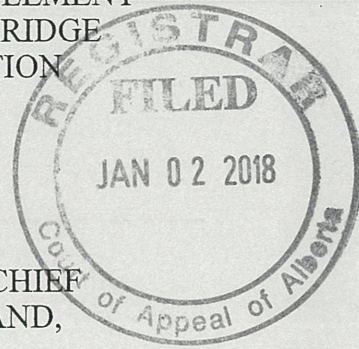


# Fast Track

Action No.: 1103 14112, 1403 04885  
E-File No.: EVQ17SAWRIDGEBAND2  
Appeal No.: 1703-0288AC

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

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 Trust)



IN THE MATTER OF THE SAWRIDGE TRUST CREATED BY CHIEF  
WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND,  
NO. 19 ON AUGUST 15, 1986 (the \*1986 Trust)

AND BETWEEN:

CATHERINE TWINN as Trustee for the 1985 Trust and  
the 1986 TRUST

Applicant

ROLAND TWINN, BERTHA L'HIRONDELLE, EVERETT JUSTIN  
TWIN AND MARGARET WARD, as Trustees for the 1985 Trust  
and the 1986 Trust

Respondents

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## PROCEEDINGS

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Edmonton, Alberta  
October 13, 2017

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1 Proceedings taken in the Court of Queen's Bench of Alberta, Law Courts, Edmonton, Alberta

2

3 October 13, 2017

Morning Session

4

5 The Honourable Mr.

Court of Queen's Bench of Alberta

6 Justice Belzil

7

8 D.D. Risling

For the Applicant

9 C. Osualdini

For the Applicant

10 K.B. Haluschak

For the Respondents

11 D.C.E. Bonora

For the Respondents

12 N. Lachat

Court Clerk

13

14

15 **Discussion**

16

17 THE COURT CLERK:

Order in court.

18

19 THE COURT:

Good morning, please be seated.

20

21 Okay, I want to make some preliminary comments here about what I think is my limited  
22 role this morning. I am very aware and I've spent a number of hours reading these briefs,  
23 that I'm not dealing with the substantive application under 1103 action for advice and  
24 directions and I do not want to in any way impede the decision that will ultimately be  
25 made by one of my colleagues, it won't be me.

26

27 So in my view, we have to keep our discussion this morning focussed on a very narrow  
28 issue and that is the cost issue, whether there's an entitlement to be indemnified for  
29 present and future costs. I see no merit to getting into the various actions that have taken  
30 place thusfar. I pulled the file, there were eight ARC boxes of materials have been  
31 incurred thusfar and I almost had a heart attack when I saw how much has been  
32 expended. As I say, I see no merit to going through these various things. What we have  
33 to focus on is this narrow issue and I'm deliberately keeping my focus very narrow and as  
34 I say, I do not want to stray beyond that because I just don't think it's appropriate.

35

36 All right. I've read the briefs, I've spent a number of hours going through. You can  
37 argue as you see fit, but as I say, I've read them I think we need to get right down to  
38 brass tacks.

39

40 **Submissions by Mr. Risling**

41

1 MR. RISLING: Thank you, Sir. So this morning's application,  
2 myself and my friend Ms. Osualdini, will be making submissions on behalf of Ms. Twinn.  
3 Opposing our application are the four other trustees who sit on trustees on both trusts with  
4 Ms. Twinn and who are represented by Ms. Haluschak.  
5

6 MS. HALUSCHAK: Good morning, Sir.  
7

8 MR. RISLING: Also appearing this morning is Ms. Bonora who  
9 acts for all of the trustees on the advice and directions action.  
10

11 THE COURT: Right.  
12

13 MR. RISLING: I anticipate that during the course of our  
14 presentation this morning, all counsel will likely refer to the 1985 Trust that was created  
15 as the '85 Trust and the '86 Trust that was created in August 1986, as the '86 Trust.  
16

17 THE COURT: Okay.  
18

19 MR. RISLING: My plan for presentation of the materials this  
20 morning was that I would deal initially with the legal principles that I do not believe are  
21 in dispute, but I would like to highlight the positions in relation to the application of these  
22 principles in this circumstance.  
23

24 Ms. Osualdini will then highlight the evidence and facts we believe are significant and I  
25 will address then the legal issues that I believe are in dispute after Ms. Osuladini's  
26 presentation.  
27

28 THE COURT: Excuse me just for one second. Ms. Godrey,  
29 do you need to address something?  
30

31 (OTHER MATTERS SPOKEN TO)  
32

33 MR. RISLING: That's fine, Sir. And to your point, Sir, our  
34 oral argument today will focus on the main issue from our perspective and that is that  
35 Ms. Twinn's position in the advice and directions action is entirely driven by her fiduciary  
36 duty to the beneficiaries.  
37

38 Although much of the evidence contained in the briefs before you is contentious and in  
39 relation to many issues, the parties are very antagonistic, our submission is that really  
40 there isn't much contrary evidence on the main facts that give rise to the request to have  
41 Ms. Twinn indemnified. The test for indemnification is at page 13 of our brief. The

1 Courts have developed a three-part test for indemnification which requires a trustee  
2 seeking indemnification to demonstrate that the expenses are out of an act or within the  
3 scope of the trusteeship's duties and powers, that the expense is reasonable and the trustee  
4 is duty bound.

5  
6 The three-part test does not appear to be an issue between us. The common law governing  
7 when a trustee is entitled to indemnification is clear. Further, it appears that there is  
8 really only one primary fact within the test in the circumstances that I would submit that  
9 is in dispute. The issue appears to be the second arm of the test and that is, whether  
10 Ms. Twinn's decision to act independent of the other four trustees and to attain counsel in  
11 the circumstances is reasonable.

12  
13 THE COURT:

And that was her decision, correct?

14  
15 MR. RISLING:

It was Ms. Twinn's decision.

16  
17 THE COURT:

18 do that?

It could be characterized as her sole decision to

19  
20 MR. RISLING:

Yes, it was her decision.

21  
22 THE COURT:

Right, right.

23  
24 MR. RISLING:

25 So, in addition to the common law, the Trust  
26 Deed itself explicitly addresses the requirement to reimburse expenses by a trustee. The  
27 Trust Deed provides for mandatory indemnification for costs that are incurred in  
28 connected with the Trusts.

29 Our position is that the common law test for indemnification is modified to the extent that  
30 the Trust Deed does not make any reference to the trustees being duty bound. As a result  
31 of the trustees' Trust Deed's mandatory indemnification provision, our position is that the  
32 test for that really is also similar in that we're narrowed to the reasonableness factor in  
33 that decision.

34  
35 I anticipate that during the day, both parties will be drawing the Court's attention to  
36 various events and refer to facts with the purpose of attempting to either convince you  
37 that Ms. Twinn's conduct was reasonable or that it was unreasonable in making that  
38 decision.

39  
40 THE COURT:

But, bear in mind my opening comments.

1 MR. RISLING:

Right.

2  
3 THE COURT: I'm not going down the path of deciding  
4 specific issues in this litigation.

5  
6 MR. RISLING: And I'm not going to invite you to do that or  
7 even really talk about that. Our position is that this application again could be totally  
8 decided based upon the one issue, the reasonableness of Ms. Twinn's decision. In this  
9 regard, we say, that Ms. Twinn's decision was driven by her obligation to protect the  
10 rights of beneficiaries.

11  
12 This evidence is not disputed. Certain beneficiaries would lose their status as  
13 beneficiaries in light of the position being advanced by the other four trustees in relation  
14 to the change in the definition being proposed.

15  
16 THE COURT: But, isn't that ultimately the Court's decision?  
17 The judge who hears the substantive 1103 application, which is not me, is going to make  
18 a decision in the fullness of time about that issue, right?

19  
20 MR. RISLING: Yes.

21  
22 THE COURT: So, I must say I have trouble following the  
23 argument that one would have to rely on one trustee, in this case Ms. Twinn, to advance  
24 argument that in fact will be hashed out in front of that particular judge and he or she will  
25 then make the decision.

26  
27 MR. RISLING: So, our position is that without Ms. Twinn  
28 taking a position, there wouldn't be evidence and argument that Ms. Twinn is bringing to  
29 the table as a trustee without her presence. It's a simple argument, Sir, it's -- Ms. Twinn  
30 recognized at the outset of the action that was commenced that the basis for which she  
31 understood that action for direction -- for advice and direction was being made had  
32 changed and that as a trustee she had to communicate to the Court concerns that she had  
33 with the application, evidence that she had to the application to assist the Court with the  
34 advice and direction application.

35  
36 THE COURT: So there are a pool of people and I wasn't told  
37 in the materials how many people we're talking about; there are a pool of people who  
38 potentially may be found not to be beneficiaries?

39  
40 MR. RISLING: No, Sir, there are a pool of people and I  
41 think -- I can't remember the paragraph in the materials, but I think there's about 400 and



1 some odd people who have a relationship that they could be beneficiaries in trust.

2

3 THE COURT:

Sure but --

4

5 MR. RISLING:

There are about 40 - 50 Band members --

6

7 THE COURT:

Okay.

8

9 MR. RISLING:

-- and so the change in definition would result

10 in potentially a large group of people and for sure a group of people would lose their  
11 status as beneficiary with a change in definition.

12

13 THE COURT:

But isn't that something that the -- I'll call it

14 the substantive judge, if I can use that expression, on the substantive application, whoever  
15 he or she is, will deal with that issue?

16

17 MR. RISLING:

That judge will deal with that issue, but that

18 judge, in my respectful submission, will need to hear from the stakeholders and parties  
19 and particularly the trustees as to the information and evidence they have about that  
20 decision. And so Ms. Twinn, to be clear, is bringing a completely different perspective  
21 to, first of all, whether that definition should be changed, secondly, if it is changed,  
22 whether it's appropriate to change it in the way it is.

23

24 Now, what highlights -- what highlights the importance of her position, Sir, is that keep in  
25 mind, at the beginning of the process there were settlement discussions that immediately  
26 advocated for a change in definition by the four trustees. Ms. Twinn jumped in at that  
27 point and said, look, this is -- this is too early, we first of all need to know whether the  
28 definition is appropriate to change, is it necessary and secondly, as trustees we've got to  
29 be concerned about the changing definition because of -- because of the issues that there  
30 may be consequences arising out of that change. And Ms. Twinn was the only person, the  
31 only trustee that was advancing that position.

32

33 THE COURT:

Sure, but that brings us back to the root

34 problem here. I thought the Trust Deeds provided for majority rule, simple majority. The  
35 Trust Deed as I read it, does not reflect or does not establish a principle whereby one or  
36 more trustees in opposition to the majority can then proceed as they see fit. At least I  
37 didn't read that.

38

39 MR. RISLING:

Yes, okay, so I'm going to jump ahead then

40 and deal directly with that issue because it is an important issue and our first submission  
41 is that Ms. Twinn agrees that there is a majority rule and that that majority rule applies to

1 most trustees' decisions.

2

3 THE COURT:

M-hm --

4

5 MR. RISLING:

But, the rule doesn't trump her obligations as a  
6 fiduciary to beneficiaries. So, when there's a conflict between a majority decision and an  
7 obligation that Ms. Twinn feels that she has to beneficiaries, her obligation is to act on  
8 behalf of the beneficiaries.

9

10 THE COURT:

Well, doesn't the majority owe an obligation to

11 the -- as fiduciaries, as well?

12

13 MR. RISLING:

Yes.

14

15 THE COURT:

Okay. So, I'm having trouble following the  
16 logic here. I understand that she believes -- I understand the position she's advancing, but  
17 it's a self-anointed position, right?

18

19 MR. RISLING:

Well, it has to be if she's the only one -- if she

20 is the only trustee --

21

22 THE COURT:

Yes --

23

24 MR. RISLING:

-- that is going to take that position on behalf  
25 of the beneficiaries, she is then faced with a dilemma which she was in this case, do I  
26 have to go along with the majority when I believe that that position is in breach of our  
27 duty?

28

29 THE COURT:

Okay and I accept that that's her belief --

30

31 MR. RISLING:

Yes --

32

33 THE COURT:

-- and I accept its' a bonafide belief, but it  
34 brings us back to the root problem here. The Trust Deeds are not drafted in that form,  
35 right? It's a majority rule because the drafters recognized, I think fairly early on, that you  
36 have to have a mechanism to move on. It was not a unanimous requirement of  
37 agreement of the trustees.

