

Fast Track COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER: 1703-0288AC

TRIAL COURT FILE NUMBER: 1103 14112 and 1403 04885

REGISTRY OFFICE: Edmonton



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

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

APPLICANT: CATHERINE TWINN, as Trustee for the 1985 Trust and the 1986 Trust

STATUS ON APPEAL: Appellant

RESPONDENTS: ROLAND TWINN, EVERETT JUSTIN TWINN, CATHERINE TWINN, BERTHA L'HIRONDELLE and MARGARET WARD, as Trustees for the 1985 Trust and the 1986 Trust

STATUS ON APPEAL: Respondents

RESPONDENT: OFFICE OF THE PUBLIC TRUSTEE OF ALBERTA

STATUS ON APPEAL: Respondent

DOCUMENT: **FACTUM**

Appeal from the Decision of
The Honourable Mr. Justice R.P. Belzil
Dated the 13 day of October, 2015
Presently Not Entered

FACTUM OF THE APPELLANT

SCANNED

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COURT OF APPEAL OF ALBERTA

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INTRODUCTION

1. The Appellant, Catherine Twinn in her capacity as a trustee, is one of five trustees of the Sawridge Band Inter Vivos Settlement Created by Chief Walter Patrick Twinn (the "Settlor"), of the Sawridge Indian Band, No. 19, now known as Sawridge First Nation (the "First Nation"), on April 15, 1985 (the "1985 Trust") and the Sawridge Trust, settled by the Settlor on August 15, 1986 (the "1986 Trust") and collectively referred to as the "Trusts".
2. This appeal pertains to Ms. Twinn's application for indemnification for her legal fees incurred as a Trustee pertaining to litigation in Court of Queen's Bench Action No. 1103 – 14112 (the "2011 Action") and Court of Queen's Bench Action No. 1403-04885 (the "2014 Action") (or collectively referred to as the "Actions").
3. The Actions, particularly the 2011 Action, relate to significant issues that impact the administration of the Trusts and raise complex issues of law. The final determination of the 2011 Action has the potential to result in significant and life changing consequences for existing beneficiaries.
4. The 2011 Action relates to a proceeding commenced by the trustees of the 1985 Trust (the "Trustees") to seek advice and direction of the Court in relation to, *inter alia*, the definition of "beneficiary" pursuant to the 1985 Trust deed. The 2014 Action was initiated by the other Trustees, not including Ms. Twinn, (the "Four Trustees"), in relation to a trustee appointment. Ms. Twinn filed an application within the existing 2014 Action to address, *inter alia*, issues of trustee succession, appointment and composition.

Appellant's Extracts of Key Evidence, pg. A455

5. The 2011 Action remains ongoing and was the subject of a recent decision from the Court of Appeal that addressed the entitlement of certain affected beneficiaries to party status in the 2011 Action ("Beneficiary Appeal"). In the Beneficiary Appeal, the Court of Appeal provided the Trustees with direction on various procedural issues that should be addressed in the 2011 Action before the matter is set down for trial. Given the Court of Appeal's comments, it appears that there will likely be further interlocutory applications in the 2011 Action before it will be scheduled for trial.

Twinn v. Twinn, 2017 ABCA 419, at paras 21-22

6. The 2014 Action was effectively concluded in early 2017, as the Trustees agreed to transfer the outstanding issues to private arbitration, which has been scheduled.
7. Ms. Twinn submits that she has been compelled to obtain independent legal counsel and advance positions independently of the Four Trustees in the Actions due to her view that the positions being advocated and the conduct of the Four Trustees are not consistent with their fiduciary duty to the beneficiaries of the Trusts and are affected by a structural conflict of interest. This inherent structural conflict arises from, amongst other matters, the fact that certain trustees also hold elected positions with the First Nation, such as Chief Roland Twinn.
8. Ms. Twinn's concerns relating to conflict of interest have been heightened by the recent submission made by the First Nation to Justice Thomas in the 2011 Action that advises that the Chief and Council of the First Nation are considering commencing an application to dissolve the 1985 Trust. This is despite the fact that Chief Twinn is also a trustee.

