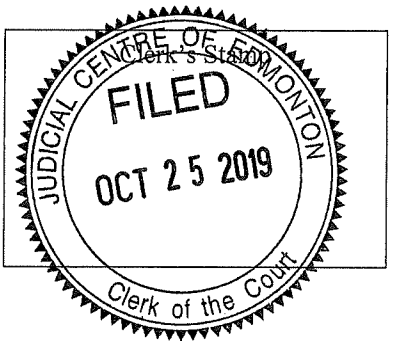


COURT FILE NO. 1103 14112

COURT 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, and

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

APPLICANT **ROLAND TWINN, EVERETT JUSTIN TWIN, MARGARET WARD, TRACEY SCARLETT and DAVID MAJESKI, as Trustees for the 1985 Trust**

RESPONDENTS **THE OFFICE OF THE PUBLIC GUARDIAN AND TRUSTEE and CATHERINE TWINN**

DOCUMENT **WRITTEN BRIEF OF SHELBY TWINN**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

c/o 10721 – 214 St.
Edmonton, AB T5S 2A3

Self Represented
Telephone: (780) 264-4822
Email: s.twinn@live.ca
File No.: N/A

TABLE OF CONTENTS

PART 1 INTRODUCTION 1

PART 2 RELEVANT FACTS AND EVIDENCE 2

PART 3 ISSUES 3

PART 4 ARGUMENT 3

A. Intervenor Status 3

B. Indemnity 5

PART 5 REMEDY SOUGHT 6

PART 1 INTRODUCTION

1. I am seeking intervenor status on the hearing of the jurisdictional question as applied for by the parties to this litigation by way of Consent Order filed December 18, 2018 and the transfer issue raised by Justice Henderson and subsequently applied for by the 1985 Sawridge Trustees ("Trustees") in their application filed September 13, 2019 (together the "**Jurisdictional Applications**").

2. I am a current beneficiary of the 1985 Trust. I am an adult beneficiary and have been an adult since this litigation started. My interests are not represented by the Trustees in this litigation.

3. My father, Paul Twinn, the late Chief Walter Twinn's son, is a member of the Sawridge First Nation. I lived with my parents on the Sawridge First Nation until I was about five years old. At that point, my mother was compelled to leave and take myself and my sister to British Columbia due to my father's addiction problems. My father unfortunately has substance abuse issues which destroy relationships.

4. I am 27 years old and do not have the financial means to pay a lawyer to assist me with this application or with representation as an intervenor.

5. The issues raised in the Jurisdictional Applications have the potential to result in me losing my status as a beneficiary of the 1985 Trust or alternatively to deplete the assets of the 1985 Trust if they are found to belong to the 1982 Trust.

6. I believe the Trustees and the Sawridge First Nation (SFN) are working together to further the interests of the SFN, specifically to see the assets of the 1985 Trust become under the control of the SFN in that the SFN will decide who is and isn't a beneficiary of the trust.

7. Myself and other adult beneficiaries who are not represented will be personally affected by the outcome of the Jurisdictional Applications, as opposed to the other parties who are

only acting in a representative capacity, although some of the Trustees and the representatives of the SFN stand to personally benefit.

8. The Trustees and the SFN have proposed that the definition of beneficiary in the 1985 Trust should be changed to only include those persons who are on the SFN membership list. This will impact me not only because I am not a member of the SFN, but even if I become one, that status could be taken away at any time if the Chief and council so decide. As such, with membership in the First Nation being the proposed beneficiary definition, the quality of the SFN membership system has been put into issue. I have relevant information about the SFN membership process based on my personal experience and those of others. It is my belief that it is corrupt.

9. The manner in which membership is currently being handled at SFN leads to results that are very illogical, painful and blatantly unequal. For example, Chief Roland Twinn, who is the brother of my father, Paul Twinn, is a member of the First Nation. However, his sister, Deborah Serafinchon and myself, his niece, are not. This circumstance is certainly not for a lack of trying, both Deborah and I applied for membership in April 2018 and our applications have still not been processed. Yet my uncle Roland's sons (my cousins) were rapidly admitted shortly after applying, queue jumping ahead of other applicants who had waited for years[1]. I am aware of other examples of this type of inequality within close family relationships. It is very painful for us to be denied our heritage by our own family. It becomes even more painful when you realize that at the same time my membership application is being disregarded, Chief Roland Twinn is also trying to take away my status as a beneficiary of the 1985 Trust and deny me this rightful connection to my heritage.

10. If granted intervenor status, I am also seeking full indemnity funding from the assets of the 1985 Trust for the legal fees I will incur for participating as an intervenor.

PART 2 RELEVANT FACTS AND EVIDENCE

[1] Twinn v. Sawridge First Nation, 2017 FC 407 at paras. 17, 79-80, 86, 94 and 131

11. I filed an Affidavit on October 23, 2019 that contains my information. Since I filed that Affidavit, I have been made aware that the Trustees responded on October 23, 2019 to the letter referred to at Exhibit "F" of my Affidavit and paragraph 25(f). In their response, the Trustees declined to formally confirm they are committed to protecting the interests of the current and future beneficiaries of the 1985 Trust under the existing definition in any possible settlement.[2]

PART 3 ISSUES

12. The issues on my application are whether I should be granted intervenor status and whether I should be granted funding from the 1985 Trust to pay for my legal fees for participating as an intervenor.

PART 4 ARGUMENT

A. *Intervenor Status*

13. I am not a lawyer. I have read the arguments of the SFN for their attempt at gaining intervenor status and am using the legal tests they have put forward to inform my understanding of what I need to demonstrate.

14. Rule 2.10 allows a Court to grant intervenor status on any terms set out by the Court and with any rights and privileges set out by the Court.

15. I recognize there are other 1985 beneficiaries who would also be affected by any rulings that come out of the Jurisdictional Applications. I am prepared to share my intervenor status with those people, if they wish to be involved, in order to limit the number of submissions being made to the Court.

16. I am told and understand that the Court of Appeal recognized that the participation of beneficiaries in this process needs to be dealt with. I am proposing that adult

---

[2] Letter dated October 23, 2019 from Dentons

beneficiaries be given intervenor status for the purpose of the Jurisdictional Applications.[3]

17. As was pointed out by the SFN in their submissions, in Papachase Indian Band (Descendants of) v. Canada (Attorney General), the Court set out the two step approach for determining intervenor applications. See paragraph 36 of SFN written submissions.

18. The Court has generally held that a party should be granted intervenor status if they are specifically affected by the outcome of the decision OR they have special expertise or perspective that will assist the Court in reaching a decision. See paragraph 37 of SFN written submissions.

19. In my view, my interests, along with those of other adult beneficiaries, are not represented by the Trustees. The Trustees claim to represent my interests, but for the reasons set out in my Affidavit I do not believe they will do so or have done so. The Trustees have historically tried to end this litigation with solutions that would eliminate my rights. They have acted in a hostile manner towards me and other beneficiaries and have tried to exclude the participation of others who they know will interfere with their ability to obtain their desired outcome.

20. I understood that the Trustees and the representatives of the SFN are fiduciaries and are supposed to be held to the highest standard. Given, at the very least, the ambiguity surrounding their intentions and personal interests in the outcome of this matter (Chief Roland Twinn, Justin Twin and Margaret Ward are all members of the SFN and the representatives for the SFN are also members), they should support me in being an intervenor in order to minimize the chance for a conflict of interest.

21. The Trustees and SFN are both asking the Court to change the beneficiary definition to include only those on the SFN's membership list. I have information about what this definition would mean for me and others in a similar situation. It is important the Court

---

[3] Twinn v Twinn, 2017 ABCA 419 at para. 22.

is aware of this information before they make a decision because exposing me to the SFN membership process would likely be fatal to my status as a beneficiary.

22. I also intend to provide the Court with information on the issues relating to the transfer order. I will also be pointing out to the Court that the SFN has been aware of the transfer of assets for a long time and in my view is only now suggesting the assets never left the control of 1982 Trust because the Court's jurisdiction to change the definition has now been acknowledged to not exist unless new law is created. I note the SFN wrote to the Court on September 18, 2017 threatening to dissolve the 1985 Trust. If they did not believe the 1985 Trust received the assets of the 1982 Trust then what was there to dissolve![4] Also, the SFN admits in their submissions that Chief Walter Twinn testified that the assets of the 1982 Trust were intended to be placed in the 1985 Trust (see paragraph 33) albeit they apparently intended to move them again to the 1986 Trust. I have great difficulty with the SFN's argument in this context and find them to be disingenuous. Despite this obvious conclusion, the Trustees appear to be silent on the point and willing to sacrifice my status as a beneficiary.

23. I want to argue that the SFN should not be allowed to intentionally use its assets in a certain way and then, at my expense, be allowed to "un do" that when it is no longer convenient for them. I will argue that the trustees of the 1982 Trust intentionally gave its assets to the 1985 Trust and if that was wrong then the proper remedy is to sue the Trustees of the 1982 Trust and the SFN for allowing that to happen, as they were all involved and wanted it to happen.

24. At the time the August 24, 2016 Consent Order was entered with the Court, I was represented by counsel. I understood what the Order was meant to do and as such did not ask my counsel to object to it. I would like to speak to this.

B. Indemnity

25. I need help to make proper legal submissions to the Court.

---

[4] Letter from Parlee McLaws to Justice Thomas dated September 18, 2017

26. I have read the written submissions of the Office of the Public Guardian and Trustee filed February 22, 2012 when they sought to be given status in this litigation and advance indemnity costs for their participation from the 1985 Trust.

27. I understand from reading those submissions that when an application for advice and direction relates to a trust or the administration of the trust, the parties costs are often paid for by the trust or it may create a "special circumstance" that merits an advance cost award.[5].

28. At present, there is a significant power imbalance for me in dealing with this litigation. The Trustees have access to the 1985 Trust assets to pay for this litigation and legal counsel. The SFN has received full indemnity funding from the Trustees in the past for their participation. The OPGT is funded by the 1985 Trust and is a government entity. I am a self-funded person and cannot afford legal advice to navigate these complex legal issues. This situation does not allow my interests and those of the current adult beneficiaries to be presented in a fair manner. This power imbalance should be corrected.

