2016 ABQB 512
Alberta Court of Queen's Bench

C. (L.) v. Alberta

2016 CarswellAlta 1763, 2016 ABQB 512, [2016] A.W.L.D. 4088, 270 A.C.W.S. (3d) 479, 3 C.P.C. (8th) 392

LC, EMP by her Litigation Representative Phillip Tinkler, DC by his next friend LC and CC by her next friend LC (Plaintiffs) and Her Majesty the Queen In Right of Alberta and Metis Settlements Child & Family Services, Region 10 (Defendants)

Robert A. Graesser J.

Heard: July 29, 2016
Judgment: September 15, 2016
Docket: Edmonton 0703-10836

Counsel: R.P. Lee, for Plaintiffs
P. Barber, G.K. Epp, W.K. Branch, Q.C., for Defendants

Subject: Civil Practice and Procedure; Evidence; Family; Public

Related Abridgment Classifications

Evidence
XVII Affidavits
XVII.7 Miscellaneous

Headnote

Evidence --- Affidavits — Miscellaneous

Action was certified as class proceeding — Plaintiff's litigation guardian swore affidavit in support of application of class counsel for order requiring defendant Crown to pay advance costs to him to conduct class action — Crown applied to strike out exhibits from litigation guardian's affidavit — Application granted in part — Child advocate's report should be struck from affidavit — Report, by itself, was not evidence and attaching it to affidavit, without more, did not make it evidence — Report might be secondary authority in relation to social facts but such authorities did not need to be introduced by affidavit — Materials from other trust litigation should be struck out, as they were not evidence and were irrelevant to issues to be determined on underlying application — Budget did not need to be struck out — Budget was document provided to litigation guardian as client by his lawyer — While much of introduction to budget might be characterized as legal argument, in context here it also provided explanation for how some aspects of budget had been put together.

Table of Authorities

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

British Columbia (Minister of Forests) v. Okanagan Indian Band (2003), 2003 SCC 71, 2003 CarswellBC 3040, 2003 CarswellBC 3041, 313 N.R. 84, [2004] 2 W.W.R. 252, 21 B.C.L.R. (4th) 209, 233 D.L.R. (4th) 577, [2004] 1 C.N.L.R. 7, 189 B.C.A.C. 161, 309 W.A.C. 161, 43 C.P.C. (5th) 1, [2003] 3 S.C.R. 371, 114 C.R.R. (2d) 108, 2003 CSC 71 (S.C.C.) — followed

C. (L.) v. Alberta (2016), 2016 ABQB 491, 2016 CarswellAlta 1678 (Alta. Q.B.) — followed

Daniels v. Canada (Minister of Indian Affairs and Northern Development) (2016), 2016 SCC 12, 2016 CSC 12, 2016 CarswellNat 1037, 2016 CarswellNat 1038, 395 D.L.R. (4th) 381, 481 N.R. 348 (S.C.C.) — considered

Edmonton Police Service v. Alberta (Law Enforcement Review Board) (2013), 2013 ABCA 236, 2013 CarswellAlta 1071, 42 C.P.C. (7th) 293, 58 Admin. L.R. (5th) 100, 553 A.R. 389, 583 W.A.C. 389, 86 Alta. L.R. (5th) 184 (Alta. C.A.) — followed

L. (T.) v. Alberta (Director of Child Welfare) (2006), 2006 ABQB 104, 2006 CarswellAlta 184, 23 C.P.C. (6th) 276, 58 Alta. L.R. (4th) 23, 395 A.R. 327 (Alta. Q.B.) — referred to

Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue Agency) (2007), 2007 SCC 2, 2007 CarswellBC 78, 2007 CarswellBC 79, 215 C.C.C. (3d) 449, 62 B.C.L.R. (4th) 40, 275 D.L.R. (4th) 1, (sub nom. *Little Sisters Book and Art Emporium v. Minister of National Revenue)* 356 N.R. 83, (sub nom. *Little Sisters Book & Art Emporium v. Minister of National Revenue)* 235 B.C.A.C. 1, (sub nom. *Little Sisters Book & Art Emporium v. Minister of National Revenue)* 388 W.A.C. 1, 37 C.P.C. (6th) 1, 53 Admin. L.R. (4th) 153, 150 C.R.R. (2d) 189, (sub nom. *Little Sisters Book & Art Emporium v. Canada)* [2007] 1 S.C.R. 38 (S.C.C.) — considered

