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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"),

AND

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

APPLICANT	**CATHERINE TWINN**
RESPONDENTS	**ROLAND TWINN, BERTHA L'HIRONDELLE, EVERETT JUSTIN TWIN AND MARGARET WARD, as Trustees for the 1985 Trust and the 1986 Trust**
DOCUMENT	**WRITTEN REPLY BRIEF OF THE APPLICANT, CATHERINE TWINN**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

McLennan Ross LLP
LEGAL COUNSEL
Suite 600
McLennan Ross Building
12220 Stony Plain Road
Edmonton, AB T5N 3Y4

Lawyer: David Risling and Crista Osualdini
Telephone: (780) 482-9200
Fax: (780) 482-9100
Email: cosualdini@mross.com
File No.: 144194

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PART 1 EXECUTIVE SUMMARY

1. Ms. Twinn submits that the Four Trustees (also referred to as the "Respondents" or the other Trustees) have mischaracterized the significant issues being raised in the Actions and have focused on tertiary matters in an attempt to paint Ms. Twinn as being unreasonable. An example of this includes raising a clerical error relating to service of a document that occurred over two years ago. See paragraph 77 of the Respondents' submissions.

2. Ms. Twinn is relying on the defined terms used in her initial submissions and case citations from the Respondents' submissions.

3. Ms. Twinn submits that the Court must focus on whether Ms. Twinn's legal costs are reasonably incurred in the context of her obligations as a fiduciary to certain beneficiaries who would lose their status as beneficiaries if the definition of beneficiary is changed as proposed by the Respondents in the 2011 Action. These beneficiaries, their children and their descendants would lose access to benefits that they currently are entitled to receive and which may have a profound impact on their quality of life and their family's quality of life. This is the one of the primary issues Ms. Twinn has been advancing and for which she seeks indemnification.

4. Ms. Twinn disagrees with the Respondents' position that she has consistently adopted positions that the Court has disagreed with or that she has supported failed or improper applications by other parties. Ms. Twinn wants to be clear and ensure that the focus for this application is not lost, even though she is now compelled to respond to many of the Respondents' positions as there is a clear attempt to paint Ms. Twinn as being irrational and unreasonable in the past so the Court will infer she must be irrational and unreasonable in relation to the steps she has and will take in the main litigation. Unfortunately, Ms. Twinn must engage in this irrelevant debate as it would not be fair if some of these inaccurate positions are not addressed.

5. In reply, Ms. Twinn submits that the characterization of her successes and/or failures, as well as her positions in support of certain parties or non-support of trustee positions, have been presented in a manner that is either not accurate or unfair. In the argument below, Ms. Twinn will attempt to objectively and fairly provide context and outcomes that demonstrate the reasonableness of Ms. Twinn's positions and positive results.

6. Ms. Twinn also takes issue with the few substantive arguments of the Respondents in relation to her request for indemnity. First, the position that a decision of the majority of trustees must be followed is not appropriate in all circumstances. In this case it is obviously not appropriate.

7. Ms. Twinn acknowledges that many decisions of the Trustees would be governed by the majority. However, by way of example, it is not the law that a minority trustee must follow decisions of the majority in circumstances where the minority trustee has identified an obvious profound negative impact on beneficiaries that can be avoided or where there is improper motive for a majority decision. Such a decision amounts to a breach of fiduciary duty. The minority does not have to blindly follow a majority decision in such a circumstance. It is not the law that the majority rules in all circumstances and that minority trustees cannot dissent or must accept the majority's position. Ms. Twinn will address this further below in the reply brief.

8. Ms. Twinn also submits that the Respondents are not correct in their interpretation of Justice Thomas' comments regarding First Nation membership. The position is not logical. Ms. Twinn agrees with the Respondents that it is not the place of the Trustees, including herself, to insert themselves into the membership process. This is not what Ms. Twinn is suggesting. Ms. Twinn's position is that the Trustees cannot simply agree to or advocate for a change in the definition of beneficiary within the 1985 Trust, for which the Trustees have an obligation to oversee, to First Nation membership without addressing concerns about whether that process will result in excluding existing beneficiaries or is also discriminatory or non-*Charter* compliant. This is not only Ms. Twinn's view, it was

also the opinion of Dr. Waters, who is cited as a learned authority in the Respondents' submissions. See paragraph 77(b) of Ms. Twinn's initial brief.

9. This is an issue that will be before the Court at the adjudication of the main relief in the 2011 Action. Ms. Twinn submits Justice Thomas was not directing what the Court in the main hearing can receive as evidence. In addition, the Court in the main hearing will not be asked to provide any remedies against the First Nation in relation to its membership process. The question before the Court is for advice and direction as to whether a change in definition is necessary, and if so, whether a change in definition in the 1985 Trust to First Nation membership is appropriate in the circumstances where existing beneficiaries and their children are not members and where applications for membership may be dealt with unfairly or through a discriminatory process.

10. The aggressiveness of the Respondents in terms of their submissions that First Nation membership must never be discussed highlights, in Ms. Twinn's respectful submission, the extent to which the other Trustees are prepared to avoid this difficult, but important, issue and the impact it will have on current beneficiaries. It also highlights the deference the other Trustees have to the First Nation's position even though the First Nation does not have a seat at the Trustee table.

11. In deliberating on this application, we ask the Court to consider - Why are the other Trustees advocating so vehemently that any mention of First Nation membership is offside when that is their proposed new definition for beneficiary in the 1985 Trust? The memo from RMRF to the Trustees likely provides some insight into the reason. See paragraph 103 of Ms. Twinn's initial brief.

12. The Trustees are obligated to disclose to the Court any relevant issues or facts so that proper advice and direction can be provided by the Court in the 2011 Action. Any failure to do so undermines the process of seeking advice and direction.

Re de Foras, [1958] 15 DLR (2d) 758 (ABCA) at paras 19-22 – **TAB 1**

13. In addition, Ms. Twinn disagrees with the proposition and argument of the Respondents that it is not necessary for Ms. Twinn to advocate for grandfathering. From the beginning of the litigation, grandfathering has not been the position of the other Trustees during Court proceedings. The submissions of the other Trustees has been that there is no problem with the First Nation membership process and that, after the definition changes, beneficiaries who are not First Nation members can simply apply for membership to regain their status as beneficiaries. If the position now is that grandfathering is a requirement by the Respondent Trustees, then Ms. Twinn is very pleased and submits that this is evidence of significant success in relation to her efforts to participate independently in the litigation. This level of compromise may lead to a joint submission by the Trustees in the 2011 Action. Ms. Twinn submits that, had she not acted independently, grandfathering was not being advocated for by the Four Trustees. If there is progress in this regard, now certain beneficiaries will not lose their status – this is a significant and meaningful success.

14. Ms. Twinn has been assertive in the litigation and in cross examination. In her submission, this has been necessary to emphasize to the other Trustees the impropriety of ignoring the rights and status of existing beneficiaries, of succumbing to external pressures or adopting a position in a conflict of interest. Ms. Twinn submits that the other side has also been very aggressive with Ms. Twinn. The treatment she has experienced because of her positions has at times been threatening to her status and finances as well as personally devastating to longstanding relationships. In this matter Ms. Twinn's own counsel is aggressively opposing her indemnification.

15. In Ms. Twinn's respectful submission, distractions created as a result of the adversarial nature of the submissions should not take away from the objective analysis of this application, the focus of the ongoing litigation and the primary issues that are required to be put before the Court in the hearing for advice and direction. It should also not distract from the legal test for indemnification.

16. Ms. Twinn's position is that the Trustees should be funded so that both sides can present to the Court, when seeking advice and direction. This will ensure that the interests of certain beneficiaries are included when arguments are before the Court. In Ms. Twinn's respectful submission, without her involvement independent of the other Trustees, the protection of certain beneficiaries would not have occurred.

PART 2 ISSUES

17. The following matters will be canvassed in reply to the issues raised by the Four Trustees:

a) Duties of a dissenting trustee;

b) Response to argument on the Sawridge case management decisions as they relate to membership in the First Nation;

c) Response to attack on Ms. Twinn's character and conduct.

PART 3 ARGUMENT

Duties of a Dissenting Trustee

18. The Four Trustees have argued that as a dissenting Trustee, Ms. Twinn is bound by the relevant decisions of the Four Trustees pertaining to the Actions unless bad faith can be shown.

19. Ms. Twinn disagrees with this position for the following reasons:

a) Minority trustees cannot delegate their fiduciary obligations to majority decision making and are required to act if they reasonably believe the actions of the majority are breaching fiduciary obligations;

b) A trustee is jointly and severally liable with their co-trustees for group decision making, as such, Ms. Twinn would expose herself to personal liability if she allowed what she perceives as breaches of fiduciary duty to continue;

c) The 1985 Trust Deed does not permit majority decision making where it pertains to a decision that would have the effect of changing the beneficiary definition of the 1985 Trust. The Code of Conduct executed by the Trustees cannot override their authority conferred by the 1985 Trust deed.

20. The authorities relied upon by the Four Trustees in support of their position that majority decision making prevails, absent bad faith, pertain to disputes by beneficiaries of executor decisions relating to the distribution of discretionary testamentary trusts. Such authorities are not speaking to the issues raised by Ms. Twinn.

21. The requirement for the Trustees to meet their fiduciary duties is not discretionary, it is mandatory.

Waters' Law of Trusts in Canada, 4th ed by Donovan WM Waters, Mark R Gillen & Lionel D Smith (Toronto: Carswell, 2014) ("Waters' on Trusts") at 42-43 – **TAB 2**

22. Ms. Twinn submits that the cases provided by the Four Trustees and the resulting argument, which is essentially that "majority rules", is not applicable to situations wherein a Trustee has a *bona fide* belief that the majority decision is not in the best interests of the beneficiaries – which is the situation that exists for Ms. Twinn.

23. In her initial submissions, Ms. Twinn sets out fully the basis for her belief that the conduct of the Four Trustees in relation to the Actions is not meeting their fiduciary duties to the existing beneficiaries of the Trusts and her obligation to bring these matters to the attention of the Court for consideration.

24. The Saskatchewan Court of Appeal in *Re: Ocean Man Trust* provided further guidance on this issue in a decision pertaining to an indigenous trust wherein a single trustee was opposing the decision of the majority trustees to transfer to the trust assets to the control

of a separate trust. As a consequence, the majority group was seeking her removal as a trustee. The minority trustee believed that the successor trust and the associated first nation did not have the necessary administrative machinery in place to manage such large sums and that by consenting to the transfer of the trust assets, it would place the trust assets at significant risk.

Ocean Man Trust, Re, [1993] SJ No 367, 113 Sask R 179 [***"Ocean Man Trust"***] - **TAB 3**

25. The Court of Appeal in *Ocean Man Trust* was not required to make a ruling on whether the minority trustee's concerns were justified, but did find that her actions were taken out of what appeared to be a *bona fide* concern for the protection of trust property and the best interest of the beneficiaries and that her actions did not justify her removal as a trustee given that she was taking steps to protect the best interests of the beneficiaries.

Ocean Man Trust, *supra* at paras 13-14 – **TAB 3**

26. Ms. Twinn submits that the inference to be derived from *Ocean Man Trust* is that when a minority trustee has a *bona fide* belief that the best interests of the beneficiaries will be impacted, it is appropriate for them to act, regardless that their position is contrary to the majority.

27. Further, trustees are jointly and severally liable for any breaches of the trust deed.

Waters' on Trusts, *supra* at 1298 – **TAB 2**

28. As such, if Ms. Twinn fails to take action to protect the beneficiaries, she may face personal liability in the face of a claim by an aggrieved beneficiary for breach of her duties. This concern is furthered by the fact that Ms. Twinn is a named applicant in the 2011 Action and the Four Trustees are advancing positions in her name.

29. Further, upon a review of paragraph 13 of the 1985 Trust deed, it appears that the majority decision making power was not intended to extend to decisions that could result

in a change to the definition of "beneficiary". More particularly, paragraph 13 of the 1985 Trust Deed states that it is subject to paragraph 11.

Sawridge Band Inter Vivos Settlement, Declaration of Trust, Sawridge Band Trust at para 13 **[*1985 Trust Deed*] – TAB 4**

30. Paragraph 11 of the 1985 Trust deed states:

> The provisions of this Settlement may be amended from time to time by a resolution of the Trustees that receives the approval in writing of at least eighty percent (80%) of the Beneficiaries who are alive and over the age of twenty-one (21) years provided that no such amendment shall be valid or effective to the extent that it changes or alters in any manner, or to any extent, the definition of "Beneficiaries"...

1985 Trust Deed, *supra* at para 11 – **TAB 4**

31. Given that the purpose of the 2011 Action is to change the "beneficiary" definition of the 1985 Trust and given that the Trustees' authority to make decisions by majority approval, is subject to the express restriction against amendment to the beneficiary definition, Ms. Twinn submits that the decisions of the Trustees in the 2011 Action must be made unanimously. See Tab 26 of the Four Trustees' submissions where *Waters' On Trusts* is cited for the proposition that trustees must act unanimously unless a contrary intent is expressed in the trust deed.

32. Ms. Twinn also draws the Court's attention to the inconsistent submissions by the Four Trustees in regards to her duty to take action when she believes inappropriate conduct has occurred. The Four Trustees criticize Ms. Twinn for not taking more aggressive steps in the 2014 Action and state at paragraph 62 of their submissions that "If Catherine was genuinely concerned that it was not in the Trusts' best interests for them to act as Trustee, it would seem incumbent on her to have advanced her application", yet argue in relation to the steps Ms. Twinn has taken that she was acting without justification in the Actions because she was going against a majority decision.

33. In summary, Ms. Twinn is seeking the advice and direction of the Court on issues that she believes comprise her fiduciary duties and are taken with a *bona fide* belief that they are in the best interests of the beneficiaries of the Trusts.

Response to Argument on the Sawridge case management decisions as they relate to membership in the First Nation

34. The submissions of the Four Trustees do not accurately characterize the relevance and position of Ms. Twinn in relation to the membership process. Ms. Twinn's concern is not about the membership process, it is whether it is appropriate to change the current beneficiaries of the 1985 Trust, to which Ms. Twinn owes a fiduciary duty, to members of the First Nation.

35. To be clear, Ms. Twinn has not and is not:

a) Seeking relief that would have the effect of altering the membership process;
b) Seeking relief that would have the effect of declaring any individual a member of the First Nation;
c) Taking positions in the 2011 Action *because* of the membership process. She is taking positions in the 2011 Action *because* the relief sought by the Four Trustees would negatively impact current beneficiaries of the 2011 Trust who are not members of the First Nation.

36. For clarity, Ms. Twinn's primary and overarching concern in relation to the 2011 Action is seeing the existing beneficiaries of the 1985 Trust grandfathered into any amendment to the beneficiary definition of the 1985 Trust.

37. In their submissions, the Four Trustees rely on various Orders and decisions issued in case management in the 2011 Action to support their position that issues relating to membership in the First Nation cannot be raised in the 2011 Action following the issuance of *Sawridge #3* on December 17, 2015.

38. It is noteworthy that Ms. Twinn has not raised any issues about the First Nation's membership process in case management since *Sawridge #3*.

39. Ms. Twinn wishes to draw to the Court's attention certain unique aspects of *Sawridge #3*:

a) In *Sawridge #1*, the Court gave the following direction:

> I conclude that it is entirely within the jurisdiction of this Court to examine the Band's membership definition and application processes, provided that:
>
> 1. investigation and commentary is appropriate to evaluate the proposed amendments to the 1985 Sawridge Trust, and
>
> 2. the result of that investigation does not duplicate the exclusive jurisdiction of the Federal Court to order "relief" against the Sawridge Band Chief and Council.
>
> Put another way, this Court has the authority to examine the band membership processes and evaluate, for example, whether or not those processes are discriminatory, biased, unreasonable, delayed without reason, and otherwise breach *Charter* principles and the requirements of natural justice. However, I do not have authority to order a judicial review remedy on that basis because that jurisdiction is assigned to the Federal Court of Canada.
>
> In the result, I direct that the Public Trustee may pursue, through questioning, information relating to the Sawridge Band membership criteria and processes because such information may be relevant and material to determining issues arising on the advice and directions application.

1985 Sawridge Trust v. Alberta (Public Trustee), 2012 ABQB 365 at paras 53-55 [***"Sawridge #1"***] – **TAB 5**

b) *Sawridge #3* arose from an application by the OPT for document production from the First Nation in furtherance of its investigation authorized by *Sawridge #1*. The application was heard over the course of September 2/3, 2015.

c) At the application, the Four Trustees and the First Nation, did not raise any concerns with the membership process and in fact, the Four Trustees discounted concerns with the process noted by the OPT and advocated that Ms. Twinn's concerns were irrelevant. The First Nation was fully indemnified for its legal expense in this regard by the Trusts.

1985 Sawridge Trust v Alberta (Public Trustee), 2015 ABQB 799 at paras 24-25 [***"Sawridge #3"***] – **TAB 6**

d) The parties did not apply nor were they put on notice that the direction in *Sawridge #1* relating to an investigation in the membership process could be overturned.

e) Justice Thomas, the case management justice, found that the need for the OPT's investigation into the First Nation's membership process was no longer necessary because of the Federal Court's findings in *Stoney v. Sawridge First Nation*, 2013 FC 509 ("*Stoney*").

***Sawridge #3,** supra,* at para 35 – **TAB 6**

f) Since the issuance of the decision in *Stoney*, Justice Russell of the Federal Court has had critical comments of the quality of the First Nation's membership process, as is referred to at paragraph 136 of Ms. Twinn's initial submissions.

g) *Sawridge #3* contemplated an immediate distribution of 1985 Trust assets to individuals who were First Nation members or children of members with a holdback for those with unresolved applications or applications pending appeal with a possible full distribution of the remaining holdback to those individuals -- thus resulting in a complete distribution of the 1985 Trust assets.

***Sawridge #3,** supra*, at paras 62-65 – **TAB 6**

h) Since the issuance of *Sawridge #3*, Justice Thomas has directed that the substantive issues should be directed to trial, more particularly whether the 1985 Trust is discriminatory and if so, what should be done. It appears that the distribution of 1985 Trust assets that was contemplated by Justice Thomas in *Sawridge #3* is no longer proceeding.

40. The Four Trustees argue in their submissions that they have never failed to be candid with the Court in relation to their knowledge about the membership process. They excuse their failure to bring these concerns forward on the basis that such knowledge was

"not before this Court". In light of the direction in *Sawridge #1*, these issues were arguably before the Court at the application that resulted in *Sawridge #3*.

41. The Four Trustees' refusal to bring their relevant knowledge to the Court at the application that resulted in *Sawridge #3*, informed Ms. Twinn's need to be involved at this application and bring forward her information.

42. The 2011 Action is an application for advice and direction by the Trustees. The law is very clear that it is the Trustees' duty not only to the court, but to all persons interested in the 2011 Action, to lay before the court all the facts which they have in their knowledge or possession which might assist the just determination of the questions which they raised.

Re de Foras, *supra* **– TAB 1**

43. The reason for this rule is obvious, in order for the Court to exercise an intelligent discretion it must have all available materials before it.

Re de Foras, *supra* **– TAB 1**

44. The Four Trustees should not have so boldly decided what is or is not relevant information to the Court, but instead provide their information which may be assistive to the decision maker.

45. The Order that was issued in relation to *Sawridge #3*, does not explicitly state that the Trustees are not to challenge the membership process. What the Order provides is that the Trustees are not to engage in collateral attacks on the membership process.

Respondent's Brief **at Tab 14**

46. A collateral attack is typically defined as an attempt to invalidate a prior decision through a designated appellate or judicial review route. Ms. Twinn is not seeking to invalidate any decisions of the First Nation.

1985 Sawridge Trust v. Alberta (Public Trustee) at para 49 [**"*Sawridge #6*"**] – **TAB 7**

47. The Four Trustees cite the decision of *Sawridge #5* and characterize it as a decision pertaining to "the application of a non-member to be added as a party." The Four Trustees fail to advise that *Sawridge #5* is presently under appeal and is slated to be heard by the Court of Appeal in early November 2017.

48. The subject matter of *Sawridge #5* is set out fully in the initial submissions and is defined therein as the "Beneficiary Application". This was a significant application as one of the applicants, Shelby Twinn, is an example of an individual who currently qualifies as a beneficiary of the 1985 Trust, but would lose that entitlement if the relief sought by the Four Trustees is granted.

49. With respect, there appears to be meaningful issues to be addressed at the appeal of *Sawridge #5* and its findings should be considered cautiously.

50. One of the matters for appeal will likely be that the findings of Justice Thomas were influenced by significant factual misunderstandings. More particularly, Justice Thomas stated that the interests of two of the applicants were already represented by the OPT and thus their interests would be looked after by the OPT. This was not accurate as neither of these applicants are represented by the OPT, as they were not minors at the outset of the 2011 Action. In addition, Justice Thomas opined that he could not foresee a circumstance where the status of Shelby Twinn under the 1985 Trust would be eliminated. Unfortunately, if the relief sought and advocated for on the Court record by the Four Trustees is granted, this is exactly what will happen.

Letter from OPT to Justice Thomas, July 17, 2017 – **TAB 8**

1985 Sawridge Trust v. Alberta (Public Trustee, 2017 ABQB 377 at paras 34 and 37 [**"*Sawridge #5*"**] – **TAB 9**

51. Therefore, in Ms. Twinn's respectful submission, relying on the outcomes of Sawridge #5 as a failed position of Ms. Twinn is not appropriate until the Court of Appeal has dealt with the matter. Ms. Twinn also notes that the applicant beneficiaries in *Sawridge #5* had their own counsel.

52. The Four Trustees also cite the decision of *Sawridge #6* as support that the Trustees are prohibited from raising issues pertaining to the membership process. *Sawridge #6* was a significantly different situation as the applicant was seeking to be declared a member of the Sawridge First Nation after he had previously been denied membership in the First Nation and had utilized the First Nation's procedures, including appeals.

53. Justice Thomas identified this as a collateral attack on the membership process because it "attempts to subvert an unappealed and crystallized judgment of a Canadian court which has already addressed and rejected the Applicant's claims and arguments." It should be noted that *Sawridge #6*, along with *Sawridge #7* are also currently under appeal.

Sawridge #6 at para 3 – **TAB 7**

54. Ms. Twinn submits that the comments of Justice Thomas in *Sawridge #6* confirm her understanding of *Sawridge #3*, wherein the parties were directed not to undertake collateral attacks, or in other words attempt to overturn unappealed judgments or decisions. This direction did not extend to forbidding the parties from making submissions on the appropriateness of the new beneficiary definition put forward by the Four Trustees at the trial of the 2011 Action.

Response to attack on Ms. Twinn's character and positions.

55. The Four Trustees attempt to characterize Ms. Twinn's steps in the Actions and other unrelated litigation involving the Trustees as unnecessary and causing delay. With respect, Ms. Twinn entirely disagrees.

56. It is noteworthy that it appears that Ms. Twinn had a generally good relationship with Mr. Bujold and Mr. Heidecker prior to her becoming outspoken in her concerns with the conduct of the 2011 Action.

57. In his evidence, Mr. Bujold stated that when he was first hired by the Trusts in 2009 that Ms. Twinn was very helpful in getting him up to speed on the Trusts and he had no issues working with her. Mr. Heidecker further provided Ms. Twinn with a glowing letter of reference dated June 20, 2011 in support of Ms. Twinn's application for an employment position that described her as an "intelligent and sensitive individual" who has historically spent "a tremendous amount of time seeking sustainable solutions to some very intractable problems" affecting her community and confirming that he had "an enormous amount of respect" for Ms. Twinn.

Bujold Transcript, Exhibit 4

Bujold Transcript, at 20-21, Lines 22-3

58. It appears that the relationship with Mr. Bujold has soured, as he has presumably instructed counsel (given that he instructs counsel on behalf of the Trustees) to include a list of attacks on Ms. Twinn's conduct in Tab 6 to their submissions. Ms. Twinn views these attacks as irrelevant, misleading and intended to distract from the real issues. Given the aggressive nature of these allegations, Ms. Twinn is compelled to respond and has appended her response to these submissions.

Response to Four Trustees' Allegations – **TAB 10**

59. Ms. Twinn also wishes to address other inaccuracies in the Four Trustees' submissions:

a) Paragraph 76 – The Four Trustees state that Ms. Twinn filed a Brief on the eve of the Settlement Application without notice and which thwarted the settlement. For clarity, the Four Trustees only gave notice of the Settlement Application by way of motion filed June 12, 2015, returnable June 30, 2015. As such, the parties had very limited time in which to consider the matter and file submissions. Ms.

Bonora of Dentons was advised by Ms. Platten of McLennan Ross on June 24, 2015 that Ms. Twinn would be filing a Brief. Ms. Twinn filed her brief on the Friday before the application (or two weeks after the application was filed) and it was only due to a clerical error that it was served on the Four Trustees on the Monday following the weekend. The Four Trustees were advised of the clerical error at the Settlement Application on June 30, 2015, yet raise this issue as though it was an intentional act of an "unreasonable" trustee.

Brief of Catherine Twinn, filed June 26, 2015 – **TAB 11**

Transcript of June 30, 2015 Application – **TAB 12**

b) Mr. Bujold filed an Affidavit on August 30, 2017 which deposed that Ms. Twinn's information in regards to the amount of legal fees expended by the Four Trustees in relation to the Actions was incorrect. Despite denying in his Affidavit that the Trustees had actually spent $4 million dollars on the litigation, in a report provided to the Trustees in September 2017, Mr. Bujold provided the Trustees with a report that confirmed that over $4.2 million dollars had been spent.

Affidavit of Paul Bujold, filed August 30, 2017 – **TAB 13**

Affidavit of Catherine Twinn, filed October 6, 2017 – **TAB 14**

c) The Four Trustees argue that Ms. Twinn has "done nothing" to advance the 2014 Action for three years, except seek payment of her costs. This is very much inaccurate. In early 2017, the parties agreed to move certain matters raised in the 2014 Action to private arbitration and discontinue the 2014 Action. These matters would be arbitrated in conjunction with the Code of Conduct proceedings in order to provide a more economic approach to the disputes. The Code of Conduct arbitration is scheduled to occur in March 2018. Ms. Twinn would

suggest that this is significant progress as the 2014 Action is now effectively concluded. As such, there will not be any future legal fees in relation to the 2014 Action, save for any fees associated with this application.

60. Ms. Twinn has been very successful in advocating for full grandfathering and protecting the interests of those beneficiaries who stand to lose their beneficial entitlement based on the relief sought by the Four Trustees and as articulated in her initial submissions. Despite grandfathering being the primary concern for Ms. Twinn, the Four Trustees' submissions only dedicated a paragraph to this matter and instead chose to focus on issues of less significance.

61. Ms. Twinn's success in relation to protecting those beneficiaries who require grandfathering also occurred from her appeal of *Sawridge #3* which resulted in a settlement amongst the parties, including the Four Trustees, that had the effect of protecting the interests of those who stand to be disentitled. One of Ms. Twinn's significant concerns with the decision in *Sawridge #3* is that it arguably had the effect of granting final relief in the 2011 Action as it implied that the beneficiary definition of the 1985 Trust was now membership in the First Nation.

62. Ms. Twinn was successful in seeking the separation of her concerns about the process of trustee appointment from the transfer of assets from one group of trustees to a new group.

63. While irrelevant to the proceedings in this application, the Trustees criticize Ms. Twinn's litigation conduct in the 1503 08727 action. Since the Four Trustees have raised the issue, Ms. Twinn is pleased to report her successes in this litigation:

a) Compelling the Four Trustees to concede to appointing an independent arbitrator to conduct the Code of Conduct proceedings and abandoning improperly constituted Code of Conduct proceedings;

b) Defending against the Four Trustees' application to stay the 2015 Action pending completion of the Code of Conduct proceedings;

c) Obtaining an agreement with the Four Trustees that her legal expense in participating the Code of Conduct proceedings would be indemnified from the Trusts;

d) Being awarded costs on a solicitor/client basis payable from the Trusts for various actions taken by Ms. Twinn in the 2015 Action.

Twinn v. Twinn, 2016 ABQB 553 at paras 10, 16, 17, 83 and 88-89 – **TAB 15**

64. In brief response to the Four Trustees' criticisms of her conduct in the 2011 and 2014 Actions:

a) Ms. Twinn's support, which only consisted of very brief submissions, of the OPT's production application that resulted in *Sawridge #3* was entirely reasonable in light of the findings of the Court in *Sawridge #1*;

b) Ms. Twinn made limited oral submissions (no submissions were made in writing) only in relation to Mr. Stoney's application to extend the time for Mr. Stoney to file an appeal of *Sawridge #3*. This decision was already under appeal by Ms. Twinn and the OPT at the time of Mr. Stoney's application. Mr. Stoney's filed materials claimed that *Sawridge #3* had affected his rights, without prior notice. Given that *Sawridge #3* appeared to have granted final relief in the 2011 Action without notice being given to any of the litigants, *Sawridge #3* was already under appeal by Ms. Twinn and the OPT and the fact that Mr. Stoney had been born a member of the First Nation and had only lost that status involuntarily as result of his parent's decision to enfranchise, her support for an extension to file was not unreasonable. Ms. Twinn notes that upon Mr. Stoney subsequently filing his application for party status in the 2011 Action, Ms. Twinn became fulsomely aware of the nature of his positions and did not participate in this process given that Dentons was making submissions on behalf of the Trustees.

c) Ms. Twinn wishes to correct the Four Trustees submissions in relation to her support of the Beneficiary Application that resulted in *Sawridge #5*. For clarity, Ms. Twinn did not personally provide financial support for this application. Ms. Twinn did provide brief submissions in support of the application given that the interests of at least two of the three applicants could conceivably be affected by the relief sought in the 2011 Action and Ms. Twinn understood that the applicant beneficiaries were not already represented in the proceedings.

Applicant Transcript, at 487-488, Lines 25-12

65. While Ms. Twinn does not believe a trustee's success on any particular application is solely determinative as to whether they are entitled to indemnification from the trust assets, reasonableness is the key factor, she notes that the Four Trustees argue that Ms. Twinn should not be indemnified for her support of unsuccessful applications. The Four Trustees do not apply this same principle to their own applications. For instance, the Four Trustees were unsuccessful in *Sawridge #1 and #2*, yet reimbursed themselves from the 1985 Trust in any event.

66. The Four Trustees also criticize Ms. Twinn for her performance over six days of questioning and well over a hundred undertaking responses. Despite this extensive examination of Ms. Twinn, it appears that only a handful of references to her evidence were utilized. This process was undoubtedly very frustrating for Ms. Twinn, as it was lengthy, expensive and often personal such as when she was questioned on her former employment that was unrelated to the Trusts and asked such questions as whether she was let go from that job and what happened in terms of that employment.

Applicant Transcript, at 568, Lines 1-10

67. The grueling nature of the extensive questioning and the personal experience of Ms. Twinn is perhaps well summarized in the following answer given by Ms. Twinn at questioning:

> "We've, in a sense, been through this before. The – in relationship to the Sawridge membership system and my bringing motions and petitions in relation to that, there was a very violent gesture made towards me at the March, 2017 meeting by Roland Twinn. And I caught it and Brian Heidecker knew I caught it, and it was immediately followed by don't do that.
>
> So why would I ask the trustees who treat me with this disdain when they've made it clear that they're not consenting, they're not authorizing, they're not paying. And their intention is to, in my opinion, bankrupt me by this protracted process. That's the tactic.
>
> And I will say that I have been under cross-examination longer, I believe, than Walter when he was in – when he was plaintiff in constitutional litigation at trial. So that is my answer."
>
> ***Applicant Transcript***, at 492-493, Lines 16-5

68. It is unfortunate that the Four Trustees elect to criticize Ms. Twinn's conduct on questioning, when not one of them, was willing to file their own Affidavit and expose themselves to cross examination.

69. For clarity, Ms. Twinn is not proposing that she receive "unqualified , unconditional and advance payment" from the 1985 Trust. She is proposing the her accounts be submitted to the Four Trustees, redacted for sensitive information, and if there is a dispute about the reasonableness of the quantum, the parties can return to the Court or an assessment officer for a resolution on quantum. That said, her accounts should be paid in the interim subject to divestment by the assessment office. All parties entitlement to reimbursement will be subject to any future findings of the Court in the 2011 Action. This is similar to the treatment Ms. Twinn's future fees will receive in relation to the matters from the 2014 Action that have been moved to private arbitration. Ms. Twinn seeks a similar resolution in regards to the 2011 Action.

70. In response to the Four Trustees suggestion that Ms. Twinn is irresponsible with her billing practices, given that they raise her dispute with the First Nation regarding various legal invoices incurred by the First Nation with Ms. Twinn's law firm for a significant constitutional challenge. The Four Trustees fail to point out that the approximate $175,000 in disputed expenditures, were incurred over the course of an over $5 million dollar retainer with Twinn Law over a span of many years. Thus the disputed billings were only about 3.5% of all billings. Ms. Twinn submits that this is not cause for the alarm that the Four Trustees attempt to suggest.

71. Further, the test for advance indemnification put forward in the Supreme Court of Canada decision in *Little Sisters Book and Art Emporium v Canada (Commission of Customs and Revenue)* is not applicable in these circumstances. Ms. Twinn is a trustee, acting in furtherance of her fiduciary duties. She is not a third party seeking indemnification from the Trusts. Further, the Four Trustees are advancing the 2011 Action in Ms. Twinn's name, in conjunction with their own, as Trustees. *Little Sisters* does not apply to these circumstances.

72. In summary, the concerns brought forward by Ms. Twinn are not trite, hopeless or busybody pursuits. These are serious issues that go to the core of the Trustees' fiduciary obligations to the beneficiaries for which they are required to act. In this matter, beneficiaries may well lose their status if the relief sought by the Four Trustees is granted.

73. While the Four Trustees often cite Dr. Waters' learned text for support for their positions in their submissions, it is unfortunate that they have not perused with the same vigour Dr. Waters' specific recommendations to them on the issues affecting the Trusts, more particularly:

a) Full grandfathering for any affected beneficiary;

b) The quality of the First Nation's membership process is integral to the proper operation of the Trusts; and

c) The First Nation's existing membership Code is likely discriminatory and not *Charter* compliant, as such the Trustees should work with the First Nation to correct this if they are going to proceed with the relief in the 2011 Action.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at the City of Edmonton, in the Province of Alberta, this 6th day of October, 2017.

McLennan Ross LLP

Per: _____

David R. Risling and Crista C. Osualdini
Solicitors for the Applicant, Catherine Twinn in her capacity as a Trustee of the Trusts

TABLE OF AUTHORITIES

1958 CarswellAlta 43
Alberta Supreme Court, Appellate Division

De Foras Estate, Re

1958 CarswellAlta 43, 15 D.L.R. (2d) 758, 26 W.W.R. 131

Re De Foras Estate

Ford, C.J.A., Porter and Johnson, JJ.A.

Judgment: August 25, 1958

Counsel: *E. S. Watkins* , for appellant.
Hugh John MacDonald, Q.C. , for respondent.

Subject: Estates and Trusts; Civil Practice and Procedure

Headnote

Estates --- Actions involving personal representatives — Practice and procedure — Parties — Necessary parties — Addition of parties

Trusts and Trustees --- Powers and duties of trustees — Supervision by court

Trusts and Trustees --- Powers and duties of trustees

Right of Executor to Take Proceedings Regarding Estate While Title Remains with Executor.

Proper Material Necessary on Application.

Appeal by a beneficiary from an order in chambers authorizing an executrix to settle an action claiming certain lands as part of the estate on the grounds: (1) That the executrix had no right to take the proceedings; and (2) That the material before the chambers judge was insufficient. The court's power to make the order appealed from was also questioned.

Held, per curiam , allowing the appeal on the second ground only:

If the court is to exercise an intelligent discretion on such an application it must have all available material before it. *In re Herwin v. Herwin*, [1953] 1 Ch. 701 , at 708, [1953] 3 W.L.R. 530 , quoted and applied. While it is not necessary to show that the other party would be successful to justify a compromise (*In re Ridsdel; Ridsdel v. Rawlinson*, [1947] 1 Ch. 597) the court must be in a position to assess the difficulties in the executrix' case and the chance of success or failure before it can authorize or approve a settlement. The suggestion that, if all the difficulties in the case are disclosed, the other party may withdraw his offer of settlement, does not excuse the failure to supply the court with the necessary material.

So long as the title remains in the executrix, she is competent to take and defend proceedings concerning the estate lands without joining any of the beneficiaries. (On this point Porter, J.A. thought the foregoing statement, while appropriate to the facts of this case, where estate debts remained unpaid, possibly too broad.) R. 54 considered. *Re Cooper; Cooper v. Vesey* (1882) 20 Ch D 631, at 635, 51 LJ Ch 862, quoted and applied.

Rule 466 cannot be read as extending the power of the court to act except as authorized by the trust agreement, *The Trustee Act* , RSA, 1955, ch. 346, or any other Act defining or conferring the court's powers.

Sec. 23 of *The Trustee Act* authorizes a trustee to compromise an action, which power is unlimited so long as the compromise is made in good faith. If the trustee decides not to exercise this power he may surrender his right to do so by applying to the court for advice and directions: *Re Ezekiel's Settlement Trusts; National Prov. Bank Ltd. v. Hyam*, [1942] 1 Ch. 230 , at 233, 111 LJ Ch 155. If the trustee feels that a real doubt exists as to his power to compromise (and the court should not require the executors to incur the risk of personal liability) the court, under sec. 17 of *The Trustee Act* , may confer the necessary power to compromise. Under either sec. 17 or 23 of *The Trustee Act* , there is clearly a right to apply to the court for such an order as that appealed from.

Ford, C.J.A **. concurred with Johnson, J.A.:**

Porter, J.A. **:**

1 I concur.

2 I would like to add that the broad statement "So long as the title remains in the executrix, she is competent to take and defend proceedings concerning the estate lands without joining any of the beneficiaries," while appropriate to the facts of this case, where debts of the estate remain unpaid, may well be too broad when considered in those many cases in the province, where although the estate is fully administered the executor continues to hold title to property which he neglects or refuses to vest in the beneficiaries.

Johnson, J.A .:

3 The testatrix Maria Jose, Countess De Foras, died February 20, 1947, leaving surviving six children, all of whom were of age. Alix Ashton-Cross, a daughter, was granted probate of her estate on March 18, 1949.

4 The estate consisted principally of lands in the High River district and her will contained the following provision:

> I give, devise and bequeath to my daughters Nicole, Odette, Madeleine and Alix and to Emelia Galvani, the house on my farm and the 60 acres around the house, in equal shares absolutely.
>
> The residue of my estate, real and personal, whatsoever and wheresoever I give, devise and bequeath to my children Jacques, Barlo, Nicole, Odette, Madeleine and Alix, in the following shares absolutely one-seventh each to Jacques, Nicole, Odette, Madeleine and Alix and two-sevenths to Barlo.

5 The estate was the registered owner of one and three-quarter sections of land in which was included the above devise of 60 acres. The estate also claimed to be owner by adverse possession of a section of land which lay to the south of the estate lands. It was alleged that the De Foras family had been in possession of these lands which had previously stood in the name of Eugene, Marquis D'Oncien, of Savoie, France, at least since 1926 and probably for a longer time. At the date of the death of the testatrix, the title to one-half of the lands stood in the name of the custodian of enemy alien property of Canada, and the remaining lands in the name of D'Oncien.

6 In August, 1957, the executrix made an application by originating notice of motion for an order for sale of the lands standing in the name of the deceased and for advice and direction of the court as to what action should be taken respecting the claim for title to the lands alleged to be held by adverse possession. The learned chamber judge before whom the application came on for hearing, authorized the executrix to obtain appraisals of the lands and gave her leave to apply further when the valuations had been obtained. By the same order, the executrix was authorized and empowered to commence proceedings to prove the claim of the estate to title to the lands alleged to be held by adverse possession.

7 The action to establish title to the D'Oncien land was commenced and an offer of settlement was received from the solicitor for the defendant in those proceedings. In it he proposed that all the lands in dispute be offered for sale and the amount realized therefrom be divided equally between the plaintiff estate and the defendant. The executrix of the De Foras estate made the present application by notice of motion in the first proceedings for the advice and direction of the court, and in particular, for an order authorizing the executrix to enter into an agreement with the D'Oncien estate for settlement of the action "on the basis that the lands herein shall be sold as may be directed by the Honourable Court and the proceeds of the sale to be divided equally" between the plaintiff and the defendant. The applica tion also asked for directions as to listing and advertising the lands for sale (including the land standing in the name of the estate).

8 The appellant, who is a daughter and one of the persons to whom the 60 acres of land was devised, and who is also one of the residuary legatees and devisees, opposed the compromise of the action. The learned chambers judge, however, granted the application and the appellant appeals from only that portion of the order which "authorized the executrix" to make a settlement of the action for title by adverse possession by "dividing equally" between the applicant and the defendant in those proceedings, the moneys realized from the sale of the lands in dispute.

9 The appellant raises two points in support of her appeal: (1) She questions the executrix's right to take the proceedings to establish title by adverse possession; and (2) She claims there was no material before the learned chamber judge which would entitle him to make the order.

10 If I understand the first argument, it is this: Ownership by adverse possession creates a title (sometimes called a parliamentary title) once the limitation period for taking action for possession has expired, notwithstanding that the title issued under *The Land Titles Act* remains in the name of the original owner. By sec. 9 (3) of *The Devolution of Real Property Act* , RSA, 1955, ch. 83, the court may order the personal representative at any time after the expiration of one year from the date of the grant of probate, to convey lands to the persons entitled under the will. The appellant claims to be entitled to a conveyance of her portion of these lands held by adverse possession notwithstanding that the only title held by the estate is one arising by operation of *The Limitations Act* and has not yet become registered in the land titles office. For this reason she claims that the executrix was not competent to commence these proceedings in the name of the estate and that her only remaining duty as executrix was to transfer these properties to the beneficiaries. She asks alternatively that she, as having an equitable estate in the lands as devisee named in the will, should have been made a party to those proceedings.

11 *Re Anderton* (1908) 8 W.L.R. 319 , and *Wallace v. Potter* (1913) 4 W.W.R. 138, 24 W.L.R. 262, 6 Alta. L.R. 83 , long ago established that a parliamentary title arises in the occupant of land once the period of limitation for obtaining possession expires, notwithstanding the provisions of *The Land Titles Act* . There is no doubt that the appellant could have applied for a conveyance of her share of the "parliamentary" title. Whether the court would have granted such an application is, of course, another matter. There are debts still owing by the estate and until they are paid or their payment provided for, there should be no distribution of the estate. So long as the title remains in the executrix, she is competent to take and defend proceedings concerning the estate lands without joining any of the beneficiaries. R. 54 provides:

> Trustees, executors or administrators may sue and be sued on behalf of or as representing the property or estate of which they are trustees, or representatives without joining any of the persons beneficially interested in the trust or estate, and shall be considered as representing such persons; but a judge may, at any stage of the proceedings, order any of such persons to be made parties either in addition to or in lieu of the previously existing parties.

12 Jessel, M.R. in *In re Cooper; Cooper v. Vesey* (1882) 20 Ch D 631, at 635, 51 LJ Ch 862, says:

> It is clear that under the present practice these Defendants are not proper parties to the action. The claim is made by executors and trustees on behalf of their trust estate against strangers, and the Plaintiffs are by virtue of r. 7, of Order XVI (in the same wording as the above Rule) entitled to represent their *cestuis que trust* in such an action.

13 During the argument the power of the court to make the order that the learned chamber judge made was questioned.

14 By sec. 23 of *The Trustee Act* , RSA, 1955, ch. 346, an executor

(*c*) may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim or thing whatever relating to the testator's or intestate's estate or to the trust,

and for any of those purposes may enter into, give, execute, and make such agreements, instruments of composition or arrangement and releases and do such other things as to him or them seem expedient without being responsible for any loss occasioned by any act or thing so done by him or them in good faith.

15 Sec. 17 (1) of the same Act provides:

Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is expedient in the opinion of the Supreme Court or a district court or a judge thereof, but it cannot be effected by reason of the absence of any power for that purpose vested in the trustee by the trust instrument, if any, or by law, the court or judge,

(*a*) may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court or judge thinks fit.