29. I have been advised that there is also a test set out by the Supreme Court of Canada for advance funding in contentious litigation. If this case is deemed to be contentious litigation, and not simply advice and direction as the trustees have framed it, I believe I meet this test. I believe this because I cannot afford this litigation, I have legitimate issues to bring to the Court's attention, these are issues of public importance as the issues being raised are novel and have great bearing on how first nation trusts can be administered and these are special circumstances.[6]

PART 5 REMEDY SOUGHT

30. I am asking the Court to:

---

[5] Written Submissions of the OPGT filed February 22, 2012 paragraph 82, Deans v. Thachuk [2005] A.J. No. 142 (C.A.) at para. 42-45 and 51 and Taylor v. Alberta Teacher's Association [2002], A.J. No. 1571 at para 13 and 18-25

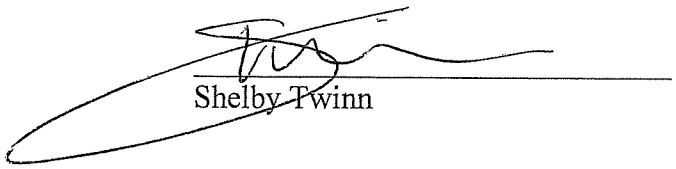
[6] Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue Agency), 2007 SCC 2 at para. 37.

a) Grant intervenor status to me and allow me to make written and oral submissions on all matters raised in the Jurisdictional Applications;

b) Grant me funding from the assets of the 1985 Trust for my participation as an intervenor so that I can hire a lawyer to help me.

c) Costs of this application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at the City of Edmonton, in the Province of Alberta, this 25th day of October, 2019.



Shelby Twinn

TAB 1

Federal Court  Cour fédérale

Date: 20170426

Docket: T-1073-15

Citation: 2017 FC 407

Ottawa, Ontario, April 26, 2017

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

SAM TWINN AND ISAAC TWINN

Applicants

and

SAWRIDGE FIRST NATION, SAWRIDGE FIRST NATION FORMERLY KNOWN AS THE SAWRIDGE INDIAN BAND, ROLAND TWINN, ACTING ON HIS OWN BEHALF AND IN HIS CAPACITY AS CHIEF OF THE SAWRIDGE FIRST NATION AND HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

III. DECISIONS UNDER REVIEW

[11] According to the Applicants, there are three related decisions that constitute the subject of this judicial review:

(1) Rejection of Walter's Vote

[12] According to the Scrutineer, the CEO set aside Walter's ballot upon opening Walter's mail-in vote because it had been cut and the CEO's initials removed. The CEO later determined Walter's vote to be invalid, overruling the Scrutineer's suggestion that Walter be permitted to cast a new in-person vote in place of his spoiled ballot.

(2) Conduct of the Election

[13] The mail-out packages were dated December 3, 2014 and mailed December 4, 2014, with the Election held on February 17, 2015.

[14] Two of the mail-out packages, addressed to Patrick Twinn and Georgina Ward, were not delivered and returned.

[15] Following corrections, the CEO sent revised lists of electors. The deadline to correct the new list was January 2, 2015. However, Sam Twinn did not receive the notice until January 6, 2015.

[16] On January 12, 2015, the CEO stated in an email to Catherine Twinn, the Membership Registrar, that general membership issues were dealt with by the Membership rather than the CEO. This response was a reply to Catherine's question of whether the CEO had authority to add the names of persons who were entitled to membership to the list of electors, including those whose completed applications had been pending for an unreasonable length of time.

(3) SFN Membership Application Process

[17] In the mail-out package of December 4, 2014, Roy Twinn, the son of Roland Twinn, was listed on the non-resident sub-list. There is no documentation indicating when Roy became a member, but Roy was not on the elector lists for the 2011 election, and others have applied for membership and have not yet received a decision.

IV. ISSUES

[18] The Applicants submit that the following are at issue:

A. Whether the CEO erred in law, including that going to jurisdiction, both in his initial and appeal decisions, in rejecting an election ballot through misinterpretation and misapplication of statutory provisions, compounded by breach of rules of natural justice and procedural fairness?

B. Whether the Respondents failed in their fiduciary duty to establish and confirm that a proper and complete list of electors was prepared, in disregard of constitutional, statutory, and other legal requirements, compounded by corrupt practices, thereby committing errors going to jurisdiction?

C. Whether the CEO erred in law, including that going to jurisdiction, in failing or declining to make adequate inquiry into the composition of the Electors List, compounded by procedural unfairness and disregard for rules of natural justice?

[19] The Respondents submit that the following are at issue:

Membership Issues

[77] In their written submissions, the Applicants say that the CEO erred in law – including jurisdiction – in failing or declining to make adequate inquiry into the composition of the Electors List that was used by the CEO to administer the Election. They say this error was further compounded by the CEO's procedural unfairness and disregard for the rules of natural justice in his handling of the appeals.

[78] For the obligation to ensure the completeness and integrity of the Electors List, the Applicants rely primarily on s 20(1) of the *Elections Act* which reads as follows:

> *Correcting the Electors Lists*
>
> 20. (1) The Electoral Officer shall revise the Electors Lists where it is demonstrated to the Electoral Officer's satisfaction prior to the commencement of the Nomination Meeting that
>
> (a) the name of an Elector has been omitted from the Electors List;
>
> (b) the name or birth date of an elector is incorrectly set out in the Electors List;
>
> (c) the name of a person who is not qualified to vote is included in the Electors List.
>
> [...]

[79] The Applicants say that these provisions place the responsibility upon the CEO to go behind the Electors List provided by SFN to ascertain the names of all persons who the Courts have said are rightfully members of SFN, and not just those individuals who SFN has decided to admit to membership in accordance with its own Membership Code. They say the CEO's

decision to leave the status of membership to SFN simply compounds the corrupt practices and procedures regarding membership that the Courts have found to prevail at SFN. In other words, the argument is that membership for the purposes of the Electors List is not simply a matter of accepting the list provided by SFN's Membership Registrar; it is a matter of the CEO ascertaining and assembling a full membership list in accordance with the Court's directions on membership entitlement at SFN.

[80] While I think that current membership practices at SFN could give rise to corrupt electoral practices (which I will address later), I don't think the CEO can be faulted for taking the position that he cannot be expected to resolve such broad and complex issues of membership in his electoral role. And I think that the governing legislation supports that position.

[81] Under the *Elections Act*, the definition of "Electors List" means "the list of Electors prepared pursuant to this Act" and the preparation of the list is governed by Part III of the *Elections Act*.

[82] Under Part III, it is the "Membership Registrar" who must "provide the Electoral Officer named by the Council pursuant to the Constitution with an alphabetical list of all members who will be Electors on the day of the Election...." What the CEO can and should do with this list is set out fully in the other provisions of Part III. These provisions deal mainly with corrections, omissions and additions to the Electors List provided by the Membership Registrar. And this must all be done before the nomination meeting because s 18.3 of the *Elections Act* makes it clear that:

> after which, shall decide on which list the name of the Elector in question shall appear. The decision of the Elders Commission must be provided to the Electoral Officer prior to the date set for the nomination meeting.
>
> 18.3 After the commencement of the nomination meeting the names which appear on the Electoral List may not be changed and the names which appear on a Sub-List may not be removed from that Sub-List and placed on the other Sub-List.

[85] It is questionable whether s 20 gives the CEO any authority to go beyond s 18 but, even if it did, there would have to be a request to amend "prior to the commencement of the Nomination Meeting," which did not occur in this case.

[86] It seems clear from Part III that the CEO is neither empowered or obliged to make changes to the Electors List, or to reject or supplement the Electors List provided by the Membership Registrar, without a request from a member that he do so. On the facts before me, no such request was made. I see nothing in the *Elections Act* that would allow the CEO to reject the Electors List provided by the Membership Registrar and, on his own initiative, compile an alternative Electors List based upon what the Courts have said about entitlement to membership at SFN. It would make no sense for SFN to put in place an *Elections Act* that did not reflect and conform to its own position on membership. This is not to say, of course, that SFN's position on membership is legal, or that it is not simply defiant of what the Courts have ruled on the issue of membership. But I don't think that those Court rulings give the CEO any power to go beyond the present *Elections Act*. And the Court has not been asked to review the legality of the *Elections Act* in this application.

decisions at issue form part of a continuous course of conduct. However, where two or more decisions are made at different times and involve a different focus, they cannot be said to form part of a continuing course of conduct. See, for example, *Servier Canada Inc v Canada (Minister of Health)*, 2007 FC 196.

[94] In the present case, I do not think that the Respondents' implementation of a Membership Code and the general process for granting membership at SFN can be said to be part of a continuing course of conduct that includes the decisions made by the CEO at the 2015 Election, except perhaps in one respect. There is an allegation of queue jumping in membership applications that the Applicants say was facilitated by Chief Roland Twinn in the 6 month period prior to the 2015 Election to ensure that his own son was granted membership, while other applicants for membership have been kept waiting for years. The inference is that this was done so that Roland's son could vote for his father in the 2015 Election. In a First Nation such as SFN with a total membership of only 44, of which only 41 are qualified to vote, I can see why this might be a concern. In the notice of appeal dated March 2, 2015, the Applicants stated as a ground under IV. Non Compliance with the Rules Regarding the Creation and Notice of Voter Lists:

> 3. The failure to comply with the creation and notice of Voter's Lists was compounded by a process that unfairly added persons and excluded others. In particular, notwithstanding applications for inclusion which had been outstanding for years, only the son of the successful candidate for Chief was added to the List."

This was not addressed by the CEO in the appeal decision. However, the CEO did reply, in an email to the Membership Registrar regarding the Election and his authority to "add the names of persons entitled to membership to the electoral list including those whose completed applications

have been pending for an unreasonable time" that "a general membership issue would be dealt with by Membership." In other words, the CEO felt that he could not deal with this complaint because, as previously mentioned, his authority to deal with membership issues is restricted by ss 18 and 20 of the *Elections Act*. It seems to me that this position is neither unreasonable or incorrect.

Errors by CEO

[95] The true focus of this application must be the allegations that the CEO, Mr. Callihoo, erred in law (including jurisdiction) in rejecting Walter's election ballot through misinterpretation and misapplication of the governing statutory provisions, and that this error was compounded by a breach of the rules of natural justice and procedural fairness.

[96] It is noteworthy that the error identified is the rejection of "an election ballot," and this would appear to be a reference to the ballot of Walter Felix Twinn.

