & Family Services, Region 10)* [2011] A.J. No. 396 (Q.B.) at para.8-10 and 12-15 [Tab 10, Public Trustee Authorities]

70. While the Public Trustee does not have a statutory duty to act in this particular matter, it is willing to do so as there appears to be a compelling need for independent and objective representation of the minor's interests. However, the Public Trustee seeks appropriate terms and conditions of any appointment in this matter.

a.) Representing Different Groups of Minors

71. The first area in which the Court's direction is requested relates to a balancing of the interests of the groups of minor beneficiaries. It is the Public Trustee's understanding that there are two groups of minor beneficiaries in the group of 31 that have been identified to date.

Affidavit of Paul Bujold, dated September 30, 2011, para. 4

72. Within that group of 31, some minors will gain beneficiary status if the Sawridge Trustee's proposed variance to the beneficiary definition is approved. However,

another group will lose beneficiary status. While the Sawridge Trustees propose to continue to provide benefits to the group of minors that will lose beneficiary status, this does not account for the fact that they will have lost an important, and extremely valuable, interest on a go forward basis.

Affidavit of Paul Bujold, dated September 30, 2011, para. 4 <+para>

73. As noted, there is likely a further group of minor beneficiaries, or potential beneficiaries, affected by the undecided Sawridge Band membership applications.

74. The Public Trustee is of the view that, at least at this stage of the proceeding, it can properly act to represent the interests of both the minors who will lose, and the minors who will gain, beneficiary status. It can also act to represent the interests of the potentially affected minors.

75. This is because the Public Trustee will take a dispassionate view of the underlying issues, including any issues relating to the articulation of the definition of beneficiaries in the 1985 Trust and identification and location of additional minors who are, or may be, entitled to beneficiary status.

76. The Public Trustee can perform the necessary service of ensuring that the Court has the information and argument it needs to determine the issues which pertain to minor's interests in this proceeding. The Public Trustee could also take steps within the proceeding to assess whether there are other potentially affected minors, for example, those affected by undecided and pending Sawridge Band membership applications, as contemplated by the submissions which follow on the scope of questioning in this matter.

77. The Public Trustee will be able to provide to the Court information and argument concerning the duties of the Sawridge Trustees in law and equity, and how those

duties might be discharged in a way that would safeguard the interests of all minors, whatever may be their interest in the Trust.

78. However, given the appearance of at least a potential conflict of interest as between those who will gain, and those who might lose, beneficiary status, the Public Trustees seeks the direction of the Court as to whether a litigation representative is required for one or the other of these groups, or possibly for the presently unascertained minor beneficiaries and potential beneficiaries.

b. Public Trustee's Costs to Represent the Affected Minors

79. The second area in which the Court's direction is required in relation to terms of appointment relates to costs. The Public Trustee seeks terms of appointment that require both payment of costs incurred by the Public Trustee in relation to representation of the minor's interests and an exemption of liability for costs to other parties. It asks that the order for payment of its solicitor and own client costs be in any event of the cause. Given the unique aspects of this proceeding, it also requests the Court award advance costs.

80. Dealing first with the issue of the Public Trustee's costs of this proceeding, the Court has a broad discretion to deal with costs issues, and costs awards, at any stage of a proceeding. The Court also has discretion to impose appropriate conditions on the appointment of a litigation representative. This authority, taken in context of the Court's authority under Division 2 and 10 of the Rules, extends to conditions requiring payment of costs, advance costs and exemption of liability for costs. The Public Trustee submits, as well, that the *parens patriae* jurisdiction of the Court reinforces and strengthens the ability which the Court has, by reason of statute, to deal with these issues.

> *Alberta Rules of Court*, Alta Reg 124/2010, Rule 2.21 and 10.31 [Tab 1, Public Trustee Authorities]

81. In matters involving the Public Trustee, the Court has discretion not only to award costs but to order that costs be paid out of the estate in issue in the proceeding. Further, a number of provisions in the *Public Trustee Act* suggest the Public Trustee is not intended to act at the expense of the taxpayer when the estate in question can pay those costs. These provisions support the approach that the Public Trustee should not bear the direct expense of representation in all matters it has discretion to act on.

    Public Trustee Act, S.A. 2004, P-44.1, s.10, 12(4) and 41 [Tab 14, Public Trustee Authorities]

82. Further, non-adversarial applications for advice and directions regarding a trust or dealing with difficulties in the administration of a trust are generally situations where the parties' costs are paid by the trust. Such cases also fall into the category of cases with "special circumstance" that may merit an award of advance costs.

    Deans v. *Thachuk* [2005] A.J. No. 142 (C.A.) at para 42-45 and 51; leave refused [2005] S.C.C.A. No. 555 [Tab 4, Public Trustee Authorities]
    Taylor v. *Alberta Teacher's Association* [2002] A.J. No. 1571 (Q.B.) at para. 13, 18-25 [Tab 21, Public Trustee Authorities]

83. At this point in the proceeding, the Sawridge Trustees have not put any evidence before this Court to demonstrate due diligence in identifying and ascertaining the individuals entitled to be members of the Sawridge Band, namely ascertaining the full class of beneficiaries. The Sawridge Trustees have not filed any evidence to demonstrate they have made reasonable inquiries with respect to the current status of the Sawridge Band membership application process. Some of the evidence herein suggests that they have become aware of numbers of applications for membership to the Sawridge Band. However, the Trustees have filed nothing

with the Court to indicate a systematic attempt to discover what is happening with these applications, and do not say whether they accept any responsibility to ensure that the process is carried out according to law before they would proceed with a distribution.

84. The above considerations make the need for an independent objective litigation representative particularly compelling. The unique facts of the case support an approach where costs associated with providing affected minors with that representation should be borne by the Trust:

    i. The individuals requiring representation are minors and the *parens patriae* jurisdiction of the Court entitles it to act to address the minor's best interests;
    ii. The facts of this case signal that the interests of the minors cannot be effectively and objectively represented by any individual or entity representing the Sawridge Band, the Sawridge Trustees or by Sawridge Band members;
    iii. The applicant in the main proceeding owes fiduciary duties to any minors who are entitled to be beneficiaries of the 1985 Trust and there is, at least, an appearance of a potential conflict of interest given the Sawridge Trustees other roles, such as their own beneficiary status. It appears to be in all parties' interests that an independent objective litigation representative be appointed;
    iv. There are arguably grounds to suggest the Sawridge Trustees ought to have been proactive and applied for the appointment of a representative for the affected or potentially affected minors. In such a case, the costs of the litigation representative would almost certainly have been paid by the Sawridge Trustees;
    v. The 1985 Trust has access to over $70 million in assets. There is a massive imbalance of resources between the Trust on the one hand, and any minor beneficiary or potential beneficiary on the other.

vi. The issues raised by the main application are complex and involve significant financial interests. Beneficiary status for a minor could have life changing financial impacts.

vii. The issues raised by this application go beyond the normal scope of issues routinely dealt with by the Public Trustee's office- and raise issues of aboriginal law and the extensive history around Bill C-31. The Public Trustee determined retainer of outside legal counsel was required to effectively represent the interests of minors.

L.C. v. *Alberta (Métis Settlements Child & Family Services, Region 10)* [2011] A.J. No. 84 (Q.B.) para 67, 79-82 [Tab 9, Public Trustee Authorities]

Deans v. *Thachuk* [2005] A.J. No. 142 (C.A.) at para 42-45 and 51; leave refused [2005] S.C.C.A. No. 555 [Tab 4, Public Trustee Authorities]

Taylor v. *Alberta Teacher's Association* [2002] A.J. No. 1571 (Q.B.) at para. 13, 18-25 [Tab 21, Public Trustee Authorities]

85. The Public Trustee submits that, on the unique facts of this case, one of the terms and conditions of its appointment as litigation representative should be a requirement that all reasonable costs incurred by the Public Trustee to retain legal counsel to represent the interests of minor beneficiaries in the within proceeding be paid by the 1985 Sawridge Trust.

Myran et al. v. *The Long Plain Indian Band et. al.* [2002] MBQB 48 at para. 40-42 [Tab 12, Public Trustee Authorities]

L.C. v. *Alberta (Métis Settlements Child & Family Services, Region 10)* [2011] A.J. No. 84 (Q.B.) para. 79-82 [Tab 9, Public Trustee Authorities]

c. Exemption from Liability for Costs

86. The Public Trustee further submits this is a case where it should not be held responsible for any other parties' costs of this proceeding. In an action, the default rule is that a litigation representative will not be liable for costs of a proceeding, absent a court order. While this proceeding is an application, the facts of this case place the respondent minors in a similar position to a defendant in an action and a similar approach is merited.

> *Alberta Rules of Court*, Alta Reg 124/2010, Rule 10.47 [Tab 1, Public Trustee Authorities]

87. Where a minor requires a litigation representative and the person or entity appointed is essentially a stranger to the minor, there is a strong case to exempt the litigation representative from liability for costs. Terms of appointment of this nature may also be important for reasons of public policy. Exemption from costs ensures there is no disincentive to the Public Trustee to stepping in to represent the interests of minors when it has the discretion not to act but there is a clear need for representation of minor's interests.

> *L.C.* v. *Alberta (Métis Settlements Child & Family Services, Region 10)* [2011] A.J. No. 84 (Q.B.) para 29-30, 53-55 [Tab 9, Public Trustee Authorities]
>
> *Thomlinson* v. *Alberta (Child Services)* [2003] A.J. No. 716 para 117-119 [Tab 22, Public Trustee Authorities]

88. The clear need for an independent third party, distanced from any possible connections to the Sawridge Band, is an additional reason to facilitate the involvement of the Public Trustee, or another appropriate independent litigation representative, through exemption from liability for costs.

C. Relevance of Membership Issues

89. Pursuant to Rule 5.1 and 5.2 of the *Alberta Rules of Court*, matters that are relevant and material to the proceeding will be appropriate topics to explore in questioning. Information should be considered relevant and material if it can reasonably be expected to significantly help determine one or more of the issues raised by the pleadings.

> *Araam Inc.* v. *Aman Building Corp.* [2011] A.J. No. 1097 para 13-17 [Tab 2, Public Trustee Authorities]

90. It is the Public Trustee's understanding that the Sawridge Trustees regard matters relating to the Sawridge Band membership criteria and process to be irrelevant to the main application. This aspect of the Public Trustee's application has been brought in order to limit, or avoid, extensive objections- and related applications- on these issues during questioning.

91. The Public Trustee takes the position that information relating to the current functioning of the Sawridge Band membership process, the outstanding membership applications, and how many of those applications affect minor's interests is extremely relevant to the within proceeding, in particular, in relation to identification of beneficiaries and to ascertaining whether the proposed definition variation satisfies the need for certainty of objects.

> *Barry* v. *Garden River Band of Ojibways* [1997] O.J. No.2109 (C.A.) para. 39-40 [Tab 3, Public Trustee Authorities]
> *Guaranty Trust Co. of Canada* v. *Hetherington* [1987] A.J. No. 148 (Q.B.) pg. 15-16 [Tab 6, Public Trustee Authorities]

92. Notably, the materials filed state that the Sawridge Trustees are seeking direction from the Court regarding identification of the appropriate beneficiaries of the

Trust. This also suggests that the membership criteria and process, which are the basis for identification of beneficiaries, are entirely relevant to the main application.

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

93. The evidence filed by the Sawridge Trustees also indicates that they have gathered at least some evidence that may be relevant to that identification process, including a list of pending applications for Sawridge Band membership. However, they have not provided the details of that information to the Court at this point in the proceeding.

Affidavit of Paul Bujold, dated August, 30, 2011, para.10.

94. The Sawridge Trustees have a clear duty to make reasonable inquiries into the existence of beneficiaries and to identify and locate all members of the class of beneficiaries. Accordingly, it is certainly relevant and material to the main application to inquire as to the measures the Sawridge Trustees have taken to satisfy that duty.

Barry v. *Garden River Band of Ojibways* [1997] O.J. No.2109 (C.A.) para. 41-45 [Tab 3, Public Trustee Authorities]

95. The duty to identify the full class of beneficiaries is particularly relevant given that the Sawridge Trustee's application is brought, in part, to permit distribution of assets from the 1985 Trust.

Affidavit of Paul Bujold, dated August, 30, 2011
Affidavit of Paul Bujold, dated September 12, 2011, para. 4 and 35

96. As such, the Sawridge Trustees must not only ensure that funds are distributed fairly, but also that they are distributed to the appropriate recipients. To do that they have an obligation to identify the beneficiaries of the Trust. It is not sufficient to simply rely on the Band membership list, particularly when reasonable inquiries will reveal there are some, and possibly many, pending Band membership applications.

    Polchies v. *Canada* [2007] F.C.J. 667 (Proth.) at para 56 [Tab 13, Public Trustee Authorities]
    Barry v. *Garden River Band of Ojibways* [1997] O.J. No.2109 (C.A.) para. 38 and 41-45 [Tab 3, Public Trustee Authorities]

97. Other indicators of the relevance of the Sawridge Band membership criteria and process include:

    i. By definition, anyone entitled to be a member of the Sawridge Band would be a beneficiary of the 1985 Trust under the proposed definition change. As such, it is not tenable to suggest the membership criteria and process is not relevant to beneficiary status and entitlement;

    ii. There is a considerable background to the Sawridge Band membership issue, including information to suggest membership applications are not dealt with in a timely manner, that should put this Court and, indeed, the Sawridge Trustees on inquiry regarding the current status of the membership process and how that process is affecting identification of the true class of beneficiaries;

    iii. There is evidence before this Court that there are pending Sawridge Band membership applications. However, the Court has

no particulars that would allow it to determine which applications affect the interests of minors;

iv. There is no evidence before this Court to demonstrate what the Sawridge Trustees have done, pursuant to their obligations of due diligence in identifying the possible members of the class of beneficiaries, to inquire into the Sawridge Band membership process and the process being used for pending applications;

v. At least one Trustee appears to have a dual role, sitting on Chief and Council to deal with membership applications while also dealing with the interests of beneficiaries in the role of Trustee. This potential conflict of interest is relevant in that the Court should have access to information regarding the measures in place to manage these dual roles appropriately.

98. Notably, in relation to the minors whose interests may be affected by pending membership applications, the Public Trustee is also empowered to inquire into whether an individual should become represented by, or a client, of the Public Trustee.

Public Trustee Act, S.A. 2004, P-44.1, s. 40 [Tab 14, Public Trustee Authorities]

99. When the Public Trustee is acting in relation to a minor's interests in a trust, it is entitled to request information and documentation to satisfy itself, *inter alia*, that the Trustees are avoiding dealings with trust property where the trustee's self interest conflicts with the trustee's duties and dealing with trust property according to the trust instrument. Under the same legislative provisions, the Public Trustee can request any order from the Court that it considers necessary to protect the interests of the minors. Given the potential for at least an appearance

of conflict of interest – given that the individuals who may decide Band membership entitlement are also beneficiaries, it would be prudent for the litigation representative for affected minors to make inquiries into the process.

Public Trustee Act, S.A. 2004, P-44.1, s.21 [Tab 14, Public Trustee's authorities]

100. Rather than pursue the required information under its statutory powers, the Public Trustee submits it would be more efficient and appropriate to deal with these information requests in the course of questioning.

101. In short, the Public Trustee considers it essential to the interests of the minors that it be permitted to pursue questioning regarding the Sawridge membership criteria, the current functioning of the Sawridge Band membership process, the outstanding Sawridge Band membership applications, and how many of those membership applications currently affect minor's interests. These matters are relevant both to the Sawridge Trustee's duties to ascertain the class of beneficiaries for the 1985 Trust and to providing the Court with sufficient information to demonstrate the variation in Trust definition satisfies the requirement of certainty of objects.

PART IV - REMEDY SOUGHT

102. On the basis of the foregoing, the Public Trustee seeks an order:

a.) Appointing the Public Trustee as litigation representative for the minors whose interests are affected by the Sawridge Trustee's application in the within proceeding, subject to appropriate terms and conditions;

b.) Setting terms and conditions of the Public Trustee's appointment as follows:

i. Permitting the Public Trustee to act for all identified affected minors for the time being;

ii. Permitting the Public Trustee to represent potentially affected minors whose interests are affected by pending Sawridge Band membership applications;

iii. Providing for leave to return to the Court for further directions regarding additional litigation representatives for the affected minors, should any potential conflicts of interests as between the groups of minor beneficiaries crystallize;

iv. Ordering the Sawridge Trust is to reimburse the Public Trustee for its reasonable solicitor-client costs in relation to the retainer of outside counsel to represent the interests of the minors in this proceeding, both as incurred to date and on a go forward basis in the proceeding;

v. Ordering that the Public Trustee shall be exempted from liability for costs to any other party in this proceeding;

c.) Directing that the Public Trustee, or other parties, may question witnesses in the within proceeding on matters, including:

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

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

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

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at the City of Edmonton, Province of Alberta, this 22nd day of February, 2012.

CHAMBERLAIN HUTCHISON

Per: _____
JANET L. HUTCHISON
Solicitors for the Public Trustee of Alberta

Estimation of time for Oral Argument: 1.5 hours

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)

Current to February 15, 2012

Alta. Reg. 124/2010, r. 2.11

Judicature Act

ALBERTA RULES OF COURT

Alta. Reg. 124/2010

Part 2 The Parties to Litigation

Division 2 Litigation Representatives

RULE 2.11

Litigation representative required

2.11 The following individuals or estates must have a litigation representative to bring or defend an action or to continue or to participate in an action, or for an action to be brought or to be continued against them:

(a) an individual under 18 years of age;

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

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

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

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

claim.

Alta. Reg. 124/2010 r2.11 effective November 1, 2010 (Alta. Gaz. August 14, 2010)

Current to February 15, 2012

Alta. Reg. 124/2010, r. 2.12

Judicature Act

ALBERTA RULES OF COURT

Alta. Reg. 124/2010

Part 2 The Parties to Litigation

Division 2 Litigation Representatives

RULE 2.12

Types of litigation representatives and service of documents

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

(a) an automatic litigation representative described in rule 2.13;

(b) a self-appointed litigation representative under rule 2.14;

(c) a Court-appointed litigation representative under rule 2.15,

2.16 or 2.21.

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

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

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

Alta. Reg. 124/2010 r2.12 effective November 1, 2010 (Alta. Gaz. August 14, 2010)

Current to February 15, 2012

Alta. Reg. 124/2010, r. 2.15

Judicature Act

ALBERTA RULES OF COURT

Alta. Reg. 124/2010

Part 2 The Parties to Litigation

Division 2 Litigation Representatives

RULE 2.15

Court appointment in absence of self-appointment

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

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

** Editor's Table **

Provision	Changed by	Effective	Gazette Date
2.14	Alta. Reg. 143/2011 s2	2011 Jul 14	2011 Jul 30

*****

Alta. Reg. 124/2010 r2.15 effective November 1, 2010 (Alta. Gaz. August 14, 2010); Alta. Reg. 143/2011 s2

Current to February 15, 2012

Alta. Reg. 124/2010, r. 2.16

Judicature Act

ALBERTA RULES OF COURT

Alta. Reg. 124/2010

Part 2 The Parties to Litigation

Division 2 Litigation Representatives

RULE 2.16

Court-appointed litigation representatives in limited cases

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

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

(b) property subject to a trust;

(c) the interpretation of a written instrument;

(d) the interpretation of an enactment.