16 And sec. 50 gives trustees, guardians, executors and administrators the right to apply to any court

for the opinion, advice and direction of a judge of the Supreme Court or a district court on any question respecting the management or administration of the trust property or the assets of the testator or intestate.

17 By R. 466 application by originating notice may be made by executors, administrators and trustees as well as others, for the following, as well as other, relief:

(*e*) Directing the executors or administrators or trustees to do or abstain from doing any particular act in their character as such executors, administrators or trustees.

(*f*) The approval of any sale, purchase, compromise or other transaction.

(*g*) The opinion, advice or direction of a judge pursuant to *The Trustee Act* .

(*h*) The determination of any question arising in the administration of the estate or trust.

18 These Rules cannot be read as extending the power of the court to act except as authorized by the trustee agreement, *The Trustee Act* or any other Act defining or conferring its powers.

19 In the present case, it would appear that the executrix by the powers conferred on her by sec. 23 of *The Trustee Act* , to which I have referred, could have compromised the action she commenced for title to the D'Oncien land without application to the court. The section is the same as sec. 15 of the English *Trustee Act* of 1925 and there is no suggestion in any of the cases that the power to compromise is limited except as provided in that section. i.e.. the compromise must be made in good faith. If the trustee decides not to exercise the power to compromise, he may surrender his right to do so by applying to the court for advice and directions as to whether a settlement of the action be made (Bennett, J. in *In re Ezekiels Settlement Trusts; National Provincial Bank Ltd. v. Hyam* (1942) 1 Ch 230. at 233, 111 LJ Ch 155). If the trustee feels that a real doubt exists as to his power to compromise (and the court should not require the executors to incur the risk of personal liability) the courts under sec. 17 of *The Trustee Act* , which I have quoted in part, upon application to it. would confer the necessary power to compromise or settle the action. There is clearly then, under secs. 17 or 23 of *The Trustee Act* , a right to apply to the court for this order.

20 Turning to the question of the sufficiency of the material which was placed before the learned chamber judge, it is obvious that if the court is to exercise an intelligent discretion in this matter it must have all available material before it. Evershed, M.R. in *In re Herwin v. Herwin*, [1953] 1 Ch. 701 , at 708, [1953] 3 W.L.R. 530 , at 536, says:

> It was a proceeding taken out under the rules applicable to the Chancery Division, whereby the plaintiffs, in their capacity as administrators, sought the directions of the court; and it is plain that, acting in that capacity, it was their duty, not only to the court but to all persons interested in the estate, to lay before the court all the facts which they had in their knowledge or possession which might assist the just determination of the questions which they raised.

21 In the present case, the executrix was bound to place all information that she had before the court. It is only on such information that the court can determine if the settlement is in the interest of the estate. While it is not necessary to show that the defendant would be successful to justify a compromise (*In re Ridsdel; Ridsdel v. Rawlinson*, [1947] Ch. 597, [1947] 2 All E.R. 312) the court must be in a position to assess the difficulties in the executrix's case and the chance of success or failure before it can authorize or approve a settlement.

22 The only material before the learned chamber judge was the affidavit of the solicitor for the executrix which exhibited the letter containing the offer of settlement and the appraisals of these properties by two real estate valuators. Counsel attempted to excuse the absence of pertinent material by suggesting that if all the difficulties in the law suits were disclosed, the defendant might withdraw his offer of settlement. This cannot excuse the failure to supply the court with the only material which would enable the court to determine the questions raised by the application.

23 The appeal is allowed and without prejudice to the right of the executrix to renew her application as she may be advised. The appellant will be entitled to the costs of this appeal out of the estate, to be taxed in col. 5 of sched. C.

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WATERS' LAW OF TRUSTS IN CANADA

Fourth Edition

By

Editor-in-Chief

Donovan W.M. Waters, Q.C.

M.A., D.C.L. (Oxon.), Ph. D. (London), LL.D. (Hons.) Victoria, McGill, F.R.S.C.
Emeritus Professor, University of Victoria, B.C., of Lincoln's Inn, Barrister at Law, Counsel, Horne Coupar, Barristers & Solicitors, Victoria, B.C.

Contributing Editors

Mark R. Gillen

B.Comm. (Toronto), M.B.A. (York), LL.B. (Osgoode), LL.M. (Toronto),
Faculty of Law, University of Victoria

Lionel D. Smith

B.Sc., LL.M. (Cantab.), D. Phil., M.A. (Oxon.),
James McGill Professor of Law, McGill University,
of the Bar of Alberta

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Several types of legal relationships share common features with the trust relationship while being distinct in other ways. Comparing trusts to these other concepts yields not only a better appreciation of trust relationships, but an understanding of the important practical consequences the characterization of a relationship, as trust or otherwise, can have.

I. TRUST AND FIDUCIARY RELATIONSHIP

A. Trustees as Fiduciaries

The hallmark of a trust is the fiduciary relationship which the trust creates between the trustee and the beneficiary. The whole purpose of a trustee's existence is to administer property on behalf of another, to hold it exclusively for the other's enjoyment. The express trustee is expected to put the interests of the trust and the beneficiaries first in his thinking whenever he is exercising the powers, or performing the duties of, his office. His duty is one of selfless service. And the object of describing a man as a resulting or constructive trustee is to emphasize that he is a person who is under the express trustee's fiduciary obligation to hold property, of which he is technically the owner, for the benefit of another.

It was in Equity that the notion of the fiduciary was first conceived, and it originated to explain the position of one who at law held title and had all the appearance of full enjoyment, but who nevertheless because of Equity's intervention had no right of personal enjoyment. Here was a man who had the capacity to bring

every proprietary and possessory action available at law, but who was personally liable to another for all he did; a man whose rights were only those of administration and disposition, and whose liability to another resulted in his holding even those rights on behalf of the other. At law such a man would have been an agent, a mere conduit for the creation of rights and duties between his principal (the trust beneficiary) and the third party (for instance, those selling to and buying from the trust), but it did not work out that way. As we have seen, Equity could not deny the doctrines of the common law, and at law the trustee was title holder and possessor. The only way around that obstacle was for Equity to impose obligations upon this person with title and possession, and the nature and scope of these obligations were spelt out in the concept of fiduciary relationship. The trustee was a fiduciary of his rights and powers; he not only exercised those rights and powers on behalf of the beneficiary, he owed to the beneficiary the utmost duty of loyalty.

The fiduciary's obligations have been defined in a number of ways by the courts and commentators,[1] but essentially it means the duty to account to another, who is the person with the right of enjoyment over the property in question, for all that one does with the property and in the office of trustee. Nothing may be done which is not directed solely towards the best interests of the trust beneficiary or beneficiaries. The ramifications of this character of the office of trustee are many. The prime outcome is that the trustee may not occupy, or permit himself to be in a position, where the duties of his office and his personal interests may conflict.[2] As far as Equity is concerned, his office is so selfless that he is not entitled to remuneration for his services, though no objection will be taken to the settlor or testator extending to the trustee a remuneration, either unsolicited or as the result of agreement.[3] He must perform his duties personally – the principle of delegation is not recognized by Equity; though, if the nature of his trust duties, given the nature of the trust property and the terms of the trust, are such that in the ordinary course of affairs businessmen would employ agents, that freedom will be extended to him.[4] But he may be liable for the agent's wrongdoing. Similarly, he is not entitled to shrug off the wrongful actions of a co-trustee on the basis that he knew nothing of what the other was doing; as a fiduciary he is responsible for all acts of trusteeship, and he therefore carries a several, as well as a joint, liability for all that is done in the name of the trust or through the exercise of the office of trustee.[5]

Over the years it has been necessary to relax somewhat this high and rigorous standard of selfless behaviour and ultimate responsibility. It has been recognized by legislatures that for Equity to impose such standards in a modern business setting is self-defeating. No one would accept the office, particularly professionals who, since the second half of the nineteenth century, have come to be in the eyes of many settlors and testators the obvious persons for trusteeship appointment. In common

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[1] See *infra*, "Constructive Trusts", chapter 11, Part II B; Donovan W.M. Waters, *The Constructive Trust* (1964) at 68-69, and 341-43; P.D. Finn, "The Fiduciary Principle" in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989) at 1-56.

[2] *Infra*, chapter 18, Part II.

[3] *Infra*, chapter 22, Part II.

[4] *Infra*, chapter 18, Part I.

[5] *Infra*, chapter 25, Part III.

III. LIABILITY OF TRUSTEES AMONG THEMSELVES

A. To the Trust Beneficiaries

When trustees are acting together in the discharge of trustee duties, or the exercise of trustee powers, so that the act or omission is the act or omission of them all, it is a well established rule that they are jointly and severally liable to the trust beneficiaries for the loss arising out of their breach of trust. That is to say, each is liable for his own part in the loss (several liability) and also for the loss caused by all the trustees (joint liability). The trust beneficiaries are not therefore concerned with the question of who among the trustees to sue for the breach. They can sue one trustee, or they can sue two or more out of several trustees, and recover their entire loss. If they recover only part of their loss from those trustees whom they sue, they can sue one or more of the others to recover the rest of the loss.[145]

It is of great value to those who are beneficiaries of a fiduciary relationship, that is, a relationship other than that of express trustee and beneficiary, that this rule extends also to trusts arising by imposition of law.[146] In *Canada Safeway Ltd. v. Thompson*,[147] for instance, the plaintiff had been defrauded by seven persons, one of whom had instructions to investigate the Empress Manufacturing Co. with a view to its purchase for the plaintiff. The seven bought the Empress shares for themselves and sold them to the plaintiff for considerable profit. When the plaintiff learned of what had happened, it claimed an accounting of the profits made by three of the "conspirators",[148] as the trial judge called them. Had the plaintiff known when it launched its action what it knew at the end, Manson J. had no doubt that it would have sued at least one other, and possibly all seven of the constructive trustees. The

---

[145] Since the object of the beneficiaries' remedy is to compensate them, they can only recover to the extent of their loss. If an action against one trustee succeeds in only part of the loss being recovered, they can proceed against another for the remainder only. However, suppose a trust where the testator's widow and a corporate trustee are the trustees, the widow is the life tenant and her children take the capital on her death. The children plan to sue the trustees for breach of trust, but, being capacitated, they release their mother as trustee, and sue the corporate trustee. What is the position of the corporate trustee, if breach is so found? *Cf. Dixon v. R.*, [1980] 6 W.W.R. 406, 24 B.C.L.R. 382 (B.C. C.A.) at 423 [W.W.R.]: joint tortfeasors.

[146] For the personal liability of a trustee when the trustee in question is properly not acting, or omitting to act, together with his co-trustee or co-trustees, see, *supra*, Part I C, especially note 22. See *Re Associated Investors of Canada Ltd.* (1996), 46 Alta. L.R. (3d) 16, 15 E.T.R. (2d) 296 (Alta. Q.B.) at paras. 66-77.

[147] *Supra*, note 142. See also *Minneapolis-Honeywell Regulator Co. v. Empire Brass Manufacturing Co.* (1953), (sub nom. *Minneapolis-Honeywell Regulator Co. v. Irvine & Reeves Ltd.*) 11 W.W.R. (N.S.) 212, [1954] 1 D.L.R. 678 (B.C. S.C.) at 223 [W.W.R.], reversed (sub nom. *Minneapolis-Honeywell Regulator Co. v. Irvine & Reeves Ltd.*) 13 W.W.R. 449, [1954] 4 D.L.R. 800 (B.C. C.A.), which was reversed (sub nom. *Minneapolis-Honeywell Regulator Co. v. Empire Brass Manufacturing Co.*) [1955] S.C.R. 694, [1955] 3 D.L.R. 561 (S.C.C.).

[148] Their liability was determined in *Canada Safeway Co. v. Thompson*, *supra*, note 142, consequential orders as to accounting: (1951), [1952] 3 D.L.R. 295 (B.C. S.C.).

1993 CarswellSask 88
Saskatchewan Court of Appeal

Ocean Man Trust, Re

1993 CarswellSask 88, [1993] S.J. No. 367, 113 Sask. R. 179, 42 A.C.W.S. (3d) 289, 50 E.T.R. 150, 52 W.A.C. 179

Re Ocean Man Trust; Re application pursuant to s. 34(1) of The Trustee Act, R.S.S. 1978, c. T-23 by DELLA EWACK (trustee of Ocean Man Trust)

Bayda C.J.S., Wakeling and Jackson JJ.A.

Heard: May 6, 1993
Judgment: July 20, 1993
Docket: Doc. Regina Q.B.M. 556/92

Counsel: *J. Nugent*, for appellant.
P. Butler, for respondent.
T. Waller, for Whitebear Band, Pheasant's Rump Band and Ocean Man Band Trust.

Subject: Estates and Trusts

Headnote

Trusts and Trustees --- Nature of trustee's office — Removal of trustee

Trusts and trustees — Removal of trustees — Removal of trustee unjustified where trustee acting bona fide and dissension between trustees not putting trust property in jeopardy.

The appellant was one of several trustees of a large trust fund established as a result of a settlement of an aboriginal land claim. Under the terms of that trust, the OM Band (along with other bands) was entitled to have the share of the settlement money transferred to a separate trust, the OM Trust, to be created for its benefit. The appellant refused to sign the necessary documents to effect the transfer, contending that a better system of internal accounting was needed before the transfer took place. The respondent, one of the appellant's co-trustees, applied for an order forcing the appellant to comply with her duty as trustee or, alternatively, removing the appellant as trustee.

The appellant argued that, as she believed she was acting in the best interests of the trust and as she had not acted dishonestly or endangered trust property, there were no grounds for her removal.

At first instance, it was ordered that the appellant sign the necessary documents to effect the transfer and that if she did not do so she would be removed as trustee. She appealed.

Held:

The appeal was allowed.

The court had inherent jurisdiction to remove the appellant as trustee. However, that jurisdiction should not have been exercised, in effect, to order her removal. All of her decisions have been taken out of what appeared to be a bona fide concern for the protection of the trust property and for the best interests of the beneficiaries. The judge at first instance was unduly concerned with the need to transfer the funds in order to protect the trust property. There

was no suggestion that the assets were in jeopardy while they remained part of the existing trust. On the other hand, the appellant held the view that the transfer would serve to put the assets at risk. It would be inappropriate that she be removed as a trustee for actions she saw as being in the best interest of both the OM Band and the OM Trust.

Table of Authorities

Cases considered:

Scott v. Scott, 41 E.T.R. 150, [1991] 5 W.W.R. 185, 92 Sask. R. 301 (Q.B.) — *considered*

Statutes considered:

Federal Court Act, R.S.C. 1985, c. F-7 —

s. 18(1)

Trustee Act, The, R.S.S. 1978, c. T-23 —

s. 14

s. 15

Appeal from decision reported at (1992), 46 E.T.R. 224, 103 Sask. R. 304 (Q.B.), ordering trustee to perform certain actions and in default to be removed as trustee.

The judgment of the court was delivered by *Wakeling J.A.*:

1 This appeal seeks to reverse the decision of Barclay J., sitting in chambers [reported at (1992), 46 E.T.R. 224 (Sask. Q.B.)], which in effect removes the appellant, Althea Sunkawasti, as a trustee of the Ocean Man Trust (OMT) upon application by the respondent in this appeal, Della Ewack, another trustee of O.M.T.

2 The facts in summary form are as follows:

1. Ocean Man Band (OMB) had been disbanded in 1901 as a result of membership reduction beyond a point where the continuation of the band was a practical reality.

2. The land which belonged to OMB had been sold with sufficient irregularities that it was appropriate for the Crown to consider reimbursement of the OMB for the land it lost.

3. The White Bear Band is the continuing dominant band in the area and it negotiated with the Federal Crown to obtain a land claims settlement for the White Bear Band, the Pheasant's Rump Band and the OMB. An agreement was reached on January 30 and 31, 1986, awarding a settlement of approximately $18,000,000 inclusive of fees and costs. Of this amount, approximately $4,000,000 was due to the OMB.

4. A trusteeship was created known as the Whitebear Band Pheasant's Rump Band Ocean Man Band Trust (the Main Trust) which was to receive the settlement money and to see to its transfer to a separate trust to be created for each of the Bands. One of these trusts was the OMT.

5. Descendants of the original OMB decided it would facilitate the payout of these land claim settlements if the OMB was reinstated. A committee was formed to carry out this objective and it drew up a constitution with the trust conditions for the OMT attached. The trust conditions were intended to cover the operation of the OMT which would in due course receive the land claim entitlement in trust for the benefit of the OMB as beneficiary.

6. Approximately 125 Indians whose ancestors had been OMB members decided to leave other bands and join the newly revived OMB. These persons voted to accept the constitution and in September, 1990, the band was reinstated by the Minister for Indian Affairs.

7. At an original organization meeting duly called, the appellant participated in nominating councillors and was nominated herself as a prospective councillor. The members did not elect her to office as a band councillor but did elect her as one of the five trustees of the OMT.

8. The appellant commenced an action in the Federal Court and brought an application for an order of *quo warranto* that the OMB was not properly constituted and did not have a legal existence. In a decision issued on January 10, 1992, the Federal Court chambers judge refused to issue a *quo warranto* order and the matter has not proceeded further.

9. It was assumed that the OMT would proceed to obtain the funds held by the Main Trust and manage these funds for the OMB. The separateness of the trusteeship and the Band was assured by the constitution which did not allow the chief or a band councillor to serve as a trustee.

10. On January 29, 1992, the trustees of the Main Trust by resolution authorized transfer of the funds to the OMT subject to certain preconditions of which the following are now unfulfilled and considered essential to the completion of the transfer:

(i) delivery of an executed indemnification agreement satisfactory to the trustees of the Main Trust; and

(ii) execution of the OMT Trust agreement by all trustees (this agreement has now been signed by all but the appellant).

11. The appellant has frequently been asked to sign the indemnification agreement, which would acknowledge that she accepts that the Main Trust has been properly managed and that she waives her right to make any claim against the trustees in respect of their actions as trustees of the Main Trust. This document was set out as a requirement in the settlement agreement in which the three bands negotiated the division of the land claim settlement.

12. The appellant has consistently refused to sign the indemnity agreement, not only because of the wording of the document, but also because she has no faith that the administrative machinery is in place with either the OMT or with the OMB to handle such a large sum in a way which would assure responsibility and accountability to the band members.

13. In an affidavit filed with this court, the appellant produced information from the auditors of the OMB indicating that the OMB does not have a satisfactory accounting system in operation. Amongst other irregularities, the auditors indicate that monthly statements from the bank and cancelled cheques are missing, no regular reconciliation of the bank balance has taken place and the OMB does not have a system of filing to reliably retain and recover financial documents.

14. The respondent has filed an affidavit indicating that the OMT has now appointed a solicitor (who is also the solicitor for the OMB) and an auditor and that it is now able to properly manage the funds in its possession. It also appears that negotiations have taken or are taking place to have the funds professionally handled.

15. If the funds are released to the OMT, they will be paid out on the basis of a majority decision of the trustees. The appellant will then be without the element of control she now possesses.

3 Against this factual background, Della Ewack, as one of the trustees of the OMT applied under ss. 14 and 15 of *The Trustee Act*, R.S.S. 1978, c. T-23, for an order removing the appellant as trustee. The chambers judge held that the Act allowed a court to remove a trustee only when appointing another and, therefore, had no application to this case.

However, he concluded that a superior court judge has inherent jurisdiction to remove a trustee, and he exercised this jurisdiction in making an order which had the effect of removing the appellant as a trustee.

4 The appellant contended that she could not, with a clear conscience, take steps which would see this money paid to the OMT when she had no confidence it would be responsibly handled. The chambers judge did not find it necessary to rule on the merits of this position as he decided that it was the first responsibility of a trustee to marshall the assets of a trust. The appellant's failure to allow for the transfer of the trust funds constituted a breach of this basic duty as a trustee and this breach was of such a fundamental nature as to warrant her removal.

5 The appeal is taken on the ground that the chambers judge by compelling the appellant to sign the indemnity agreement and trust agreement in order to retain her position as a trustee was requiring her to act in a manner so as to place the trust funds in jeopardy. This would necessarily also be contrary to the interests of the OMB as beneficiary of the trust. The order was therefore counterproductive to its expressed intent of working in the best interests of the trust and its beneficiary.

6 The issue is not easily resolved as it may well be that the four other trustees are legitimately satisfied that the money will be well managed by the OMT and are anxious to have it spent on useful projects for the benefit of the OMB. Conversely, there is no reason to believe the appellant is not acting out of a *bona fide* concern that the OMT and the OMB as beneficiary of the trust, both being newly formed, are not sufficiently organized to adequately handle such a large sum of money in a way which will assure fiscal responsibility and accountability to the members of the OMB. These are the conflicting positions with which this appeal must deal.

7 Turning first to the application for the removal of the appellant under ss. 14 and 15 of *The Trustee Act*, I am in agreement with the ruling of the chambers judge. Removal of a trustee by the court pursuant to these sections is possible only when another trustee is being appointed in his or her place. We are left with the question of whether there is an inherent jurisdiction at common law for an order removing a trustee and, if so, whether that jurisdiction should be exercised in this case.

8 In finding that such an inherent jurisdiction exists, the chambers judge relied upon the recent case of *Scott v. Scott*, [1991] 5 W.W.R. 185 (Sask. Q.B.) wherein Baynton J. carefully reviewed the law in this area [at pp. 189-190]:

> As a Court of Equity, the Queen's Bench court has an inherent jurisdiction to remove a trustee: see ss. 12, 44(1) and 45(12) of the Queen's Bench Act, R.S.S. 1978, c. Q-1; *Re Dickinson* (1892), 2 B.C.R. 262; *Re Wrightson; Wrightson v. Cooke*, [1908] 1 Ch. 789; *MacLaren v. Grant* (1894), 23 S.C.R. 310 [N.B.] ... [and] *Mardesic v. Vukovich Estate* (1988), 30 B.C.L.R. (2d) 170 [...] (S.C.) ...
>
> . . . . .
>
> Numerous textbooks acknowledge this inherent jurisdiction of the court and rely on *Letterstedt v. Broers* (1884), 9 App. Cas. 371 (P.C.), as authority for this principle: Snell, Principles of Equity, 27th ed. (1973), p. 202; MacDonnell, Sheard, Hull, Probate Practice, 2d ed. (1972), pp. 132-35; Widdifield on Executors' Accounts, 5th ed., p. 41405; Keeton, Law of Trusts, 8th ed. (1963), pp. 186 and 191. Rule 452(*d*)(ii), (iii) and (ix) and R. 455 [of the Queen's Bench Act] envisage such applications by originating notice. I am accordingly satisfied that notwithstanding the restricted authority in the *Trustee Act*, I have an inherent jurisdiction to remove a trustee without appointing a replacement.

9 Furthermore, in his text on the *Law of Trusts in Canada*, (2nd ed.) 1984, Professor D.W.M. Waters writes that the power of a court to remove a trustee is not hampered by the absence of a statutory provision to that effect. At p. 683, after commenting on the more usual situation of a court removing a trustee in order to appoint another, he writes:

> But in no jurisdiction has the court a statutory power to remove a trustee without appointing in his place. It is under the inherent jurisdiction that the court has power to remove a trustee without making a further appointment.

Accordingly, I agree that the chambers judge had the inherent jurisdiction to remove the appellant as a trustee of the OMT.

10 Having found jurisdiction, I must then determine whether the appellant should have been removed. Did the appellant fail to uphold the obligations imposed upon her by law when she assumed the role of trustee? If so, she should be removed. It is a well settled principle of the law of trusts that a trustee must act in the best interests of the beneficiaries. At p. 683, Professor Waters invokes this principle in the context of the removal of a trustee:

> Canadian courts have consistently followed the general guidelines set out by Lord Blackburn in *Letterstedt v. Broers* [supra], where he said that the courts' "main guide must be the welfare of the beneficiaries." If it is clear that the continuance of the trustee would be detrimental to the execution of the trust, and on request he refuses to retire without any reasonable ground for his refusal, the court might then consider it proper to remove him.

11 In determining whether a trustee is acting with the best interests of the beneficiaries in mind, a court must bear in mind that the nature of a trustee's power is discretionary and that judicial interference should be exercised with restraint. Again, I look to Professor Waters (at p. 685):

> It is as well to remember, however, that the trustee's power reflects a discretion, and that the courts have consistently refused to interfere with a trustee's *bona fide* exercise of a discretion. What the trustee is required to do is to put his mind to the matter in question, and, if he then makes the kind of decision which an honest and attentive man could have made, the court will not agree to his removal. [Footnote omitted.]

12 The chambers judge was obviously of the view that the predominant role of a trustee involved the protection of the trust property. The protection of trust property was seen by him as synonymous with the acquisition of the trust property so that it comes under the control of those responsible for its management. No one would quarrel with this as a reasonable starting point in most cases. The trustee is obligated to act in the best interests of the beneficiary, and this certainly involves the protection of the trust property. However, because of the special circumstances that exist here, the appellant believed that authorizing the transfer of the trust funds would serve not to protect the trust property, but to put it beyond the appellant's control and, in her mind, expose it to grave risk.

13 Given this basic concern, now reinforced by additional evidence filed at this hearing, it becomes difficult to conclude that a case has been made out to warrant her removal as a trustee. All of her decisions have been taken out of what appears to be a *bona fide* concern for the protection of the trust property and for the best interests of the beneficiary. The appellant has acted, so she believes, so as to fulfil her primary obligation as trustee. As Professor Waters has noted at p. 689 of his text, her "duty of loyalty to the trust beneficiaries, could well make him [her] responsible to the beneficiaries for his [her] conduct even before he [she] receives title to, or possession of, the trust assets". Her duty therefore as a trustee, is not diminished by the fact that the trust funds have not yet been transferred to the OMT.

14 The respondent contends that the failure to sign the documents and particularly the indemnity agreement constitutes a breach of the appellant's duty. But once again, the appellant believes that this is what she must do to protect the trust funds. She may or may not be correct, but she should not be removed from office for failing to sign an indemnification agreement which in essence involves an acceptance that all that has been done by the main trustees concerning the handling of that trust is entirely in order and releases them from any further liability in respect of same. No suggestion has been raised that the Main Trust has been mismanaged, but neither has it been approved beyond the usual audit and there is no way in which one can decide with assurance that the appellant is not justified in failing to execute such a document.

15 In the result, I am of the view that the chambers judge was unduly concerned with the need to transfer the funds in order to protect the trust property. In this instance, there is no suggestion the assets are in jeopardy while they remain a part of the Main Trust while on the other hand, the appellant holds the view that such transfer will serve to put these assets at risk. It would be inappropriate that she be removed as a trustee for actions she sees as being in the best interests of both the OMT and OMB.

16 I am mindful that there are those who possess exaggerated and unrealistic concerns about the actions of others. If I thought that it had been established that the appellant was such a person, it might well be that the judgment of the learned chambers judge could be justified. However, there is nothing in the material before me which would lead me to conclude the appellant held irrational and completely unsupportable opinions. Indeed, the additional material before us supports the view that there is at least some basis for her concern. There is no denial of the validity of the auditor's concerns or evidence to provide adequate assurance that necessary steps have been taken to overcome the many difficulties the auditor has identified.

17 I am also mindful that other approaches may be available to the trustees of the Main Trust and other trustees of the OMT if this im passe continues. Indeed, if all else fails, the term of office of the appellant is three years and, in the final analysis, the acceptability of her role as a trustee may be judged at the next election by the members of the OMB.

18 Finally, the appellant has questioned whether the Queen's Bench court has jurisdiction to entertain an application of this nature. It was contended that the OMB was a "federal board" within the meaning of s. 18(1) of the *Federal Court Act* and as such this was a matter exclusively within the jurisdiction of the Federal Court. The appellant acknowledged that it was questionable from a review of the relevant cases whether an Indian Band was federal board within the meaning of that section but sought to have this Court accept such an interpretation. I do not find it necessary to determine that issue as the Ocean Man Band is not a party to these proceedings. I agree with the chambers judge that this is an application to remove a trustee of a private trust fund which is being managed in this province. The only relationship that trust has with the federal government is that the government was the original source of the funds. That connection no longer exists and the issue of trusteeship is properly one dealt with by the Court of Queen's Bench of this province.

19 For the reasons indicated, this appeal is allowed with costs on double Column 5.

Appeal allowed.

SAWRIDGE BAND INTER VIVOS SETTLEMENT

DECLARATION OF TRUST

THIS DEED OF SETTLEMENT is made in duplicate the 15th day of April, 1985

B E T W E E N :

CHIEF WALTER PATRICK TWINN,
of the Sawridge Indian Band,
No. 19, Slave Lake, Alberta,
(hereinafter called the "Settlor"),

OF THE FIRST PART,

- and -

CHIEF WALTER PATRICK TWINN,
GEORGE V. TWIN and SAMUEL G. TWIN,
of the Sawridge Indian Band,
No. 19, Slave Lake, Alberta,
(hereinafter collectively called
the "Trustees"),

OF THE SECOND PART.

WHEREAS the Settlor desires to create an inter vivos settlement for the benefit of the individuals who at the date of the execution of this Deed are members of the Sawridge Indian Band No. 19 within the meaning of the provisions of the Indian Act R.S.C. 1970, Chapter I-6, as such provisions existed on the 15th day of April, 1982, and the future members of such band within the meaning of the said provisions as such provisions existed on the 15th day

of April, 1952 and for that purpose has transferred to the Trustees the property described in the Schedule hereto;

AND WHEREAS the parties desire to declare the trusts, terms and provisions on which the Trustees have agreed to hold and administer the said property and all other properties that may be acquired by the Trustees hereafter for the purposes of the settlement;

NOW THEREFORE THIS DEED WITNESSETH THAT in consideration of the respective covenants and agreements herein contained, it is hereby covenanted and agreed by and between the parties as follows:

1. The Settlor and Trustees hereby establish a trust fund, which the Trustees shall administer in accordance with the terms of this Deed.

2. In this Settlement, the following terms shall be interpreted in accordance with the following rules:

(a) "Beneficiaries" at any particular time shall mean all persons who at that time qualify as members of the Sawridge Indian Band No. 19 pursuant to the provisions of the Indian Act R.S.C. 1970, Chapter I-6 as such provisions existed on the 15th day of April, 1982 and, in the event that such provisions are amended after the date of the execution of this Deed all persons who at such particular time

would qualify for membership of the Sawridge Indian Band No. 19 pursuant to the said provisions as such provisions existed on the 15th day of April, 1982 and, for greater certainty, no persons who would not qualify as members of the Sawridge Indian Band No. 19 pursuant to the said provisions, as such provisions existed on the 15th day of April, 1982, shall be regarded as "Beneficiaries" for the purpose of this Settlement whether or not such persons become or are at any time considered to be members of the Sawridge Indian Band No. 19 for all or any other purposes by virtue of amendments to the Indian Act R.S.C. 1970, Chapter I-6 that may come into force at any time after the date of the execution of this Deed or by virtue of any other legislation enacted by the Parliament of Canada or by any province or by virtue of any regulation, Order in Council, treaty or executive act of the Government of Canada or any province or by any other means whatsoever; provided, for greater certainty, that any person who shall become enfranchised, become a member of another Indian band or in any manner voluntarily cease to be a member of the Sawridge Indian Band

No 19 under the Indian Act R.S.C. 1970, Chapter I-6, as amended from time to time, or any consolidation thereof or successor legislation thereto shall thereupon cease to be a Beneficiary for all purposes of this Settlement; and

(b) "Trust Fund" shall mean:

(A) the property described in the Schedule hereto and any accumulated income thereon;

(B) any further, substituted or additional property and any accumulated income thereon which the Settlor or any other person or persons may donate, sell or otherwise transfer or cause to be transferred to, or vest or cause to be vested in, or otherwise acquired by, the Trustees for the purposes of this Settlement;

(C) any other property acquired by the Trustees pursuant to, and in accordance with, the provisions of this Settlement; and

(D) the property and accumulated income thereon (if any) for the time being and from time to time into which any of the aforesaid properties and accumulated income thereon may be converted.

3. The Trustees shall hold the Trust Fund in trust and shall deal with it in accordance with the terms and conditions of this Deed. No part of the Trust Fund shall be used for or diverted to purposes other than those purposes set out herein. The Trustees may accept and hold as part of the Trust Fund any property of any kind or nature whatsoever that the Settlor or any other person or persons may donate, sell or otherwise transfer or cause to be transferred to, or vest or cause to be vested in, or otherwise acquired by, the Trustees for the purposes of this Settlement.

4. The name of the Trust Fund shall be "The Sawridge Band Inter Vivos Settlement", and the meetings of the Trustees shall take place at the Sawridge Band Administration Office located on the Sawridge Band Reserve.

5. Any Trustee may at any time resign from the office of Trustee of this Settlement on giving not less than thirty (30) days notice addressed to the other Trustees. Any Trustee or Trustees may be removed from office by a resolution that receives the approval in writing of at least eighty percent (80%) of the Beneficiaries who are then alive and over the age of twenty-one (21) years. The power of appointing Trustees to fill any vacancy caused by the death, resignation or removal of a Trustee shall be vested in the continuing Trustees or Trustee of this Settlement and such

power shall be exercised so that at all times (except for the period pending any such appointment, including the period pending the appointment of two (2) additional Trustees after the execution of this Deed) there shall be at least five (5) Trustees of this Settlement and so that no person who is not then a Beneficiary shall be appointed as a Trustee if immediately before such appointment there is more than one (1) Trustee who is not then a Beneficiary.

6. The Trustees shall hold the Trust Fund for the benefit of the Beneficiaries; provided, however, that at the end of twenty-one (21) years after the death of the last survivor of all persons who were alive on the 15th day of April, 1982 and who, being at that time registered Indians, were descendants of the original signators of Treaty Number 8, all of the Trust Fund then remaining in the hands of the Trustees shall be divided equally among the Beneficiaries then living.

Provided, however, that the Trustees shall be specifically entitled not to grant any benefit during the duration of the Trust or at the end thereof to any illegitimate children of Indian women, even though that child or those children may be registered under the Indian Act and their status may not have been protested under section 12(2) thereunder.

The Trustees shall have complete and unfettered discretion to pay or apply all or so much of the net income of the Trust Fund, if any, or to accumulate the same or any portion thereof, and all or so much of the capital of the Trust Fund as they in their unfettered discretion from time to time deem appropriate for any one or more of the Beneficiaries; and the Trustees may make such payments at such time, and from time to time, and in such manner and in such proportions as the Trustees in their uncontrolled discretion deem appropriate.

7. The Trustees may invest and reinvest all or any part of the Trust Fund in any investments authorized for Trustees' investments by the Trustees' Act, being Chapter T-10 of the Revised Statutes of Alberta, 1980, as amended from time to time, but the Trustees are not restricted to such Trustee Investments but may invest in any investment which they in their uncontrolled discretion think fit, and are further not bound to make any investment nor to accumulate the income of the Trust Fund, and may instead, if they in their uncontrolled discretion from time to time deem it appropriate, and for such period or periods of time as they see fit, keep the Trust Fund or any part of it deposited in a bank to which the Bank Act (Canada) or the Quebec Savings Bank Act applies.

8. The Trustees are authorized and empowered to do all acts necessary or, in the opinion of the Trustees, desirable for the purpose of administering this Settlement for the benefit of the Beneficiaries including any act that any of the Trustees might lawfully do when dealing with his own property, other than any such act committed in bad faith or in gross negligence, and including, without in any manner to any extent detracting from the generality of the foregoing, the power

(a) to exercise all voting and other rights in respect of any stocks, bonds, property or other investments of the Trust Fund;

(b) to sell or otherwise dispose of any property held by them in the Trust Fund and to acquire other property in substitution therefor; and

(c) to employ professional advisors and agents and to retain and act upon the advice given by such professionals and to pay such professionals such fees or other remuneration as the Trustees in their uncontrolled discretion from time to time deem appropriate (and this provision shall apply to the payment of professional fees to any Trustee who renders professional services to the Trustees).

9. Administration costs and expenses of or in connection with the Trust shall be paid from the Trust Fund,

including, without limiting the generality of the foregoing, reasonable reimbursement to the Trustees or any of them for costs (and reasonable fees for their services as Trustees) incurred in the administration of the Trust and for taxes of any nature whatsoever which may be levied or assessed by federal, provincial or other governmental authority upon or in respect of the income or capital of the Trust Fund.

10. The Trustees shall keep accounts in an acceptable manner of all receipts, disbursements, investments, and other transactions in the administration of the Trust.

11. The provisions of this Settlement may be amended from time to time by a resolution of the Trustees that receives the approval in writing of at least eighty percent (80%) of the Beneficiaries who are then alive and over the age of twenty-one (21) years provided that no such amendment shall be valid or effective to the extent that it changes or alters in any manner, or to any extent, the definition of "Beneficiaries" under subparagraph 2(a) of this Settlement or changes or alters in any manner, or to any extent, the beneficial ownership of the Trust Fund, or any part of the Trust Fund, by the Beneficiaries as so defined.

12. The Trustees shall not be liable for any act or omission done or made in the exercise of any power, authority or discretion given to them by this Deed provided such

act or omission is done or made in good faith; nor shall they be liable to make good any loss or diminution in value of the Trust Fund not caused by their gross negligence or bad faith; and all persons claiming any beneficial interest in the Trust Fund shall be deemed to take notice of and subject to this clause.

13. Subject to paragraph 11 of this Deed, a majority of fifty percent (50%) of the Trustees shall be required for any decision or action taken on behalf of the Trust.

Each of the Trustees, by joining in the execution of this Deed, signifies his acceptance of the Trusts herein. Any other person who becomes a Trustee under paragraph 5 of this Settlement shall signify his acceptance of the Trust herein by executing this Deed or a true copy hereof, and shall be bound by it in the same manner as if he or she had executed the original Deed.

14. This Settlement shall be governed by, and shall be construed in accordance with the laws of the Province of

Alberta.

IN WITNESS WHEREOF the parties hereto have executed this Deed.

SIGNED, SEALED AND DELIVERED
in the presence of:

NAME

ADDRESS

A. Settlor

B. Trustees:

NAME

ADDRESS

1.

NAME

ADDRESS

2.

NAME

ADDRESS

3.

Schedule

One Hundred Dollars ($100.00) in Canadian Currency.

Court of Queen's Bench of Alberta

Citation: 1985 Sawridge Trust v. Alberta (Public Trustee), 2012 ABQB 365

Date: 20120612
Docket: 1103 14112
Registry: 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 the Sawridge Indian Band, on April 15, 1985 (the "1985 Sawridge Trust")

Between:

Roland Twinn, Catherine Twinn, Walter Felix Twin, Bertha L'Hirondelle, and Clara Midbo, As Trustees for the 1985 Sawridge Trust

Respondent

- and -

Public Trustee of Alberta

Applicant

Reasons for Judgment of the Honourable Mr. Justice D.R.G. Thomas

["Sawridge #1"]

I. Introduction

[1] On April 15, 1985 the Sawridge Indian Band, No. 19, now known as the Sawridge First Nation [the "Band" or "Sawridge Band"] set up the 1985 Sawridge Trust [sometimes referred to as the "Trust" or the "Sawridge Trust"] to hold some Band property on behalf of its then members. The 1985 Sawridge Trust and other related trusts were created in the expectation that persons who had been excluded from Band membership by gender (or the gender of their parents) would be entitled to join the Band as a consequence of amendments to the *Indian Act*, R.S.C. 1985, c. I-5 which were being proposed to make that legislation compliant with the *Canadian Charter of Rights and Freedoms*, Part 1, *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [the "*Charter*"].

[2] The 1985 Sawridge Trust is administered by the Trustees named as Respondents in this application [the "Sawridge Trustees" or the "Trustees"] who now seek the advice and direction of this Court in respect to proposed amendments to the definition of the term "Beneficiaries" in the 1985 Sawridge Trust and confirmation of the transfer of assets into that Trust. One consequence of these proposed amendments to the 1985 Sawridge Trust would be that the entitlement of certain dependent children to share in Trust assets would be affected. There is some question as to the exact nature of the effects, although it seems to be accepted by all of those involved on this application that certain children who are presently entitled to a share in the benefits of the 1985 Sawridge Trust would be excluded if the proposed changes are approved and implemented. Another concern is that the proposed revisions would mean that certain dependent children of proposed members of the Trust would become beneficiaries and entitled to shares in the Trust, while other dependent children would be excluded.

[3] At the time of confirming the scope of notices to be given in respect to the application for advice and directions, it was observed that children who might be affected by variations to the 1985 Sawridge Trust were not represented by counsel. In my Order of August 31, 2011 [the "August 31 Order"] I directed that the Office of the Public Trustee of Alberta [the "Public Trustee"] be notified of the proceedings and invited to comment on whether it should act in respect of any existing or potential minor beneficiaries of the Sawridge Trust.

[4] On February 14, 2012 the Public Trustee applied to be appointed as the litigation representative of minors interested in the proceedings, for the payment of advance costs on a solicitor and own client basis and exemption from liability for the costs of others. The Public Trustee also applied, for the purposes of questioning on affidavits which might be filed in this proceeding, for an advance ruling that information and evidence relating to the membership criteria and processes of the Sawridge Band is relevant material.

[5] On April 5, 2012 I heard submissions on the application by the Public Trustee which was opposed by the Sawridge Trustees and the Chief and Council of the Sawridge Band. The Trustees and the Band, through their Chief and Council, argue that the guardians of the potentially affected children will serve as adequate representatives of the interests of any minors.

[6] Ultimately in this application I conclude that it is appropriate that the Public Trustee represent potentially affected minors, that all costs of such representation be borne by the Sawridge Trust and that the Public Trustee may make inquiries into the membership and application processes and practices of the Sawridge Band.

II. The History of the 1985 Sawridge Trust

[7] An overview of the history of the 1985 Sawridge Trust provides a context for examining the potential role of the Public Trustee in these proceedings. The relevant facts are not in dispute and are found primarily in the evidence contained in the affidavits of Paul Bujold (August 30, 2011, September 12, 2011, September 30, 2011), and of Elizabeth Poitras (December 7, 2011).

[8] In 1982 various assets purchased with funds of the Sawridge Band were placed in a formal trust for the members of the Sawridge Band. In 1985 those assets were transferred into the 1985 Sawridge Trust. At the present time the value of assets held by the 1985 Sawridge Trust is approximately $70 million. As previously noted, the beneficiaries of the Sawridge Trust are restricted to persons who were members of the Band prior to the adoption by Parliament of the *Charter* compliant definition of Indian status.

[9] In 1985 the Sawridge Band also took on the administration of its membership list. It then attempted (unsuccessfully) to deny membership to Indian women who married non-aboriginal persons: ***Sawridge Band v. Canada***, 2009 FCA 123, 391 N.R. 375, leave denied [2009] S.C.C.A. No. 248. At least 11 women were ordered to be added as members of the Band as a consequence of this litigation: ***Sawridge Band v. Canada***, 2003 FCT 347, [2003] 4 F.C. 748, affirmed 2004 FCA 16, [2004] 3 F.C.R. 274. Other litigation continues to the present in relation to disputed Band memberships: ***Poitras v. Sawridge Band***, 2012 FCA 47, 428 N.R. 282, leave sought [2012] S.C.C.A. No. 152.

[10] At the time of argument in April 2012, the Band had 41 adult members, and 31 minors. The Sawridge Trustees report that 23 of those minors currently qualify as beneficiaries of the 1985 Sawridge Trust; the other eight minors do not.

[11] At least four of the five Sawridge Trustees are beneficiaries of the Sawridge Trust. There is overlap between the Sawridge Trustees and the Sawridge Band Chief and Council. Trustee Bertha L'Hirondelle has acted as Chief; Walter Felix Twinn is a former Band Councillor. Trustee Roland Twinn is currently the Chief of the Sawridge Band.

[12] The Sawridge Trustees have now concluded that the definition of "Beneficiaries" contained in the 1985 Sawridge Trust is "potentially discriminatory". They seeks to redefine the class of beneficiaries as the present members of the Sawridge Band, which is consistent with the definition of "Beneficiaries" in another trust known as the 1986 Trust.