38

39 MR. RISLING:

Well let's take -- let's take an example, Sir,  
40 where an absurd situation. Let's say the majority of the trustees vote that they should get  
41 all of the benefits of the trust because of their hard work in administration of the trust.

1  
2 THE COURT: Well, then you would apply to have them  
3 removed.  
4

5 MR. RISLING: You could also apply for advice and direction  
6 and the minority -- the minority shareholders is one that's going to have to or the  
7 minority trustee, is the one who's going to have to take the initiative to make that  
8 application.  
9

10 THE COURT: Sure and that's fine, but that would involve  
11 misconduct. If the four trustees said, look, we're going to take all this money and put it  
12 into our Swiss bank accounts, you know, just to use an absurd example, you would move  
13 to have them removed because that would be obviously misconduct. But, there's no  
14 misconduct here. There's no misconduct here. There's no Court has concluded  
15 misconduct on the part of the majority.  
16

17 MR. RISLING: No, but that's going to be -- that's going to be  
18 before the Court in the initial -- in the action, right?  
19

20 THE COURT: Right, exactly right.  
21

22 MR. RISLING: And so --  
23

24 THE COURT: But, as of this morning I repeat, the limitations  
25 of my jurisdiction this morning --  
26

27 MR. RISLING: Right --  
28

29 THE COURT: -- there was no finding of any judge of this  
30 Court on misconduct on the part of the majority.  
31

32 MR. RISLING: It hasn't been yet before the Court to determine.  
33

34 THE COURT: Right, I agree with you.  
35

36 MR. RISLING: Right, but what has been before the -- or what  
37 has happened, is given rise to -- so I guess one thing, Sir, before I go further, am I getting  
38 a sense that you agree that a minority trustee who disagrees with that event has to take  
39 some action.  
40

41 THE COURT: Well, the trustee can make a decision to do so,

1 the issue is, who pays the freight?

2

3 MR. RISLING:

Right.

4

5 THE COURT:

That's really what we're talking about.

6

7 MR. RISLING:

That is what we're talking about.

8

9 THE COURT:

So at the end of the day, I note you've not

10 supplied any case law wherein any judge in this country that I could see has agreed with

11 the argument whereby a dissenting trustee, absent a finding of misconduct, is entitled to

12 say to the trust, you need to reimburse me because, I, the setting trustee have decided that

13 I need to do something.

14

15 MR. RISLING:

Yes --

16

17 THE COURT:

That's really the essence of what we're talking

18 about.

19

20 MR. RISLING:

We have provided a decision, Sir, it's a case

21 called *Ocean* --

22

23 THE COURT:

Yes, *Ocean* involved the removal -- I've read

24 *Ocean*. The Saskatchewan Court of Appeal, Justice Wakeling talked about an application

25 to remove a dissenting trustee, the application was dismissed. I don't read that case as

26 being authority for the proposition that the dissenting trustee is then entitled to necessarily

27 indemnification. You use the word inferentially or by inference.

28

29 MR. RISLING:

Right.

30

31 THE COURT:

So you quite properly did not represent to the

32 Court that the case stands for that proposition, it does not. You're seeking to extend the

33 ruling in *Ocean Man* beyond -- with all due respect, the factual matrix. That was an

34 application to remove the dissenting trustee and Justice Wakeling said, no, I'm not going

35 to do that, this person's acting in good faith, there's no misconduct.

36

37 MR. RISLING:

And we do point that case out by analogy and

38 our submission is that it is a good analogy because at the end of the day, that trustee was

39 compensated for the steps that she'd took --

40

41 THE COURT:

Well, that may well be, but that doesn't mean

1 that there was a ruling in advance of the application, the substantive application for  
 2 indemnification of fees incurred to date of \$850,000 plus a prospective order for whatever  
 3 amount in the future. That is the step that really confronts us this morning.

4  
 5 I repeat, your brief, very extensive brief by the way, very extensive reply brief and very  
 6 extensive brief on the other side; I couldn't see any authority where any Court has  
 7 accepted your argument on these facts, absent misconduct.

8  
 9 MR. RISLING: Again, I understand Sir, that you have read the  
 10 briefs --

11  
 12 THE COURT: I have.

13  
 14 MR. RISLING: -- we would submit that both the case of *Brown*  
 15 both *Brown* and *Waters*, talk about trustees being compensated for their expenses and  
 16 advice and direction actions.

17  
 18 THE COURT: Well, that you see -- it seems to me that that  
 19 could apply here at the end of the day. The judge who hears the substantive 1103  
 20 application, the advice and directions, I'm just calling it the 1103, the judge might agree  
 21 with you after he or she hears all of the evidence, all of the argument, you might be right.

22  
 23 The conundrum that I'm faced with as I see it, is I have no finding of misconduct on the  
 24 part of the majority. I look at the wording of the Trust Deed which provides for majority  
 25 rule. I don't see any case authority supporting the argument that you're making. You  
 26 argue *Ocean Man*, but that's -- with respect, that's an inferential argument that is a step  
 27 beyond what the Court decided.

28  
 29 So I say to myself, okay, what am I left with here? You may be right, Mr. Risling, at the  
 30 end of the day that the judge who presides might agree with the proposition. The issue is,  
 31 as of now, on an interlocutory basis where I'm not the judge dealing with the substantive  
 32 issue, is it appropriate to apply it and on what authority?

33  
 34 Where the majority position as set out in their brief is no, we don't agree with this. You  
 35 see the issue really boils down to this. I don't question the bonafides of your client, she's  
 36 not playing games here, I don't think that for a moment. She genuinely believes what's  
 37 being asserted. But, a genuine belief does not necessarily create legal rights, right? I  
 38 mean that's the issue that I'm hung up on here.

39  
 40 MR. RISLING: Okay. Sir, so let me take another path here and  
 41 we make this claim in our brief. A trustee facing the dilemma that Ms. Twinn is facing

1 bonafide, I'll assume, has to make a decision, I would submit, not during the trial and it's  
2 not efficient at the time of the application, but must make that decision early on and  
3 participate throughout.

4  
5 If the Court does not provide any avenue for a trustee to be able to participate in that  
6 regard at the outset, then that is going to put trustees in a significant position in terms of  
7 deciding not to advance these positions. Ms. Twinn's costs in terms of advancing the  
8 position have been significant.

9  
10 THE COURT:

Yes, they have, but this is a situation wherein  
11 she's made a voluntary decision to proceed as she has. I'm having trouble accepting that  
12 the only way to protect these rights is to say, oh well, Ms. Twinn has to be involved.  
13 Again, I repeat, the judge who hears the 1103 application, which I think will be very  
14 involved, will deal with those issues and the Court will decide whoever the judge is, will  
15 decide whatever he or she decides and it could be appealed.

16  
17 **Submissions by Ms. Osualdini**

18  
19 MS. OSUALDINI:

Sir, I mean as a practical consideration when  
20 Ms. Twinn entered into the fray in the 2011 action with counsel, that was in response to a  
21 motion by the four trustees to approve a settlement offer that only included certain minor  
22 beneficiaries.

23  
24 THE COURT:

I know that, but it's majority rule. You see, at  
25 the end of the day what you're really saying is that when a dissenting trustee feels  
26 strongly and she does feel strongly, that an error has been made, that she feels that the  
27 trust should compensate her with respect to an order for costs to date and prospectively  
28 because she feels strongly. Well, that flies in the face of the majority rule requirement.

29  
30 MS. OSUALDINI:

But, if she hadn't interjected then there may  
31 never have been a trial.

32  
33 THE COURT:

Well, that may be, but my point is this, you  
34 know, it cannot be that someone's strong belief that there's a problem, justifies  
35 indemnifying fees. There's no case law that says that and you haven't given me any.

36  
37 MS. OSUALDINI:

But, the majority rules clause, I would submit is  
38 not about fiduciary obligations, those are mandatory, that's not subject to majority rules,  
39 whether you have to comply with your fiduciary obligations and that's now what this is  
40 about, this isn't about disputing a discretionary decision which is the case law that's  
41 before you from my friends. It's about a discretionary decision of the trustees in an



1 element -- having to show an element of bonafides in order to set aside the decision,  
2 that's not what we're arguing about.

3  
4 THE COURT: No, what you're arguing is that she thinks  
5 they're fundamentally wrong, right?

6  
7 MS. OSUALDINI: Well, she's thinks a breach of fiduciary duty  
8 not to protect these people.

9  
10 THE COURT: That's her position.

11  
12 MS. OSUALDINI: Correct.

13  
14 THE COURT: That's not their position.

15  
16 MS. OSUALDINI: Correct.

17  
18 THE COURT: And the Court -- my point is, the Court will  
19 ultimately decide, right? She may be right, I'm not saying that she's wrong. My point is  
20 this; I'm troubled by the notion of a dissenting trustee or trustees saying, you know, we  
21 think that the majority are absolutely wrong and I need to intervene and by the way, the  
22 trust is going to compensate me. With the benefit of hindsight, she may be right, I'm not  
23 saying that she's wrong.

24  
25 MS. OSUALDINI: Sure.

26  
27 THE COURT: I am troubled by the notion of saying to the  
28 Court as of today, you give me an order for \$850,000 plus a prospective order on a  
29 solicitor/client basis on the theory that maybe I'm right here.

30  
31 MS. OSUALDINI: Well, I think we presented a very strong case,  
32 Sir, about these beneficiaries. This isn't a possibility, there are people who could be  
33 excluded.

34  
35 THE COURT: I repeat, I am not dealing with the substantive  
36 application this morning and I feel it's not appropriate for me to go there. It's not  
37 appropriate for one judge to comment that yes, you're right, or no you're wrong, but  
38 another judge might say no or you know, might take an opposite position. It's not  
39 appropriate that I do that.

40  
41 MS. OSUALDINI: Well, Sir, we have provided the case from

1 Justice Graesser's decision from the 2015 action and I think that's actually quite tangential  
2 to the issue that we're dealing with today because in that action there was a majority  
3 decision to institute Code of Conduct proceedings. There was a majority decision to only  
4 have funding for the four trustees and not Ms. Twinn and Justice Graesser ordered that  
5 there would be.

6  
7 THE COURT: Yes, but that was Code of Conduct stuff.

8  
9 MS. OSUALDINI: True, but it was also in relation to her decision  
10 to initiate the 2015.

11  
12 THE COURT: Yes, but he wasn't dealing with the substantive  
13 1103 issue.

14  
15 MS. OSUALDINI: Oh, I agree.

16  
17 THE COURT: We have to keep coming back to that, it seems  
18 to me, right? And that's -- you know, I ask you again, is there any case law supporting  
19 this position 'cause I didn't see it here.

20  
21 MS. OSUALDINI: Well, our position on that is that majority rules  
22 doesn't apply to fiduciary obligations.

23  
24 THE COURT: I understand that.

25  
26 MS. OSUALDINI: Sure.

27  
28 THE COURT: But, that's not necessarily what the Court will  
29 decide.

30  
31 MS. OSUALDINI: Well, we have provided direction from Waters,  
32 from his learned text, in terms of a trustee's obligation when their duty is in question.

33  
34 THE COURT: No, but what -- but my point is, that the Court,  
35 one of my colleagues will ultimately decide this.

36  
37 MS. OSUALDINI: It creates a practical problem, that if we're  
38 waiting for trial for that decision, I mean this is very expensive litigation.

39  
40 THE COURT: Apparently, yes.

41

1 MS. OSUALDINI: There's no question about that, Sir. That places  
2 an obligation on a trustee who has concerns about their fiduciary obligations to have to  
3 self-fund multi-million dollar litigation in order to bring that to the Court and ultimately  
4 get a direction.  
5

6 THE COURT: I understand why you're making the argument  
7 that you're making. My question is this. Is there legal authority that justifies on this set  
8 of facts and the set of facts is critical here; is there justification for this position?  
9

10 MS. OSUALDINI: Well, I have to say, we obviously did a search  
11 of case law on this point.  
12

13 THE COURT: I have no doubt you did an extensive search.  
14

15 MS. OSUALDINI: Yes, and we also haven't -- while frankly there  
16 wasn't a lot of case law on the issue, but, there also wasn't saying case law saying that  
17 she can't.  
18

19 THE COURT: No, but that's -- you're flying in the face of the  
20 majority rule problem here.  
21

22 MS. OSUALDINI: But, going back to fundamental principles  
23 because in thinking about this, you know, why isn't there a lot of case law on this? To me  
24 it's intuitive, that when a trustee has a question about their fiduciary obligation, they  
25 should be funded and able to bring it forward.  
26

27 THE COURT: Well, I don't think any Court, at least I couldn't  
28 see in the materials where any Court has said it's open season any time a dissenting  
29 trustee feels that there's a problem.  
30

31 MS. OSUALDINI: Of course, but that's where the reasonableness  
32 standard comes in and where we crafted our submissions to try to demonstrate to you that  
33 this is reasonable what she's advancing. This isn't, you know, a frivolous exercise,  
34 there's serious issues.  
35

36 THE COURT: Well, let me flip the coin over. Why isn't the  
37 conduct of the majority reasonable thusfar from their prospective?  
38

39 MS. OSUALDINI: Well, some of the submissions I was going to  
40 go into in terms of critical facts, is I think the initial advice to the trustees before they  
41 ever embarked on this course of litigation is very critical.