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

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

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

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

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

Alta. Reg. 124/2010 r2.16 effective November 1, 2010 (Alta. Gaz. August 14, 2010)

Current to February 15, 2012

Alta. Reg. 124/2010, r. 10.31

Judicature Act

ALBERTA RULES OF COURT

Alta. Reg. 124/2010

Part 10 Lawyers' Charges, Recoverable Costs of Litigation, and Sanctions

Division 2 Recoverable Costs of Litigation

Subdivision 1 General Rule, Considerations and Court Authority

RULE 10.31

Court-ordered costs award

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) one party to pay to another all or part of the reasonable and proper costs with or without reference to Schedule C;

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

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

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

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

(5) In appropriate circumstances, the Court may order, in a costs award, payment to a

self-represented litigant of an amount or part of an amount equivalent to the fees specified in Schedule C.

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

Alta. Reg. 124/2010 r10.31 effective November 1, 2010 (Alta. Gaz. August 14, 2010)

Current to February 15, 2012

Alta. Reg. 124/2010, r. 10.47

Judicature Act

ALBERTA RULES OF COURT

Alta. Reg. 124/2010

Part 10 Lawyers' Charges, Recoverable Costs of Litigation, and Sanctions

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

RULE 10.47

Liability of litigation representative for costs

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

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

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

(b) the Court so orders.

Alta. Reg. 124/2010 r10.47 effective November 1, 2010 (Alta. Gaz. August 14, 2010)

Case Name:

Araam Inc. v. Aman Building Corp.

Between
Araam Inc., Applicant, and
Aman Building Corporation, Langford Electric Ltd., Philips Electronics Ltd., Philips Electronics Ltd. Carrying on Business Under the Name and Style of Philips Lighting, Earth Tech (Canada) Ltd., Earth Tech (Canada) Inc., ETC Earth Tech (Canada) Inc., AECOM Canada Ltd., Bolt Security Systems Ltd., Voxcom Incorporated, Beretta Protective Services International Inc., United Protection Services Inc., Eger Construction Management Inc., Rexel Canada Electrical Inc., Rexel Canada Electrical Inc. Carrying on Business In the Name and Style of Westburne Electrical Supply Alberta, Prolux Lighting Edmonton Ltd., Cooper Industries (Electrical) Inc., Cooper Industries (Electrical) Inc., Carrying on Business In the Name and Style of Cooper Lighting, Respondents

[2011] A.J. No. 1097

2011 ABQB 631

Docket: 0703 05172

Registry: Edmonton

Alberta Court of Queen's Bench
Judicial District of Edmonton

G.A. Verville J.

Heard: September 30 and October 5, 2011.
Judgment: October 12, 2011.
Released: October 13, 2011.

(34 paras.)

Civil litigation -- Civil procedure -- Discovery -- Examination for discovery -- Range of

examination -- Objections and compelling answers -- Relevancy -- Undertakings -- Production and inspection of documents -- Relevancy -- Application by plaintiff in product liability claim to compel answers to undertakings allowed in part -- Plaintiff claimed 2005 fire was result of negligent design and manufacture of unreasonably dangerous Halide lamp produced by defendant -- Request for defendant's consent to release Canada Standards Association files premature since plaintiff made no request from CSA -- Defendant to answer undertakings on changes to product and testing since 1983, which may be relevant to claim defendant could have economically changed design -- Plaintiff failed to establish relevancy of subsequent non-passive failures, pleadings and expert reports from other lawsuits.

Tort law -- Suppliers of goods -- Product liability -- Duty to warn (product labelling) -- Duty to test -- Distributors -- Manufacturers -- Application by plaintiff in product liability claim to compel answers to undertakings allowed in part -- Plaintiff claimed 2005 fire was result of negligent design and manufacture of unreasonably dangerous Halide lamp produced by defendant -- Request for defendant's consent to release Canada Standards Association files premature since plaintiff made no request from CSA -- Defendant to answer undertakings on changes to product and testing since 1983, which may be relevant to claim defendant could have economically changed design -- Plaintiff failed to establish relevancy of subsequent non-passive failure, pleadings and expert reports from other lawsuits.

Application by the plaintiff in a products liability claim to compel answers to undertakings. The defendant manufactured and distributed the lighting system for the plaintiff's warehouse. The plaintiff alleged a 2005 fire was caused by the defendant's negligent design and manufacture of an unreasonably dangerous Halide lamp. The defendant only partially answered four undertakings and refused two others.

HELD: Application allowed in part. Undertaking 35 was the plaintiff's request for the defendant's consent to the release of its files from the Canadian Standards Association. As the plaintiff had yet to make any request from the CSA, this request was premature and did not have to be answered. The plaintiff may be able to argue that the defendant could have economically changed its design to reduce the risk of fire. Therefore, three undertakings relating to changes to the product and testing since 1983 were relevant and had to be answered. The plaintiff was seeking documentation on non-passive failures subsequent to the fire but had not established this information was relevant to its pleadings, so the defendant was not required to respond. The defendant had produced occurrence reports and had been questioned on them. However, the plaintiff was now seeking information on lawsuits against the defendant since 2000, pleadings and expert reports from these lawsuits. This request amounted to a fishing expedition, the documentation would likely be entitled to little weight, would confuse the issues and would improperly delay the proceedings. The defendant was not required to respond to this undertaking.

Statutes, Regulations and Rules Cited:

Rules of Court, Rule 5.1(1), Rule 5.25(1)(a)

Counsel:

Christopher Reain, for the Applicant.

Danielle Bourgeois, for the Applicant.

W. Paul Sharek, Q.C., for the Respondent.

[Editor's note: A corrigendum was released by the Court on October 19, 2011; the corrections have been made to the text and the corrigendum is appended to this document.]

Reasons for Judgment

G.A. VERVILLE J.:--

Introduction

1 This is an application brought before me as case manager by the Plaintiff Araam Inc. ("Araam") to compel answers to undertakings sought from Defendant Philips Lighting ("Philips").

2 It is Philips' position that it should not be required to provide answers on the basis that these questions are irrelevant to Araam's cause of action, they are unduly onerous to answer, or the materials are covered by litigation privilege.

Facts

3 In 2002, Araam contracted with various parties, all of which are named Defendants in this Action, to design and construct a warehouse (the "Araam Warehouse") for the express purpose of manufacturing mattresses and box springs.

4 The lighting system in the Araam Warehouse utilized 1000 Watt MH 1000/U Metal Halide Lamps manufactured and distributed by Philips ("Halide Lamps") in open suspended metal halide luminaries above the fabricating, finishing and wood-shop area.

5 A fire occurred on or around May 23, 2005 (the "Fire"), at the Araam Warehouse, and an investigation conducted by Edmonton Fire Rescue Services determined that the Fire was caused by a Halide Lamp. The Halide Lamp had failed and exploded causing hot particles from the Halide Lamp's quartz "arc-tube" to fall onto stacks of plastic packaging materials stored on top of a wooden pallet, causing the Fire.

unreasonably dangerous product?

b. Did Philips know or ought it to have known, prior to the date of the loss, that the Halide Lamp was a defective and unreasonably dangerous product?

c. Was Philips negligent, and did it breach a duty of care to Araam by designing, manufacturing, marketing, and distributing the Halide Lamp which it knew or ought to have known was dangerous?

d. Was Philips negligent, by failing to warn Araam of the Halide Lamp which it knew or ought to have known was dangerous?

The Questions

11 Philips provided partial answers to four questions and declined to answer two others. The issue with respect to the four questions partially answered is whether Philips is obliged to provide information pertaining to the time period subsequent to the Fire. The questions and positions taken by Philips are as follows:

1. Undertaking No. 19: (Under advisement in relation to the present) Inquire and advise as to any changes in the arc tube design from 1983 to the present and what those changes were, and if it is already in the documents, pinpoint where in the documents it's located.

   Post 2005 declined.

2. Undertaking No. 20: (Under advisement in relation to the present) Produce a copy of reports generated from the testing of the changes in the arc tube design since 1983 to the present.

   Post 2005 declined.

3. Undertaking No. 25: (Under advisement in relation to the present) Produce a copy of any and all complaint documentation with respect to non-passive failures of 1,000 watt bulbs from 1990 to the present.

   Post 2005 declined.

4. Undertaking No. 35: (Under advisement) If required by the Canadian

Standards Association, provide the consent of Philips Lighting to access their file with respect to the investigation, testing and certification of metal halide bulbs.

Declined.

5. Undertaking No. 42: (Under advisement) Advise as to any design changes generally for the 1,000 watt metal halide bulb from 2002 to present and produce a copy of any supporting documentation with respect to those design changes.

Post 2005 declined.

6. Undertaking No. 43: Produce the statistics of the number of lawsuits against Philips Lighting from 2000 to the present relating to the non-passive failure of metal halide bulbs. With respect to those lawsuits, provide a copy of reports of expert witnesses delivered by or on behalf of complainants in those actions and provide a copy of all pleadings in those actions.

Declined.

Preliminary Finding

Undertaking No. 35

12 With respect to Undertaking No. 35 it, in my view, is unnecessary to consider the *Rules* or the case law at this point in time. I find that Undertaking No. 35 "If required ..." is premature and speculative in that Araam has not yet made the request to the Canadian Standards Association.

Analysis

13 The parties referred to a number of cases including: ***Weatherill (Estate) v. Weatherill***, 2003 ABQB 69, 337 A.R. 180 at paras. 16 - 17; ***D'Elia v. Dansereau***, 2000 ABQB 425, 267 A.R. 157 at para. 17; ***Dunn v. Dunn***, 2001 ABQB 852, 297 A.R. 365, at para. 8, ***Tremco Inc. v. Gienow Building Products Ltd.***, 2000 ABCA 105, 255 A.R. 273 at para. 15; ***Hepworth v. Canadian Equestrian Federation***, 2000 ABCA 327, 277 A.R. 138 (C.A.) at paras. 9 - 10; ***Cominco Ltd. v. Westinghouse Canada Ltd.*** (1979), 11 B.C.L.R. 142, [1979] B.C.J. No. 1963 (C.A.) at paras. 37 - 39; ***Jones v. Schloss***, 1999 ABQB 812 at paras. 4, 7-8; ***Mahamad v. Matthews***, 2011 ABQB 187 at

para. 12; ***Mustard v. Brache***, 2006 ABCA 265, 397 A.R. 361 at paras. 11-12; ***Baker v. Suzuki Motor Co.*** (1993), 143 A.R. 1, [1993] A.J. No. 605 (Q.B.) at paras. 86, 126; ***Nicholson v. John Deere Ltd.*** (1986), 58 O.R. (2d) 53, [1986] O.J. No. 1320 (H.C.J.) at paras. 10 - 11, 26; ***Hollis v. Dow Corning Corp.***, [1995] 4 S.C.R. 634, [1995] S.C.J. No. 104 at para 20; ***Algoma Central Railway v. Herb Fraser and Associates Ltd.*** (1988), 31 O.A.C. 287, [1988] O.J. No. 1849 (Div.Ct.); ***Sandhu (Litigation guardian of) v. Wellington Place Apartments***, 2008 ONCA 215, 234 O.A.C. 200 at paras.54 - 62, appeal disc'd August 20, 2008: [2008] S.C.C.A. No. 261; and ***Prosser v. 20 Vic Management Inc.***, 2009 ABQB 177, 8 Alta L.R. (5th) 68 at para. 36.

14 In ***Weatherill***, Slatter J. (as he then was) stated:

> 16 In determining whether a document is relevant and material, the starting point is the pleadings. The pleadings define the issues, and relevance must be determined with respect to the issues. The pleadings are also relevant with respect to the issue of materiality. However, with respect to materiality one must also have regard to the issue in question. Where does the burden of proof lie? Is the issue something that is capable of direct proof, or is it something like a person's state of mind, which can only be proven indirectly. Does one party essentially have to try and prove a negative? How are cases of this type usually proven at trial? The less amenable a fact is to direct proof, the wider will be the circle of materiality. There are some facts that can only be proven by essentially eliminating all the competing scenarios, thereby leaving the fact in issue as the sole logical inference. When a state of mind is in issue, it can generally only be proven by demonstrating a pattern of conduct of the person whose state of mind it is. In deciding whether a particular document is material, one must take a very pragmatic view, viewing the situation from the perspective of the party who must prove the fact in question. At an interlocutory stage of proceedings, the Court should not measure counsels' proposed line of argument too finely; if counsel can disclose a rational strategy in which the disputed document plays a material part, that should be sufficient. Again it must be remembered that the purpose of the Rule was to avoid abusive, excessive, and unnecessarily expensive discovery, not to cut off legitimate lines of inquiry.
>
> 17 That relevance is determined by the pleadings, while materiality is more a matter of proof can be seen by the wording of the Rule. The Rule talks about records that can "help determine" an issue, or that can "ascertain evidence" that will determine an issue. These are words of proof, and materiality must be determined with that in mind.

15 In ***Mustard*** the Court stated:

> 11 Discovery of records is now confined to eliciting facts of primary relevance, i.e., facts that are directly in issue, or of secondary relevance, i.e., facts from which the existence of the primary facts may be directly inferred. Both primary and secondary relevance are determined by reference to the issues raised by the pleadings. Records seeking information that could reasonably be expected to lead to facts or records of secondary relevance need not be produced.

> 12 In addition to being relevant within the meaning of Rule 186.1, records must also be material, that is, they must be reasonably expected to significantly help determine one or more of the issues raised in the pleadings. The materiality of evidence refers to its pertinency or weight in relation to the issue it is adduced to prove: *Black's Law Dictionary*, (6th ed. 1990). Records may be relevant within Rule 186.1, but, either alone or in combination with other evidence, be of no significant help to the examining party in proving a fact in issue: ***NAC Constructors Ltd. v. Alberta Capital Region Wastewater Commission***, [2006] A.J. No. 1051, 2006 ABCA 246, at para. 13.

16 In ***Mahamad*** Veit J. held:

> 12 Rule 5.2(1) states that a record is relevant and material only if the record could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings, or to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings. This rule is much narrower than its predecessor. Not only is tertiary relevance excluded, but, more importantly here, the materiality or weight of the evidence must be addressed with a view to determining whether the record will significantly help to determine one of the issues raised in the pleadings.

17 The above cases provide guidance with respect to whether Philips should have answered the impugned questions. In my view, there is not a one size fits all answer in the circumstances, and each question must be looked at separately. However undertakings 19, 20 and 42 are related in that they deal with design changes and testing of changes. The two remaining undertakings require separate consideration.

Undertakings 19, 20 and 42

18 Philips submits that the two primary elements in a product liability claim are the applicable standard of care and how the defendant may have failed to maintain that standard of care. It says further that evidence of industry standards as of the date of design is at best evidence of secondary relevance, citing ***Baker*** and ***Nicholson***. However these were not disclosure cases but rather trial decisions and in ***Baker***, Bielby J. (as she then was) noted at para. 126 that the plaintiff had not alleged that Suzuki knew of any flaw in the motorcycle.

19 Philips further asserts that in product liability actions it has been argued that the probative value of remedial actions after a loss is slight and that additional precautionary measures after an accident should not be used as a sword to prove negligence.

20 What use if any is to be made of remedial measures after an occurrence has been considered in ***Algoma***, ***Cominco***, ***Sandhu*** and ***Prosser***. In ***Algoma***, Chilcott J. for the Court stated:

> 39 It is my opinion that the weight of authority in Ontario is in accordance with the position adopted by Wigmore and that Rule 403 of the *Federal Rules of Evidence* (U.S.) states that position aptly. May I attempt an outline of what I consider to be the rule which the court should apply to the matter of evidence at hand?
>
> 1. Neither at trial nor at examination for discovery is it necessary for a defendant to answer questions as to remedial measures taken after some allegedly negligent occurrence if the only purpose is to seek evidence on the issue of negligence.
> 2. If the questions are directed in a *bona fide* way to some issue in the action other than the issue of negligence then such questions should be answered either on examination for discovery or at trial. An example of such issue would be the feasibility and practicability of the remedial measures having been taken prior to the occurrence.
> 3. In the event that the defendants concede that the remedial measures which they took after the occurrence were feasible and practicable, before the occurrence, then it is not proper to ask such questions with a view to showing their feasibility and practicability since that is not a controverted issue. That not being a controverted issue, the only function left for such evidence to perform would be to tend to show negligence.

21 In ***Sandhu***, the Court considered the issue of relevance and admissibility where remedial steps were taken, stating:

> 56 ... Apart from any inference of an admission of liability, the fact that repairs to the screens were made quickly and inexpensively after the accident was relevant in other ways. It was evidence from which the jury could infer that the appellants had failed to meet a reasonable standard in keeping the building in good repair. The evidence of repairs could also be evidence of a failure to take reasonable care because it was capable of showing that the appellants' inspection of the building before the accident failed to meet a reasonable standard.
>
> ...

Indexed as:

Barry v. Garden River Band of Ojibways

Between

Caroline Barry, Patricia Lariviere, Arlene Barry, Valerie Boissoneau, Rita Tice and Carolyn Musgrove each suing on behalf of herself and on behalf of all the women reinstated to and entitled to be reinstated to membership in the Garden River Ojibway Nation #14 [also known as the Garden River Band of Ojibways]; and, Natalie Barry, a minor, and Christian Barry, a minor, and Kari Barry, a minor, by their litigation guardian, Caroline Barry; Lee Ann Barry, a minor, and Charla Barry, a minor, by their Litigation guardian, Arlene Barry; Daniel Tice, a minor, and Deanna Tice, a minor, by their Litigation guardian, Rita Tice; Kelly Musgrove, a minor, Melanie Musgrove, a minor, and Stacey Musgrove, a minor, by their Litigation guardian, Carolyn Musgrove, each minor plaintiff suing on behalf of himself or herself and on behalf of all the other children and lawful wards of all the women reinstated to and entitled to be reinstated to membership in the said Band, plaintiffs (appellants), and

The Chief and Council of the Garden River Band of Ojibways [also known as the Garden River Ojibway Nation #14] including, before the election of 14 October 1988, Ron Boissoneau (Chief, Morley Pine, Ronald Thibault, Daniel L. Pine, Darrell Boissoneau, Willard Pine, Chris Belleau, Arnold Solomon and Terry J. Belleau, Councillors, and, after the said election, Dennis Jones (Chief, Morley Pine, Ronald Thibault, Willard Pine, Chris Belleau, Arnold Solomon, Terry J. Belleau, Muriel Lesage, Gordon Boissoneau and Ted Nolan, Councillors, defendants (respondents)

[1997] O.J. No. 2109

33 O.R. (3d) 782

147 D.L.R. (4th) 615

100 O.A.C. 201

[1997] 4 C.N.L.R. 28

71 A.C.W.S. (3d) 800

No. C14296

Ontario Court of Appeal
Toronto, Ontario

Finlayson, Charron and Rosenberg JJ.A.