[97] The Applicants explain the problems associated with the rejection of Walter's ballot as follows, and I think it would be helpful to set out the arguments of both sides on this central point in detail:

> 16. Walter Felix Twin ("Walter") is an elderly resident member of the SFN. He asked Sam in 2012 to run for the position of Chief which Sam, in Sept., 2014, decided to do. Walter was about 80 years old, has health issues and may have difficulty reading and comprehending English, Cree being his first language. On election day Sam was present in the polling station before 6 p.m., as were Walter and his wife.
>
> 17. Mail in ballots were mailed to electors. Before the poll opened at 10 a.m.; the CEO showed Sam's Scrutineer, Ron Rault

Conclusions

[130] The Applicants have not convinced me that a reviewable error has occurred in this application.

Costs

[131] The Respondents have asked for their costs in this case, but I feel this is an appropriate case to require that both sides meet their own costs. As the jurisprudence shows, there is significant concern and confusion regarding membership and, thus, voting entitlement at SFN. As Justice Zinn pointed out, this application raises "serious matters that will affect the electoral process undertaken in 2015 and future elections." These are serious, public issues that affect all members of SFN and I do not think that individual members should be discouraged from coming before the Court on those occasions when their concerns have some justification. SFN is unique in being such a small and self-contained First Nation. It has also faced numerous disputes on the membership issue. Membership is a requirement which is tightly controlled and the process for granting and withholding membership is opaque and secretive. Hence, there is scope for abuse and the lack of transparency is bound to give rise to future disputes. This application is a function of the system in place at SFN. Although I cannot find for the Applicants on the facts of this case, it seems to me that this application is, to some extent at least, a response to a public need at SFN that will persist until membership issues are resolved.

TAB 2

大成DENTONS

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Dentons Canada LLP
2500 Stantec Tower
10220 - 103 Avenue NW
Edmonton, AB, Canada T5J 0K4

dentons.com

October 21, 2019

File No.: 551860-1

VIA EMAIL

McLennan Ross LLP
600, 12220 Stony Plain Road
Edmonton AB T5N 3Y4

Attention: Crista Osualdini/Dave Rislling

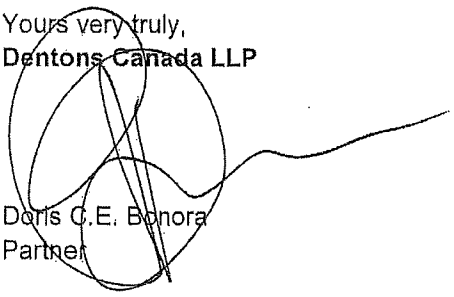
Dear Sir/Madam:

RE: Sawridge Trust - Settlement Matters

We write in reply to your "with prejudice" letter of October 16, 2019. Once again, the Sawridge Trustees express concern with settlement discussions done on a with prejudice basis and repeat that concern here. As outlined in our letter of October 11, 2019, the Sawridge Trustees would be happy to participate in settlement discussions, discuss an agenda and discuss issues on a without prejudice basis.

You have raised the Ginoogaming First Nation case and the fiduciary duties of the Sawridge Trustees. We do not feel it is appropriate to debate either of these items in this forum. We do wish to state that we disagree with your characterization of both of these items but as stated will not debate these in this manner.

Yours very truly,
Dentons Canada LLP



Doris C.E. Bonora
Partner

DCEB/sh

Cc Hutchison Law
Attention: Janet Hutchison
Cc Field Law
Attention: P. Jonathan Faulds
Cc Dentons Canada LLP
Attention: Michael Sestito

TAB 3

In the Court of Appeal of Alberta

Citation: Twinn v Twinn, 2017 ABCA 419

Date: 20171212
Docket: 1703-0193-AC
Registry: Edmonton

Between:

Patrick Twinn, on his behalf, Shelby Twinn and Deborah A. Serafinchon

Appellants
(Applicants)

- and -

Roland Twinn, Catherine Twinn, Walter Felix Twinn, Bertha L'Hirondelle, and Clara Midbo, as Trustees for the 1985 Sawridge Trust (the "1985 Sawridge Trustees" or "Trustees")

Respondents
(Respondents)

- and -

Public Trustee of Alberta ("OPTG")

Respondent
(Respondent)

- and -

Catherine Twinn

Respondent
(Respondent)

- and -

Patrick Twinn, on behalf of his infant daughter, Aspen Saya Twinn, and his wife Melissa Megley

Not Parties to the Appeal
(Respondents)

The Court:

The Honourable Madam Justice Marina Paperny
The Honourable Madam Justice Barbara Lea Veldhuis
The Honourable Madam Justice Sheilah Martin

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice D.R.G. Thomas
Dated the 5th day of July, 2017
Filed on the 19th day of July, 2017
(2017 ABQB 377; Docket: 1103 14112)

Memorandum of Judgment

The Court:

Introduction

[1] This appeal is part of ongoing litigation involving the 1985 Sawridge Trust (the Trust), which was established by the Sawridge Indian Band No. 19 (the Band, now known as the Sawridge First Nation, or SFN) to hold certain assets belonging to the Band. Disputes regarding membership in the SFN have a history going back decades, but the current Trust litigation deals specifically with potential amendments to the Trust. The Trust litigation has been case managed since 2011, and several procedural orders have been made including the one on appeal: *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 377 (Sawridge #5). The specific procedural issues on this appeal are straightforward: did the case management judge err in declining to add three potential parties to the Trust litigation, and did he err in awarding solicitor and his own client costs against those potential parties?

Background to the Sawridge Trust Litigation

[2] In 1982, various assets purchased with Band funds were placed in a formal trust for Band members. On April 15, 1985, then Chief Walter Patrick Twinn established the 1985 Sawridge Trust, into which those assets were transferred. The Trust was established in anticipation of proposed amendments to the *Indian Act*, RSC 1970, c I-6, intended to make the *Indian Act* compliant with the *Canadian Charter of Rights and Freedoms* by addressing gender discrimination in provisions governing band membership. It was expected that the legislative amendments (later known as Bill C-31) would result in an increase in the number of individuals included on the Band membership list. Specifically, it was expected that persons, mainly women and their descendants, who had been excluded from Band membership under earlier membership rules, would become members of the Band under the new amendments. Since 1985, and continuing to the present day, there has been extensive litigation regarding who is entitled to be a member of the SFN: see, eg., *Sawridge First Nation v Canada*, 2009 FCA 123, 391 NR 375, leave denied [2009] SCCA No 248; *Twinn v Poitras*, 2012 FCA 47, 428 NR 282; *Stoney v Sawridge First Nation*, 2013 FC 509, 432 FTR 253.

[3] The 1985 Sawridge Trust restricts the Beneficiaries of the Trust to those persons who qualified as members of the Band under the provisions of the *Indian Act* in existence as of April 15, 1982, that is before the legislative amendments of Bill C-31. The Trust is currently administered by five Trustees, at least four of whom are also Beneficiaries. In 2011, the Trustees sought advice and direction from the court with respect to possible amendments to the Trust, and specifically to the definition of Beneficiaries, which the Trustees recognize as potentially discriminatory. It is not clear how the Trust might be amended to address any discrimination,

although there is a suggestion that Beneficiaries could be defined as present members of the SFN. As of April 2012, the SFN had 41 adult and 31 minor members. Most, but not all, of those members qualify as Beneficiaries of the Trust under the existing definition. If the Trust is amended, some individuals may cease to be Beneficiaries, and others, not currently Beneficiaries, may come within the amended definition.

[4] On August 31, 2011, the case management judge issued a procedural order intended to provide notice of the application for advice and direction to potentially affected persons. The current parties to the litigation include four of the Trustees, Roland Twinn, Walter Felix Twinn, Berta L'Hirondelle and Clara Midbo. A fifth Trustee, Catherine Twinn, is a separately named and separately represented party. Ms. Twinn, who was married to the late Chief Walter Patrick Twinn, is a dissenting trustee; although her position is not entirely clear, she seems to take the position that the Trust does not necessarily have to be amended. In 2012, the Public Trustee was added as a party to act as litigation representative for affected minors and those who were minors at the commencement of the proceeding but who have since become adults: 2012 ABQB 365 (Sawridge #1).

The application to be added as parties (Sawridge #5)

[5] The application that gives rise to this appeal was filed by three individuals who wish to be added as party respondents to the Trust litigation. Each of the three is differently situated. Patrick Twinn is the son of Catherine Twinn. He is a member of the SFN and a beneficiary of the Trust. Shelby Twinn is Patrick Twinn's niece (she is the daughter of Paul Twinn, who is Patrick Twinn's half-brother). Roland Twinn, one of the trustees, is also Shelby's uncle. Catherine Twinn is her great-aunt. Shelby is a beneficiary of the Trust but not a member of the SFN. The third applicant, Deborah Serafinchon, is neither a member of the SFN nor a current beneficiary of the Trust. She says that her father is the late Walter Twinn. She is not currently a status Indian under the *Indian Act*.

[6] The appellants submit that their interests are directly affected by the Trust litigation and that they should be added as parties to that litigation. Shelby Twinn, in particular, wishes to argue that she may cease to be a beneficiary under the Trust if it is amended. Both she and Patrick Twinn wish to argue that the Trust cannot and ought not be amended. The position to be taken by Ms. Serafinchon is currently unclear.

[7] The first procedural order, as amended on November 8, 2011, provided that any person interested in participating in the advice and direction application was to file an affidavit no later than December 7, 2011. Two of the three applicants were served with that order. There was no suggestion any of the applicants was unaware of the application and the time lines.

[8] The case management judge denied the applications to be added as parties. He held that the addition of more parties would add to the complexity of the litigation, increase the costs to the

Trust and the assets held in it, and expand the issues beyond those identified during case management.

[9] With respect to the applications of Shelby and Patrick Twinn, the case management judge held that their participation in the advice and direction application would be redundant as their interests are already represented. He noted that both Shelby and Patrick are currently Beneficiaries under the Trust and opined that this status would not be eliminated by the outcome of the Trust litigation, a conclusion that is challenged by the appellants. He further held that the ongoing involvement of current Beneficiaries would be better served by transparent communications with the Trustees and their legal representatives, in order to ensure that their status as Beneficiaries is respected.