1  
2 At the beginning of this process, the trustees, they had very senior legal advice advising  
3 them and they initially had decided to embark upon a process of utilizing a tribunal to try  
4 to ascertain who are the 1985 trust beneficiaries. Because when you were talking with  
5 Mr. Risling, about you know, how many people there are, that's part of the problem in  
6 being able to tell you how many people there are because there's never been a proper  
7 process, a fulsome process to ascertain who exactly these people are. We know some of  
8 them like Shelby Twinn who you've read about in our materials. Shelby is the perfect  
9 example of an individual who currently qualifies under the existing rules, but won't, cause  
10 she's not a Band member.

11  
12 So following that, Dr. Waters was retained by the trust to advise them on their obligations  
13 as trustees and what to do in the face of this issue with the 1985 trust definition. So as  
14 part of this process, Dr. Waters, you know, was certainly advised and his concerns were  
15 discussed about the Band membership system and concerns trustees had.

16  
17 And in follow-up to the trustees and this is very critical because we rely on Dr. Waters'  
18 authority for propositions, but here's what his comments were about this very situation.  
19 He provided them with an array of possibilities on how to address the situation, one of  
20 which included utilizing a tribunal to ascertain the beneficiaries and move forward. That  
21 was one of the options.

22  
23 THE COURT:

M-hm --

24  
25 MS. OSUALDINI:

What we see now, is the 2011 action was also  
26 one of the options and that's what the trustees picked to go forward.

27  
28 THE COURT:

Which is not yet complete.

29  
30 MS. OSUALDINI:

Correct, but as part of that process and I mean  
31 this really is where the breakdown occurs and this informed my client's understanding on  
32 what she was approving to go ahead and informed the other trustees at the time. So the  
33 December 2010 trustee meeting is kind of the critical meeting where a lot of these things  
34 are discussed.

35  
36 So when questioning Mr. Beaujeau (phonetic) he confirmed that Dr. Waters had raised  
37 concerns about the validity of the Band membership code with him and that's in his  
38 transcript. Dr. Waters had also advised that it was within the trustees' proper range of  
39 concerns to be interested in the efficiency and timeliness of processing applications. So,  
40 Dr. Waters is acknowledging these issues as properly within things trustees should be  
41 concerned about. He raised concerns about whether the Band membership code was

1 *Charter* compliant, whether it would withstand scrutiny.

2  
3 And that informs and when we go to what the trustees actually resolved to proceed with,  
4 My Lord, you'd notice that there was some pretty critical -- it wasn't just proceed with  
5 2011 litigation. The resolution provided to proactively work with the Sawridge  
6 membership committee and the Chief and Council to expedite recommendations to the  
7 legislative assembly so that applications can be determined within six months from the  
8 date received. And also to work with Chief and Council to develop proposed amendments  
9 to the Sawridge citizenship code, including outlining legal standards that the decision  
10 making process much meet.

11  
12 So as part of voting to proceed with this, it was contemplated by the trustees and pointed  
13 out by Dr. Waters that they needed to get these things in place.

14  
15 THE COURT: Do you think Dr. Waters will be testifying on  
16 the proceedings, the substantive proceedings, the 1103 action?

17  
18 MS. OSUALDINI: I don't know.

19  
20 THE COURT: Well, one thought I had, was frankly I won't be  
21 presiding, but I would've thought that that's a likelihood, so the judge presiding will hear  
22 what Dr. Waters has to say.

23  
24 MS. OSUALDINI: True, but once again we're getting back to the  
25 issue of, this is why Catherine needs indemnification so that she can advance that.

26  
27 THE COURT: No, that's a leap of logic, with respect. If  
28 Dr. Waters testifies, for example, on the substantive proceedings, then we don't need  
29 Catherine Twinn to advance any concerns cause Waters can do that.

30  
31 MS. OSUALDINI: But, whose calling him?

32  
33 THE COURT: Well, I don't know.

34  
35 MS. OSUALDINI: Yeah --

36  
37 THE COURT: But, all I'm saying is, it's not much of a stretch  
38 to think that his opinion will be before the Court, by way of a report of viva voce  
39 evidence, whatever.

40  
41 MS. OSUALDINI: It's never been to date.

1  
2 THE COURT: Well, the substantive hearing hasn't been heard  
3 yet.  
4

5 MS. OSUALDINI: But, there's been issues, the Office of the  
6 Public Trustee had a production application, Sawridge Number 3, these issues were not  
7 brought forward.  
8

9 THE COURT: No but my point is this; if there's a concern  
10 about expressing opinions and support and expanded pool, if I can use that expression, of  
11 beneficiaries, surely that can be dealt with at the substantive hearing.  
12

13 MS. OSUALDINI: But, who will deal with it?  
14

15 THE COURT: Well, I don't know, I'm not the case  
16 management judge, Justice Thomas is. My point is this, it's a self-serving argument, with  
17 respect, to say that the only person in the world who can advance this argument is  
18 Catherine Twinn.  
19

20 MS. OSUALDINI: But, she's the only person that has.  
21

22 THE COURT: No, but you can address that issue at the  
23 proceedings, the substantive proceedings which I'm not getting involved in.  
24

25 MS. OSUALDINI: Fair, but my point in this, Sir, is that at the  
26 outset Dr. Waters had told the trustees that all 85's would be grandfathered.  
27

28 THE COURT: And she disagrees with what they've done?  
29

30 MS. OSUALDINI: Yes.  
31

32 THE COURT: Okay and I get that.  
33

34 MS. OSUALDINI: Okay.  
35

36 THE COURT: But, again the judge ultimately is going to  
37 decide here, what is going to happen with respect to that issue. I'm not that judge and I  
38 repeat, it is not appropriate that I comment about what I think will happen here.  
39

40 MS. OSUALDINI: This is the basis for why Catherine has become  
41 involved, why she feels she needs to be involved.



1  
2 THE COURT: I get that.  
3  
4 MS. OSUALDINI: And Sir, also in our reply brief too --  
5  
6 THE COURT: Your reply brief?  
7  
8 MS. OSUALDINI: -- upon reviewing my friend's submissions.  
9  
10 THE COURT: What page are you look at?  
11  
12 MS. OSUALDINI: Sorry, I'm just getting there myself.  
13  
14 THE COURT: Oh, okay.  
15  
16 MS. OSUALDINI: So this is in terms of the majority rules  
17 clause. Okay. So paragraph -- I'm going to paragraph 29 of the reply brief.  
18  
19 THE COURT: Give me one second.  
20  
21 MS. OSUALDINI: Okay.  
22  
23 THE COURT: Yes, 29, I have it, yes.  
24  
25 MS. OSUALDINI: Yes, it's 29 of the reply brief. So paragraph 13  
26 of the 1985 Trust Deed states that it's subject to paragraph 11 and paragraph 13 is of  
27 course the majority rules provision. Now, we argue that the majority rules decision or  
28 provision does not extend to any actions that may impact who the beneficiaries are.  
29  
30 THE COURT: I understand that's your argument. But, the  
31 Court has not determined whether that argument is valid or invalid.  
32  
33 MS. OSUALDINI: But, that's relevant to today.  
34  
35 THE COURT: Well, it's --  
36  
37 MS. OSUALDINI: Because of the whole reason that she's not --  
38 you know, if that would be the position that she's not entitled because of majority rules,  
39 that matters.  
40  
41 THE COURT: Now, the issue is, whether or not, this could be

1 authorized in this factual matrix. My point is this, I'm not assuming the outcome of this  
2 argument. I can't. It's not proper. So your argument may or may not succeed, correct?  
3 I mean you say it appears that the majority decision power was not intended, well the  
4 Court will ultimately decide whether that's correct, or not.

5  
6 MS. OSUALDINI: But that's an issue for indemnification.

7  
8 THE COURT: Indemnification when? At the end of the day  
9 or in advance?

10  
11 MS. OSUALDINI: In advance. She has expended fees in relation  
12 to the trust.

13  
14 THE COURT: Oh I know she has, but it was a voluntary  
15 expenditure.

16  
17 MS. OSUALDINI: Well, I perhaps would argue whether it was  
18 voluntary, fiduciary duties aren't voluntary, you're obligated.

19  
20 THE COURT: I'm not criticizing her, but she, of her own  
21 volition decided that she owes a duty to this pool of people and that's a fine motive,  
22 that's a different issue than saying, well trust you must indemnify me today and  
23 prospectively, on a solicitor/client basis.

24  
25 MS. OSUALDINI: But, she's undertaken these actions as a trustee.

26  
27 THE COURT: Well, as a minority trustee, yes.

28  
29 MS. OSUALDINI: But, the logical extension of that is how many  
30 people can afford to do this?

31  
32 THE COURT: Well, I know but that doesn't mean, with  
33 respect, that you can then go to the other side and say well you have to indemnify me.

34  
35 MS. OSUALDINI: But on the -- I mean to argue the reverse  
36 though, Ms. Twinn, if she's indemnified now, it can always be subject to divestment by  
37 the trial judge if -- when you know, as you say, these issues are decided. Because that  
38 levels the playing field and allows these very important issues to get to trial.

39  
40 THE COURT: Well, except with all due respect, there are  
41 some significant hurdles in that argument. The Court may or may not agree with it

1 ultimately, but you know, what you're asking this Court to do in my limited jurisdiction  
 2 this morning, is to say, in the event or that she may be right, therefore direct payment to  
 3 her of \$850,000 plus an order to pay prospectively, I don't know how much, I mean it  
 4 could be a substantial amount given what's occurred thusfar. And I repeat, I see no  
 5 authority for that presented to me.

6  
 7 You did a very extensive search, I have no doubt about that, but that speaks volumes.  
 8 There is no authority cited whereby any Court has accepted absent a finding of  
 9 misconduct, I repeat that's critical, if there were misconduct that's a different story.

10  
 11 MS. OSUALDINI: But, there's no -- there isn't any cases presented  
 12 to the Court either citing that proposition.

13  
 14 THE COURT: Well, what authority do I have to do this? Just  
 15 cause I feel like it or I have authority?

16  
 17 MS. OSUALDINI: Well, the test for trustee indemnification --  
 18 because the test for trustee indemnification doesn't say that it's subjective to majority  
 19 rules --

20  
 21 THE COURT: No, but what --

22  
 23 MS. OSUALDINI: -- it's about being fiduciary that --

24  
 25 THE COURT: -- it's whether or not a relation to the  
 26 administration of the trust, so it brings us full circle, is what she is doing and I agree she  
 27 understands that she's acting in good faith, is it relevant to the administration of these  
 28 trusts?

29  
 30 MS. OSUALDINI: What could be more relevant to the  
 31 administration of the trust than who the beneficiaries are?

32  
 33 THE COURT: Well, the majority says we're looking after that  
 34 and she disagrees. She's entitled to disagree, the question is, at whose expense?

35  
 36 MS. OSUALDINI: The distribution proposal, are you familiar with  
 37 that? That was appended to our brief.

38  
 39 THE COURT: Yes.