Heard: April 17, 1997.
Judgment: May 27, 1997.

(31 pp.)

Counsel:

Michael F.W. Bennett for the appellants.
Robert MacRae for the respondents.

The following judgment was delivered by

1 THE COURT:-- The adult appellants are female members of the Garden River First Nation of Ojibways who were reinstated to Indian status and to membership in the Garden River Band of Ojibways ("Band") on or before December 17, 1987 as a result of amendments, introduced in Bill C-31, infra, to the Indian Act, R.S.C. 1970, c. I-6, as amended. The minor appellants are their children. The respondents are the Chief and Council of the Band at the material times.

2 The appellants appeal from the judgment of the Honourable Mr. Justice Noble of the Ontario Court of Justice (General Division), wherein the action of the appellants for an equal per capita distributive share of land claim settlement moneys was dismissed. When the moneys were distributed to the members of the Garden River Band, the adult appellants' shares were reduced by amounts of Band moneys that they had previously received when they were deemed to have left the Band and became "enfranchised" by reason of marriage to a man who was not a status Indian. The appellant children were denied shares on the ground that they were not members of the Band at the date of distribution.

The proceedings

3 This is an action for an accounting and payment to the appellants of their per capita distributive share in what they maintain is a trust fund received by the Garden River Band in settlement of an outstanding claim of the Band against the Government of Canada. The adult appellants claimed a distributive share for themselves and on behalf of all other women reinstated to membership in the Band. The minor appellants claimed a distributive share for themselves and on behalf of all other children of reinstated women who are or shall be known to the respondents. They also sought:

(a) A temporary injunction restraining the Chief and Council, from time to time, of the Band from distributing or disposing of any part of or of the whole of the balance of the funds from the Squirrel Island Settlement Trust monies remaining in its account until the trial of this action and, in the event there is an insufficient balance of such funds to satisfy the claims of the plaintiffs, then an order that the defendants account to the plaintiffs and trace the said funds.

(b) A declaration that the defendants' failure to distribute the plaintiffs' share of the said Band's Squirrel Island Settlement Trust monies is contrary to s. 15 of the Canadian Charter of Rights and Freedoms ("Charter").

(c) A claim for pre-judgment and post-judgment interest and costs on a solicitor client basis.

4 On the face of it, this would appear to be a straightforward case involving the per capita distribution of a finite sum of money. Unfortunately, at the Band Council stage, the distribution of these moneys was caught up in a larger and more contentious issue relating to the reinstatement of these adult appellants and their children to the Garden River Band as a result of the passage by the Parliament of Canada of certain amendments to the Indian Act, those amendments being commonly referred to as Bill C-31. We propose to deal with the factual aspects of the Settlement Agreement separate from our analysis of the effect, if any, of Bill C-31 on the contemplated distribution.

Facts

(1) The Squirrel Island Land Claim

5 The Band had an outstanding claim against the Government of Canada that related to the sale of land on Squirrel Island in the middle of the St. Mary's River. The Band contended that Squirrel Island was part of the Band Reservation set aside by the Robinson Huron Treaty of 1850. The moneys in issue are part of the Garden River Land Settlement Agreement ("Settlement Agreement") dated March 30, 1987, wherein the Crown, as represented by the Minister of Indian Affairs and Northern Development, agreed with the Chief and Council of the Band to pay in settlement of the claim the sum of $2,530,000.000 made up as follows:

(a) the offsetting of $154,600.00 as full payment for advances and loans provided by the Crown for researching, preparing and negotiating the agreement;

(b) $1,036,250.00 to be paid into an interest bearing trust account, to be held by the Band in trust exclusively for the repurchase of Squirrel Island;

(c) $1,339,150.00 to be paid into the Band's revenue account, an account set up under the provisions of the Indian Act.

6 Section 69.(1) of the Indian Act provides:

> The Governor in Council may by order permit a band to control, manage and expend in whole or in part its revenue moneys and may amend or revoke such order.

7 The Indian Bands Revenue Moneys Regulations, C.R.C. 1978, c. 953, as amended, names the Garden River Band of Indians as a Band. As we read the Regulation, this Band may, subject to the Regulations, control, manage and expend in whole or part its revenue moneys. The Regulations relate to the establishment of a bank account, the selection of signing officers, the appointment of auditors and the publication of an annual auditor's report.

8 At trial, a councillor of the Band testified that the Band Council considered it necessary to consult the Band members and obtain a consensus regarding disposition of the settlement funds in the Revenue Account. Accordingly, a questionnaire was circulated to individual members, asking whether it was agreed "to divide equally amongst the members of the Garden River Band the one million dollars from the trust account [sic]". The questionnaire further asked whether, if the member agreed with the distribution, the distributive share of an enfranchised person now reinstated pursuant to Bill C-31 should be reduced by the aggregate amount of Band moneys paid out to the person when he or she left the Band. The tabulated results of the questionnaire demonstrated that almost everyone who completed a questionnaire was in favour of the distribution. By a small majority, members were also in favour of making deductions from the shares of the enfranchised women in the amount that they had received upon leaving the Band. It is interesting to note that, at a later date, the Chief and Council agreed that no deductions would be made from any members who owed debts to the Band for other reasons, such as water use charges.

9 Accordingly, on September 28, 1987, the Band Council passed a Band Council Resolution ("BCR") which stated:

> As we the Garden River Band operate under section 69 of the Indian Act, do hereby request that the sum of one million dollars from our Revenue Account be made available and payable to the Garden River Band. These monies are required for per capita distribution to the Garden River Band Members.
>
> 1. The Garden River Band will arrange for an audit report to be completed by June 30, 1988. Our auditor is Dunwoody and Company.
> 2. The Band will submit expenditure reports.
> 3. The Band will use the funds provided for distribution only.
> 4. The Band will maintain financial records in accordance with generally

accepted accounting principles and practices.

10 It would appear from the above that the sum of $1,000,000.00, being part of the $1,339,150.00 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 $1,000,000.00 for that purpose, in our view a trust was created. The Band Council was then under a duty to ensure that the distribution was carried out in accordance with trust principles.

(2) Band Membership and the Bill C-31 issue

11 Prior to April 1985, pursuant to s. 5 of the Indian Act, the Department of Indian Affairs and Northern Development ("Department") was responsible for maintaining a list, known as the Indian Register, of all aboriginals with Indian status. The Department also maintained the lists of all the Indians who were members of the individual bands ("Band Lists") and did so on the basis of the names in the Indian Register. At that time, subject to s. 12(1)(b) of the Indian Act, an aboriginal woman with Indian status was no longer entitled to be included in the Indian Register if she married a man who was not a status Indian. As a consequence of losing her eligibility to be registered, she not only lost her status as an Indian under the Indian Act, she lost her eligibility to remain on the Band List of the Band in which she had previously enjoyed membership and with it her status as a member of the Band. As a further consequence, children of such a union were also deprived of the opportunity of achieving status as an Indian, both on the Register maintained by the Department and as a member in the Indian Band. This process leading to a lack of status was known as enfranchisement because when it was first enacted in 1869, the woman became eligible to vote in Canadian elections, a right she had not previously held as a status Indian under the Indian Act.

12 On the other hand, if a man with Indian status married a non-status woman, he did not lose his status but rather his wife gained his status. With the advent of the Constitution Act, 1982 and the Canadian Charter of Rights and Freedoms ("Charter"), this obvious inequality could no longer be tolerated. Parliament passed Bill C-31, An Act to Amend the Indian Act, R.S.C. 1985 (1st Supp.) c. 32, s. 4. It received Royal Assent on June 28, 1985 but was made effective retroactively to April 17, 1985. It removed the discriminatory provisions and permitted the re-registration of enfranchised Indian women and their children. It also permitted each band to assume control over its membership list. Thus, the Department continued to register aboriginals who had status or who were reinstated to status, but once a band gained control of its membership list, the Department relinquished responsibility for that list to the Band. Two separate lists, one maintained by the Department and

one maintained by the band, would come into existence.

13 In order to assume control of its membership list, a Band was required to create a code setting out the rules by which membership was to be determined, and submit it for approval to the Department before June 28, 1987. These provisions are found in s. 10 of Bill C-31, as follows:

> 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 (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.
>
> To bring this section into effect, it is necessary to invoke s. 81(1) (p. 4) of the Indian Act which states:
>
> 81.(1) The council of a band may make by-laws not inconsistent with this Act or with any regulations made by the Governor in Council or the Minister, for any or all of the following purposes, namely:
>
> (p. 4) to bring subsection 10(3) or 64.1(2) into effect in respect of the band;

14 On June 19, 1987, the Garden River Band complied with the procedural requirements of s.10 and submitted its membership rules, called Citizenship Registry Regulations, to the Minister. They were accepted by the Minister by letter dated September 25, 1987 and the membership rules were effective retroactively to June 25, 1987. Part IX provided:

Non-Discrimination

> This Code shall be administered and all powers, duties and functions hereunder shall be exercised or performed without discrimination based on sex, affiliation to First Nations or Indian Bands, creeds or religion.

15 The Garden River Band membership rules created four categories of members: Original Members, Restored Members, Accepted Members and Members by Birth. "Original Members" were those who were entitled to be entered on the band list immediately prior to April 17, 1985 and also any child born after April 17, 1985, if the child's natural parents were both original members. The "Restored Members" category applied to those persons, including the adult appellants, who were entitled to rejoin the band pursuant to Bill C-31. The "Accepted Members" category encompassed all members who had applied for membership and whose applications had been accepted and confirmed. The children of reinstated women, including the appellant children, would belong in this category. The final category was created to provide greater certainty for children born after April 17, 1985 and whose natural parents are or were both members of the Garden River Band at the time of the child's birth. At the time that the Band was drafting the membership rules, the Department was having difficulty managing a large, unexpected backlog of applications for reinstatement to Indian status. The Department was also waiting for the bands to complete the process of assuming control over their membership. As a result, births after April 17, 1985 were not being registered by the Department, with the exception of those children born to parents who were both original members. This time was referred to as an abeyance period. There was concern that a child might be denied membership in the Band, and so this section provided for automatic membership for the child.

16 If a person had only one parent who was a member of the Band, that person was required to apply for membership, and thus would become an Accepted Member. The rules further provided for the application process. This is the route by which the appellant children could obtain Band membership. It should be noted that after the rules became effective on June 25, 1987, application for membership was necessary whether the parent-member was the father or the mother of the child. It should be further noted that the application process required the person to first obtain Indian status with the Department prior to applying for membership in the Band. Due to the Department backlog, this requirement created problems in some cases.

17 It was the testimony of the adult appellants that although they frequently and regularly inquired at Band Council meetings regarding the membership application process for their children, the Chief and Councillors did not provide satisfactory answers. The reinstated women were reassured that there was no deadline for applications. Minutes of the Band Council Meeting of February 8, 1988 indicate that application forms were still not available at that time, long after the date of distribution of the settlement moneys. At the time of the distribution, the appellant children were not members of the Band, although in most cases, they had achieved Indian status by directly applying to the Department.

(3) Enfranchisement payments

18 Bill C-31 also dealt with payments that had been made to enfranchised women or other aboriginal persons who became enfranchised or otherwise ceased to be a member of a band. On leaving, these persons were entitled to receive one per capita share of money held in the band's capital fund, one per capita share of money held in the revenue fund, and if they were in a treaty area, 20 years treaty annuity. Each of the adult appellants had received an aggregate sum of less than one thousand dollars at the time she lost status. A band was allowed a strictly limited right of recovery of these sums by s. 64.1(2) of the Indian Act. The provision permits recovery of money paid out on enfranchisement in excess of one thousand dollars. Section 64.1 of the Indian Act was never resorted to by the Garden River Band. Even if the Band had invoked s. 64.1, it would have had no application in this case, because individually each adult appellant received an enfranchisement payment that was less than $1,000.

(4) The distribution procedure

19 As noted above, on September 28, 1987, the Band passed a resolution to make a per capita distribution of $1,000,000.00 from the revenue account to all members of the Band. The minutes of a special meeting of the Band Council held on December 3, 1987, indicate that it was agreed to make the disbursements two weeks later on December 17 and 18, 1987. These minutes further note that it was decided to give each member the sum of $1,000.00 and that no deductions would be made from the shares of members with outstanding debts to the Band. There is no indication in the minutes of the reason for choosing this date for distribution.

20 One week before the dates set for distribution, on December 11, 1987, the Band Council held a "Working Meeting". Several issues related to the disbursement of the funds were discussed. Decisions were finalized regarding the distribution procedure. It is recorded in the minutes that the reinstated women who had applied for reinstatement before June 15, 1987 would qualify for a share, but that a reduction would be applied in the amount of money received at the time of enfranchisement, rounded off to the nearest $100.00.

21 Another issue raised was the question of entitlement of certain children to a share in the settlement funds. There was no provision in the Indian Act as amended by Bill C-31, or in the Band's own membership rules, which automatically bestowed membership to children born after April 17, 1985 to parents, only one of whom was a member of the Band. Due to the Department's abeyance period for registering births, these children were in an uncertain situation. The minutes note:

> STATUS CHILDREN - Children birn [sic] to one parent original band members born after April 17, 1985 and before June 15, 1987, should they get a share? Noted that all birth registrations were suspended for band membership during that time, except where two parents were band members. Noted that membership code came into effect June 15, 1987.

> Decision was made to make Status children Garden River Band members under both of the following categories:
>
> 1 - Born between April 17, 1985 and December 16, 1987.
>
> 2 - Born to one parent original Garden River Band member.
>
> All in agreement.

22 At trial, considerable time was spent in interpreting this decision. It was established by witnesses for both sides that it should be read conjunctively, such that a person was required to satisfy both conditions in order to achieve membership in the Band. Therefore, any child born after the effective date of Bill C-31, who had at least one parent who was a member in the Garden River Band, would be entitled to membership in the Band without having to fulfil the procedural requirements set out in the Band's recently enacted membership rules.

23 The decision was implemented by passing Band Council Resolution number 90, dated December 11, 1987, listing forty-nine individuals by name who met both of these requirements, and admitting them to Band membership. People on the list had either a mother or a father who was a member of the Garden River Band. This decision remedied the problem created by the delays in the membership process which existed because the Department had suspended the registration of births and because the Band had not yet instituted its application process. At trial, it was established that persons who obtained membership as a result of this resolution were allowed to collect full shares of the settlement money on December 17 and 18, 1987.

24 The December 11, 1987 decision did not address the concerns of the appellants regarding the position of their children, who were all born before April 17, 1985. These children were still required to complete the application process set out in the membership rules. Thus, the discrimination which Bill C-31 attempted to remedy was perpetuated. Children born before April 17, 1985 to a father with Indian status who had married a non-status woman could become members of the Band, since both parents were entitled to Indian status and Band membership according to the Indian Act prior to the Bill C-31 amendments. Children born before April 17, 1985 to unmarried mothers who were Band members could obtain membership, since their mothers never lost status or membership. Children born after April 17, 1985 to fathers or to mothers whose spouses were without status, gained membership as a result of the December 11, 1987 resolution. However, the children of the reinstated women continued to be denied membership. In effect, this denial was based on their mothers' lost status. A woman's loss of status due to marriage of a non-status man had been recognized and rejected as discriminatory action by Parliament. Thus, the denial of membership to the appellant children, while granting membership to other children in a similar

position, was a breach of the non-discriminatory clause in the Band's membership rules.

25 This issue of discrimination directed towards children of enfranchised woman was finally eliminated on February 13, 1989. A Band Council Resolution passed on that date reflects the following decision:

> THAT ALL Children of restored and original Band Members who have attained Indian Band status designated as First Generation be accepted by the Garden River Band with no exceptions or reservations to any individual.

26 The rapidity of the meetings and decision-making must be noted. The Settlement Agreement was made on March 30, 1987. The dates for distribution of the funds were accepted on December 3rd, of that year, the procedures were discussed one week later on December 11th, and the actual disbursements were made on December 17th and 18th. It is also noted that during the same time period, Band members continued to raise concerns regarding who would share and to what extent, as evidenced by the minutes of the meeting and the testimony at trial.

The trial judge's disposition

27 The trial judge determined this case based upon his analysis of what he regarded as the two issues before the court. The first issue was whether the first generation children of women formerly deprived of Indian status, and to whom Indian status has now been restored by Bill C-31, were entitled to membership in the Band as of the date for distribution of the $1,000,000 from the Settlement Agreement. The second issue was whether it was appropriate to deduct from Indian women re-admitted under Bill C-31 those amounts which had been advanced to them individually by the Government of Canada when their Indian status, and therefore Band membership, had been lost.

28 The trial judge found that on the date of distribution, the appellant children could not claim membership based on any of the enumerated classes found within the Band's membership rules. He stated that he was unable to find that "in its application of its Citizenship Regulations or in the distribution of the Squirrel Island Settlement Trust Money, that the band acting through its Council, did so contrary to law". He also found:

> There was nothing sinister or deliberate in the sense of lacking fairness or was there anything legally improper in the decision to make distribution on December 17 and 18, 1987 to those persons who were, at that time, recorded in the records of the Garden River Band of Ojibways as members in the Band.

Therefore, he held that the appellant children were not entitled to a share.

29 Regarding the second issue, he stated:

> In my opinion, what the Band Council did was fair and equitable and restored the financial interests of the restored C-31 Indian women to equal that of their Indian sisters who had not been deprived of their status and who had not received earlier distribution.

Having decided both issues in the negative, the trial judge dismissed the action.

Analysis

30 In our opinion, the essential error of the trial judge was in not recognizing that the Band in this case was attempting to deal with two unrelated matters at the same time. In the result, he dealt with the two issues in the manner in which they were presented to him and later to this court. They are:

(1) should the appellant children have received a full share as members of the Band?
(2) were the deductions from the adult appellants appropriate?

With respect, we are of the view that the trial judge erred in his conclusions on both issues.

31 The Band Council Resolution stated that $1,000,000.00 of the settlement moneys was required for per capita distribution to the Garden River Band members. Black's Law Dictionary (6th ed.) at p. 1136, provides the following definition of per capita:

> By the heads or polls; according to the number of individuals; share and share alike. This term, derived from the civil law, is much used in the law of descent and distribution, and denotes that method of dividing an intestate estate by which an equal share is given to each of a number of persons, all of whom stand in equal degree to the decedent, without reference to their stocks or the right of representation.

Webster's Ninth New Collegiate Dictionary, at p. 872 defines per capita as meaning "equally to each individual".