[13] This proposed revision to the definition of the defined term "Beneficiaries" is a precursor to a proposed distribution of the assets of the 1985 Sawridge Trust. The Sawridge Trustees indicate that they have retained a consultant to identify social and health programs and services to be provided by the Sawridge Trust to the beneficiaries and their minor children. Effectively they say that whether a minor is or is not a Band member will not matter: see the Trustee's written brief at para. 26. The Trustees report that they have taken steps to notify current and potential beneficiaries of the 1985 Sawridge Trust and I accept that they have been diligent in implementing that part of my August 31 Order.

III. Application by the Public Trustee

[14] In its application the Public Trustee asks to be named as the litigation representative for minors whose interests are potentially affected by the application for advice and directions being made by the Sawridge Trustees. In summary, the Public Trustee asks the Court:

1. to determine which minors should be represented by it;

2. to order that the costs of legal representation by the Public Trustee be paid from the 1985 Sawridge Trust and that the Public Trustee be shielded from any liability for costs arising; and

3. to order that the Public Trustee be authorized to make inquiries through questioning into the Sawridge Band membership criteria and application processes.

The Public Trustee is firm in stating that it will only represent some or all of the potentially affected minors if the costs of its representation are paid from the 1985 Sawridge Trust and that it must be shielded from liability for any costs arising in this proceeding.

[15] The Sawridge Trustees and the Band both argue that the Public Trustee is not a necessary or appropriate litigation representative for the minors, that the costs of the Public Trustee should not be paid by the Sawridge Trust and that the criteria and mechanisms by which the Sawridge Band identifies its members is not relevant and, in any event, the Court has no jurisdiction to make such determinations.

IV. Should the Public Trustee be Appointed as a Litigation Representative?

[16] Persons under the age of 18 who reside in Alberta may only participate in a legal action via a litigation representative: *Alberta Rules of Court*, Alta Reg 124/2010, s. 2.11(a) [the "*Rules*", or individually a "*Rule*"]. The general authority for the Court to appoint a litigation representative is provided by *Rule*, 2.15. A litigation representative is also required where the membership of a trust class is unclear: *Rule*, 2.16. The common-law *parens patriae* role of the courts (***E. v. Eve (Guardian Ad Litem)***, [1986] 2 S.C.R. 388, 31 D.L.R. (4th) 1) allows for the appointment of a litigation representative when such action is in the best interests of a child. The *parens patriae* authority serves to supplement authority provided by statute: ***R.W. v. Alberta (Child, Youth and Family Enhancement Act Director)***, 2010 ABCA 412 at para. 15, 44 Alta. L.R. (5th) 313. In summary, I have the authority in these circumstances to appoint a litigation representative for minors potentially affected by the proposed changes to the 1985 Sawridge Trust definition of "Beneficiaries".

[17] The Public Trustee takes the position that it would be an appropriate litigation representative for the minors who may be potentially affected in an adverse way by the proposed redefinition of the term "Beneficiaries" in the 1985 Sawridge Trust documentation and also in respect to the transfer of the assets of that Trust. The alternative of the Minister of Aboriginal Affairs and Northern Development applying to act in that role, as potentially authorized by the *Indian Act*, R.S.C. 1985, c. I-5, s. 52, has not occurred, although counsel for the Minister takes a watching role.

[18] In any event, the Public Trustee argues that it is an appropriate litigation representative given the scope of its authorizing legislation. The Public Trustee is capable of being appointed to supervise trust entitlements of minors by a trust instrument (*Public Trustee Act*, S.A. 2004, c. P-44.1, s. 21) or by a court (*Public Trustee Act*, s. 22). These provisions apply to all minors in Alberta.

A. Is a litigation representative necessary?

[19] Both The Sawridge Trustees and Sawridge Band argue that there is no need for a litigation representative to be appointed in these proceedings. They acknowledge that under the proposed change to the definition of the term "Beneficiaries" no minors could be part of the 1985 Sawridge Trust. However, that would not mean that this class of minors would lose access to any resources of the Sawridge Trust; rather it is said that these benefits can and will be funnelled to

those minors through those of their parents who are beneficiaries of the Sawridge Trust, or minors will become full members of the Sawridge Trust when they turn 18 years of age.

[20] In the meantime the interests of the affected children would be defended by their parents. The Sawridge Trustees argue that the Courts have long presumptively recognized that parents will act in the best interest of their children, and that no one else is better positioned to care for and make decisions that affect a child: ***R.B. v. Children's Aid Society of Metropolitan Toronto***, [1995] 1 S.C.R. 315 at 317-318, 122 D.L.R. (4th) 1. Ideally, a parent should act as a 'next friend' [now a 'litigation representative' under the new *Rules*]: ***V.B. v. Alberta (Minister of Children's Services)***, 2004 ABQB 788 at para. 19, 365 A.R. 179; ***C.H.S. v. Alberta (Director of Child Welfare)***, 2008 ABQB 620, 452 A.R. 98.

[21] The Sawridge Trustees take the position at para. 48 of its written brief that:

> [i]t is anachronistic to assume that the Public Trustee knows better than a First Nation parent what is best for the children of that parent.

The Sawridge Trustees observe that the parents have been notified of the plans of the Sawridge Trust, but none of them have commented, or asked for the Public Trustee to intervene on behalf of their children. They argue that the silence of the parents should be determinative.

[22] The Sawridge Band argues further that no conflict of interest arises from the fact that certain Sawridge Trustees have served and continue to serve as members of the Sawridge Band Chief and Council. At para. 27 of its written brief, the Sawridge Band advances the following argument:

> ... there is no conflict of interest between the fiduciary duty of a Sawridge Trustee administering the 1985 Trust and the duty of impartiality for determining membership application for the Sawridge First Nation. The two roles are separate and have no interests that are incompatible. The Public Trustee has provided no explanation for why or how the two roles are in conflict. Indeed, the interests of the two roles are more likely complementary.

[23] In response the Public Trustee notes the well established fiduciary obligation of a trustee in respect to trust property and beneficiaries: ***Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.***, 2011 SCC 23 at para. 148, [2011] 2 S.C.R. 175. It observes that a trustee should avoid potential conflict scenarios or any circumstance that is "... ambiguous ... a situation where a conflict of interest and duty might occur ..." (citing D. W. M. Waters, M. Gillen and L. Smith, eds., *Waters' Law of Trusts in Canada*, 3rd. ed. (Toronto: Thomson Carswell, 2005), at p. 914 ["*Waters' Law of Trusts*"]. Here, the Sawridge Trustees are personally affected by the assignment of persons inside and outside of the Trust. However, they have not taken preemptive steps, for example, to appoint an independent person or entity to protect or oversee the interests of the 23

minors, each of whom the Sawridge Trustees acknowledge could lose their beneficial interest in approximately $1.1 million in assets of the Sawridge Trust.

[24] In these circumstances I conclude that a litigation representative is appropriate and required because of the substantial monetary interests involved in this case. The Sawridge Trustees have indicated that their plan has two parts:

> firstly, to revise and clarify the definition of "Beneficiaries" under the 1985 Sawridge Trust; and
>
> secondly, then seek direction to distribute the assets of the 1985 Sawridge Trust with the new amended definition of beneficiary.

While I do not dispute that the Sawridge Trustees plan to use the Trust to provide for various social and health benefits to the beneficiaries of the Trust and their children, I observe that to date the proposed variation to the 1985 Sawridge Trust does not include a *requirement* that the Trust distribution occur in that manner. The Trustees could, instead, exercise their powers to liquidate the Sawridge Trust and distribute approximate $1.75 million shares to the 41 adult beneficiaries who are the present members of the Sawridge Band. That would, at a minimum, deny 23 of the minors their current share of approximately $1.1 million each.

[25] It is obvious that very large sums of money are in play here. A decision on who falls inside or outside of the class of beneficiaries under the 1985 Sawridge Trust will significantly affect the potential share of those inside the Sawridge Trust. The key players in both the administration of the Sawridge Trust and of the Sawridge Band overlap and these persons are currently entitled to shares of the Trust property. The members of the Sawridge Band Chief and Council are elected by and answer to an interested group of persons, namely those who will have a right to share in the 1985 Sawridge Trust. These facts provide a logical basis for a concern by the Public Trustee and this Court of a potential for an unfair distribution of the assets of the 1985 Sawridge Trust.

[26] I reject the position of the Sawridge Band that there is no potential for a conflict of interest to arise in these circumstances. I also reject as being unhelpful the argument of the Sawridge Trustees that it is "anachronistic" to give oversight through a public body over the wisdom of a "First Nations parent". In Alberta, persons under the age of 18 are minors and their racial and cultural backgrounds are irrelevant when it comes to the question of protection of their interests by this Court.

[27] The essence of the argument of the Sawridge Trustees is that there is no need to be concerned that the current and potential beneficiaries who are minors would be denied their share of the 1985 Sawridge Trust; that their parents, the Trustees, and the Chief and Council will only act in the best interests of those children. One, of course, hopes that that would be the case, however, only a somewhat naive person would deny that, at times, parents do not always act in

the best interests of their children and that elected persons sometimes misuse their authority for personal benefit. That is why the rules requiring fiduciaries to avoid conflicts of interest is so strict. It is a rule of very longstanding and applies to all persons in a position of trust.

[28] I conclude that the appointment of the Public Trustee as a litigation representative of the minors involved in this case is appropriate. No alternative representatives have come forward as a result of the giving of notice, nor have any been nominated by the Respondents. The Sawridge Trustees and the adult members of the Sawridge Band (including the Chief and Council) are in a potential conflict between their personal interests and their duties as fiduciaries.

[29] This is a 'structural' conflict which, along with the fact that the proposed beneficiary definition would remove the entitlement to some share in the assets of the Sawridge Trust for at least some of the children, is a sufficient basis to order that a litigation representative be appointed. As a consequence I have not considered the history of litigation that relates to Sawridge Band membership and the allegations that the membership application and admission process may be suspect. Those issues (if indeed they are issues) will be better reviewed and addressed in the substantive argument on the adoption of a new definition of "Beneficiaries" under the revised 1985 Sawridge Trust.

B. Which minors should the Public Trustee represent?

[30] The second issue arising is who the Public Trustee ought to represent. Counsel for the Public Trustee notes that the Sawridge Trustees identify 31 children of current members of the Band. Some of these persons, according to the Sawridge Trustees, will lose their current entitlement to a share in the 1985 Sawridge Trust under the new definition of "Beneficiaries". Others may remain outside the beneficiary class.

[31] There is no question that the 31 children who are potentially affected by this variation to the Sawridge Trust ought to be represented by the Public Trustee. There are also an unknown number of potentially affected minors, namely, the children of applicants seeking to be admitted into membership of the Sawridge Band. These candidate children, as I will call them, could, in theory, be represented by their parents. However, that potential representation by parents may encounter the same issue of conflict of interest which arises in respect to the 31 children of current Band members.

[32] The Public Trustee can only identify these candidate children via inquiry into the outstanding membership applications of the Sawridge Band. The Sawridge Trustees and Band argue that this Court has no authority to investigate those applications and the application process. I will deal in more detail with that argument in Part VI of this decision.

[33] The candidate children of applicants for membership in the Sawridge Band are clearly a group of persons who may be readily ascertained. I am concerned that their interest is also at risk. Therefore, I conclude that the Public Trustee should be appointed as the litigation representative

not only of minors who are children of current Band members, but also the children of applicants for Band membership who are also minors.

V. The Costs of the Public Trustee

[34] The Public Trustee is clear that it will only represent the minors involved here if:

1. advance costs determined on a solicitor and own client basis are paid to the Public Trustee by the Sawridge Trust; and

2. that the Public Trustee is exempted from liability for the costs of other litigation participants in this proceeding by an order of this Court.

[35] The Public Trustee says that it has no budget for the costs of this type of proceedings, and that its enabling legislation specifically includes cost recovery provisions: *Public Trustee Act*, ss. 10, 12(4), 41. The Public Trustee is not often involved in litigation raising aboriginal issues. As a general principle, a trust should pay for legal costs to clarify the construction or administration of that trust: ***Deans v. Thachuk***, 2005 ABCA 368 at paras. 42-43, 261 D.L.R. (4th) 300, leave denied [2005] S.C.C.A. No. 555.

[36] Further, the Public Trustee observes that the Sawridge Trustees are, by virtue of their status as current beneficiaries of the Trust, in a conflict of interest. Their fiduciary obligations require independent representation of the potentially affected minors. Any litigation representative appointed for those children would most probably require payment of legal costs. It is not fair, nor is it equitable, at this point for the Sawridge Trustees to shift the obligation of their failure to nominate an independent representative for the minors to the taxpayers of Alberta.

[37] Aline Huzar, June Kolosky, and Maurice Stoney agree with the Public Trustee and observe that trusts have provided the funds for litigation representation in aboriginal disputes: ***Horse Lake First Nation v. Horseman***, 2003 ABQB 114, 337 A.R. 22; ***Blueberry Interim Trust (Re)***, 2012 BCSC 254.

[38] The Sawridge Trustees argue that the Public Trustee should only receive advance costs on a full indemnity basis if it meets the strict criteria set out in ***Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)***, 2007 SCC 2, [2007] 1 S.C.R. 38 [***"Little Sisters"***] and ***R. v. Caron***, 2011 SCC 5, [2011] 1 S.C.R. 78. They say that in this instance the Public Trustee can afford to pay, the issues are not of public or general importance and the litigation will proceed without the participation of the Public Trustee.

[39] Advance costs on a solicitor and own client basis are appropriate in this instance, as well as immunization against costs of other parties. The ***Little Sisters*** criteria are intended for advance costs by a litigant with an independent interest in a proceeding. Operationally, the role of the

Public Trustee in this litigation is as a neutral 'agent' or 'officer' of the court. The Public Trustee will hold that position only by appointment by this Court. In these circumstances, the Public Trustee operates in a manner similar to a court appointed receiver, as described by Dickson J.A. (as he then was) in ***Braid Builders Supply & Fuel Ltd. v. Genevieve Mortgage Corp. Ltd.*** (1972), 29 D.L.R. (3d) 373, 17 C.B.R. (N.S.) 305 (Man. C.A.):

> In the performance of his duties the receiver is subject to the order and direction of the Court, not the parties. The parties do not control his acts nor his expenditures and cannot therefore in justice be accountable for his fees or for the reimbursement of his expenditures. It follows that the receiver's remuneration must come out of the assets under the control of the Court and not from the pocket of those who sought his appointment.

In this case, the property of the Sawridge Trust is the equivalent of the "assets under control of the Court" in an insolvency. Trustees in bankruptcy operate in a similar way and are generally indemnified for their reasonable costs: ***Residential Warranty Co. of Canada Inc. (Re)***, 2006 ABQB 236, 393 A.R. 340, affirmed 2006 ABCA 293, 275 D.L.R. (4th).

[40] I have concluded that a litigation representative is appropriate in this instance. The Sawridge Trustees argue this litigation will proceed, irrespective of whether or not the potentially affected children are represented. That is not a basis to avoid the need and cost to represent these minors; the Sawridge Trustees cannot reasonably deny the requirement for independent representation of the affected minors. On that point, I note that the Sawridge Trustees did not propose an alternative entity or person to serve as an independent representative in the event this Court concluded the potentially affected minors required representation.

[41] The Sawridge Band cites recent caselaw where costs were denied parties in estate matters. These authorities are not relevant to the present scenario. Those disputes involved alleged entitlement of a person to a disputed estate; the litigant had an interest in the result. That is different from a court-appointed independent representative. A homologous example to the Public Trustee's representation of the Sawridge Trust potential minor beneficiaries would be a dispute on costs where the Public Trustee had represented a minor in a dispute over a last will and testament. In such a case this Court has authority to direct that the costs of the Public Trustee become a charge to the estate: *Public Trustee Act*, s. 41(b).

[42] The Public Trustee is a neutral and independent party which has agreed to represent the interests of minors who would otherwise remain unrepresented in proceedings that may affect their substantial monetary trust entitlements. The Public Trustee's role is necessary due to the potential conflict of interest of other litigants and the failure of the Sawridge Trustees to propose alternative independent representation. In these circumstances, I conclude that the Public Trustee should receive full and advance indemnification for its participation in the proceedings to make revisions to the 1985 Sawridge Trust.

VI. Inquiries into the Sawridge Band Membership Scheme and Application Processes

[43] The Public Trustee seeks authorization to make inquiries, through questioning under the *Rules*, into how the Sawridge Band determines membership and the status and number of applications before the Band Council for membership. The Public Trustee observes that the application process and membership criteria as reported in the affidavit of Elizabeth Poitras appears to be highly discretionary, with the decision-making falling to the Sawridge Band Chief and Council. At paras. 25 - 29 of its written brief, The Public Trustee notes that several reported cases suggest that the membership application and review processes may be less than timely and may possibly involve irregularities.

[44] The Band and Trustees argue that the Band membership rules and procedure should not be the subject of inquiry, because:

A. those subjects are irrelevant to the application to revise certain aspects of the 1985 Sawridge Trust documentation; and

B. this Court has no authority to review or challenge the membership definition and processes of the Band; as a federal tribunal decisions of a band council are subject to the exclusive jurisdiction of the Federal Court of Canada: *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.

A. In this proceeding are the Band membership rules and application processes relevant?

[45] The Band Chief and Council argue that the rules of the Sawridge Band for membership and application for membership and the existence and status of any outstanding applications for such membership are irrelevant to this proceeding. They stress at para. 16 of their written brief that the "Advice and Direction Application" will not ask the Court to identify beneficiaries of the 1985 Sawridge Trust, and state further at para. 17 that "... the Sawridge First Nation is fully capable of determining its membership and identifying members of the Sawridge First Nation." They argue that any question of trust entitlement will be addressed by the Sawridge Trustees, in due course.

[46] The Sawridge Trustees also argue that the question of yet to be resolved Band membership issues is irrelevant, simply because the Public Trustee has not shown that Band membership is a relevant consideration. At para. 108 of its written brief the Sawridge Trustees observe that the fact the Band membership was in flux several years ago, or that litigation had occurred on that topic, does not mean that Band membership remains unclear. However, I think that argument is premature. The Public Trustee seeks to investigate these issues not because it has *proven* Band membership is a point of uncertainty and dispute, but rather to reassure itself (and the Court) that the beneficiary class can and has been adequately defined.

[47] The Public Trustee explains its interest in these questions on several bases. The first is simply a matter of logic. The terms of the 1985 Sawridge Trust link membership in the Band to an interest in the Trust property. The Public Trustee notes that one of the three 'certainties' of a valid trust is that the beneficiaries can be "ascertained", and that if identification of Band membership is difficult or impossible, then that uncertainty feeds through and could disrupt the "certainty of object": *Waters' Law of Trusts* at p. 156-157.

[48] The Public Trustee notes that the historical litigation and the controversy around membership in the Sawridge Band suggests that the 'upstream' criteria for membership in the Sawridge Trust may be a subject of some dispute and disagreement. In any case, it occurs to me that it would be peculiar if, in varying the definition of "Beneficiaries" in the trust documents, that the Court did not make some sort inquiry as to the membership application process that the Trustees and the Chief and Council acknowledge is underway.

[49] I agree with the Public Trustee. I note that the Sawridge Band Chief and Council argue that the Band membership issue is irrelevant and immaterial because Band membership will be clarified at the appropriate time, and the proper persons will then become beneficiaries of the 1985 Sawridge Trust. It contrasts the actions of the Sawridge Band and Trustees with the scenario reported in ***Barry v. Garden River Band of Ojibways*** (1997), 33 O.R. (3d) 782, 147 D.L.R. (4th) 615 (Ont. C.A.), where premature distribution of a trust had the effect of denying shares to potential beneficiaries whose claims, via band membership, had not yet crystalized. While the Band and Trustees stress their good intentions, this Court has an obligation to make inquiries as to the procedures and status of Band memberships where a party (or its representative) who is potentially a claimant to the Trust queries whether the beneficiary class can be "ascertained". In coming to that conclusion, I also note that the Sawridge Trustees acknowledge that the proposed revised definition of "Beneficiaries" may exclude a significant number of the persons who are currently within that group.

B. Exclusive jurisdiction of the Federal Court of Canada

[50] The Public Trustee emphasizes that its application is not to challenge the procedure, guidelines, or otherwise "interfere in the affairs of the First Nations membership application process". Rather, the Public Trustee says that the information which it seeks is relevant to evaluate and identify the beneficiaries of the 1985 Sawridge Trust. As such, it seeks information in respect to Band membership processes, but not to affect those processes. They say that this Court will not intrude into the jurisdiction of the Federal Court because that is not 'relief' against the Sawridge Band Chief and Council. Disclosure of information by a federal board, commission, or tribunal is not a kind of relief that falls into the exclusive jurisdiction of the Federal Courts, per *Federal Court Act*, s. 18.

[51] As well, I note that the "exclusive jurisdiction" of statutory courts is not as strict as alleged by the Trustees and the Band Chief and Council. In ***783783 Alberta Ltd. v. Canada***

(Attorney General), 2010 ABCA 226, 322 D.L.R. (4th) 56, the Alberta Court of Appeal commented on the jurisdiction of the Tax Court of Canada, which per *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, s. 12 has "exclusive original jurisdiction" to hear appeals of or references to interpret the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp). The Supreme Court of Canada in ***Canada v. Addison & Leyen Ltd.***, 2007 SCC 33, 365 N.R. 62 indicated that interpretation of the *Income Tax Act* was the sole jurisdiction of the Tax Court of Canada (para. 7), and that (para. 11):

> ... The integrity and efficacy of the system of tax assessments and appeals should be preserved. Parliament has set up a complex structure to deal with a multitude of tax-related claims and this structure relies on an independent and specialized court, the Tax Court of Canada. Judicial review should not be used to develop a new form of incidental litigation designed to circumvent the system of tax appeals established by Parliament and the jurisdiction of the Tax Court. ...

[52] The legal issue in ***783783 Alberta Ltd. v. Canada (Attorney General)*** was an unusual tort claim against the Government of Canada for what might be described as "negligent taxation" of a group of advertisers, with the alleged effect that one of two competing newspapers was disadvantaged. Whether the advertisers had or had not paid the correct income tax was a necessary fact to be proven at trial to establish that injury: paras. 24-25. The Alberta Court of Appeal concluded that the jurisdiction of a provincial superior court includes whatever statutory interpretation or application of fact to law that is necessary for a given issue, in that case a tort: para. 28. In that sense, the trial court was free to interpret and apply the *Income Tax Act*, provided in doing so it did not determine the income tax liability of a taxpayer: paras. 26-27.

[53] I conclude that it is entirely within the jurisdiction of this Court to examine the Band's membership definition and application processes, provided that:

1. investigation and commentary is appropriate to evaluate the proposed amendments to the 1985 Sawridge Trust, and

2. the result of that investigation does not duplicate the exclusive jurisdiction of the Federal Court to order "relief" against the Sawridge Band Chief and Council.

[54] Put another way, this Court has the authority to examine the band membership processes and evaluate, for example, whether or not those processes are discriminatory, biased, unreasonable, delayed without reason, and otherwise breach *Charter* principles and the requirements of natural justice. However, I do not have authority to order a judicial review remedy on that basis because that jurisdiction is assigned to the Federal Court of Canada.

[55] In the result, I direct that the Public Trustee may pursue, through questioning, information relating to the Sawridge Band membership criteria and processes because such information may be relevant and material to determining issues arising on the advice and directions application.

VII. Conclusion

[56] The application of the Public Trustee is granted with all costs of this application to be calculated on a solicitor and its own client basis.

Heard on the 5th day of April, 2012.
Dated at the City of Edmonton, Alberta this 12th day of June, 2012.

D.R.G. Thomas
J.C.Q.B.A.

Appearances:

Ms. Janet L. Hutchison
(Chamberlain Hutchison)
for the Public Trustee / Applicants

Ms. Doris Bonora,
Mr. Marco S. Poretti
(Reynolds, Mirth, Richards & Farmer LLP)
for the Sawridge Trustees / Respondents

Mr. Edward H. Molstad, Q.C.
(Parlee McLaws LLP)
for the Sawridge Band / Respondents

Court of Queen's Bench of Alberta

Citation: 1985 Sawridge Trust v Alberta (Public Trustee), 2015 ABQB 799

Date: 20151217
Docket: 1103 14112
Registry: Edmonton

In the Matter of the *Trustees Act*, RSA 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 the Sawridge Indian Band, on April 15, 1985 (the "1985 Sawridge Trust")

Between:

Ronald Twinn, Catherine Twinn, Walter Felix Twin, Bertha L'Hoirondelle and Clara Midbo, As Trustees for the 1985 Sawridge Trust

Respondents

- and -

Public Trustee of Alberta

Applicant

["Sawridge #3]

Reasons for Judgment
of the
Honourable Mr. Justice D.R.G. Thomas

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I Introduction

[1] This is a decision on a production application made by the Public Trustee and also contains other directions. Before moving to the substance of the decision and directions, I review the steps that have led up to this point and the roles of the parties involved. Much of the relevant information is collected in an earlier and related decision, ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2012 ABQB 365 ["***Sawridge #1***"], 543 AR 90 affirmed 2013 ABCA 226, 553 AR 324 ["***Sawridge #2***"]. The terms defined in ***Sawridge #1*** are used in this decision.

II. Background

[2] On April 15, 1985, the Sawridge Indian Band, No. 19, now known as the Sawridge First Nation [sometimes referred to as the "Band", "Sawridge Band", or "SFN"], set up the 1985 Sawridge Trust [sometimes referred to as the "Trust" or the "Sawridge Trust"] to hold some Band assets on behalf of its then members. The 1985 Sawridge Trust and other related trusts were created in the expectation that persons who had previously been excluded from Band membership by gender (or the gender of their parents) would be entitled to join the Band as a consequence of amendments to the *Indian Act*, RSC 1985, c I-5, which were being proposed to make that legislation compliant with the *Canadian Charter of Rights and Freedoms*, Part 1, *Constitution Act,* 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the "*Charter*"].

[3] The 1985 Sawridge Trust is administered by the Trustees [the "Sawridge Trustees" or the "Trustees"]. The Trustees had sought advice and direction from this Court in respect to proposed amendments to the definition of the term "Beneficiaries" in the 1985 Sawridge Trust (the "Trust Amendments") and confirmation of the transfer of assets into that Trust.

[4] One consequence of the proposed amendments to the 1985 Sawridge Trust would be to affect the entitlement of certain dependent children to share in Trust assets. There is some question as to the exact nature of the effects, although it seems to be accepted by all of those involved on this application that some children presently entitled to a share in the benefits of the 1985 Sawridge Trust would be excluded if the proposed changes are approved and implemented. Another concern is that the proposed revisions would mean that certain dependent children of proposed members of the Trust would become beneficiaries and be entitled to shares in the Trust, while other dependent children would be excluded.

[5] Representation of the minor dependent children potentially affected by the Trust Amendments emerged as an issue in 2011. At the time of confirming the scope of notices to be given in respect to the application for advice and directions, it was observed that children who might be affected by the Trust Amendments were not represented by independent legal counsel. This led to a number of events:

> August 31, 2011 - I directed that the Office of the Public Trustee of Alberta [the "Public Trustee"] be notified of the proceedings and invited to comment on whether it should act in respect of any existing or potential minor beneficiaries of the Sawridge Trust.

February 14, 2012 - The Public Trustee applied:

1. to be appointed as the litigation representative of minors interested in this proceeding;
2. for the payment of advance costs on a solicitor and own client basis and exemption from liability for the costs of others; and
3. for an advance ruling that information and evidence relating to the membership criteria and processes of the Sawridge Band is relevant material.

April 5, 2012 - the Sawridge Trustees and the SFN resisted the Public Trustee's application.

June 12, 2012 - I concluded that a litigation representative was necessary to represent the interests of the minor beneficiaries and potential beneficiaries of the 1985 Sawridge Trust, and appointed the Public Trustee in that role: ***Sawridge #1***, at paras 28-29, 33. I ordered that Public Trustee, as a neutral and independent party, should receive full and advance indemnification for its activities in relation to the Sawridge Trust (***Sawridge #1***, at para 42), and permitted steps to investigate "... the Sawridge Band membership criteria and processes because such information may be relevant and material ..." (***Sawridge #1***, at para 55).

June 19, 2013 - the Alberta Court of Appeal confirmed the award of solicitor and own client costs to the Public Trustee, as well as the exemption from unfavourable cost awards (***Sawridge #2***).

April 30, 2014 - the Trustees and the Public Trustee agreed to a consent order related to questioning of Paul Bujold and Elizabeth Poitras.

June 24, 2015 - the Public Trustee's application directed to the SFN was stayed and the Public Trustee was ordered to provide the SFN with the particulars of and the basis for the relief it claimed. A further hearing was scheduled for June 30, 2015.

June 30, 2015 - after hearing submissions, I ordered that:

- the Trustee's application to settle the Trust was adjourned;
- the Public Trustee file an amended application for production from the SFN with argument to be heard on September 2, 2015; and
- the Trustees identify issues concerning calculation and reimbursement of the accounts of the Public Trustee for legal services.

September 2/3, 2015 - after a chambers hearing, I ordered that:

- within 60 days the Trustees prepare and serve an affidavit of records, per the *Alberta Rules of Court*, Alta Reg 124/2010 [the "*Rules*", or individually a "*Rule*"],
- the Trustees may withdraw their proposed settlement agreement and litigation plan, and

- some document and disclosure related items sought by the Public Trustee were adjourned *sine die*.
("September 2/3 Order")

October 5, 2015- I directed the Public Trustee to provide more detailed information in relation to its accounts totalling $205,493.98. This further disclosure was intended to address a concern by the Sawridge Trustees concerning steps taken by the Public Trustee in this proceeding.

[6] Earlier steps have perhaps not ultimately resolved but have advanced many of the issues which emerged in mid-2015. The Trustees undertook to provide an Affidavit of Records. I have directed additional disclosure of the activities of the legal counsel assisting the Public Trustee to allow the Sawridge Trustees a better opportunity to evaluate those legal accounts. The most important issue which remains in dispute is the application by the Public Trustee for the production of documents/information held by the SFN.

[7] This decision responds to that production issue, but also more generally considers the current state of this litigation in an attempt to refocus the direction of this proceeding and the activities of the Public Trustee to ensure that it meets the dual objectives of assisting this Court in directing a fair distribution scheme for the assets of the 1985 Sawridge Trust and the representation of potential minor beneficiaries.

III. The 1985 Sawridge Trust

[8] ***Sawridge #1*** at paras 7-13 reviews the history of the 1985 Sawridge Trust. I repeat that information verbatim, as this context is relevant to the role and scope of the Public Trustee's involvement in this matter:

> [8] In 1982 various assets purchased with funds of the Sawridge Band were placed in a formal trust for the members of the Sawridge Band. In 1985 those assets were transferred into the 1985 Sawridge Trust. [In 2012] the value of assets held by the 1985 Sawridge Trust is approximately $70 million. As previously noted, the beneficiaries of the Sawridge Trust are restricted to persons who were members of the Band prior to the adoption by Parliament of the *Charter* compliant definition of Indian status.
>
> [9] In 1985 the Sawridge Band also took on the administration of its membership list. It then attempted (unsuccessfully) to deny membership to Indian women who married non-aboriginal persons: ***Sawridge Band v. Canada***, 2009 FCA 123, 391 N.R. 375, leave denied [2009] S.C.C.A. No. 248. At least 11 women were ordered to be added as members of the Band as a consequence of this litigation: ***Sawridge Band v. Canada***, 2003 FCT 347, 2003 FCT 347, [2003] 4 F.C. 748, affirmed 2004 FCA 16, [2004] 3 F.C.R. 274. Other litigation continues to the present in relation to disputed Band memberships: ***Poitras v. Sawridge Band***, 2012 FCA 47, 428 N.R. 282, leave sought [2012] S.C.C.A. No. 152.
>
> [10] At the time of argument in April 2012, the Band had 41 adult members, and 31 minors. The Sawridge Trustees report that 23 of those minors currently qualify as beneficiaries of the 1985 Sawridge Trust; the other eight minors do not.

[11] At least four of the five Sawridge Trustees are beneficiaries of the Sawridge Trust. There is overlap between the Sawridge Trustees and the Sawridge Band Chief and Council. Trustee Bertha L'Hirondelle has acted as Chief; Walter Felix Twinn is a former Band Councillor. Trustee Roland Twinn is currently the Chief of the Sawridge Band.

[12] The Sawridge Trustees have now concluded that the definition of "Beneficiaries" contained in the 1985 Sawridge Trust is "potentially discriminatory". They seek to redefine the class of beneficiaries as the present members of the Sawridge Band, which is consistent with the definition of "Beneficiaries" in another trust known as the 1986 Trust.

[13] This proposed revision to the definition of the defined term "Beneficiaries" is a precursor to a proposed distribution of the assets of the 1985 Sawridge Trust. The Sawridge Trustees indicate that they have retained a consultant to identify social and health programs and services to be provided by the Sawridge Trust to the beneficiaries and their minor children. Effectively they say that whether a minor is or is not a Band member will not matter: see the Trustee's written brief at para. 26. The Trustees report that they have taken steps to notify current and potential beneficiaries of the 1985 Sawridge Trust and I accept that they have been diligent in implementing that part of my August 31 Order.

IV. The Current Situation

[9] This decision and the June 30 and September 2/3, 2015 hearings generally involve the extent to which the Public Trustee should be able to obtain documentary materials which the Public Trustee asserts are potentially relevant to its representation of the identified minor beneficiaries and the potential minor beneficiaries. Following those hearings, some of the disagreements between the Public Trustee and the 1985 Sawridge Trustees were resolved by the Sawridge Trustees agreeing to provide a *Rules* Part V affidavit of records within 60 days of the September 2/3 Order.

[10] The primary remaining issue relates to the disclosure of information in documentary form sought by the Public Trustee from the SFN and there are also a number of additional ancillary issues. The Public Trustee seeks information concerning:

1. membership in the SFN,
2. candidates who have or are seeking membership with the SFN,
3. the processes involved to determine whether individuals may become part of the SFN,
4. records of the application processes and certain associated litigation, and
5 how assets ended up in the 1985 Sawridge Trust.

[11] The SFN resists the application of the Public Trustee, arguing it is not a party to this proceeding and that the Public Trustee's application falls outside the *Rules*. Beyond that, the SFN questions the relevance of the information sought.

V. Submissions and Argument

A. The Public Trustee

[12] The Public Trustee takes the position that it has not been able to complete the responsibilities assigned to it by me in ***Sawridge #1*** because it has not received enough information on potential, incomplete and filed applications to join the SFN. It also needs information on the membership process, including historical membership litigation scenarios, as well as data concerning movement of assets into the 1985 Sawridge Trust.

[13] It also says that, without full information, the Public Trustee cannot discharge its role in representing affected minors.

[14] The Public Trustee's position is that the Sawridge Band is a party to this proceeding, or is at least so closely linked to the 1985 Sawridge Trustees that the Band should be required to produce documents/information. It says that the Court can add the Sawridge Band as a party. In the alternative, the Public Trustee argues that *Rules* 5.13 and 9.19 provide a basis to order production of all relevant and material records.

B. The SFN

[15] The SFN takes the position that it is not a party to the Trustee's proceedings in this Court and it has been careful not to be added as a party. The SFN and the Sawridge Trustees are distinct and separate entities. It says that since the SFN has not been made a party to this proceeding, the *Rules* Part V procedures to compel documents do not apply to it. This is a stringent test: ***Trimay Wear Plate Ltd. v Way***, 2008 ABQB 601, 456 AR 371; ***Wasylyshen v Canadian Broadcasting Corp.***, [2006] AJ No 1169 (Alta QB).

[16] The only mechanism provided for in the *Rules* to compel a non-party such as the SFN to provide documents is *Rule* 5.13, and its function is to permit access to specific identified items held by the third party. That process is not intended to facilitate a 'fishing expedition' (***Ed Miller Sales & Rentals Ltd v Caterpillar Tractor Co*** (1988), 94 AR 17, 63 Alta LR (2d) 189 (Alta QB)) or compel disclosure (***Gainers Inc. v Pocklington Holdings Inc.*** (1995), 169 AR 288, 30 Alta LR (3d) 273 (Alta CA)). Items sought must be particularized, and this process is not a form of discovery: ***Esso Resources Canada Ltd. v Stearns Catalytic Ltd.*** (1989), 98 AR 374, 16 ACWS (3d) 286 (Alta CA).

[17] The SFN notes the information sought is voluminous, confidential and involves third parties. It says that the Public Trustee's application is document discovery camouflaged under a different name. In any case, a document is only producible if it is relevant and material to the arguments pled: *Rule* 5.2; ***Weatherill (Estate) v Weatherill***, 2003 ABQB 69, 337 AR 180.

[18] The SFN takes the position that ***Sawridge #1*** ordered the Public Trustee to investigate two points: 1) identifying the beneficiaries of the 1985 Sawridge Trust; and 2) scrutiny of transfer of assets into the 1985 Sawridge Trust. They say that what the decision in ***Sawridge #1*** did not do was authorize interference or duplication in the SFN's membership process and its results. Much of what the Public Trustee seeks is not relevant to either issue, and so falls outside the scope of what properly may be sought under *Rule* 5.13.

[19] Privacy interests and privacy legislation are also factors: ***Royal Bank of Canada v Trang***, 2014 ONCA 883 at paras 97, 123 OR (3d) 401; *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5. The Public Trustee should not have access to this information

unless the SFN's application candidates consent. Much of the information in membership applications is personal and sensitive. Other items were received by the SFN during litigation under an implied undertaking of confidentiality: ***Juman v Doucette; Doucette (Litigation Guardian of) v Wee Watch Day Care Systems,*** 2008 SCC 8, [2008] 1 SCR 157. The cost to produce the materials is substantial.

[20] The SFN notes that even though it is a target of the relief sought by the Public Trustee that it was not served with the July 16, 2015 application, and states the Public Trustee should follow the procedure in *Rule* 6.3. The SFN expressed concern that the Public Trustee's application represents an unnecessary and prejudicial investigation which ultimately harms the beneficiaries and potential beneficiaries of the 1985 Sawridge Trust. In ***Sawridge #2*** at para 29, the Court of Appeal had stressed that the order in ***Sawridge #1*** that the Public Trustee's costs be paid on a solicitor and own client basis is not a "blank cheque", but limited to activities that are "fair and reasonable". It asks that the Public Trustee's application be dismissed and that the Public Trustee pay the costs of the SFN in this application, without indemnification from the 1985 Sawridge Trust.

C. The Sawridge Trustees

[21] The Sawridge Trustees offered and I ordered in my September 2/3 Order that within 60 days the Trustees prepare and deliver a *Rule* 5.5-5.9 affidavit of records to assist in moving the process forward. This resolved the immediate question of the Public Trustee's access to documents held by the Trustees.

[22] The Trustees generally support the position taken by the SFN in response to the Public Trustee's application for Band documents. More broadly, the Trustees questioned whether the Public Trustee's developing line of inquiry was necessary. They argued that it appears to target the process by which the SFN evaluates membership applications. That is not the purpose of this proceeding, which is instead directed at re-organizing and distributing the 1985 Sawridge Trust in a manner that is fair and non-discriminatory to members of the SFN.

[23] They argue that the Public Trustee is attempting to attack a process that has already undergone judicial scrutiny. They note that the SFN's admission procedure was approved by the Minister of Indian and Northern Affairs, and the Federal Court concluded it was fair: ***Stoney v Sawridge First Nation***, 2013 FC 509, 432 FTR 253. Further, the membership criteria used by the SFN operate until they are found to be invalid: ***Huzar v Canada***, [2000] FCJ No 873 at para 5, 258 NR 246. Attempts to circumvent these findings in applications to the Canadian Human Rights Commission were rejected as a collateral attack, and the same should occur here.

[24] The 1985 Sawridge Trustees reviewed the evidence which the Public Trustee alleges discloses an unfair membership admission process, and submit that the evidence relating to Elizabeth Poitras and other applicants did not indicate a discriminatory process, and in any case was irrelevant to the critical question for the Public Trustee as identified in ***Sawridge #1***, namely that the Public Trustee's participation is to ensure minor children of Band members are treated fairly in the proposed distribution of the assets of the 1985 Sawridge Trust.

[25] Additional submissions were made by two separate factions within the Trustees. Ronald Twinn, Walter Felix Twin, Bertha L'Hoirondelle and Clara Midbo argued that an unfiled affidavit made by Catherine Twinn was irrelevant to the Trustees' disclosure. Counsel for Catherine Twinn expressed concern in relation to the Trustee's activities being transparent and

that the ultimate recipients of the 1985 Sawridge Trust distribution be the appropriate beneficiaries.

VI. Analysis

[26] The Public Trustee's application for production of records/information from the SFN is denied. First, the Public Trustee has used a legally incorrect mechanism to seek materials from the SFN. Second, it is necessary to refocus these proceedings and provide a well-defined process to achieve a fair and just distribution of the assets of the 1985 Sawridge Trust. To that end, the Public Trustee may seek materials/information from the Sawridge Band, but only in relation to specific issues and subjects.

A. Rule 5.13

[27] I agree with the SFN that it is a third party to this litigation and is not therefore subject to the same disclosure procedures as the Sawridge Trustees who are a party. Alberta courts do not use proximal relationships as a bridge for disclosure obligations: ***Trimay Wear Plate Ltd. v Way***, at para 17.

[28] If I were to compel document production by the Sawridge Band, it would be via *Rule* 5.13:

> 5.13(1) On application, and after notice of the application is served on the person affected by it, the Court may order a person who is not a party to produce a record at a specified date, time and place if
>
> (a) the record is under the control of that person,
>
> (b) there is reason to believe that the record is relevant and material, and
>
> (c) the person who has control of the record might be required to produce it at trial.
>
> (2) The person requesting the record must pay the person producing the record an amount determined by the Court.

[29] The modern *Rule* 5.13 uses language that closely parallels that of its predecessor *Alberta Rules of Court*, Alta Reg 390/1968, s 209. Jurisprudence applying *Rule* 5.13 has referenced and used approaches developed in the application of that precursor provision: ***Toronto Dominion Bank v Sawchuk***, 2011 ABQB 757, 530 AR 172; ***H.Z. v Unger***, 2013 ABQB 639, 573 AR 391. I agree with this approach and conclude that the principles in the pre-*Rule* 5.13 jurisprudence identified by the SFN apply here: ***Ed Miller Sales & Rentals Ltd v Caterpillar Tractor Co***; ***Gainers Inc. v Pocklington Holdings Inc.***; ***Esso Resources Canada Ltd. v Stearns Catalytic Ltd.***

[30] The requirement for potential disclosure is that "there is reason to believe" the information sought is "relevant and material". The SFN has argued relevance and materiality may be divided into "primary, secondary, and tertiary" relevance, however the Alberta Court of Appeal has rejected these categories as vague and not useful: ***Royal Bank of Canada v Kaddoura***, 2015 ABCA 154 at para 15, 15 Alta LR (6th) 37.

[31] I conclude that the only documents which are potentially disclosable in the Public Trustee's application are those that are "relevant and material" to the issue before the court.

B. Refocussing the role of the Public Trustee

[32] It is time to establish a structure for the next steps in this litigation before I move further into specific aspects of the document production dispute between the SFN and the Public Trustee. A prerequisite to any document disclosure is that the information in question must be *relevant*. Relevance is tested *at the present point*.

[33] In ***Sawridge #1*** I at paras 46-48 I determined that the inquiry into membership processes was relevant because it was a subject of some dispute. However, I also stressed the exclusive jurisdiction of the Federal Court (paras 50-54) in supervision of that process. Since ***Sawridge #1*** the Federal Court has ruled in ***Stoney v Sawridge First Nation*** on the operation of the SFN's membership process.

[34] Further, in ***Sawridge #1*** I noted at paras 51-52 that in ***783783 Alberta Ltd. v Canada (Attorney General)***, 2010 ABCA 226, 322 DLR (4th) 56, the Alberta Court of Appeal had concluded this Court's inherent jurisdiction included an authority to make findings of fact and law in what would nominally appear to be the exclusive jurisdiction of the Tax Court of Canada. However, that step was based on *necessity*. More recently in ***Strickland v Canada (Attorney General)***, 2015 SCC 37, the Supreme Court of Canada confirmed the Federal Courts decision to refuse judicial review of the *Federal Child Support Guidelines*, SOR/97-175, not because those courts did not have potential jurisdiction concerning the issue, but because the provincial superior courts were better suited to that task because they "... deal day in and day out with disputes in the context of marital breakdown ...": para 61.