40  
 41 MS. OSUALDINI: That was submitted -- it's in 2016 that was

1 submitted to the Court by the four trustees. That proposed that the Sawridge First Nation  
2 members be the new beneficiary definition. There was no grandfathering, none. Like that  
3 is historically the position. If Ms. Twinn isn't involved that it's --  
4

5 THE COURT: But, counsel, I repeat I am not going to  
6 pronounce this morning whether that's correct or incorrect or proper or improper. That's  
7 not my role this morning. That's not appropriate for me to comment. Isn't the whole  
8 purpose of the 1103 action to seek advice and directions?  
9

10 MS. OSUALDINI: But, all of the information is being laid out in  
11 terms of possible positions; one position is being advocated for.  
12

13 THE COURT: Well, I don't understand why that can't be  
14 presented to the Court. The presiding judge can certainly proceed with a request to hear  
15 this argument. That's not the same thing though as indemnifying in advance. I'm not  
16 following the argument. If I were presiding at a trial and someone stood up and said,  
17 look, I've got relevant evidence to present here, then I have the power to say, you have  
18 leave to present the argument.  
19

20 MS. OSUALDINI: Well, I guess a distinction here too is that  
21 Ms. Twinn, she is a party to these proceedings, she's an applicant.  
22

23 THE COURT: She is.  
24

25 MS. OSUALDINI: So she's not an outsider to this litigation that's  
26 seeking indemnification, she's an applicant just like the other four trustees.  
27

28 THE COURT: Yes, except that her role is in opposition to the  
29 majority. As I understand it, from what I read her, it's typically four to one, right? I  
30 know some trustees have died and been replaced, I know that. But, as I read the file, or  
31 these briefs, it's usually a four to one split. As a matter of fact, I didn't see a single three  
32 to two; am I wrong about that? I think it's all four to one.  
33

34 MS. OSUALDINI: I think so, as well.  
35

36 THE COURT: Okay. So she's the dissenting trustee.  
37

38 MS. OSUALDINI: Sure, absolutely.  
39

40 THE COURT: And I repeat, she may be correct. I'm not  
41 saying that she's wrong, it's not my role this morning to say that.

1  
2 MS. OSUALDINI: But, Sir, I would submit to you that the cases  
3 provided by my friends in support of this principle that the majority, you know, can  
4 proceed absent bonafides, those cases were provided in the context of the exercise of  
5 discretionary decision making power. Those cases do not stand for the principle that  
6 when fiduciary is at issue that that's the test, they don't stand for that proposition.  
7

8 THE COURT: No, but the majorities are fiduciaries, as well.  
9 Trustees are fiduciaries. The issue is, whether or not, a dissenting trustee who interpreters  
10 her fiduciary duty differently than the majority can go to the trust, through the Court and  
11 say, I want payment of my fees to date and a prospective order. That's the root issue  
12 here. Where -- where at the end of the day, the Court and I mean the ultimate judge who  
13 hears this and it will not be myself, may or may not agree with her position.  
14

15 MS. OSUALDINI: Well, Sir, in terms of our search of the case  
16 law, while I could not find something exactly on point, I also didn't find anything that  
17 wasn't --  
18

19 THE COURT: Sure.

20  
21 MS. OSUALDINI: -- like speaking to the opposite.  
22

23 THE COURT: But, you're the applicant.  
24

25 MS. OSUALDINI: Yes.  
26

27 THE COURT: The burden falls to the applicant, right?  
28

29 MS. OSUALDINI: Sure, so in the absence of caselaw on this point  
30 and I note that my friends don't submit any either, so I'm thinking that I've probably  
31 done a fairly fulsome search, is that we need to fall back to basic principles, which is  
32 what we put in our brief is basic principles about trustee indemnification. Because in  
33 thinking about this, I thought perhaps -- 'cause to be honest, I was surprised when I didn't  
34 find decisions on point.  
35

36 And I thought, you know, perhaps the reason is, is that logically trustees can't advance  
37 these position and do and meet their fiduciary duty without funding. Like it -- like it  
38 logically can't happen and so perhaps that's the reason for the absence.  
39

40 THE COURT: No, but firstly you're asking me to assume that  
41 this pool of people, this I'll call them the potential beneficiaries, I'm to assume from your

1 argument that without Ms. Twinn's intervention that they're silent, that they have no  
 2 rights, they have no ability to do anything. I'm aware there was an application to add  
 3 somebody, some individuals as parties which was denied by Justice Thomas, in Sawridge  
 4 number 3 or something, I've forgotten the number.

5  
 6 MS. OSUALDINI: There's many, I think six.

7  
 8 THE COURT: I know there's been so many it's tough to keep  
 9 track. So that is one mechanism, but I don't accept the proposition for what I've read  
 10 here that that's the only way that these folks can be potentially protected is through  
 11 Ms. Twinn. I mean why is that so?

12  
 13 MS. OSUALDINI: Well, who has money --

14  
 15 THE COURT: Well, I don't --

16  
 17 MS. OSUALDINI: -- to come and involve themselves?

18  
 19 THE COURT: Look, I don't know who these people are, but  
 20 on my point is simply this, that I don't accept that that's the only mechanism. But, even  
 21 if it were the only mechanism, that doesn't justify where you've got a majority saying, no,  
 22 no, no, we're going to govern the way we think is appropriate, for the Court to then say  
 23 to the dissenting trustee, we're going to indemnify you to date and prospectively so you  
 24 can make this argument.

25  
 26 I repeat, the ultimate judge who hears this matter might say that Ms. Twinn is right, I  
 27 don't know.

28  
 29 **Submissions by Mr. Risling**

30  
 31 MR. RISLING: So, Sir, we seem to debating the timing of the  
 32 application for Ms. Twinn's indemnification and if I'm understanding you correctly, the  
 33 timing has to occur when the substantive issue is before the Court.

34  
 35 THE COURT: Well, what I'm saying is, that the judge who  
 36 ultimately hears the matter could entertain the application. I have no jurisdiction to say to  
 37 that judge, you can't do that, I have no such authority.

38  
 39 MR. RISLING: But, Sir, I would say that, with all due respect,  
 40 that is a misinterpretation of the test for indemnification of trustees. The test does not  
 41 address timing at all. There is nothing in the test that says that trustee must wait, nothing.



1  
2 THE COURT: No, but it does beg the question about whether  
3 or not it deals with the administration of the trust. We're going around the mulberry bush  
4 here. The majority on the other side of the room says that it is not.  
5

6 MR. RISLING: But my point, Sir, is it can't -- there is -- first  
7 of all let's assume a scenario where there is only one advocate for a group of existing  
8 beneficiaries, not just maybe beneficiaries, that can advance or is interested in advancing a  
9 position that protects those people.  
10

11 Let's assume that the majority of trustees take a position that that trustee believes  
12 bonafides is a breach of fiduciary duty and let's assume that those majority trustees were  
13 paying somebody to advance that position and let's assume there's a settlement  
14 negotiation, in terms of trying to resolve that issue. If that minority trustee has decided  
15 not to participate because they can't afford it, because they're concerned they're not going  
16 to be funded, then that minority trustee is left in an untenable decision of making the  
17 decision to take a stand on the basis that she has a fiduciary duty to take a stand and fund  
18 it or do nothing.  
19

20 And my position, Sir, is that there's nothing in the test that says wait -- wait for your  
21 court application and because the majority has said or taken a position, you shouldn't be  
22 incurring these fees at this time.  
23

24 THE COURT: Well, why didn't Ms. Twinn come to the Court  
25 early on and say, look, I'm proposing to do this? Or I'd like the Court's approval or seek  
26 approval for the indemnification? She has expended, apparently from what I read,  
27 \$850,000, right?  
28

29 **Submissions by Ms. Osualdini**  
30

31 MS. OSUALDINI: Of which a significant amount relates to this.  
32

33 THE COURT: Okay. But, my point is, why not come to the  
34 Court and say, look, here's what I would like to do, okay and Court I'd like you to order  
35 the trust to pay my fees and the Court could at that point dealt with it. She's spent  
36 \$850,000 to date as I understand it --  
37

38 MS. OSUALDINI: And in terms of timing, I think the timing is  
39 very relevant to this. As I said, Ms. Twinn interjected herself formally in June 2015, at  
40 the beneficiary application. This application was filed December 2015. It's taken us this  
41 long and this much paper to get here.

1  
2 THE COURT: But, I understand before all the paper was  
3 developed, why wasn't there an application to the Court, this application advanced much  
4 earlier so that the Court could say to her, either yes or no. And if the answer's no, then  
5 she can proceed as she has with her own funds and seek indemnification later.

6  
7 MS. OSUALDINI: This application was brought within a few  
8 months of her interjecting.

9  
10 THE COURT: I know, but it was just scheduled this week. I  
11 mean I was assigned this a few days ago.

12  
13 MS. OSUALDINI: Sure, because we've been examining,  
14 undertaking.

15  
16 THE COURT: Right, but you see my point and I know the  
17 date of the application, it's on the file. My point is, here we are October the 13th of  
18 2017, a ton of money has been spent --

19  
20 MS. OSUALDINI: Sure --

21  
22 THE COURT: -- and one thing that struck me as I read the  
23 material is, you know, had she gone to the Court earlier saying, I propose to do this Court  
24 what do you say about this, then if the Court said no, we won't order indemnification, it  
25 would be her decision to proceed and seek it later.

26  
27 MS. OSUALDINI: I mean I suppose perhaps that is not exactly,  
28 but is somewhat what we're doing today. I mean was the application to seek  
29 indemnification.

30  
31 THE COURT: But it's after \$850,000 has been spent.

32  
33 MS. OSUALDINI: But, I mean there's steps that have occurred to  
34 date that have resulted in that --

35  
36 THE COURT: I know, I know -- yes.

37  
38 MS. OSUALDINI: -- and steps that couldn't wait for today. I  
39 mean there's been a lot going on, I mean you've seen Ms. Twinn's involvement, you  
40 know, interjecting in the beneficiary application, appealing Sawridge number 3, which  
41 resulted in a positive result for beneficiaries. You know, being involved in the application

1 by, you know, Shelby Twin and her son and Deborah Serafinchon. And then there's also  
2 been lots of discussions, you know, without prejudice meetings and conversations behind  
3 the scenes, like things that couldn't wait for today.

4  
5 So it's a bit impractical to think that she can sit back and wait for today's application and  
6 ruling and not have to deal with the flurry of things.

7  
8 THE COURT: But, you'll agree with me that the risk that  
9 anyone incurs in proceeding without court approval is that the Court might say no, or the  
10 Court might say no for the time being.

11  
12 MS. OSUALDINI: Sir, I know that there's a risk that an  
13 application can be denied, I know that my client knows that, but that is how strongly she  
14 feels about what's happening here. That she is taking that risk.

15  
16 THE COURT: You don't have to persuade me that she feels  
17 strongly about her position. I mean that comes out loudly and clearly. The issue is, what  
18 legal effect does that create, if anything.

19  
20 MS. OSUALDINI: But, Sir, I would point you to the  
21 indemnification provision of the Trust Deed, because the indemnification provision is very  
22 broad and actually I'm referring right now to paragraph 54 of our initial brief.

23  
24 THE COURT: Just give me one second here.

25  
26 MS. OSUALDINI: Yes, of course.

27  
28 THE COURT: Yes, this is paragraph 9.

29  
30 MS. OSUALDINI: Yes, paragraph 9, that's correct.

31  
32 THE COURT: Paragraph 9 of the Deed.

33  
34 MS. OSUALDINI: Yes, that's correct.

35  
36 THE COURT: Yes.

37  
38 MS. OSUALDINI: So it says: (as read)

39  
40 Administration costs and expense of or in connection with the  
41 Trust shall -- shall be paid.

1  
2 THE COURT: But look at the first few words, the first clause:  
3 (as read)

4  
5 Administration costs and expense of or in connection with the  
6 Trust . . .

7  
8 If you just stop right there, begs the question surely whether the dissenting trustees  
9 actions, however well intentioned, fall within that clause.

10  
11 MS. OSUALDINI: But, I would note that there's an "and" because  
12 I notice that you in your questions to us, you're focussing on whether this is an  
13 administrative issue because the majority rules. But, there's an "and": (as read)

14  
15 Administration costs and expense of or in connection with.

16  
17 I don't think there's any argument that this is in connection with the trusts, this is  
18 absolutely against her personal interest that she's doing this.

19  
20 THE COURT: Without majority approval.

21  
22 MS. OSUALDINI: Yes, the trustees were notified of her  
23 concerns. She attempted to work with them before we got here.

24  
25 THE COURT: And they disagreed?

26  
27 MS. OSUALDINI: And they disagreed, yeah.

28  
29 THE COURT: Right and at the end of day and I'm not  
30 criticising her, but at the end of the day she said, I think the majority were wrong and I'm  
31 going to proceed down this path.

32  
33 MS. OSUALDINI: Yes.

34  
35 THE COURT: Now, you're before me this morning and saying  
36 having done this, I'd like an order of the Court to direct indemnification to date and a  
37 prospective order, right?

38  
39 MS. OSUALDINI: Correct.