32 In order to comply with its own Resolution to make a per capita distribution to band members, the Band Council would have to give an equal share to all band members. In effect, it constituted itself a trustee for this purpose. The Band itself appears to have recognized this, given the language of its questionnaire relating to distribution. The trial judge also appears to have proceeded on the basis that from at least the date of the resolution to make a per capita distribution, the Band Council was dealing with trust moneys. As D.W.M. Waters, Law of Trusts in Canada, 2nd ed. (1984) explains at p. 111, "whether a trust has been created is simply a matter of construction". In our view, the proper construction of the September 28, 1987 Band Council Resolution is that an express trust was created with the Garden River Band as both settlor and trustee of the $1,000,000.00, being the moneys necessary to make a per capita distribution, and the Garden River Band Members as beneficiaries.

33 One of the primary duties of a trustee is to treat all beneficiaries impartially: Benoit v. Tisdale (1925), 28 O.W.N. 477 (Weekly Court); Re McClintock (1976), 70 D.L.R. (3d) 175 at 180 (Ont. Div. Ct.). Waters, Law of Trusts in Canada, supra, describes this duty as follows at p. 787:

> It is a primary duty upon trustees that in all their dealings with trust affairs they act in such a way that, if there are two or more beneficiaries, each beneficiary receives exactly what the terms of the trust confer upon him and otherwise receives no advantage and suffers no burden which other beneficiaries do not share. In this way the trustees act impartially; they hold an even hand. The settlor or testator may choose to give disproportionate interests to various beneficiaries, and he very often does so in practice, but that is his privilege. It is still the duty of the trustees to carry out the terms of the trust as they find them, and to ensure that in the administration of the trust they do not give advantage or impose burden when that advantage or burden is not to be found in the terms of the trust. [emphasis added].

34 The duty to act impartially would require the trustee to treat equally all members of a class of beneficiaries. We think this basic principle is dispositive of the appeal as it relates to the adult appellants. Once the decision was made by the Band Council that there should be a per capita distribution of the sum in issue, then it is apparent that the Band Council had an obligation to treat all members of the Band equally. There could be no suggestion of set off with respect to so-called Band indebtedness unless all Band indebtedness was subject to the set off. The evidence at trial established that a decision was made to deduct sums only from the appellant women. Members of the Band who owed sums for such items as water use charges were able to collect full shares. The reinstated women were entitled to be treated equally to all other beneficiaries. Since all other beneficiaries received full shares, the Band should have advanced full shares to the adult appellants.

35 In any event, such a set off could not be employed to recover from formerly enfranchised women sums relating to re-instatement under Bill C-31. There was a special provision in Bill C-31 relating to that and it is reproduced in s. 64.1(2) of the Indian Act. This provision limits recovery to sums paid in excess of one thousand dollars. The appellant women had all received sums less than this amount. The trial judge erred in permitting this deduction from the per capita distributive share of each of the adult appellants.

36 The minor appellants, being the first generation children of formerly enfranchised women present a different problem, but it is a problem that disappears when one ignores the self-imposed time limit for the distribution. When the Band Council Resolution in question was passed, it is common ground that the identity of all the first generation children were known. The only live issue

for a time was whether a distinction would be drawn between children born after April 17, 1985 with only one parent who was a Band member and children born before April 17, 1985 with similar parentage. The latter group was comprised of the minor appellants whose applications for membership in the Band were being held in abeyance because of matters over which they had no control. Leaving apart the highly valid point that such a distinction could not be made between the two classes of children without violence to the self-imposed non-discrimination provisions of the Band's membership rules, the Band Council knew that these children would ultimately become members, as in fact they did, but well after the date for distribution. The cut off date, being highly arbitrary, could not have the effect of eliminating these children from participation in the per capita distribution. Alternatively, if the deadline was of some significance to the Band Council, it would have been a simple thing to have made the distribution to the members whose credentials were certain, after withholding for the time being an amount sufficient to cover the interests of those minor appellants whose applications had not yet been accepted.

37 However, on the evidence, the date for distribution was not chosen for any particular reason. Despite notice of concerns regarding individual entitlement to participate in the distribution of the moneys, the Chief and Council appeared determined to distribute the entire $1,000,000.00 at one time. In fairness to the Band Council, last minute attempts were made to remedy entitlement problems. The December 11th resolution addressed the question of entitlement for some individuals. At trial, witnesses testified that even on the date of distribution, children were brought to the Band Office, produced birth documentation, were accepted as members, and were given their shares. It is also noted that on October 13, 1988, many months after the self-imposed deadline, a Band Council Resolution similar to the December 11, 1987 resolution was passed. As a result, seven more children were entered onto the membership list and advanced shares in the settlement funds.

38 In setting the arbitrary deadline, the Band compromised its ability to fulfil its duties with respect to the distribution of funds. The Band placed itself in the position of having to disburse the funds before it could, as trustee, definitively ascertain the identity of all beneficiaries. This was not only a breach of the Band's duty to act impartially, but it was a breach of its specific duty to determine and ascertain the class that was to benefit from the distribution and to identify and locate the members of that class.

39 It is basic to all trust concepts that for a trust to come into existence, it must have three essential characteristics. Before a trustee can begin the administration of a trust, he or she must be satisfied that the trust satisfies the following three requirements: a) certainty of intention; b) certainty of subject-matter; and, c) certainty of objects.

40 It is the third requirement which is relevant to the discussion of the entitlement of the minor appellants. The need for certainty of objects means that a fixed trust will fail unless it is possible to say whether any person is a member of the class and unless all the possible members of the class are known or ascertainable: Waters, Law of Trusts in Canada, supra at p. 80. In determining whether

the trust satisfies the requirement of certainty of objects, the trustee will effectively be determining what classes are entitled to benefit from the trust fund. This is because the question whether it is possible to say that any person is a member of the class and the question whether all possible members of the class are known or ascertainable assumes that the class has been determined. In the case under appeal, there is no issue that the object of the distribution was the membership of the Band; the question that arose was whether the Band could pick the date that it did to ascertain the membership of the Band.

41 We think that it could not. A trustee's first duty is to follow implicitly the terms of the trust instrument: Merrill Petroleums Ltd. v. Seaboard Oil Co. (1957), 22 W.W.R. 529 at 557, affirmed 25 W.W.R. 236 (Alta C.A.), noted in Waters, Law of Trusts in Canada, supra at 695. As a logical extension of this duty, we think that before a distribution is made, a trustee has a duty to make reasonable efforts to identify and locate the members of a class of beneficiaries. If a trust dictates that the trustee should distribute trust funds to a certain class of beneficiaries, the trustee can only comply with this requirement by first identifying and determining the members of the class.

42 The case of Atlantic Trust Co. v. McGrath (1969), 8 D.L.R. (3d) 225 (N.S.C.A.) stands for the proposition that an administrator of an estate has a duty to make reasonable inquiries as to the existence of beneficiaries of the estate. In that case, the administrator had the final accounts passed and the estate distributed after sending out the usual notices for persons having claims against the estate. After the distribution had been completed, the widow of a son of the deceased came forward claiming that she had been excluded from the distribution. At the time of the distribution, the administrator did not know about the deceased's son but he did have reasonable grounds for believing that such a son existed and was last thought to be in the north-eastern United States. Notwithstanding such reasonable grounds, he made no effort to locate the son. The trial judge held that the administrator had a duty to make inquiries as to the existence of the son (quoted at p. 228):

> ... I am of the opinion from all the evidence on the point that Howard McGrath [the administrator] had reasonable grounds for supposing there might well be a son of Harvey McGrath's [the deceased] residing somewhere in the eastern American States. He should have advertised at least in Massachusetts for the next of kin.

The Nova Scotia Court of Appeal agreed that a duty to make such inquiries existed (at p. 238):

> Here the evidence which I have mentioned and which was accepted by the trial Judge indicates a very definite warning that further inquiries and investigations should have been made.

See also: M.V. Ellis, Fiduciary Duties in Canada, (1993), at 4.6.

43 Accordingly, there was an affirmative and readily performable duty on the Band Council to ascertain and identify the membership of the Band. That duty came into existence on September 28,

1987 when the decision was made to make a per capita distribution. That Band Council Resolution did not fix a date for distribution or set special guidelines for those entitled to a distributive share: it referred only to "Garden River Band Members". Its only time limit on that date was that it would produce an audited report by June 30, 1988. During that period, the Band Council was made aware of the inability of some children who were clearly eligible for Band membership to complete their applications for membership within the time frame set by the Band Council.

44 The trial judge was in error in determining this issue in favour of the Band Council by holding that there was nothing sinister or deliberately unfair in the decision to fix the date for distribution for December 17th and 18th of 1987. That is not the test in scrutinizing the performance of a trustee. The issue of whether a trustee can set an arbitrary time limit for identifying and locating the members of the class is to be resolved by a standard of care analysis. In other words, would a trustee be reasonably fulfilling his or her duty to identify and locate the members of the beneficiary class if he or she operated on a self-imposed deadline?

45 In Learoyd v. Whiteley, (1887), 12 App. Cas. 727 (H.L.), Lord Watson set out the standard of care expected of a trustee in carrying out his or her duties. He stated at p. 733 that

> "the law requires of a trustee no higher degree of diligence in the execution of his office than a man of ordinary prudence would exercise in the management of his own affairs.".

Waters defined the standard as follows at p. 750, supra:

> the trustee must show ordinary care, skill, and prudence, he must act as the prudent man of discretion and intelligence would act in his own affairs.

In Fales v. Can. Permanent Trust Co., [1977] 2 S.C.R. 302 at 318, Dickson J. stated that the trustee must show "vigilance, prudence and sagacity".

46 In our opinion, the Band Council did not show ordinary care, skill and prudence in carrying out its duties as trustee with respect to the minor appellants and the class they represent.

Disposition

47 We are of the opinion that this case can be decided on the basis of well recognized principles relating to the fiduciary obligations of any person who undertakes to make a per capita distribution of a fund of money entrusted to that persons' care. Accordingly, we find it unnecessary to address the appellants' submissions regarding s. 15 of the Charter of Rights and Freedoms.

48 For the reasons given, we are allowing the appeal and setting aside the judgment below. The appellants and all those they represent are entitled to a declaration that they are each entitled to the payment of an equal distributive share of the $1,000,000 fund from the Settlement Agreement

without deduction of any kind. They are also entitled to pre-judgment interest from the distribution date until the date of the trial judgment below and post-judgment interest thereafter until payment. In order to give effect to this declaration, the matter is remitted to the trial judge or a judge of concurrent jurisdiction for an accounting and judgment with respect to the individual appellants and members of the class they represent.

49 Since the appellants are beneficiaries of a trust who were obliged to sue their trustees, they should receive costs on a solicitor and client basis here and below.

FINLAYSON J.A.
CHARRON J.A.
ROSENBERG J.A.

qp/d/ln/mmr/mjb/qlhjk

Case Name:

Deans v. Thachuk

Between
Dennis Black Deans, Nelson Russling, Terence Day, and James Sharp on their own behalf and on behalf of all beneficiaries of the Edmonton Pipe Industry Pension Plan, appellants, (plaintiffs), and
Bob Thachuk, Cliff Williams, Rob Kinsey, M.B. Strong, R. Garon, H. Cicconi, J. Curtis, J. Falvo, H. Morissette, R. Shirriffs, R. Auger, G. Dobson, N. Frederiksen, R. Dubord, W. Shaughnessy, P. Stalenhoef, G. Panas, H. Blakely and L. Matychuk, respondents (defendants)

[2005] A.J. No. 1421

2005 ABCA 368

261 D.L.R. (4th) 300

[2006] 4 W.W.R. 698

52 Alta. L.R. (4th) 41

376 A.R. 326

48 C.C.P.B. 65

23 C.P.C. (6th) 100

20 E.T.R. (3d) 19

144 A.C.W.S. (3d) 25

2005 CarswellAlta 1518

Docket No.: 0403-0156-AC

Alberta Court of Appeal

Edmonton, Alberta

Fraser C.J.A. and Russell J.A. and Sirrs J. (ad hoc)

Heard: May 9, 2005.
Judgment: October 27, 2005.

(51 paras.)

Civil procedure -- Costs -- Special orders -- Appeal from order dismissing an application for interim legal costs reported at [2004] A.J. No. 470 allowed -- Applicants in representative action had established personal impecuniosity, a prima facie meritorious case, and special circumstances which justified an award for interim costs.

Appeal by the plaintiffs, Deans, Russling, Day, and Sharp, on behalf of all of the beneficiaries of the Edmonton Pipe Industry Pension Plan, from the dismissal of their application to have their interim legal costs paid out of the Pension trust fund in connection with their action against the trustees of the Pension. The beneficiaries of the Pension were all members of a union representing plumbers and pipe-fitters. The Superintendent of Pensions had identified several serious breaches of the administration of the Pension. The representative beneficiaries brought an action against the trustees for breach of fiduciary duty, negligence and misconduct in the administration of the plan. The trustees refused to fund the litigation from the Pension fund. The applications judge found that the test required that the beneficiaries establish a prima facie meritorious claim, demonstrate impecuniosity which would prevent the continuation of the claim without an award of interim costs, as well as the existence of special circumstances. She held that the representative beneficiaries should have canvassed the remaining beneficiaries for financial support. On appeal, the beneficiaries argued that the test should have been simply whether the action was meritorious and was brought for the benefit of all of the beneficiaries of the plan.

HELD: Appeal allowed. The beneficiaries had established personal impecuniosity. The applications judge applied the correct three-part test, but erred in requiring the representative beneficiaries to canvas the remaining beneficiaries for financial support, because it would effectively preclude the possibility of interim costs in such cases. The beneficiaries had shown a prima facie case and special circumstances justifying interim costs.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, S.A. 2003, c. C-16.5, s. 20

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

Pension Benefits Standards Act, R.S.C. 1985, c. 32

Appeal From:

Appeal from the Order by The Honourable Madam Justice M.T. Moreau Dated the 2nd day of April, 2004 Filed on the 21st day of May, 2004

Counsel:

J.C. Lloyd for the Appellants

B.G. Kapusianyk for the Respondent

J. Rosselli for the Board of Trustees of the Edmonton Pipe Industry Pension Fund (Not a Party To the Appeal)

MEMORANDUM OF JUDGMENT

THE COURT:--

Nature of Proceedings

1 This is an appeal (with leave) from the dismissal of an application for the appellants' interim legal costs to be paid from the Edmonton Pipe Industry Pension Trust Fund (the "Fund").

Background

2 The appellants are members of a union representing plumbers and pipe-fitters. As such, they are entitled to benefits under the Edmonton Pipe Industry Pension Plan (the "Plan"). The Plan was established in October 1968 by an Agreement and Declaration of Trust, which was amended in December 2001. The Declaration of Trust created the Fund to provide retirement, death and disability benefits for Plan members. It provided for the appointment of a Board of Trustees (the "Trustees") consisting of representatives from both the union and the employers.

3 Under the Trust Agreement, the Trustees had discretion to invest the Fund's assets in compliance with applicable statutes and regulations. It provided, amongst other things, that:

> the costs and expenses of any action, suit or proceeding brought by or against the Trustees or any of them (including counsel fees), shall be paid from the Trust Fund, except in relation to matters as to which it shall be adjudged in such action, suit or proceeding that such Trustees were acting in bad faith, or were grossly negligent in the performance of their duties hereunder.

The appellants contend that provision preserves the right of beneficiaries seeking redress against the Trustees to have their legal costs paid by the Trust Fund. However, the 2001 amendment deleted that provision from the Trust Agreement. The appellants allege any amendment thereto is of no force and effect.

4 As a result of complaints of non-compliance with provincial and federal pension legislation, the Provincial Superintendent of Pensions (the "Superintendent") instructed Price Waterhouse Coopers ("PWC") to conduct a review of the Plan. That review culminated in a report, dated June 30, 2000, which identified several significant breaches of compliance and unsound administrative practices. The Superintendent viewed those breaches as "serious". They included: investing the Plan's assets in excess of the limits prescribed by the Pension Benefits Standards Act, R.S.C. 1985, c. 32 (2d Supp.), Schedule III ("PBSA") and the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

("ITA"); acquiring excess voting interest in a golf course in breach of the PBSA; pledging the Plan's assets as security in contravention of the ITA; and investing in self-directed, high risk investments.

5 The PWC report also found a significant lack of due diligence by the Trustees prior to entering into self-directed investments, including: failure to undertake a thorough risk analysis of investments; failure to consult legal counsel and the Superintendent to determine if the investments were in compliance with the legislation; and failure to establish a methodology to assess the performance of self-directed assets. The report concluded that, had the self-directed assets been left with professional money managers, the present net assets of the Plan would have been $27.5 million higher, and that:

> It would be difficult not to conclude that the failure to comply with legislation and failure to adhere to basic governance procedures has made a significant contribution to the current financial difficulties facing the Plan.

6 In November 2000, Plan members were informed that the Superintendent had engaged PWC to review the governance, administration, management, compliance, finances and investments of the Fund, and that the review had disclosed some concerns.

7 In March 2001, the Trustees reported to Plan members that concerns disclosed in the PWC report had arisen during the terms of some former Trustees. The current Trustees, some of whom were also Trustees when the concerns arose and are respondents in this appeal, assured Plan members that their focus was on resolving the issues in the best interests of the Plan and its members.

8 Although the Trustees did not distribute the PWC report to Plan members, the appellant, Dennis Black Deans, obtained a copy from the office of the Provincial Information and Privacy Commission. On June 26, 2002, the appellants filed a statement of claim on their own behalf and on behalf of all of the beneficiaries of the Plan, alleging breach of fiduciary duties, gross negligence and wilful misconduct by present and former trustees of the Plan and its employee administrator, Bob Thachuk. The Trustees declined to finance the lawsuit from the Fund.

9 As of September 30, 2002 there were 5,547 active members of the Plan and 1,308 pensioners. Approximately 200 of the Plan members who were informally canvassed voluntarily contributed financially toward the appellants' legal costs. Based on the number of contributors to the costs of the action, the respondents contend the appellants represent only two to three percent of the beneficiaries of the Plan.

10 On February 3, 2004, the appellants' first application to have their legal fees and disbursements paid from the Fund was dismissed as pleadings had not yet closed. However, they were granted leave to reapply at a later date. A second application, which is the subject of this appeal, was dismissed on April 2, 2004. Leave to appeal was granted June 9, 2004.

11 The chambers judge rejected suggestions that the appellants were required to challenge the Trustees through the electoral process before commencing litigation. However, she found there was no organized funding campaign to collect donations to fund the litigation.

12 Evidence suggests that the majority of the members of the Plan were not dissatisfied with the manner in which the Trustees responded to the concerns identified by the Superintendent: union members refused the resignations tendered by the 4 union trustees in office in June, 2001; three of the current union trustees, who are respondents in this appeal, were re-elected in the January, 2003

election; and each of the appellants was unsuccessful in his bid for election as a union trustee at the same election.