Letter from Parlee McLaws LLP to Justice Thomas,
dated September 18, 2017, Appellant's Book of
Authorities

TAB 2

9. In this appeal, Ms. Twinn appeals the oral decision of Justice Belzil pronounced on October 13, 2017 and in relation to her application for indemnification of past and future legal fees incurred in relation to the Actions and filed on December 11, 2016 ("Indemnification Application"). At the time of filing this Factum, the Order following Justice Belzil's oral decision has not yet been filed.
10. While the 2011 Action is case managed by Justice Thomas, Justice Thomas directed that the Indemnification Application did not need to be heard as part of his case management.
11. In his oral decision, Justice Belzil found that he did not question the sincerity of Ms. Twinn's concerns. Justice Belzil expressed concern that he did not want his decision to interfere with the discretion of the trial judge in the 2011 Action and held that the trial judge would be in a proper position to decide issues of indemnification. As a result, Justice Belzil dismissed the Indemnification Application on a without prejudice basis to the ultimate trier of fact.

Appeal Record, pg. F4-F5

12. With respect, Justice Belzil made reviewable errors of law and fact in his oral decision. More particularly and most significantly, he failed to apply the legal test for trustee indemnification, the application of which would not interfere with the discretion of the trial judge in the 2011 Action. Further, he failed to consider that the 2014 Action is already concluded and as such, there will not be a trial.
13. As a practical matter, Justice Belzil also failed to consider how Ms. Twinn is to continue putting forward her positions in the 2011 Action when she is not indemnified by the Trusts. The legal expenses incurred by the Four Trustees, alone, in the 2011 Action well exceeds four million dollars and are only climbing. It is not practical or likely possible for Ms. Twinn to continue to effectively advocate in the 2011 Action, unfunded, in light of the complexity and adversarial nature of this litigation.

Appellant's Extracts of Key Evidence, pg. A388,
October 6, 2017 Affidavit of C. Twinn, at para. 3 and 4

14. Ms. Twinn's advocacy in the 2011 Action plays an important role in the effective representation of the beneficiaries of the Trusts, as has been recognized by both the Four Trustees and the Court of Appeal. The unequal access to indemnification amongst the Trustee group has created an unequal playing field that needs to be leveled for the benefit of the beneficiaries and to allow Ms. Twinn to discharge her fiduciary duties.

PART 1 FACTS

15. The 1985 Trust was settled by Chief Walter Twinn of the First Nation on April 15, 1985 for the benefit of its beneficiaries. The beneficiaries are defined at paragraph 2(a) of the Deed.

Appellant's Extracts of Key Evidence, 1985
Declaration of Trust, pg. A90

16. On August 15, 1986, Chief Twinn settled an additional and separate trust (the "1986 Trust"), which provides for a different group of beneficiaries than the 1985 Trust.

Appellant's Extracts of Key Evidence, 1986
Declaration of Trust, pg. A101

17. Effectively, the 1985 Trust provided for all persons who would qualify for First Nation band membership pre *Bill C-31* amendments and the 1986 Trust provides for all

First Nation band members post *Bill C-31* amendments.

18. Further particulars of the relevant facts, which are not disputed amongst the parties can be found at paragraphs 19 through 49 of the initial written submissions of Ms. Twinn filed in support of the Indemnification Application.

PART 2 GROUNDS OF APPEAL

19. Ms. Twinn appeals the decision of Justice Belzil ("Hearing Judge") on the following grounds that amount to errors in law and/or fact. It is respectfully submitted that:
- (a) The Hearing Judge failed to consider and properly apply the test for trustee indemnification, and failed to consider the conduct and positions put forward by the Four Trustees which has compelled Ms. Twinn to act independently and in furtherance of her fiduciary duties;
 - (b) The Hearing Judge failed to consider that the 2014 Action is concluded; and
 - (c) The Hearing Judge failed to consider the effect of denying indemnification in the 2011 Action until trial and how that would impact a trustee proceeding in a *bona fide* manner in relation to their fiduciary duties.

PART 3 STANDARD OF REVIEW

20. The typical appellant standards of review are applicable on this appeal. Questions of law engage the correctness standard.