[35] The same is true for this Court attempting to regulate the operations of First Nations, which are 'Bands' within the meaning of the *Indian Act*. The Federal Court is the better forum and now that the Federal Court has commented on the SFN membership process in ***Stoney v Sawridge First Nation,*** there is no need, nor is it appropriate, for this Court to address this subject. If there are outstanding disputes on whether or not a particular person should be admitted or excluded from Band membership then that should be reviewed in the Federal Court, and not in this 1985 Sawridge Trust modification and distribution process.

[36] It follows that it will be useful to re-focus the purpose of the Public Trustee's participation in this matter. That will determine what is and what is not *relevant*. The Public Trustee's role is not to conduct an open-ended inquiry into the membership of the Sawridge Band and historic disputes that relate to that subject. Similarly, the Public Trustee's function is not to conduct a general inquiry into potential conflicts of interest between the SFN, its administration and the 1985 Sawridge Trustees. The overlap between some of these parties is established and obvious.

[37] Instead, the future role of the Public Trustee shall be limited to four tasks:

1. Representing the interests of minor beneficiaries and potential minor beneficiaries so that they receive fair treatment (either direct or indirect) in the distribution of the assets of the 1985 Sawridge Trust;
2. Examining on behalf of the minor beneficiaries the manner in which the property was placed/settled in the Trust; and
3. Identifying potential but not yet identified minors who are children of SFN members or membership candidates; these are potentially minor beneficiaries of the 1985 Sawridge Trust; and

4. Supervising the distribution process itself.

[38] The Public Trustee's attention appears to have expanded beyond these four objectives. Rather than unnecessarily delay distribution of the 1985 Sawridge Trust assets, I instruct the Public Trustee and the 1985 Sawridge Trustees to immediately proceed to complete the first three tasks which I have outlined.

[39] I will comment on the fourth and final task in due course.

Task 1 - Arriving at a fair distribution scheme

[40] The first task for the 1985 Sawridge Trustees and the Public Trustee is to develop for my approval a proposed scheme for distribution of the 1985 Sawridge Trust that is fair in the manner in which it allocates trust assets between the potential beneficiaries, adults and children, previously vested or not. I believe this is a largely theoretical question and the exact numbers and personal characteristics of individuals in the various categories is generally irrelevant to the Sawridge Trustee's proposed scheme. What is critical is that the distribution plan can be critically tested by the Public Trustee to permit this Court to arrive at a fair outcome.

[41] I anticipate the critical question for the Public Trustee at this step will be to evaluate whether any differential treatment between adult beneficiaries and the children of adult beneficiaries is or is not fair to those children. I do not see that the particular identity of these individuals is relevant. This instead is a question of fair treatment of the two (or more) categories.

[42] On September 3, 2015, the 1985 Sawridge Trustees withdrew their proposed distribution arrangement. I direct the Trustees to submit a replacement distribution arrangement by January 29, 2016.

[43] The Public Trustee shall have until March 15, 2016 to prepare and serve a *Rule* 5.13(1) application on the SFN which identifies specific documents that it believes are relevant and material to test the fairness of the proposed distribution arrangement to minors who are children of beneficiaries or potential beneficiaries.

[44] If necessary, a case management meeting will be held before April 30, 2016 to decide any disputes concerning any *Rule* 5.13(1) application by the Public Trustee. In the event no *Rule* 5.13(1) application is made in relation to the distribution scheme the Public Trustee and 1985 Sawridge Band Trustees shall make their submissions on the distribution proposal at the pre-April 30 case management session.

Task 2 – Examining potential irregularities related to the settlement of assets to the Trust

[45] There have been questions raised as to what assets were settled in the 1985 Sawridge Trust. At this point it is not necessary for me to examine those potential issues. Rather, the first task is for the Public Trustee to complete its document request from the SFN which may relate to that issue.

[46] The Public Trustee shall by January 29, 2016 prepare and serve a *Rule* 5.13(1) application on the Sawridge Band that identifies specific types of documents which it believes are relevant and material to the issue of the assets settled in the 1985 Sawridge Trust.

[47] A case management hearing will be held before April 30, 2016 to decide any disputes concerning any such *Rule* 5.13(1) application by the Public Trustee.

Task 3 - Identification of the pool of potential beneficiaries

[48] The third task involving the Public Trustee is to assist in identifying potential minor beneficiaries of the 1985 Sawridge Trust. The assignment of this task recognizes that the Public Trustee operates within its Court-ordered role when it engages in inquiries to establish the pools of individuals who are minor beneficiaries and potential minor beneficiaries. I understand that the first category of minor beneficiaries is now identified. The second category of potential minor beneficiaries is an area of legitimate investigation for the Public Trustee and involves two scenarios:

1. an individual with an unresolved application to join the Sawridge Band and who has a child; and
2. an individual with an unsuccessful application to join the Sawridge Band and who has a child.

[49] I stress that the Public Trustee's role is limited to the representation of potential child beneficiaries of the 1985 Sawridge Trust only. That means litigation, procedures and history that relate to past and resolved membership disputes are not relevant to the proposed distribution of the 1985 Sawridge Trust. As an example, the Public Trustee has sought records relating to the disputed membership of Elizabeth Poitras. As noted, that issue has been resolved through litigation in the Federal Court, and that dispute has no relation to establishing the identity of potential minor beneficiaries. The same is true of any other adult Sawridge Band members.

[50] As Aalto, J. observed in ***Poitras v Twinn***, 2013 FC 910, 438 FTR 264, "[M]any gallons of judicial ink have been spilt" in relation to the gender-based disputes concerning membership in the SFN. I do not believe it is necessary to return to this issue. The SFN's past practise of relentless resistance to admission into membership of aboriginal women who had married non-Indian men is well established.

[51] The Public Trustee has no relevant interest in the children of any parent who has an unresolved application for membership in the Sawridge Band. If that outstanding application results in the applicant being admitted to the SFN then that child will become another minor represented by the Public Trustee.

[52] While the Public Trustee has sought information relating to incomplete applications or other potential SFN candidates, I conclude that an open-ended 'fishing trip' for unidentified hypothetical future SFN members, who may also have children, is outside the scope of the Public Trustee's role in this proceeding. There needs to be minimum threshold proximity between the Public Trustee and any unknown and hypothetical minor beneficiary. As I will stress later, the Public Trustee's activities need to be reasonable and fair, and balance its objectives: cost-effective participation in this process (i.e., not unreasonably draining the Trust) and protecting the interests of minor children of SFN members. Every dollar spent in legal and research costs turning over stones and looking under bushes in an attempt to find an additional, hypothetical minor beneficiary reduces the funds held in trust for the known and existing minor children who are potential beneficiaries of the 1985 Sawridge Trust distribution and the clients of the Public Trustee. Therefore, I will only allow investigation and representation by the Public Trustee of

children of persons who have, at a minimum, completed a Sawridge Band membership application.

[53] The Public Trustee also has a potential interest in a child of a Sawridge Band candidate who has been rejected or is rejected after an unsuccessful application to join the SFN. In these instances the Public Trustee is entitled to inquire whether the rejected candidate intends to appeal the membership rejection or challenge the rejection through judicial review in the Federal Court. If so, then that child is also a potential candidate for representation by the Public Trustee.

[54] This Court's function is not to duplicate or review the manner in which the Sawridge Band receives and evaluates applications for Band membership. I mean by this that if the Public Trustee's inquiries determine that there are one or more outstanding applications for Band membership by a parent of a minor child then that is not a basis for the Public Trustee to intervene in or conduct a collateral attack on the manner in which that application is evaluated, or the result of that process.

[55] I direct that this shall be the full extent of the Public Trustee's participation in any disputed or outstanding applications for membership in the Sawridge Band. This Court and the Public Trustee have no right, as a third party, to challenge a crystalized result made by another tribunal or body, or to interfere in ongoing litigation processes. The Public Trustee has no right to bring up issues that are not yet necessary and relevant.

[56] In summary, what is pertinent at this point is to identify the potential recipients of a distribution of the 1985 Sawridge Trust, which include the following categories:

1. Adult members of the SFN;
2. Minors who are children of members of the SFN;
3. Adults who have unresolved applications to join the SFN;
4. Children of adults who have unresolved applications to join the SFN;
5. Adults who have applied for membership in the SFN but have had that application rejected and are challenging that rejection by appeal or judicial review; and
6. Children of persons in category 5 above.

[57] The Public Trustee represents members of category 2 and potentially members of categories 4 and 6. I believe the members of categories 1 are 2 are known, or capable of being identified in the near future. The information required to identify persons within categories 3 and 5 is relevant and necessary to the Public Trustee's participation in this proceeding. If this information has not already been disclosed, then I direct that the SFN shall provide to the Public Trustee by January 29, 2016 the information that is necessary to identify those groups:

1. The names of individuals who have:
   a) made applications to join the SFN which are pending (category 3); and
   b) had applications to join the SFN rejected and are subject to challenge (category 5); and
2. The contact information for those individuals where available.

[58] As noted, the Public Trustee's function is limited *to representing minors*. That means the Public Trustee:

1. shall inquire of the category 3 and 5 individuals to identify if they have any children; and

2. if an applicant has been rejected whether the applicant has challenged, or intends to challenge a rejection by appeal or by judicial proceedings in the Federal Court.

[59] This information should:

1. permit the Public Trustee to know the number and identity of the minors whom it represents (category 2) and additional minors who may in the future enter into category 2 and become potential minor recipients of the 1985 Sawridge Trust distribution;

2. allow timely identification of:

a) the maximum potential number of recipients of the 1985 Sawridge Trust distribution (the total number of persons in categories 1-6);

b) the number of adults and minors whose potential participation in the distribution has "crystalized" (categories 1 and 2); and

c) the number of adults and minors who are potential members of categories 1 and 2 at some time in the future (total of categories 3-6).

[60] These are declared to be the limits of the Public Trustee's participation in this proceeding and reflects the issues in respect to which the Public Trustee has an interest. Information that relates to these issues is potentially relevant.

[61] My understanding from the affidavit evidence and submissions of the SFN and the 1985 Sawridge Trustees is that the Public Trustee has already received much information about persons on the SFN's membership roll and prospective and rejected candidates. I believe that this will provide all the data that the Public Trustee requires to complete Task 3. Nevertheless, the Public Trustee is instructed that if it requires any additional documents from the SFN to assist it in identifying the current and possible members of category 2, then it is to file a *Rule* 5.13 application by January 29, 2016. The Sawridge Band and Trustees will then have until March 15, 2016 to make written submissions in response to that application. I will hear any disputed *Rule* 5.13 disclosure application at a case management hearing to be set before April 30, 2016.

Task 4 - General and residual distributions

[62] The Sawridge Trustees have concluded that the appropriate manner to manage the 1985 Sawridge Trust is that its property be distributed in a fair and equitable manner. Approval of that scheme is Task 1, above. I see no reason, once Tasks 1-3 are complete, that there is any reason to further delay distribution of the 1985 Sawridge Trust's property to its beneficiaries.

[63] Once Tasks 1-3 are complete the assets of the Trust may be divided into two pools:

Pool 1: trust property available for immediate distribution to the identified trust beneficiaries, who may be adults and/or children, depending on the outcome of Task 1; and

Pool 2: trust funds that are reserved at the present but that may at some point be distributed to:

a) a potential future successful SFN membership applicant and/or child of a successful applicant, or

b) an unsuccessful applicant and/or child of an unsuccessful applicant who successfully appeals/challenges the rejection of their membership application.

[64] As the status of the various outstanding potential members of the Sawridge Band is determined, including exhaustion of appeals, the second pool of 'holdback' funds will either:

1. be distributed to a successful applicant and/or child of the applicant as that result crystalizes; or

2. on a pro rata basis:

a) be distributed to the members of Pool 1, and

b) be reserved in Pool 2 for future potential Pool 2 recipients.

[65] A minor child of an outstanding applicant is a potential recipient of Trust property, depending on the outcome of Task 1. However, there is no broad requirement for the Public Trustee's direct or indirect participation in the Task 4 process, beyond a simple supervisory role to ensure that minor beneficiaries, if any, do receive their proper share.

C. Disagreement among the Sawridge Trustees

[66] At this point I will not comment on the divergence that has arisen amongst the 1985 Sawridge Trustees and which is the subject of a separate originating notice (Docket 1403 04885) initiated by Catherine Twinn. I note, however, that much the same as the Public Trustee, the 1985 Sawridge Trustees should also refocus on the four tasks which I have identified.

[67] First and foremost, the Trustees are to complete their part of Task 1: propose a distribution scheme that is fair to all potential members of the distribution pools. This is not a question of specific cases, or individuals, but a scheme that is fair to the adults in the SFN and their children, current and potential.

[68] Task 2 requires that the 1985 Sawridge Trustees share information with the Public Trustee to satisfy questions on potential irregularities in the settlement of property into the 1985 Sawridge Trust.

[69] As noted, I believe that the information necessary for Task 3 has been accumulated. I have already stated that the Public Trustee has no right to engage and shall not engage in collateral attacks on membership processes of the SFN. The 1985 Sawridge Trustees, or any of them, likewise have no right to engage in collateral attacks on the SFN's membership processes. Their fiduciary duty (and I mean all of them), is to the beneficiaries of the Trust, and not third parties.

D. Costs for the Public Trustee

[70] I believe that the instructions given here will refocus the process on Tasks 1 – 3 and will restrict the Public Trustee's activities to those which warrant full indemnity costs paid from the 1985 Sawridge Trust. While in ***Sawridge #1*** I had directed that the Public Trustee may inquire into SFN Membership processes at para 54 of that judgment, the need for that investigation is now declared to be over because of the decision in ***Stoney v Sawridge First Nation***. I repeat that

inquiries into the history and processes of the SFN membership are no longer necessary or relevant.

[71] As the Court of Appeal observed in ***Sawridge #2*** at para 29, the Public Trustee's activities are subject to scrutiny by this Court. In light of the four Task scheme set out above I will not respond to the SFN's cost argument at this point, but instead reserve on that request until I evaluate the *Rule* 5.13 applications which may arise from completion of Tasks 1-3.

Heard on the 2nd and 3rd days of September, 2015.
Dated at the City of Edmonton, Alberta this 17th day of December, 2015.

D.R.G. Thomas
J.C.Q.B.A.

Appearances:

Janet Hutchison
(Hutchison Law)
and
Eugene Meehan, QC
(Supreme Advocacy LLP)
for the Public Trustee of Alberta / Applicant

Edward H. Molstad, Q.C.
(Parlee McLaws LLP)
for the Sawridge First Nation / Respondent

Doris Bonora
(Dentons LLP)
and
Marco S. Poretti
(Reynolds Mirth Richards & Farmer)
for the 1985 Sawridge Trustees / Respondents

J.J. Kueber, Q.C.
(Bryan & Co.)
for Ronald Twinn, Walter Felix Twin,
Bertha L'Hoirondelle and Clara Midbo

Karen Platten, Q.C.
(McLennan Ross LLP)
For Catherine Twinn

Court of Queen's Bench of Alberta

Citation: 1985 Sawridge Trust v Alberta (Public Trustee), 2017 ABQB 436

Date: 20170712
Docket: 1103 14112
Registry: Edmonton

In the Matter of the Trustee Act, RSA 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 Sawridge Trust" or "Trust")

Between:

Maurice Felix Stoney and His Brothers and Sisters

Applicants

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

Respondents (Original Applicants)

- and –

Public Trustee of Alberta ("OPTG")

Respondent

- and –

The Sawridge Band (the"Band" or "SFN")

Intervenor

Case Management Decision (Sawridge #6) of the Honourable Mr. Justice D.R.G. Thomas

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I. Introduction

[1] This is a case management decision on an application filed on August 12, 2016 (the "Stoney Application") by Maurice Felix Stoney "and his brothers and sisters" (Billy Stoney, Angeline Stoney, Linda Stoney, Bernie Stoney, Betty Jean Stoney, Gail Stoney, Alma Stoney, and Bryan Stoney) to be added "as beneficiaries to these Trusts". In his written brief of September 28, 2016, Maurice Stoney asks that his legal costs and those of his siblings be paid for by the 1985 Sawridge Trust.

[2] The Stoney Application is opposed by the Trustees and the Sawridge Band, which applied for and has been granted intervenor status on this Application. The Public Trustee of Alberta ("OPTG") did not participate in the Application.

[3] The Stoney Application is denied. Maurice Stoney is a third party attempting to insert himself (and his siblings) into a matter in which he has no legal interest. Further, this Application is a collateral attack which attempts to subvert an unappealed and crystallized judgment of a Canadian court which has already addressed and rejected the Applicant's claims and arguments. This is serious litigation misconduct, which will have costs implications for Maurice Stoney and also potentially for his lawyer Priscilla Kennedy.

II. Background

[4] This Action was commenced by Originating Notice, filed on June 12, 2011, by the 1985 Sawridge Trustees and is sometimes referred to as the "Advice and Direction Application".

[5] The history of the Advice and Direction Application is set out in previous decisions (including the Orders taken out in relation thereto) reported as ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2012 ABQB 365, 543 AR 90 ("***Sawridge #1***"), aff'd 2013 ABCA 226, 543 AR 90 ("***Sawridge #2***"), ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2015 ABQB 799 ("***Sawridge #3***"), time extension for appeal denied 2016 ABCA 51, 616 AR 176, ***1985 Sawridge v Alberta (Public Trustee)***, 2017 ABQB 299 ("***Sawridge #4***"). A separate motion by three third parties to participate in this litigation was rejected on July 5, 2017, and that decision is reported as ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2017 ABQB 377 ("***Sawridge #5***"), (collectively the "***Sawridge Decisions***").

[6] Some of the terms used in this decision ("***Sawridge #6***") are also defined in the various Sawridge Decisions.

[7] I directed that this Application be dealt with in writing and the materials filed include the following:

August 12, 2016	Application by Maurice Felix Stoney and His Brothers and Sisters
September 28, 2016	Written Argument of Maurice Stoney, supported by an Affidavit of Maurice Stoney sworn on May 17, 2016.
September 28, 2016	Written Submission of the Sawridge Band, supported by an Affidavit of Roland Twinn, dated September 21, 2016, for the Sawridge Band to be granted Intervenor status in the Advice and Direction Application in relation to the August 12, 2016 Application, and that the Application be struck out per *Rule* 3.68.
September 30, 2016	Application by the Sawridge Trustees that Maurice Stoney pay security for costs.
October 27, 2016	Written Response Argument to the Application of Sawridge First Nation filed by Maurice Stoney.
October 31, 2016	The OPTG sent the Court and participants a letter indicating it has "no objection" to the Stoney Application.
October 31, 2016	Trustees' Written Submissions in relation to the Maurice Stoney Application and the proposed Sawridge Band intervention.
October 31, 2016	Sawridge Band Written Submissions responding to the Maurice Stoney Application.
November 14, 2016	Reply argument to Maurice Stoney's Written Response Argument filed by the Sawridge Band.

November 15, 2016	Further Written Response Argument of Maurice Stoney.

III. Preliminary Issue #1 - Who is/are the Applicant or Applicants?

[8] As is apparent from the style of cause in this Application, the manner in which the Applicants have been framed is unusual. They are named as "Maurice Felix Stoney and His Brothers and Sisters". The Application further states that the Applicants are "Maurice Stoney and his 10 living brothers and sisters" (para 1). Para 2 of the Application states the issue to be determined is:

> Addition of Maurice Stoney, Billy Stoney, Angeline Stoney, Linda Stoney, Bernie Stoney, Betty Jean Stoney, Gail Stoney Alma Stoney, Alva Stoney and Bryan Stony as beneficiaries of these Trusts.

[9] There is no evidence before me or on the court file that indicates any of these named individuals other than Maurice Stoney has taken steps to involve themselves in this litigation. The "10 living brothers or sisters" are simply named. Maurice Stoney's filings do not include any documents such as affidavits prepared by these individuals, nor has there been an *Alberta Rules of Court*, Alta Reg 124/2010 [the "*Rules*", or individually a "*Rule*"] application or appointment of a litigation representative, per *Rules* 2.11-2.21. In fact, aside from Maurice Stoney, the Applicant(s) materials provide no biographical information or records such as birth certificates for any of these additional proposed litigants, other than the year of their birth.

[10] Counsel for Maurice Stoney, Priscilla Kennedy, has not provided or filed any data to show she has been retained by the "10 living brothers or sisters".

[11] Participating in a legal proceeding can have significant adverse effects, such as exposure to awards of costs, findings of contempt, and declarations of vexatious litigant status. Being a litigant creates obligations as well, particularly in light of the positive obligations on litigation actors set by *Rule* 1.2.

[12] In the absence of evidence to the contrary and from this point on, I limit the scope of Maurice Stoney's litigation to him alone and do not involve his "10 living brothers and sisters" in this application and its consequences. I will return to this topic because it has other implications for Maurice Stoney and his lawyer Priscilla Kennedy.

IV. Preliminary Issue #2 - The Proposed Sawridge Band Intervention and Motion to Strike Out the Stoney Application

[13] To this point, the role of the Sawridge Band in this litigation has been what might be described as "an interested third party". The Sawridge Band has taken the position it is not a party to this litigation: ***Sawridge #3*** at paras 15, 27. The Sawridge Band does not control the 1985 Sawridge Trust, but since the beneficiaries of that Trust are defined directly or indirectly by membership in the SFN, there have been occasions where the Sawridge Band has been involved in respect to that underlying issue, particularly when it comes to the provision of relevant information on procedures and other evidence: see ***Sawridge #1*** at paras 43-49; ***Sawridge #3***.

[14] The Sawridge Band argued that its intervention application under *Rule* 2.10 should be granted because the Stoney Application simply continues a lengthy dispute between Maurice Stoney and the Sawridge Band over whether Maurice Stoney is a member of the Sawridge Band.

[15] The Trustees support the application of the Sawridge Band, noting that the proposed intervention makes available useful evidence, particularly in providing context concerning Maurice Stoney's activities over the years.

[16] The Applicant, Stoney responds that intervenor status is a discretionary remedy that is only exercised sparingly. Maurice Stoney submits the broad overlap between the Sawridge Band and the Trustees means that the Band brings no useful or unique perspectives to the litigation. Maurice Stoney alleges the Sawridge Band operates in a biased and discriminatory manner. If any party should be involved it should be Canada, not the Sawridge Band. Maurice Stoney demands that the intervention application be dismissed and costs ordered against the Band.

[17] Two criteria are relevant when a court evaluates an application to intervene in litigation: whether the proposed intervenor is affected by the subject matter of the proceeding, and whether the proposed intervenors have expertise or perspective on that subject: ***Papaschase Indian Band v Canada (Attorney General)***, 2005 ABCA 320, 380 AR 301; ***Edmonton (City) v Edmonton (Subdivision and Development Appeal Board)***, 2014 ABCA 340, 584 AR 255.

[18] The Sawridge Band intervention is appropriate since that response was made in reply to a collateral attack on its decision-making on the core subject of membership. The common law approach is clear; here the Sawridge Band is particularly prejudiced by the potential implications of the Stoney Application. Indeed, it is hard to imagine a more fundamental impact than where the Court considers litigation that potentially finds in law that an individual who is currently an outsider is, instead, a part of an established community group which holds title and property, and exercises rights, in a *sui generis* and communal basis: ***Delgamuukw v British Columbia***, [1997] 3 SCR 1010, 153 DLR (4th) 193; ***R v Van der Peet***, [1996] 2 SCR 507, 137 DLR (4th) 289.

[19] I grant the Sawridge Band application to intervene and participate in the Advice and Direction Application, but limited to the Stoney Application only.

V. Positions of the Parties on the Application to be Added

A. Maurice Stoney

[20] The Applicant's argument can be reduced to the following simple proposition. Maurice Stoney wants to be named as a party to the litigation or as an intervenor because he claims to be a member of the Sawridge Band. The Sawridge 1985 Trust is a trust that was set up to hold property on behalf of members of the Sawridge Band. He is therefore a beneficiary of the Trust, and should be entitled to participate in this litigation.

[21] The complicating factor is that Maurice Stoney is not a member of the Sawridge Band. He argues that his parents, William and Margaret Stoney, were members of the Sawridge Band, and provides documentation to that effect. In 1944 William Stoney and his family were "enfranchised", per *Indian Act*, RSC 1927, c 98, s 114. This is a step where an Indian may accept a payment and in the process lose their Indian status. The "enfranchisement" option was subsequently removed by Federal legislation, specifically an enactment commonly known as "Bill C-31".

[22] Maurice Stoney argues that the enfranchisement process is unconstitutional, and that, combined with the result of a lengthy dispute over the membership of the Sawridge Band, means he (and his siblings) are members of the Sawridge Band. In his Written Response argument this claim is framed as follows:

> Retroactive to April 17, 1985, Bill C-31 (R.S.C. 1985, c. 32 (1st Supp.) amended the provisions of the Indian Act, R.S.C. 1985, I-5 by removing the enfranchisement provisions returning all enfranchised Indians back on the pay lists of the Bands where they should have been throughout all of the years.

[23] In 2012, Maurice Stoney applied to become a member of the Sawridge Band, but that application was denied. Maurice Stoney then conducted an unsuccessful judicial review of that decision: ***Stoney v Sawridge First Nation***, 2013 FC 509, 432 FTR 253. Maurice Stoney says all this is irrelevant to his status as a member of the Sawridge Band; the definition of beneficiaries is contrary to public policy, and unconstitutional. The Court should order that Maurice Stoney and his siblings are beneficiaries of the 1985 Sawridge Trust and add them as parties to this Action. The Trust should pay for all litigation costs.

[24] The Written Response claims the Sawridge Band is in breach of orders of the Federal Court, that Maurice Stoney and others "have faced a tortuous long process with no success". Maurice Stoney and his siblings' participation does not cause prejudice to the Trustees, and claims that Maurice Stoney has not paid costs are false. I note the Written Response was not accompanied by any evidence to establish that alleged fact.

[25] The October 27, 2016 Written Response Argument stresses the Sawridge Band is not a party to this litigation, it has voluntarily elected to follow that path, and a third party should not be permitted to interfere with Maurice Stoney's litigation. In any case, the Sawridge Band is wrong - Maurice Stoney is already a member of the Sawridge Band. He deserves enhanced costs in response to the *Rule* 3.68 Application by the Band.

B. Sawridge Band

[26] The Sawridge Band points to the decision in ***Stoney v Sawridge First Nation*** and says the Maurice Stoney Application is an attempt to revisit an issue that was decided and which is now subject to *res judicata* and issue estoppel. Maurice Stoney is wrong when he argues that he automatically became a Sawridge Band member when Bill C-31 was enacted. His Affidavit contains factual errors. Maurice Stoney's claim to be a Sawridge Band member was rejected in court judgments that Maurice Stoney did not appeal.

[27] Instead, Maurice Stoney had a right to apply to become a Sawridge Band member. He did so, and that application was denied, as was the subsequent appeal. The Federal Court reviewed and confirmed that result in the ***Stoney v Sawridge First Nation*** decision. The issue of Maurice Stoney's potential membership in the Sawridge Band is therefore closed.

[28] The Sawridge Band has entered evidence that Maurice Stoney has not paid the costs that were awarded against him in the ***Stoney v Sawridge First Nation*** action, and that Maurice Stoney has unpaid costs awards in relation to the unsuccessful appeal in ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2016 ABCA 51, 616 AR 176.

[29] On January 31, 2014, Maurice Stoney filed a Canadian Human Rights Commission complaint concerning the Sawridge Band's decision to refuse him membership. The Commission

refused the complaint, and concluded the issue had already been decided by ***Stoney v Sawridge First Nation***.

[30] The Sawridge Band says this Court should do the same and strike out the Stoney Application per *Rule* 3.68.

[31] As for the "10 brothers and sisters", the Sawridge Band indicates it has received and refused an application from one individual who may be in that group.

[32] The Sawridge Band seeks solicitor and own client costs, or elevated costs, in light of Maurice Stoney's litigation history in relation to his alleged membership in the Sawridge Band.

C. 1985 Sawridge Trustees

[33] The Trustees echo the Sawridge Band's arguments, assert the Application is "unnecessary, vexatious, frivolous, *res judicata*, and an abuse of process", and that the Stoney Application should be denied. The Trustees seek solicitor and own client costs or enhanced costs as a deterrent against further litigation abuse by Maurice Stoney.

VI. Analysis

[34] The law concerning *Rule* 3.68 is well established and is not in dispute. This is a civil litigation procedure that is used to weed out hopeless proceedings:

> 3.68(1) If the circumstances warrant and a condition under subrule (2) applies, the Court may order one or more of the following:
>
> (a) that all or any part of a claim or defence be struck out;
>
> (b) that a commencement document or pleading be amended or set aside;
>
> (c) that judgment or an order be entered;
>
> (d) that an action, an application or a proceeding be stayed.
>
> (2) The conditions for the order are one or more of the following:
>
> ...
>
> (b) a commencement document or pleading discloses no reasonable claim or defence to a claim;
>
> (c) a commencement document or pleading is frivolous, irrelevant or improper;
>
> (d) a commencement document or pleading constitutes an abuse of process;
>
> ...
>
> (3) No evidence may be submitted on an application made on the basis of the condition set out in subrule (2)(b).
>
> (4) The Court may
>
> (a) strike out all or part of an affidavit that contains frivolous, irrelevant or improper information;

...

[35] An action or defence may be struck under *Rule* 3.68 where it is plain and obvious, or beyond reasonable doubt, that the action cannot succeed: ***Hunt v Carey Canada Inc.***, [1990] 2 SCR 959, 74 DLR (4th) 321. Pleadings should be considered in a broad and liberal manner: ***Tottrup v Lund***, 2000 ABCA 121 at para 8, 186 DLR (4th) 226.

[36] A pleading is frivolous if its substance indicates bad faith or is factually hopeless: ***Donaldson v Farrell***, 2011 ABQB 11 at para 20. A frivolous plea is one so palpably bad that the Court needs no real argument to be convinced of that fact: ***Haljan v Serdahely Estate***, 2008 ABQB 472 at para 21, 453 AR 337.

[37] A proceeding that is an abuse of process may be struck on that basis: ***Reece v Edmonton (City)***, 2011 ABCA 238 at para 14, 335 DLR (4th) 600. "Vexatious" litigation may be struck under either *Rule* 3.682(c) or (d): ***Wong v Leung***, 2011 ABQB 688 at para 33, 530 AR 82; ***Mcmeekin v Alberta (Attorney General)***, 2012 ABQB 144 at para 11, 537 AR 136.

[38] The documentary record introduced by Maurice Stoney makes it very clear that in 1944 William J. Stoney, his wife Margaret, and their two children Alvin Joseph Stoney and Maurice Felix Stoney, underwent the enfranchisement process and ceased to be Indians and members of the Sawridge Band per the *Indian Act*.

[39] As noted above, the Advice and Direction Application was initiated on June 11, 2011.

[40] On December 7, 2011, the Sawridge Band rejected Maurice Stoney's application for membership. An appeal of that decision was denied.

[41] Maurice Stoney then pursued a judicial review of the Sawridge Band membership application review process, in the Federal Court of Canada, which resulted in a reported May 15, 2013 decision, ***Stoney v Sawridge First Nation***. At that proceeding, Maurice Stoney and two cousins argued that they were automatically made members of the Sawridge Band as a consequence of Bill C-31. At paras 10-14, Justice Barnes investigates that question and concluded that this argument is wrong, citing ***Sawridge v Canada***, 2004 FCA 16, 316 NR 332.

[42] At para 15, Justice Barnes specifically addresses Maurice Stoney:

> I also cannot identify anything in Bill C-31 that would extend an automatic right of membership in the Sawridge First Nation to [Maurice] Stoney. He lost his right to membership when his father sought and obtained enfranchisement for the family. The legislative amendments in Bill C-31 do not apply to that situation.

I note the original text of this paragraph uses the name "William Stoney" instead of "Maurice Stoney". This is an obvious typographical error, since it was William Stoney who in 1944 sought and obtained enfranchisement. Maurice Stoney is William Stoney's son.

[43] Justice Barnes continues to observe at para 16 that this very same claim had been advanced in ***Huzar v Canada***, [2000] FCJ 873, 258 NR 246 (FCA), but that Maurice Stoney as a respondent in that hearing at para 4 had acknowledged this argument had no basis in law:

> It was conceded by counsel for the respondents that, without the proposed amending paragraphs, the unamended statement of claim discloses no reasonable cause of action in so far as it asserts or assumes that the respondents are entitled to Band membership without the consent of the Band. [Emphasis added.]

[44] Justice Barnes at para 17 continues on to observe that:

> It is not open to a party to relitigate the same issue that was conclusively determined in an earlier proceeding. The attempt by these Applicants to reargue the question of their automatic right of membership in Sawridge is barred by the principle of issue estoppel ...

[45] As for the actual judicial review, Justice Barnes concludes the record does not establish procedural unfairness due to bias: paras 19-21. A *Charter*, s 15 application was also rejected as unsupported by evidence, having no record to support the relief claims, and because the Crown was not served notice of a challenge to the constitutional validity of the *Indian Act*: para 22.

[46] Maurice Stoney did not appeal the ***Stoney v Sawridge First Nation*** decision.

[47] The Sawridge Band and the Trustees argue that Maurice Stoney's current application is an attempt to attack an unappealed judgment of a Canadian court. They are correct. Maurice Stoney is making the same argument he has before - and which has been rejected - that he now is one of the beneficiaries of the 1985 Sawridge Trust because he is automatically a full member of the Sawridge Band, due to the operation of Bill C-31.

[48] In summary, there are four separate grounds for rejecting Maurice Stoney's application:

1. He is estopped from making this argument via his concession in ***Huzar v Canada*** that this argument has no legal basis.
2. He made this same argument in ***Stoney v Sawridge First Nation***, where it was rejected. Since Mr. Stoney did not choose to challenge that decision on appeal, that finding of fact and law has 'crystallized'.
3. In ***Sawridge #3*** at para 35 I concluded the question of Band membership should be reviewed in the Federal Court, and not in the Advice and Direction Application.
3. In any case I accept and adopt the reasoning of ***Stoney v Sawridge First Nation*** as correct, though I am not obliged to do so.

[49] Maurice Stoney has conducted a "collateral attack", an attempt to use 'downstream' litigation to attack an 'upstream' court result. This offends the principle of *res judicata*, as explained by Abella J in ***British Columbia (Workers' Compensation Board) v Figliola***, 2011 SCC 52 at para 28, [2011] 3 SCR 422:

> The rule against collateral attack similarly attempts to protect the fairness and integrity of the justice system by preventing duplicative proceedings. It prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route ... [Emphasis added.]

[50] McIntyre J in ***Wilson v The Queen***, [1983] 2 SCR 594 at 599, 4 DLR (4th) 577 explains how it is the intended effect that defines a collateral attack:

> It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally — and a collateral attack may be

> described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment. [Emphasis added.]

See also: ***R v Litchfield***, [1993] 4 SCR 333, 86 CCC (3d) 97; ***Quebec (Attorney General) v Laroche***, 2002 SCC 72, 219 DLR (4th) 723; ***R v Sarson***, [1996] 2 SCR 223, 135 DLR (4th) 402.

[51] While I am not bound by the Federal Court judgments under the doctrine of *stare decisis*, I am constrained by *res judicata* and the prohibition against collateral attacks on valid court and tribunal decisions. Maurice Stoney's application to be a member of the Sawridge Band was rejected, and his court challenges to that result are over. He did not pursue all available appeals. He cannot now attempt to slip into the Sawridge Band and 1985 Sawridge Trust beneficiaries pool 'through the backdoor'.

[52] I dismiss the Stoney Application to be named either as a party to this litigation, or to participate as an intervenor. Maurice Stoney has no interest in the subject of this litigation, and is nothing more than a third-party interloper. In light of this conclusion, it is unnecessary to address the Sawridge Band's application that Maurice Stoney pay security for costs.

VII. Vexatious Litigant Status

[53] Maurice Stoney's conduct in relation to the Advice and Direction Application has been inappropriate. He arguably had a basis to be an interested party in 2011, because when the Trustees initiated the distribution process he had a live application to join the Sawridge Band. Therefore, at that time he had the potential to become a beneficiary. However, by 2013, that avenue for standing was closed when Justice Barnes issued the ***Stoney v Sawridge First Nation*** decision and Maurice Stoney did not appeal.

[54] Maurice Stoney nevertheless persisted, appearing before the Alberta Court of Appeal in ***1985 Sawridge Trust (Trustee for) v Alberta (Public Trustee)***, 2016 ABCA 51, 616 AR 176, where Justice Watson concluded Mr. Stoney should not receive an extension of time to challenge ***Sawridge #3*** because he had no chance of success as he did not have standing and was "... in fact, a stranger to the proceedings insofar as an appeal from the decision of Mr. Justice Thomas to the Court of Appeal is concerned.": paras 20-21. Now Maurice Stoney has attempted to add himself (and his siblings) to this action as parties or intervenors, in a manner that defies *res judicata* and in an attempt to subvert the decision-making of the Sawridge Band and the Federal Court of Canada.

[55] ***Chutskoff v Bonora***, 2014 ABQB 389 at para 92, 590 AR 288, aff'd 2014 ABCA 444 is the leading Alberta authority on the elements and activities that define abusive litigation. That decision identifies eleven categories of litigation misconduct which can trigger court intervention in litigation activities. Several of these indications of abusive litigation have already emerged in Maurice Stoney's legal actions:

1. Collateral attacks that attempt to determine an issue that has already been determined by a court of competent jurisdiction, to circumvent the effect of a court or tribunal decision, using previously raised grounds and issues;
2. Bringing hopeless proceedings that cannot succeed, here in both the present application and the ***Sawridge #3*** appeal where Maurice Stoney was declared to be an uninvolved third party; and

3. Initiating "busybody" lawsuits to enforce the rights of third parties, here the recruited participation of Maurice Stoney's "10 living brothers and sisters."

[56] The Sawridge Band says Maurice Stoney does not pay his court-ordered costs. Maurice Stoney denies that. Failure to pay outstanding cost awards is another potential basis to conclude a person litigates in an abusive manner. However, I defer any finding on this point until a later stage.

[57] Any of the abusive litigation activities identified in ***Chutskoff v Bonora*** are a basis to declare a person a vexatious litigant and restrict access to Alberta courts. Maurice Stoney has exhibited three independent bases to take that step. The Alberta Court of Queen's Bench has adopted a two-step vexatious litigant application process to meet procedural justice requirements set in ***Lymer v Jonsson***, 2016 ABCA 32, 612 AR 122, see ***Hok v Alberta***, 2016 ABQB 651 at paras 10-11, leave denied 2017 ABCA 63; ***Ewanchuk v Canada (Attorney General)***, 2017 ABQB 137 at para 97.

[58] I therefore exercise this Court's inherent jurisdiction to control litigation abuse (***Hok v Alberta***, 2016 ABQB 651 at paras 14-25, ***Thompson v International Union of Operating Engineers Local No. 955***, 2017 ABQB 210 at para 56, affirmed 2017 ABCA 193; ***Ewanchuk v Canada (Attorney General)*** at paras 92-96; ***McCargar v Canada***, 2017 ABQB 416 at para 110) and to examine whether Maurice Stoney's future litigation activities should be restricted.

[59] To date this two-step process has sometimes involved a hearing on the second step, for example ***Kavanagh v Kavanagh***, 2016 ABQB 107; ***Ewanchuk v Canada (Attorney General)***; ***McCargar v Canada***. However, other vexatious litigant analyses have been conducted via written submissions and affidavit evidence: ***Hok v Alberta***, 2016 ABQB 651.Veldhuis J in ***Hok v Alberta***, 2017 ABCA 63 at para 8 specifically reproduces the trial court's instruction that the process was conducted via written submissions and subsequently concludes the vexatious litigant analysis and its result shows no error or legal issues that raise a serious issue of general importance with a reasonable chance of success: para 10.

[60] In this case, I follow the approach of Verville J. in ***Hok v Alberta*** and proceed using a document-only process. In ***R v Cody***, 2017 SCC 31, the Court at para 39 identified that one of the ways courts may improve their efficiencies is to operate on a documentary record rather than to hold in-person court hearings. That advice was generated in the context of criminal proceedings, which are accorded a special degree of procedural fairness due to the fact the accused's liberty is at stake.

[61] The Ontario courts use a document-based 'show cause' procedure authorized by *Rules of Civil Procedure*, RRO 1990, Reg 194, s 2.1 to strike out litigation and applications that are obviously hopeless, vexatious, and abusive. This mechanism has been confirmed as a valid procedure for both trial level (***Scaduto v Law Society of Upper Canada***, 2015 ONCA 733, 343 OAC 87, leave to the SCC denied 36753 (21 April 2016)) and appellate proceedings (***Simpson v Institute of Chartered Accountants of Ontario***, 2016 ONCA 806).

[62] I conclude the procedural fairness requirements indicated in ***Lymer v Jonsson*** are adequately met by a document-only approach, particularly given that the implications for a litigant of a criminal proceeding application, or for the striking out of a civil action or application, are far greater than the potential consequences of what is commonly called a vexatious litigant order. As Justice Verville observed in ***Hok v Alberta***, 2016 ABQB 651 at paras

30-34, the implications of a restriction of this kind should not be exaggerated, it instead "... is not a great hurdle."

[63] I therefore order that Maurice Stoney is to make written submissions **by close of business on August 4, 2017**, if he chooses to do so, on whether:

1. his access to Alberta courts should be restricted, and
2. if so, what the scope of that restriction should be.

[64] The Sawridge Band and the Trustees may make submissions on Maurice Stoney's potential vexatious litigant status, and introduce additional evidence that is relevant to this question, see ***Chutskoff v Bonora*** at paras 87-90 and ***Ewanchuk v Canada (Attorney General)*** at paras 100-102. Any submissions by the Sawridge Band and the Trustees are due **by close of business on July 28, 2017**.

[65] In addition, I follow the process mandated in ***Hok v Alberta***, 2016 ABQB 335 at para 105, and order that Maurice Stoney's court filing activities are immediately restricted. I declare that Maurice Stoney is prohibited from filing any material on any Alberta court file, or to institute or further any court proceedings, without the permission of the Chief Justice, Associate Chief Justice, or Chief Judge of the court in which the proceeding is conducted, or his or her designate. This order does not apply to:

1. written submissions or affidavit evidence in relation to the Maurice Stoney's potential vexatious litigant status; and
2. any appeal from this decision.

[66] This order will be prepared by the Court and filed at the same time as this Case Management decision.

VIII. Costs

[67] I have indicated Maurice Stoney's application had no merit, and was instead abusive in a manner that exhibits the hallmark characteristics of vexatious litigation. The Sawridge Band and Trustees seek solicitor and own client indemnity costs against Maurice Stoney. Those are amply warranted. In ***Sawridge #5***, I awarded solicitor and own client indemnity costs against two of the applicants since their litigation conduct met the criteria identified by Moen J in ***Brown v Silvera***, 2010 ABQB 224 at paras 29-35, 488 AR 22, affirmed 2011 ABCA 109, 505 AR 196, for the Court to exercise its *Rule* 10.33 jurisdiction to award costs beyond the presumptive *Rule* 10.29(1) party and party amounts indicated in Schedule C. The same principles apply here.

[68] The costs award to the Sawridge Band is appropriate given its valid intervention and the important implications of Maurice Stoney's attempted litigation, as discussed above.

[69] In ***Sawridge #5***, at paras 50-51, I observed that there is a "new reality of litigation in Canada":

> *Rule* 1.2 stresses this Court should encourage cost-efficient litigation and alternative non-court remedies. The Supreme Court of Canada in ***Hryniak v Mauldin***, 2014 SCC 7 at para 2, [2014] 1 SCR 87 has instructed it is time for trial courts to undergo a "culture shift" that recognizes that litigation procedure must reflect economic realities. In the subsequent ***R v Jordan***, 2016 SCC 27, [2016]

> 1 SCR 631 and ***R v Cody***, 2017 SCC 31 decisions, Canada's high court has stressed it is time for trial courts to develop and deploy efficient and timely processes, "to improve efficiency in the conduct of legitimate applications and motions" (***R v Cody***, at para 39). I further note that in ***R v Cody*** the Supreme Court at para 38 instructs that trial judges test criminal law applications on whether they have "a *reasonable* prospect of success" [emphasis added], and if not, they should be dismissed summarily. That is in the context of *criminal* litigation, with its elevated protection of an accused's rights to make full answer and defence. This Action is a civil proceeding where I have found the addition of the Applicants as parties is unnecessary.
>
> This is the new reality of litigation in Canada. The purpose of cost awards is notorious; they serve to help shape improved litigation practices by creating consequences for bad litigation practices, and to offset the litigation expenses of successful parties. ...
>
> [Emphasis in original.]