Issues

13 Did the chambers judge err in law in determining that the test prescribed by the Supreme Court of Canada to determine interim costs applies in the context of pension litigation?

14 If the chambers judge did not err in relying on the Supreme Court of Canada's test, did she err in her application of that test?

Standard of Review

15 The standard of appellate review on questions of law is correctness, and on questions of fact is palpable and overriding error: Housen v. Nikolaisen, [2002] 2 S.C.R. 235, 2002 SCC 33 at paras. 10, 25 & 27.

16 A discretionary decision as to costs may be set aside if an appellate court finds that a judge has misdirected herself as to the applicable law or made a palpable error in her assessment of the facts. "[T]he criteria for the exercise of a judicial discretion are legal criteria, and their definition as well as a failure to apply them or a misapplication of them raise questions of law which are subject to appellate review": British Columbia (Minister of Forests) v. Okanagan Indian Band [2003] 3 S.C.R. 371, 2003 SCC 71 at para. 43 ("Okanagan"), citing Pelech v. Pelech, [1987] 1 S.C.R. 801 at 814-15.

Analysis

Did the chambers judge err in law in determining that the test prescribed by the Supreme Court of Canada to determine interim costs applies in the context of pension litigation?

17 The chambers judge applied the three-part test for an exercise of the discretionary power to award interim costs prescribed by the Supreme Court of Canada in Okanagan at para. 36. There, LeBel J., speaking for the majority, prescribed the following criteria for an award of interim costs:

> (a) the claimant must be impecunious to the extent that without such an order, the claimant would be deprived of the opportunity to proceed with the case;
> (b) the claimant must establish a prima facie case of sufficient merit to warrant pursuit; and
> (c) there must be special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate.

However, in this case, the chambers judge was not satisfied the appellants met these criteria.

18 In their application before the chambers judge, the appellants invited her to invoke the principles from Okanagan. However, they now argue in this Court that Okanagan should not be applied to pension trust litigation cases. Instead, they claim the only questions to be asked are whether the claim is prima facie meritorious and whether the litigation is brought for the benefit of all the beneficiaries of the plan, citing Re Buckton, Buckton v. Buckton, [1907] 2 Ch. 406 (A.C.J.) ("Re Buckton") and McDonald v. Horn, [1995] 1 All E.R. 961 (C.A.) ("Horn"). They say that where both questions are answered in the affirmative, the interim order should be granted.

19 The appellants submit that, in considering an award of interim costs in the context of pension and trust litigation, the focus must be on the nature of the issue to be addressed in the litigation and not on the characteristics of the applicant for the award. In particular, they argue that an applicant for such an award in pension trust cases should not be required to demonstrate impecuniosity. They also contend they should not be required to demonstrate the likelihood of recoverability, as found by the chambers judge.

20 Relying on a statement in Okanagan at para. 34, that interim costs are available in "certain trust, bankruptcy and corporate cases", the appellants argue that the majority in that case did not intend to extend the Okanagan test to those types of cases. According to the appellants, costs in pension and trust cases are determined by different principles and are ordinarily granted on a solicitor-and-client basis, payable from the pension or trust fund regardless of the outcome of the case.

21 However, the statement in Okanagan relied on by the appellants was made in the context of a discussion of the types of cases in which interim costs have historically been granted and the policy reasons for doing so. At para. 31, LeBel J. stated:

> Concerns about access to justice and the desirability of mitigating severe inequality between litigants ... feature prominently in the rare cases where interim costs are awarded.

He found that cases falling within that realm include matrimonial or family cases, as well as "certain trust, bankruptcy and corporate cases." The three part test he prescribed established the parameters within which a court's discretion to award interim costs should be exercised. Nothing in his reasons suggests the test was not intended to apply in the context of pension trust litigation.

: see also Dominion Bridge Inc. (Trustee of) v. Retirement Income Plan of Dominion Bridge Inc. - Manitoba, [2004] M.J. No. 419, 2004 MBCA 180 at para. 24.

22 It is not disputed that the appellants have established personal impecuniosity. What is at issue is the extent to which an applicant for interim costs, acting in a representative capacity in an action involving a pension trust fund, is required to canvas all the members of the plan for financial support for the litigation or pursue contingency fee arrangements, in order to satisfy the first criteria of the three part test in Okanagan. The second issue is whether the likelihood of recoverablity is a proper factor to consider in weighing the merit of the case. Neither of those issues obviates the application of the three part test. Rather each of those issues can be addressed in the application of that test.

23 As no error of law has been shown in the decision of the chambers judge to apply the three-part test prescribed in Okanagan, the first ground of appeal is dismissed.

Did the chambers judge err in her application of the three-part test established in Okanagan?

(a) Impecuniosity

24 In Okanagan at para. 34, LeBel J. held that impecuniosity should not prevent litigants from pursuing meritorious claims. [para. 34] He stated that

> "[t]he party seeking the order must be impecunious to the extent that, without such an order, that party would be deprived of the opportunity to proceed with the case ": Okanagan at para. 36.

25 In this case, the chambers judge rejected the Trustees' argument that the Fund's assets were relevant to the determination of impecuniosity, but found insufficient evidence that the appellants' other potential funding resources had been depleted. In her view, before asserting they could not afford the litigation, the appellants should have formally canvassed all members of the Plan on whose behalf the action was brought, or pursued a contingency fee arrangement.

26 However, because only a small percentage of members responded to the informal canvassing for funds, it can be inferred that the majority of them were satisfied with the Trustees' response to concerns regarding the administration of the Fund. Moreover, since the majority of members refused to accept the resignation of, and even re-elected, the four union Trustees, it seems patent that any formal canvas for funds to support the litigation would have been futile.

27 This litigation predates the Class Proceedings Act, S.A. 2003, c. C-16.5. Section 20 of that Act requires a representative plaintiff to give class members notice that the action has been certified to proceed as a class proceeding. However, before that Act was proclaimed, the Supreme Court of Canada held that, because a judgment in a representative action is not binding on a class member unless that member has been notified of the suit, "prudence suggests that all potential class members be informed of the existence of the suit ...": Western Canadian Shopping Centres Inc. v Dutton, [2001] 2 S.C.R. 534, 2001 SCC 46 at para. 49. So while notice may be prudent, it appears that prior to the enactment of the Class Proceedings Act, notice was not essential for a representative action to proceed. But, in the absence of notice to the class members, the cost of conducting such an action falls on the representatives. Since formal notice was not a prerequisite to a representative action when this proceeding arose, it follows that the support of the majority of Plan members need not be established.

28 It is not clear from the chambers judge's reasons how any subsequent application for interim costs should be resolved if a formal canvas proved entirely unsuccessful. But it seems implicit that in such an event, the intent of the chambers judge is that the action would not be able proceed, whether or not the suit is meritorious. That being so, the requirement to canvas Plan members for financial support cannot be justified, because it would effectively preclude the possibility of interim costs in such cases.

29 While the prospect of a contingency fee arrangement might dictate against the remedy of interim costs, there must be evidence that such an arrangement is a viable alternative: Okanagan at para. 44. Although there was no such evidence in this case, it seems clear that such an arrangement is not realistic in view of concerns expressed by the chambers judge regarding the poor prospect of recovery.

30 Accordingly, the chambers judge erred in relying on the lack of evidence of a formal canvas or the prospect of a contingency arrangement, and disregarding undisputed evidence of the appellants' personal impecuniosity.

(b) Prima Facie Case

31 The chambers judge was satisfied there was sufficient evidence of gross negligence or wilful misconduct to justify the matter going forward "at least to the conclusion of the discoveries." How-

ever, she concluded that, because it was not clear whether the respondents had sufficient funds to make pursuit of the lawsuit worthwhile, any victory for the appellants would be hollow. It is implicit in her reasons that she relied on that factor in declining interim costs. However, the conclusion that the action was not worthy of pursuit due to a poor prospect of recovery does not appear to be supported by evidence of the net worth of the respondents. The chambers judge also placed reliance on the decision of the Trustees not to pursue the litigation themselves in declining the remedy. It must be noted that some of those Trustees are also some of the respondents in this action.

32 The appellants acknowledge that prima facie merit is a reasonable prerequisite to an interim costs order. But they quarrel with the onus placed on them by the chambers judge to demonstrate the ability of the respondents to satisfy a damages award, and to provide assurance that the lawsuit is in the long-term interests of Plan members. No authorities have been cited in support of their position.

33 In Okanagan, LeBel J. held that the case must be strong enough to step past the preliminary threshold of being worthy of pursuit, but the order should not be refused merely because key issues remain live and contested between the parties. Nor should it be refused because of concerns about fettering the discretion of the trial judge in adjudicating the merits of the case.

34 In Horn, supra, Hoffmann L.J. reasoned that unlike ordinary trust beneficiaries, pension plan members, as contributors to the trust fund, have a commercial relationship with it and are therefore entitled to be satisfied the trust fund is being properly administered. Because pension funds are a special form of trust, he found an analogy between beneficiaries and corporate shareholders. Thus, he determined that when beneficiaries of pension trusts bring an action on behalf of the trust, they should enjoy the same right of indemnity as corporate shareholders in derivative actions.

35 Hoffmann L.J., at 974, cautioned that the power to order "preemptive" costs in a pension fund case should be exercised with considerable care, although in his view that did not require a close examination of the merits of the dispute. Rather, the question is whether a sufficient case for further investigation has been established. If so, the most economical form of investigation should be chosen. Hoffmann L.J. noted that even if further investigation is required, it need not necessarily take the form of a full scale trial, and might extend only to discovery or involve the appointment of judicial trustees with power to take possession of the documents and investigate for themselves.

36 Here, the chambers judge recognized that although there are some elements of this litigation analogous to a derivative action, leave is required to commence such actions and will only be granted if the court is satisfied that the proceeding is in the best interests of the corporation. Inferentially, she was thus disinclined to follow the reasoning of Hoffmann L.J. in Horn. However, since it was open to her to determine whether it was in the best interests of the Plan members to provide interim costs funding, that was not a proper ground on which to distinguish Horn.

37 In pension trust cases, the obligation to preserve the trust fund for the beneficiaries, to the extent reasonably possible, requires a balancing of the cost of the litigation with the prospect of recovery if successful. But those factors must also be balanced against what Hoffmann L.J. agreed was a moral right of beneficiaries to be satisfied that the trust fund is being properly administered, given their commercial relationship with it: Horn at 973.

38 Moreover, in the face of allegations of significant breaches of trust, which are substantiated in an independent report, reliance on the prospect of recoverability is contrary to public policy interests of ensuring that wrongdoers are held legally responsible for their actions regardless of their

financial circumstances. And in any event, those circumstances may change dramatically throughout the course of the litigation and the life of any ensuing judgment.

39 The second part of the test established in Okanagan requires only that the case be strong enough to get over the preliminary threshold of being worthy of pursuit. It does not require a close examination of the merits of the dispute, nor the prospects of success, including the likelihood of recovery. The action here is of sufficient merit to warrant pursuit and the appellants have therefore met the second part of the test for interim costs.

(c) Special Circumstances

40 The third step in determining whether interim costs should be granted requires proof of "special circumstances sufficient to satisfy the court that the case is within a narrow class of cases where this extraordinary exercise of its powers is appropriate": Okanagan at para. 36.

41 The Court in Okanagan at para. 36 made the general observation that the power to order interim costs is inherent in the nature of the equitable jurisdiction as to costs. Accordingly, factors of an equitable nature may be relevant considerations in determining the existence of special circumstances. With respect to special circumstances, Lane J. in Townsend v. Florentis, [2004] O.J. No. 5770, [2004] O.T.C. 313, 2004 CarswellOnt 1402 at paras. 56-57 (S.C.J.) noted:

> [T]here must exist some factor which decisively lifts the applicant's case out of the generality of cases. The existence of issues going beyond the interests of the parties alone would seem to be one possible example of the minimum required. ... The mere 'leveling of the playing field', although an admirable objective, would deprive the Third Test [in Okanagan] of any real meaning ...

42 Issues specific to trust cases may also be relevant in this context. Trust litigation may entail unique obligations to preserve the trust fund for the beneficiaries: see Liddell v. Deacou (1873), 20 Gr. 70 (Ont. Ch.); Cummings v. McFarlane (1851), 2 Gr. 151 (Ch. Upper Canada); and Andrews v. Barnes (1887), 39 Ch. D. 133 at 135 (Ch.) per Kay J., aff'd (1888), 39 Ch. D. 133 at 141. In Mediterranea Raffineria Siciliana Petroli S.p.a. v. Mabanaft G.m.b.h. (December 1, 1978, Eng.C.A.) [unreported], cited in Bankers Trust Co. v. Shapira, [1980] 3 All E.R. 353 at 357 (C.A.), Templeman L.J. noted that the courts of equity would not hesitate to use their powers to protect and preserve a trust fund in interlocutory proceedings to ensure that it is not entirely depleted before trial. The obligation to protect the Fund from depletion includes not only the duty to protect it from costs of an unmeritorious suit, but as well the duty to protect it from mismanagement.

43 In Re Buckton, supra, Kekewich J. identified three categories of cases involving costs in trust litigation. The first are actions by trustees for guidance from the court as to the construction or the administration of a trust. In such cases, the costs of all parties necessarily incurred for the benefit of the estate will be paid from the fund. The second are actions by others relating to some difficulty of construction or administration of a trust that would have justified an application by the trustees, where costs of all parties necessarily incurred for the benefit of the trust will also be paid from the fund. The third are actions by some beneficiaries making claims which are adverse or hostile to the interests of other beneficiaries. In those cases, the usual rule that the unsuccessful party bears the costs will apply.

44 The chambers judge held that the present case is adversarial because damages are being sought rather than declaratory relief. That factor weighed against an award of interim costs in her decision, presumably because she was concerned that a damage award in favour of the appellants could jeopardize the Fund. Ultimately, she determined there was insufficient evidence of special circumstances to warrant the exercise of the Court's authority to grant interim costs.

45 However, the chambers judge overlooked the following factors:

> 1. The action involves allegations of bad faith, conflict of interest, gross negligence, wilful misconduct, lack of due diligence, and failure to comply with statutory requirements on the part of the Trustees, resulting in financial difficulties now facing the Plan; 2. Many of those allegations are substantiated by an independent report prepared by an expert accounting body; 3. The independent report was initiated and issued by the Superintendent; 4. The decision not to pursue litigation with respect to the administration of the Fund was made by the Trustees, and concerned the actions of some of their fellow Trustees; 5. The appellants, acting on behalf of all the beneficiaries, are entitled to be satisfied that the Fund was being administered properly; and 6. Damages are sought on behalf of all the beneficiaries of the Fund, and not merely for the named appellants.

Those factors are sufficient to constitute special circumstances, which are not outweighed by concerns regarding the prospect of recoverability. Failure to give adequate weight to those circumstances in addressing the best interests of the beneficiaries constitutes an error of law.

Did the chambers judge err in interpreting the indemnification provision of the agreement?

46 Although it is not strictly necessary for the resolution of this appeal to address the interpretation of the indemnification provision in the agreement, having heard oral submissions on the issue we do wish to offer the following comment.

47 Generally, trustees are entitled to indemnity for all costs and expenses properly incurred in the due administration of the trust, including solicitor-client costs "in all proceedings in which some question or matter in the course of the administration is raised as to which the trustee has acted prudently and properly": Thompson v. Lampert, [1945] S.C.R. 343 at 356.

48 The indemnification provision in the agreement in this case specifies that no costs are payable if the trustees are found to have acted in bad faith or to have been grossly negligent. If the provision is interpreted as permitting any party to recover its costs from the Fund, it would lead to the anomalous result that parties bringing an action against the Trustees would be able to claim their costs from the Fund if the Trustees acted properly in respect of the matter adjudicated, but not if the Trustees had acted improperly. The more reasonable interpretation of the intent of this provision was to allow the Trustees to recover their costs, both in actions they commenced on behalf of the Fund and in actions brought against them, rather than to allow the other parties to these actions to recover their costs from the Fund. That interpretation leads to the conclusion that the appellants can only claim interim costs on the basis of the common law principles enunciated in Okanagan.

49 Thus the chambers judge did not err in declining to interpret the indemnification provision to apply to the appellants' application for legal costs in their action against the Trustees.

Conclusion

50 While the chambers judge did not err in finding that the three-part test prescribed in Okanagan applies in applications for interim costs in pension trust fund cases, she did err in her application of that test by finding the appellants were obliged to canvas the Plan members for financial support for the litigation to establish impecuniosity, and by finding that the prospect of recoverability outweighed other, more critical, special circumstances warranting interim costs.

51 Accordingly, the appeal is allowed and interim costs are awarded to the appellants from the Fund through examinations for discovery, with leave to reapply thereafter.

FRASER C.J.A.
RUSSELL J.A.
SIRRS J.

cp/e/qw/qlpha

Case Name:

Deans v. Thachuk

The Board of Trustees of the Edmonton Pipe Industry Pension Trust Fund
v.
Dennis Black Deans, Nelson Russling, Terence Day, and James Sharp on their own behalf and on behalf of all beneficiaries of the Edmonton Pipe Industry Pension Plan and Bob Thachuk, Cliff Williams, Rob Kinsey, M.B. Strong, R. Garon, H. Cicconi, J. Curtis, J. Falvo, H. Morissette, R. Shirriffs, R. Auger, G. Dobson, N. Fredericksen, R. Dubord, W. Shaughnessy, P. Stalenhoef, G. Panas, H. Blakely and L. Matychuk

[2005] S.C.C.A. No. 555

File No.: 31255

Supreme Court of Canada

Record created: December 22, 2005.
Record updated: April 13, 2006.

Appeal From:

ÒN APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Status:

Application for leave to appeal dismissed with costs (without reasons) April 13, 2006.

Catchwords:

Procedural law -- Interim costs -- Alleged mismanagement of trust fund -- Whether appellate-level conflict in the case law on interim costs is an issue of public importance.

Case Summary:

Respondents Deans, Russling, Day and Sharp are beneficiaries of a pension plan. They brought an action in damages on behalf of all beneficiaries of the plan against the administrator and current and former trustees of the plan alleging breach of fiduciary duties, gross negligence and wilful misconduct.

Counsel:

Thomas W. Wakeling, Q.C. (Fraser, Milner, Casgrain), for the motion.

Julie C. Lloyd, contra.

Chronology:

1. Application for leave to appeal:

FILED: December 22, 2005. S.C.C. Bulletin, 2006, p. 9.
SUBMITTED TO THE COURT: February 13, 2006. S.C.C. Bulletin, 2006, p. 213.
DISMISSED WITH COSTS: April 13, 2006 (without reasons). S.C.C. Bulletin, 2006, p. 493.
Before: McLachlin C.J. and Binnie and Charron JJ.

Procedural History:

Judgment at first instance: Application for interim costs of Respondents Deans, Russling, Day and Sharp dismissed.
Court of Queen's Bench of Alberta, Moreau J., April 5, 2004.