Creston Moly Corporation v. Sattva Capital Corp.,
2014 SCC 53, at paras 52-55, Appellant's Book of
Authorities **TAB 3**

21. The Hearing Judge's findings of fact or inferences of fact are entitled to deference and are not to be overturned absent palpable and overriding error. Questions of mixed fact and law such as questions that involve the application of legal standard to a set of facts and errors in principle such as applying an incorrect standard or failing to consider a required element of a legal test, require deference and the standard is palpable and overriding error. However, if it is clear that the Hearing Judge made some extricable error in principle with respect to the characterization of the standard or its application, the error may amount to an error of law, and is subject to the standard of correctness.

Housen v. Nikolaisen, 2002 SCC 33 at para 36,

PART 4 ARGUMENT**A. Failed to Consider and Apply Test for Trustee Indemnification**

22. Ms. Twinn contends that the Hearing Judge failed to apply the legal test for trustee indemnification, which is an error in law and reviewable on a standard of correctness.

23. The Hearing Judge dismissed the Indemnification Application on the basis that there is not any legal authority for the proposition that a dissenting trustee, acting against the majority and without a finding of bad faith against the majority group, is entitled to indemnification from the trust assets. The Hearing Judge held that the ultimate trier of fact would be in the proper position to make assessments on "credibility or what people have done or not done, it stands to reason that the judge who ultimately hears the matter will make those decisions. And he or she will then be in a position to make a proper decision on this cost application."

Appeal Record, pg. F5

24. With respect, this is incorrect. In Ms. Twinn's written submissions to the Hearing Judge, the test for trustee indemnification was fulsomely set out. Which included consideration of both the common law test for trustee indemnification, along with the specific provisions in the Trusts' deeds that pertain to indemnification.

25. The common law is well settled in relation to when a trustee is entitled to indemnification. A three part test has developed that sets out the requirements that must be met, those are: (i) The expenses are to arise out of an act or within the scope of the trusteeship duties and powers; (ii) The expense is reasonable; and (iii) The trustee is duty-bound.

Waters' Law of Trusts in Canada, 4th ed by Donovan WM Waters, Mark R Gillen & Lionel D Smith (Toronto: Carswell, 2014) ("Waters' on Trusts") pg. 1209,
Appellant's Book of Authorities **TAB 6**

26. Further, paragraph 9 of both Trust deeds are identical and provide for mandatory indemnification to a Trustee for reasonable reimbursement of fees incurred in the administration of the Trusts.

Appellant's Extracts of Key Evidence, pg. A97-A98

and pg. A106

27. The Supreme Court of Canada has held that reasonable expenses include the costs of an action reasonably defended.

Geffen v. Goodman Estate, [1991] 2 SCR 353
("Geffen"), pg. 390, Appellant's Book of Authorities
TAB 7

28. Typically an application for advice and direction to the Court is regarded as an expense reasonably incurred by a trustee.

The Canada Trust Company v. Russell Browne et. al.,
2011 ONSC 4400 ("Browne"), at para. 15, Appellant's
Book of Authorities
TAB 8

29. It is only in a rare case where a trustee would not be entitled to indemnification related to an advice and direction application and where the Court considers the question put to the Court as well-settled, obvious or unnecessary.

Browne, at para. 15, Appellant's Book of Authorities
TAB 8

30. The Court in *Browne* cites Dr. Waters' learned text on trusts, *Waters' Law of Trusts in Canada*, and recognizes that trustees are under a duty to seek the court's advice whenever they are in doubt as to the construction of a trust instrument, the scope of their duties or powers, or any other legal question.

Browne, at para. 20, Appellant's Book of Authorities
TAB 8
Waters' Law of Trusts in Canada, 3rd ed by Donovan
WM Waters, Mark R Gillen & Lionel D Smith (*Toronto:*
Carswell, 2005) pg. 1156, Appellant's Book of
Authorities
TAB 9

31. Where a trustee properly comes before the Court they are "entitled to the fullest protection which the Court can give them".