[70] Then at para 53, I concluded that the "new reality of litigation in Canada" meant:

> ... one aspect of Canada's litigation "culture shift" is that cost awards should be used to deter dissipation of trust property by meritless litigation activities by trust beneficiaries.

[71] The Supreme Court of Canada has recently in ***Quebec (Director of Criminal and Penal Prosecutions) v Jodoin***, 2017 SCC 26 ["***Jodoin***"] commented on another facet of the problematic litigation, where lawyers abuse the court and its processes. ***Jodoin*** investigates when a costs award is appropriate against criminal defence counsel. At para 56, Justice Gascon explicitly links court discipline of abusive lawyers to the "culture of complacency" condemned in ***R v Jordan*** and ***R v Cody***. Costs awards are a way to help control this misconduct, and are a tool to help achieve the badly needed "culture shift" in civil and criminal litigation.

[72] I pause at this point to note that ***Jodoin*** focuses on *criminal* litigation, where the Courts have traditionally been cautious to order costs against defence counsel "in light of the special role played by defence lawyers and the rights of accused persons they represent": para 1.

[73] At paras 16-24 Justice Gascon discusses the issue of costs awards against lawyers in a more general manner:

> The courts have the power to maintain respect for their authority. This includes the power to manage and control the proceedings conducted before them ... A court therefore has an inherent power to control abuse in this regard ... and to prevent the use of procedure "in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute" ...
>
> It is settled law that this power is possessed both by courts with inherent jurisdiction and by statutory courts ... It is therefore not reserved to superior courts but, rather, has its basis in the common law ...
>
> There is an established line of cases in which courts have recognized that the awarding of costs against lawyers personally flows from the right and duty of the

> courts to supervise the conduct of the lawyers who appear before them and to note, and sometimes penalize, any conduct of such a nature as to frustrate or interfere with the administration of justice ... As officers of the court, lawyers have a duty to respect the court's authority. If they fail to act in a manner consistent with their status, the court may be required to deal with them by punishing their misconduct ...
>
> The power to control abuse of process and the judicial process by awarding costs against a lawyer personally applies in parallel with the power of the courts to punish by way of convictions for contempt of court and that of law societies to sanction unethical conduct by their members. ...
>
> ... although the criteria for an award of costs against a lawyer personally are comparable to those that apply to contempt of court ... the consequences are by no means identical. Contempt of court is strictly a matter of law and can result in harsh sanctions, including imprisonment. In addition, the rules of evidence that apply in a contempt proceeding are more exacting than those that apply to an award of costs against a lawyer personally, as contempt of court must be proved beyond a reasonable doubt. Because of the special status of lawyers as officers of the court, a court may therefore opt in a given situation to award costs against a lawyer personally rather than citing him or her for contempt ...
>
> In most cases, of course, the implications for a lawyer of being ordered personally to pay costs are less serious than those of the other two alternatives. A conviction for contempt of court or an entry in a lawyer's disciplinary record generally has more significant and more lasting consequences than a one-time order to pay costs. Moreover, as this appeal shows, an order to pay costs personally will normally involve relatively small amounts, given that the proceedings will inevitably be dismissed summarily on the basis that they are unfounded, frivolous, dilatory or vexatious.
>
> [Emphasis added, citations omitted.]

[74] This costs authority operates in a parallel but separate manner from the disciplinary and lawyer control functions of law societies: paras 22-23. Cost awards against a lawyer are potentially triggered by either:

1. "an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system by the lawyer", or
2. "dishonest or malicious misconduct on his or her part, that is deliberate".

[***Jodoin***, para 29]

[75] The Court stresses that an investigation of a particular instance of potential litigation misconduct should be restricted to the specific identified litigation misconduct and not put the lawyer's "career[,] on trial": para 33. This investigation is not of the lawyer's "entire body of work", though external facts can be relevant in certain circumstances: paras 33-34.

[76] The lawyer who is potentially personally subject to a costs sanction must receive notice of that, along with the relevant facts: para 36. This normally would occur after the end of litigation, once "... the proceeding has been resolved on its merits.": para 36.

[77] I conclude this is one such occasion where a costs award against a lawyer is potentially warranted. Maurice Stoney's attempted participation in the Advice and Direction Application has ended, so now is the point where this issue may be addressed. I consider the impending vexatious litigant analysis a separate matter, though also exercised under the Court's inherent jurisdiction. I do not think this is an appropriate point at which to make any comment on whether Ms. Kennedy should or should not be involved in that separate vexatious litigant analysis, given her litigation representative activities to this point.

[78] I have concluded that Maurice Stoney's lawyer, Priscilla Kennedy, has advanced a futile application on behalf of her client. I have identified the abusive and vexatious nature of that application above. This step is potentially a "serious abuse of the judicial system" given:

1. the nature of interests in question;
2. this litigation was by a third party attempting to intrude into an aboriginal community which has *sui generis* characteristics;
3. that the applicant sought to indemnify himself via a costs claim that would dissipate the resources of aboriginal community trust property;
4. the application was obviously futile on multiple bases; and
5. the attempts to involve other third parties on a "busybody" basis, with potential serious implications to those persons' rights.

[79] I therefore order that Priscilla Kennedy **appear before me at 2:00 pm on Friday, July 28, 2017**, to make submissions on why she should not be personally responsible for some or all of the costs awards against her client, Maurice Stoney.

[80] I note that in ***Morin v TransAlta Utilities Corporation***, 2017 ABQB 409, Graesser J. applied *Rule* 10.50 and ***Jodoin*** to order costs against a lawyer who conducted litigation without obtaining consent of the named plaintiffs. Justice Graesser concludes at para 27 that a lawyer has an obligation to prove his or her authority to represent their clients. Here, that is a live issue for the "10 living brothers and sisters".

[81] ***Jodoin*** at para 38 indicates the limited basis on which the other litigants may participate in a hearing that evaluates a potential costs award against a lawyer. The Sawridge Band and Trustees may introduce evidence as indicated in paras 33-34 of that judgment. They should also appear on July 28th to comment on this issue.

Heard and decided on the basis of written materials described in paragraph 7 hereof.
Dated at the City of Edmonton, Alberta this 12th day of July, 2017.

D.R.G. Thomas
J.C.Q.B.A.

Submissions in writing from:

Priscilla Kennedy
DLA Piper
for Maurice Felix Stoney (Applicant)

D.C. Bonora and
A. Loparco, Q.C.
Dentons LLP
for 1985 Sawridge Trustees (Respondents)

J.L. Hutchison
Hutchison Law LLP
for the OPTG (Respondent)

Edward Molstad, Q.C.
Parlee McLaws LLP
for the Sawridge Band (Intervenor)

HUTCHISON LAW

Our File: 51433 JLH

SENT BY EMAIL ONLY

July 17, 2017

Court of Queen's Bench of Alberta
6th Floor Law Courts Building
1A Sir Winston Churchill Square
Edmonton, AB T5J OR2

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

Re: Sawridge Band Inter Vivos Settlement (1985 Sawridge Trust); QB Action No. 1103 14112; Patrick Twinn et. al. Standing Application

We are writing to provide comments on the two forms of orders, arising from the Court's July 5, 2017 judgment (*Sawridge #5*) in the above noted matter.

1.) The OPGT requests a slight change to the wording of paragraph #9, as set out in the attached draft order (red line and clean copy attached), to ensure it is clear the OPGT's role as litigation representative for minors who have become adults is still limited to the categories identified by the Court in *Sawridge #3*.

2.) With the above noted change, the OPGT submits that the version of the order proposed by the Trustees [which removes the paragraph #4 as proposed by BLG] is the more appropriate form of order. The OPGT is aware of the following facts, which are also noted within *Sawridge #5*:

#190 Broadway Business Square, 130 Broadway Boulevard, Sherwood Park, Alberta, T8H 2A3
Telephone: (780) 417-7871, Fax: (780) 417-7872
Email: jhutchison@jlhlaw.ca Website: www.jlhlaw.ca

i.) The within Action was commenced on June 12, 2011 (paragraph 2, *Sawridge #5*);

ii.) Patrick Twinn was born on October 22, 1985 (para. 6, *Sawridge #5*). This would mean Patrick was approximately 25.5 years old when the Action was commenced;

iii.) Shelby Twinn was born on January 3, 1992 (para. 10, *Sawridge #5*). This would mean she was 19.5 years old when the Action was commenced.

Accordingly, Patrick Twinn and Shelby Twinn do not fall into the category of minors the OPGT was appointed to represent who became adults after this litigation began.

I trust this will be of assistance to the Court and the parties. If I can provide any additional clarification on behalf of our client, please do not hesitate to contact me.

Thank you for your attention to this matter.

Yours truly,

HUTCHISON LAW

PER: JANET L. HUTCHISON
JLH/cm

cc: Client

cc: K. Platten, and C.Osualdini, McLennan Ross LLP

cc: N.Golding, BLG LLP

cc: D. Bonora, Dentons LLP

Court of Queen's Bench of Alberta

Citation: 1985 Sawridge Trust v Alberta (Public Trustee), 2017 ABQB 377

Date: 20170705
Docket: 1103 14112
Registry: 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 Sawridge Trust" or "Trust")

Between:

Patrick Twinn, on his behalf, and on behalf of his infant daughter, Aspen Saya Twinn, and his wife Melissa Megley; and Shelby Twinn; and Deborah A. Serafinchon

Applicants

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

Respondents (Original Applicants)

- and –

Public Trustee of Alberta ("OPTG")

Respondent

- and –

Catherine Twinn

Respondent

Case Management Decision (Sawridge #5)
of the
Honourable Mr. Justice D.R.G. Thomas

Table of Contents

I Introduction

[1] This is a case management decision on an application filed on August 17, 2016 (the "Application") by Patrick Twinn, Shelby Twinn and Deborah A. Serafinchon ("Applicants") to be added as full parties in Action No. 1103 14112 (the "Action"), for payment of all present and future legal costs and an accounting to existing Beneficiaries. The application by Patrick Twinn, on behalf of his infant daughter, Aspen Saya Twinn and his wife, Melissa Megley, appears to have been abandoned and, in order to keep the record clear, is dismissed. The balance of the Application by the Applicants is also dismissed, although the claims for an accounting from the Trustees by Patrick and Shelby Twinn are dismissed on a without prejudice basis.

II Background

[2] This Action was commenced by Originating Notice, filed on June 12, 2011 by the 1985 Sawridge Trustees and is sometimes referred to as the "Advice and Direction Application".

[3] The history of the Advice and Direction Application is set out in previous decisions (including the Orders taken out in relation thereto) reported as ***1985 Sawridge Trust v Alberta (Public Trustee),*** 2012 ABQB 365, 543 AR 90 ("***Sawridge #1***"), aff'd 2013 ABCA 226, 543 AR 90 ("***Sawridge #2***"), ***1985 Sawridge Trust v Alberta (Public Trustee),*** 2015 ABQB 799 ("***Sawridge #3***"), time extension denied 2016 ABCA 51, 616 AR 176, ***1985 Sawridge Trust (Trustee for) v Sawridge First Nation***, 2017 ABQB 299 ("***Sawridge #4***") (collectively the "***Sawridge Decisions***"). Some of the terms used in this decision ("***Sawridge #5***") are also defined in the previous ***Sawridge Decisions***.

[4] I had directed that this Application be dealt with through the filing of written briefs, subject to requests for clarification through correspondence between the Court and counsel. These letters have been added to the court file in this Action in a packet described as "**Sawridge #5 Correspondence**" and are listed in Schedule 'A' Part II to this decision.

III The Applicants

[5] Some factual background in relation to the three remaining Applicants is set out below and has been derived from the Affidavits forming part of the materials filed by the participants as described in Schedule 'A' Part I to this decision.

A Patrick Twinn

[6] Patrick Twinn was born on October 22, 1985. His father, Walter Patrick Twinn was the Chief of the Sawridge First Nation ("SFN") from 1966 to his death on October 30, 1997 ("Chief Walter Twinn").

[7] His mother is Sawridge Trustee, Catherine Twinn, who is also a member of the SFN.

[8] Patrick is also a member of the SFN and acknowledges that he is currently and will remain a Beneficiary of the 1985 Sawridge Trust even if the Trustees are successful in their application to vary the definition of 'beneficiary'.

[9] Patrick Twinn also acknowledges that his beneficial interest in the 1985 Sawridge Trust may either be diluted or enhanced if the Trustees vary the definition of 'beneficiary' under the Trust.

B Shelby Twinn

[10] Shelby Twinn was born on January 3, 1992 and resided on the SFN Reserve for the first 5 years of her life. She is a granddaughter of Chief Walter Twinn and the daughter of Paul Twinn, a son of Chief Walter Twinn. Paul Twinn is recognized as an Indian by the Government of Canada under the *Indian Act* and is a member of the SFN. The mother of Shelby Twinn was married to Paul Twinn at the time of Shelby's birth.

[11] Shelby Twinn is registered as an Indian under the *Indian Act*. She is not listed as a member of the SFN and claims that she may lose her entitlement as a Beneficiary if the application of the Trustees to vary the definition of 'beneficiary' under the 1985 Sawridge Trust succeeds. Shelby Twinn acknowledges that she is currently a Beneficiary under the 1985 Sawridge Trust.

C Deborah Serafinchon

[12] Deborah Serafinchon claims to be the daughter of Chief Walter Twinn and Lillian McDermott, the latter being recognized as an Indian under the *Indian Act*.

[13] Deborah Serafinchon states that she was born an illegitimate child, was placed in foster care at birth and was raised in that system. Deborah Serafinchon asserts that Patrick Twinn is her brother and co-applicant.

[14] Deborah Serafinchon notes that if the current definition of 'beneficiary' under the 1985 Sawridge Trust is varied to exclude discriminatory language, such as "illegitimate", "male" and "female", she will then be included as a 'beneficiary' under the 1985 Sawridge Trust. She expresses concern about any proposed definition which would have the effect of excluding her as a 'beneficiary' being accepted by the Court.

IV Positions of the Parties

[15] The materials filed on this Application and reviewed by me are extensive. They are described in Schedule 'A'. The written briefs forming part of this array of materials contain the arguments of the various participants.

[16] The initial position of the Public Trustee of Alberta ("OPTG") on the Application is set out in a short letter, dated October 31, 2016, as supplemented by clarification letters of June 23 and 30, 2017 and are all included in the "Sawridge #5 Correspondence" packet.

[17] The Application is also supported by Sawridge Trustee Catherine Twinn, who is the mother of the Applicant, Patrick Twinn. She disassociates herself from the opposition to the Application by the other Trustees.

[18] The Sawridge Trustees (except Catherine Twinn) oppose the Application in its entirety.

V Issues

[19] The issues to be decided on this Application are:

a Whether some or all of the Applicants should be made a Party to this Action?

b Whether the Applicants should be awarded advance costs and indemnification for future legal fees from the 1985 Sawridge Trust?

[20] While claims for an accounting by the Trustees have been made by some of the Applicants, no submissions were made on this remedy.

VI Disposition of the Application

[21] I confirm that the claims by Patrick Twinn on behalf of his infant daughter, Aspen Saya Twinn, and his wife, Melisa Megley, have been abandoned and, for clarity of record purposes, are dismissed.

[22] I also dismiss the claims of the remaining Applicants for the reasons which follow.

A Applicability of Rules 3.74 and 3.75 of the *Alberta Rules of Court*, Alta Reg 124/2010

[23] *Alberta Rules of Court*, Alta Reg 124/2010 (the "*Rules*" or individually a "*Rule*") *Rules* 3.74 and 3.75 provide for the procedure for the addition of parties to an action commenced by a statement of claim or originating notice, respectively.

[24] The Trustees characterize the Applicants as "third parties" and argue that they cannot be added as parties, because they are not persons named in the original litigation. They rely on the decision of Poelman, J in ***Manson Insulation Products Ltd v Crossroads C & I Distributors***, 2011 ABQB 51 at para 48, 2011 CarswellAlta 108 ("***Manson Insulation***").

[25] ***Manson Insulation*** involves an action commenced by statement of claim. This Action was commenced by an originating notice, a procedure under which all participants are not known at the outset and it is also less clear as to when the 'pleadings' close. I do not accept that the Applicants are barred by application of *Rule* 3.74(2)(b) because they may be "third parties".

[26] However, *Rules* 1.2 and 3.75(3) do have application to the circumstances here. I must be satisfied that an order should be made to add the Applicants as parties and I must also be satisfied that the addition of these Applicants as parties will not cause prejudice to the primary Respondents, the Trustees.

[27] The Advice and Direction Application has been underway for almost six years. There have been a number of complex applications resulting in a variety of decisions (See the ***Sawridge Decisions***). The Trustees assert that some of the Applicants have chosen not to abide by deadlines imposed by this Court. In turn the Applicants take issue with the effectiveness of the early notifications in respect to the Advice and Direction Application. All of that said it is clear that this proceeding has gone on for a long time. I agree with the Trustees that the addition of more participants will make an already complex piece of litigation more complicated, not only in terms of potential new issues, but also in terms of more difficult logistics in coordinating additional counsel and individual parties and prolonging the procedural steps in this litigation, for example, even more questioning. All of that will in turn result in increased costs likely to be borne one way or another by the 1985 Sawridge Trust and the assets held by the Trust for its beneficiaries whom, I have already noted, include at a minimum two of the Applicants, namely Patrick and Shelby Twinn.

[28] In my decisions to date I have attempted to narrow and define the issues in this litigation. To allow additional parties at this stage will expand the lawsuit rather than create a more focussed set of issues for determination by a trial judge who will ultimately be tasked with determining this litigation.

[29] Further, I am not satisfied that the Applicants can pay the costs if they are unsuccessful and are not awarded an indemnity against paying the Trustees and, therefore, the costs of the

Trust. In other words, if this attempted entry into this Action is unsuccessful, then the Trust and its beneficiaries are left again to pay the bill.

[30] In conclusion, the Applicants have not satisfied me that their addition to this proceeding as full parties will not cause prejudice to the Trustees and the 1985 Sawridge Trust. Delay in bringing this litigation to a conclusion and expanding its scope are not, in my view, capable of being remedied by costs awards.

B Is it necessary to add Patrick and Shelby Twinn as Parties?

[31] The Trustees take the position that the interests of Patrick and Shelby Twinn are already represented in the Advice and Direction Application and that their addition would be redundant.

[32] In respect to Patrick Twinn, I agree that it is unnecessary to add him as a party. Patrick Twinn takes the position that he is currently, and will remain a Beneficiary of the 1985 Sawridge Trust. The Trustees confirm this and I accept that is correct and declare him to be a current Beneficiary of the Trust.

[33] Patrick Twinn understands and accepts that his beneficial interest under the 1985 Sawridge Trust may either be diluted or enhanced if the Trustees vary the definition of 'beneficiary' under the 1985 Sawridge Trust. There is no circumstance that I can foresee where his status as a Beneficiary will be eliminated and there is no need to add him as a party to this Action. In fact, adding him to the litigation will only result in the Trust's resources being further reduced, to the detriment of all current and future beneficiaries.

[34] Further, counsel for the OPTG in her letters of June 23 and June 30, 2017 has confirmed that the Public Trustee continues to represent minors who have become adults during the course of this litigation. As a result, both Patrick and Shelby Twinn will have their interests looked after by the OPTG in any event.

[35] Shelby Twinn is in a similar situation. She acknowledges that she is currently a Beneficiary under the 1985 Sawridge Trust. The Trustee states at para 24 of its Brief, filed October 31, 2016, that:

> Shelby and her sister, Kaitlyn Twinn, are both **current beneficiaries** of the 1985 Trust. (Emphasis added.)

[36] I accept the Trustees' confirmation and declare Shelby Twinn to be a current Beneficiary of the Trust.

[37] As with Patrick Twinn, I cannot foresee a circumstance where the status of Shelby Twinn as a Beneficiary under the 1985 Sawridge Trust will be eliminated. Her participation through her own lawyer offers no benefit other than to dissipate the Trust's property through the payout of another set of legal fees.

[38] For these reasons, there is no need to add Shelby Twinn as a party to this Action.

[39] A further reason of more general application for not adding Patrick and Shelby Twinn as parties to this Action is that to do so would have the effect of making this lawsuit a more adversarial process. Since both of these Applicants are already recognized as Beneficiaries by the Trustees and now by the Court, I observe that their ongoing involvement in the litigation would be better served by transparent and civil communications with the Trustees and their legal

counsel and through a positive dialogue with the Trustees to ensure that their status as Beneficiaries is respected.

C Should Deborah Sarafinchon be added as a Party?

[40] On the evidence presented to me, Debora Sarafinchon is not currently a Beneficiary under the 1985 Sawridge Trust. She accepts that she is not an Indian under the *Indian Act* and is not a member of the SFN. She has not applied for membership in the SFN and apparently has no intention of making such an application.

[41] As I have said in my earlier decisions in ***Sawridge #3***, it is not appropriate for this Court to get involved in disputes over membership in the SFN. Apart from the jurisdictional issues which might arise if I was tempted to address membership issues, it would be contrary to my position that this litigation should be narrowed rather than unnecessarily expanded.

[42] I will give Ms. Sarafinchon the benefit of the doubt and will not characterize her application to be added as a party as being a collateral attack on SFN membership issues. However, I am concerned about the Court being drawn into that sort of contest in this long-running litigation.

[43] There is nothing stopping Ms. Sarafinchon from monitoring the progress of this litigation and reviewing the proposals which the Trustees may make in respect to the definition of 'beneficiary' under the 1985 Sawridge Trust and providing comments to the Trustees and the Court. I also repeat my concern about increasing the adversarial nature of this Advice and Direction Application.

[44] For all these reasons, I decline the request by Ms. Sarafinchon to be added as a party to this Action.

VII Is the consent of beneficiaries required to vary the 1985 Sawridge Trust such that they ought to be entitled to party status?

[45] It is not necessary for me to address this issue in deciding this Application and I decline to do so.

VIII Should the Applicants be entitled to advance costs?

[46] In light of my decision to refuse to add all of these Applicants as parties to this Action, it is not necessary for me to decide the issue of awarding them advance costs.

IX Costs

[47] As is apparent from my analysis, I have concluded that Patrick and Shelby Twinn, who are attempting to participate in this process, offer nothing and instead propose to fritter away the Trust's resources to no benefit. In coming to this conclusion I observe that Patrick and Shelby Twinn were not interested in paying for their own litigation costs. They instead sought to offload that on the Trust, which would then have to pay for their representation in this litigation. I would not have permitted that, even if I had concluded these were appropriate litigation participants, which they are not.

[48] There is a parallel here with estate disputes where an unsuccessful litigation participant seeks to have an estate pay his or her legal costs. In that type of litigation a cost award of that kind means someone inside the group of intended beneficiaries loses, usually the residual beneficiary. Moen J in ***Babchuk v Kutz***, 2007 ABQB 88, 411 AR 181, affirmed *en toto* 2009

ABCA 144, 457 AR 44, conducted a detailed review of the principles that guide when an estate should indemnify an unsuccessful litigant. That investigation investigates the role and need for the unsuccessful litigant's participation, for example by asking who caused the litigation, whether the unsuccessful litigant's participation was reasonable, and how the parties as a whole conducted themselves.

[49] Here I have concluded that Patrick and Shelby Twinn had no basis to participate, and, worse, that their proposed participation would only end up harming the pool of beneficiaries as a whole. Their appearance is late in the proceeding, and they have not promised to take steps to ameliorate the cost impact of their proposed participation, other than to shift it to the Trust.

[50] *Rule* 1.2 stresses this Court should encourage cost-efficient litigation and alternative non-court remedies. The Supreme Court of Canada in ***Hryniak v Mauldin***, 2014 SCC 7 at para 2, [2014] 1 SCR 87 has instructed it is time for trial courts to undergo a "culture shift" that recognizes that litigation procedure must reflect economic realities. In the subsequent ***R v Jordan***, 2016 SCC 27, [2016] 1 SCR 631 and ***R v Cody***, 2017 SCC 31 decisions Canada's high court has stressed it is time for trial courts to develop and deploy efficient and timely processes, "to improve efficiency in the conduct of legitimate applications and motions" (***R v Cody***, at para 39). I further note that in ***R v Cody*** the Supreme Court at para 38 instructs that trial judges test criminal law applications on whether they have "a *reasonable* prospect of success" [emphasis added], and if not, they should be dismissed summarily. That is in the context of *criminal* litigation, with its elevated protection of an accused's rights to make full answer and defence. This Action is a civil proceeding where I have found the Addition of the Applicants as parties is unnecessary.

[51] This is the new reality of litigation in Canada. The purpose of cost awards is notorious; they serve to help shape improved litigation practices by creating consequences for bad litigation practices, and to offset the litigation expenses of successful parties. By default successful litigation parties are due costs for that reason: *Rule* 10.29(1). The Court nevertheless retains a broad jurisdiction to vary costs depending on the circumstances (*Rule* 10.33), and naturally should make cost awards to encourage the *Rules* overall objectives and purposes (*Rule* 1.2).

[52] Elevated cost awards are appropriate in a wide variety of circumstances so as to achieve those objectives, as is reviewed in ***Brown v Silvera***, 2010 ABQB 224 at paras 29-35, 488 AR 22, affirmed 2011 ABCA 109, 505 AR 196.

[53] I conclude one aspect of Canada's litigation "culture shift" is that cost awards should be used to deter dissipation of trust property by meritless litigation activities by trust beneficiaries. I therefore order that Patrick and Shelby Twinn shall pay solicitor and own client indemnity costs of the Trustees in responding to this Application.

[54] In respect to Deborah Serafinchon, she was outside the Trust relationship and though I have rejected her application she has not litigated as an 'insider' who has done nothing but attempt to diminish resources of the Trust. I therefore award costs against Deborah Serafinchon in favour of the Trustees on a party/party basis. If there is any dispute over the resolution of the amount of costs in both cases, I retain jurisdiction to resolve that problem should it arise.

[55] In closing, I confirm the OPTG representation of minors who have become adults will be subject to the existing indemnity and costs exemption orders. This direction shall be included in the formal order documenting this judgment.

Heard and decided on the basis of the written materials described in Schedule 'A'.
Dated at the City of Edmonton, Alberta this 5th day of July, 2017.

D.R.G. Thomas
J.C.Q.B.A.

Submissions in writing from:

N.L. Golding Q.C.
Borden Ladner Gervais LLP
for the Applicants Patrick Twinn et al.

D.C. Bonora and
A. Loparco, Q.C.
Dentons LLP
for The 1985 Sawridge Trustees

J.L. Hutchison
Hutchison Law LLP
for the OPTG

C.K.A. Platten, Q.C. and
C. Osualdini
McLennan Ross LLP
for Catherine Twinn

Schedule 'A'

Part I - Materials filed by the participants in the Application by Patrick Twinn et al.

FILING DATE	DESCRIPTION
August 17, 2016	Application by Patrick Twinn et al. to be added as parties to Action 1103 14112 – Borden Ladner Gervais ("BLG").
August 17, 2016	Affidavit of Patrick Twinn, sworn July 26, 2016.
August 17, 2016	Affidavit of Shelby Twinn, sworn July 26, 2016.
August 17, 2016	Affidavit of Deborah Sarafinchon, sworn July 26, 2016.
September 30, 2016	Brief of Patrick Twinn, Shelby Twinn and Deborah Serafinchon – BLG.
September 30, 2016	Extracts of Evidence of Patrick Twinn, Shelby Twinn and Deborah Serafinchon – BLG.
September 30, 2016	Book of Authorities of Patrick Twinn, Shelby Twinn and Deborah Serafinchon – BLG.
October 21, 2016	Transcript of Questioning on Affidavit of Patrick Twinn.
October 21, 2016	Transcript of Questioning on Affidavit of Shelby Twinn.
October 21, 2016	Transcript of Questioning on Affidavit of Deborah Serafinchon.
October 31, 2016	Response Brief of the Trustees for the 1985 Sawridge Trust in Response to the Brief of the Applicants Patrick Twinn, Shelby Twinn, and Deborah Serafinchon – Dentons.
October 31, 2016	Letter from Hutchison Law to Denise Sutton re Application by Patrick Twinn et al. – Hutchison Law.
November 1, 2016	Brief of Catherine.
November 1, 2016	Affidavit of Paul Bujold sworn October 31, 2016 – Dentons.
November 10, 2016	Letter from Dentons to counsel (cc'd to Thomas J) re Undertaking Responses of Patrick Twinn, Shelby Twinn and Deborah Serafinchon – Dentons.
November 10, 2016	Undertakings of Patrick Twinn.
November 10, 2016	Undertakings of Shelby Twinn.

November 10, 2016	Undertakings of Deborah Serafinchon.
November 14, 2016	Letter from Dentons to Thomas J re typo in response to the Brief of Patrick Twinn.
December 2, 2016	Affidavit of Deborah Serafinchon sworn November 24, 2016.
December 2, 2016	Letter from Dentons to Thomas J re response to unfiled Affidavit of Deborah Serafinchon.
December 5, 2016	Reply Brief of Patrick Twinn, Shelby Twinn and Deborah Serafinchon – BLG.
December 5, 2016	Extract of Evidence related to Reply Brief of Patrick Twinn, Shelby Twinn and Deborah Serafinchon – BLG.
December 9, 2016	Letter from Dentons to Thomas J re filed Undertakings of Paul Bujold from the Questioning on Affidavit on November 29, 2016.
December 9, 2016	Undertakings of Paul Bujold – Dentons.
December 12, 2016	Transcript on Questioning of Paul Bujold of November 29, 2016 – Dentons.

Part II - List of Correspondence

DATE	FROM	TO
June 09, 2017	Justice D.R.G. Thomas	Ms. Nancy L. Golding
June 16, 2017	Ms. Nancy L. Golding, QC	Justice D.R.G. Thomas
June 19, 2017	Ms. Nancy L. Golding, QC	Justice D.R.G. Thomas
June 20, 2017	Ms. Janet L. Hutchison	Justice D.R.G. Thomas
June 22, 2017	Justice D.R.G. Thomas	Ms. Nancy L. Golding, QC and Ms. Janet Hutchison
June 22, 2017	Justice D.R.G. Thomas	Ms. Janet Hutchison
June 23, 2017	Ms. Janet L. Hutchison	Justice D.R.G. Thomas
June 27, 2017	Ms. Doris C.E. Bonora	Justice D.R.G. Thomas
June 28, 2017	Ms. Karen A. Platten, QC	Justice D.R.G. Thomas
June 29, 2017	Justice D.R.G. Thomas	Ms. Janet Hutchison
June 30, 2017	Ms. Janet L. Hutchison	Justice D.R.G. Thomas

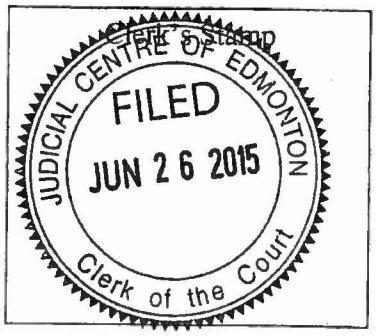
Included in a filed packet described as "Sawridge #5 Correspondence".

No.	SUMMARY OF BEHAVIOUR	CITATION
1.	**Representations to the Court** Ms. Twinn was accurate in her submissions to the Court that she required time to retain, instruct and receive advice from counsel in relation to the proceedings that had been commenced by the Four Trustees against Ms. Twinn in relation to the 2014 Action. While Ms. Twinn had an existing retainer with McLennan Ross LLP to advise on her duties and obligations as a Trustee, the retainer, at this point in time, did not include representation in the 2014 Action. It is accurate that the terms of McLennan Ross' retainer had to be discussed and agreed to. In regards to the letter that was submitted by Karen Platten, Q.C. from McLennan Ross on Ms. Twinn's behalf to Justice Thomas regarding an agreement that had been reached between the parties. The contents of this letter reflected Ms. Twinn's understanding at this point in time. There was certainly no intention to deceive the Court and evidence to support such an allegation has not been provided by the Four Trustees. What the Four Trustees fail to advise is that a letter was subsequently sent by Ms. Bonora of Dentons LLP to Justice Thomas that advised that an agreement had not been reached, as such Ms. Twinn did not perceive a need to have to write to the Court further given that the misunderstanding had been identified.	Questioning of Catherine Twinn, Undertaking 61
2.	**Unfounded Evidence of Fraud** Ms. Twinn was not making an unfounded allegation of fraud. The information she received about the use of the Trust assets came from the late David Ward, the Trusts' senior legal advisor at the time. This information is brought forward as part of the information that Ms. Twinn has received that is informing the basis for her actions. Ms. Twinn notes that despite the Four Trustees concern about Mr. Ward's information, they have only submitted hearsay evidence from Mr. Bujold to deny its accuracy and have failed to provide any supporting documentation, despite such documentation presumably being within their control.	
3.	**Failure to Abide by Court Order** The cost award the Trustees refer to was in the amount of $500.00 and is insignificant in relation to the amount of money Ms. Twinn is expending in an attempt to advance the interests of the Trusts. Ms. Twinn has a significant claim for unpaid services.	
4.	**Failure to Deal with Evidence** The referenced Trustee meeting minutes were entered as Exhibits for Identification because Ms. Twinn did not believe that they accurately reflected the subject Trustee meeting. Ms. Twinn gave evidence at questioning that it had become apparent to her that the meeting minutes	Questioning of Catherine Twinn, page 97

	were "manufacturing a certain narrative that didn't accord with my experience in the meeting."	
5.	**Refusing to Confirm Relief** Ms. Twinn believes she responded to Undertaking 49 with her position on the issue. Unfortunately the answer is not a simply "yes" or "no" as the Four Trustees have attempted to characterize it. If the Four Trustees are unclear about the relief being sought in the 2014 Action they could direct such queries to counsel, which they have not done.	
6.	**Submitting Hearsay Evidence** It is strange that the Four Trustees are taking exception with the hearsay evidence contained in Ms. Twinn's Affidavit given that Mr. Bujold's Affidavits are rife with hearsay evidence on significant matters and matters wherein an Affidavit could and should have been submitted from the individual who holds personal knowledge, which was usually one of the Four Trustees.	
7.	**Failure to Abide by Court Precedent and Stare Decisis and Failing to Follow Court Direction** Ms. Twinn was prepared to sign a transfer of assets to Dr. Ward so long as the issue of trustee appointment was separated. This was consistent with the Order of Justice Neilsen issued on May 16, 2014 which directed that the transfer of assets to Justin Twin was without prejudice to Ms. Twinn's ability to dispute his eligibility to sit as a Trustee. The issue of the transfer of assets to Dr. Ward was resolved by a Consent Order that separated the issue of the transfer of assets from her appointment. Ms. Twinn notes that this was also her position in relation to the transfer of assets to Justin Twin, but the Four Trustees refused to accommodate this request and instead pursued a Court application. It is entirely inaccurate to state that Ms. Twinn has raised First Nation membership issues in the context of case management following the issuance of *Sawridge #3*. Ms. Twinn has raised membership issues in the context of this application to provide context for conduct prior to *Sawridge #3* in case management and to provide information on the issues that will be relevant at the trial of the 2011 Action. Given that the Four Trustees continue to advocate for membership in the First Nation as being the proposed "beneficiary" definition it would be impossible for the trial judge to make a ruling on this relief without being able to consider the merits of the definition. Ms. Twinn is not aware of a direction from the Court that conflict of interest is not relevant to the 2011 Action and note that the Trustees have failed to point to any order in this regard. Ms. Twinn has raised her concerns regarding the composition of the Trustee group, more particularly the structural conflict, in the 2014 Action. As such, it is	Affidavit of Catherine Twinn filed December 16, 2015, Exhibit "G" Questioning of Catherine Twinn, Exhibit 10 Questioning of Catherine Twinn, Undertaking 56

	unclear what conduct the Four Trustees are referring to in the 2011 Action, especially so given that they provide no citing authority for their serious accusation.	
8.	**Inflammatory Language in Brief** Ms. Twinn disagrees with the characterization that inflammatory language was used in her brief. Much of what is alleged to be inflammatory, is simply Ms. Twinn's position based on her observations and submitted evidence. Ms. Twinn agrees that the impugned conduct of the Four Trustees is a sensitive matter, but this does not make the complaint inflammatory. Ms. Twinn does not intend to respond to all of the Four Trustees complaints in this regard, but wishes to draw the Court's attention to certain allegations that are factually untrue based on the evidence before the Court on this application. Point 8 – There is ample evidence of the First Nation being secretive in relation to its membership process. This includes the observations of Dr. Waters and most recently, Justice Russell of the Federal Court of Appeal. Point 10 – It was Mr. Bujold's own evidence on cross examination that the 2011 Action had been designed to not include grandfathering in order to prevent individuals from having any leverage in seeking membership in the First Nation. This is the Trustees' own affiant, not Ms. Twinn. Point 11 – Prior to *Sawridge #3*, the issue of membership concerns was squarely before the parties and the OPT was mandated to investigate the same. As such, to suggest the Four Trustees had no obligation to bring their relevant knowledge on these matters to the Court's attention because membership was not an issue, is an inaccurate statement. Point 13 – There is no evidence before the Court that work was done in advance of the Trustee meeting to determine whether Justin was an appropriate candidate. The legal opinions provided in support of Justin's eligibly were not completed until after his appointment had been approved by the Four Trustees. Mr. Bujold' evidence on this point was that he was not even aware that Justin was being put forward until the meeting.	Affidavit of Paul Bujold filed February 15, 2017, Exhibit H Questioning of Paul Bujold, page 351

COURT FILE NO.	1103 14112
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON



IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, C. T-8, AS AMENDED

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

APPLICANTS	**ROLAND TWINN, WALTER FELIX TWINN, BERTHA L'HIRONDELLE, CLARA MIDBO AND CATHERINE TWINN, as trustees for the 1985 Sawridge Trust**
DOCUMENT	**REPLY BRIEF OF CATHERINE TWINN FOR SPECIAL CHAMBERS CASE MANAGEMENT MEETING ON JUNE 30, 2015**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

MC LENNAN ROSS LLP
LEGAL COUNSEL
#600 West Chambers
12220 Stony Plain Road
Edmonton, AB T5N 3Y4

Lawyer: Karen Platten, Q.C.
Telephone: (780) 482-9200
Fax: (780) 482-9100
Email: kplatten@mross.com
File No.: 144194

Action No.: 1103 14112
E-File No.: EVQ15SAWRIDGEBAND1
Appeal No.: _____

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 Sawridge Trust")

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

Applicants

PROCEEDINGS

Edmonton, Alberta
June 30, 2015

Transcript Management Services, Edmonton
1000, 10123 99th Street
Edmonton, Alberta T5J-3H1
Phone: (780) 427-6181 Fax: (780) 422-2826

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may still have gone ahead as we think that actually the contents of those affidavits perhaps help us.

But the problem that caused us significant concerns was the fact that Ms. Platten on behalf Catherine Twinn filed a Brief and I believe the filing date was June 26th, but in fact was not given to any of the parties or at least not given to our office until June 29th, so we received it yesterday morning around 9:30.

So I -- at the last application I can advise that Ms. Platten said she would be filing a Brief. That was interesting to me because the deadlines had all passed. All of the parties had complied with the deadlines with these two exceptions. Mr. Molstad brought a separate application to seek an adjournment and Ms. Cumming who was -- who received materials late filed her Brief two days late. So she filed on June 23rd instead of June 19th.

Ms. Platten in the context of discussing the communications between counsel on June 24th advised she would be filing a Brief, and that wasn't pursued at the time. And so we had understood that in respect of the settlement the Briefs and materials had all been filed.

Subsequent to the application on June 24th, Ms. Hutchison asked us if we would file the undertakings and put together a Book of Evidence, both of which we agreed to and the undertakings have now been filed. And the Book of Evidence didn't get filed with the filing of the Brief on -- by McLennan Ross on June 29th because we would say that that Brief has become entirely a game changer to the whole of the application. And --

THE COURT: Sorry, which Brief?

MS. BONORA: This is the Brief filed by Ms. Platten's office.

THE COURT: Okay.

MS. BONORA: McLennan Ross on behalf of Catherine Twinn.

THE COURT: All right. I -- okay. Just before you go on, I am just -- I am missing a whole bunch of material here, madam clerk. A couple of the -- my -- my files are not up here. Do you know where those? Those orange files?

MS. BONORA: There's -- there's orange files in this fol -- in this --

THE COURT CLERK: My Lord, directly to the right of the -- to the

But I started my application this afternoon by saying we really think we needed an adjournment, and perhaps given your comments that issue can be put aside for now and we can consider it and come back.

The -- I do wish to address some of the many comments that were made --

THE COURT: Well, just -- well, just a minute. Why do I not give you a decision on the adjournment and then we can -- we sort of get this back on the rail.

MS. BONORA: Yes, Sir. I guess perhaps I'd just like it on the record that there were many allegations made by Ms. Hutchison today that I would suggest are untrue and are very difficult to have on the record and not be addressed by the trustees. So perhaps if I can just leave it at that without going into them --

THE COURT: Okay.

MS. BONORA: -- but I -- I find it very difficult to listen to some of the things that she said and that -- that are allegations that are very serious against the trustees and perhaps against us that we don't have an opportunity to address.

THE COURT: Well, I can assure you that is all water off a duck's back as far as I am concerned, okay?

MS. BONORA: Thank you, Sir.

THE COURT: Ms. Platten, you would like to say something?

Submissions by Ms. Platten (Adjournment)

MS. PLATTEN: I'll be brief, Sir.

THE COURT: This is on the adjournment motion or --

MS. PLATTEN: Uh, yes.

First of all, I'd like to apologize to the Court and other counsel. It is true our Brief was served late. Unfortunately I was away from the office for part of last week and with miscommunication it happened. I apologize.

We are acting for Ms. Twinn as one of the trustees. If we did not act for Ms. Twinn, no

Form 49
Alberta Rules of Court
Rule 13.19

Clerk's Stamp

COURT FILE NUMBER	1103 14112 and 1403 04885
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c. T-8, AS AMENDED, and IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION, ON APRIL 15, 1985 (the "1985 Trust") AND IN THE MATTER OF THE SAWRIDGE TRUST CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND NO. 19, AUGUST 15, 1986 (the "1986 Trust")
APPLICANT	CATHERINE TWINN, as Trustee for the 1985 Trust and the 1986 Trust
RESPONDENTS	ROLAND TWINN, BERTHA L'HIRONDELLE, EVERETT JUSTIN TWIN AND MARGARET WARD, as Trustees for the 1985 Trust and 1986 Trust
DOCUMENT	**AFFIDAVIT**
PARTY FILING THIS DOCUMENT	**THE RESPONDENTS**
ADDRESS FOR SERVICE OF LAWYER OF RECORD	BRYAN & COMPANY LLP 2600 Manulife Place 10180 – 101 Street Edmonton, AB T5J 3Y2
LAWYER IN CHARGE	NANCY E. CUMMING, Q.C. Phone: 780.423.5730 File No. 29793-1/NEC

AFFIDAVIT OF PAUL BUJOLD

SWORN on August 30, 2017

I, PAUL BUJOLD, of the City of Edmonton, in the Province of Alberta, SWEAR AND SAY THAT:

1. I, Paul Bujold, of Edmonton, Alberta, make oath and say that: I am the Chief Executive Officer of the 1985 Sawridge Trust and as such have personal knowledge of the matters hereinafter deposed to unless stated to be based upon information and belief, in which case I verily believe the same to be true.