Judgment on appeal: Appeal allowed; interim costs through examinations for discovery awarded to Respondents Deans, Russling, Day and Sharp.
Court of Appeal of Alberta, Fraser C.J.A. and Russell and Sirrs JJ.A., October 27, 2005.

e/qljml

Indexed as:

E. (Mrs.) v. Eve

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

v.

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

[1986] 2 S.C.R. 388

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

File No: 16654.

Supreme Court of Canada

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

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

ON APPEAL FROM THE COURT OF APPEAL FOR PRINCE EDWARD ISLAND

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

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

Human rights -- Disabled persons -- Mentally incompetent person -- Application made for

non-therapeutic sterilization of adult daughter by parent -- Whether or not court authorized to grant consent -- Whether or not authority to be found in statutes -- Whether or not authority flowing from parens patriae power.

[page389]

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

Held: The appeal should be allowed.

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

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

While the scope of the parens patriae jurisdiction is unlimited, the jurisdiction must nonetheless be exercised in accordance with its underlying principle. The discretion given under this jurisdiction is to be exercised for the benefit of the person in need of protection and not [page390] for the benefit of others. It must at all times be exercised with great caution, a caution that must increase with the seriousness of the matter. This is particularly so in cases where a court might be tempted to act because failure to act would risk imposing an obviously heavy burden on another person.

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

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

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

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Considered: X (a minor), Re, [1975] 1 All E.R. 697; D (a minor), Re, [1976] 1 All E.R. 326; Eberhardy, Matter of, 307 N.W.2d 881 (Wis. 1981); Grady, In re, 426 A.2d 467 (N.J. 1981); Hayes, Guardianship, [page391] Matter of, 608 P. 2d 635 (Wash. 1980); referred to: Cary v. Bertie (1696), 2 Vern. 333, 23 E.R. 814; Morgan v. Dillon (Ire.) (1724), 9 Mod. R. 135, 88 E.R. 361; Beall v. Smith (1873), L.R. 9 Ch. 85; Beverley's Case (1603), 4 Co. Rep. 123 b, 76 E.R. 1118; Wellesley v. Duke of Beaufort (1827), 2 Russ. 1, 38 E.R. 236; Wellesley v. Wellesley (1828), 2 Bli. N.S. 124, 4 E.R. 1078; Beson v. Director of Child Welfare (Nfld.), [1982] 2 S.C.R. 716; Re S. v. McC (orse. S.) and M; W. v. W., [1972] A.C. 24; P (a minor), In re (1981), 80 L.G.R. 301; B (a minor), Re (1982), 3 F.L.R. 117; K and Public Trustee, Re (1985), 19 D.L.R. (4th) 255; Buck v. Bell, 274 U.S. 200 (1927); Tulley, Guardianship of, App., 146 Cal.Rptr. 266 (1978); Hudson v. Hudson, 373 So.2d 310 (Ala. 1979); Eberhardy's Guardianship, Matter of, 294 N.W.2d 540 (Wis. 1980); Stump v. Sparkman, 435 U.S. 349 (1978); C.D.M., Matter of, 627 P. 2d 607 (Alaska 1981); A. W., Matter of, 637 P. 2d 366 (Colo. 1981); Terwilliger, Matter of, 450 A.2d 1376 (Pa. 1982); Wentzel v. Montgomery General Hospital, Inc., 447 A.2d 1244 (Md. 1982); Moe, Matter of, 432 N.E.2d 712 (Mass. 1982); P.S. by Harbin v. W.S., 452 N.E.2d 969 (Ind. 1983); Sallmaier, Matter of, 378 N.Y.S.2d 989 (1976); A. D., Application of, 394 N.Y.S.2d 139 (1977); Penny N., In re, 414 A.2d 541 (N.H. 1980); Quinlan, Matter of, 355 A.2d 647 (N.J. 1976); J. v. C., [1970] A.C. 668; Strunk v.

Strunk, 445 S.W.2d 145 (Ky. 1969).

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[page392]

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and Policy Alternatives," 60 N.C.L. Rev. 943 (1982).
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APPEAL from a judgment of the Prince Edward Island Court of Appeal (1980), 27 Nfld. & P.E.I.R. 97, 74 A.P.R. 97, with addendum (1981), 28 Nfld. & P.E.I.R. 359, 97 A.P.R. 359, 115 D.L.R. (3d) 283, allowing an appeal from a judgment of McQuaid J. dismissing an application for consent to the sterilization of a mentally incompetent person. Appeal allowed.

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

[page393]

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

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

The judgment of the Court was delivered by

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

Background

(f) prescribing the powers and duties of inspectors;
(g) providing that certain persons shall be by virtue of their office members of the Board in addition to the members of the Board appointed or elected in accordance with the authority whereby the hospital is established;
(h) respecting their administrators, staffs, officers, servants, and employees and the powers and duties thereof;
(i) providing for the certification of chronically ill persons;
(j) defining residents of the province for the purposes of this Act and the regulations;
(k) respecting the admission, treatment, care, conduct, discipline and discharge of patients or any class of patients;
(l) respecting the classification of patients and the lengths of stay of and the rates and charges for patients;
(m) prescribing the manner in which hospital rates and charges shall be calculated;
(n) prescribing the facilities that hospitals shall provide for students;
(o) respecting the records, books, accounting systems, audits, reports and returns to be made and kept by hospitals;
(p) respecting the reports and returns to be submitted to the Commission by hospitals;
(q) prescribing the classes of grants by way of provincial aid and the methods of determining the amounts of grants and providing for the manner and times of [page406] payment and the suspension and withholding of grants and for the making of deductions from grants;
(r) respecting such other matters as the Lieutenant Governor in Council considers necessary or desirable for the more effective carrying out of this Act.

29 As will be evident from a reading of s. 16, the purpose of the regulations is to regulate the construction, management and operation of hospitals. They are not aimed at defining the rights of individuals as such. Section 48 of the regulations (which appears to have been enacted under s. 16(k)) does not so much authorize the performance of an operation as direct that none shall be performed in the absence of appropriate consents, except in cases of necessity. The enumerated consents and necessity are at law valid defences in certain circumstances to a suit for battery that might be brought as a result of an unauthorized operation. So, for the purposes of managing the workings of the hospital, the regulations require that these consents be signed. They do not purport to regulate the validity of the consents; this is otherwise governed by law. Indeed, I rather doubt that the Act empowers the making of regulations affecting the rights of the individual, particularly a basic right involving an individual's physical integrity. For in the absence of clear words, statutes are, of course, not to be read as depriving the individual of so basic a right. In a word, the intent of the regulations is to provide for the governance of hospitals, not human rights.

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

[page407]

Parens Patriae Jurisdiction -- Its Genesis

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

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

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

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

[page408]

35 When tenures and the Court of Wards were abolished, the concept of wardship should, in theory, have disappeared. It was kept alive, however, by the Court of Chancery, which justified it as an aspect of its parens patriae jurisdiction; see, for example, Cary v. Bertie (1696), 2 Vern. 333, at p. 342, 23 E.R. 814, at p. 818; Morgan v. Dillon (Ire.) (1724), 9 Mod. R. 135, at p. 139, 88 E.R. 361, at p. 364. In time wardship became substantively and procedurally assimilated to the parens patriae jurisdiction, lost its connection with property, and became purely protective in nature. Wardship thus is merely a device by means of which Chancery exercises its parens patriae jurisdiction over children. Today the care of children constitutes the bulk of the courts' work involving the exercise of the parens patriae jurisdiction.

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

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

38 By the early part of the nineteenth century, the work arising out of the Lord Chancellor's jurisdiction became more than one judge could handle and the Chancery Court was reorganized and the work assigned to several justices including the Master of the Rolls. In 1852 (by 15 & 16 Vict., c. 87, s. 15 (U.K.)) the jurisdiction of the Chancellor regarding [page409] the "Custody of the Persons and Estates of Persons found idiot, lunatic or of unsound Mind" was authorized to be exercised by anyone for the time being entrusted by virtue of the Sign Manual.

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

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

By virtue of the Chancery Jurisdiction Transfer Act, S.P.E.I. 1974, c. 65, s. 2, the jurisdiction of the

Chancery Court was transferred to the Supreme Court of Prince Edward Island. It will be obvious from these provisions that the Supreme Court of Prince Edward Island has the same parens patriae jurisdiction as was vested in the Lord Chancellor in England and exercised by the Court of Chancery there.

Anglo-Canadian Development

40 Since historically the law respecting the mentally incompetent has been almost exclusively focused on their estates, the law on guardianship of their persons is "pitifully unclear with respect to some basic issues"; see P. McLaughlin, Guardianship of the Person (Downsview 1979), p. 35. Despite this vagueness, however, it seems clear that the parens patriae jurisdiction was never limited solely to the management and care of the estate of a mentally retarded or defective person. As early as 1603, Sir Edward Coke in Beverley's Case, 4 Co. Rep. 123 b, at pp. 126 a, 126 b, 76 E.R. 1118, at p. 1124, stated that "in the case of an idiot or fool natural, [page410] for whom there is no expectation, but that he, during his life, will remain without discretion and use of reason, the law has given the custody of him, and all that he has, to the King" (emphasis added). Later at the bottom of the page he adds:

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

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

41 The famous custody battle waged by one Wellesley in the early nineteenth century sheds some light on the exercise of the king's parens patriae jurisdiction by the Lord Chancellor. Wellesley (considered an extremely dissolute and objectionable father due to his philandering ways and vulgar language, in spite of his "high" birth), waged a lengthy court battle to gain custody of his children following the death of his estranged wife who had entrusted the care of the children to members of her family. In Wellesley v. Duke of Beaufort (1827) 2 Russ. 1, 38 E.R. 236, Lord Eldon, then Lord Chancellor, in discussing the jurisdiction of the Court of Chancery, touched upon the King's parens patriae power at 2 Russ. 20, 38 E.R. 243. He there made it clear that "it belongs to the King, as parens patriae, having the care of those who are not able to take care of themselves, and is founded on the obvious necessity that the law should place somewhere the care of individuals who cannot take care of themselves, particularly in cases where it is clear that some care should be thrown round them". He then underlined that the jurisdiction has been exercised for the maintenance of children solely when there was property, not because of any rule of law, but [page411] for the practical reason that the court obviously had no means of acting unless there was property available.

Indexed as:

Guaranty Trust Co. of Canada v. Hetherington

Between
Guaranty Trust Company of Canada, Plaintiff, and
Clifford Hetherington, Agnes Berry, Hazel Lockhart, Arthur Hetherington, Lloyd Hetherington, Orbit Oil & Gas Ltd., Renaissance Energy Ltd., Campbell Resources Inc., 106962 Canada Inc., The Royal Bank of Canada, Dart Petroleums Ltd., Charterhall Resources Canada Ltd. and The Bank of Montreal, Defendants
And Between
Eleanor Ione Damkar, as Surviving Executor of the Estate of Jensine Pedersen, sometimes known as Sine Pedersen, Plaintiff, and
Guaranty Trust Company of Canada and Amoco Canada Petroleum Company Ltd., Defendants
And Between
Clifford Hetherington, Agnes Berry, Hazel Lockhart, Arthur Hetherington and Lloyd Hetherington, Applicants, and
Guaranty Trust Company of Canada, Respondent
And Between
Orbit Oil & Gas Ltd., Applicant, and
Clifford Hetherington, Agnes Berry, Hazel Lockhart, Arthur Hetherington and Lloyd Hetherington, Claimants, and
Guaranty Trust Company of Canada, Claimant
And Between
Orbit Oil and Gas Ltd., Applicant, and
Canada Northwest Energy Limited and Clifford Hetherington, Agnes Berry, Hazel Lockhart, Arthur Hetherington and Lloyd Hetherington, Claimants, and
Guaranty Trust Company of Canada, Claimant

[1987] A.J. No. 148

[1987] 3 W.W.R. 316

50 Alta. L.R. (2d) 193

77 A.R. 104

44 R.P.R. 154

3 A.C.W.S. (3d) 404

Action Nos. 8501-01398, 8201-22795, 8201-30566, 8401-00188

8401-09029, 8201-27128, and 8201-27119

Alberta Court of Queen's Bench
Judicial District of Calgary

O'Leary J.

February 19, 1987

[Ed. note: Appendices A, B, and C appended to Reasons for Judgment]

L.M. Sali, Esq., H.D.D. Lloyd, Esq., for Guaranty Trust Company of Canada.
Ms. C.M. Conrad, Q.C., J.S. Lancaster, Esq., for Eleanor Ione Damkar, Estate of Jensine (Sine) Pedersen.
J.D. Charnock, Esq., for Clifford Hetherington, Agnes Berry, Hazel Lockhart, Arthur Hetherington, and Lloyd Hetherington.
R.W. Thompson, Esq., for Orbit Oil & Gas Ltd.
J.G. Shea, Esq., for Renaissance Energy Ltd.
F. Zinkhofer, Esq., for Dart Petroleums Ltd.

REASONS FOR JUDGMENT

O'LEARY J.:--

I Introduction

These consolidated proceedings involve the interpretation of three separate but similarly worded gross royalty trust agreements made in 1952 between Harry Alden, Nina Clare Alden and Jensine (Sins) Pedersen, then freehold mineral owners, and the Prudential Trust Company Limited. The broad issue is whether the assignments made by the freehold mineral owners to Prudential Trust in 1952 are binding upon the present holders of the mineral titles and the oil companies in whose favor they have granted petroleum and natural gas leases.

The following parties did not appear and were not represented at trial: Amoco Canada Petroleum Company, Ltd., Canada Northwest Energy Company Limited, Campbell Resources Inc., 106962 Canada Inc., Charterhall Resources Canada Ltd., The Royal Bank of Canada and The Bank of Montreal. They are not therefore included in any reference herein to "the parties".

trinsic evidence generally and referred in particular to evidence of the subsequent conduct of the parties. He said at p. 372:

> The types of extrinsic evidence that will be admitted, if they meet the test of relevance and are not excluded by other evidentiary tests, include evidence of the facts leading up to the making of the agreement, evidence of the circumstances as they exist at the time the agreement is made and, in Canada, evidence of subsequent conduct of the parties to the agreement. However, to say that these types of evidence become admissible where two reasonable interpretations exist is not to say that the evidence, if tendered, must be given weight. In the case of evidence of subsequent conduct, the evidence is likely to be most cogent where the parties to the agreement are individuals, the acts considered are the acts of both parties, the acts can relate only to the agreement, the acts are intentional and the acts are consistent only with one of the alternative interpretations. Where the parties to the agreement are corporations and the acts are the acts of employees of the corporations, then evidence of subsequent conduct is much less likely to carry weight. In no case is it necessary that weight be given to evidence of subsequent conduct. In some cases it may be most misleading to do so, and it is to this danger that allusions are made throughout the recent English cases, ... In England the risks have been considered sufficiently grave that the possibility of illumination from the use of subsequent conduct has been ruled out. In Canada they have not, but those risks must be carefully assessed in each individual case before determining to give weight to subsequent conduct.

With these principles in mind, I now turn to consider the royalty trust agreements and the nature of the interests created thereby.

V Discussion

(i) Did the agreements create valid trusts?

Before dealing with the main issues, I wish to dispose of an argument advanced by the present mineral owners based upon the law of trusts.

It was the submission of both Mrs. Damkar and the Hetheringtons that the royalty trust agreements were invalid from the outset because they lacked at least one, if not more, of the three essentials of a trust. The law was expressed by Lord Langdale, M.R. in Knight v. Knight (1840), 3 Beav. 148, 49 E.R. 58. He held that for a trust to come into existence, it must have three essential characteristics: certainty of intention, certainty of objects and certainty of subject-matter.

Certainty of intention requires the language of the alleged settlor to be imperative. An examination of the royalty trust agreements as a whole reveals a clear intention by the respective settlors to create a trust.

Certainty of objects requires that the beneficiaries who are to benefit from the trust be certain or ascertainable. To be asertainable, the descriptive term must be sufficiently clear that it could be said of any person whether or not he is a member of the described class of beneficiaries: Re Bethel (1973), 35 D.L.R. (3d) 97 (S.C.C.). It was the submission of Mrs. Damkar and the Hetheringtons that since clause 5 of the agreements required that the owners/settlors instruct Prudential Trust in

writing of any assignment of the gross royalty trust certificates, and since there has been no evidence to prove that such notices were ever given, there is no certainty of objects and therefore the trusts are invalid.

As consideration for entering into the trust agreements, the owners were to receive royalty trust certificates. All that clause 5 indicates is that the owners "may" authorize the trustee to issue the royalty trust certificates directly to those persons indicated by the owners immediately following execution of the agreements. Written advice under clause 5 is not a prerequisite to ascertaining beneficiaries of the trusts. In my opinion, the gross royalty trust agreements are certain or ascertainable as to objects, whether the beneficiaries be the original owners or someone the owners authorize to take certificates directly from the trustee (clause 5), or someone to whom the owners later assign certificates. Proof of title to the relevant certificates is all that need be shown to prove one is a beneficiary under the trust agreements.

The third essential requires that there be certainty of the subject-matter of the trust. For a trust to be validly created, it must be possible to clearly identify the property which is the subject of the trust, as well as the shares in that property which the beneficiaries are each to take: Waters, Law of Trusts in Canada (1984), at page 108. Both of these factors appear to be readily certain or ascertainable from the words of these trust agreements. With regard to certainty of the property, it is clear that the property is an assignment of the 12 1/2% royalty under the Rio Bravo leases and subsequent leases. With regard to the shares of the property which the beneficiaries are to take, this is readily ascertainable from ownership of the royalty trust certificates.

I conclude that the gross royalty trust agreements satisfy the three certainties enunciated in Knight v. Knight, supra, and are thus valid trust documents.

(ii) Did the agreements survive the original leases?

It is not necessary to look beyond the terms of the agreements themselves to dispose of this issue. The relevant provisions are contained in Clauses 2 and 25. They are as follows:

> 2. The Owner herein doth hereby grant, bargain, sell, assign, transfer and set over unto the Trustee, its successors and assigns forever, all the estate, right, title, interest, claim and demand whatsoever, both at law and in equity of the Owner in and to the above mentioned Twelve and One-Half (12 1/2%) percentum gross royalty or share of production from any well or wells that may be drilled upon the said lands or any part thereof (hereinafter referred to as "the Gross Royalty") TO HAVE AND TO HOLD the same with all and every benefit that may or can be derived from the same unto the Trustee, its successors and assigns forever, subject only to the terms of this Trust Agreement.
>
> 25. The Owner hereby covenants and agrees with the Trustee that, in the event that any lease that may be in existence as at the date of this Agreement is cancelled for any reason or in any event that no lease is in existence as at the date of this Trust Agreement, he shall and will in negotiating any lease or other instrument for developing the said lands reserve unto the Trustee the full 12 1/2% Gross Royalty hereby assigned to the Trustee.