Mikisew Cree First Nation v. Canada (2002), 2002 ABCA 110, 2002 CarswellAlta 603, 303 A.R. 43, 273 W.A.C. 43, 2 Alta. L.R. (4th) 1 (Alta. C.A.) — considered

R. c. Caron (2011), 2011 SCC 5, 2011 CarswellAlta 81, 2011 CarswellAlta 82, 14 Admin. L.R. (5th) 30, 97 C.P.C. (6th) 205, [2011] 4 W.W.R. 1, 37 Alta. L.R. (5th) 19, (sub nom. *R. v. Caron)* 411 N.R. 89, (sub nom. *R. v. Caron)* 264 C.C.C. (3d) 320, (sub nom. *R. v. Caron)* 329 D.L.R. (4th) 50, (sub nom. *R. v. Caron)* 499 A.R. 309, (sub nom. *R. v. Caron)* 514 W.A.C. 309, [2011] 1 S.C.R. 78 (S.C.C.) — considered

R. v. Spence (2005), 2005 SCC 71, 2005 CarswellOnt 6824, 2005 CarswellOnt 6825, 33 C.R. (6th) 1, 259 D.L.R. (4th) 474, 202 C.C.C. (3d) 1, 206 O.A.C. 150, 135 C.R.R. (2d) 318, [2005] 3 S.C.R. 458, 342 N.R. 126 (S.C.C.) — considered

Rumley v. British Columbia (2003), 2003 BCSC 234, 2003 CarswellBC 324, 12 B.C.L.R. (4th) 121 (B.C. S.C.) — considered

Winnipeg Child & Family Services (Central Area) v. W. (K.L.) (2000), 2000 SCC 48, 2000 CarswellMan 469, 2000 CarswellMan 470, 191 D.L.R. (4th) 1, [2001] 1 W.W.R. 1, 260 N.R. 203, 10 R.F.L. (5th) 122, 78 C.R.R. (2d) 1, [2000] 2 S.C.R. 519, 150 Man. R. (2d) 161, 230 W.A.C. 161, 2000 CSC 48 (S.C.C.) — considered

1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee) (2012), 2012 ABQB 365, 2012 CarswellAlta 1042, 75 Alta. L.R. (5th) 188, (sub nom. *Twinn v. Public Trustee (Alta.))* 543 A.R. 90, (sub nom. *1985 Sawridge Trust v. Alberta (Public Trustee))* [2013] 3 C.N.L.R. 395 (Alta. Q.B.) — considered

Statutes considered:

Alberta Evidence Act, R.S.A. 2000, c. A-18

Generally — referred to

Rules considered:

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

R. 6.8 — considered

R. 6.11(1) — considered

R. 6.11(1)(f) — considered

R. 13.8 — considered

R. 13.21 — considered

APPLICATION by defendant Crown to strike out exhibits from litigation guardian's affidavit filed in support of class counsel's application for advance costs.

***Robert A. Graesser J.*:**

Introduction

1 This application arises in the context of the class proceeding certified in this matter on July 11, 2016.

2 Mr. Lee brought an application for advance costs in June, 2016 to require Her Majesty the Queen ("HMQ") to pay advance costs to him to conduct the class action. This application on behalf of HMQ arises in their defence of that application.

3 In support of the application, EMP's litigation representative, Phillip Tinkler, swore an affidavit on July 19, 2016.

4 In his affidavit, Mr. Tinkler swears that he has "personal knowledge of the matters to which I depose in this Affidavit except where I state my information to be based on information and belief, in which case I verily believe the same to be true." He goes on to attach:

- Exhibit A: a copy of the July 2016 special report of the Office of the Child and Youth Advocate Alberta titled *Voices for Change: Aboriginal Child Welfare in Alberta*;

- Exhibit B: a budget Mr. Lee has prepared. He goes on to swear as to what he has been told about the budget by Mr. Lee; and

- Exhibits C-N: copies of court documents and correspondence relating to Action No. 1003 14112, an action brought by the Trustees of the 1985 Sawridge Trust.

5 HMQ has applied to strike these Exhibits from Mr. Tinkler's affidavit, arguing that:

- Exhibit A: the Special Report, contravenes Rule 13.8 as Mr. Tinkler has not sworn as to his belief in the truth of the report; that it is not evidence and it is inadmissible hearsay. Further, it is irrelevant to the issues on the application;

- Exhibit B: the budget contains an introduction that is argument and not evidence; and

- Exhibits C-N: the Sawridge Trust documents, are objectionable for the same reasons. They are also barred by Rule 6.11(f) as they are not evidence.