[10] With respect to the application of Deborah Sarafinchon, the case management judge noted that she has not applied for membership in the SFN and apparently has no intention to do so. He also noted that the Trust litigation is not intended to address membership issues, and that the purpose of case management has been to narrow the issues in the litigation rather than expand them. He held that Ms. Sarafinchon can monitor the progress of the Trust litigation, review proposals made by the Trustees as to the definition of Beneficiaries under the Trust, and provide comments to the Trustees and the court.

[11] The case management judge then went on to consider costs. He concluded that Patrick and Shelby Twinn "offer nothing and instead propose to fritter away the Trust's resources to no benefit". He concluded that they had no basis to participate in the Trust litigation, and that their proposed litigation would end up harming the pool of beneficiaries as a whole. They appeared late in the proceeding, and they did not promise to take steps to ameliorate the cost impact of their proposed participation, instead proposing to have the Trust pay for that participation. Based on the Supreme Court's decision in *Hryniak v Mauldin*, 2014 SCC 7 at para 2, [2014] 1 SCR 87, he noted a "culture shift" toward more efficient litigation procedure and concluded that one aspect of that culture shift is to use costs awards to deter dissipation of trust property by meritless litigation activities. He therefore ordered Patrick and Shelby Twinn to pay solicitor and own client indemnity costs of the Trustees in respect of the application. He awarded party and party costs against Deborah Serafinchon in favour of the Trustees.

[12] All three applicants appeal the denial of their applications to be added as parties to the Trust litigation. Patrick and Shelby Twinn also appeal the award of solicitor and own client costs made against them.

Standard of review

[13] Case management decisions are entitled to considerable deference on appeal. Absent a legal error, this Court will not interfere with a case management judge's exercise of discretion unless the result is unreasonable. This is particularly the case where a decision is made by a case management judge as part of a series of decisions in an ongoing matter: *Ashraf v SNC Lavalin ATP*

Inc, 2017 ABCA 95 at para 3, [2017] AJ No 276; *Goodswimmer v Canada (Attorney General)*, 2015 ABCA 253 at para 8, 606 AR 291; *Lameman v Alberta,* 2013 ABCA 148 at para 13, 553 AR 44.

[14] Cost awards are also discretionary, and are entitled to deference on appeal. The standard of review for discretionary decisions of a lower court was succinctly stated by the Supreme Court in *Penner v (Niagara Regional Police Services Board)*, 2013 SCC 19 at para 27, [2013] 2 SCR 125:

> A discretionary decision of a lower court will be reversible where that court misdirected itself or came to a decision that is so clearly wrong that it amounts to an injustice. Reversing a lower court's discretionary decision is also appropriate where the lower court gives no or insufficient weight to relevant considerations [*citations omitted*].

[15] This Court has noted that when reviewing discretionary decisions, appellate intervention is required where a) a case management judge failed to give sufficient weight to relevant considerations; b) a case management judge proceeded arbitrarily, on wrong principles or on an erroneous view of the facts; or c) there is likely to be a failure of justice if the impugned decision is upheld: *Bröeker v Bennett Jones*, 2010 ABCA 67 at para 13, 487 AR 111.

Did the case management judge err in declining to add the appellants as parties to the Sawridge Trust litigation?

[16] The Alberta *Rules of Court* provide a discretionary procedure for the addition of parties to litigation. Rule 3.75 applies to litigation commenced by way of originating application. It requires that the court be satisfied that the order adding a respondent *should* be made, and that the addition of the party will not result in prejudice that cannot be remedied through costs, an adjournment, or the imposition of terms.

[17] Two main questions have been identified when considering whether a party should be added to litigation under the Rules: (1) Does the proposed party have a legal interest (not only a commercial interest) that will be directly affected by the order sought? (2) Can the question raised be effectually and completely resolved without the addition of the party as a party? (*Amoco Canada Petroleum Co v Alberta & Southern Gas Co* (1993), 10 Alta LR (3d) 325 (QB) at paras 23-25). In a narrow sense, the only reason that it is necessary to make a person a party to an action is to ensure they are bound by the result: see *Amoco* at paras 13-15, citing *Amon v Raphael Tuck & Sons Ltd*, [1956] 1 QB 357 at 380. That the person may have relevant evidence or arguments does not make it necessary that they be added as a party. In the appropriate circumstances, such a person may be added as an intervenor, or may be a necessary witness.

[18] In this case, it is unclear what interest the individual appellants have that is not represented by the parties already before the court, or what position they would bring to the litigation, necessary to permit the issues to be completely and effectually resolved, that will not be presented

by those existing parties. As a matter of law, the Trustees represent the interests of the Beneficiaries, who include Patrick and Shelby Twinn. Catherine Twinn, as dissenting trustee, is separately represented, has taken an opposing view as to the need for amendment of the Trust, and will place that position before the court. The Public Trustee is tasked with representing the interests of all Beneficiaries who were minors when the litigation began, although it is acknowledged that the Public Trustee does not represent the interests of Patrick and Shelby Twinn (notwithstanding a comment made by the case management judge to the contrary).

[19] Neither the record, nor the oral or written submissions of the appellants, puts forward the positions each of the proposed parties intends to advance. As such, it is impossible for us to conclude that each proposed party has an interest that is not yet represented. Given the absence of information about the actual views of the appellants, we have no foundation to conclude otherwise. It is to be presumed that the Trustees and Public Trustee will put forward the various arguments regarding proposed amendments to the Trust and how those proposed amendments could affect the interests of various categories of current and potential beneficiaries. That there is a separately represented dissenting Trustee before the court adds to the likelihood that all views will be canvassed and all interests protected.

[20] The case management judge has been involved in the Trust litigation for several years, and deference is owed to his assessment of which parties need to be before the court in order for the questions raised in the litigation to be effectively resolved. His cautious approach to increasing the cost burden on the Trust and its beneficiaries, and unnecessarily expanding the Trust litigation, is well founded. Adding all the beneficiaries and potential beneficiaries as full parties to the Trust litigation is neither advisable nor necessary. We would not interfere with the case management judge's decision not to grant party status to the appellants.

[21] The appellants and Catherine Twinn also argue that the process followed here is flawed, as no originating application was filed to commence the Trust litigation. The Trustees say that it was always intended that the Procedural Order made by the case management judge on August 31, 2011 would be the constating document for the application for advice and direction. We agree with the Trustees that the lack of an originating application is not fatal to the litigation. However, the lack of an originating application, setting out specifics of the relief being sought, has resulted in a lack of clarity regarding if and how the Trust will be varied, whose interests will be affected by the variation, and how those interests might be affected. The Procedural Order provides details of how the litigation will proceed, including notice provisions and timelines, but it does not address the nature of the relief being sought.

[22] During the oral hearing, this issue and a number of others arose that have not yet been the subject of an application to, or direction from the case management judge. One such issue is whether there is a need for a formal pleading setting forth the position of the Trustees and the relief being sought; specifically, whether the Trust is discriminatory; and if so, what remedy is being sought. A second issue is what procedure will be implemented for beneficiaries and/or potential

beneficiaries to participate in the Trust litigation either individually or as representatives of a particular category of beneficiary. In addition, concern was raised to whether discrete legal issues could be determined prior to the merits of the Trust litigation being heard. These include whether the Trust is discriminatory, and whether s 42 of the *Trustee Act* applies. To date, we understand no formal application has been made to the case management judge on any of these matters. We strongly recommend that they be dealt with forthwith.

Did the case management judge err in awarding solicitor and own client costs?

[23] The case management judge awarded solicitor and own client costs against two of the appellants, Patrick and Shelby Twinn, in favour of the Trustees. His rationale for doing so was "to deter dissipation of trust property by meritless litigation activities by trust beneficiaries": see para 53.

[24] Solicitor and own client costs allow for a complete indemnification of legal fees and other costs for the successful party. This can include payment for "frills and extras" authorized by the client, but which should not fairly be passed on to a third party. They are distinct from solicitor-client costs, which allow for recovery of reasonable fees and disbursements, for all steps reasonably necessary within the four corners of the litigation: *Brown v Silvera*, 2010 ABQB 224 at para 8, 25 Alta LR (5th) 70; *Luft v Taylor, Zinkhofer & Conway*, 2017 ABCA 228 at para 77, 53 Alta LR (6th) 44.

[25] Awards of solicitor-client costs are reserved for exceptional circumstances constituting blameworthy conduct of litigation; cases where a party's litigation conduct has been described as reprehensible, egregious, scandalous or outrageous: see *Stagg v Condominium Plan 882-2999*, 2013 ABQB 684 at para 25; *Brown v Silvera* at paras 29-35; aff'd 2011 ABCA 109. The increased costs award is intended to deter others from like misconduct. This court has reiterated recently that awards of solicitor and client costs are rare and exceptional; awards of solicitor and "own client" costs are virtually unheard of except where provided by contract: see *Luft* at para 78.

[26] In an earlier case management decision in the Trust litigation, the case management judge issued an *obiter* warning to all parties, including counsel for Patrick Twinn, who seems to have been in attendance, of the possibility of awards for increased costs, saying:

> I have taken a "costs neutral" approach to the Trust, the Band, and the Public Trustee in this litigation. That is because all three of these entities in one sense or another have key roles in the distribution process. However, this non-punitive and collaborative approach to costs has no application to third party interlopers in the distribution process as it advances to trial. The same is true for their lawyers. Attempts by persons to intrude into the process without a valid basis, for example, in an abusive attempt to conduct a collateral attack on a concluded court or tribunal process, can expect very strict and substantial costs awards against them (both applicants and lawyers) on a punitive or indemnity basis. True outsiders to the

> Trust's distribution process will not be permitted to fritter away the Trust assets so that they do not reach the people who own that property in equity, namely, the Trust beneficiaries.
>
> *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 299 (Sawridge #4) at para 30.

[27] The case management judge's concerns in this regard may provide the basis for an award of solicitor-client costs in appropriate circumstances, but they do not eliminate the requirement to assess the appropriateness of such an award on a case by case basis. The judgment under appeal here does not set out what exceptional circumstances existed to justify an award of solicitor and own client costs against these appellants on this application, nor is it apparent from the reasons, or from the record, what litigation misconduct on the part of these appellants led to the making of this costs award. Moreover, an award for increased or punitive costs ought not be made in the absence of notice of the possibility of such an order and an opportunity for parties to make submissions as to whether the order is warranted. Although the case management judge raised the prospect of punitive cost awards in Sawridge #4, there was no specific notice or specific submissions on the issue in this application and no party to the proceedings sought those costs. On that basis alone the costs award should be set aside.