Indexed as:

Huzar v. Canada

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

[1997] F.C.J. No. 1556

[1997] A.C.F. no 1556

139 F.T.R. 81

75 A.C.W.S. (3d) 1032

Court File No. T-1529-95

Federal Court of Canada - Trial Division
Edmonton, Alberta

Hargrave, Prothonotary

Heard: October 22, 1997
Judgment: November 14, 1997

(20 pp.)

Practice -- Pleadings -- Striking out pleadings -- Grounds, false, frivolous, vexatious or scandalous -- Grounds, failure to disclose a cause of action -- Indians, Inuit and Metis -- Nations, tribes and bands -- Bands -- Membership.

This was an application by the defendant Twinn to strike out all or part of the plaintiffs' statement of claim on the grounds that it disclosed no reasonable cause of action or was frivolous or vexatious. The plaintiffs were Treaty Indians by virtue of the Indian Act. In the statement of claim they sought a declaration of entitlement to membership in the Sawbridge. Their parents had an affiliation with the Sawbridge band and it was on this basis that they applied for membership. Twinn was the chief of the Band. The Band was wealthy and there were hundreds of membership applications. Twinn and the Band Council never bothered to read the lengthy applications. Since 1985 only two individuals were accepted for membership and they were both sisters of Twinn.

HELD: Application allowed in part. Only one paragraph of the statement of claim was struck but the plaintiffs were given an opportunity to amend it. The plaintiffs proved that they had a reasonable cause of action based on the pleaded facts and there was no reason to believe that they could not prove their case. Twinn could not satisfy the heavy onus imposed on him by Rule 419 to strike out the statement of claim. With the exception of one paragraph, certain paragraphs objected to by Twinn complied with the Rules. Only one paragraph was struck because the court required clarification of a statutory reference that appeared to be irrelevant.

Statutes, Regulations and Rules Cited:

Federal Court Rules, Rules 419, 419(1),419(1)(a), 419(1)(c), 419(1)(e).
Indian Act, R.S.C. 1985, c. I-5, ss. 6, 11, 14.

Counsel:

Peter Abrametz, for the plaintiffs.
Michael R. McKinney, for the defendants Walter P. Twinn and Sawride Indian Band.
Mary King, for the defendant Her Majesty the Queen.

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1 HARGRAVE, PROTHONOTARY (Reasons for Order):-- These reasons arise out of an application on behalf of the defendants, Walter Patrick Twinn, Chief of the Sawridge Indian Band and the Sawridge Indian Band (the "Sawridge Band" and together referred to as the "Sawridge Defendants") to strike out all of the Statement of Claim or alternatively, part of the Statement of Claim and a portion of the reply to a demand for particulars, or in the further alternative, for further and better particulars, together with an extension of time within which to file a defence.

2 The motion is denied, for the reasons which follow, except as to paragraph 34 of the Statement of Claim, which is struck out with leave to amend and as to a 30 day extension, following service of an amended Statement of Claim, within which to file a defence. I now turn to some pertinent background material.

BACKGROUND:

3 The plaintiffs are Treaty Indians by virtue of the Indian Act (the "Act"), R.S.C. 1985 c. I-5, as amended. The plaintiffs' forbearers are said to have been either members of the Sawridge Band or duly constituted Sawridge Band members by adhesion to Treaty No. 8, a treaty signed by a group of Indians, known as the Treaty 8 Group, the Group including the Sawridge Band. The late Walter Twinn, Chief of the Sawridge Band, was cross-examined on his affidavit in support of this motion: he admitted that all of the plaintiffs had an affiliation with the Sawridge Band "through their parents" (p. 98). On the basis of band membership the plaintiffs' forbearers had such rights and benefits as would, in the normal course of events, accompany band membership, including land allocation, educational programmes, agriculture and economic incentives and an interest in the assets of the Sawridge Band: the plaintiffs would like to be in a similar position.

4 The plaintiffs point out, in their Statement of Claim, that members of Indian bands might at one time lose membership in their band by reason of provisions contained in the Act, but that the possibility of such a unilateral loss of membership, referred to by the plaintiffs as a discriminatory loss, was abolished by amendments to the Act in 1985. The amendments are referred to in the Statement of Claim, including in paragraph 19, where the plaintiffs set out their understanding of the effect of five new sections of the Act, which are now Sections 8 through 12 of the Act.

5 The plaintiffs, who wish a declaration of entitlement to membership in the Sawridge Band, plead that the effect of the 1985 amendments to the Act is that persons whose names were omitted or deleted from band membership and indeed, a number of additional persons, are entitled to have their names entered in the relevant Band List maintained by the Department of Indian Affairs and Northern Development ("DIAND"). Moreover, the plaintiffs say that while an Indian band may control its membership pursuant to the Act, there are limits to this control, which do not justify the Sawridge Band excluding the plaintiffs from band membership.

6 While the plaintiffs all hold status cards issued by DIAND, pursuant to the 1985 amendments to the Act, identifying them as members of the Sawridge Band, the Sawridge Band has refused to reinstate them.

7 The Sawridge Band is wealthy. As a result since 1985 there have been, according to the Sawridge Band, "hundreds" of applications for membership (p. 89 of the cross-examination of Walter Twinn) and "more than two hundred" (ibid p. 39). None of the applications have been put forward to the Sawridge Band membership for approval (ibid p. 42). Indeed, the Chief and Sawridge Band Council have never read any of the completed 42 page Sawridge Band membership application questionnaires received from applicants for band membership (ibid, p. 68). Since 1985 there have only been two individuals accepted into band membership, both sisters of the Chief, Walter Twinn.

8 It is against this background that the plaintiffs seek band membership. Their claim is set out in detail in a moderately lengthy, but quite readable Statement of Claim, filed 20 July 1995.

9 On 22 September 1995 the defendants, Walter Twinn and the Sawridge Band, served a 12 point demand for particulars. The plaintiffs responded, 4 March 1996, with a detailed reply to the demand for particulars: one might even say an overly detailed response which, if read with the Statement of Claim, would seem to leave nothing to speculation, at least so far as particulars required for pleading are concerned.

10 On 2 May 1996 the Sawridge Defendants requested further particulars. Reading the Statement of Claim, the demand for particulars, the reply and the further request for particulars, one is hard pressed to see what else might be required or even available which could assist the Sawridge Defendants in filing a defence. Indeed, Walter Twinn, in his affidavit in support of this motion, fails to offer any explanation at to why further particulars are required in order to prepare a defence.

11 The present motion was filed on 23 May 1997, to be heard 20 August 1997. The motion referred to Mr. Twinn's affidavit in support, however the affidavit was not sworn until 13 August 1997. It was served on counsel for the plaintiffs at the last minute. As a result the motion was adjourned to allow plaintiffs' counsel to assimilate the affidavit and, as it turned out, to cross-examine on the affidavit. The matter finally came on for hearing 22 October 1997.

ANALYSIS:

Some Applicable Principles

12 The Sawridge Defendants first seek to have the whole of the Statement of Claim struck out, either as disclosing no reasonable cause of action under Rule 419(1)(a) or as being scandalous, frivolous or vexatious (Rule 419(1)(c)).

13 A motion to strike out under Rule 419 places a heavy onus on the applicant. In the case of an allegation of want of a reasonable cause of action, I must accept the Statement of Claim as if the facts had been proven, unless the facts are patently unreasonable. No affidavit evidence is permitted, when testing for a reasonable cause of action, except where there is a jurisdictional issue. It must be plainly, obviously and beyond doubt that a pleading is futile and will not succeed before it will be struck out. When it is alleged that an action is scandalous, frivolous or vexatious, under Rule 419(1)(c) the test is as stringent as or even more stringent than that under Rule 419(1)(a): Waterside Ocean Navigation Co. v. International Navigation Ltd. [1977] 2 F.C. 257 at 259. A court will not deny a party a day in court if there is any chance of the claim succeeding. If a claim might possibly succeed it ought to be allowed to proceed. Alternately, if the claim might succeed if the statement of claim were amended, an amendment should be allowed: to deny an amendment there must be no scintilla of a cause of action.

14 When there are contentious or serious issues of law, disputed points of law, or uncertain points of law, they ought not be determined on a summary motion to strike out, but rather left for a decision at trial when all the facts are known: Manitoba Fisheries Ltd. v. The Queen [1976] 1 F.C. 8 at 18; Vulcan Equipment Co. Ltd. v. Coats Co. Inc. (1981) 58 C.P.R. (2d) 47 at 48 (Fed. C.A.),

leave to appeal to the Supreme Court of Canada refused (1982), 63 C.P.R. (2d) 261 and The Queen v. Amway of Canada Ltd. (1986) 2 F.C. 312 at 326, affirmed [1986] 2 C.T.C. 339 at 340.

15 The final relevant point of procedure is that a court will not strike out statements that are merely surplus, provided no prejudice flows from them: Belanger Inc. v. Keglonada Investments Ltd. (1986) 1 F.T.R. 238 at 241; Pater International Automotive Franchising Inc. v. Mister Mechanic Inc. [1990] 1 F.C. 237 at 243; and Copperhead Brewing Co. v. John Labatt Ltd. (1995) 61 C.P.R. (3d) 317 at 322 (F.C.T.D.).

Striking Out the Statement of Claim

16 Counsel for the Sawridge Band referred to s. 10 of the Act and particularly the ability of an Indian band to elect to control its own membership. This submission left unanswered the question of whether the Sawridge Band had in fact assumed control for it would seem that, other than for two nepotistic inductions, the Band has not in fact provided any real mechanism or procedure for either making or reviewing decisions on membership.

17 Counsel also referred to Sections 6 and 11 of the Act, giving his interpretation of those Sections. He submitted that the Statement of Claim set out no facts that would allow any of the plaintiffs to meet the requirements in the Act and which might lead to membership in the Sawridge Band. Here I would note that band membership rules may not deprive a person, with pre-existing rights of membership under the Act, from becoming a member.

18 Rather than set out my own interpretation of the effect of the 1985 amendments to the Act on the rights of a person to rejoin a forebear's band, I would refer to the gloss given to the pertinent portions of the amended Act by the Federal Court of Appeal in Twinn v. The Queen, [1997] F.C.J. No. 794, A-779-95 and A-807-95, an unreported decision of 3 June, 1997:

> "This appeal involves an action commenced in 1986 for declarations that certain sections of the Indian Act are invalid. These sections were added by an amendment in 1985. 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.". (p. 2)

Pertinent in the present instance is the concept that the children of women, who had lost status through marriage to a non-Indian man, might regain status under the 1985 amendments. Indeed, in Walter Twinn's own words, on cross-examination, each of the plaintiffs has an affiliation "through their parents".

19 On my reading of the Statement of Claim each of the plaintiffs, a status Indian identified by DIAND as a member of the Sawridge Band, is either the son or the daughter of a parent who was a Sawridge Band member at one time and is the grandchild of a Sawridge Band member or members. These facts are not patently unreasonable and therefore I must accept them, for the purposes of this motion, as proven. These facts fall within the view of the Court of Appeal in Twinn v. The Queen (supra) as to those who became entitled to become members of a band by reason of the 1985 amendments to the Act. The defendants have not made their case that the action is plainly, obviously and beyond doubt a futile proceeding.

20 Once a reasonable cause of action has been established it often becomes difficult for a defendant to then go on to establish the action as one which is scandalous, frivolous or vexatious. In this instance, having found a reasonable cause of action on the pleaded facts and not being disabused of the real possibility that the plaintiffs may in due course establish these facts through evidence, I am unwilling to find the action one which should be struck out as scandalous, frivolous or vexatious and as a result futile.

Striking Out Portions of the Statement of Claim

21 The defendants' submissions as to striking out the Statement of Claim do not end here. The defendants submit, as an alternative, that paragraphs 11 through 18, 25, 26, 29, 30, 34 and 37 ought to be struck out under all of the heads contained in Rule 419(1) except Rules 419(1)(a) and (f). On the basis of the defendants' motion and counsel submissions, I will look at these paragraphs of the Statement of Claim to see if, in themselves, they are immaterial or redundant, scandalous, frivolous or vexatious, or are such as may prejudice, embarrass or delay a fair trial of the action: I do not accept that any of the paragraphs which the defendants seek to have struck out constitute a departure from a previous pleading and therefore do not consider further the application of Rule 419(1)(e) to any portions of the Statement of Claim.

22 Paragraphs 11 through 18 refer to the effect, in the view of the plaintiffs, of the Constitution Act of 1982, and the types of rights possessed by Aboriginal people in 1899, under Treaty No. 8, the Treaty adopted by adhesion by the representatives or predecessors of the Sawridge Band. These paragraphs also touch on the method by which the ancestors and predecessors of the plaintiffs determined membership in the Sawridge Band, and the rights and benefits accruing to the Band and its members by reason of Treaty No. 8. In the more recent past, this portion of the Statement of Claim also deals with loss of membership by way of operation of the Indian Act, before the 1985 amendments and submits that the 1985 amendments to the Act reestablished existing bands as they would have been, but for the termination of band membership by reason of provisions in the earlier

versions of the Indian Act. These paragraphs provide background information which helps in establishing the views of the plaintiffs and their claim. The paragraphs or some of them may not be strictly necessary. As such they may be surplus to the Statement of Claim, but as I have pointed out they also have a useful aspect. Merely because they may be surplusage is not a reason to strike them out: see The Belanger, Pater International and Copperhead Brewing cases, supra. Nor am I prepared to pass judgment on what may be contentious but serious issues of law and of the interpretation of the effect of early treaties and of provisions in the earlier versions of the Indian Act: see Manitoba Fisheries Ltd. v. The Queen, Vulcan Equipment Co. Ltd. v. Coats Co. Inc. and The Queen v. Amway of Canada Ltd., supra. Indeed, the proper interpretation of relevant provisions of the legislation involved in this instance would in all probability be better determined at trial where a proper factual basis can be set out: see for example Dumont v. Attorney General of Canada [1990] 4 W.W.R. 127 at 129 (S.C.C.).

23 Paragraphs 25 and 26 allege that the plaintiffs, by reason of their loss of membership in the Sawridge Band, have lost a number of benefits including those of education, medical care, housing and tax exemption: each of the plaintiffs claims membership in the Sawridge Band and substantial damages for the loss of those benefits and entitlements. The Sawridge Defendants say the Act does not give rise to any rights or entitlements. However the claim is that the plaintiffs, having lost membership in the Sawridge Band and having been denied reinstatement, have suffered economic loss. I do not see this as immaterial or redundant, as scandalous, frivolous or vexatious, or as prejudicial, embarrassing or matters which would delay a fair trial. Indeed, these paragraphs are the crux of the plaintiffs' claim.

24 In paragraph 29 the plaintiffs claim punitive and exemplary damages. The wording of the paragraph has a somewhat invective tone. But this is not inconsistent with a claim for punitive and exemplary damages. The plaintiffs say that the actions of the Sawridge Defendants have, among other things, been arrogant, high-handed, unwarranted and unjustified. The plaintiffs will have to prove those allegations, but given all of the background paragraph 29 does not go so far as to be scandalous, frivolous, vexatious, prejudicial or embarrassing. Indeed the sort of allegations contained in paragraph 24 appear to be material to the claim for punitive and exemplary damages in this instance. Paragraph 29 will remain in the Statement of Claim.

25 Paragraph 30 is not directed toward the Sawridge Defendants, but rather against what the plaintiffs view as the discriminatory nature of previous versions of the Indian Act as passed by the Parliament of Canada and as administered by DIAND, all of which the plaintiffs say has resulted in loss to them. It does not impinge directly upon the Sawridge Defendants. It contains allegations basic to the claim of the plaintiffs against the Crown. While to explore this area may lengthen the trial, paragraph 30 is not one which ought to be struck out on the grounds of prejudice, embarrassment, or that it will unduly delay a fair trial of the action.

26 In paragraph 34 the plaintiffs refer to Section 14 of the Indian Act and then go on to plead that they are entitled to their pro rata share of the interest monies and rents received by the Sawridge

Band. Section 14 of the Act refers to the provision, maintenance and posting of Band Lists. I do not see the relevance of the reference to Section 14 in paragraph 34 of the Statement of Claim, although the balance of the paragraph, the claim for a share of interest and rents, certainly follows in the progression of the Statement of Claim. As a result of the reference to Section 14, which seems immaterial, paragraph 34 is struck out. However the plaintiffs may amend should they wish to elaborate and explain the reference to Section 14 and, of course, to include the plea of the plaintiffs' entitlement to a share of interest and rents.

27 Paragraph 37 of the Statement of Claim alleges that the Sawridge Defendants are committing waste and are dissipating and squandering the assets of the reserve, in which the plaintiffs have a vested interest. It goes on to seek relief of an injunctive nature. Now the bare allegations of waste and of dissipation and squandering of assets, if made without any factual basis, might constitute a vexatious or an embarrassing pleading. However before moving to strike out such a pleading it is reasonable to request particulars and this has been done and reasonable particulars provided. Were I to strike out paragraph 37, leave to amend would certainly be indicated. Given the particulars, which become part of the pleadings, it would be counter-productive to strike out paragraph 37, which shall remain.

Striking Out of Particulars

28 The defendants seek to have paragraphs 11 and 12 of the Reply to Demand for Particulars struck out. A reply setting out particulars is a pleading (S.C. Johnson & Son Ltd. v. Pic Corp. (1975) 19 C.P.R. (2d) 26 at 28 (F.C.T.D.)) and as such may be struck out.

29 Paragraph 11 of the particulars provided by the plaintiffs elaborates on the allegations of arrogant and high-handed behaviour by the Sawridge Defendants. Nothing in the affidavit of Walter Twinn, after his cross-examination, casts doubt on these particulars to the extent that they might be struck out under Rule 419(1)(b), (c), (d) or (e) as being particulars which beyond doubt are futile and unable, as a pleading, to succeed. Paragraph 11 will remain.

30 Paragraph 12 of the particulars provides examples of waste and of the squandering and dissipation of assets. Nothing in the affidavit evidence provided by the Sawridge Defendants bears on this. The particulars do not appear unreasonable. If proven, and assuming the plaintiffs have an interest as Band members, the allegations could well constitute the commission of waste and the dissipation and squandering of Band assets. This is not to say that the allegations will succeed, but I cannot say that they are futile. Paragraph 12 of the particulars will remain.

Further and Better Particulars

31 The function of particulars is to enable a party to know the nature of the case to be met and to limit the issues to be tried. Particulars prevent a party from being taken by surprise at trial and indeed to gather appropriate evidence in order to be prepared for trial. The leading case, as to particulars generally, is the decision of the Federal Court of Appeal in Gulf Canada Ltd. v. Tug

"Mary Mackin" (1984) 52 N.R. 282.

