September 9, 2013

Advance Costs and Trusts: *Little Sisters* and *Okanagan* Distinguished

Written by: MaryWyatt Sindlinger

Case commented on: *1985 Sawridge Trust v Alberta (Public Trustee)*, 2013 ABCA 226

The Alberta Court of Appeal recently upheld an award of advance costs originally granted in *1985 Sawridge Trust v Alberta (Public Trustee)*, 2013 ABCA 226. In so doing, the Court of Appeal distinguished *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71, [2003] 3 SCR 371 [*Okanagan*] and *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 SCR 38 [*Little Sisters (No.2)*] concluding that the strict requirements of *Little Sisters* and *Okanagan* did not apply in the unique, non-adversarial circumstances of *Sawridge Trust*.

Judicial History

In April, 1985, the 1985 Sawridge Trust (the "Trust") was established to hold certain properties in trust for members of the Sawridge First Nation. The current value of the Trust is approximately $70,000,000.00. The beneficiaries of the Trust were defined as "all persons who qualified as a member of the Sawridge First Nation pursuant to the provisions of the *Indian Act* as they existed on April 15, 1982". The Trust was created in anticipation of impending changes to the *Indian Act*, RSC 1985, c. I-5 which opened up membership in the Sawridge First Nation to Aboriginal women and their children who had previously lost their Indian status and band membership through marriage to a non-Indian. The definition of beneficiaries would have excluded the reinstated women and their descendants from the Trust.

The Trustees now want to distribute the assets of the Trust. They recognize that the definition of "beneficiaries" is potentially discriminatory and, therefore, seek to redefine beneficiary to mean the present members of the Sawridge First Nation.

The Trustees sought the advice and direction of the Court in regard to redefining beneficiaries under the Trust. In the course of the application, it was apparent that no one was representing the minors who may be affected by the alteration to the Trust: both current minor beneficiaries who may be excluded by the change and unidentified minors who may be affected by the change. After being notified of the proceedings, the Public Trustee brought a successful application to be appointed as the litigation representative of the affected minors. The chambers judge awarded the Public Trustee advanced costs from the Trust on a solicitor and own client basis and ordered that

the Public Trustee be exempted from liability for costs to the other participants in the litigation. The Trustees unsuccessfully appealed the chambers decision.

The Court of Appeal

The primary issue on appeal was whether the chambers judge erred in failing to apply the *Little Sisters* criteria for the awarding of advance costs. The appointment of the Public Trustee as litigation representative of the potentially affected minors was not appealed. The Trustees argued that *Little Sisters* and *Okanagan* established that advance interim costs can only be awarded if "the three criteria of impecuniosity, a meritorious case and special circumstances" are established on the evidence and that these criteria were not met in this case (citing *Okanagan* at para 36). As noted in a previous post on ABlawg, these criteria were explained by Justice Binnie in *R v Caron*, 2011 SCC 5, [2011] 1 SCR 78 at para 39 as follows:

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

2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.

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

The Alberta Court of Appeal (Justices Costigan, O'Brien and McDonald) rejected the Trustees' argument and did not apply the *Little Sisters* criteria. The Court stated (at para 17) that the *Little Sisters* criteria are not to be applied rigidly to all awards of advance funding and distinguished *Little Sisters* (and *Okanagan*) on two grounds. First, the Court noted (at paras 18-19) that both *Little Sisters* and *Okanagan* dealt with adversarial situations where an impecunious party sought to sue another private party and sought costs in advance. By contrast, in *Sawridge*, the Public Trustee has not been appointed to sue on anyone's behalf; rather, its mandate is to represent the interests of the potentially affected minor children when the court hears the Trustees' application for advice and direction. At this point, it is not possible to say what the issues are or whether they will be contentious. All that is known is that the potentially affected minors require independent representation.

Secondly, the Court of Appeal distinguished *Little Sisters* on the basis that *Sawridge* involves trust litigation as opposed to a constitutional challenge (at para 20). As such, the Public Trustee has a well-founded claim for costs as affirmed by the Alberta Court of Appeal in *Deans v Thachuk*, 2005 ABCA 368, at para 43. In *Deans*, the Court of Appeal (citing *Re Buckton,* [1907] 2 Ch 406) recognized three categories of costs in trust litigation the first of which is directly applicable to *Sawridg*e. Where trustees seek the advice and direction of the court as to the construction or administration of a trust, the costs of all parties necessarily incurred for the benefit of the estate are to be paid from the trust fund.

Given the very different factual contexts, the Court of Appeal held that the application of the three criteria in *Little Sisters* was not required.

The Court of Appeal relied on three sources of jurisdiction in upholding the award for advanced costs. First (at para 23), s. 41 of the *Public Trustee Act,* SA 2004, c. P-44.1 provides that where the Public Trustee is a party to any matter before the court, costs are in the discretion of the court and that the court may order that costs are payable out of the estate. Secondly (at para 24), Rule 2.21 of the *Alberta Rules of Court,* Alta Reg 124/2010, also allows courts to impose terms and conditions upon the appointment of a litigation representative including the awarding of costs. Finally (at para 25), the chambers judge relied on its *parens patriae* jurisdiction to award advance costs in the best interests of the children. Both individually and in combination, these statutory and inherent powers conferred a wide discretion to grant advance costs in the situation before the Court in *Sawridge*.

Comment

Though not specifically stated by the Court, the main basis for not applying *Little Sisters* seems to be that *Sawridge* does not involve public interest litigation in which broad issues of public importance are being advanced by an impecunious individual(s) on behalf of society at large. As such, the factual context of the *Sawridge* case distinguishes it from and limits the application of *Little Sisters*. *Sawridge* reaffirms the court's discretion to award advance costs in certain specific circumstances. This is particularly important in trust situations such as this one where vulnerable individuals are otherwise unrepresented in matters that have a potentially huge financial impact. The trust situation is also relevant in that there is little question that the Public Trustee would be paid its costs at some point: the question is not whether the Public Trustee will be paid its costs from the trust, but whether those costs will be paid in advance or at the end of the application.