[28] In the circumstances, we conclude that there was not a sufficient basis for the award of extraordinary costs against the appellants on this application, and the appeal from the costs award is allowed. The case management judge awarded party and party costs against Deborah Serafinchon in favour of the Trustees, and we make the same award against Patrick and Shelby Twinn.

Appeal heard on November 1, 2017

Memorandum filed at Edmonton, Alberta
this 12th day of December, 2017

Paperny J.A.

Veldhuis J.A.

Martin J.A.

Appearances:

N.L. Golding, Q.C.
for the Appellants

D.C. Bonora and A. Loparco
for the Respondents Roland Twinn, Catherine Twinn, Walter Felix Twinn, Bertha L'Hirondelle and Clara Midbo, as Trustees for the 1985 Trust

J.L. Hutchison
for the Respondent The Office of the Public Guardian and Trustee

D.D. Risling
for the Respondent Catherine Twinn

TAB 4

September 18, 2017

EDWARD H. MOLSTAD, Q.C.
DIRECT DIAL: 780.423.8506
DIRECT FAX: 780.423.2870
EMAIL: emolstad@parlee.com
OUR FILE #: 64203-7/EHM

Delivered by Hand and
Via email to denise.sutton@albertacourts.ca

Court of Queen's Bench of Alberta
6th Floor Law Courts Building
1A Sir Winston Churchill Square
Edmonton, Alberta T5J 0R2

Attention: The Honourable Mr. Justice D.R.G. Thomas

Dear Mr. Justice Thomas:

Re: Sawridge Band Inter Vivos Settlement (1985 Trust)
Court of Queen's Bench Action No: 1103 14112

We reply to your letter of September 13, 2017 on behalf of the Sawridge First Nation (SFN).

There are a number of matters that are continuing in this action including the following:

- Ms. Catherine Twinn's application for indemnification for legal fees and disbursements in this action and in Action No. 1403 04885 from the 1985 Sawridge Trust (1985 Trust) scheduled to be heard in Chambers on October 13, 2017. We are advised that the claim for indemnification relates to past legal fees and disbursements in the approximate amount of $855,000.00 plus future legal fees and disbursements. (SFN is not a party to this application).

- We are advised that Patrick Twinn, Shelby Twinn and Deborah Serafinchon have appealed Sawridge #5. (SFN is not a party to this application or appeal).

- Maurice Felix Stoney has filed a Notice of Appeal in relation to Sawridge #6 (SFN is a party intervenor in relation to this matter).

Chief and Council of SFN (Chief and Council) are concerned that the legal costs that have been paid by the 1985 Trust to date and the future legal costs in relation to these proceedings and related proceedings will substantially impair the ability of the 1985 Trust to provide benefits to the beneficiaries who are members of SFN. As a result, Chief and Council have instructed our offices to review the evidence and the Record in this matter and to consult with them in relation to an application to dissolve the 1985 Trust on grounds that it fails as being discriminatory and contrary to public policy and other grounds.

Should the 1985 Trust be dissolved, it is the intention of Chief and Council to settle a new trust which would be for the benefit of SFN members today and future generations of SFN members as it is the position of Chief and Council of the SFN that this was the intended purpose of the 1985 Trust when it was settled.

We would anticipate being in a position to advise the parties and the Court as to whether SFN will be proceeding with this application/action by approximately mid-October, 2017.

Should the SFN proceed with this application/action, it is our view that Your Lordship would be the person best suited to hear this matter; however, this would be subject to SFN advancing an application within this action and your agreement and availability.

As a result, we would request that we be given notice of the in person Case Management Meeting which is to be scheduled in order that we might attend and advise the Court and the parties of our position at that time.

Yours truly,

PARLEE McLAWS LLP

EDWARD H. MOLSTAD, Q.C.
EHM/mb

cc: Doris Bonora, Dentons Canada LLP
Via email: doris.bonora@dentons.co

cc: Janet Hutchison, Hutchison Law
Via email: jhutchison@jlhlaw.ca

cc: Karen Platten, Q.C., McLennan Ross
Via email: kplatten@mross.com

TAB 5

TAB A

Clerk's Stamp:

COURT FILE NUMBER: 1103 14112

COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE EDMONTON

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

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

APPLICANTS

ROLAND TWINN,
CATHERINE TWINN,
WALTER FELIX TWIN,
BERTHA L'HIRONDELLE, and
CLARA MIDBO, as Trustees for the 1985 Sawridge Trust

DOCUMENT

WRITTEN BRIEF OF THE PUBLIC TRUSTEE OF ALBERTA VOLUME 1 OF 2

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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

Attention: **Janet L. Hutchison**
Telephone: (780) 423-3661
Fax: (780) 426-1293
File: 51433 JLH

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]

TAB 5

TAB B

Taylor v. Alberta Teachers' Association, 2002 ABQB 554

Date: 20020603
Action No. 9603 13948

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

ROGER TAYLOR AND SANDRA DENNEY
ON THEIR OWN BEHALF, AND ON BEHALF OF ALL
THOSE PERSONS ENTITLED TO RECEIVE BENEFITS OR
PAYMENTS, NOW OR IN THE FUTURE, FROM THE
ALBERTA TEACHERS' ASSOCIATION OFFICE STAFF PENSION PLAN

Plaintiffs

- and -

THE ALBERTA TEACHERS' ASSOCIATION

Defendant

MEMORANDUM OF DECISION
of the
HONOURABLE MR. JUSTICE STERLING SANDERMAN

APPEARANCES:

Elizabeth M. Regan
Julie C. Lloyd
for the Plaintiffs

Greg A. Harding, Q.C.
Monica M. Bokenfohr
for the Defendant

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

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

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

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

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

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

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

[7] There are exceptions to this general rule. Although there is no legislation in this province governing class actions, the Alberta Law Reform Institute has prepared a report in relation to this topic. I have been directed to this report, to legislation in other provinces, and to

reports from Law Reform Commissions in other provinces. A common theme in the reports and legislation is apparent. The supervising court is given the discretion to dispense with notice to all members of the class if it is considered proper to do so. This is one of those cases. Notice is given to a class member so that individual can decide whether or not to opt out of the lawsuit. In certain cases the right to opt out is meaningless. It is meaningless, as a practical matter, if the member would be affected by a decision of the court notwithstanding an informed decision to opt out.

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

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

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

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

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

[13] There is no doubt that the defendant is in a much better position to fund the lawsuit. Impecuniosity on the part of a party involved in this type of litigation is not enough to establish

the grounds for making such an order. It is merely a factor that has to be taken into consideration but is not overly significant in determining the success of the application.

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

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

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

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

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

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

[20] The members belonging to the plan are asking the court to interpret a course of action followed by the defendant. They seek a declaration as to whether the action was permissible or prohibited. If permissible, the defendant can continue to do what it has been doing. If prohibited, it must desist and repay funds to the plan.

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

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

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

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

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

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

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

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

> At all material times, the Plaintiffs were fully aware of the matters alleged in the Statement of claim, acquiesced in the matters of which they now complain thereby causing the Defendant to believe that the Plaintiffs had no objection to its conduct and consequently the Defendant has been prejudiced. The Plaintiffs are guilty of prolonged, inordinate and inexcusable delay in bringing this action and in seeking the relief claimed herein. In the circumstances, the Defendant claims that the Plaintiffs are estopped or barred by laches from claiming the alleged or any relief against the Defendant.

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

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

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

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

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

[33] I have been directed to the Alberta Law Reform Institute Final Report on class actions that was released in December of 2000. At page 119 of that report the Alberta Law Reform

Institute came to a conclusion in relation to a class member's duty to inform themself. The report states:

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

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

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

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

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

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

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

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

> On what facts do you rely..."does not ask for facts which the witness knows or can learn. Nor does it ask for facts which may exist. Instead it makes the witness choose from some set of facts, discarding those upon which he does not "rely" and naming only those on which he does "rely". The questioner here does not really dispute much the same interpretation of its question. (I will call it "the questioner".)
>
> Because the question demands a selection, it demands a product of the witness' planning. How he is to select is unclear. He may have to decide what evidence is then available or is legally admissible. The question really asks how his lawyer will prove the plea.
>
> ...
>
> Another fundamental rule is that an examination for discovery may seek only facts, not law: Turta v. C.P.R. (1951) 2 W.W.R. (ns) 628, 63102 (Alta.); cf. Curlett v. Can. Fire Ins. Co. [1938] 3 W.W.R. 357 (Alta.). These questions try to evade that rule by forcing the witness to think of the law applicable or relied upon, then use it to perform some operation (selecting facts),and then announce the result.

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

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

> which may themselves be the consequence of the adoption of a certain view of the law are nonetheless questions of fact and may be put on discovery.

[41] Continuing on at para. 27 he stated:

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

[42] A flexible as opposed to an overly rigid approach should be applied to matters of this sort. It is against this backdrop that I view the application of the defendant. I have had an opportunity to review the transcript of the Examination for Discovery and have had an opportunity to place the questions objected to in a proper context. The defendant, in its materials, seeks answers to certain questions. The plaintiff's materials set out the objections raised.

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

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

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

HEARD on the 24th day of April, 2002.
DATED at Edmonton, Alberta this 3rd day of June, 2002.

J.C.Q.B.A.

TAB 5

TAB C

In the Court of Appeal of Alberta

Citation: Deans v. Thachuk, 2005 ABCA 368

Date: 20051027
Docket: 0403-0156-AC
Registry: Edmonton

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)

The Court:

The Honourable Chief Justice Catherine Fraser
The Honourable Madam Justice Anne Russell
The Honourable Mr. Justice Douglas Sirrs

Memorandum of Judgment

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

Memorandum of Judgment

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 (2nd 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 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." However, 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.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.

Appeal heard on May 9, 2005

Memorandum filed at Edmonton, Alberta
this 27th day of October, 2005

Fraser, C.J.A.

Russell J.A.

Sirrs J.

Appearances:

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)

TAB 6

Little Sisters Book and Art Emporium *Appellant*

v.

Commissioner of Customs and Revenue and Minister of National Revenue *Respondents*

and

Attorney General of Ontario, Attorney General of British Columbia, Canadian Bar Association, Egale Canada Inc., Sierra Legal Defence Fund and Environmental Law Centre *Interveners*

Little Sisters Book and Art Emporium *Appelante*

c.