Browne, at para. 33, Appellant's Book of Authorities
TAB 8

32. This concept is codified in the *Trustee Act*, which provides for reimbursement of a Trustee for expenses incurred.

Trustee Act, RSA 2000, c T-8, s. 25
TAB 10

33. The Supreme Court of Canada has held that:

In so far as such person [trustee] does not recover his costs from any other person, he is entitled to take his costs out of the fund held by him

unless the court otherwise orders; and the court can otherwise order **only** on the ground that he has acted unreasonably, or in substance for his own benefit, rather than for the benefit of the fund. [Emphasis mine]

Geffen, pg. 391, Appellant's Book of Authorities **TAB 7**

34. With respect, there is a test for trustee indemnification that is not determined by majority decisions. This is logical because a minority trustee's fiduciary duties exist independently of majority decision making. It is imperative that a minority trustee be allowed indemnification for reasonably advancing issues that are within the scope of their duties and powers. Failing such indemnification, most trustees would not be able to meet their obligations given the personal cost potentially involved.
35. While there is a body of case law that stands for the proposition that in exercising discretionary powers, trustee decisions are not to be overturned absent bad faith, the positions being put forward by the Four Trustees do not amount to exercises of discretionary powers. The 1985 Trust deed does not empower the Trustees to make discretionary decisions on amendments to the beneficiary definition. As such, the principles of law that protect exercises of discretionary powers, absent bad faith, are irrelevant to the issues being raised on this application.
36. Further, Ms. Twinn submits that the 1985 Trust deed does not authorize majority decision making in relation to matters that pertain to amendments to the 1985 Trust Deed. More particularly, the 1985 Trust Deed expressly prohibits amendments to the definition of "beneficiary", (see paragraph 11 of 1985 Trust deed). The majority decision making power that is relied on by the Four Trustees (see paragraph 13 of 1985 Trust deed) is expressly subject to the restriction against amending the "beneficiary definition". Ms. Twinn submits that majority decision making is not authorized in the circumstances by the 1985 Trust Deed and unanimity is required for decision making in relation to the 2011 Action.

Appellant's Extracts of Key Evidence, pg. A90, and
Affidavit of Catherine Twinn, pg. A66

37. It is settled law that in Alberta, unless a contrary intent is expressed in the deed of trust, trustees must act unanimously.

Waters' Law of Trusts in Canada, 4th ed by Donovan WM Waters, Mark R Gillen & Lionel D Smith (Thomson Reuters, 2012) pg. 918, Appellant's Book of Authorities **TAB 6**

38. Further particulars on the test for trustee indemnification are found at paragraphs 18 through 33 of Ms. Twinn's Written Reply Submissions filed in support of the Indemnification Application. Ms. Twinn has genuine concerns about beneficiaries.

Written Reply Submissions of Ms. Twinn, filed October 6, 2017 ("Reply Submissions".)

39. The Hearing Judge found that he accepts "without hesitation that Catherine Twinn genuinely and bone fide believes the position she is adopting and has advanced through counsel. That, for me, is not an issue this morning."

Appeal Record, pg. F4

40. The Hearing Judge expressed concern that he did not wish to impede the discretion of the judge who ultimately hears the Actions from deciding what they think is appropriate. He also expressed concern with the lack of case law addressing situations of indemnification for a dissenting trustee.

41. With respect, there is a test for trustee indemnification and the application of that test on an interlocutory motion does not act as an impediment to the trier of fact. The legal test does not require the trustee seeking indemnification to be found to be correct in their position by the trier of fact, the test only requires the trustee to be acting reasonably and within the scope of their duties.

42. Ms. Twinn submits that the reasonability factor of the test for trustee indemnification provides for situations where there is a dissenting trustee. The reasonability of the trustee's actions act as the gatekeeper to ensuring that expenditures from the trusts' assets are appropriate and necessary.

43. The Hearing Judge wholly failed to assess the reasonableness of Ms. Twinn's conduct, which amounts to an error in law.