40  
41 THE COURT: Right.

1  
2 MS. OSUALDINI: But, based on that "expense of or in connection  
3 with" and then looking at the following words "including without limiting the generality  
4 of the foregoing", that language suggests that this is supposed to be very expansive  
5 indemnification.  
6

7 THE COURT: What it does not say is that a dissenting trustee  
8 is entitled on his or her own volition to have this clause kick in if they decide to spend  
9 money, in connection with the trust, let's not be silly here --  
10

11 MS. OSUALDINI: Yes --  
12

13 THE COURT: -- she's not spending money on unrelated  
14 issues, but in connection with the trust, does that then apply to a dissenting trustee  
15 without majority approval?  
16

17 MS. OSUALDINI: I would argue that it does because this clause  
18 doesn't say that it doesn't.  
19

20 THE COURT: Yes, you friends would disagree with that.  
21

22 MS. OSUALDINI: Sure, no that's fair, I understand there will be a  
23 dispute on this point.  
24

25 THE COURT: It's a --  
26

27 MS. OSUALDINI: Yes, there's a dispute on that point. But, it's a  
28 very general clause administrative issues and expense reimbursements are clearly two  
29 separate concepts and it says shall. And I would submit to you, Sir, that that is the key  
30 word in whether a minority trustee can be indemnified, shall be reimbursed.  
31

32 THE COURT: Yes.  
33

34 MS. OSUALDINI: Not if the majority approves it, shall be.  
35

36 THE COURT: Well, you know modern interpretation of  
37 statutes and documents requires a liberal and purposive approach, right, all the cases say  
38 that and I think there's going to be a real strong argument on the effect of this clause,  
39 using that liberal and purposive approach. Your friends will strongly disagree with that  
40 interpretation and the Court will ultimately decide.  
41

1 MS. OSUALDINI:  
2 strong argument there.

Sure, but I would submit that there is a very

3  
4 THE COURT:

Well, it's an argument that will be discussed.

5  
6 MS. OSUALDINI:

Sure.

7  
8 THE COURT:

But, it's not a slam dunk, right?

9  
10 MS. OSUALDINI:

Nothing is.

11  
12 THE COURT:

Right, but my point is this; there's no reference

13 to dissenting trustees in that paragraph.

14  
15 MS. OSUALDINI:

Correct.

16  
17 THE COURT:

Okay, if it were then I think you might well

18 have a slam dunk argument. It's an argument that will be advanced and the Court will  
19 decide, it's not a slam dunk.

20  
21 MS. OSUALDINI:

And that's fully understood, Sir, fully

22 understand. But, I would also submit to you though, the issue of whether majority rules  
23 applies to the -- to decisions in the 2011 action given, I mean really the point of the 2011  
24 action is to change the beneficiary definition.

25  
26 THE COURT:

I know, but we're not there yet.

27  
28 MS. OSUALDINI:

No, no, no and I'm not suggesting that needs to

29 be decided, but I'm suggesting for today that in terms of indemnification because if the  
30 whole issue is that majority rules prohibits a trustee from being indemnified it matters  
31 whether majority rules applies to the types of decisions that are being made.

32  
33 THE COURT:

But, you'll agree that's a hotly contested issue.

34  
35 MS. OSUALDINI:

Sure.

36  
37 THE COURT:

This judge is not going to decide that this

38 morning 'cause it's not appropriate.

39  
40 MS. OSUALDINI:

But, that's clear though that that's the issue in

41 2011, there's no debating that that's the issue.



1  
2 THE COURT: That's the issue, but, is it appropriate for this  
3 judge on this application to decide that issue? And I say, no, that would be for the judge  
4 who hears the substantive application.

5  
6 MS. OSUALDINI: As to whether the majority rules clause applies  
7 to these types of decisions?

8  
9 THE COURT: Yes, absolutely. I mean I don't see your  
10 friends conceding that, I think that will be hotly -- hotly contested.

11  
12 MS. OSUALDINI: But, I think -- my submission is, with respect,  
13 is that that's an issue for today.

14  
15 THE COURT: Well, I disagree with you. I repeat what I said  
16 when I started this morning. I'm walking a very fine line here and I will not do anything  
17 that somehow impedes what another judge will do who hears this matter ultimately and it  
18 will not be me.

19  
20 MS. OSUALDINI: And we're not asking you to, Sir, it is a  
21 difficult line.

22  
23 THE COURT: Yes and I have to be careful not to cross it.

24  
25 **Submissions by Mr. Risling**

26  
27 MR. RISLING: So, Sir, again I understand that you've read all  
28 the materials. I understand that we're stuck really on this issue of the timing and if I may  
29 fairly describe it that way in respect to the application for indemnification.

30  
31 You've heard our position that the application was commenced very quickly after the  
32 action was for advice and direction was commenced. With any application unfortunately  
33 these days, there's abilities to cross-examine on affidavits, there's difficulty in getting  
34 quick time for the special chambers application and there's a bunch of evidentiary issues  
35 that have to be dealt with before the application. The reality of that meant that we're here  
36 before you today and the additional reality is that in the last period from the  
37 commencement of that action to today, there is a bunch of steps that were taken that  
38 Ms. Twinn felt she was obliged to insert herself in and I appreciate the Court, you're not  
39 suggesting that that wasn't bonafide.

40  
41 The one point that I think we've clarified with you, is that when we say, voluntary of

1 course it was her decision, but keep in mind, Sir, she made that decision in the context of  
2 being a trustee, what her duties were, you don't have to decide today.

3  
4 THE COURT: Right, but it was a voluntary decision,  
5 Mr. Risling, in the sense that it was not directed by the Court and she made a voluntary  
6 decision, she's a lawyer, she's an intelligent person, she knew what she was doing and  
7 she made a decision to do certain things. I get that.

8  
9 MR. RISLING: She made a decision, Sir, that was her decision  
10 that was based on a number of opinions that a group of trustees had received and her  
11 interpretation of those arrangements.

12  
13 THE COURT: Right.

14  
15 MR. RISLING: To retain senior counsel from McLennan Ross  
16 who specializes in trusts to advise her on her duties, that lawyer, Karen Platten of our  
17 office presented Ms. Twinn's positions throughout. I would submit, Sir, that the test is  
18 not about the timing, the test is about the reasonableness on this.

19  
20 THE COURT: Let's get one thing straight. The timing issue  
21 talks about, whether or not, if she's unsuccessful on this application this morning, she can  
22 advance the same argument. I dare say that your friends in their final paragraph 126  
23 make that exact proposal, right? If you look at the very last paragraph of the materials  
24 filed by Ms. Bonora and Mr. Kueber, they say "in the alternative the respondents request  
25 a dismissal of this application without prejudice to the applicant's belief to seek her cost  
26 at the conclusion of the litigation" et cetera.

27  
28 What I take that to mean is that the substantive 1103 application, they're not arguing or at  
29 least I didn't understand them to be arguing that she can't make the claim ever. I thought  
30 that was very fairly stated, at the end of the substantive application you can stand up and  
31 say, well Ms. Twinn has incurred all these costs et cetera, et cetera, et cetera, your friends  
32 are not going to argue 'cause they've clearly stated here that she can do that and the judge  
33 may well agree with you or may not.

34  
35 MR. RISLING: And I would submit that the reason for the  
36 timing issues not being expressed in a test, is that that's not with all due respect, a  
37 practical approach for a situation like this.

38  
39 THE COURT: No, but it's without prejudice. I mean they're  
40 very clear and they use the words without prejudice in that paragraph. It's the very last  
41 paragraph of their brief, right?

1  
2 MR. RISLING: Sir, if I was on the other side of a file where I  
3 knew that the funding wouldn't be there for the party until that application, I would take  
4 the same position, because from a practical point of view, it's difficult to litigate in such a  
5 complex matter with so many issues without the funding and Ms. Twinn is entitled to it if  
6 she establishes that she's been reasonable.

7  
8 THE COURT: Well, the judge ultimately in the substantive  
9 application will decide that issue and I don't want to say any more about that.

10  
11 MR. RISLING: Yes.

12  
13 THE COURT: My point is this, your friends are not suggesting  
14 that she's somehow going to be estopped from raising that argument, it would be without  
15 prejudice. You see, you've got at the end of the day, Mr. Risling, I don't mean this in a  
16 critical sense, your client has undertaken a course of action without court approval, she  
17 may be right, she may be wrong, and at the end of the day the real nub of the issue that  
18 I'm dealing with this morning, is whether or not, this Court, myself, should order  
19 indemnification in the face of strong opposition to her position by the majority and again  
20 the judge will decide whether the majority is right or wrong.

21  
22 And then on top of that order, as prospective order with respect to costs not yet incurred  
23 to be incurred, which could be -- well I have no idea how much, but a lot. If it's  
24 \$850,000 to date, one can easily foresee that it will be significantly more than that at the  
25 end of the day.

26  
27 MR. RISLING: My friend wants to sneak in.

28  
29 THE COURT: Sure.

30  
31 **Submissions by Ms. Osualdini**

32  
33 MS. OSUALDINI: You know, Sir, I would just go back to the  
34 decision of Justice Graesser from 2016, it's found at tab 28 of our materials, of the first  
35 brief.

36  
37 THE COURT: Just a second here, 28?

38  
39 MS. OSUALDINI: Yes, 28 that's right. I'm starting at paragraph  
40 88 of --

41

1 THE COURT: Just give me one second here. Yes, I have it.  
2 What paragraph am I looking at?

3  
4 MS. OSUALDINI: It's paragraph 88 that I'm starting at --

5  
6 THE COURT: 88?

7  
8 MS. OSUALDINI: -- yes, right at the end.

9  
10 THE COURT: Just give me one second here. Yes, I have it.

11  
12 MS. OSUALDINI: Okay. Because this was in many ways a  
13 similar issue before Justice Graesser it was about -- there was issues about the four  
14 trustees have access to legal funding and Ms. Twinn is sitting there have to fund on her  
15 own. And Justice Graesser at paragraph 88 starting on the top of page 11: (as read)

16  
17 It is manifestly unfair that the Respondent trustees have been  
18 reimbursed their legal fees for commencing Code of Conduct  
19 proceedings and then abandoning them when the Applicant  
20 objected and was required to commence this action to stop them  
21 ...

22  
23 I mean that's tantamount to what's happening here.

24  
25 THE COURT: I don't agree with you. Code of Conduct and I  
26 did see there was a Code of Conduct, I don't see that as being synonymous with what  
27 we're dealing with here.

28  
29 MS. OSUALDINI: But, it's trustee decisions. That was a decision  
30 of the majority to do this and Justice Graesser thought it was manifestly unfair.

31  
32 THE COURT: Well, in a Code of Conduct context, sure.

33  
34 MS. OSUALDINI: But, it's sure a majority rules issue.

35  
36 THE COURT: I know, but at the end of the day, I repeat  
37 where is the authority for the dissenting trustee on her own to say, all right, I'm going to  
38 do this and you have to reimburse me. That's the bottom line here, right?

39  
40 MS. OSUALDINI: And to that I would say, you know, as we've  
41 already talked about, the Trust Deed is authority for that and basic trustee principles on

1 indemnification which are set out in our brief.

2

3 THE COURT: Assuming what she's doing is in the interest of  
4 administering the trust, it brings us full circle.

5

6 MS. OSUALDINI: No, no, because the indemnification clause of  
7 the Trust Deed is broader than that, it's in connection to the trust.

8

9 THE COURT: Well, I don't --

10

11 MS. OSUALDINI: It is broader.

12

13 THE COURT: -- I don't think, well I know that your friends  
14 will oppose the interpretation that any time a dissenting trustee opposes a majority  
15 decision they're entitled to indemnification. That would be a rather startling proposition.

16

17 MS. OSUALDINI: But, I would actually direct you to though  
18 paragraph 52 of our initial submissions because that sets out the tests, the common law  
19 tests that's set out in Dr. Waters text on trusts.