Commissaire des Douanes et du Revenu et ministre du Revenu national *Intimés*

et

Procureur général de l'Ontario, procureur général de la Colombie-Britannique, Association du Barreau canadien, Egale Canada Inc., Sierra Legal Defence Fund et Environmental Law Centre *Intervenants*

INDEXED AS: LITTLE SISTERS BOOK AND ART EMPORIUM *v.* CANADA (COMMISSIONER OF CUSTOMS AND REVENUE)

Neutral citation: 2007 SCC 2.

File No.: 30894.

2006: April 19; 2007: January 19.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

RÉPERTORIÉ : LITTLE SISTERS BOOK AND ART EMPORIUM *c.* CANADA (COMMISSAIRE DES DOUANES ET DU REVENU)

Référence neutre : 2007 CSC 2.

N° du greffe : 30894.

2006 : 19 avril; 2007 : 19 janvier.

Présents : La juge en chef McLachlin et les juges Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron et Rothstein.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Civil procedure — Costs — Advance costs — Whether requirements to award advance costs met.

L is a small corporation that operates a bookstore catering to the lesbian and gay community. Book sales represent 30 to 40 percent of its business. L, which still struggles to make a profit, is engaged in litigation to gain the release of four books prohibited by Customs on the basis that they were obscene. Frustrated after years of court battles with Customs over similar issues, L chose to enlarge the scope of the litigation and to pursue a broad inquiry into Customs' practices. When this litigation began, L had already fought a protracted legal battle against Customs, which culminated in this Court's decision in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69 ("*Little Sisters No. 1*"), where it held that Customs' practices at the time infringed ss. 2(*b*) and 15 of the *Canadian Charter of Rights and Freedoms*. L

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Procédure civile — Dépens — Provisions pour frais — Les conditions requises pour accorder une provision pour frais sont-elles remplies?

L est une petite société qui exploite une librairie desservant la communauté gaie et lesbienne. Les ventes de livres représentent 30 à 40 pour 100 de ses activités. L, qui parvient encore mal à réaliser un bénéfice, a engagé des procédures pour obtenir le dédouanement de quatre livres que les Douanes ont interdits pour le motif qu'ils étaient obscènes. Irritée après avoir passé des années à affronter les Douanes devant les tribunaux relativement à des questions similaires, L a décidé d'élargir la portée du litige et de procéder à une vaste enquête sur les pratiques des Douanes. Lorsque le présent litige a pris naissance, L avait déjà livré aux Douanes une longue bataille judiciaire qui a abouti à l'arrêt *Little Sisters Book and Art Emporium c. Canada (Ministre de la Justice)*, [2000] 2 R.C.S. 1120, 2000 CSC 69 (« *Little Sisters n° 1* »), dans lequel notre Cour a décidé que les

"efficiency" question was significantly less important to the public than the question of whether the problems were addressed at all (para. 57).

Finally, Thackray J.A. pointed out that Bennett J. had not considered whether the present litigation could be defined as "special" enough to merit advance costs, as opposed to simply being important (para. 60). Freedom of expression, he stated, is always of public interest, but not every freedom of expression case can satisfy the public importance requirement. In the present case, it was worth considering the fact that the communities on which the appellant's claim would have the greatest impact did not view this case as sufficiently important to undertake funding it (para. 63). What is more, Thackray J.A. was hesitant about spending public funds on litigation that could result in a significant award for the applicant (para. 62).

In all, the Court of Appeal concluded that the appellant's claim was not of sufficient significance that the public purse should be obligated to help it move forward. Thackray J.A. concluded that "the public has not appointed Little Sisters to this role" as a watchdog, and he was "not satisfied that it is necessary for Little Sisters to be the instrument of reform of Customs" (paras. 72 and 74). Although recognizing the deference owed to Bennett J., the court nonetheless felt that this was an appropriate circumstance to find that the trial judge had erred (para. 66). Accordingly, it set aside her order for advance costs.

4. Analysis

4.1 *Rule in Okanagan*

Okanagan concerned logging rights of four Indian bands on Crown land in British Columbia. These bands had begun logging in order to raise funds for housing and desperately needed social

les problèmes relevés dans l'arrêt *Little Sisters n^o^ 1* avaient tous éventuellement été résolus. La question de « l'efficacité » était beaucoup moins importante pour le public que celle de savoir si les problèmes étaient un tant soit peu résolus (par. 57).

30 Enfin, le juge Thackray a souligné que la juge Bennett ne s'était pas demandé si le présent litige pouvait être qualifié de suffisamment « particulier » pour justifier une provision pour frais, au lieu de simplement important (par. 60). La liberté d'expression, a-t-il rappelé, est toujours d'intérêt public, mais les affaires où il est question de liberté d'expression ne peuvent pas toutes satisfaire à l'exigence d'importance pour le public. En l'espèce, il convenait de tenir compte du fait que les communautés qui seraient les plus touchées par la demande de l'appelante ne considéraient pas que la présente affaire était suffisamment importante pour qu'elles contribuent à son financement (par. 63). Qui plus est, le juge Thackray hésitait à affecter des deniers publics à un litige à l'issue duquel le demandeur pourrait se voir accorder un montant considérable (par. 62).

31 Dans l'ensemble, la Cour d'appel a statué que la demande de l'appelante ne revêtait pas une importance suffisante pour que le trésor public soit tenu de l'aider à suivre son cours. Le juge Thackray a conclu que [TRADUCTION] « le public n'a pas confié à Little Sisters ce rôle » de surveillance, et il n'était pas « convaincu que Little Sisters doit être l'instrument de réforme des Douanes » (par. 72 et 74). Tout en reconnaissant la nécessité de faire montre de déférence envers la juge Bennett, la cour a néanmoins estimé qu'il convenait, en l'espèce, de conclure que la juge de première instance avait commis erreur (par. 66). La cour a donc annulé son ordonnance accordant une provision pour frais.

4. Analyse

4.1 *La règle de l'arrêt Okanagan*

32 L'affaire *Okanagan* portait sur le droit de quatre bandes indiennes à l'exercice d'activités d'exploitation forestière sur des terres publiques en Colombie-Britannique. Ces bandes avaient

services. Contending that they had no right to do so, the Minister of Forests served them with stop-work orders and then commenced proceedings to enforce the orders. The bands tried to prevent the matter from going to trial, seeking to have it determined summarily by arguing that it would be impossible for them to finance a full trial.

commencé l'exploitation forestière dans le but de financer la construction de maisons ainsi que des services sociaux dont elles avaient désespérément besoin. Prétendant qu'elles n'avaient aucun droit à cet égard, le ministre des Forêts leur a signifié des ordonnances de cessation des travaux et a ensuite introduit une instance afin de les faire respecter. Les bandes ont tenté d'éviter que l'affaire fasse l'objet d'un procès et ont demandé qu'elle soit tranchée par procédure sommaire pour le motif qu'il leur serait impossible de financer un procès complet.

33 An exceptional convergence of factors occurred in *Okanagan*. At the individual level, the case was of the utmost importance to the bands. They were caught in a grave predicament: the costs of the litigation were more than they could afford, especially given pressing needs like housing; yet a failure to assert their logging rights would seriously compromise those same needs. On a broader level, the case raised aboriginal rights issues of great public importance. There was evidence that the land claim advanced by the bands had *prima facie* merit, but the courts had yet to decide on the precise mechanism for advancing such claims — the fundamental issue of general importance had not been resolved by the courts in other litigation. However the case was ultimately decided, it was in the public interest to have the matter resolved. For both the bands themselves and the public at large, the litigation could not, therefore, simply be abandoned. In these exceptional circumstances, this Court held that the public's interest in the litigation justified a structured advance costs order insofar as it was necessary to have the case move forward.

L'affaire *Okanagan* réunissait un ensemble exceptionnel de facteurs. D'un point de vue individuel, elle revêtait une importance capitale pour les bandes, qui se trouvaient dans une situation très difficile : les coûts du litige dépassaient ce qu'elles pouvaient se permettre, compte tenu surtout de leurs besoins urgents, notamment en matière de logement; l'omission de faire valoir leurs droits d'exercer des activités d'exploitation forestière compromettrait d'ailleurs gravement leurs chances de répondre à ces mêmes besoins. D'un point de vue général, l'affaire soulevait des questions de droits ancestraux d'une grande importance pour le public. Des éléments de preuve indiquaient que la revendication territoriale présentée par les bandes était fondée à première vue, mais les tribunaux n'avaient encore établi aucun mécanisme précis de présentation de ces revendications — la question fondamentale d'importance générale n'avait pas été tranchée par les tribunaux dans le cadre d'une autre instance. Sans égard à l'issue de l'affaire, il était dans l'intérêt du public qu'elle soit tranchée. Donc, tant pour les bandes elles-mêmes que pour le public en général, il n'était simplement pas possible d'abandonner l'instance. Dans ces circonstances exceptionnelles, notre Cour a jugé que l'intérêt du public dans le litige justifiait une ordonnance structurée de provision pour frais dans la mesure où il était nécessaire de permettre à l'affaire de suivre son cours.

34 In essence, *Okanagan* was an evolutionary step, but not a revolution, in the exercise of the courts' discretion regarding costs. As was explained in that case, the idea that costs awards can be used as a powerful tool for ensuring that the justice system functions fairly and efficiently was not a

Essentiellement, l'arrêt *Okanagan* constituait une phase d'évolution — et non une révolution — de l'exercice du pouvoir discrétionnaire que les tribunaux possèdent en matière de dépens. Comme l'a expliqué cet arrêt, on savait depuis longtemps que l'attribution de dépens peut constituer un

novel one. Policy goals, like discouraging — and thus sanctioning — misconduct by a litigant, are often reflected in costs awards: see M. M. Orkin, *The Law of Costs* (2nd ed. (loose-leaf)), vol. I, at § 205.2(2). Nevertheless, the general rule based on principles of indemnity, i.e., that costs follow the cause, has not been displaced. This suggests that policy and indemnity rationales can co-exist as principles underlying appropriate costs awards, even if "[t]he principle that a successful party is entitled to his or her costs is of long standing, and should not be departed from except for very good reasons": Orkin, at p. 2-39. This framework has been adopted in the law of British Columbia by establishing the "costs follow the cause" rule as a default proposition, while leaving judges room to exercise their discretion by ordering otherwise: see r. 57(9) of the Supreme Court of British Columbia *Rules of Court*, B.C. Reg. 221/90.