2. I have reviewed the Affidavit of Catherine Twinn ("Catherine") filed May 11, 2017 (the "May 2017 Affidavit") and wish to provide by this Affidavit some responses to the evidence provided in the May 2017 Affidavit provided by Catherine in the course of litigation in the 1103 14112 ("1103") and 1403 04885 ("1403") actions. I have also reviewed the transcript from the Questioning of Catherine on the May 2017 Affidavit and also wish to respond to portions of that evidence.

3. I will not be commenting upon the SFN membership process as Justice Thomas has clearly indicated in his December 17, 2015 decision that the Trustees are not to engage in a collateral attack upon the SFN membership process. Attached as Exhibit "A" to my Affidavit is the Order of Justice Thomas arising from his December 17, 2015 decision.

4. The May 2017 Affidavit of Catherine also comments upon the 1986 Trust beneficiaries. I will not be commenting upon this as the 1986 Trust and beneficiaries are not the subject of either the 1103 or 1403 actions.

5. In reply to paragraph 12 of the May 2017 Affidavit, drafts of my Affidavit were provided and discussed at more than one Trustee meeting. Not only do I specifically recall this occurring, but the Minutes reflect that this occurred. My previous Affidavit is accurate. Catherine is the one who is mistaken. Attached as Exhibit "B" to my Affidavit are Minutes from the April 26, 2011, May 24, 2011, June 21, 2011 and September 20, 2011 Trustee meetings.

6. In reply to paragraph 31 of the May 2017 Affidavit, the 1985 Trust requires a certain number of Trustees to carry on the business of the Trust. It is also necessary for all existing Trustees to jointly hold the assets of the Trust. As there was a pending commercial deal, it was necessary that the Trusts be properly constituted and Trust assets properly held in

advance of the pending commercial deal. John MacNutt may not have been aware of these requirements for the Trusts.

7. In response to paragraph 39 of the May 2017 Affidavit, Catherine's involvement in the 2011 action and the 2013 action has led to increased litigation. This has included her support of the Application of the Office of the Public Trustee to pursue document production from the SFN, support of intervenor Applications, and an attempt to stay a mediation/arbitration process commenced by the other four Trustees. All of these Applications were unsuccessful, but resulted in significant legal fees having to be incurred by the Trusts.

8. Catherine supported Maurice Stoney's Application to extend an appeal period and also pursue intervenor status. Mr. Stoney's Application was ultimately unsuccessful. Catherine did not support an Application to have Stoney's lawyer pay costs to the Trusts even though this would have benefited the Trust. Rather than accept the decision of Justice Thomas, Catherine apparently commented that the decision was "a travesty". Attached as Exhibit "C" to my Affidavit is a newspaper article quoting Catherine. Attached as Exhibit "D" to my Affidavit is a copy of Stoney's appeal to the SFN for membership status. Interestingly enough, Catherine is recorded as voting against Mr. Stoney's Application.

9. In response to paragraph 43 of the May 2017 Affidavit, I have spoken to Bertha L'Hirondelle and Mike McKinney. They both advised me that the allegations in that paragraph are false. Ms. L'Hirondelle was the Chief during the time period referred to in the paragraph. She advised me that she received a salary for being Chief which was paid by the SFN. She also received a small amount from the Companies for work assisting in the management of the Slave Lake businesses. She was never "paid large sums" by the SFN, the Companies or the Trusts. She advised me that there was no "lucrative contract". Mike McKinney also advised me that there was no "lucrative contract" and that he at no time was "paid large sums" by the SFN, the Companies or the Trusts. Mr. McKinnney advised me that he spoke to Mr. MacNutt concerning the allegations made against them and Mr. MacNutt confirmed that the allegations were untrue and that he had never advised Mr. Ward that the Chief and Mr. McKinney were "paid large sums" from a "lucrative contract". Both Mr. McKinney and Ms. L'Hirondelle are very upset by these wrongful allegations being made against them.

10. In response to paragraph 53 of the May 2017 Affidavit, the Trusts have not spent "more than $4 million of Trust money on an amorphous litigation process". That amount is

inaccurate. However it is sadly true that counsel for the Trusts and the four Trustees have had to defend numerous Applications brought by Catherine and others at significant costs to the Trusts.

11. I make this Affidavit in response to the evidence provided by Catherine Twinn.

SWORN before me at the City of Edmonton, in the Province of Alberta, this 30th day of August, 2017.

Commissioner for Oaths in and for the Province of Alberta

JOSEPH J. KUEBER
Barrister & Solicitor

PAUL BUJOLD

Court of Queen's Bench of Alberta

Citation: 1985 Sawridge Trust v Alberta (Public Trustee), 2015 ABQB 799

Date: 20151217
Docket: 1103 14112
Registry: Edmonton

In the Matter of the *Trustees Act*, RSA 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 the Sawridge Indian Band, on April 15, 1985 (the "1985 Sawridge Trust")

Between:

Ronald Twinn, Catherine Twinn, Walter Felix Twin, Bertha L'Hoirondelle and Clara Midbo, As Trustees for the 1985 Sawridge Trust

Respondents

- and -

Public Trustee of Alberta

Applicant

Reasons for Judgment of the Honourable Mr. Justice D.R.G. Thomas

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I Introduction

[1] This is a decision on a production application made by the Public Trustee and also contains other directions. Before moving to the substance of the decision and directions, I review the steps that have led up to this point and the roles of the parties involved. Much of the relevant information is collected in an earlier and related decision, ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2012 ABQB 365 ["***Sawridge #1***"], 543 AR 90 affirmed 2013 ABCA 226, 553 AR 324 ["***Sawridge #2***"]. The terms defined in ***Sawridge #1*** are used in this decision.

II. Background

[2] On April 15, 1985, the Sawridge Indian Band, No. 19, now known as the Sawridge First Nation [sometimes referred to as the "Band", "Sawridge Band", or "SFN"], set up the 1985 Sawridge Trust [sometimes referred to as the "Trust" or the "Sawridge Trust"] to hold some Band assets on behalf of its then members. The 1985 Sawridge Trust and other related trusts were created in the expectation that persons who had previously been excluded from Band membership by gender (or the gender of their parents) would be entitled to join the Band as a consequence of amendments to the *Indian Act*, RSC 1985, c I-5, which were being proposed to make that legislation compliant with the *Canadian Charter of Rights and Freedoms*, Part I, *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the "*Charter*"].

[3] The 1985 Sawridge Trust is administered by the Trustees [the "Sawridge Trustees" or the "Trustees"]. The Trustees had sought advice and direction from this Court in respect to proposed amendments to the definition of the term "Beneficiaries" in the 1985 Sawridge Trust (the "Trust Amendments") and confirmation of the transfer of assets into that Trust.

[4] One consequence of the proposed amendments to the 1985 Sawridge Trust would be to affect the entitlement of certain dependent children to share in Trust assets. There is some question as to the exact nature of the effects, although it seems to be accepted by all of those involved on this application that some children presently entitled to a share in the benefits of the 1985 Sawridge Trust would be excluded if the proposed changes are approved and implemented. Another concern is that the proposed revisions would mean that certain dependent children of proposed members of the Trust would become beneficiaries and be entitled to shares in the Trust, while other dependent children would be excluded.

[5] Representation of the minor dependent children potentially affected by the Trust Amendments emerged as an issue in 2011. At the time of confirming the scope of notices to be given in respect to the application for advice and directions, it was observed that children who might be affected by the Trust Amendments were not represented by independent legal counsel. This led to a number of events:

> August 31, 2011 - I directed that the Office of the Public Trustee of Alberta [the "Public Trustee"] be notified of the proceedings and invited to comment on whether it should act in respect of any existing or potential minor beneficiaries of the Sawridge Trust.

February 14, 2012 - The Public Trustee applied:

1. to be appointed as the litigation representative of minors interested in this proceeding;
2. for the payment of advance costs on a solicitor and own client basis and exemption from liability for the costs of others; and
3. for an advance ruling that information and evidence relating to the membership criteria and processes of the Sawridge Band is relevant material.

April 5, 2012 - the Sawridge Trustees and the SFN resisted the Public Trustee's application.

June 12, 2012 - I concluded that a litigation representative was necessary to represent the interests of the minor beneficiaries and potential beneficiaries of the 1985 Sawridge Trust, and appointed the Public Trustee in that role: ***Sawridge #1***, at paras 28-29, 33. I ordered that Public Trustee, as a neutral and independent party, should receive full and advance indemnification for its activities in relation to the Sawridge Trust (***Sawridge #1***, at para 42), and permitted steps to investigate "... the Sawridge Band membership criteria and processes because such information may be relevant and material ..." (***Sawridge #1***, at para 55).

June 19, 2013 - the Alberta Court of Appeal confirmed the award of solicitor and own client costs to the Public Trustee, as well as the exemption from unfavourable cost awards (***Sawridge #2***).

April 30, 2014 - the Trustees and the Public Trustee agreed to a consent order related to questioning of Paul Bujold and Elizabeth Poitras.

June 24, 2015 - the Public Trustee's application directed to the SFN was stayed and the Public Trustee was ordered to provide the SFN with the particulars of and the basis for the relief it claimed. A further hearing was scheduled for June 30, 2015.

June 30, 2015 - after hearing submissions, I ordered that:

- the Trustee's application to settle the Trust was adjourned;
- the Public Trustee file an amended application for production from the SFN with argument to be heard on September 2, 2015; and
- the Trustees identify issues concerning calculation and reimbursement of the accounts of the Public Trustee for legal services.

September 2/3, 2015 - after a chambers hearing, I ordered that:

- within 60 days the Trustees prepare and serve an affidavit of records, per the *Alberta Rules of Court*, Alta Reg 124/2010 [the "*Rules*", or individually a "*Rule*"],
- the Trustees may withdraw their proposed settlement agreement and litigation plan; and

- some document and disclosure related items sought by the Public Trustee were adjourned *sine die*.

("September 2/3 Order")

October 5, 2015- I directed the Public Trustee to provide more detailed information in relation to its accounts totalling $205,493.98. This further disclosure was intended to address a concern by the Sawridge Trustees concerning steps taken by the Public Trustee in this proceeding.

[6] Earlier steps have perhaps not ultimately resolved but have advanced many of the issues which emerged in mid-2015. The Trustees undertook to provide an Affidavit of Records. I have directed additional disclosure of the activities of the legal counsel assisting the Public Trustee to allow the Sawridge Trustees a better opportunity to evaluate those legal accounts. The most important issue which remains in dispute is the application by the Public Trustee for the production of documents/information held by the SFN.

[7] This decision responds to that production issue, but also more generally considers the current state of this litigation in an attempt to refocus the direction of this proceeding and the activities of the Public Trustee to ensure that it meets the dual objectives of assisting this Court in directing a fair distribution scheme for the assets of the 1985 Sawridge Trust and the representation of potential minor beneficiaries.

III. The 1985 Sawridge Trust

[8] *Sawridge #1* at paras 7-13 reviews the history of the 1985 Sawridge Trust. I repeat that information verbatim, as this context is relevant to the role and scope of the Public Trustee's involvement in this matter:

> [8] In 1982 various assets purchased with funds of the Sawridge Band were placed in a formal trust for the members of the Sawridge Band. In 1985 those assets were transferred into the 1985 Sawridge Trust. [In 2012] the value of assets held by the 1985 Sawridge Trust is approximately $70 million. As previously noted, the beneficiaries of the Sawridge Trust are restricted to persons who were members of the Band prior to the adoption by Parliament of the *Charter* compliant definition of Indian status.
>
> [9] In 1985 the Sawridge Band also took on the administration of its membership list. It then attempted (unsuccessfully) to deny membership to Indian women who married non-aboriginal persons: ***Sawridge Band v. Canada***, 2009 FCA 123, 391 N.R. 375, leave denied [2009] S.C.C.A. No. 248. At least 11 women were ordered to be added as members of the Band as a consequence of this litigation: ***Sawridge Band v. Canada***, 2003 FCT 347, 2003 FCT 347, [2003] 4 F.C. 748, affirmed 2004 FCA 16, [2004] 3 F.C.R. 274. Other litigation continues to the present in relation to disputed Band memberships: ***Poitras v. Sawridge Band***, 2012 FCA 47, 428 N.R. 282, leave sought [2012] S.C.C.A. No. 152.
>
> [10] At the time of argument in April 2012, the Band had 41 adult members, and 31 minors. The Sawridge Trustees report that 23 of those minors currently qualify as beneficiaries of the 1985 Sawridge Trust; the other eight minors do not.

[11] At least four of the five Sawridge Trustees are beneficiaries of the Sawridge Trust. There is overlap between the Sawridge Trustees and the Sawridge Band Chief and Council. Trustee Bertha L'Hirondelle has acted as Chief; Walter Felix Twinn is a former Band Councillor. Trustee Roland Twinn is currently the Chief of the Sawridge Band.

[12] The Sawridge Trustees have now concluded that the definition of "Beneficiaries" contained in the 1985 Sawridge Trust is "potentially discriminatory". They seek to redefine the class of beneficiaries as the present members of the Sawridge Band, which is consistent with the definition of "Beneficiaries" in another trust known as the 1986 Trust.

[13] This proposed revision to the definition of the defined term "Beneficiaries" is a precursor to a proposed distribution of the assets of the 1985 Sawridge Trust. The Sawridge Trustees indicate that they have retained a consultant to identify social and health programs and services to be provided by the Sawridge Trust to the beneficiaries and their minor children. Effectively they say that whether a minor is or is not a Band member will not matter: see the Trustee's written brief at para. 26. The Trustees report that they have taken steps to notify current and potential beneficiaries of the 1985 Sawridge Trust and I accept that they have been diligent in implementing that part of my August 31 Order.

IV. The Current Situation

[9] This decision and the June 30 and September 2/3, 2015 hearings generally involve the extent to which the Public Trustee should be able to obtain documentary materials which the Public Trustee asserts are potentially relevant to its representation of the identified minor beneficiaries and the potential minor beneficiaries. Following those hearings, some of the disagreements between the Public Trustee and the 1985 Sawridge Trustees were resolved by the Sawridge Trustees agreeing to provide a *Rules* Part V affidavit of records within 60 days of the September 2/3 Order.

[10] The primary remaining issue relates to the disclosure of information in documentary form sought by the Public Trustee from the SFN and there are also a number of additional ancillary issues. The Public Trustee seeks information concerning:

1. membership in the SFN,
2. candidates who have or are seeking membership with the SFN,
3. the processes involved to determine whether individuals may become part of the SFN,
4. records of the application processes and certain associated litigation, and
5 how assets ended up in the 1985 Sawridge Trust.

[11] The SFN resists the application of the Public Trustee, arguing it is not a party to this proceeding and that the Public Trustee's application falls outside the *Rules*. Beyond that, the SFN questions the relevance of the information sought.

V. Submissions and Argument

A. The Public Trustee

[12] The Public Trustee takes the position that it has not been able to complete the responsibilities assigned to it by me in ***Sawridge #1*** because it has not received enough information on potential, incomplete and filed applications to join the SFN. It also needs information on the membership process, including historical membership litigation scenarios, as well as data concerning movement of assets into the 1985 Sawridge Trust.

[13] It also says that, without full information, the Public Trustee cannot discharge its role in representing affected minors.

[14] The Public Trustee's position is that the Sawridge Band is a party to this proceeding, or is at least so closely linked to the 1985 Sawridge Trustees that the Band should be required to produce documents/information. It says that the Court can add the Sawridge Band as a party. In the alternative, the Public Trustee argues that *Rules* 5.13 and 9.19 provide a basis to order production of all relevant and material records.

B. The SFN

[15] The SFN takes the position that it is not a party to the Trustee's proceedings in this Court and it has been careful not to be added as a party. The SFN and the Sawridge Trustees are distinct and separate entities. It says that since the SFN has not been made a party to this proceeding, the *Rules* Part V procedures to compel documents do not apply to it. This is a stringent test: ***Trimay Wear Plate Ltd. v Way***, 2008 ABQB 601, 456 AR 371; ***Wasylyshen v Canadian Broadcasting Corp.***, [2006] AJ No 1169 (Alta QB).

[16] The only mechanism provided for in the *Rules* to compel a non-party such as the SFN to provide documents is *Rule* 5.13, and its function is to permit access to specific identified items held by the third party. That process is not intended to facilitate a 'fishing expedition' (***Ed Miller Sales & Rentals Ltd v Caterpillar Tractor Co*** (1988), 94 AR 17, 63 Alta LR (2d) 189 (Alta QB)) or compel disclosure (***Gainers Inc. v Pocklington Holdings Inc.*** (1995), 169 AR 288, 30 Alta LR (3d) 273 (Alta CA)). Items sought must be particularized, and this process is not a form of discovery: ***Esso Resources Canada Ltd. v Stearns Catalytic Ltd.*** (1989), 98 AR 374, 16 ACWS (3d) 286 (Alta CA).

[17] The SFN notes the information sought is voluminous, confidential and involves third parties. It says that the Public Trustee's application is document discovery camouflaged under a different name. In any case, a document is only producible if it is relevant and material to the arguments pled: *Rule* 5.2; ***Weatherill (Estate) v Weatherill***, 2003 ABQB 69, 337 AR 180.

[18] The SFN takes the position that ***Sawridge #1*** ordered the Public Trustee to investigate two points: 1) identifying the beneficiaries of the 1985 Sawridge Trust; and 2) scrutiny of transfer of assets into the 1985 Sawridge Trust. They say that what the decision in ***Sawridge #1*** did not do was authorize interference or duplication in the SFN's membership process and its results. Much of what the Public Trustee seeks is not relevant to either issue, and so falls outside the scope of what properly may be sought under *Rule* 5.13.

[19] Privacy interests and privacy legislation are also factors: ***Royal Bank of Canada v Trang***, 2014 ONCA 883 at paras 97, 123 OR (3d) 401; *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5. The Public Trustee should not have access to this information

unless the SFN's application candidates consent. Much of the information in membership applications is personal and sensitive. Other items were received by the SFN during litigation under an implied undertaking of confidentiality: ***Juman v Doucette; Doucette (Litigation Guardian of) v Wee Watch Day Care Systems,*** 2008 SCC 8, [2008] 1 SCR 157. The cost to produce the materials is substantial.

[20] The SFN notes that even though it is a target of the relief sought by the Public Trustee that it was not served with the July 16, 2015 application, and states the Public Trustee should follow the procedure in *Rule* 6.3. The SFN expressed concern that the Public Trustee's application represents an unnecessary and prejudicial investigation which ultimately harms the beneficiaries and potential beneficiaries of the 1985 Sawridge Trust. In ***Sawridge #2*** at para 29, the Court of Appeal had stressed that the order in ***Sawridge #1*** that the Public Trustee's costs be paid on a solicitor and own client basis is not a "blank cheque", but limited to activities that are "fair and reasonable". It asks that the Public Trustee's application be dismissed and that the Public Trustee pay the costs of the SFN in this application, without indemnification from the 1985 Sawridge Trust.

C. The Sawridge Trustees

[21] The Sawridge Trustees offered and I ordered in my September 2/3 Order that within 60 days the Trustees prepare and deliver a *Rule* 5.5-5.9 affidavit of records to assist in moving the process forward. This resolved the immediate question of the Public Trustee's access to documents held by the Trustees.

[22] The Trustees generally support the position taken by the SFN in response to the Public Trustee's application for Band documents. More broadly, the Trustees questioned whether the Public Trustee's developing line of inquiry was necessary. They argued that it appears to target the process by which the SFN evaluates membership applications. That is not the purpose of this proceeding, which is instead directed at re-organizing and distributing the 1985 Sawridge Trust in a manner that is fair and non-discriminatory to members of the SFN.

[23] They argue that the Public Trustee is attempting to attack a process that has already undergone judicial scrutiny. They note that the SFN's admission procedure was approved by the Minister of Indian and Northern Affairs, and the Federal Court concluded it was fair: ***Stoney v Sawridge First Nation***, 2013 FC 509, 432 FTR 253. Further, the membership criteria used by the SFN operate until they are found to be invalid: ***Huzar v Canada***, [2000] FCJ No 873 at para 5, 258 NR 246. Attempts to circumvent these findings in applications to the Canadian Human Rights Commission were rejected as a collateral attack, and the same should occur here.

[24] The 1985 Sawridge Trustees reviewed the evidence which the Public Trustee alleges discloses an unfair membership admission process, and submit that the evidence relating to Elizabeth Poitras and other applicants did not indicate a discriminatory process, and in any case was irrelevant to the critical question for the Public Trustee as identified in ***Sawridge #1***, namely that the Public Trustee's participation is to ensure minor children of Band members are treated fairly in the proposed distribution of the assets of the 1985 Sawridge Trust.

[25] Additional submissions were made by two separate factions within the Trustees. Ronald Twinn, Walter Felix Twin, Bertha L'Hoirondelle and Clara Midbo argued that an unfiled affidavit made by Catherine Twinn was irrelevant to the Trustees' disclosure. Counsel for Catherine Twinn expressed concern in relation to the Trustee's activities being transparent and

that the ultimate recipients of the 1985 Sawridge Trust distribution be the appropriate beneficiaries.

VI. Analysis

[26] The Public Trustee's application for production of records/information from the SFN is denied. First, the Public Trustee has used a legally incorrect mechanism to seek materials from the SFN. Second, it is necessary to refocus these proceedings and provide a well-defined process to achieve a fair and just distribution of the assets of the 1985 Sawridge Trust. To that end, the Public Trustee may seek materials/information from the Sawridge Band, but only in relation to specific issues and subjects.

A. Rule 5.13

[27] I agree with the SFN that it is a third party to this litigation and is not therefore subject to the same disclosure procedures as the Sawridge Trustees who are a party. Alberta courts do not use proximal relationships as a bridge for disclosure obligations: ***Trimay Wear Plate Ltd. v Way***, at para 17.

[28] If I were to compel document production by the Sawridge Band, it would be via *Rule* 5.13:

> 5.13(1) On application, and after notice of the application is served on the person affected by it, the Court may order a person who is not a party to produce a record at a specified date, time and place if
>
> (a) the record is under the control of that person,
>
> (b) there is reason to believe that the record is relevant and material, and
>
> (c) the person who has control of the record might be required to produce it at trial.
>
> (2) The person requesting the record must pay the person producing the record an amount determined by the Court.

[29] The modern *Rule* 5.13 uses language that closely parallels that of its predecessor *Alberta Rules of Court*, Alta Reg 390/1968, s 209. Jurisprudence applying *Rule* 5.13 has referenced and used approaches developed in the application of that precursor provision: ***Toronto Dominion Bank v Sawchuk***, 2011 ABQB 757, 530 AR 172; ***H.Z. v Unger***, 2013 ABQB 639, 573 AR 391. I agree with this approach and conclude that the principles in the pre-*Rule* 5.13 jurisprudence identified by the SFN apply here: ***Ed Miller Sales & Rentals Ltd v Caterpillar Tractor Co***; ***Gainers Inc. v Pocklington Holdings Inc.***; ***Esso Resources Canada Ltd. v Stearns Catalytic Ltd.***

[30] The requirement for potential disclosure is that "there is reason to believe" the information sought is "relevant and material". The SFN has argued relevance and materiality may be divided into "primary, secondary, and tertiary" relevance, however the Alberta Court of Appeal has rejected these categories as vague and not useful: ***Royal Bank of Canada v Kaddoura***, 2015 ABCA 154 at para 15, 15 Alta LR (6th) 37.

[31] I conclude that the only documents which are potentially disclosable in the Public Trustee's application are those that are "relevant and material" to the issue before the court.

B. Refocussing the role of the Public Trustee

[32] It is time to establish a structure for the next steps in this litigation before I move further into specific aspects of the document production dispute between the SFN and the Public Trustee. A prerequisite to any document disclosure is that the information in question must be *relevant*. Relevance is tested *at the present point*.

[33] In ***Sawridge #1*** I at paras 46-48 I determined that the inquiry into membership processes was relevant because it was a subject of some dispute. However, I also stressed the exclusive jurisdiction of the Federal Court (paras 50-54) in supervision of that process. Since ***Sawridge #1*** the Federal Court has ruled in ***Stoney v Sawridge First Nation*** on the operation of the SFN's membership process.

[34] Further, in ***Sawridge #1*** I noted at paras 51-52 that in ***783783 Alberta Ltd. v Canada (Attorney General)***, 2010 ABCA 226, 322 DLR (4th) 56, the Alberta Court of Appeal had concluded this Court's inherent jurisdiction included an authority to make findings of fact and law in what would nominally appear to be the exclusive jurisdiction of the Tax Court of Canada. However, that step was based on *necessity*. More recently in ***Strickland v Canada (Attorney General)***, 2015 SCC 37, the Supreme Court of Canada confirmed the Federal Courts decision to refuse judicial review of the *Federal Child Support Guidelines*, SOR/97-175, not because those courts did not have potential jurisdiction concerning the issue, but because the provincial superior courts were better suited to that task because they "... deal day in and day out with disputes in the context of marital breakdown ...": para 61.

[35] The same is true for this Court attempting to regulate the operations of First Nations, which are 'Bands' within the meaning of the *Indian Act*. The Federal Court is the better forum and now that the Federal Court has commented on the SFN membership process in ***Stoney v Sawridge First Nation,*** there is no need, nor is it appropriate, for this Court to address this subject. If there are outstanding disputes on whether or not a particular person should be admitted or excluded from Band membership then that should be reviewed in the Federal Court, and not in this 1985 Sawridge Trust modification and distribution process.

[36] It follows that it will be useful to re-focus the purpose of the Public Trustee's participation in this matter. That will determine what is and what is not *relevant*. The Public Trustee's role is not to conduct an open-ended inquiry into the membership of the Sawridge Band and historic disputes that relate to that subject. Similarly, the Public Trustee's function is not to conduct a general inquiry into potential conflicts of interest between the SFN, its administration and the 1985 Sawridge Trustees. The overlap between some of these parties is established and obvious.

[37] Instead, the future role of the Public Trustee shall be limited to four tasks:

1. Representing the interests of minor beneficiaries and potential minor beneficiaries so that they receive fair treatment (either direct or indirect) in the distribution of the assets of the 1985 Sawridge Trust;
2. Examining on behalf of the minor beneficiaries the manner in which the property was placed/settled in the Trust; and
3. Identifying potential but not yet identified minors who are children of SFN members or membership candidates; these are potentially minor beneficiaries of the 1985 Sawridge Trust; and

4. Supervising the distribution process itself.

[38] The Public Trustee's attention appears to have expanded beyond these four objectives. Rather than unnecessarily delay distribution of the 1985 Sawridge Trust assets, I instruct the Public Trustee and the 1985 Sawridge Trustees to immediately proceed to complete the first three tasks which I have outlined.

[39] I will comment on the fourth and final task in due course.

Task 1 - Arriving at a fair distribution scheme

[40] The first task for the 1985 Sawridge Trustees and the Public Trustee is to develop for my approval a proposed scheme for distribution of the 1985 Sawridge Trust that is fair in the manner in which it allocates trust assets between the potential beneficiaries, adults and children, previously vested or not. I believe this is a largely theoretical question and the exact numbers and personal characteristics of individuals in the various categories is generally irrelevant to the Sawridge Trustee's proposed scheme. What is critical is that the distribution plan can be critically tested by the Public Trustee to permit this Court to arrive at a fair outcome.

[41] I anticipate the critical question for the Public Trustee at this step will be to evaluate whether any differential treatment between adult beneficiaries and the children of adult beneficiaries is or is not fair to those children. I do not see that the particular identity of these individuals is relevant. This instead is a question of fair treatment of the two (or more) categories.

[42] On September 3, 2015, the 1985 Sawridge Trustees withdrew their proposed distribution arrangement. I direct the Trustees to submit a replacement distribution arrangement by January 29, 2016.

[43] The Public Trustee shall have until March 15, 2016 to prepare and serve a *Rule* 5.13(1) application on the SFN which identifies specific documents that it believes are relevant and material to test the fairness of the proposed distribution arrangement to minors who are children of beneficiaries or potential beneficiaries.

[44] If necessary, a case management meeting will be held before April 30, 2016 to decide any disputes concerning any *Rule* 5.13(1) application by the Public Trustee. In the event no *Rule* 5.13(1) application is made in relation to the distribution scheme the Public Trustee and 1985 Sawridge Band Trustees shall make their submissions on the distribution proposal at the pre-April 30 case management session.

Task 2 – Examining potential irregularities related to the settlement of assets to the Trust

[45] There have been questions raised as to what assets were settled in the 1985 Sawridge Trust. At this point it is not necessary for me to examine those potential issues. Rather, the first task is for the Public Trustee to complete its document request from the SFN which may relate to that issue.

[46] The Public Trustee shall by January 29, 2016 prepare and serve a *Rule* 5.13(1) application on the Sawridge Band that identifies specific types of documents which it believes are relevant and material to the issue of the assets settled in the 1985 Sawridge Trust.

[47] A case management hearing will be held before April 30, 2016 to decide any disputes concerning any such *Rule* 5.13(1) application by the Public Trustee.

Task 3 - Identification of the pool of potential beneficiaries

[48] The third task involving the Public Trustee is to assist in identifying potential minor beneficiaries of the 1985 Sawridge Trust. The assignment of this task recognizes that the Public Trustee operates within its Court-ordered role when it engages in inquiries to establish the pools of individuals who are minor beneficiaries and potential minor beneficiaries. I understand that the first category of minor beneficiaries is now identified. The second category of potential minor beneficiaries is an area of legitimate investigation for the Public Trustee and involves two scenarios:

1. an individual with an unresolved application to join the Sawridge Band and who has a child; and
2. an individual with an unsuccessful application to join the Sawridge Band and who has a child.

[49] I stress that the Public Trustee's role is limited to the representation of potential child beneficiaries of the 1985 Sawridge Trust only. That means litigation, procedures and history that relate to past and resolved membership disputes are not relevant to the proposed distribution of the 1985 Sawridge Trust. As an example, the Public Trustee has sought records relating to the disputed membership of Elizabeth Poitras. As noted, that issue has been resolved through litigation in the Federal Court, and that dispute has no relation to establishing the identity of potential minor beneficiaries. The same is true of any other adult Sawridge Band members.

[50] As Aalto, J. observed in ***Poitras v Twinn***, 2013 FC 910, 438 FTR 264, "[M]any gallons of judicial ink have been spilt" in relation to the gender-based disputes concerning membership in the SFN. I do not believe it is necessary to return to this issue. The SFN's past practise of relentless resistance to admission into membership of aboriginal women who had married non-Indian men is well established.

[51] The Public Trustee has no relevant interest in the children of any parent who has an unresolved application for membership in the Sawridge Band. If that outstanding application results in the applicant being admitted to the SFN then that child will become another minor represented by the Public Trustee.

[52] While the Public Trustee has sought information relating to incomplete applications or other potential SFN candidates, I conclude that an open-ended 'fishing trip' for unidentified hypothetical future SFN members, who may also have children, is outside the scope of the Public Trustee's role in this proceeding. There needs to be minimum threshold proximity between the Public Trustee and any unknown and hypothetical minor beneficiary. As I will stress later, the Public Trustee's activities need to be reasonable and fair, and balance its objectives: cost-effective participation in this process (i.e., not unreasonably draining the Trust) and protecting the interests of minor children of SFN members. Every dollar spent in legal and research costs turning over stones and looking under bushes in an attempt to find an additional, hypothetical minor beneficiary reduces the funds held in trust for the known and existing minor children who are potential beneficiaries of the 1985 Sawridge Trust distribution and the clients of the Public Trustee. Therefore, I will only allow investigation and representation by the Public Trustee of

children of persons who have, at a minimum, completed a Sawridge Band membership application.

[53] The Public Trustee also has a potential interest in a child of a Sawridge Band candidate who has been rejected or is rejected after an unsuccessful application to join the SFN. In these instances the Public Trustee is entitled to inquire whether the rejected candidate intends to appeal the membership rejection or challenge the rejection through judicial review in the Federal Court. If so, then that child is also a potential candidate for representation by the Public Trustee.

[54] This Court's function is not to duplicate or review the manner in which the Sawridge Band receives and evaluates applications for Band membership. I mean by this that if the Public Trustee's inquiries determine that there are one or more outstanding applications for Band membership by a parent of a minor child then that is not a basis for the Public Trustee to intervene in or conduct a collateral attack on the manner in which that application is evaluated, or the result of that process.

[55] I direct that this shall be the full extent of the Public Trustee's participation in any disputed or outstanding applications for membership in the Sawridge Band. This Court and the Public Trustee have no right, as a third party, to challenge a crystalized result made by another tribunal or body, or to interfere in ongoing litigation processes. The Public Trustee has no right to bring up issues that are not yet necessary and relevant.

[56] In summary, what is pertinent at this point is to identify the potential recipients of a distribution of the 1985 Sawridge Trust, which include the following categories:

1. Adult members of the SFN;
2. Minors who are children of members of the SFN;
3. Adults who have unresolved applications to join the SFN;
4. Children of adults who have unresolved applications to join the SFN;
5. Adults who have applied for membership in the SFN but have had that application rejected and are challenging that rejection by appeal or judicial review; and
6. Children of persons in category 5 above.

[57] The Public Trustee represents members of category 2 and potentially members of categories 4 and 6. I believe the members of categories 1 are 2 are known, or capable of being identified in the near future. The information required to identify persons within categories 3 and 5 is relevant and necessary to the Public Trustee's participation in this proceeding. If this information has not already been disclosed, then I direct that the SFN shall provide to the Public Trustee by January 29, 2016 the information that is necessary to identify those groups:

1. The names of individuals who have:
   a) made applications to join the SFN which are pending (category 3); and
   b) had applications to join the SFN rejected and are subject to challenge (category 5); and
2. The contact information for those individuals where available.

[58] As noted, the Public Trustee's function is limited *to representing minors*. That means the Public Trustee:

1. shall inquire of the category 3 and 5 individuals to identify if they have any children; and

2. if an applicant has been rejected whether the applicant has challenged, or intends to challenge a rejection by appeal or by judicial proceedings in the Federal Court.

[59] This information should:

1. permit the Public Trustee to know the number and identity of the minors whom it represents (category 2) and additional minors who may in the future enter into category 2 and become potential minor recipients of the 1985 Sawridge Trust distribution;

2. allow timely identification of:

a) the maximum potential number of recipients of the 1985 Sawridge Trust distribution (the total number of persons in categories 1-6);

b) the number of adults and minors whose potential participation in the distribution has "crystalized" (categories 1 and 2); and

c) the number of adults and minors who are potential members of categories 1 and 2 at some time in the future (total of categories 3-6).

[60] These are declared to be the limits of the Public Trustee's participation in this proceeding and reflects the issues in respect to which the Public Trustee has an interest. Information that relates to these issues is potentially relevant.

[61] My understanding from the affidavit evidence and submissions of the SFN and the 1985 Sawridge Trustees is that the Public Trustee has already received much information about persons on the SFN's membership roll and prospective and rejected candidates. I believe that this will provide all the data that the Public Trustee requires to complete Task 3. Nevertheless, the Public Trustee is instructed that if it requires any additional documents from the SFN to assist it in identifying the current and possible members of category 2, then it is to file a *Rule* 5.13 application by January 29, 2016. The Sawridge Band and Trustees will then have until March 15, 2016 to make written submissions in response to that application. I will hear any disputed *Rule* 5.13 disclosure application at a case management hearing to be set before April 30, 2016.

Task 4 - General and residual distributions

[62] The Sawridge Trustees have concluded that the appropriate manner to manage the 1985 Sawridge Trust is that its property be distributed in a fair and equitable manner. Approval of that scheme is Task 1, above. I see no reason, once Tasks 1-3 are complete, that there is any reason to further delay distribution of the 1985 Sawridge Trust's property to its beneficiaries.

[63] Once Tasks 1-3 are complete the assets of the Trust may be divided into two pools:

Pool 1: trust property available for immediate distribution to the identified trust beneficiaries, who may be adults and/or children, depending on the outcome of Task 1; and

Pool 2: trust funds that are reserved at the present but that may at some point be distributed to:

a) a potential future successful SFN membership applicant and/or child of a successful applicant, or

b) an unsuccessful applicant and/or child of an unsuccessful applicant who successfully appeals/challenges the rejection of their membership application.

[64] As the status of the various outstanding potential members of the Sawridge Band is determined, including exhaustion of appeals, the second pool of 'holdback' funds will either:

1. be distributed to a successful applicant and/or child of the applicant as that result crystalizes; or

2. on a pro rata basis:

a) be distributed to the members of Pool 1, and

b) be reserved in Pool 2 for future potential Pool 2 recipients.

[65] A minor child of an outstanding applicant is a potential recipient of Trust property, depending on the outcome of Task 1. However, there is no broad requirement for the Public Trustee's direct or indirect participation in the Task 4 process, beyond a simple supervisory role to ensure that minor beneficiaries, if any, do receive their proper share.

C. Disagreement among the Sawridge Trustees

[66] At this point I will not comment on the divergence that has arisen amongst the 1985 Sawridge Trustees and which is the subject of a separate originating notice (Docket 1403 04885) initiated by Catherine Twinn. I note, however, that much the same as the Public Trustee, the 1985 Sawridge Trustees should also refocus on the four tasks which I have identified.

[67] First and foremost, the Trustees are to complete their part of Task 1: propose a distribution scheme that is fair to all potential members of the distribution pools. This is not a question of specific cases, or individuals, but a scheme that is fair to the adults in the SFN and their children, current and potential.

[68] Task 2 requires that the 1985 Sawridge Trustees share information with the Public Trustee to satisfy questions on potential irregularities in the settlement of property into the 1985 Sawridge Trust.

[69] As noted, I believe that the information necessary for Task 3 has been accumulated. I have already stated that the Public Trustee has no right to engage and shall not engage in collateral attacks on membership processes of the SFN. The 1985 Sawridge Trustees, or any of them, likewise have no right to engage in collateral attacks on the SFN's membership processes. Their fiduciary duty (and I mean all of them), is to the beneficiaries of the Trust, and not third parties.

D. Costs for the Public Trustee

[70] I believe that the instructions given here will refocus the process on Tasks 1 – 3 and will restrict the Public Trustee's activities to those which warrant full indemnity costs paid from the 1985 Sawridge Trust. While in *Sawridge #1* I had directed that the Public Trustee may inquire into SFN Membership processes at para 54 of that judgment, the need for that investigation is now declared to be over because of the decision in *Stoney v Sawridge First Nation*. I repeat that

inquiries into the history and processes of the SFN membership are no longer necessary or relevant.

[71] As the Court of Appeal observed in *Sawridge #2* at para 29, the Public Trustee's activities are subject to scrutiny by this Court. In light of the four Task scheme set out above I will not respond to the SFN's cost argument at this point, but instead reserve on that request until I evaluate the *Rule* 5.13 applications which may arise from completion of Tasks 1-3.

Heard on the 2nd and 3rd days of September, 2015.
Dated at the City of Edmonton, Alberta this 17th day of December, 2015.

D.R.G. Thomas
J.C.Q.B.A.

Appearances:

Janet Hutchison
(Hutchison Law)
and
Eugene Meehan, QC
(Supreme Advocacy LLP)
for the Public Trustee of Alberta / Applicant

Edward H. Molstad, Q.C.
(Parlee McLaws LLP)
for the Sawridge First Nation / Respondent

Doris Bonora
(Dentons LLP)
and
Marco S. Poretti
(Reynolds Mirth Richards & Farmer)
for the 1985 Sawridge Trustees / Respondents

J.J. Kueber, Q.C.
(Bryan & Co.)
for Ronald Twinn, Walter Felix Twin,
Bertha L'Hoirondelle and Clara Midbo

Karen Platten, Q.C.
(McLennan Ross LLP)
For Catherine Twinn

SAWRIDGE TRUSTS

Catherine Twinn
EXHIBIT NO. DD
July 20/17
D. WILLIAMS DW

TRUSTEE MEETING MINUTES

Sawridge Inn Edmonton South, Edmonton
26 April 2011

Attendees: **Bertha L'Hirondelle, Clara Midbo, Catherine Twinn, Roland Twinn, Walter Felix Twin**

Guests: **Brian Heidecker, Chair, Paul Bujold, Trusts Administrator, Doris Bonora, Trust Lawyer, Donovan Waters, Trust Lawyer (Conference Telephone), Eileen Key, Accountant**

Recorder: **Paul Bujold**

1. OPENING AND PRAYER

Brian called the meeting to order at 10:00 AM and opened the meeting with a prayer led by Walter Felix.

2. REVIEW OF AGENDA

Following the meeting with Doris Bonora and Donovan Waters (section 5.2.1 below) the Trustees reviewed the agenda for the meeting. The following items were added to the Agenda:

5.3 Lilly Potskin Application for House Repairs Funding

6.2.2 Affirmative Action and Value-Based Management of the Companies Policy.

2011-014 **Moved by Bertha, seconded by Clara that the agenda be accepted as amended.**

Carried unanimously.

3. REVIEW OF MINUTES 15 MARCH 2011

Minutes from the meeting held 15 March 2011 were reviewed.

The last paragraph in the introduction of Section 3 is substituted with:

> "The Companies should feel free to consult any Trustee that they feel has information on the question being considered."

In Section 5.1.3 in the first paragraph, add the phrase "up to a" before "10-year agreement" so that the paragraph reads:

> "Roland reported that the Sawridge First Nation and INAC have signed a two-year deal for delivery of services and have also signed a MOU to begin discussions for a longer-term up to a 10-year agreement."

This is Exhibit "B" referred to in the Affidavit of
Paul Bujold
Sworn before me this 30th day
of August A.D. 2017
A Notary Public, A Commissioner for Oaths in and for the Province of Alberta
JOSEPH J. KUEBER
Barrister & Solicitor

2011-015 **Moved by Clara, seconded by Roland that the Minutes of 15 March 2011 be accepted as corrected.**

Carried unanimously.

4. Business Arising

1004-42 The Band is in the process of acquiring the equipment to produce identity cards. The Trusts will cost-share in this project.

1007-11 Trustees will be discussing an Affirmative Action program and Value-Based Management on the agenda for this meeting.

1008-01 Brian and Paul are meeting with Ralph and John on 5 May to discuss the tax strategy in preparation for a meeting between the Trustees and Directors to discuss future plans.

5. Beneficiaries

5.1 Revised List of Benefits

Paul presented a revised list of benefits from the list that was proposed in the last budget estimate. The savings benefits have been combined into three benefits: the Housing Savings Plan to cover on- and off-Reserve housing construction and repair, the retirement Savings Plan to cover the cost of future Seniors' Support Benefits payments and the Education Savings Plan to cover the future cost of providing the Education Support Benefit.

Because the First Nation is not a beneficiary, it cannot receive benefits from the Trusts. As such, providing funding for on-Reserve housing and repair will require an arrangement with the First Nation to provide funding through a specific beneficiary.

5.2 Pamphlet Approval

Benefits pamphlets which were presented at the last meeting and provided to the Trustees following that meeting were discussed.

2011-016 **Moved by Clara, seconded by Catherine that the pamphlets be approved as presented.**

Carried, Four in favour, Roland abstaining.

5.3 Lillian Potskin House Repair Funding Request

Trustees reviewed a request from Lillian Potskin for funding of $8,482.36 to repair her house in Smith which was damaged in a storm. It was noted that there is presently no Housing Benefit in place in order to provide this funding.

2011-017 **Moved by Clara, seconded by Bertha that since there is no Housing Benefit available through the Trusts that this funding not be provided to Lillian Potskin.**

Carried Unanimously.

6. TRUST MATTERS

6.1 Reports

6.1.1 Chair's Report

Brian complimented the Trustees on their accomplishments over the past months. A number of tasks are moving forward.

The Company-Shareholder AGM is scheduled for June 24. The coming week, the Directors will be reviewing the 2010 Year End Audited Financial Statements in preparation for that meeting.

The May meeting of the Board of Trustees will deal with Phase II of the Application to the Court for Direction and Advice on the determination of the certainty of beneficiaries for the 1985 Trust.

The Trustees will be considering a policy statement on Affirmative Action at this meeting.

6.1.2 Trust Administrator's Report

Paul reported that he was able to obtain a number of paintings on loan from Brenda Draney to hang in the Trusts Office. These have been picked up and mounted.

Most of the month has been spent working on legal and accounting research and data collection for the Application before the Court and for the Passing of Accounts. Some time was also spent developing the projects and timelines tracking as requested and on reviewing the Docushare file storage and the Minutes Register being completed by the Office.