44. In the Initial Written Submissions at paragraph 77, Ms. Twinn sets out in detail the circumstances surrounding the initiation of the 2011 Action and subsequent events that informed her involvement in the 2011 Action. A significant issue of concern for Ms. Twinn, was the Four Trustees failure to follow the advice of Dr. Donovan Waters in regards to how to address concerns with the "beneficiary" definition in the 1985 Trust. Of particular importance, Dr. Waters advised the Trustees that full grandfathering for affected beneficiaries should occur – the Four Trustees have failed to follow this advice in the positions they have advanced in the 2011 Action

(see Distribution Proposal put forward by Four Trustees on January 21, 2016 in 2011 Action).

Distribution Proposal – Extracts of Key Evidence,
pg. A392

Paul Bujold Questioning Transcript, March 9, 2017,
Exhibit 10 – Extracts of Key Evidence, pg. A449-A453

45. Ms. Twinn asserts that the Four Trustees have failed to meet their fiduciary duties in the following ways:

- (a) The Trustees have failed to properly ascertain the current beneficiaries of the 1985 Trust and do not know all of the people who will lose their status as a beneficiary if the definition changes;
- (b) The Trustees have failed to put forward a plan that protects or meaningfully considers the interests of the existing 1985 Trust beneficiaries and propose appropriate grandfathering;
- (c) The Trustees have failed to work with the First Nation to resolve the concerns with its membership process, which was the basis upon which the Trustees, including Ms. Twinn, resolved to proceed with the 2011 Action. Ms. Twinn believes that the membership process is still very clearly inadequate and flawed;
- (d) The Trustees' decision making may be conflicted by their affiliation with the First Nation and personal interest in seeing the size of the beneficiary pool reduced and under the control of the First Nation;
- (e) The Trustees have improperly delegated their authority to Mr. Bujold, who has been tasked with instructing legal counsel (Dentons) with achieving their objectives in the 2011 Action. Mr. Bujold has made significant litigation decisions without prior Trustee approval.

The particulars of these concerns are set out in full in the Initial Written Submissions at paragraphs 89 through 177.

46. In the Beneficiary Appeal, and shortly following the Indemnification Application, a decision was rendered by the Court of Appeal that are instructive on the reasonableness of Ms. Twinn's conduct in the 2011 Action.

47. In the Beneficiary Appeal, the Four Trustees opposed the granting of party status to two individuals who were currently beneficiaries of the 1985 Trust. One basis for

this opposition, as written by the Four Trustees in their submission to the Court of Appeal, was that the two beneficiaries did not offer a unique perspective in the litigation because “The Trustees, Catherine Twinn and the OPGT are all advocating for the beneficiaries...”

Written Submissions of the Four Trustees, filed October 20, 2017, at para. 33 in relation to the Beneficiary Appeal

48. Ms. Twinn’s role in the 2011 Action was considered by the Court of Appeal in the Beneficiary Appeal. The Court of Appeal found that because “...there is a separately represented dissenting Trustee before the court adds to the likelihood that all views will be canvassed and all interests protected.”

Twinn v. Twinn, 2017 ABCA 419, at para 19
Appellant’s Book of Authorities **TAB 1**

49. Ms. Twinn submits that the acknowledgment by both the Four Trustees and the Court of Appeal of the importance of her advocacy in the 2011 Action demonstrates the reasonableness of her conduct and is a basis upon which to support her application for indemnification as she is advocating to preserve beneficiary rights.

50. It would be manifestly unjust for the Four Trustees to utilize Ms. Twinn’s advocacy in the 2011 Action to oppose party status for affected beneficiaries, and then deny Ms. Twinn indemnification for this work.

51. Ms. Twinn’s role in this litigation has been recognized by the Four Trustees and the Court of Appeal as being for the benefit of the beneficiaries. As such, her legal expenses for which she seeks indemnification are patently within the scope of her role and duties as a Trustee. Ms. Twinn submits that any disputes relating to the quantum of her legal fees can be addressed by the assessment office.

52. Ms. Twinn took the position on the Indemnification Action that her indemnification would be subject to any alternative ruling by the trier of fact in the 2011 Action. As such, any concerns with the reasonability of her positions can be addressed at trial. Proceeding in this manner, rather than requiring Ms. Twinn to self-fund until trial ensures the Court will have the benefit of contrary positions, and provide a fair and balanced result. It is not just or practical for Ms. Twinn’s contribution to the 2011 Action to be self-funded, while the positions put forward by the Four Trustees have the benefit of full and advance indemnification from the 1985 Trust.