Okanagan did not establish the access to justice rationale as the paramount consideration in awarding costs. Concerns about access to justice must be considered with and weighed against other important factors. Bringing an issue of public importance to the courts will not automatically entitle a litigant to preferential treatment with respect to costs: *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69; *Office and Professional Employees' International Union, Local 378 v. British Columbia (Hydro and Power Authority)*, [2005] B.C.J. No. 9 (QL), 2005 BCSC 8; *MacDonald v. University of British Columbia* (2004), 26 B.C.L.R. (4th) 190, 2004 BCSC 412. By the same token, however, a losing party that raises a serious legal issue of public importance will not necessarily bear the other party's costs: see, e.g., *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4, at para. 69; *Valhalla Wilderness Society v. British Columbia (Ministry of Forests)* (1997), 4 Admin. L.R. (3d)

moyen puissant d'assurer le fonctionnement équitable et efficace du système de justice. L'attribution de dépens est souvent liée à des objectifs d'intérêt général, comme ceux visant à décourager — et, partant, à punir — l'inconduite de la part d'un plaideur : voir M. M. Orkin, *The Law of Costs* (2e éd. (feuilles mobiles)), vol. I, § 205.2(2). Néanmoins, la règle générale fondée sur les principes d'indemnisation, selon laquelle les dépens suivent l'issue de la cause, n'a pas été abrogée. Cela indique que les justifications d'intérêt général et en matière d'indemnisation peuvent coexister en tant que principes sous-jacents d'une attribution convenable de dépens, même si [TRADUCTION] « [l]e principe voulant que la partie qui obtient gain de cause ait droit à ses dépens existe depuis longtemps et ne devrait faire l'objet d'une dérogation que pour de très bonnes raisons » (Orkin, p. 2-39). Le droit de la Colombie-Britannique a repris ce cadre en adoptant comme solution par défaut la règle selon laquelle « les dépens suivent l'issue de la cause », tout en permettant aux juges d'exercer leur pouvoir discrétionnaire de rendre une ordonnance différente : voir par. 57(9) des *Rules of Court* de la Cour suprême de la Colombie-Britannique, B.C. Reg. 221/90.

35 L'arrêt *Okanagan* n'a pas établi que le principe d'accès à la justice constitue désormais la considération primordiale en matière d'attribution de dépens. Les préoccupations concernant l'accès à la justice doivent être examinées et soupesées en fonction d'autres facteurs importants. Le fait de saisir les tribunaux d'une question d'importance pour le public ne signifie pas que le plaideur a automatiquement droit à un traitement préférentiel en matière de dépens : *Succession Odhavji c. Woodhouse*, [2003] 3 R.C.S. 263, 2003 CSC 69; *Office and Professional Employees' International Union, Local 378 c. British Columbia (Hydro and Power Authority)*, [2005] B.C.J. No. 9 (QL), 2005 BCSC 8; *MacDonald c. University of British Columbia* (2004), 26 B.C.L.R. (4th) 190, 2004 BCSC 412. Du même coup, cependant, la partie déboutée qui soulève une question de droit sérieuse et importante pour le public ne doit pas toujours supporter les dépens de l'autre partie : voir, par exemple, *Canadian Foundation for Children,*

120 (B.C.S.C.). Each case must be considered on its merits, and the consequences of an award for each party must be weighed seriously: see *Sierra Club of Western Canada v. British Columbia (Chief Forester)* (1994), 117 D.L.R. (4th) 395 (B.C.S.C.), at pp. 406-7, aff'd (1995), 126 D.L.R. (4th) 437 (B.C.C.A.).

36 *Okanagan* was a step forward in the jurisprudence on advance costs — restricted until then to family, corporate and trust matters — as it made it possible, in a public law case, to secure an advance costs order in special circumstances related to the public importance of the issues of the case (*Okanagan*, at para. 38). In other words, though now permissible, public interest advance costs orders are to remain special and, as a result, exceptional. These orders must be granted with caution, as a last resort, in circumstances where the need for them is clearly established. The foregoing principles could not yield any other result. If litigants raising public interest issues will not always avoid adverse costs awards at the conclusion of their trials, it can only be rarer still that they could benefit from advance costs awards. An application for advance costs may be entertained only if a litigant establishes that it is impossible to proceed with the trial and await its conclusion, and if the court is in a position to allocate the financial burden of the litigation fairly between the parties.

37 The nature of the *Okanagan* approach should be apparent from the analysis it prescribes for advance costs in public interest cases. A litigant must convince the court that three absolute requirements are met (at para. 40):

1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other

Youth and the Law c. Canada (Procureur général), [2004] 1 R.C.S. 76, 2004 CSC 4, par. 69; *Valhalla Wilderness Society c. British Columbia (Ministry of Forests)* (1997), 4 Admin. L.R. (3d) 120 (C.S.C.-B.). Chaque cas est un cas d'espèce où il faut soupeser sérieusement les conséquences d'une attribution de dépens pour chacune des parties : voir *Sierra Club of Western Canada c. British Columbia (Chief Forester)* (1994), 117 D.L.R. (4th) 395 (C.S.C.-B.), p. 406-407, conf. par (1995), 126 D.L.R. (4th) 437 (C.A.C.-B.).

L'arrêt *Okanagan* a fait évoluer la jurisprudence relative aux provisions pour frais — jusqu'alors limitée aux affaires concernant la famille, les sociétés et les fiducies — puisqu'il a permis, dans une affaire de droit public, d'obtenir une ordonnance accordant une provision pour frais dans des circonstances particulières tenant à l'importance des questions en jeu pour le public (*Okanagan*, par. 38). En d'autres termes, bien qu'elles soient maintenant permises, les ordonnances accordant une provision pour frais pour des raisons d'intérêt public doivent demeurer spéciales et, de ce fait, exceptionnelles. Elles doivent être rendues avec circonspection, en dernier recours et dans des circonstances où leur nécessité est clairement établie. Les principes qui précèdent ne sauraient donner lieu à un résultat différent. Les plaideurs qui soulèvent des questions d'intérêt public n'échappent pas toujours à une attribution de dépens défavorable à l'issue de leur procès, mais il est encore plus rare qu'ils puissent bénéficier d'une provision pour frais. Une demande de provision pour frais ne peut être accordée que si le plaideur établit l'impossibilité d'ester en justice et d'attendre l'issue du procès, et si le tribunal est en mesure de répartir équitablement entre les parties le fardeau financier de l'instance.

La nature de la démarche suivie dans l'arrêt *Okanagan* devrait se dégager de l'analyse qu'il prescrit relativement à la provision pour frais dans les affaires d'intérêt public. Le plaideur doit convaincre le tribunal que trois conditions absolues sont remplies (par. 40) :

1. La partie qui demande une provision pour frais n'a véritablement pas les moyens de payer les frais

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.

In analysing these requirements, the court must decide, with a view to all the circumstances, whether the case is sufficiently special that it would be contrary to the interests of justice to deny the advance costs application, or whether it should consider other methods to facilitate the hearing of the case. The discretion enjoyed by the court affords it an opportunity to consider all relevant factors that arise on the facts.

It is only a "rare and exceptional" case that is special enough to warrant an advance costs award: *Okanagan*, at para. 1. The standard was indeed intended to be a high one, and although no rigid test can be applied systematically to determine whether a case is "special enough", some observations can be made. As Thackray J.A. pointed out, it was in failing to verify whether the circumstances of this case were "exceptional" enough that the trial judge committed an error in law.

First, the injustice that would arise if the application is not granted must relate both to the individual applicant and to the public at large. This means that a litigant whose case, however compelling it may be, is of interest only to the litigant will be denied an advance costs award. It does not mean, however, that every case of interest to the public will satisfy the test. The justice system must not become a proxy for the public inquiry process, swamped with actions launched by test plaintiffs

occasionnés par le litige et ne dispose réalistement d'aucune autre source de financement lui permettant de soumettre les questions en cause au tribunal — bref, elle serait incapable d'agir en justice sans l'ordonnance.

2. La demande vaut *prima facie* d'être instruite, c'est-à-dire qu'elle paraît au moins suffisamment valable et, de ce fait, il serait contraire aux intérêts de la justice que le plaideur renonce à agir en justice parce qu'il n'en a pas les moyens financiers.

3. Les questions soulevées dépassent le cadre des intérêts du plaideur, revêtent une importance pour le public et n'ont pas encore été tranchées.

En analysant ces conditions, le tribunal doit décider, eu égard à toutes les circonstances, si l'affaire est si particulière qu'il serait contraire aux intérêts de la justice de rejeter la demande de provision pour frais, ou s'il devrait envisager d'autres moyens de faciliter l'audition de l'affaire. Le pouvoir discrétionnaire du tribunal lui permet de tenir compte de tous les facteurs pertinents qui émanent des faits.

38 Seule une affaire « rar[e] et exceptionell[e] », qui est suffisamment particulière, peut justifier l'attribution d'une provision pour frais (*Okanagan*, par. 1). Cette norme se voulait sûrement élevée et, bien qu'aucun critère rigide ne puisse être appliqué systématiquement pour décider si une affaire est « suffisamment particulière », il est possible de formuler certaines observations. Comme l'a souligné le juge Thackray, c'est en omettant de vérifier si les circonstances de la présente affaire étaient suffisamment « exceptionnelles » que la juge de première instance a commis une erreur de droit.

39 Premièrement, l'injustice qui découlerait du rejet de la demande doit concerner à la fois le demandeur personnellement et le public en général. Cela signifie que le plaideur dont l'affaire, aussi impérieuse qu'elle puisse être, n'intéresse que lui se verra refuser la provision pour frais. Toutefois, cela ne signifie pas que toute affaire d'intérêt public satisfera à ce critère. Le système de justice ne doit pas tenir lieu de processus d'enquête publique et être inondé d'actions intentées par des demandeurs et des groupes

and public interest groups. As compelling as access to justice concerns may be, they cannot justify this Court unilaterally authorizing a revolution in how litigation is conceived and conducted.