6.1.3 Trustee Reports

Walter and Roland asked that the Trusts review the health benefits plan so that the range of benefits can include vision care, more dental coverage and better health coverage matching what is available through the Company.

Action 1104-01 Paul will discuss plan upgrades with John Moland and will report back to the Board.

Catherine reported that she is working on the Art from the Heart fund raiser for the capital Care Foundation to be held at the Sawridge Inn Edmonton South on 5 June 2011.

She also reported that the First Nation in planning a mediation meeting to deal with membership and residency status on 14 May. She recommended that the First Nation consider asking the Trusts Office to manage finding a mediator.

6.2 Policy Development

6.2.1 Revised Personal Development Benefits Policy

Paul presented a revised Personal Development Benefits policy. Since this benefit was the first one developed, the policy does not include providing benefits to the dependants of beneficiaries as do all the other benefits except life insurance. This revision corrects this but will increase the budget for this benefit from $41,000 to $92,000 for 2011.

2011-018 **Moved by Walter, seconded by Clara that the revised Personal Development Benefit policy be accepted as revised.**

Carried unanimously.

6.3 Affirmative Action and Values-Based Management

Trustees reviewed a statement on an Affirmative Action Recruiting and Hiring Plan for the Company and on a Values-Based Approach to Management for the Company. Trustees felt that Company Management should be asked to develop a set of programs and policies that will meet these requirements for discussion with the Directors and Trustees complete with measurable targets and consequences. Roland pointed out that the statement should refer to First Nations not Aboriginal people only.

Action 1104-02 **Brian will present this policy statement and request to the Company Directors.**

6.4 Legal

6.4.1 *Phase II Court Application and Passing of Accounts*

Trustees welcomed Doris Bonora and Donovan Waters to the meeting.

Doris explained the Court Application process and her understanding of the terms of reference provided by the Trustees for this process. According to her understanding she and Donovan are to prepare an Application to the Alberta Court of Queen's Bench for Direction and Advice on the determination of beneficiaries to the 1985 Trust. The question being asked is basically neutral, not siding with one view or another. The question is: can the definition in the 1985 Trust Deed stand since the law has changes since this Trust Deed was created and does this definition offend any public policy or the Canadian Bill of Rights? If the Court answers that the present definition cannot stand, we will propose the use of the definition in the 1986 Trust and grandfather anyone who would have been included under the 1985 Trust definition but would be excluded under the 1986 Trust definition.

There is an issue with the transfer of assets from the 1982 Trust to the 1985 Trust. Other than a resolution of the Trustees for the 1982 Trust, a Court document winding up the 1982 Trust and transferring its assets to the 1985 Trust has not been found yet.

Doris presented a draft of the Affidavit that will accompany the filing of the second part of the Application. She asked Trustees to review the document and present their suggestions for corrections and amendments to Paul by 17 May 2011 so that the Application can be reviewed at the Trustees meeting on 24 May 2011. There will also be various Exhibits files with this document which Doris will provide ahead of the meeting.

The timelines for filing the second part of the Application is September or October 2011 and for the filing of the Application for the Passing of Accounts in October or November 2011. When these Applications will be heard depends on how many file interventions on these Applications.

Donovan Waters and Doris Bonora left the meeting at this point.

6.5 Financial

6.5.1 *Financial Report March 2011*
Trustees reviewed the financial statements for March 2011. Paul reported that the numbers in the March statement would change because of the Accounts review and resulting journal adjustments made for the 2010 financial Year End Reports.

6.5.2 *Accounts Review 2010 Statements and Passing of Accounts Reports*
Trustees welcomed Eileen Key to the meeting at this point.

Eileen presented the results of the Meyers Norris Penny review of the accounts for the Sawridge Trusts for 2010. She pointed out that this was not an audit but simply a review of the accounts as presented by the Trusts' Management.

Paul was asked to leave the room at this time so that trustees could question Eileen regarding any problems that she encountered with the review or in the trusts' financial records. Eileen reported that there were no problems with either the financial records or with the support received from Paul during this process.

Paul was invited back into the room.

2011-019 **Moved by Roland, seconded by Bertha that the trustees approve the 2010 Accounts review reports for the 1985 and 1986 trusts.**

Carried unanimously.

6.5.3 *Revised 2011 Budget*
Trustees reviewed a revised 2011 Budget. The revision is to accommodate the addition of the dependants of beneficiaries to the Personal Development Benefit and increases the total for operations, trustee costs and benefits to $3,032,255.

2011-020 **Moved by Roland, seconded by Clara that the revised 2011 Budget be accepted as adjusted.**

Carried unanimously.

6.5.4 *Trustee Communication*
Paul presented a proposal to purchase iPads and printers for the Trustees, the Chair and the Trusts Administrator to facilitate communication between the Trusts Office and the Trustees and among the Trustees. The present system of email, telephone and fax is not working very well. The iPads could also facilitate making information available for Trustee meetings.

2011-021 **Moved by Roland, seconded by Bertha to approve the purchase of iPads and printers for all Trustees and for the Board Chair and Trusts Administrator.**

Carried unanimously.

7. Company Issues

Brian reported that he will be attending the Director's meetings on 29 April where the 2010 Financial Reports will be approved and the Company strategic plan will be discussed.

Action 1104-03 **Paul will provide copies of the approved Company Financial Statements for 2010 to the Shareholders/Trustees as soon as they are available.**

He also reported that the Sunil Lall case has been closed with Sunil signing off on a Company severance offer.

Trustees discussed Director succession and changes on the Board of Directors. A question was raised about the number of Directors permitted under the company By-Laws.

Action 1104-04 **Paul will contact Ron Odynski to check information about the number of Directors permitted in the Company By-Laws.**

8. Next Meeting and Adjournment

Action 1103-05 **The May Trustee Meeting will be held 24 May from 10:00 AM to 4:00 PM in Edmonton at the Sawridge Inn Edmonton South.**

Brian declared the meeting adjourned at 3:15 PM

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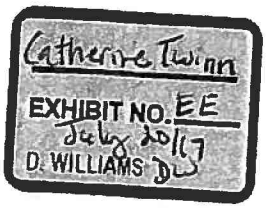
Brian Heidecker, Chair

SAWRIDGE TRUSTS



TRUSTEE MEETING MINUTES

Sawridge Inn Edmonton South, Edmonton
24 May 2011

Attendees: **Bertha L'Hirondelle, Clara Midbo, Catherine Twinn, Roland Twinn**

Guests: **Brian Heidecker, Chair; Paul Bujold, Trusts Administrator; Doris Bonora, Trust Lawyer; Marco Poretti, Trust Lawyer; Donovan Waters, Trust Lawyer**

Recorder: **Paul Bujold**

1. OPENING AND PRAYER

Brian called the meeting to order at 10:25 AM and opened the meeting with a prayer led by Roland.

2. REVIEW OF AGENDA

Following the meeting with Doris Bonora, Marco Poretti and Donovan Waters (section 6.2.1 below) the Trustees reviewed the agenda for the meeting.

2011-022 **Moved by Roland, seconded by Clara that the agenda be accepted as presented.**

Carried unanimously.

3. REVIEW OF MINUTES 26 APRIL 2011

Minutes from the meeting held 26 April 2011 were reviewed.

2011-023 **Moved by Bertha, seconded by Clara that the Minutes of 26 April 2011 be accepted as presented.**

Carried unanimously.

4. BUSINESS ARISING

Tabled to next meeting.

5. BENEFICIARIES

5.1 Replacement of Income for Treatment Services

Tabled to next meeting.

5.2 ID Cards for Beneficiaries

Tabled to next meeting.

5.3 Coordination of Health Benefits

Tabled to next meeting

5.4 Fire Benefits and Needs

Paul reported that he had advanced $1,000 from the Compassionate Care Benefit to each beneficiary who lived in Slave Lake and had to leave because of the fire there and that many of them were staying at the Sawridge Inn Edmonton South. Some people also went to Fork Lake, Smith, Athabasca and Bonnyville to stay with friends or relatives. It was reported that other agencies were also providing financial and other aid including: the Red Cross, the Sawridge First Nation and the Federal and Provincial Governments. Trustees discussed whether a special fund needed to be set up to provide continuing assistance but since other agencies are now taking charge, it was felt that the Trusts would not likely have to provide and further assistance.

Roland outlined the Emergency Services plan for returning residents to Slave Lake now that the fire is under control. The First Nation will be talking to Indian Affairs about assistance to cover the costs of members who had to stay in the Sawridge Inn and others. The Company has been keeping track of its expenses in providing assistance and accommodation so that they can submit them to their insurer or to the responsible party.

6. TRUST MATTERS

6.1 Reports

6.1.1 Chair's Report
Tabled to next meeting.

6.1.2 Trust Administrator's Report
Tabled to next meeting.

6.1.3 Trustee Reports
Tabled to next meeting.

6.2 Legal

6.2.1 Phase II Court Application for Advice and Direction
Trustees welcomed Doris Bonora, Marco Poretti and Donovan Waters to the meeting.
The legal team presented Trustees with a revised binder of information and legal documents for the Court Application.
Trustees reviewed the package and the Affidavit of Paul Bujold presented by the legal team. A number of suggestions made to improve the Affidavit and the package in general were noted by Doris for inclusion in a revised document.
Catherine presented an extensive history of the legal, legislative, Band, company and trust actions that led to the present situation. Brian and the legal team thanked Catherine for her enlightening presentation.
Doris, Marco and Donovan left the meeting at this point.

Action 1105-01 **The legal team will review the information presented and will revise the Affidavit and Application for presentation at a Special Meeting on 7 June.**

6.3 Financial

6.3.1 Financial Reports April 2011
Tabled to next meeting.

7. Company Issues

7.1 Annual General Meeting

Brian outlined how the Annual General Meeting will proceed. The financial statements and company annual report will be presented and reviewed with the Shareholders. The resolution appointing the Directors, Auditor and approving the financial statements will be presented and approved and the meeting will adjourn. Following the meeting, the Company plans to present a detailed plan on affirmative action and to discuss this at length with the Shareholders.

Trustees asked whether, in light of the Slave Lake fire and the involvement of the Companies in dealing with this issue, the Annual General Meeting should be postponed.

Action 1105-02 **Brian will consult with Ralph Peterson and John MacNutt regarding the postponement of the Annual General Meeting and will inform the trustees if the meeting date is changed.**

7.2 Directors, Auditors, Financial Statements Resolution

Trustees discussed the resolution that would be presented at the Annual General Meeting regarding the appointment of Directors, Auditors for 2011 and approving the financial statements for 2010 for the Sawridge Group of Companies.

2011-024 **Moved by Roland, seconded by Clara that the Shareholders Resolution appointing Ralph Peterson, Keith Anderson, Sidney Hanson, Ron Gilbertson and Gerry St. Germain to the Board of Directors and the firm of Deloitte & Touche LLP as the Corporate Auditor be accepted. The financial statements will be reviewed and approved at the Annual General Meeting.**

Carried. Three in favour, Catherine opposed.

8. Next Meeting and Adjournment

The next Trustee Meeting will be held will be a Special Meeting to continue with the Court Application on 7 June May from 8:30 AM to 12:00 PM in Edmonton at the Sawridge Inn Edmonton South. The Regular Meeting will still be on 21 June 2011.

Brian declared the meeting adjourned at 4:55 PM

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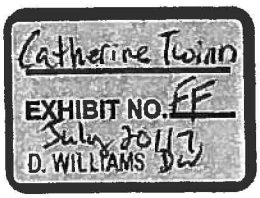
Brian Heidecker, Chair

SAWRIDGE TRUSTS



TRUSTEE MEETING MINUTES

Sawridge Inn Edmonton South, Edmonton
21 June 2011

Attendees: **Bertha L'Hirondelle, Clara Midbo, Catherine Twinn, Roland Twinn**

Guests: **Brian Heidecker, Chair; Paul Bujold, Trusts Administrator; Marco Poretti, Trust Lawyer**

Recorder: **Paul Bujold**

1. OPENING AND PRAYER

Brian called the meeting to order at 9:35 AM and opened the meeting with a prayer led by Walter.

2. REVIEW OF AGENDA

Following the meeting with Marco Poretti (section 6.2.1 below) the Trustees reviewed the agenda for the meeting. The following items were added:

6.2.2 Letter to Sawridge First Nation regarding the Membership Code

6.3.2 Cheque Signing for the Trusts

2011-025 **Moved by Clara, seconded by Roland that the agenda be accepted as amended.**

Carried unanimously.

3. REVIEW OF MINUTES 24 MAY 2011

Minutes from the meeting held 24 May 2011 were reviewed. It was pointed out that the header after page 1 has the wrong date. Paul will correct this.

2011-026 **Moved by Roland, seconded by Bertha that the Minutes of 24 May 2011 be accepted as amended.**

Carried unanimously.

4. BUSINESS ARISING

Trustees reviewed the Action List.

Action 1106-01 **Item 1008-01 should be listed as "In Process".**

5. BENEFICIARIES

5.1 Replacement of Income for Treatment Services

Trustees reviewed a presentation on Replacement Income for Addictions Treatment Services which would assist those who have no employer benefits to cover lost income if they participate in treat for their addictions. Trustees felt that a more in-depth

discussion was required for this and that more information needed to be made available. It was felt that mental heal treatment should also be included.

Action 1106-02 **Paul to do more research on the impact of replacement income for addictions and mental health treatment services and present this recommendation at a later date.**

5.2 ID Cards for Beneficiaries

Paul reported that the First Nation has purchased the equipment to produce membership cards and that beneficiary cards will be produced at the same time. The Trusts will cost-share this project with the First Nation.

5.3 Coordination of Health Benefits

Roland informed the Trustees that the First Nation is looking to hire another administrative assistant and that this person could possibly be cost-shared with the Trusts to cover the coordination of health benefits position.

2011-027 **Moved by Clara, seconded by Walter to approve in principle Paul negotiating with the Sawridge First Nation regarding cost-sharing and work-sharing arrangements to cover the coordination of health benefits for beneficiaries.**

Carried, unanimously

5.4 Benefits Funds Carry Forwards

Paul presented a proposal that the Trustees consider permitting the Addictions Treatment, Education Support and Children's Development Funds to carry-forward unspent amounts from year-to-year so that these funds can be built up rather than returning the money to the bank account each year and reallocating a new amount.

2011-028 **Moved by Roland, seconded by Walter that the Addictions treatment, Education Support and Children's Development Funds carry-forward their unspent amount to the next year.**

Carried, unanimously.

5.5 Upgrading Health Benefits

Trustees discussed a proposal to upgrade the existing Great West Life Health Benefits to include a change in Orthodontics amounts from $1000 to $2500 at no additional cost, including Vision Care coverage of up to $350 per year per person at a cost of $6 for singles and $12 for families. It was felt that upgrading the ambulance benefit to include air ambulance would be too costly. Diabetic supplies, breathing equipment and homecare and mobility aids are already covered under the Great West Life Plan and no additional coverage is available.

2011-029 **Moved by Catherine, seconded by Roland that the Great West Life Benefits Plan be upgraded to $2500 for orthodontics and $350 per person per year for eye glasses.**

Carried, unanimously.

6. TRUST MATTERS

6.1 Reports

6.1.1 Chair's Report

Brian reported that the Companies would be presenting a comprehensive employment strategy/policy at the Annual General Meeting and would be discussing this with the Trustees. He commended the Trustees on their work on the legal issues facing the Trusts. Brian reported that he will be retiring from the University of Alberta Board of Governors as of 1 November 2011.

6.1.2 Trust Administrator's Report

Paul reported on the work that he has been doing with the legal team and with the accountants on the Court Application and on the Passing of Accounts. He also reported that he attended a one-day workshop in Vancouver on Trusts. The iPads and printers have been purchased for the Trustees and set up. Paul also reported on the work done during the Slave Lake fire.

6.1.3 Trustee Reports

Roland reported that he has had discussions with INAC about funding for the Slave Lake fire costs.

Catherine reported that the Art from the Heart fund raiser went well and that the next step in the Economic Development through Reconciliation community dialogue will take place at Hobbema, October 11-12-13.

6.2 Legal

6.2.1 Phase II Court Application for Advice and Direction

Trustees welcomed Marco Poretti to the meeting.

Brian presented a summary of the issues before the Trustees on the Court Application for Advice and Direction (See Attached Flip Chart Sheets). Trustees discussed the issues presented by Brian.

Trustees wondered if there was a need to inform those who may be impacted by Option 4 that they may be impacted if the Court chooses this Option and recommend to them that they represent themselves in Court. Trustees also wondered if the Court should be asked if the trustees should hold an open meeting with interested parties ahead of time to explain the Application process. It was agreed that Paul should be the primary affiant and that others may be chosen to answer specific points raised by respondents to the Application. It was also agreed that Option 4 would be the best result for the Trusts recognising that the Court may not choose any of the options outlined. It was agreed that the legal team would prepare the Affidavit and Application on the basis of the information presented and the trustees comments and go ahead with the submission. Walter was especially concerned that this process promote peace among the beneficiaries.

2011-030 **It was agreed to proceed with Phase II of the Court Application for Advice and Direction according to the terms set out in the preamble to this decision.**

Carried, 4 in favour, Walter abstaining.

6.2.2 *Letter to Sawridge First Nation Council and Membership Committee*
Roland absented himself from the meeting for this discussion.
Paul presented a draft of a letter from the Trustees to the Sawridge First Nation Council and Membership Committee based on the legal opinion provided by Donovan Waters. Catherine pointed out that the word "Trust" in line 4 of the draft should be preceded by "1986" to avoid confusion. Trustees asked that the letter be sent to Donovan Waters to ensure that this letter reflects what he stated in his opinion.
The letter outlines some of the issues that may precipitate legal challenges to the Membership Code and membership process and how this may impact both the First Nation and the Trusts.

2011-031 **Moved by Clara, seconded by Bertha that the letter to the Sawridge First Nation Council and Membership Committee be sent after Donovan Waters has review it.**

Carried, unanimously, Roland absent.

6.3 Financial

6.3.1 *Financial Reports April, May 2011*
Trustees reviewed the Financial Reports for April and May 2011. It was pointed out that the Financial Reports should include a cheque list.

2011-032 **Moved by Roland, seconded by Clara that the Financial Statements for April and May 2011 be approved as presented.**

Carried, unanimously.

Action 1106-03 **Paul to ensure that a cheque list is attached to Financial Statements each month.**

6.3.2 *Cheque Signers for the Trusts*
Paul reported to the Trustees that, while every Trustee can co-sign cheques, he has specifically asked Clara to act as signer since this now involves clearing payments to Seniors via direct deposit through Scotiabank. This requires that one person be trained and have the software set up on their home computer and Clara has been willing to do this and is the most convenient person for the job. Trustees discussed whether Clara should the Trustee assigned to this job.

Action 1106-04 **Trustees agreed that Clara is the best person to sign co-cheques and clear direct deposits but that others should be trained as backup.**

7. Company Issues

7.1 Annual General Meeting

The Annual General Meeting will be held at the Sawridge Inn Edmonton South at 12:15 PM on 23 June 2011. Brian has arranged for the plane to pick up the Slave Lake Trustees. The Companies will also present their human resources strategy/policy at a meeting after the AGM.

8. Next Meeting and Adjournment

There will be no meeting in July. The next Trustee Meeting will be in Slave Lake on 16 August 2011.

Brian declared the meeting adjourned at 3:05 PM

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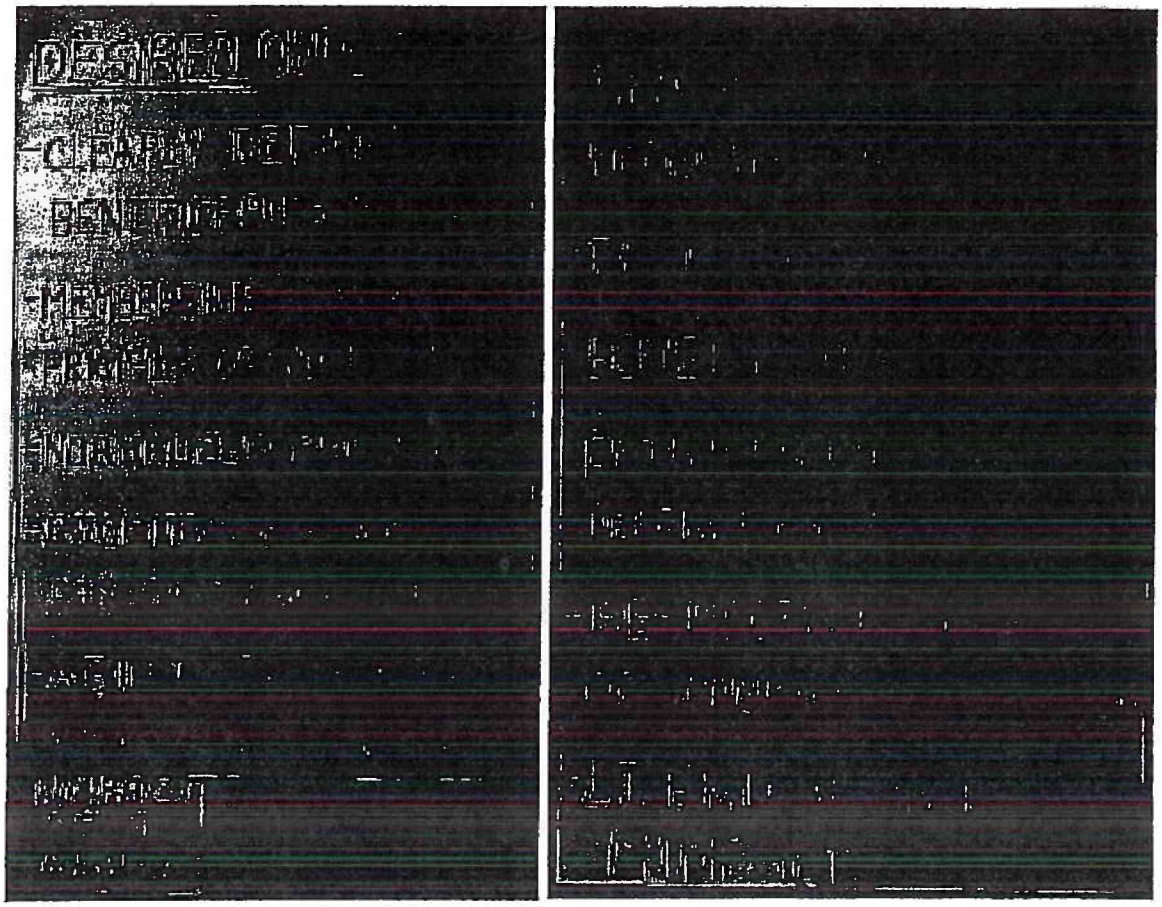
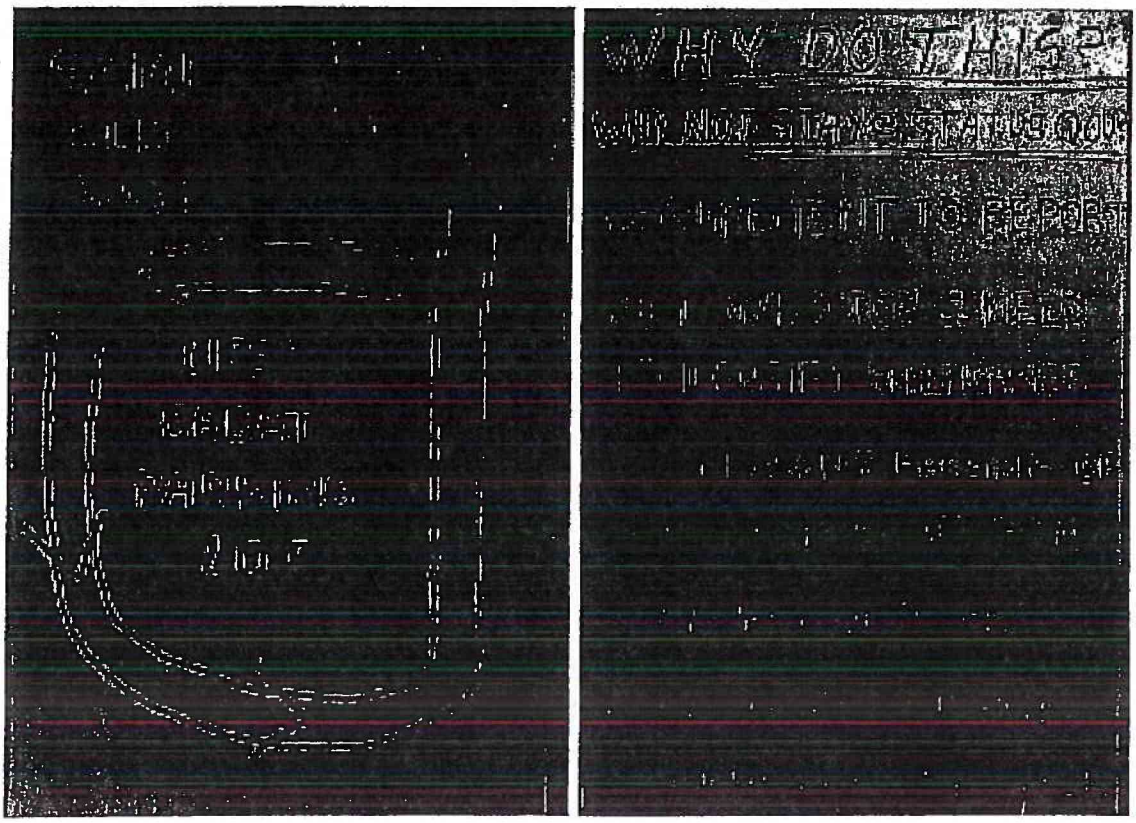
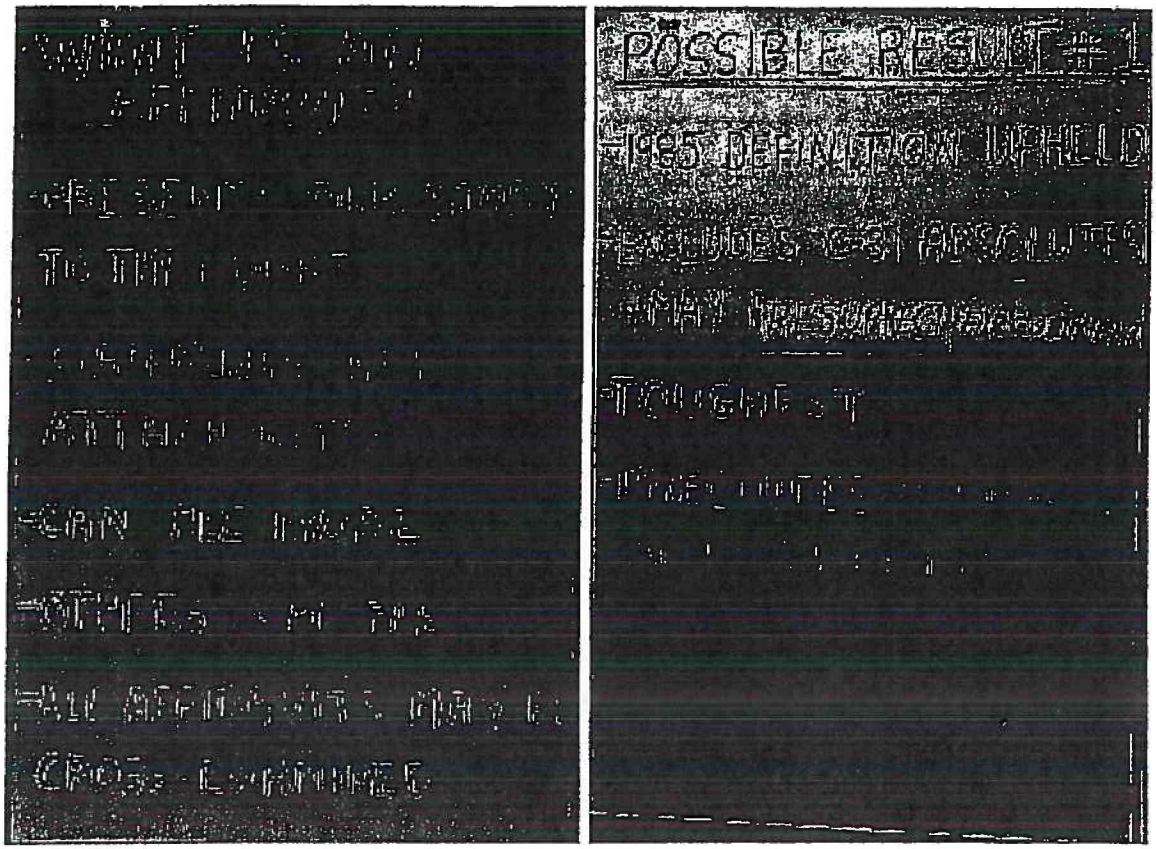
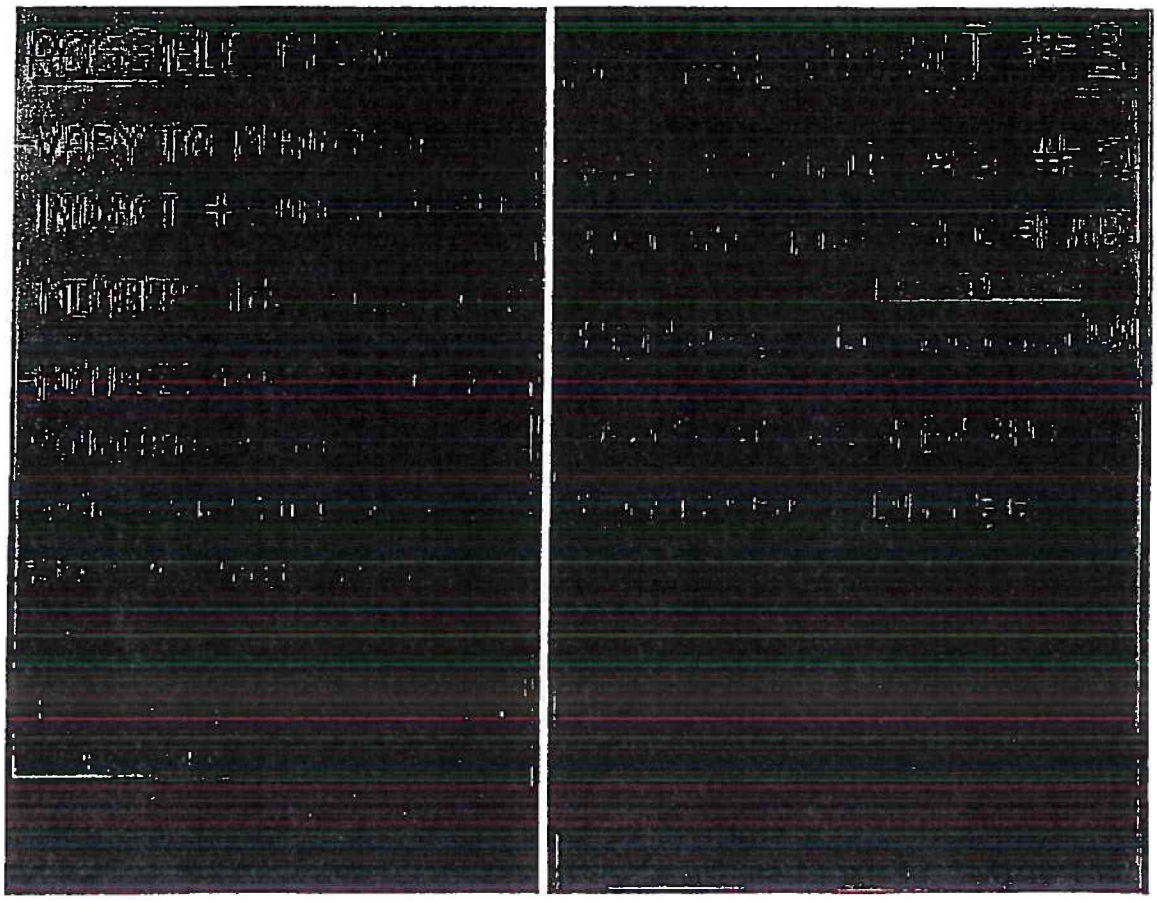
Brian Heidecker, Chair

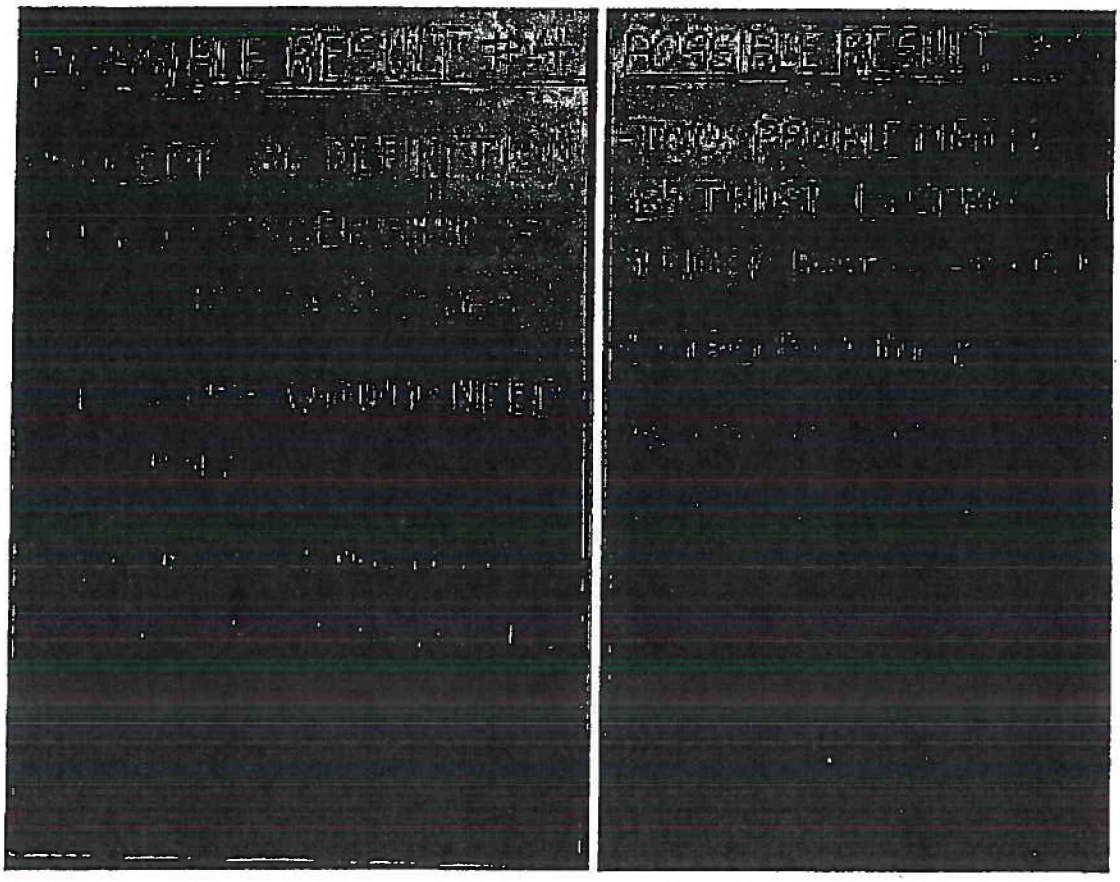
BRIAN'S PRESENTATION FLIP CHART SHEETS
AGENDA 6.2.1



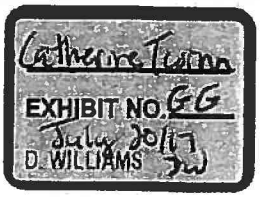



POSSIBLE RESULT #1





SAWRIDGE TRUSTS



TRUSTEE MEETING MINUTES

Sawridge Inn Edmonton South, Edmonton
20 September 2011

Attendees: **Bertha L'Hirondelle, Clara Midbo, Catherine Twinn, Roland Twinn, Walter F. Twin**

Guests: **Brian Heidecker, Chair; Paul Bujold, Trusts Administrator; Donovan Waters, Doris Bonora, Marco Poretti, Trust Lawyers**

Recorder: **Paul Bujold**

1. OPENING AND PRAYER

Brian called the meeting to order at 10:20 AM and opened the meeting with a prayer led by Walter.

2. CONGRATULATIONS TO CATHERINE TWINN

Brian offered the congratulations of the Board and those present to Catherine Twinn for her recent appointment as Assistance Deputy Minister in Alberta Children and Youth Services.

3. REVIEW OF AGENDA

Trustees reviewed the agenda.

2011-032 **Moved by Roland, seconded by Clara that the agenda be accepted as presented.**

Carried unanimously.

4. REVIEW OF MINUTES 21 JUNE 2011

Minutes from the meeting held 21 June 2011 were reviewed. It was noted that Walter was not present at the meeting and did not lead the opening prayer. Roland led the opening prayer. On page 2, item 5.1, "mental heal" should read "mental health".

2011-033 **Moved by Roland, seconded by Walter that the Minutes of 21 June 2011 be accepted as amended.**

Carried unanimously.

5. BENEFICIARIES

5.1 Fall Newsletter

Trustees reviewed the newsletter for Fall-Winter 2011.

2011-034 **Moved by Clara, seconded by Catherine that the Fall-Winter Newsletter be accepted.**

Carried. Two in favour. Roland, Bertha and Walter abstaining.

6. TRUST MATTERS

6.1 Remuneration for Clara Midbo for Cheque and Bank Account Counter-Signing

Trustees reviewed a proposal that Clara Midbo receive $200 per month for additional responsibilities in reviewing and counter-signing the Trusts' expenditures made by cheque and through direct deposit on ScotiaConnect.

2011-035 **Moved by Catherine, seconded by Roland that the Trustees authorize Clara Midbo to receive an additional fee of $200 per month for responsibilities involved in financial oversight and countersigning Trusts' expenditures and banking transactions.**

Carried. All in Favour. Clara abstaining.

6.2 Catherine Twinn's Accounts and Extra Fees

Catherine absented herself from this discussion.

Brian presented Trustees with accounts of Catherine Twinn for legal and other services that Catherine says are outstanding from 2002 to the present amounting to $101,697.09 in fees and $91,460.22 in interest owed. In addition, he informed the Trustees that Catherine had indicated that she had an additional $1.3 million in fees for services provided to the Trusts.

Trustees discussed the fees in light of current Trustee policy regarding contracting with Trustees for services charged above and beyond the normal trustee fees. It was recommended that Brian negotiate the outstanding accounts submitted by Catherine and that he inform Catherine that since there are no agreements with the Trustees for any additional services that these would not be considered.

Action 1109-01 **Brian negotiate with Catherine on the outstanding accounts submitted and inform Catherine that since there are no agreements with the Trustees for any additional services that these would not be considered.**

6.3 Legal

Trustees welcomed Donovan Waters, Doris Bonora and Marco Poretti to the meeting.

6.3.1 Application for Court's Advice and Direction

Marco Poretti presented a summary of actions-to-date on the Application for the Court's Advice and Direction. The Procedural Order was presented to Judge Thomas of the Court of Queen's Bench. The judge modified the order to include posting a notice in the Slave Lake and High Prairie Newspapers and sending an email out to all those persons on our list for whom we had emails. The Judge also asked Marco to contact Justice Canada and the Alberta Public Trustee to apprise them of the case. Paul has posted the newspaper notices, sent all the emails and sent out registered letters to those on the list as well as posting the documents on the web site. In addition, the second Affidavit has been filed detailing our legal arguments on the Application. This Affidavit has also been posted on the web site. The Procedural Order sets 12 January 2012 as the date that the matter will be heard by the Court. Until that time, we are awaiting any responses and preparing our case.

Justice Canada seemed pleased that we were advancing the recommendation that the Bill C-31 persons be included in the 1985 Trust beneficiaries definition as they are in the 1986 Trust. They were also pleased that the Four Worlds report on benefits set up a process of providing benefits and not cash to the beneficiaries. Marco felt that while Justice Canada may attend the hearing, it seemed disinclined to file evidence on the case.

The Alberta Public Trustee was interested in minors living on the Reserve. The Public Trustee also seemed to think that the Application was in order.

Catherine raised the point that some people may be confused and afraid for themselves and their children because they do not understand the process. She felt that the Trustees should reach out to people to help calm them down. Trustees were advised to answer questions as they arose and to refer people to Paul who would be able to answer their concerns. It was suggested that Paul create a Wall on the web site where people could post their questions and have them answered.

Action 1109-03 **Trustees to review the Trustee Self-Evaluation Form before December 2011 and fill out the revised form in December prior to individual meetings of each Trustee with Brian.**

6.3.2 *Passing of Accounts*

On 2 February 2009, the Trustees passed a Resolution to initiate a Passing of Accounts before the Court of Queen's Bench.

After looking at the financial reports, it was felt that the Trustees needed to review the advisability of continuing with this process. Donovan Waters presented Trustees with some legal information and advice on this process.

In regular practice, a Passing of Accounts is carried out so that the Court can review the actions and financial accounts of the Trustees up to a certain point-in-time and give its blessing that all has been done according to the rules and legislation. This is a public process in which the public and beneficiaries are able to examine the affairs of the Trusts. Future Trustees then need not concern themselves with anything that occurred before that point-in-time.

In the review of the accounts of the Trusts from 1985 to 2010, it has come to light that there were substantial losses in some operations. In a public Passing of Accounts these losses and much more would become public information and could affect confidence in the Companies as well as in the Trust administration, even though these losses are historic and not now occurring.

As a private trust, the Trustees need not undertake such a public process as a Passing of Accounts before the Court unless they are required to do so by the courts. The Trustees still need to provide an accounting to the beneficiaries but not to the public or to the Court. This could take the form of an Accounting to the Beneficiaries. Once the beneficiaries are identified for the 1985 Trust through the Application for the Court's Advice and Direction, both the 1985 and 1986 Trust beneficiaries would be invited to attend a meeting where the information and explanations could provided in total frankness to the beneficiaries in a more confidential and private setting.

6.3.3 *Trustee Liability*

Donovan also explained the nature of trusts, the responsibilities of trustees and trustee liability.

In medieval times when the trust idea was originated, faith played a significant part in people's lives. A trustee was called a fiduciary (one who is trusted completely) and his or her duty was considered to be a spiritual obligation. Confidence and trust in such a person was akin to the confidence and trust one would have in the Great Spirit. The trustee was expected to be a person of integrity, honesty, selflessness and fully applied to the tasks involved in holding the assets of the beneficiaries in trust and in protecting the interests of the beneficiaries. In the case Fales v. Canada Permanent Trust Co. (1976), 70 D.L.R. (3d) 257 (SCC), Justice Brian Dickson of the Supreme Court of Canada, later the Chief Justice of Canada, considered the duties of the trustees to beneficiaries and said that "the standard of care and diligence required of a trustee in administering a trust is that of a man of ordinary prudence in managing his own affairs...and traditionally the standard has applied equally to professional and non-professional trustees." He went on to say that a trustee should demonstrate the standards of vigilance, prudence and sagacity in conducting the affairs of the trust.

These standards are demonstrated when a trustee is taking care always to examine the figures, is always aware of what is going on, is acting with care and concern to find a balance between high risk actions and too little risk, is showing the level of skill that would be shown by a reasonable business person, and is completely objective in his/her decision-making, even if the trustee himself or herself is also a beneficiary.

Where a trustee does not act according to these standards, liability arises, and the trustee is personally liable for his or her breach of trust. With the Sawridge Trusts there may be a case of 'gross negligence'. The 1985 and 1986 Trust Deeds protect trustees against minor negligence but not against 'bad faith' or 'gross negligence'. It could be argued that the losses sustained by the Trusts, especially during the lengthy period of 1992 to 2004 relating to Sawridge Waters Ltd, constitute gross negligence.

To guard against liability, a trustee coming into office should first seek to inform him/herself, before taking responsibility, about the past affairs of the trust. Courts will look at how a trustee informed himself/herself about a serious, continuing loss situation. If there has been wrong-doing, the trustees can initiate an action to recover losses from previous trustees to protect the beneficiaries. Once the trustee has accepted the position, he/she becomes equally responsible, to the extent of his own participatory lack of vigilance, careful concern and wisdom, for all past, present and future actions of trust administration.