6 EMP responds that the Court has previously ruled that Reports from the Child Advocate could be admitted in evidence, citing an order in this action dated October 20, 2010. That order was granted in an application by HMQ to strike pleadings in this action, which apparently allowed certain portions of these reports into evidence.

7 EMP also responds that in *Daniels v. Canada (Minister of Indian Affairs and Northern Development)*, 2016 SCC 12 (S.C.C.), the Truth and Reconciliation Report (2015) was considered with as an "authority" along with other reports, including various Royal Commission Reports. That decision was an application for declarations in relation to Metis and non-status Indians. EMP also cites *Winnipeg Child & Family Services (Central Area) v. W. (K.L.)*, [2000] 2 S.C.R. 519 (S.C.C.), where the report of the case cites the Third Annual Report of the Child Advocate under "Authors cited" and it is referred to in the decision.

8 EMP argues that it is not necessary for the deponent of an affidavit to state a belief in the truth of the exhibits attached, citing Rule 13.21 which permits records to be exhibited to affidavit.

9 Alternatively, EMP asks that the Court use its curative power to waive any non-compliance or irregularity in Mr. Tinkler's affidavit.

10 With respect to the Sawridge Trust documents, EMP argues that they are relevant to show the reasonableness of the request for advance costs here as opposed to the hourly rates charged to the Public Trustee in that action, citing *1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)*, 2012 ABQB 365 (Alta. Q.B.).

11 With respect to the budget, EMP argues that the manner in which the budget was calculated "is relevant to assist the Court in assessing its reasonableness".

12 EMP as an alternative seeks an order that she be permitted to question the Child Advocate and the Public Trustee "with advanced costs payable to EMP for conducting the questioning."

13 In her Sur-Reply Brief, EMP argues that the materials attached to Mr. Tinkler's affidavit ought to be permitted on the basis stated in *R. v. Spence*, [2005] 3 S.C.R. 458, 2005 SCC 71 (S.C.C.), where Justice Binnie discussed "social fact" evidence. Paras 57 and 58 are quoted, and they bear repeating here:

> 57 "Social fact" evidence has been defined as social science research that is used to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a particular case: see, e.g., C. L'Heureux-Dubé, "Re-examining the Doctrine of Judicial Notice in the Family Law Context" (1994), 26 *Ottawa L. Rev*. 551, at p. 556. As with their better known "legislative fact" cousins, "social facts" are general. They are not specific to the circumstances of a particular case, but if properly linked to the adjudicative facts, they help to explain aspects of the evidence. Examples are the Court's acceptance of the "battered wife syndrome" to explain the wife's conduct in *R. v. Lavallee*, 1990 CanLII 95 (SCC), [1990] 1 S.C.R. 852, or the effect of the "feminization of poverty" judicially noticed in *Moge v. Moge*, 1992 CanLII 25 (SCC), [1992] 3 S.C.R. 813, at p. 853, and of the systemic or background factors that have contributed to the difficulties faced by aboriginal people in both the criminal justice system and throughout society at large in *R. v. Wells*, [2000] 1 S.C.R. 207, 2000 SCC 10 (CanLII), at para. 53, and in *R. v. Gladue*, 1999 CanLII 679 (SCC), [1999] 1 S.C.R. 688, at para. 83.
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> 58 No doubt there is a useful distinction between "adjudicative facts" (the where, when and why of what the accused is alleged to have done) and "social facts" and "legislative facts" which have relevance to the reasoning process and may involve broad considerations of policy: Paciocco and Stuesser, at p. 286. However, simply categorizing an issue as "social fact" or "legislative fact" does not license the court to put aside the need to examine the trustworthiness of the "facts" sought to be judicially noticed. Nor are counsel encouraged to bootleg "evidence in the guise of authorities": *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, 1999 CanLII 640 (SCC), [1999] 3 S.C.R. 845, at para. 3.