20

21 THE COURT: 52, yes.

22

23 MS. OSUALDINI: The common law test doesn't speak to arising  
24 within the administration and thus importing, you know, majority rules concept. It says,  
25 "the expenses to arise out of an act or within the scope of trusteeship duties and powers".  
26 It's about duties and powers. We're talking about --

27

28 THE COURT: Whose duty?

29

30 MS. OSUALDINI: Her duty as a fiduciary.

31

32 THE COURT: As she defines it. See she defines her duty as a  
33 fiduciary to this pool of people and that's fine and I understand that --

34

35 MS. OSUALDINI: No, as a --

36

37 THE COURT: -- but is that reasonable?

38

39 MS. OSUALDINI: Now, as a fiduciary as a trustee.

40

41 THE COURT: Yes, they're all fiduciaries. But, is the

1 dissenting trustee entitled to interpret her fiduciary duty as being broad enough to protect  
2 this pool of people? The majority doesn't see it that way, right? She does and it brings us  
3 full circle.  
4

5 MS. OSUALDINI: But, that's what a fiduciary is, is a service to  
6 the beneficiaries of the trust.  
7

8 THE COURT: Now, but the fiduciary law doesn't apply to the  
9 whole world every time a fiduciary says, you know, I've decided to expand my perception  
10 of my duties.  
11

12 MS. OSUALDINI: But, I mean -- you know, I like using the  
13 example of Shelby Twinn because this isn't an abstract person, this is a real person.  
14

15 THE COURT: Yes.  
16

17 MS. OSUALDINI: I mean Shelby is an example of someone who  
18 currently qualifies, there's no question, and she won't if this goes through. I mean this  
19 isn't subjective, I mean this is an objective issue.  
20

21 THE COURT: And the Court will decide that in a substantive  
22 application. I'm not deciding that.  
23

24 MS. OSUALDINI: And you're not being asked to, but we are  
25 asking you to decide on the trustee's right to indemnification. So it's hard to put that to  
26 you in a vacuum of why, of why she's doing it, like that obviously isn't forming the  
27 decision and so Dr. Waters, it's not -- it's about duties and that's what we're saying this  
28 is. Is this is about her duty.  
29

30 THE COURT: All right. Anything further from the applicant's  
31 side? You'll have a right of reply, of course.  
32

33 MR. RISLING: No, Sir.  
34

35 THE COURT: All right. Mr. Kueber or Ms. Bonora?  
36

37 MR. HALUSCHAK: I wonder, Sir, if we might have a five-minute  
38 break in light of what we've heard and seen?  
39

40 THE COURT: Sure, five minutes then.  
41

1 MR. HALUSCHAK:

Thank you.

2

3 THE COURT CLERK:

Court stands adjourned.

4

5 (ADJOURNMENT)

6

7 THE COURT CLERK:

Order in court

8

9 THE COURT:

Thank you. Please be seated. All right.

10 Ms. Bonora, Mr. Kueber?

11

12 **Submissions by Mr. Haluschak**

13

14 MR. HALUSCHAK:

I'll start, Sir. Mr. Kueber is not able to be here

15 due to a personal matter that he could not avoid, so Ken Haluschak stepping in for him

16 and Ms. Cumming was also unavailable both for reasons that occurred after this date was

17 set. But, my friend in our firm did not want to adjourn this, so I agreed to step in and do

18 the best I can.

19

20 THE COURT:

Okay.

21

22 MR. HALUSCHAK:

So from a high level, Sir, and whether or not

23 this is intended, this application is inviting you to, we think to set a dangerous precedent

24 that will likely open a very dangerous and potentially expensive floodgate that will spill

25 over well beyond this particular case.

26

27 You have, I think, read and interpreted our joint brief correctly in terms of the thrust of

28 our arguments. We do think that there is a very discreet issue for this Court to decide

29 today. You have, I think, captured the essence of our arguments. One of the first points

30 we wanted to make was about the fact that the majority made a legal decision, four out of

31 five trustees decided to proceed in a certain direction.

32

33 Indirectly, indirectly, I think this application is inviting the Court to somehow or for some

34 reason intercede, review or somehow overturn a unanimous resolution that four trustees

35 made properly. We say, those four trustees acted in a bonafide and legal manner and

36 there is no suggestion or evidence to the contrary. You've made that point more than

37 once.

38

39 Ms. Twinn offers no legal authority to justify any type or degree of intervention or review

40 by this Court or any case that supports the proposition that her counsel are contending for

41 today.

1  
2 We think that there is a very important proposition running through our brief and our  
3 submissions today and you've already touched on that pillar argument, but I might put it  
4 in the same way or a slightly different way. Ms. Twinn claims that she's entitled to be  
5 reimbursed for the legal fees she's paid at common law and because of the language that  
6 we know about in clause 9 of the 1985 Deed of Settlement. In effect, that clause says:  
7 Administration costs and expenses of or in connection with the trust, shall be paid from  
8 the trust and reasonable reimbursement to a trustee shall be made for costs incurred in the  
9 administration of the trust, I'm paraphrasing. .PP So the threshold question is, whether or  
10 not, the McLennan Ross legal fees were incurred by Ms. Twinn in the administration of  
11 this trust. We respectfully suggest the answer to that question is a resounding no.  
12

13 We say a trustee does not get reimbursed for legal fees incurred as a result of unilaterally  
14 deciding to act as an adversary for the trust. We say one trustee cannot incur and claim  
15 reimbursement for legal fees incurred taking a swing at other trustees the way Ms. Twinn  
16 has in paragraph 78 of Volume 1 of the brief we have submitted.  
17

18 So given my previous comments about the fact that four of these trustees made and  
19 passed a legal resolution to proceed the way they did and in light of the law, the  
20 respondents collectively urge you to consider the following proposition. It's a two-fold  
21 proposition. Reasonable expenses incurred by a trustee discharging an administrative  
22 power or duty, are recoverable from the trust. However, expenses incurred by a trustee  
23 who challenges the validity of the legally exercised administrative power or duty are not  
24 recoverable from the trust.  
25

26 THE COURT: But, I take it you would agree though, that the  
27 judge who hears the substantive application, the 1103 application, may determine that  
28 there's a valid claim on her part of costs indemnification?  
29

30 MR. HALUSCHAK: Yes.  
31

32 THE COURT: Right.  
33

34 MR. HALUSCHAK: In the ordinary -- as it would be in the ordinary  
35 course.  
36

37 THE COURT: Right, so when you said a moment ago that  
38 anyone who challenges the validity would not be entitled to indemnification, the last  
39 paragraph of your brief really says, at the end of the day, however, the judge presiding  
40 might say, you know what, this was legitimate in the circumstances?  
41



1 MR. HALUSCHAK: Correct and as part of the Court's inherent  
2 jurisdiction to deal with costs, that's what they might award. What I'm saying is, that  
3 clause 9 doesn't say -- it says you can recover costs or expenses incurred in administering  
4 the trust, well what does administering the trust really mean?  
5

6 THE COURT: Right.  
7

8 MR. HALUSCHAK: And I'm saying challenging the validity of the  
9 trust of challenging what is on its face a legal decision to proceed in a certain way, is not  
10 administering the trust, it's challenging the trust. It's challenging the validity of the trust.  
11

12 THE COURT: But, you would agree, however, that if at the  
13 end of the day the judge who hears the substantive application accepts the substance of  
14 the argument being advanced by Ms. Twinn, the judge might say, not necessarily will, but  
15 might say, you know what, that was helpful to me deciding that issue.  
16

17 MR. HALUSCHAK: I agree.  
18

19 THE COURT: And thus those expenses can be paid by the  
20 trust or the judge might not say that. But, all I'm saying is you're not foreclosing that  
21 possibility.  
22

23 MR. HALUSCHAK: And thus our suggestion in paragraph 126 of  
24 the brief.  
25

26 THE COURT: Right, right.  
27

28 MR. HALUSCHAK: So that's in essence the submission we were  
29 going to make to you today, is that this is a very discreet issue. It is not, with respect, we  
30 don't think that complicated especially in light of the facts, in the absence of any law that  
31 supports the position that my friends are putting forward today.  
32

33 It's our respectful submission that Ms. Twinn has acted, you know, based on her own  
34 agenda and self-defined sense of duty or obligation and that's fine, to people who are not  
35 before you and in the absence of any evidence that those people have permitted or  
36 authorized her to speak for them.  
37

38 And so, for all of those reasons, our submission to you, is that the application should be  
39 dismissed today and we have submissions on costs to make, if in fact that becomes  
40 appropriate today or on some other occasion. And with your permission Ms. Bonora  
41 would just like to add a few comments of her own.

1  
2 THE COURT:

Sure. Ms. Bonora?

3  
4 **Submissions by Ms. Bonora**

5  
6 MS. BONORA:

Thank you, My Lord. In light of your  
7 comments, I'll be brief as well. The -- I would start by saying that I think we also need to  
8 focus, and I'd like to have on the record, that we're also dealing with a trust here. These  
9 monies don't belong to anybody except the beneficiaries. And we must be very judicious  
10 about that.

11  
12 My friends have said that Ms. Twinn is the only person putting those arguments forward  
13 and without her those arguments won't be heard. And I would submit to you, Sir -- and  
14 my friend, Ms. Osualdini, specifically said I want to refer you to Shelby Twinn because  
15 she's so important. But, Sir, in the application involving Shelby Twinn and Patrick Twinn,  
16 it was the four trustees' brief that conceded she was a beneficiary. And on that basis, the  
17 Court found and declared her to be a beneficiary of the trust. So, Shelby Twinn is not  
18 solely within the mouth of Catherine Twinn. We made that concession and the Court  
19 accepted that concession.

20  
21 On that topic and the whole idea of who will be included in this trust, we have always  
22 said, first we need to determine if the trust is discriminatory, and then we need to  
23 determine who should be included and whether grandfathering should occur for people  
24 who might be left out. And I think if you read especially the reply brief you would have  
25 the impression that we would never advocate for that. And, Sir --

26  
27 THE COURT:

Well, that is what -- the reply seems to say this  
28 is over, it's a done deal and that's the end of that.

29  
30 MS. BONORA:

And it's easy to say, but we will say that. But I  
31 thought I would show you some proceedings in which I said it in court and in which I, in  
32 brings of bringing forward our settlement proposal, which you had some evidence and  
33 some submissions on today. So, this was from June 24th, of 2015. And I say in front of  
34 the Court, you can see the highlighted version there, in presenting and asking the Court to  
35 consider our settlement proposal and when it would be heard, you appointed an  
36 independent party under your previous order because you believed there were 23 minors  
37 who would lose their benefits. That was a big part of the reasons you appointed an  
38 independent party. Over and over in your decision you said you were worried that there  
39 might be a capital payment and these 23 people would lose their benefits. These 23  
40 people may be left out and they need representation.

41

1 What we've said in our settlement is that we'll grandfather them. We'll give them  
2 everything. So all of those concerns that have been raised in terms of appointing a public  
3 trustee have now, I think, been completely satisfied in that settlement.

4  
5 And then we go on, on page 11 and I say in the third paragraph: (as read)

6  
7 Remember that our application is we believe that our definition  
8 right now is discriminatory. We're coming to the Court to fix that,  
9 to include those people who were discriminated against. We have  
10 lots of -- we provided lots of information already on the process.

11  
12  
13 So I would say that this is -- oh, I'm so sorry, I haven't provided this to my friends.

14  
15 Sir, I would say that is evidence for you, and I didn't bring it all, I just thought I would  
16 give you one example where those are givens will be before the Court.

17  
18 THE COURT: So it's a live issue, in other words.

19  
20 MS. BONORA: It's a completely live issue. It's a very difficult  
21 issue. We have a discriminatory trust that left out the Bill C-31 women. And how do we  
22 fix that? How do we fix that in the face of a trust that says don't change the beneficiary  
23 definition? So, it is a live issue. We are -- we've always been concerned about who's  
24 going to be left out, who -- how we can deal with that problem. So, that's a very live  
25 issue.

26  
27 And you can see from our submissions that we intended to grandfather 23 people. That  
28 settlement proposal simply got adjourned. It wasn't as though it has been Ms. Twinn's  
29 intervention killed it. It was adjourned sine die and then many other proceedings have  
30 taken over. So, that still sits out there as a potential that could come back before the  
31 Court.

32  
33 Sir, in respect of the expenses, and you invited us to speak to the purposeful  
34 (INDISCERNIBLE) clause in the trust. I would say that you would never interpret a trust  
35 clause that says any expense provided by a trustee must be paid without question.

36  
37 THE COURT: Yes. It's not a carte blanche provision.

38  
39 MS. BONORA: It can never be a carte blanche provision. And  
40 so we would submit that you need to read that in the context.

41

1 The other submission I would make, and that is twofold. Number 1, my friends have  
2 said -- you challenged them on when this application was brought and why are we in  
3 2017. And they said the application was brought in 2015 and that -- or the settlement was  
4 dealt with in 2015 and the application was brought shortly after that. That's absolutely  
5 true. But my friends are seeking costs going back to 2014. So, it's not as though they  
6 brought that application immediately when they thought they would try and seek costs  
7 from the trust.