B. Failed to Consider that the 2014 Action is Concluded

53. The Hearing Judge dismissed the Indemnification Application, without prejudice, and directed that the "judge who ultimately hears the matter will make those decisions".

Appeal Record, pg. F5

54. The Hearing Judge failed to consider that the 2014 Action is concluded given the parties agreed to transfer certain issues to private arbitration. Consequently, there will not be a trial in the 2014 Action. With respect, the basis upon which the Hearing Judge declined to determine indemnification in the 2014 Action was made on an inaccurate factual understanding which Ms. Twinn submits constitutes a palpable and overriding error on a significant issue.

C. Failed to Consider the Practical Effect of Denying Indemnification until Trial

55. The decision of the Hearing Judge creates public policy concerns for dissenting trustees who are concerned about the conduct and actions of the majority.

56. In today's litigation context, it is not uncommon for an action to take many years to get to trial. To require trustees to wait until the trial of an action to find out whether they will receive indemnification, would ask the trustee to expend significant personal resources, for the benefit of others, without any assurance that they will be reimbursed.

57. If the Hearing Judge's decision is not overturned, this decision creates significant public policy concerns, as it would have a chilling effect on the ability of minority trustees to bring forward issues. Due to the cost of litigation, most trustees would not have the financial resources (or the appetite) to personally fund their advocacy.

58. The consequence of this direction to trustees would be that minority trustees would be forced to abandon their fiduciary obligations, likely resign as a trustee, all to the detriment of affected beneficiaries. Further, majority trustee groups would likely be emboldened as the ability to challenge their decision making would be impeded.

59. It is important that minority trustees are able to bring their reasonable concerns forward. The test for indemnification requires the trustee's conduct, for which indemnification is sought, to be reasonable. This portion of the test provides sufficient protection to the trust assets to ensure that only reasonable issues are being advanced by a minority trustee.

60. In oral argument, the Hearing Judge noted the importance of Ms. Twinn's evidence on the Indemnification Application being raised at the trial of the 2011 Action, such as the advice provided by Dr. Water's to the Trustees. However, without Ms. Twinn's participation, it is unlikely that these matters would be presented to the trier of fact, as they are certainly not matters that have been raised to date by the Four Trustees in the 2011 Action.

61. It is unjust for Ms. Twinn to participate in the 2011 Action, in light of the circumstances of this particular action, without advance indemnification. The manifest unfairness that is created by unequal access to indemnification amongst the Trustee group, was recognized by Justice Graesser in a decision that pertained to a separate issue that arose amongst the Trustee group. In his decision, Justice Graesser directed indemnification for Ms. Twinn's legal fees that had previously been denied by the Four Trustees in order to correct the manifest unfairness.

Twinn v. Twinn, 2016 ABQB 553, at para. 88-89 –
See Tab 15 of Initial Written Submissions

PART 5 RELIEF SOUGHT

62. The Appellant seeks an Order setting aside the decision of the Hearing Judge and directing that:

- (i) Ms. Twinn's legal fees in relation to the 2011 Action are to be reimbursed from the assets of the 1985 Trust;
- (ii) Ms. Twinn's legal fees in relation to the 2014 Action are to be reimbursed from the assets of the Trusts;
- (iii) Ms. Twinn's future legal fees incurred in the Actions shall be payable from the Trusts, as relevant, within 30 days of an invoice being presented to the Four Trustees. The invoice may be redacted so as to not disclose privileged information; and
- (iv) awarding the Appellant costs of this appeal on a solicitor-client basis payable from the assets of the Trusts.

63. All of which is respectfully submitted.

Estimate of time required for the oral argument: 45 minutes.¹

¹ Rule 14.32(4) provides that unless the panel otherwise permits, oral argument must not exceed 45 minutes for each separately represented party in the appeal, with any consolidated appeals to be treated as one appeal.

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