Analysis

Child Advocate's Report

14 The underlying application is for advance costs. The law relating to the availability of advance costs is set out mainly in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 (S.C.C.) and *Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue Agency)*, 2007 SCC 2, [2007] 1 S.C.R. 38 (S.C.C.). I dealt with these principles recently in *C. (L.) v. Alberta*, 2016 ABQB 491 (Alta. Q.B.). I will briefly repeat excerpts from those cases and from *R. c. Caron*, 2011 SCC 5 (S.C.C.).

15 The test for advance costs relates to three things, described at para 40 of *Okanagan*:

> 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.

16 There is ultimately a broad discretion for the Courts to exercise in dealing with such applications. *Little Sisters* discusses the broad discretion for the Courts at para 37:

> 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.

17 *R. c. Caron* emphasizes this residual discretion in para 6:

[6] ...Okanagan was based on the strong public interest in obtaining a ruling on a legal issue of exceptional importance that not only transcended the interest of the parties but also would, in the absence of public funding, have failed to proceed to a resolution, creating an injustice...

18 It is particularly noteworthy that *R. v. Spence* warns that the simple characterization of social fact does not address its trustworthiness, which must still be done. As well, counsel should not "bootleg evidence in the guise of authorities".

19 The public interest is a very important aspect of an advance costs application. I recognize that the action that I have certified is not an action on behalf of aboriginal children. Some aboriginal children are undoubtedly among the child plaintiff class. But many others are not aboriginal. This is not an action about how the Government has treated aboriginal children, it is about the Government's failure to follow its legislated obligations to a number of children in care, regardless of their ancestry or background. While the class proceeding clearly seeks damages for the benefit of the individual plaintiffs, there is undoubtedly a public interest aspect to the litigation: considerations of the rule of law and the extent to which the government should be accountable for failure to follow its legislated obligations.

20 *R. v. Spence* is a case about challenges for cause in jury selection. The decision deals with judicial notice and social science evidence:

53 Still less can it be said that such favouritism satisfies the more stringent test of judicial notice adopted by this Court in *Find*, at para. 48, *per* McLachlin C.J.:

Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy.

21 From these decisions, it can be concluded that the Report from the Office of the Child and Youth Advocate is not evidence. The Supreme Court has included similar reports (like the 2015 Truth and Reconciliation Report) under the category of "authors", which is a subset of secondary authorities.

22 A research paper, like a book or journal article, may have some persuasive value but is not of itself evidence of anything. In the area of social fact, it seems to me that if a litigant alleges a particular social fact or set of social facts, it may (as suggested in *R. v. Spence*) consider the extent to which the Court may take judicial notice of the facts alleged. The litigant might also state what he or she understands to be social fact, and cite in support research papers, journal articles or books.

23 Merely attaching a research paper to an affidavit, without more, is not helpful and proves nothing. That invites the question "so what?".

24 In this case, it is not clear at all from Mr. Tinkler's affidavit what the Report is being appended for. What is the point to be made by referring to it? Merely attaching a document, without more, offends Rule 13.18:

13.18(1) An affidavit may be sworn

a) on the basis of personal knowledge, or

b) on the basis of information known to the person swearing the affidavit and that person's belief.

(2) If an affidavit is sworn on the basis of information and belief, the source of the information must be disclosed in the affidavit.

(3) If an affidavit is used in support of an application that may dispose of all or part of a claim, the affidavit must be sworn on the basis of the personal knowledge of the person swearing the affidavit.

25 HMQ cites *Mikisew Cree First Nation v. Canada*, 2002 ABCA 110 (Alta. C.A.), which makes the point that affidavits on information and belief are admissible "only if the affidavit contains statements as to the belief of the deponent" (at para 12).

26 *Rumley v. British Columbia*, 2003 BCSC 234 (B.C. S.C.) deal with the prejudice if reports (there, Ombudsman and Royal Commission reports) were admitted in evidence for the truth of their contents. That position was rejected in that case.

27 EMP refers to Rule 13.21 and says "the document speaks for itself". Rule 13.21 states:

13.21(1) record to be used with an affidavit must be

a) an exhibit to the affidavit, and

b) identified by a certificate of the person administering the oath.

(2) If the total number of pages of an affidavit and attached exhibits is 25 or more,

a) the exhibits must be separated by tabs, and the pages within each tab must be numbered consecutively, or

b) the pages of the affidavit and all exhibits must be consecutively numbered using a single series of numbers.

(3) An exhibit to an affidavit must be attached or appended to the affidavit when the affidavit is filed unless

a) the exhibit is unduly large or bulky and can be adequately identified,

b) the exhibit has already been filed and is identified, or

c) the Court otherwise orders.