8  
9 The second point I would make, and I provide this to you because we asked for evidence,  
10 what costs were being sought. So, this Court is being asked to give Ms. Twinn \$850,000  
11 today in perspective costs. And \$850,000 was before briefs were filed and before today.  
12 So you can imagine --

13  
14 THE COURT: It's probably -- yes.

15  
16 MS. BONORA: -- where those are now.

17  
18 THE COURT: Yes.

19  
20 MS. BONORA: So I would submit to you, Sir, that if you were  
21 asked to give those kinds of costs and this -- my friends are asking me to find that those  
22 are administrative expenses, that there might actually be some evidence in front of you to  
23 provide that those are administrative expenses. And this is the only evidence that is  
24 provided and all other requests for information and details were rejected.

25  
26 I understand that we could've made an application for more, but my submission is the  
27 onus is on the applicant.

28  
29 THE COURT: So all we have is --

30  
31 MS. BONORA: And this evidence is insufficient.

32  
33 THE COURT: -- the series of accounts then from McLennan  
34 Ross.

35  
36 MS. BONORA: Pardon me?

37  
38 THE COURT: We just have a series of accounts from  
39 McLennan Ross.

40  
41 MS. BONORA: We -- well, Sir, I -- just to be clear, we have a

1 series of front pages --

2

3 THE COURT:

Right.

4

5 MS. BONORA:

-- of accounts --

6

7 THE COURT:

Not detailed.

8

9 MS. BONORA:

-- that say what the fees and disbursements

10 are. There's no evidence of any detail in terms of what that entails and what it's for. And,  
11 of course, we submitted in our brief the decision of Justice Pentelchuk who showed that  
12 there were times when Ms. Twinn submitted costs that were not appropriate.

13

14 Sir, in respect of Justice Graesser's decision, I would say that we agree that's exactly  
15 what you're saying. Justice Graesser's decision is exactly what you're saying. Have the  
16 application heard and then let the judge decide the costs. And that's what he did. He  
17 didn't make that finding. You will see that the paragraph below it says that the applicant  
18 was unsuccessful, that was Ms. Twinn. Of course, she -- what's interesting is he didn't  
19 award costs in that but my understanding is that's part of the costs that are being sought  
20 by -- in front of you today.

21

22 I think it's also telling that while you said I don't want to get involved in all of the  
23 applications and better the discretion either of Justice Thomas or of the trial judge, if you  
24 awarded costs you would actually be intervening in all of the decisions in which Justice  
25 Thomas made costs award. So, where we were awarded costs in the Stoney decision,  
26 Catherine Twinn would be saying, yes, but now you need to pay me. Regardless of the  
27 position I took. And I would say that it's almost a backdoor appeal to those decisions.

28

29 And so in following up on your comments this morning that you did not want to  
30 intervene in that, we think that you -- that is exactly why you shouldn't intervene.

31

32 And, Sir, certainly my friend, I know, attended when we spoke to costs on Stoney but she  
33 said nothing. So she could have asked the Court to give her those costs, she could have  
34 asked that at that time. Instead, she chose to leave it for you to make that decision. And,  
35 therefore, really appeal that decision in some ways. And that is certainly true in respect of  
36 the Stoney decisions and certainly true in respect of the Patrick Twinn decisions.

37

38 I would submit to you, my friend has implored you to look at Waters, but in the  
39 submission we have from Waters, he says, yes, administrative costs of a trust are paid, but  
40 legal fees are different. And so --

41

1 THE COURT: Waters does not stand for the proposition that  
2 any claim is paid, you know, automatically.

3  
4 MS. BONORA: Exactly. Obviously, we agree with your position  
5 on the majority rule.

6  
7 Sir, the -- I'll finish with this, and that is that the people who are -- who Ms. Twinn said  
8 she's representing have every ability to come forward and be witnesses in the trial.  
9 Ms. Twinn still has the ability to come forward and be an advocate at the trial. And there  
10 have been other people who have come forward and been advocates. She doesn't need to  
11 be that person.

12  
13 And certainly, I'll finally say, that certainly the few comments have been made about she  
14 can't afford it. We tried to explore that, they said no, that's not an argument. We are not  
15 saying she can't afford it, we are not dealing with the little sister's case. We are -- it's an  
16 entirely different argument.

17  
18 So, I think you can say there's no evidence that she will be silenced by the fact that she  
19 has to pay for this. In fact, we received notice yesterday she will be participating in the  
20 Patrick Twinn appeal. So, clearly she intends to participate and carry on. And I don't  
21 think there's any evidence that her voice will be silenced.

22  
23 Those are my submissions, Sir.

24  
25 THE COURT: All right. Any reply?

26  
27 **Submissions by Ms. Osualdini (Reply)**

28  
29 MS. OSUALDINI: Sir, I just wanted to respond to a few factual  
30 issues in terms of grandfathering. My friend spoke about the four trustees' position in  
31 terms of Shelby Twinn. I happen to have their submissions here in regards to that  
32 application. And their submissions were not that Shelby -- they did acknowledge that  
33 she's an existing 1985 beneficiary. I don't think there's any dispute about that. But in  
34 terms of what may happen to her as a result of the relief, it was not acknowledged that  
35 she was going to be protected. In fact, I quote from their submissions, it is acknowledged  
36 that the advice and direction application could have a potential effect on Shelby and her  
37 sister's beneficiary status.

38  
39 THE COURT: No, but does that -- do I understand that's a  
40 live issue?

41

1 MS. OSUALDINI:  
2 grandfathering --  
3

But I'm just correcting that in terms of

4 THE COURT:  
5

No, no.

6 MS. OSUALDINI:  
7

-- and what the trustees' position is --

8 THE COURT:  
9

But I think it's important that we get this  
straight. If I understood what was just said to me, this is a live issue that will be dealt  
with by the judge in the substantive application.  
10  
11

12 MS. OSUALDINI:  
13

It's -- grandfathering will be an issue.

14 THE COURT:  
15

Right.

16 MS. OSUALDINI:  
17

My point though is -- my friend made the point  
that the trustees are also concerned about this and suggested that they had protected  
Shelby Twinn. Here's --  
18  
19

20 THE COURT:  
21

Okay. But I think what Ms. Bonora was trying  
to say, if I understood her correctly, is that this is an issue that will be before the Court  
ultimately. It's not a situation where the door is slammed on this issue. Am I  
understanding that correctly?  
22  
23  
24

25 MS. OSUALDINI:  
26

No, I agree that -- no, I agree with that.

27 THE COURT:  
28

Yes.

29 MS. OSUALDINI:  
30

I agree with that.

31 THE COURT:  
32

So, therefore, what Ms. Bonora just said, and I  
think she's right, that it is open to the Court on hearing argument to rule in your favour  
on that issue. Perhaps not. I don't know. But it's not as if this is a dead issue.  
33  
34

35 MS. OSUALDINI:  
36

No, and I'm not saying -- that wasn't what my  
point was. My point was, is historically what are the parties' positions?  
37

38 THE COURT:  
39

Okay. But the Court ultimately will decide. I  
mean, you can advocate as counsel for whatever you want. The judge will ultimately  
decide.  
40  
41

1 MS. OSUALDINI:

Sure.

2

3 THE COURT:

Likely it will be appealed, given the nature of this litigation, and ultimately the court system, perhaps Supreme Court of Canada, will determine this. I don't know.

6

7 MS. OSUALDINI:

Just my point being about who's advocating for

8 grandfathering.

9

10 THE COURT:

Okay. But you will agree with me, and I think

11 Ms. Bonora made a valid point, whether Ms. Twinn is in the picture or not that issue can  
12 be placed before the Court for proper determination.

13

14 MS. OSUALDINI:

Who's going to place it before the Court?

15

16 THE COURT:

Well, the parties themselves can show up. I

17 mean, there's all sorts of possibilities here. I don't know who these people are, I don't  
18 know what the arrangement is with Ms. Twinn. I haven't been told, it's probably none of  
19 my business. But the reality is I don't accept that these people are out in the, you know,  
20 they've been excluded from these proceedings. I don't accept that.

21

22 MS. OSUALDINI:

No. But I would, just in terms of -- just a point

23 I wanted to draw your attention about the timings. I know in our initial submissions we  
24 talked about the timing of bringing these proceedings for identification. As pointed out,  
25 they were brought in December 2015. It was at that point we realized that, you know, this  
26 is going to be an expensive undertaking.

27

28 In 2014, that was before Ms. Twinn had formally interjected herself, I mean, things were  
29 much more minor at that point. We brought the proceedings when we realized that this is  
30 going to be a significant cost --

31

32 THE COURT:

Right.

33

34 MS. OSUALDINI:

-- undertaking. The proceedings were initially

35 scheduled to go ahead, I'm sorry, I can't remember which month, I think it was  
36 September 2016. But it was essentially a year later after filing because that's how long it  
37 took to get a court date.

38

39 THE COURT:

Okay. And I'm not criticizing anyone. I know

40 how these things proceed. My point was simply this, that in a circumstance where a party  
41 seeks an order of indemnification for past costs, the Court is entitled to say, okay, could



1 you have asked earlier before the costs were incurred for approval?

2

3 MS. OSUALDINI: M-hm.

4

5 THE COURT: If the Court said yes, so be it; if the Court said  
6 no then, you know, you're on your own.

7

8 MS. OSUALDINI: M-hm. And just one other -- something I  
9 wanted to highlight from my reply brief is in term -- it's paragraph 42, and it's in terms  
10 of what the trustees' duties are in advice and direction applications.

11

12 THE COURT: Sorry, 42?

13

14 MS. OSUALDINI: Yes, correct. 42.

15

16 THE COURT: Yes, I have it.

17

18 MS. OSUALDINI: And I'm referencing the *Re De Foras* decision  
19 of the Alberta Supreme Court from 1958. And this case stands for the proposition that it's  
20 a trustee's duty, not only to the Court, but to all persons interested in the action. To lay  
21 before the Court all the facts which they have in their knowledge or possession which  
22 might assist in the just determination of the questions which they raised.

23

24 THE COURT: Right.

25

26 MS. OSUALDINI: That's exactly what we're doing.

27

28 THE COURT: Well, why should I presume that the majority  
29 will not act appropriately and have this evidence before the Court?

30

31 MS. OSUALDINI: Well, what we -- what we do know is that the  
32 majority and Ms. Twinn are taking different approaches.

33

34 THE COURT: Yes.

35

36 MS. OSUALDINI: At least on the record.

37

38 THE COURT: Yes.

39

40 MS. OSUALDINI: The record before the Court, there's different  
41 approaches being taken.

1  
2 THE COURT: Judges deal with that every day.

3  
4 MS. OSUALDINI: Sure. And while they're different, and I'm  
5 not -- at this juncture, I agree, I'm not criticizing their approach. I'm saying Ms. Twinn  
6 believes it's her fiduciary duty to lay her facts before the Court.

7  
8 THE COURT: I understand that. But it's pretty clear from the  
9 discussion this morning and the breadth of the information, I mean, there were boxes and  
10 boxes of materials, I find it hard to believe that the judge who ultimately hears this matter  
11 will not have this argument to deal with. And he or she will then make a decision which  
12 will likely be appealed. And then it will be before the Court of Appeal.

13  
14 **Submissions by Mr. Risling (Reply)**

15  
16 MR. RISLING: Just a couple little wrap-up points, Sir, in  
17 response. One, is my friend made reference to the dangerous precedent concern that he  
18 had for you. I would submit, Sir, that dangerous precedent issue fits on both sides of the  
19 coin. My submission to you is that if a decision is made to suggest that the trustee -- the  
20 trustee has to wait, that will have the effect of discouraging trustees who are faced with a  
21 duty from incurring the expense of actively satisfying that duty through their participation  
22 and litigation. So, my point is simply dangerous precedent flows both ways.

23  
24 Just as a matter of correction in terms of our position, Sir, I thought we were clear,  
25 perhaps we weren't, we weren't seeking for you to grant an order to pay all of the  
26 accounts today. What we were seeking --

27  
28 THE COURT: I understand.

29  
30 MR. RISLING: -- an order was for reversal. And then --

31  
32 THE COURT: In the appropriate amount. Yes, I understand  
33 that.