40 Second, the advance costs award must be an exceptional measure; it must be in the interests of justice that it be awarded. Therefore, the applicant must explore all other possible funding options. These include, but are not limited to, public funding options like legal aid and other programs designed to assist various groups in taking legal action. An advance costs award is neither a substitute for, nor a supplement to, these programs. An applicant must also be able to demonstrate that an attempt, albeit unsuccessful, has been made to obtain private funding through fundraising campaigns, loan applications, contingency fee agreements and any other available options. If the applicant cannot afford all costs of the litigation, but is not impecunious, the applicant must commit to making a contribution to the litigation. Finally, different kinds of costs mechanisms, like adverse costs immunity, should also be considered. In doing so, courts must be careful not to assume that a creative costs award is merited in every case; such an award is an exceptional one, to be granted in special circumstances. Courts should remain mindful of all options when they are called upon to craft appropriate orders in such circumstances. Also, they should not assume that the litigants who qualify for these awards must benefit from them absolutely. In the United Kingdom, where costs immunity (or "protective orders") can be ordered in specified circumstances, the order may be given with the caveat that the successful applicant cannot collect anything more than modest costs from the other party at the end of the trial: see *R. (Corner House Research) v. Secretary of State for Trade and Industry*, [2005] 1 W.L.R. 2600, [2005] EWCA Civ 192, at para. 76. We agree with this nuanced approach.

de défense de l'intérêt public qui souhaitent établir un précédent. Aussi impérieuses qu'elles puissent être, les préoccupations concernant l'accès à la justice ne sauraient justifier notre Cour d'autoriser unilatéralement une révolution dans la planification et le déroulement d'une action en justice.

Deuxièmement, il importe que la provision pour frais demeure une mesure exceptionnelle; il doit être conforme aux intérêts de la justice de l'accorder. Par conséquent, le demandeur doit étudier toutes les autres possibilités de financement, ce qui inclut, sans y être limité, les sources de financement public telles que l'aide juridique et les autres programmes destinés à aider divers groupes à ester en justice. Une provision pour frais ne représente ni un substitut ni un complément de ces programmes. Le demandeur doit également pouvoir démontrer qu'il a tenté, mais en vain, d'obtenir du financement privé au moyen d'une levée de fonds, d'une demande de prêt, d'une convention d'honoraires conditionnels et de toute autre source disponible. Le demandeur qui n'a pas les moyens de payer tous les frais du litige, mais qui n'est pas dépourvu de ressources, doit s'engager à fournir une contribution. Enfin, il y a également lieu d'envisager divers types de mécanismes en matière de dépens, telle l'exemption de dépens en faveur de la partie adverse. Ce faisant, les tribunaux doivent se garder de présumer que l'exercice de créativité dans l'attribution de dépens se justifie toujours; cette mesure reste exceptionnelle et doit être prise dans des circonstances particulières. Les tribunaux devraient garder à l'esprit toutes les possibilités lorsqu'ils sont appelés à concevoir les ordonnances appropriées dans ces circonstances. Ils ne devraient pas non plus présumer que les plaideurs qui remplissent les conditions requises pour se voir attribuer ces sommes doivent absolument en bénéficier. Au Royaume-Uni, où il est possible d'accorder une exemption de dépens (ou des « ordonnances préventives ») dans des circonstances précises, l'ordonnance peut être assortie de la condition que la partie qui l'obtient ne pourra obtenir de l'adversaire que des dépens modestes à l'issue du procès : voir *R. (Corner House Research) c. Secretary of State for Trade and Industry*, [2005] 1 W.L.R. 2600, [2005] EWCA Civ 192, par. 76. Nous souscrivons à cette interprétation nuancée.

Third, no injustice can arise if the matter at issue could be settled, or the public interest could be satisfied, without an advance costs award. Again, we must stress that advance costs orders are appropriate only as a last resort. In *Okanagan*, the bands tried, before seeking an advance costs order, to resolve their disputes by avoiding a trial altogether. Likewise, courts should consider whether other litigation is pending and may be conducted for the same purpose, without requiring an interim order of costs. Courts should also be mindful to avoid using these orders in such a way that they encourage purely artificial litigation contrary to the public interest.

Troisièmement, aucune injustice ne sera créée s'il est possible de régler l'affaire en cause ou de tenir compte de l'intérêt public sans accorder une provision pour frais. Là encore, nous devons souligner que les ordonnances de provision pour frais ne sont indiquées qu'en dernier recours. Dans l'affaire *Okanagan*, les bandes avaient tenté, avant de solliciter une provision pour frais, de résoudre leurs différends en évitant purement et simplement la tenue d'un procès. De même, les tribunaux devraient vérifier si une autre affaire visant les mêmes fins est en instance et peut se dérouler sans qu'il soit nécessaire de rendre une ordonnance accordant une provision pour frais. Ils devraient aussi se garder de recourir à ces ordonnances de manière à encourager les litiges purement artificiels qui sont contraires à l'intérêt public.

Finally, the granting of an advance costs order does not mean that the litigant has free rein. On the contrary, when the public purse — or another private party — takes on the burden of an advance costs award, the litigant must relinquish some manner of control over how the litigation proceeds. The litigant cannot spend the opposing party's money without scrutiny. The benefit of such funding does not imply that a party can, at will, multiply hours of preparation, add expert witnesses, engage in every available proceeding, or lodge every conceivable argument. A definite structure must be imposed or approved by the court itself, as it alone bears the responsibility for ensuring that the award is workable.

Enfin, l'attribution d'une provision pour frais ne donne pas pour autant carte blanche au plaideur. Au contraire, lorsque le trésor public — ou une autre partie privée — supporte une provision pour frais, le plaideur doit renoncer à exercer un certain contrôle sur la façon dont se déroule l'instance. Il ne peut dépenser l'argent de la partie adverse de manière incontrôlée. Ce type de financement ne signifie pas que la partie qui en bénéficie peut, à son gré, multiplier les heures de préparation, ajouter des témoins experts, recourir à toute procédure disponible ou avancer n'importe quel argument imaginable. Le tribunal lui-même doit prescrire ou approuver une structure précise, puisqu'il assume la responsabilité de vérifier le caractère réaliste du montant accordé.

For example, the court should set limits on the chargeable rates and hours of legal work, closely monitor the parties' adherence to its dictates, and cap the advance costs award at an appropriate global amount. It should also be sensitive to the reality that work often expands to fit the available resources and that the "maximum" amounts contemplated by a court will almost certainly be reached. As well, the possibility of setting the advance costs award off against damages actually collected at the end of the trial should be contemplated. In determining the quantum of the award, the court should remain aware that the purpose of

Par exemple, le tribunal devrait limiter les tarifs et les heures de travail juridique pouvant être facturés, surveiller de près le respect de ses prescriptions par les parties et plafonner la provision pour frais à un montant global convenable. Il devrait également tenir compte du fait que la somme de travail s'ajuste souvent aux ressources disponibles et qu'il est presque certain que le montant « maximal » prévu par le tribunal sera atteint. De même, il devrait envisager la possibilité de déduire le montant de la provision pour frais des dommages-intérêts obtenus à l'issue du procès. Lorsqu'il détermine le montant de la provision pour frais, le tribunal ne doit pas

these orders is to restore some balance between litigants, not to create perfect equality between the parties. Legislated schemes like legal aid and other programs designed to assist various groups in taking legal action do not purport to create equality among litigants, and there is no justification for advance costs awards placing successful applicants in a more favourable position. An advance costs award is meant to provide a basic level of assistance necessary for the case to proceed.

44 A court awarding advance costs must be guided by the condition of necessity. For parties with unequal financial resources to face each other in court is a regular occurrence. People with limited means all too often find themselves discouraged from pursuing litigation because of the cost involved. Problems like this are troubling, but they do not normally trigger advance costs awards. We do not mean to minimize their unfairness. On the contrary, we believe they are sufficiently serious that this Court cannot purport to solve them all through the mechanism of advance costs awards. Courts should not seek on their own to bring an alternative and extensive legal aid system into being. That would amount to imprudent and inappropriate judicial overreach.

4.2 *Applying the Rule in Okanagan to the Facts of This Appeal*

45 The appellant has asked this Court to award it advance costs with respect to two separate issues it raises in its litigation against Customs. The Four Books Appeal concerns Customs' prohibition of four books imported by the appellant for sale in its store. The Systemic Review, on the other hand, involves a broad investigation of Customs' practices relating to obscenity prohibitions.

46 We will first consider the merit of these claims, and will then discuss their public importance. We

oublier que ces ordonnances visent à rétablir un certain équilibre entre les parties et non à créer une égalité parfaite entre elles. Les mécanismes établis par voie législative comme l'aide juridique et les autres programmes destinés à aider divers groupes à ester en justice ne sont d'ailleurs pas de nature à mettre les parties sur un pied d'égalité, et rien ne justifie que l'attribution d'une provision pour frais place la partie qui l'obtient dans une situation plus favorable. La provision pour frais vise à fournir l'aide minimale nécessaire pour que l'affaire suive son cours.

L'état de nécessité doit guider le tribunal qui accorde une provision pour frais. Il arrive régulièrement que des parties ne disposant pas des mêmes ressources financières s'affrontent devant un tribunal. Des personnes aux moyens limités se voient trop souvent dissuadées de poursuivre l'instance en raison des coûts qui s'y rattachent. De tels problèmes sont préoccupants, mais ils ne donnent pas normalement lieu à l'attribution d'une provision pour frais. Nous ne voulons pas minimiser l'iniquité qu'ils créent. Au contraire, nous croyons que ces problèmes sont trop graves pour que notre Cour puisse prétendre les résoudre tous au moyen de la provision pour frais. Les tribunaux ne devraient pas chercher, de leur propre initiative, à mettre sur pied un autre système complet d'aide juridique. Cela constituerait un exemple d'activisme judiciaire imprudent et malencontreux.

4.2 *Application de la règle de l'arrêt Okanagan aux faits du présent pourvoi*

L'appelante a demandé à notre Cour de lui accorder une provision pour frais relativement à deux questions distinctes qu'elle soulève dans son action contre les Douanes. L'appel concernant les quatre livres porte sur l'interdiction des Douanes visant les quatre livres que l'appelante a importés pour les vendre dans son magasin. Par contre, la révision systémique met en cause une vaste enquête menée sur les pratiques des Douanes en matière d'interdiction pour cause d'obscénité.

Nous examinerons d'abord le bien-fondé de ces demandes et nous analyserons ensuite l'importance