28 This Rule does not give documents any evidentiary value by simply attaching them to an affidavit without proof of the truth of their contents. Some things are evidence by themselves, such as statutes and public documents under the *Alberta Evidence Act*, RSA 2000 c A-21.

29 In her argument, EMP points out that HMQ filed an affidavit of Danielle Lorieau which appended as exhibits various pieces of correspondence passing between Mr. Barber and Mr. Lee.

30 As with Mr. Tinkler's affidavit, Ms. Lorieau makes no comment about the truth of the contents of the letters, and I expect that HMQ's response to any criticism of the form of her affidavit would be "the letters speak for themselves".

31 This tit-for-tat argument emphasizes the practice (which appears to have become commonplace) of counsel trying to put their correspondence and records into evidence through their assistants or others, so that counsel is not exposed to cross-examination. The deponent generally has no knowledge of the subject matter and any cross-examination of him or her would be useless.

32 The "old" practice was to have the client swear such an affidavit, with the downside that this made the client subject to cross-examination, and cross-examination on affidavits is not limited by the contents of the affidavit.

33 The current practice is, in my view, a questionable one that essentially makes the lawyer a witness in the cause but with no opportunity to challenge or question what the lawyer wants put forward. It is a practice that I believe should be used sparingly and only with respect to virtually uncontested matters.

34 A further objection by HMQ is that the Report is hearsay and should not be admitted on that basis. I accept that the Report is hearsay. The Child Advocate is not a party to this litigation and he is not subject to cross-examination on his report. But hearsay is not always inadmissible. It may, for example, be used in interlocutory applications.

35 There has been no argument on point, but it seems likely that an application for advance costs would be characterized as "interlocutory". An order for advance costs is an interim order, subject to revision at the end of the trial (or on a change in circumstances or by the terms of the cost order itself).

36 So a hearsay objection on the application is not particularly well-founded. That being said, there is a difference that may be given to the weight afforded to hearsay evidence as opposed to direct evidence. I do not find the hearsay objection to be applicable to this application.

37 Here, I am satisfied that the Child Advocate's report should be struck from Mr. Tinkler's affidavit. It is not evidence, and Mr. Tinkler does not adopt the report in any fashion.

38 It may be that it is relevant in argument as a secondary authority, or to support a "social fact". But simply introducing it in the fashion "now shown to me and marked Exhibit A to my affidavit" is improper.

Sawridge Trust Litigation Materials

39 HMQ has a number of objections to these materials being attached to Mr. Tinkler's affidavit. In addition to the objections raised with respect to the Child Advocate's report, HMQ refers to Rule 6.11(f) concerning the use of materials from other lawsuits.

40 Rule 6.11 provides:

> 6.11(1) When making a decision about an application the Court may consider only the following evidence:
>
> a) affidavit evidence, including an affidavit by an expert;
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> b) a transcript of questioning under this Part;
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> c) the written or oral answers, or both, to questions under Part 5 that may be used under rule 5.31;
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> d) an admissible record disclosed in an affidavit of records under rule 5.6;
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> e) anything permitted by any other rule or by an enactment;
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> f) evidence taken in any other action, but only if the party proposing to submit the evidence gives every other party written notice of that party's intention 5 days or more before the application is scheduled to be heard or considered and obtains the Court's permission to submit the evidence;
>
> g) with the Court's permission, oral evidence, which, if permitted, must be given in the same manner as at trial.

41 Some of the Exhibits are affidavits sworn in the Sawridge Trust litigation. Some of the Exhibits are applications, briefs and correspondence in that action.

42 In my view, HMQ's objections to these materials are well-founded. Mr. Tinkler's affidavit is defective in that he fails to swear as to any evidentiary value for these materials. Additionally, pleadings and briefs are not evidence (see *L. (T.) v. Alberta (Director of Child Welfare)*, 2006 ABQB 104 (Alta. Q.B.)).

43 EMP argues that the materials are relevant to show that the hourly rate sought by Mr. Lee in the advance costs application is reasonable.

44 Thomas J's decision at *1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)*, 2012 ABQB 365 (Alta. Q.B.) imposes no limitations or restrictions on what legal fees are to be reimbursed by the Trust.