34  
35 MR. RISLING: Right. Okay. Thank you. We also, and I again  
36 want to be clear, weren't suggesting in our submissions that Ms. Twinn couldn't afford  
37 litigation. What I was saying was providing an example of a trustee who might not be  
38 able to afford. So, I just want to make sure that my submissions were clear in that regard.

39  
40 THE COURT: I understand.

41

1 MR. RISLING: I wasn't speaking specifically about Ms. Twinn.

2

3 THE COURT: I understand.

4

5 MR. RISLING: And there is actually one other point that I  
6 wanted to make that there seems to be a bit of confusion about and I just want to clear  
7 the record. We were today, of course, applying for reimbursement of Ms. Twinn's legal  
8 expenses. And we don't think that Ms. Twinn standing up and speaking to costs at an  
9 application are related. And so costs of those applications deal with party-party costs, win  
10 or lose. Today we're dealing with Ms. Twinn's own costs and our submission --

11

12 THE COURT: On a solicitor-client basis.

13

14 MR. RISLING: On a solicitor-client basis.

15

16 THE COURT: Right. Right.

17

18 MR. RISLING: So, just a point of clarification.

19

20 THE COURT: I understand that.

21

22 MR. RISLING: And just one last point. I'm finished. One last  
23 point from my friend.

24

25 MS. OSUALDINI: Just in terms of a point of clarification about  
26 seeking costs in terms of the 2011 action. That hasn't been the practice of the trustees at  
27 the end of the application to say, Court, I'd like you to award me indemnity from the  
28 trust. They just -- they do it. And that's regard -- regardless of their success or not on the  
29 application.

30

31 THE COURT: Okay.

32

33 MS. OSUALDINI: So in terms of why we weren't going up and --  
34 because we weren't seeking costs against other parties, we're seeking  
35 indemnification. And, frankly, on a Mr. Stoney application we let the trustees proceed.  
36 We weren't opposing them.

37

38 THE COURT: Okay. All right.

39

40 MS. OSUALDINI: And that was the reason, so.

41

1 THE COURT:

All right. Anything further from either side?

2

3 MR. HALUSCHAK:

No. Thank you, Sir.

4

5 **Decision**

6

7 THE COURT:

I'm going to deliver a very brief oral decision

8 here. I repeat what I said at the outset this morning that I spent a goodly number of hours  
9 reviewing the briefs prior to court this morning. I want to compliment counsel on both  
10 sides for the quality of the briefs. I thought they were excellent. And I spent many, many  
11 hours reading the material. It was well set out on both sides.

12

13 I also want to reiterate what I said at the outset this morning that I'm walking a fine  
14 judicial line this morning in that I am not the judge who is dealing with the substantive  
15 application in the 1103 matter. I'm dealing with one discreet issue only and, thus, I am  
16 deliberately abbreviating what otherwise might've been more extensive reasons. And the  
17 reason that I'm doing that is that I do not want to have anything I say somehow impede  
18 the discretion of the judge who ultimately hears the matter from deciding what he or she  
19 thinks is appropriate on the evidence and after argument from counsel.

20

21 It is significant to me that no legal authority has been cited for the proposition being  
22 advanced by the applicant. I have no doubt that there was very extensive research done on  
23 both sides. The briefs reflect that. This is not a criticism of counsel. I think it's a situation  
24 where the authorities simply don't exist. And, to my mind, that is significant.

25

26 I also want to make it clear that I accept without hesitation that Catherine Twinn  
27 genuinely and bone fide believes the position she is adopting and has advanced through  
28 counsel. That, for me, is not an issue this morning.

29

30 What is an issue is the legal effect of that. When one reduces the applicant's argument to  
31 its essence, it is that because Catherine Twinn genuinely believes that she's acting in the  
32 best interests of an unidentified pool of individuals who may ultimately be found not to  
33 be beneficiaries, that this then justifies the position being advanced this morning which is  
34 that she is entitled to indemnification of legal fees incurred to date on a solicitor-client  
35 basis. And, prospectively, again on the solicitor-client basis, fees that may be incurred in  
36 the future. Which I suspect will be substantial.

37

38 There is no legal authority that I'm aware of that justifies that position. In other words,  
39 the fact that a party genuinely and bona fide believes something, does not necessarily  
40 create legal rights which otherwise do not exist. They either exist or they do not exist. In  
41 my view, when I look at paragraph of the trustees which is the indemnification provision,

1 it is not clear on its face that a dissenting trustee, in this case one dissenting trustee who  
2 voluntarily elects to incur legal fees, is necessarily entitled to be indemnified pursuant to  
3 that provision. That is a live issue which will be argued ultimately before the judge who  
4 hears the substantive application.

5  
6 I repeat what I said during argument, it is not a slam dunk argument from Catherine  
7 Twinn's position. It is an arguable point that will be decided.

8  
9 In my view, absent any case law to date justifying this position and absent a clear  
10 provision in the trustees, the application must be dismissed. However, I do so on the basis  
11 that this is completely without prejudice to the right of Catherine Twinn in the substantive  
12 application to advance these arguments. I think it was very fair that the respondents at  
13 paragraph 126 of their very extensive brief made that as a suggestion. And I think that's  
14 fair in the circumstances.

15  
16 Having taken the position that I did, that it is not fair for me to make decisions about  
17 credibility or what people have done or not done, it stands to reason that the judge who  
18 ultimately hears the matter will make those decisions. And he or she will then be in a  
19 position to make a proper decision on this cost application.

20  
21 So, in the result, the application is dismissed. However, on a without prejudice basis.

22  
23 And, again, I want to thank counsel for your representations on both sides. Very  
24 interesting argument. All right. Anything further, counsel?

25  
26 MR. HALUSCHAK: Costs, Sir?

27  
28 THE COURT: What is your position?

29  
30 **Submissions by Mr. Haluschak (Costs)**

31  
32 MR. HALUSCHAK: Solicitor and client on a full indemnity basis.

33  
34 THE COURT: Well, what if Catherine Twinn is found to be  
35 correct in her positions ultimately determined?

36  
37 MR. HALUSCHAK: Then I suppose the judge at that time can deal  
38 with that. Take all of the proceedings and all of the costs awards to and against into  
39 account.

40  
41 THE COURT: Well, in other words, just reserve that to the

1 ultimate decision-maker?

2

3 MR. HALUSCHAK: Yes. What you do today does not bind the  
4 hearing judge from deciding in the big picture what to do out of a sense of fairness or  
5 justice.

6

7 THE COURT: Okay. Mr. Risling or Ms. Osualdini?

8

9 **Submissions by Mr. Risling (Costs)**

10

11 MR. RISLING: Our position, Sir, is that it's appropriate to put  
12 the costs essentially in the cause given your direction. And this will be a matter for  
13 potentially the trial judge to determine. Our submission was that Ms. Twinn is already  
14 funding her position with respect to this legal battle personally, and now my friend's  
15 suggestion is that Ms. Twinn fund on a solicitor-client basis the position -- the legal  
16 arguments and positions of the four trustees in the circumstances. I submit that is  
17 inappropriate.

18

19 My view would be that the appropriate order in light of your observation that this is a  
20 without prejudice decision for Ms. Twinn to deal with at a later time, that the costs would  
21 be dealt with at that time as well.

22

23 MR. HALUSCHAK: Sir, and I've asked for solicitor and all client  
24 indemnity costs including disbursements, to be clear, incurred for all steps taken  
25 subsequent to being served with Ms. Twinn's application filed December 11, 2015. I  
26 know you've dealt with solicitor and client costs before. Our submission asked you to  
27 take into account at least some of the conduct that we have set out in the brief from pages  
28 6 to 18 of our brief, and also under tab 6 of the brief. We ask you to take into account  
29 that this was a fairly discreet issue. It was booked for a whole day. Our -- we're going to  
30 be done before noon. So, we don't think it was that complicated, we don't think a full day  
31 was necessary.

32

33 A special chambers practice note, you know, prescribes briefs that are short and concise.  
34 And in this particular case, the respondents have to deal with three briefs from the  
35 plaintiffs totalling 83 pages of narrative alone and argument. You are probably well aware  
36 of Sawridge decisions 5 and 7, and Justice Thomas' comments and analysis of the culture  
37 shift and the principles that this Court is applying. I think on a more consistent and even  
38 basis, the Court is recognizing the economic realities of litigation and especially  
39 unnecessary and unreasonable litigation.

40

41 I understand and respect the position that Ms. Twinn has taken and that her counsel has

1 advocated. But a great deal of time and effort was put into a relatively straightforward  
2 application.

3  
4 THE COURT:

Well, why can't that argument be made to the  
5 judge who ultimately hears the 1103 application? I mean, I'm not disagreeing with what  
6 you're saying. These are arguments that can be addressed. But surely the judge who  
7 ultimately hears the substantive application will have the benefit of the full background.  
8 Because the conduct that you talk about and that I read about, you know, it's all in the  
9 eye of the beholder, isn't it? From the perspective of Ms. Twinn, she argues well I'm  
10 acting in the best interests of these people bona fide, in a genuine fashion, not in an  
11 obstructionist fashion. You may take a different view of it and that's fine. But surely the  
12 judge who ultimately hears it will have that benefit.

13  
14 MR. HALUSCHAK:

I think you're in the best possession to assess  
15 costs vis-a-vis this particular application. You've seen what has been presented, you've  
16 heard the arguments. I think you will be in a -- or are in a better position to assess what's  
17 happened today and before today, and leading up to today than that ultimate hearer.

18  
19 THE COURT:

See, I don't agree with that. And the reason I'm  
20 saying that is this, there is a big picture involved here; right? Those eight art boxes  
21 upstairs that I -- you know much more about it than I do, I've only seen a little bit of the  
22 picture here. But I -- this is one of those cases -- this is not garden-variety litigation,  
23 obviously. This is one of these cases where there are a lot of -- lot of, you know, issues  
24 and sub issues. And I really think that the judge ultimately, at the end of the day, is going  
25 to say to Ms. Twinn, you know, you're absolutely right here. There's a horrible injustice  
26 to these people. Or, conversely, that the majority has acted properly and, therefore,  
27 Ms. Twinn, you are not entitled to indemnification. Your argument for costs I think is  
28 focussed properly at that time.

29  
30 All right. Unless there's anything further, again, thank you for the excellent quality briefs.  
31 I'll return these documents to counsel.

32  
33 MR. HALUSCHAK:

So, no order as to costs today --

34  
35 **Ruling (Costs)**

36  
37 THE COURT:

Today. Reserved to the judge who ultimately

38 hears the substantive application.

39  
40 MR. HALUSCHAK:

Thank you, Sir.

41

1 THE COURT: And I'm not trying to restrict any arguments  
2 that you make at that time. You argue it at the fullest of time.

3  
4 MR. HALUSCHAK: Thank you for your time.

5  
6 THE COURT: All right. Thank you.

7  
8 MS. BONORA: Thank you.

9  
10 MR. RISLING: Thank you, Sir.

11  
12 THE COURT CLERK: Order in court.

13  
14 THE COURT: And court stands adjourned.

15

16

17 PROCEEDINGS CONCLUDED

18

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**1 Certificate of Record**

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I, Nicole Lachat, certify that this recording is the record made of the evidence in the proceedings in Court of Queen's Bench, held in courtroom 413, at Edmonton, Alberta, on the 13th day of October, 2017, and I was the court official in charge of the sound-recording machine during the proceedings.

**1 Certificate of Transcript**

2

3 I, Su Zaherie, certify that

4

5 (a) I transcribed the record, which was recorded by a sound-recording machine, to the best  
6 of my skill and ability and the foregoing pages are a complete and accurate transcript of  
7 the contents of the record, and

8

9 (b) the Certificate of Record for these proceedings was included orally on the record and  
10 is transcribed in this transcript.

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14

Su Zaherie, Transcriber

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Order No. 100864-17-1

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Pages: 56

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Lines: 2364

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Digital Fingerprint: 58825a949f1d3f7eba3b4f323ca2ceae67a3358779b5a35299bf099168116360

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Detailed Transcript Statistics	
Order No. 100864-17-1	
Page Statistics	
Title Pages:	1
ToC Pages:	1
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Line Statistics	
Title Page Lines:	55
ToC Lines:	18
Transcript Lines:	2291
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Visible Character Count Statistics	
Title Page Characters:	759
ToC Characters:	428
Transcript Characters:	84500
Total Billable Characters:	85687
Multi-Take Adjustment: (-) Duplicated Title Page Characters	84928