32 One must keep in mind that particulars required, or granted by court order, for the purpose of pleading, are not nearly as broad as are particulars for trial: see for example IBM Canada Ltd. v. Printech Ribbons Inc. (1994) 77 F.T.R. 147 at 149 (F.C.T.D.). Indeed, as Mr. Justice Marceau (as he then was) pointed out in Embee Electronic Agencies Ltd. v. Agence Sherwood Agencies Inc. (1979) 43 C.P.R. (2d) 285 at 286 and 287, particulars at an early stage, that is particulars for pleading, are furnished so that the defendant may understand the plaintiff's position and may reply intelligently to the statement of claim, but that such particulars need not go further:

> "... I wish to point out that, as I understand the law in this regard, a distinction must be made between a request for particulars made prior to the filing of the statement of defence and one made at a later stage of the proceedings. Before trial, after the issues have been defined, a defendant is entitled to be informed of any and every particular which will enable him to properly prepare his case, so that he may not be taken by surprise at the trial. But, before the filing of the defence, the right of a defendant to be furnished particulars is not so broad, since it does not have the same basis and serves a different purpose. A defendant should not be allowed to use a request for particulars as a means to pry into the brief of his opponent with a view to finding out about the scope of the evidence that might be produced against him at trial, nor should he be allowed to use such a request as a means to go on a sort of fishing expedition in order to discover some grounds of defence still unknown to him. At that early stage, a defendant is entitled to be furnished all particulars which will enable him to better understand the position of the plaintiff, see the basis of the case made against him and appreciate the facts on which it is founded so that he may reply intelligently to the statement of claim and state properly the grounds of defence on which he himself relies, but he is not entitled to go any further and require more than that.".

33 Still dealing with applicable general principles, the burden is on the party requesting particulars to show they are necessary. Indeed, particulars will not generally be ordered unless the party requesting them establishes that they are necessary for pleading and not within its knowledge, subject to the pleadings, on their face, appearing inadequate: see for example Windsurfing International Inc. v. Novaction Sports Inc. (1988) 18 C.P.R. (3d) 230 at 237. A party requesting further and better particulars must justify the request by affidavit unless the need is apparent from the record: see for example Flexi-Coil Ltd. v. F.P. Bourgault Industries Air Seeder Division Ltd. (1988) 19 C.P.R. (3d) 125 at 127 - 128 (F.C.T.D.). In the present instance, not only does the affidavit material fail to disclose the need for further particulars, but also it does not disclose whether, by reason of a lack of further particulars, the defendants are not able to plead to the Statement of Claim. These are essential requirements where, as here, there appear to be more than ample particulars already in existence.

34 The request for further and better particulars might well be disposed of by pointing out that nowhere in the Sawridge affidavit material is there any specific averment as to the need for particulars for pleading. Granted, there is a letter of 2 May, 1996 on Sawridge Band stationary, pointing to some perceived shortcomings in the initial particulars provided by the plaintiffs, but when one considers the Statement of Claim and the initial particulars provided by the plaintiffs pursuant to the demand for further particulars, the request, particularly at this stage, is just not plausible. The plaintiffs submit that the cross-examination of Walter Twinn indicates not that particulars are required, but that there is some malice in requesting particulars. I would not go so far. It is sufficient to say that the Sawridge Defendants have demonstrated no need for additional particulars.

35 Even leaving aside that the Sawridge Defendants have not shown a need for particulars, those already provided by the plaintiffs are, by inspection, at least sufficient and indeed more than are really necessary in order to enable the defendants to understand the plaintiffs' case: this is clearly substantiated on the cross-examination of Walter Twinn. On the basis of the particulars provided to date, the Sawridge Defendants must be taken to know the case against them, appreciate the facts on which it is founded and be in a position to provide an intelligent defence. To require further particulars would be an abuse of process.

Costs

36 There are two aspects to the consideration of costs. First, there is the failure of the Sawridge Defendants to provide the plaintiffs with their affidavit in support of this motion until the last minute. The present motion was filed in May of 1997 for a 20 August, 1997 hearing. The affidavit was not sworn until the 13th of August, 1997 and was served on counsel for the plaintiffs far too late. Quite properly the plaintiffs applied for an adjournment to consider the material and, as it turned out, to cross-examine Walter Twinn. The plaintiffs shall have the costs of that hearing in any event, in the amount of $500.00.

37 As to the costs of subsequent preparation for the motion and the ultimate disposition of the motion, the defendants have been successful on only one item, that of striking out paragraph 34. Paragraph 34 of the Statement of Claim did not invoke much debate on the hearing of the motion. The defendants sought no particulars. The plaintiffs have received leave to amend paragraph 34. All things considered, including the request for further particulars for pleading, a spurious request that ought not to have been brought to the court, the plaintiffs will also have their taxable costs, on an enhanced basis, including costs related to preparation for the hearing and the cross-examination of Walter Twinn, payable at the conclusion of the matter, in any event.

HARGRAVE, PROTHONOTARY

cp/d/mwk/DRS/DRS/qlkjg

Current to February 13, 2012

R.S.C. 1985, c. I-5, s. 4

[eff since December 12, 1988](Current Version)

Indian Act

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

APPLICATION OF ACT

SECTION 4.

Application of Act

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.

Act may be declared inapplicable

(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.

Authority confirmed for certain cases

(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.

Certain sections inapplicable to Indians living off reserves

(3) Sections 114 to 122 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.C. 1985, c. I-5, s. 4; R.S.C. 1985, c. 32 (1st Supp.), s. 2.

Current to February 13, 2012

R.S.C. 1985, c. I-5, s. 6

[eff since January 31, 2011](Current Version)

Indian Act

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

Indian Register

DEFINITION AND REGISTRATION OF INDIANS

SECTION 6.

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;

(c.1) that person

(i) is a person whose mother's name was, as a result of the mother's marriage, omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under paragraph 12(1)(b) 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,

(ii) is a person whose other parent is not entitled to be registered or, if no longer living, was not at the time of death entitled to be registered or was not an Indian at that time if the death occurred prior to September 4, 1951,

(iii) was born on or after the day on which the marriage referred to in subparagraph (i) occurred and, unless the person's parents married each other prior to April 17, 1985, was born prior to that date, and

(iv) had or adopted a child, on or after September 4, 1951, with a person who was not entitled to be registered on the day on which the child was born or adopted;

(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);

(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; and

(c) a person described in paragraph (1)(c.1) and who was no longer living on the day on which that paragraph comes into force is deemed to be entitled to be registered under that paragraph.

** Editor's Table **

For changes prior to Editor's Tables, please see other sources for in force information.

Provision	Changed by	In force	Authority
6	2010 c18 s	2011 Jan 31	SI/2011-5

*****

R.S.C. 1985, c. I-5, s. 6; R.S.C. 1985, c. 32 (1st Supp.), s. 4, c. 43 (4th Supp.), s. 1; S.C. 2010, c. 18, s. 2(1) (F), (2) to (4).

Current to February 13, 2012

R.S.C. 1985, c. I-5, s. 10

[eff since December 12, 1988](Current Version)

Indian Act

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

DEFINITION AND REGISTRATION OF INDIANS

Band Lists

SECTION 10.

Band control of membership

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.

Membership rules

(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.

Exception relating to consent

(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.

Acquired rights

(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.

Idem

(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.

Notice to the Minister

(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.

Notice to band and copy of Band List

(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.

Effective date of band's membership rules

(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.

Band to maintain Band List

(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.

Deletions and additions

(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.

Date of change

(11) A Band List maintained by a band shall indicate the date on which each name was added thereto or deleted therefrom.

R.S.C. 1985, c. I-5, s. 10; R.S.C. 1985, c. 32 (1st Supp.), s. 4.

Current to February 13, 2012

R.S.C. 1985, c. I-5, s. 52

[eff since December 12, 1988](Current Version)

Indian Act

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

GUARDIANSHIP

SECTION 52.

Property of infant children

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.

R.S.C. 1970, c. I-6, s. 52.

Case Name:

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

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

[2011] A.J. No. 84

2011 ABQB 42

509 A.R. 72

Docket: 0703 10836

Registry: Edmonton

Alberta Court of Queen's Bench
Judicial District of Edmonton

R.A. Graesser J.

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

(97 paras.)

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

participate in action -- Public Trustee should appoint next friend for EMP and pay costs -- Next friend should not be same lawyer representing LC due to potential conflict of interest -- Advanced costs justified for EMP but not for LC.

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

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

Statutes, Regulations and Rules Cited:

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

Counsel:

Robert P. Lee, for the Plaintiff.

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

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

Memorandum of Decision

R.A. GRAESSER J.:--

Nature of Application

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

2 This decision will deal with the following:

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

Background

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

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

5 Through a series of events chronicled in my decision in this matter, 2011 ABQB 12, Mr. Lee advised that this action is now the intended action to be a proposed class action for a number of classes or subclasses of persons affected by invalid TGO's. Until shortly before the application in

October, 2010, this action had been stayed as another lawsuit was being put forward as the proposed class action. When that other lawsuit fell away as the proposed class action, this action appeared to be the most appropriate, at least for the children who had been kept in government custody after their TGO's had become a nullity, and for the parents or guardians of such children.

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

7 This action has several impediments to proceeding:

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

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

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

was being abandoned because of Ms. Lightning being granted a power of attorney for L.C.

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

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

Present Positions of Parties

E.M.P.

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

Crown

13 The Crown seeks dismissal of all outstanding applications.

14 As to the appointment of Ms. Lightning as next friend for E.M.P., the Crown argues that if L.C. is competent to grant a power of attorney, she is competent to continue to act as next friend for E.M.P. A lack of competence cannot be presumed, because there is no evidence from her as to her incapacity or unwillingness to act. The Crown cites ***C.H.S. v Alberta (Director of Child Welfare)***, 2008 ABQB 620, where Thomas J. refused to appoint a stranger as next friend for C.H.S.'s children because there was no evidence from C.H.S. that C.H.S. was unable or unwilling to act as next friend.

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

> A more important factor in this case is that the Plaintiff children already have a next friend, namely their mother C.H.S. It is of significance to me that no affidavit has been sworn by C.H.S. to indicate either that she is no longer willing to act as the next friend of her children, or that she consents to Ms. Venne being substituted as the next friend for her children. This is troubling, particularly given the statements by the counsel for the Plaintiffs over the course of various case management meetings indicating his difficulties in communicating with and receiving instructions from C.H.S. who seems reluctant to continue to pursue the claims in this Action. It may be that C.H.S. no longer wishes to act as the next friend for her children, but would rather prefer someone else to represent their interests in this lawsuit. However, there is very little, if any, evidence before me

> to indicate that this is the case. In any event, I decline to make such a finding. In the absence of a proper evidentiary basis to explain why C.H.S. can no longer act as the next friend for her children, I am not able to conclude in these circumstances that it would be appropriate to appoint Ms. Venne as the replacement next friend of the children of C.H.S.

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

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

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

Analysis

1. Next friend for E.M.P.

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

20 Those matters have been dealt with in representations by her counsel, Mr. Lee, as well as in the affidavit of Denise Lightning filed with respect to her application to be appointed as next friend. The Crown cross-examined Ms. Lightning on her affidavit before the October, 2010 applications were heard. The Court also heard evidence from Les Block on the point of Ms. Lightning's difficulties in dealing with the litigation, although that evidence was not tested by cross-examination, nor were his or other medical records of L.C. produced to the Crown.

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

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

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

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

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

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

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

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

29 Ritter J. subsequently ordered that the next friend appointed by him be relieved from liability

of costs and that the next friend's fees be paid by the Defendant Government.

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

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

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

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

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

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

by the Public Trustee's office or outside counsel, as the circumstance require.

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

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

(d) The Public Trustee as trustee, or the next friend, would then be required to retain and instruct counsel to prosecute the action.
(e) At any stage of the proceedings the Public Trustee or the next friend could consult with the child and other family members, but the conduct of the litigation is not under the control of the child or the family.
(f) The Court retains a supervisory jurisdiction over the whole process. The Public Trustee or the next friend could apply for advice and directions where appropriate. Any interested person could apply to the Court for a review of decisions made during the conduct of the litigation, to ensure that the best interests of the child are paramount."

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

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

where there a party requiring a litigation representative does not have one.

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

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

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

39 In ***Gronnerud (Litigation Guardian of) v. Gronnerud Estate***, [2002] 2 S.C.R. 417, the Supreme Court considered the Saskatchewan Rules of Court regarding the removal and replacement of the litigation representative of a defendant adult. The Saskatchewan Rules are different from the Alberta Rules (both old and new). The old Alberta Rules made no provision for the removal and replacement of a next friend; the new Rules do in R. 2.21. Regardless of the differences, I am satisfied that under the old Rules, the Crown had the jurisdiction (at least under *parens patriae*) to remove and replace an infant's next friend. The test for replacement is set out in **Gronnerud** at para 18-20: the best interests of the child. At paragraph 2 the Court held:

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

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

> Therefore the respondents' claim for guardianship and custody fell squarely within the test enunciated by this court in ***D. (W.) v. P. (G.)*** (1984), 54 A.R. 161 (Alta C.A.) at para. 14 [hereinafter ***D.(W.)***], leave to appeal to S.C.C. refused [1984] 6 W.W.R. lxiii (S.C.C.)]:

> While there is some confusion on the point in the authorities, I understand the rule to be that a stranger to a child - including a governmental agent - cannot wrest custody from the lawful guardian of the child without first demonstrating that the lawful guardian has either abandoned or neglected the child, or without offering other commanding reasons. But, in a contest between two recognized guardians, the person who can offer superior parenting will prevail. The first is the "fitness" rule; the second is the "best interests" rule.

> The court concluded that in the case of a competition between a legal stranger and a legal guardian, the appropriate test is not the best interests of the child, but rather, the fitness test.

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

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

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

3. Terms and Conditions on Appointment

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

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

46 Here, the Crown does not argue that Ms. Lightning is not a suitable person to be next friend. L.C. has raised no objections to Ms. Lightning acting in this capacity and of course has appointed Ms. Lightning to be her attorney under a power of attorney. But since Ms. Lightning has sought

appointment by the Court (and seeks favourable terms from the Court), the Court must be satisfied that her appointment would be in E.M.P.'s best interests.

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

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

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

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

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

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

52 If counsel are unable to agree on an appropriate next friend/litigation representative within 30 days from the date of this decision, each of Mr. Lee and the Public Trustee should submit the name of at least one candidate along with the information required by Rule 2.14(2)(a),(c),(d) and (e),

together with a brief statement of the candidate's qualifications, and I will make an appointment so long as I find one of those candidates appropriate.

4. Exemption from liability for costs

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

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

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

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

57 The Court of Appeal ruled in ***C.H.S. v. Alberta (Child, Youth and Family Enhancement Act, Director)***, 2010 ABCA 15, that there may also be *Charter* claims arising out of the Director's "failure to file" for affected children and their parents or guardians. Those claims have not yet been added to E.M.P.'s claim against the Defendants.

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

59 Considering these various matters, I am of the view that it is appropriate to exempt E.M.P.'s next friend/litigation representative from liability for costs in this action in relation to E.M.P.'s individual action. This exemption would not apply to liability for costs as a representative plaintiff or proposed representative plaintiff if the action is converted to a proposed class action and the next

friend/litigation representative determines that it is in E.M.P.'s best interests to have him or her be put forward as representative plaintiff. It is premature to consider whether a next friend might be granted an exemption from liability for costs as a representative plaintiff in a class action.

5. Payment for the Next Friend/Litigation Representative

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

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

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

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

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

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

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

> 35 Based on the foregoing overview of the case law, the following general observations can be made. The power to order interim costs is inherent in the nature of the equitable jurisdiction as to costs, in the exercise of which the court

may determine at its discretion when and by whom costs are to be paid....

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

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

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

1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial -- in short, the litigation would be unable to proceed if

the order were not made.

2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

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

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

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

> "The third test set out by LeBel J. is whether there are special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of the court's power is appropriate. In ***Okanagan*** itself, the special circumstances were that the issues were of profound importance to the people of B.C. and their determination would be a major step

> towards resolving problems in the relationship of Aboriginals and the Crown. I do not suggest that such an extreme example is the measure to use in every case, but, recalling that the circumstances must be special, that the class is narrow, and that the exercise of the power is extraordinary, it is clear that there must exist some factor which decisively lifts the applicant's case out of the generality of cases. The existence of issues going beyond the interests of the parties alone would seem to be one possible example of the minimum required.
>
> Concerns about access to justice and the desirability of mitigating severe inequality between litigants feature prominently in the rare cases where interim costs are awarded. However, by definition, impecuniosity alone is not enough: it is but one of the three criteria. The mere 'levelling of the playing field', although an admirable objective, would deprive the Third Test of any real meaning, and substitute a form of judicial legal aid, available in any case involving impecunious parties. The principles developed in the administration of Family Law Rule 24(12) include the levelling of the playing field, but one must remember that these rules are dealing with a very special relationship."

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

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

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

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

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

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

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

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

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

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

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

Decision

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

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

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

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

82 E.M.P.'s next friend/litigation representative should be able to consult counsel and obtain legal

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

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

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

Funding for Counsel for L.C.

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

86 L.C. is now intending to carry on the action by her attorney under a power of attorney. It is not clear to me how the mechanics of that will work and I expect there will be issues raised at case management in that regard. But at the present time, Ms. Lightning has made arrangements with L.C. so that a next friend or litigation representative is not required.

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

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

89 Is L.C.'s claim *prima facie* meritorious? That is a difficult question at this stage. The precise *Charter* argument has not been plead. From the discussion of the issue in the Court of Appeal in this action and in ***C.H.S.***, there was no comment on the merits of such allegations. Those proceedings arose out of an application to strike, so the merits of the claims were irrelevant to the decision. There is nothing in the claim alleging that E.M.P. was wrongly apprehended by the Director or that the TGO was improperly obtained. L.C.'s claim is apparently that her *Charter* rights were violated

because the Director failed to prepare a timely and adequate care plan to reunite E.M.P. with L.C. and the rest of her family, as well as by the Director failing to return E.M.P. to her when the TGO became a nullity (because of his failure to file a care plan in time).

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

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

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

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

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

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

Summary

1. E.M.P. is in need of a next friend/litigation representative.
2. Denise Lightning is not appropriate to be a Court-appointed next friend/litigation representative because she is attorney for L.C. under a

power of attorney and might be placed in conflict situations;

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

Costs

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

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

R.A. GRAESSER J.

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

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

Case Name:

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

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

[2011] A.J. No. 396

2011 ABQB 236

Docket: 0703 10836

Registry: Edmonton

Alberta Court of Queen's Bench
Judicial District of Edmonton

R.A. Graesser J.

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

(26 paras.)

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

Statutes, Regulations and Rules Cited:

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

Counsel:

Robert P. Lee, for the Plaintiff.

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

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

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

Memorandum of Decision

R.A. GRAESSER J.:--

Nature of Application

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

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

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

Background

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

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

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

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

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

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

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

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

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

Analysis

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

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

R.A. GRAESSER J.

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