45 That decision was affirmed by the Court of Appeal at [*Edmonton Police Service v. Alberta (Law Enforcement Review Board)*] 2013 ABCA 236 (Alta. C.A.). There, the Court of Appeal commented on the absence of limitations at para 29:

> [29] The Trustees submit the chambers judge erred by awarding advance costs without any restrictions or guidelines. In our view, this complaint is premature and an issue not yet canvassed by the court. We would add that an award of advanced costs should not be construed as a blank cheque. The respondent fairly concedes that the solicitor and client costs incurred by it will be subject to oversight and further direction by the court from time to time regarding hourly rates, amounts to be paid in advance and other mechanisms for ensuring that the quantum of costs payable by the Trust is fair and reasonable. The subject order merely establishes that advance costs are payable; the mechanism for obtaining payment and guidelines for oversight has yet to be addressed by the judge dealing with the application for advice and directions.

46 These decisions show that the quantification of advance costs is premature. The points Mr. Lee seeks to make are essentially made by the two Court decisions.

47 My conclusion is that the Sawridge Trust materials are irrelevant such that the other objections to their inclusion in Mr. Tinkler's affidavit need not be dealt with any further.

48 The Sawridge Trust materials shall be struck from Mr. Tinkler's affidavit.

Budget

49 Mr. Tinkler's references to the budget are slightly different than his references to the Report and the Sawridge Trust materials. He includes a paragraph on what Mr. Lee has told him about the budget.

50 The budget itself is detailed as to the anticipated steps and the estimated time for each step. HMQ does not object to the budget being attached, but does object to the "introduction" or preamble, which contains comments on costs in other class proceedings and comments on how he perceives HMQ conducts litigation.

51 HMQ objects to the introduction on the same basis as above: it is attached to the affidavit without any statement by Mr. Tinkler as to the truth of its contents.

52 At the outset of this discussion, I do not see that the proposed budget needed to be put forward by way of an affidavit. It could have been submitted to the Court directly by counsel, just as counsel might submit a draft form of order before the application is heard.

53 It might have been helpful for Mr. Tinkler to opine (as client) on the reasonableness of the budget, and the reasonableness of the basis for the manner in which the budget has been prepared, but that is not the case here.

54 Instead, comments on its reasonableness have been put forward in the budget itself, as well as by Mr. Tinkler swearing as to what he has been told by counsel.

55 The budget is relevant to this application, and the basis for it is also relevant.

56 The supporting information could likely have all been put forward through legal argument. However, here EMP chose to put that information before the Court through Mr. Tinkler.

57 That makes Mr. Tinkler subject to cross-examination on what he has been told, among other things. I express no opinion on the extent to which any solicitor and client privilege has been waived by the contents of Mr. Tinkler's affidavit.

58 While what Mr. Tinkler swears he has been told by Mr. Lee is hearsay, I have already observed that hearsay is not objectionable on an interlocutory application.

59 There are portions of the introduction that could be characterized as inflammatory, but I cannot say that it is irrelevant to consider how an opposing party is likely to conduct litigation in preparing a budget. Something being inflammatory is not of itself objectionable to admissibility. I do not strike the budget, or the introduction to it.

Cross Application to Cross-Examine

60 In her reply brief, EMP seeks as an alternative remedy an order permitting her to question the Child Advocate and the Public Trustee. There is no specific notice of application regarding this request. HMQ is not required to produce the Child Advocate or the Public Trustee for cross-examination. If EMP considers that their evidence is important for the purposes of the application, she can always use Rule 6.8 to question either or both of them.

Conclusion

61 In summary, I conclude that the Child Advocate's Report *Voices for Change: Aboriginal Child Welfare in Alberta* should be struck from Mr. Tinkler's affidavit. The Report by itself is not evidence, and simply appending it to an affidavit without more does not make it evidence. It may be a secondary authority in relation to social facts; such authorities do not need to be introduced by way of affidavit.

62 The materials from the Sawridge Trust litigation should also be struck. Appending these materials without more does not make them evidence. They are also irrelevant to the issues to be determined on the underlying advance costs application.

63 The budget need not be struck. It is a document provided to him as client by his lawyer. He has sworn as to some of what his lawyer has told him about the budget I agree that much of the introduction to the budget might be characterized as legal argument, but in the context here, it also serves as an explanation for how some aspects of the budget has been put together. As noted above, I express no views on the extent to which any solicitor client privilege may have been waived through Mr. Tinkler's affidavit.

Application granted in part.