6.3.4 *Trustee Fees*

Donovan stated that in the past, the fiduciary was expected to undertake his/her task for little or no compensation. In the present system, the law and the courts expect that trustee fees will be fair and reasonable. The question of

what is fair and reasonable changes over time. In 1905, a court determined that a trustee's fees should be based on:

1. The size of the trust,
2. The amount of care and responsibility shown by the trustees,
3. The time occupied by each trustee in carrying out his/her duties as a reasonably prudent person,
4. The skill and ability required of the trustee, and
5. The success attending the administration of the trust.

Present-day determinations would vary the order of these factors somewhat:

1. The care and responsibility shown by the trustees,
2. The time occupied by each trustee in carrying out his/her duties as a reasonably prudent person,
3. The skill and ability required of the trustee,
4. The success attending the administration of the trust, and
5. The size of the trust.

Numbers 4 and 5 are today less important than in assessing the trustee's own dedication to advancing the beneficiaries' best interests.

Trustees are generally treated equally in the allotment of fees because they are jointly involved in trust work, and severally liable. A block sum is annually set aside for the trustees, and, unless the trust instrument provides to the contrary, is divided equally among the trustees, even though some may be seen to have done more than others. If one or more trustees are to carry out tasks, effectively on behalf of all the trustees, the scope of the task and the remuneration for this carrying out have to be agreed beforehand by all (or, in the Sawridge case, a majority) of the trustees.

It was pointed out that the original reason for undertaking a Passing of Accounts before the Court was to seal the past so that new trustees would not have to carry forward this history. It was also to provide some succession planning so that older trustees could leave without feeling that anything was left hanging over them. In addition, the process was to assist in providing on the occasion of the Passing court-approved trustee fees.

Trustees discussed the points raised by the legal team in reconsidering whether to proceed with a Passing of Accounts before the Court or whether to simply do an Accounting to the Beneficiaries.

2011-035 Moved by Roland, seconded by Clara to rescind the Resolution passed 2 February 2009 requiring the Trustees to carry out a Passing of Accounts before the Court of Queen's Bench and to move that the Trustees present an accounting to the beneficiaries of the past financial accounts and a history of the Trusts.

Carried. All in Favour, Walter abstaining.

Paul suggested that a plan for the Accounting to Beneficiaries should include:

1. Clarifying and identifying the story at a series of Trustee meetings based on a review of the reports prepared by Meyers Norris Penny and the history of the Trusts identified by the Trustees and other historical documents.

2. The development of a communication strategy by the Trustees with the legal team.

3. The development of a plan for the meeting for the Accounting to Beneficiaries once the beneficiaries of the 1985 Trust have been identified through the Application for the Court's Advice and Direction.

6.4 Trustee Evaluation

Brian handed out a self-evaluation form to all trustees. The form has been developed based on the Trustee Code of Conduct and on current business practices. As stipulated in Brian's contract, he will review Trustee performance in December of each year. Trustees are asked to review the self-evaluation form and propose any changes necessary to Brian before December 2011. In December, trustees will be asked to fill out the form and Brian will discuss the form and performance with each Trustee individually. The information will be confidential and only aggregated information will be presented to the Board.

7. Company Issues

7.1 Resolutions Limiting Draw on Holding Companies

Trustees reviewed two resolutions limiting the draw that the Trusts would place on the Holding Companies in the coming year. These resolutions are routinely passed by the Trustees in each year.

2011-036 **Moved by Catherine, seconded by Clara to approve the Resolution limit the draw of the 1985 Trust on the Sawridge Holdings Ltd to $5,000,000 and the Resolution to limit the draw of the 1986 Trust on 352736 Alberta Ltd to $3,000,000 for 2012.**

Carried. Unanimously.

8. Next Meeting and Adjournment

Walter led the prayer to close the meeting. The next meeting will be in Edmonton on Tuesday, 18 October 2011.

Brian declared the meeting adjourned at 3:30 PM

_____

Brian Heidecker, Chair

Lawyer argues she shouldn't have to pay for 'vexatious' litigation

PAIGE PARSONS

An Edmonton lawyer who advanced an "abusive and vexatious" court application for an client argued Friday she should not be made to pay legal costs incurred in the action.

Lawyer Priscilla Kennedy appeared before Court of Queen's Bench Justice Denny Thomas at a hearing to argue that although she took the application of client Maurice Stoney further than she should have, she should not have to pay costs.

The application was related to Stoney's ongoing efforts to be come a member of the Sawridge Band, and in turn a beneficiary of a trust that was set up in 1985 to hold the band's assets.

The Sawridge First Nation is near the town of Slave Lake, about 250 km north of Edmonton.

Stoney's parents were members of the Sawridge band, but lost their Indian status in 1944. Stoney attempts to be readmitted to the band were rejected, and subsequent efforts through the Canadian Human Rights Commission and the courts also failed.

In an interim ruling in mid-July, Thomas rejected Stoney's latest application and ordered Kennedy to appear to explain why she shouldn't be liable for associated costs. He wrote that her advancement of the "futile" application could be "a serious abuse of the judicial system."

Kennedy was represented at the hearing by a colleague from her firm, lawyer Donald Wilson.

Kennedy "litigates with her heart," Wilson told the court. He said Kennedy shouldn't have advanced the application but argued ordering her to pay costs would be "unnecessary."

"What Ms. Kennedy is guilty of, if she is guilty of anything, is seeing a wrong and persistently trying to right the wrong," Wilson said.

Lawyers for the Sawridge Band and for the trustees both argued Kennedy should be ordered to pay costs awarded against Stoney.

Court heard Stoney has limited funds, and has failed to pay previous costs ordered by the court.

Catherine Twumasi Sawridge trust who disagree with the band's rejection of Stoney, was in court Friday for the proceedings, which she said were a continuation of the initial. She said Stoney is 75 years old and works as a cab driver in Slave Lake.

"What happened to Mr. Stoney and his family is a travesty, Twumasi said.

Thomas, who reserved his decision until September, asked all parties to make submissions about whether or not Stoney should be declared a vexatious litigant.

In Canada, vexatious litigants are blocked from commencing or continuing legal actions without leave from the court.

pparsons@postmedia.com

twitter.com/paigeeparsons

This is Exhibit "C" referred to in the Affidavit of Paul Bujold sworn before me this 3rd day of August A.D. 2017

A Notary Public, A Commissioner for Oaths in and for the Province of Alberta

JOSEPH J. KUEBER
Barrister & Solicitor

IN THE MATTER OF THE APPEAL OF THE MEMBERSHIP APPLICATION OF MAURICE FELIX STONEY TO THE SAWRIDGE FIRST NATION

BETWEEN:

MAURICE FELIX STONEY

Appellant

- and -

SAWRIDGE FIRST NATION

Respondent

This is Exhibit " D " referred to in the Affidavit of Paul Bujold
Sworn before me this 30th day of August A.D. 2017
A Notary Public, A Commissioner for Oaths in and for the Province of Alberta
JOSEPH J. KUEBER
Barrister & Solicitor

DECISION

DAVIS LLP.
1201 Scotia 2 Tower
10060 Jasper Avenue
Edmonton, AB T5J 4K5
Attn: Priscilla Kennedy
Tel: (780) 426-5300
Fax: (780) 702-4383
Solicitor for Maurice Felix Stoney

PARLEE McLAWS LLP
1500 Manulife Place
10180 – 101 Street
Edmonton, AB T5J 4K1
Attn: Edward H. Molstad, Q.C.
Tel: (780) 423-8500
Fax (780) 423-2870
Solicitor for Sawridge First Nation

This is Exhibit " Y " referred to in the Affidavit of Roland Twinn
Sworn before me this 21 day of JUNE A.D. 20 12
A Commissioner for Oaths in and for the Province of Alberta
DONNA BROWN
A Commissioner for Oaths
In and for The Province of Alberta
My Appointment Expires December 30 2012

The Appeal of Maurice Felix Stoney (herein referred to as the "Appellant") in relation to his membership application was heard on the Sawridge Reserve in the Sawridge Boardroom on April 21, 2012, before Electors of the Sawridge First Nation (herein referred to as the "First Nation") in attendance at a meeting convened by the First Nation for the purposes of hearing the Appeal.

The Electors of the First Nation in attendance at the meeting who constituted the Appeal Committee were as follows:

Roland Twinn	Bertha L'Hirondelle	Frieda Draney
Vera McCoy	Margaret Claire Ward	Jaclyn Twin
Water F. Twin	Denise Midbo	Yvonne Twin
Justin Twin	Lillian Potskin	Arlene Twinn
Irene Twinn	Darcy Twin	Kristina Midbo
Winona Twin	Catherine Twinn	Sam Twinn
Clara Midbo	Paul Twinn	David Midbo

Rarihokwats chaired the Appeal Committee.

The Appellant appeared with Legal Counsel, Priscilla Kennedy of Davis LLP. The First Nation was represented by Legal Counsel, Edward H. Molstad, Q.C. of Parlee McLaws LLP and Michael McKinney, General Counsel for the First Nation.

Written submissions were presented on behalf of the Appellant and oral submissions were made on behalf of the Appellant.

Following the submissions of the Appellant and questions and comments of Members of the Appeal Committee, the Appeal Committee met in camera in order to make its decision.

The unanimous decision of the Appeal Committee is to uphold the decision of Chief and Council and to dismiss the appeal on the grounds that having heard the evidence and the submission of the Appellant and the Appellant's Legal Counsel, there are no grounds to set aside the decision of the Chief and Council.

R Rarihokwats

RARIHOKWATS
CHAIR, APPEAL COMMITTEE

Form 49
Alberta Rules of Court
Rule 13.19

Clerk's Stamp

JUDICIAL CENTRE OF EDMONTON
FILED
OCT 06 2017
Clerk of the Court of Queen's Bench

COURT FILE NO.	1103 14112 and 1403 04885
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON

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

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

AND

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

APPLICANT	CATHERINE TWINN, as Trustee for the 1985 Trust and the 1986 Trust
RESPONDENTS	ROLAND TWINN, BERTHA L'HIRONDELLE, EVERETT JUSTIN TWIN AND MARGARET WARD, as Trustees for the 1985 Trust and the 1986 Trust
DOCUMENT	**AFFIDAVIT OF CATHERINE TWINN**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McLENNAN ROSS LLP #600 West Chambers 12220 Stony Plain Road Edmonton, AB T5N 3Y4	Lawyer: Crista Osualdini Telephone: (780) 482-9200 Fax: (780) 482-9100 Email: cosualdini@mross.com File No.: 144194

AFFIDAVIT OF CATHERINE TWINN

SWORN ON THE 6th DAY OF OCTOBER, 2017

I, Catherine Twinn, of the Sawridge Indian Reserve 150 G and the City of Edmonton, in the Province of Alberta, SWEAR AND SAY THAT:

1. I am a trustee of the Sawridge Band Inter Vivos Settlement, April 15, 1985 (the "1985 Trust") and the Sawridge Trust, August 15, 1986 (the "1986 Trust") (collectively referred to as the

"Trusts"), and, as such, have a personal knowledge of the matters hereinafter deposed to, save where stated to be based upon information and belief.

2. I have reviewed the Affidavit of Paul Bujold filed August 30, 2017 (the "August 2017 Affidavit") and wish to respond to certain evidence provided by Mr. Bujold and advise the Court that I generally dispute his information contained in the August 2017 Affidavit.

3. Mr. Bujold states at paragraph 10 of his Affidavit that he refutes my evidence that the Trusts have spent more than $4 million dollars on the 1103 and 1403 actions. Those terms are defined in Mr. Bujold's affidavit.

4. Following the filing of the August 2017 Affidavit, Mr. Bujold circulated meeting materials to the trustees of the Trusts in relation to the September 2017 trustee meeting. In these materials a chart was included that set out the total legal expenses paid by the Trusts in relation to the 1103 and 1403 actions. These expenses amounted to over $4.2 million dollars and do not include my claimed expenses or all of the Office of the Public Trustee's expenses. Attached as **Exhibit "A"** to my Affidavit is a copy of the expense chart.

5. Attached as a separate document to Mr. Bujold's report was a chart that set out the accumulated fees of those parties who had claimed reimbursement and had not yet received same. These fees primarily are my own and the Office of the Public Trustee's. Attached as **Exhibit "B"** to my Affidavit is a copy of the unpaid expenses chart.

6. I swear this as evidence for the Court and for no improper purpose.

SWORN BEFORE ME at the
City of Edmonton,
in the Province of Alberta
the 6th day of October, 2017

Crista C. Osualdini
A Commissioner for Oaths in and
for the Province of Alberta

Crista C. Osualdini
Barrister & Solicitor

Catherine Twinn
CATHERINE TWINN

Year	Amount	Legal Actions
2010 Total Legal	220,069.53	Trust Setup by Trustees, Identification of Beneficiaries by Trustees
2011 Total Legal	403,297.37	Taxation by Trustees, Passing of Accounts by Trustees, 1103 Action by Trustees
2012 Total Legal	362,442.82	1103 Action by Trustees, Appeal by Trustees, Passing of Accounts by Trustees
2013 Total Legal	182,436.40	1103 Action by Trustees, Appeal by Trustees,Passing of Accounts by Trustees
2014 Total Legal	387,692.92	1103 Action by Trustees, Transfer of Assets 1 by Trustees, Transfer of Assets 2 by Trustees, 1403 Action by Catherine Twinn
2015 Total Legal	658,589.01	1103 Action by Trustees, 1403 Action by Catherine Twinn, 1503 Action by Catherine Twinn, Code of Conduct 1 by Trustees,
2016 Total Legal	1,093,572.20	1103 Action by Trustees, 1403 Action by Catherine Twin, 1503 Action by Catherine Twinn, Code of Conduct 1 by Trustees, Settlement Costs Code of Conduct by Catherine Twinn, Appeal by Catherine Twinn and OPGT, Application for Stay by OPGT, Costs Application by Catherine Twinn, Appeal by Maurice Stoney
2017 Legal To Date (Aug 2017)	914,341.29	1103 Action by Trustees, 1403 Action by Catherine Twinn, 1503 Action by Catherine Twinn, Code of Conduct 2 by Trustees, Settlement Costs Code of Conduct by Catherine Twinn, Costs Application by Catherine Twinn, Appeals by Maurice Stoney, Pricilla Kennedy, Patrick Twinn et al
TOTAL	**4,222,441.54**	

This is Exhibit " A " referred to in the Affidavit of Catherine Twinn

Sworn before me this 6 day of October 2017

Crista C. Os

A Commissioner for Oaths in and for the Province of Alberta

Crista C. Osualdini
Barrister & Solicitor

Firm	Amount	Actions
2014 Legal Outstanding	87,334.61	Catherine Twinn
2015 Legal Outstanding	330,949.28	Catherine Twinn, Hutchison Law
2016 Legal Outstanding	956,955.73	Catherine Twinn, Hutchison Law
2017 Legal Outstanding	623,309.50	Catherine Twinn, Hutchison Law, Trustees Code of Conduct
Total Outstanding (Aug)	**1,998,549.12**	
Unknown Amounts		Patrick Twinn et al, Maurice Stoney et al, Priscilla Kennedy

This is Exhibit " B " referred to in the Affidavit of

Catherine Twinn

Sworn before me this 6 day

of October 2017

Crista C. Os

A Commissioner for Oaths
in and for the Province of Alberta

Crista C. Osualdini
Barrister & Solicitor

2016 ABQB 553
Alberta Court of Queen's Bench

Twinn v. Twinn

2016 CarswellAlta 1919, 2016 ABQB 553, [2016] A.W.L.D. 4611, [2016] A.W.L.D. 4612, [2016] A.W.L.D. 4668, 24 E.T.R. (4th) 298, 271 A.C.W.S. (3d) 696

Catherine Twinn (Plaintiff) and Roland Twinn, Bertha L'Hirondelle, Everett Justin Twin, Margaret Ward and Brian Heidecker (Defendants)

Robert A. Graesser J.

Heard: May 24, 2016; June 21, 2016
Judgment: October 4, 2016
Docket: Edmonton 1503-08727

Counsel: Brian P. Kaliel, Q.C., Scott Sherlock, for Plaintiff
Nancy E. Cumming, Q.C., Joseph Kueber, Q.C., for Defendants, Roland Twinn, Bertha L'Hirondelle, Everett Justin Twin and Margaret Ward
Barbara J. Stratton, Q.C., for Defendant, Brian Heidecker

Subject: Civil Practice and Procedure; Corporate and Commercial; Estates and Trusts; Public

Headnote

Alternative dispute resolution --- Relation of arbitration to court proceedings — Miscellaneous

Stay of arbitration — Parties were trustees of inter vivos settlement established in 1985 and 1986 — Parties were bound by 2009 code of conduct — In 2011, respondents commenced action for declarations respecting definition of beneficiaries under trust — Applicant opposed position of respondents and that action remained unresolved — Applicant commenced action in 2014 challenging validity of appointment of two trustees — In February 2015 respondents complained about applicant's conduct in her role as trustee — Code of conduct arbitration process was commenced under the terms of code of conduct — Applicant also brought code of conduct proceedings against respondents — Respondents failed to proceed with original code of conduct proceedings but were preparing new proceedings to remove applicant as trustee — Applicant brought application to stay code of conduct proceedings pending outcome of other litigation — Application dismissed — There were serious issues to be tried in relation to removal of trustees — Those matters needed to be decided so that ongoing administration of trusts could continue — Applicant failed to demonstrate she would suffer irreparable harm if arbitration proceeded — Applicant did not say that she was unable to fund ongoing costs of various disputes — Applicant could continued to participate in lawsuits if she was removed as trustee — Applicant was also beneficiary of trust and had rights and remedies in that capacity — Balance of convenience did not favour granting stay.

Estates and trusts --- Trustees — Nature of trustee's office — Removal of trustee — Miscellaneous

Parties were trustees of inter vivos settlement established in 1985 and 1986 — Parties were bound by 2009 code of conduct — In 2011, respondents commenced action for declarations respecting definition of beneficiaries under trust — Applicant opposed position of respondents and that action remained unresolved — Applicant commenced action in 2014 challenging validity of appointment of two trustees — In February 2015 respondents complained about applicant's conduct in her role as trustee — Code of conduct arbitration process was commenced under the terms of code of conduct — Applicant also brought code of conduct proceedings against respondents — Respondents failed to proceed with original code of conduct proceedings but were preparing new proceedings to remove applicant as

trustee — Applicant brought application to stay code of conduct proceedings pending outcome of other litigation — Application dismissed — There were serious issues to be tried in relation to removal of trustees — Those matters needed to be decided so that ongoing administration of trusts could continue — Applicant failed to demonstrate she would suffer irreparable harm if arbitration proceeded — Applicant did not say that she was unable to fund ongoing costs of various disputes — Applicant could continued to participate in lawsuits if she was removed as trustee — Applicant was also beneficiary of trust and had rights and remedies in that capacity — Balance of convenience did not favour granting stay.

Alternative dispute resolution — Practice and procedure — Costs — Miscellaneous

Entitlement — Parties were trustees of inter vivos settlement established in 1985 and 1986 — Parties were bound by 2009 code of conduct — In February 2015 respondents complained about applicant's conduct in her role as trustee — Code of conduct arbitration process was commenced under the terms of code of conduct — Applicant also brought code of conduct proceedings against respondents — Respondents failed to proceed with original code of conduct proceedings but were preparing new proceedings to remove applicant as trustee — Respondents agreed that all trustees would be fully indemnified from trusts for their future reasonable legal costs of participation in code of conduct process — Hearing was held to determine costs of arbitration proceedings to date — Costs awarded to applicant to date of application — It was manifestly unfair that respondents were reimbursed for code of conduct proceedings, which they had abandoned, while applicant incurred legal costs to oppose proceedings — Applicant was granted her costs of code of conduct proceedings and for her action, up to date of application.

Table of Authorities

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

Alenco Inc. v. Niska Gas Storage US, LLC (2009), 2009 ABQB 192, 2009 CarswellAlta 459, 5 Alta. L.R. (5th) 353 (Alta. Q.B.) — considered

Balancing Pool v. TransAlta Utilities Corp. (2009), 2009 ABQB 631, 2009 CarswellAlta 2034, 18 Alta. L.R. (5th) 284, 492 A.R. 344 (Alta. Q.B.) — considered

Consiglio, Re (1973), [1973] 3 O.R. 326, 36 D.L.R. (3d) 658, 1973 CarswellOnt 861 (Ont. C.A.) — referred to

Dunsdon v. Dunsdon (2012), 2012 BCSC 1274, 2012 CarswellBC 2595, 80 E.T.R. (3d) 235 (B.C. S.C.) — referred to

Gunn Estate, Re (2010), 2010 PECA 13, 2010 CarswellPEI 46, 57 E.T.R. (3d) 217, 299 Nfld. & P.E.I.R. 197, 926 A.P.R. 197 (P.E.I. C.A.) — considered

MacFarlane v. MacFarlane (2016), 2016 ABCA 92, 2016 CarswellAlta 574 (Alta. C.A.) — followed

Mailing v. Conrad (2003), 48 E.T.R. (2d) 238, 2003 CarswellOnt 627 (Ont. S.C.J.) — referred to

Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832 (1987), 38 D.L.R. (4th) 321, 73 N.R. 341, (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores (M.T.S.) Ltd.*) [1987] 3 W.W.R. 1, 46 Man. R. (2d) 241, (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores (M.T.S.) Ltd.*) 25 Admin. L.R. 20, (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores (M.T.S.) Ltd.*) 87 C.L.L.C. 14,015, 18 C.P.C. (2d) 273, [1987] D.L.Q. 235, 1987 CarswellMan 176, (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*) [1987] 1 S.C.R. 110, 1987 CarswellMan 272 (S.C.C.) — referred to

New Era Nutrition Inc. v. Balance Bar Co. (2004), 2004 ABCA 280, 2004 CarswellAlta 1200, 47 B.L.R. (3d) 296, 245 D.L.R. (4th) 107, 33 Alta. L.R. (4th) 1, 357 A.R. 184, 334 W.A.C. 184 (Alta. C.A.) — considered

Olymel S.E.C. v. Premium Brands Inc. (2005), 2005 ABQB 312, 2005 CarswellAlta 1067, 7 B.L.R. (4th) 250, 14 C.P.C. (6th) 313 (Alta. Q.B.) — considered

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 60 Q.A.C. 241, 54 C.P.R. (3d) 114, 111 D.L.R. (4th) 385, 1994 CarswellQue 120F, [1994] 1 S.C.R. 311, 1994 CarswellQue 120 (S.C.C.) — followed

Radford v. Radford Estate (2008), 2008 CarswellOnt 5297, 43 E.T.R. (3d) 74 (Ont. S.C.J.) — referred to

Scott v. Scott (1991), 41 E.T.R. 150, [1991] 5 W.W.R. 185, 92 Sask. R. 301, 1991 CarswellSask 194 (Sask. Q.B.) — referred to

Yaworski v. Gowling Lafleur Henderson LLP (2012), 2012 ABQB 424, 2012 CarswellAlta 1145, 5 B.L.R. (5th) 224 (Alta. Q.B.) — considered

Statutes considered:

Arbitration Act, R.S.A. 2000, c. A-43
s. 6 — considered

s. 6(c) — considered

Judicature Act, R.S.A. 2000, c. J-2
s. 8 — considered

APPLICATION by applicant for stay of arbitration proceedings pending outcome of other litigation.

Robert A. Graesser J.:

Introduction

1 Catherine Twinn is a trustee of two Sawridge Band trusts. She seeks a stay of arbitration/mediation proceedings commenced against her by the other trustees of the trusts. She also seeks remedies concerning the costs of the arbitration/mediation proceedings to date. As an alternative to the stay she seeks, Ms. Twinn asks the Court to impose terms on the conduct of the arbitration/mediation proceedings.

Background

2 Catherine Twinn, Roland Twinn, Bertha L'Hirondelle, Everett Justin Twin and Margaret Ward are the trustees of the 1985 Sawridge Band Inter Vivos Settlement and the 1986 Sawridge Band Inter Vivos Settlement. Brian Heidecker is the Chair of the boards of trustees but is not himself a trustee.

3 There is extensive litigation between Catherine Twinn and the Respondents. In 2011, the trustees commenced actions seeking declarations as to the definition of beneficiaries under the terms of each trust. Ms. Twinn is adverse to the positions taken by the other trustees. In 2014, Ms. Twinn commenced an action challenging the validity of the appointment of two of the Respondent trustees.

4 The beneficiary actions are proceeding slowly. The validity of appointment action is apparently in its early stages. A special chambers application has been set for November, 2016 to determine whether Ms. Twinn is entitled to be indemnified for her costs in the beneficiary actions. Her position is that since the trusts are paying the costs of the other trustees (who are apparently in agreement as to how those actions should be resolved), the trusts should be paying her costs as she argues a different position. This cost application appears to be a preliminary step in the beneficiary actions before the merits will be addressed.

5 The trustees are bound by a Code of Conduct for trustees, signed by all of them on January 12, 2009. The Code of Conduct provides for a dispute resolution process in the event of complaints about a trustee's conduct.

6 In February, 2015 the Respondent Trustees complained about Ms. Twinn's conduct in her role as trustee. A Code of Conduct mediation/arbitration process was commenced under the terms of the Code of Conduct.

7 Although there were discussions between the two sides concerning the appointment of a mediator/arbitrator, Ms. Twinn commenced this action in June, 2015 to stay any mediation/arbitration proceedings against her, pending the outcome of the lawsuits already commenced concerning the beneficiaries of the trusts and the validity of appointment of some of the trustees.

8 Brian Heidecker filed an application on July 2, 2015 and the Respondent Trustees filed an application on July 6, 2015. These applications sought a stay of the two lawsuits previously commenced by Ms. Twinn pending the outcome of the Code of Conduct proceedings.

9 All of the parties' applications were adjourned to a special chambers application to be heard on January 6, 2016.

10 An arbitrator was appointed by Mr. Heidecker, but then the process was terminated in August, 2015 because of complaints by Ms. Twinn that the process required by the Code of Conduct had not been properly followed.

11 A new complaint was made by the Respondent trustees at a trustee meeting on September 16, 2015. At that meeting, Ms. Twinn advised the other trustees that she had conduct complaints concerning them.

12 All of the trustees agreed that there would be a special meeting of trustees on November 25, 2015 to discuss the two complaints. Ms. Twinn provided her letter of complaint about the other trustees on November 18, 2015.

13 Nothing was resolved at the November 25, 2015 special meeting. Following the November 25 meeting, the Respondent trustees brought an application to adjourn the special chambers application set for January 6, 2016. Ms. Twinn cross-applied for relief and conditions relating to the adjournment of the application.

14 That application was heard by me on December 16, 2015.

15 As at that date, neither side had taken steps to appoint an arbitrator or arbitrators to determine the Code of Conduct complaints.

16 At that application, I was satisfied that the special chambers application was moot, as there were no properly commenced arbitration proceedings by either side under the terms of the Code of Conduct. I cancelled the special chambers application. I stayed this action, as there was no live Code of Conduct proceeding against Ms. Twinn. While she sought an order that no further Code of Conduct proceedings be commenced until after the determination of the two previous lawsuits, I refused to grant such an order.

17 I also stayed the Respondents' application to stay Ms. Twinn's actions pending completion of the Code of Conduct proceedings, as there was no live Code of Conduct proceeding. I concluded that their application was premature, and thus moot.

18 I recognized that the parties were likely to re-commence Code of Conduct proceedings against each other, but declined to issue orders prospectively. Costs were expressly reserved.

19 The parties were ultimately unable to agree on the form of order; specifically whether the reservation of costs included the December 16 application or whether it related to costs in this action other than those relating to the December 16 application

20 Ms. Twinn brought this application returnable May 24, 2016 to settle the terms of the order from the December 16, 2015 application, to stay the pending arbitration proceedings relating to new Code of Conduct complaints, and for various cost remedies.

21 It appeared that the Respondent trustees had or were in the process of commencing arbitration proceedings relating to their Code of Conduct complaints against Ms. Twinn.

22 Mr. Heidecker took no position on the current application. The Respondent trustees argued that there should be no stay of their pending arbitration proceedings.

23 The applications were argued before me on May 24, 2016. I finalized the form of order arising from the December 16, 2015 application, and reserved on the issue of the stay of arbitration proceedings.

24 On June 7, 2016, Ms. Twinn's counsel applied for leave to file additional written submissions in relation to her applications. I agreed to allow the submissions to be filed, and that was done on June 21, 2016. The Respondent trustees filed supplementary submissions on June 30. Mr. Heidecker took no position.

Positions of the Parties

25 Ms. Twinn argues that the Court should stay the Code of Conduct arbitrations to prevent manifestly unfair or unequal treatment of a party, as well as to prevent multiple proceedings and avoid inconsistent findings. She cites s 6(c) of the *Arbitration Act*, RSA 2000 c A-43, *New Era Nutrition Inc. v. Balance Bar Co.*, 2004 ABCA 280 (Alta. C.A.) and *Olymel S.E.C. v. Premium Brands Inc.*, 2005 ABQB 312 (Alta. Q.B.).

26 Section 6 of the *Arbitration Act* provides:

> 6 No court may intervene in matters governed by this Act, except for the following purposes as provided by this Act:
>
> (a) to assist the arbitration process;
>
> (b) to ensure that an arbitration is carried on in accordance with the arbitration agreement;
>
> (c) to prevent manifestly unfair or unequal treatment of a party to an arbitration agreement;
>
> (d) to enforce awards.

27 Ms. Twinn also relies on s 8 of the *Judicature Act*, RSA 2000 c J-2 to prevent duplicative proceedings.

28 That section provides:

> 8 The Court in the exercise of its jurisdiction in every proceeding pending before it has power to grant and shall grant, either absolutely or on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to which any of the parties to the proceeding may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, so that as far as possible all matters in controversy between the parties can be completely determined and all multiplicity of legal proceedings concerning those matters avoided.

29 Ms. Twinn recognizes that the test for a stay may be governed by the interim injunction tests stated in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), and cites *MacFarlane v. MacFarlane*, 2016 ABCA 92 (Alta. C.A.), to support this principle.

30 She expresses concern that if she is removed as a trustee, potential beneficiaries of the trust may lose an advocate "both on the Board and in the 2011 and 2014 Actions" on the basis that she can only effectively represent them if she is a trustee.

31 Ms. Twinn also argues that:

a) Additional costs of the arbitration proceedings will be borne by the trusts, and will result in additional costs to all beneficiaries;

b) The Code of Conduct complaints include trustees whose appointment has been called into question by Ms. Twinn, and the validity of their appointments should be determined before Code of Conduct arbitration proceedings; and

c) The arbitration proceedings could "undercut the Applicant's claim to be indemnified for legal costs in her capacity as Trustee".

32 The Respondent trustees argue that arbitration of a Code of Conduct dispute is mandatory, citing *Balancing Pool v. TransAlta Utilities Corp.*, 2009 ABQB 631 (Alta. Q.B.). In that case, Wittmann ACJ (as he then was) stated at para 30 that "once either party invokes the arbitration process, the dispute will necessarily be referred to arbitration and arbitration is mandatory".

33 He noted at para 31:

The court must stay a suit in favour of an arbitration when the plaintiff is a party to the contract for arbitration. It has no choice. There are a few specified exceptions in s. 7(2) (of the Arbitration Act), but none applies here.

34 The Respondent trustees refer to *Yaworski v. Gowling Lafleur Henderson LLP*, 2012 ABQB 424 (Alta. Q.B.), where the Court stayed the plaintiff's action because the defendant had invoked an arbitration process.

35 They also cite several cases where the Courts have intervened in trust business where the administration of the trust has become impossible or improbable, or is stalemated, or where there are unacceptable conditions; *Consiglio, Re*, 1973 CarswellOnt 861 (Ont. C.A.), *Scott v. Scott*, [1991] 5 W.W.R. 185 (Sask. Q.B.), *Dunsdon v. Dunsdon*, 2012 BCSC 1274 (B.C. S.C.), *Radford v. Radford Estate*, 2008 CarswellOnt 5297 (Ont. S.C.J.), and *Mailing v. Conrad* [2003 CarswellOnt 627 (Ont. S.C.J.)], 2003 CanLII 21143.

36 In response to the Applicant's argument that the arbitration will not be fair, the Respondent trustees note that the Court may provide "positive" assistance to the arbitration process to ensure fairness, citing *Alenco Inc. v. Niska Gas Storage US, LLC*, 2009 ABQB 192 (Alta. Q.B.).

37 With reference to the *RJR-MacDonald* tests, the Respondent trustees argue that the first part of the test has not been satisfied, as the Applicant has not demonstrated that there are serious issues to be determined between these parties.

38 With respect to irreparable harm, Ms. Twinn argues that the harm to her is that her ability to be indemnified for costs may be impaired if she is no longer a trustee. The Respondent trustees argue that financial harm is not irreparable harm.

39 Ms. Twinn is also concerned that she could lose the ability to advocate for the beneficiaries and potential beneficiaries, whose interests she says she represents.

40 She says that "the balance of convenience favours the Applicant, as well as the Beneficiaries. The Defendant Trustees will only 'suffer' a delay in the commencement of the arbitration proceedings while the special chambers application is

heard. If the Applicant is ultimately successful at the special chambers application, then the Arbitration will be stayed and the costs associated with it will have been wasted."

41 In response to some of these concerns, the Respondent trustees have proposed that the trusts pay Ms. Twinn's legal costs (past and future) in relation to the Code of Conduct proceedings, and that they will consent to Ms. Twinn continuing to participate in the two beneficiary actions even if she is removed as a trustee as a result of the Code of Conduct proceedings.

42 Ms. Twinn responded to this proposal objecting to the scope of the costs the Respondent trustees were prepared to authorize; specifically the costs of this action as opposed to the costs of the Code of Conduct arbitrations.

43 The Respondent trustees also argue that it is not clear that the Applicant could not be indemnified in the other actions, citing *Gunn Estate, Re*, 2010 PECA 13 (P.E.I. C.A.). The Applicant is a beneficiary of the trusts, so has other avenues of recourse available to her if she is removed as a trustee.

Analysis

44 The Applicant relies heavily on s 6(c) of the *Arbitration Act* as well as the *New Era Nutrition Inc. and Olymel SEC* cases.

45 S 6(c) of the *Arbitration Act* provides:

> 6 No court may intervene in matters governed by this Act, except for the following purposes as provided by this Act:
>
> (c) to prevent manifestly unfair or unequal treatment of a party to an arbitration agreement...

46 Much of the Applicant's argument focuses on unfairness or unequal treatment of the Applicant by virtue of the Code of Conduct proceedings. I will deal with those under the tests for a stay discussed below.

47 The *New Era Nutrition Inc.* case makes it clear that the Court will in appropriate cases stay arbitration proceedings. There, Conrad JA stated at para 3:

> [3] The legislative intent behind section 7 of the Arbitration Act is to discourage duplicitous proceedings where there are overlapping matters that cannot be reasonably divided. I am satisfied that where one party has both sued and arbitrated the same issues, it would be manifestly unfair to deny the other party the remedy contemplated by statute where the matters in dispute cannot be reasonably separated. In my view, the other party can apply under section 6(c) of the Arbitration Act to stay the arbitration rather than make an application under section 7 for a remedy it does not want, and does not think appropriate — namely, to stay the litigation. Multiple proceedings in the circumstances here could involve far more than the mere "inconvenience" of having witnesses participate in two proceedings. The chambers justice should have determined whether the overlapping matters could be reasonably separated.

48 There, New Era invoked the arbitration provisions of the parties' Product Development and Distribution Agreement. It had already commenced legal proceedings seeking damages for breach of contract, tort and breach of copyright.

49 The Court noted (at para 9) that the civil suit sought some of the same declarations as it sought in the arbitration proceedings.

50 Ultimately, the Court held at para 43:

> [43] I take all of these factors to mean that the Legislature intended that the courts use subsection 6(c) to provide a remedy to cure unfairness arising from matters not covered by the specific language of the legislation. In my

> view, it would be manifestly unfair to deny the remedy contemplated by section 7 which is designed to protect against the dangers inherent in duplicitous proceedings. It is an uncommon situation where a party seeks to both sue and arbitrate. Frequently the dangers inherent in duplicitous actions arise when some parties are covered by an arbitration clause and others are not. I am satisfied that subsection 6(c) allows a party, faced with both a statement of claim and a notice to arbitrate, to apply to stay the arbitration on the basis that the matters in the two proceedings overlap and cannot be reasonably separated. To avoid the difficulties encountered by the parties here, an application for this relief should be made at an early date.

51 The essence of the decision staying the arbitration was to prevent the risk of contrary findings in proceedings with overlapping subject matters, as well as the inconvenience of the cost and having to participate in two proceedings.

52 The case at bar is entirely different. The Respondent trustees commenced arbitration proceedings against the Applicant. There does not appear to be any overlap with the lawsuits commenced by the Applicant before the Code of Conduct proceedings against her were commenced. It was the Applicant who commenced this action against the Respondent trustees, after the arbitration proceedings were commenced.

53 Since I do not see that the proceedings overlap, *New Era* would not seem to have any bearing on this case.

54 As for *Olymel SEC*, the dispute was whether or not the agreement between the parties mandated arbitration instead of litigation, such that the plaintiff's lawsuit should be stayed. Erb J refused to stay the lawsuit, holding that not all of the issues could be determined in the arbitration. She concluded that the lawsuit was the process that allowed all of the issues to be determined, especially because there was a third party involved in the litigation, not subject to the arbitration proceedings.

55 That case turned on overlap between the proceedings. Since there is no obvious overlap here, this case is of no assistance to the Applicant.

56 Thus the issues here need to be decided on the principles governing stays of proceedings.

57 Stays of proceedings are generally governed by the same principles as are interlocutory injunctions (*RJR-MacDonald* at para 46, citing *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.). The test as described in *RJR-MacDonald* requires the applicant to:

> a) Demonstrate a serious question to be tried;
>
> b) Convince the court that it will suffer irreparable harm if the relief is not granted; and
>
> c) Demonstrate that it will suffer the greater inconvenience if the relief is not granted (at paras 83 - 85).

Serious question to be tried

58 I am satisfied that there are indeed serious questions to be tried between the parties. The applications before me are only a small part of a larger battle between the two trustee camps. This part of the test is satisfied.

59 The Applicant seeks the removal of two of the Respondent trustees in one of the existing lawsuits. The Respondent trustees have responded by commencing Code of Conduct proceedings against the Applicant, seeking her removal.

60 The Applicant has also commenced Code of Conduct proceedings against the Respondent trustees. I assume that the allegations in her Code of Conduct complaint includes aspects of her lawsuit relating to the disqualification of two of the trustees.

61 I have no details as to the nature of the complaints against the trustees. Removing trustees has significant consequences to the administration of the trust. No one is suggesting that the competing complaints are frivolous.

62 These are matters that need to be decided so that ongoing administration of the trusts can continue.

Irreparable harm

63 I do not see that the Applicant has demonstrated that she will suffer irreparable harm if the arbitration proceeds.

64 The only evidence on the subject of financial harm is Ms. Twinn's argument that "there is only so much personal legal expense that the Applicant is able to sustain." No evidence has been put forward as to Ms. Twinn's financial capacity, and it seems clear that the trusts will be able to pay any amount of costs ordered against them.

65 Ms. Twinn does not say that she is unable to fund the ongoing costs of these various disputes.

66 As for her argument that if she is removed as a trustee, her ability to be indemnified for costs in the various lawsuits she has brought or defended in her capacity as a trustee, this again is a financial argument. It is by no means clear that her ability to be indemnified would be compromised. She commenced or defended the various actions while a trustee. The Respondent trustees acknowledge that they will not object to her continuing with those lawsuits if she is removed as a trustee.

67 Ms. Twinn is also a beneficiary of the trusts and has rights and remedies in that capacity. The Court has a broad discretion regarding costs. If her positions are ultimately successful, she has a reasonable prospect of recovering sizeable costs. Even if she is unsuccessful but is found to have acted reasonably and in good faith in the lawsuits, she may still have a strong argument in favour of being awarded substantial costs.

68 I do not see that these financial fears satisfy the "irreparable harm" test.

69 Regarding the Applicant's argument that she may be disadvantaged in being able to represent the interests of the beneficiaries (or potential beneficiaries) she is arguing for, the Respondent trustees have satisfied that concern by confirming that the Applicant will be entitled to continue in those lawsuits even if she is removed as a trustee.

Balance of inconvenience

70 As I have found no irreparable harm, it is unnecessary for me to assess the balance of convenience or inconvenience. Nevertheless, if I am mistaken as to irreparable harm, I should complete the analysis as to the balance of convenience and do so here.

71 If I understand the Applicant's position correctly, she seeks to stay proceedings which may have her removed as a trustee until the other lawsuits have been concluded. She has her own lawsuit against two of the Respondent trustees seeking their removal, which is not proposed to be stayed.

72 The Applicant argues that the only inconvenience to the Respondent trustees is delay in pursuing her ouster.

73 I cannot see that the balance of convenience or inconvenience favors a freezing of the Applicant's position as trustee. The trusts are ongoing and presumably have ongoing administration issues.

74 The Applicant's lawsuits are in the early stages. I am mindful of the delays inherent in litigation. These delays are exacerbated by the current shortage in judicial resources. If the lawsuits are to be tried, it is likely that the trial of the actions will be some years down the road. Civil lawsuits that are ready for trial are unlikely to be tried in Edmonton before late 2017, at the earliest.

75 The actions here are in their early stages, and are a long way away from being ready for trial. So trials in 2017 are unlikely.

76 On the other hand, arbitrations can be conducted expeditiously. There may be limited document disclosure and limited questioning. Private arbitrators are frequently available on short notice.

77 The arbitration of Code of Conduct complaints can be accomplished in a matter of months, not years.

78 To the extent that the Applicant's disqualification lawsuit is not subsumed in her Code of Conduct complaints, she may pursue those proceedings through the courts. It appears, however, that she wants to have the issues there decided in comprehensive arbitration proceedings, if the arbitration is not stayed. The Respondent trustees appear agreeable to that, although take the position that some of the issues the Applicant has raised are not the proper subject of Code of Conduct arbitration proceedings.

79 I leave that issue to be resolved in the first instances by the parties in their discussions, and next by the arbitrator. Ultimately, non-arbitrable issues may have to proceed through the litigation process, but again that would not appear to result in an overlap of issues.

80 The Applicant is a party to the Code of Conduct. She agreed to the arbitration provisions contained in it. It provides an expedient manner of resolving conduct issues. The Applicant has not satisfied me that the balance of convenience favours staying the arbitration proceedings under the Code of Conduct.

81 As for arguments that the arbitration proceedings will be expensive and will deplete the funds available to the beneficiaries, the size of the trusts and the importance of the issues in the various lawsuits outweigh concerns over the costs of arbitration proceedings over who should be trustees of the trusts.

Section 6(c) of the Arbitration Act

82 It should be obvious from my conclusions on the issues of irreparable harm and balance of inconvenience that the Applicant has failed to establish that the arbitration proceedings under the Code of Conduct would be manifestly unfair to her, or would provide unequal treatment to her. The only element of unequal treatment is the issue of payment of legal expenses, and this concern has been overcome by the Respondent trustees' agreement to reimburse the Applicant's legal costs on the same basis as theirs will be reimbursed to them.

Conclusion

83 The Applicant's application to stay the Code of Conduct proceedings is dismissed. The Code of Conduct proceedings should proceed in accordance with the provisions of the Code of Conduct, subject to the terms offered by the Respondent trustees, namely that:

> a. The complaints of all Trustees will be heard by the same mediator/arbitrator at the Code of Conduct Process. All Trustees may amend their complaints to include additional complaints, within one month prior to the commencement of the Code of Conduct Process.
>
> b. The Applicant will submit names of two potential mediators/arbitrators to the Respondent Trustees within two weeks of the entry of this Order. If one of the nominees is acceptable to the Respondent Trustees, then they will notify the Applicant. The Respondent Trustees will submit names of two potential mediators/arbitrators to the Applicant within two weeks of receipt of the Applicant's nominees. The Applicant will notify the Respondent Trustees if any of the Respondent Trustees' nominees are acceptable within two weeks of receipt of the names of the nominees. If no agreement is reached, the parties will submit the four names of the nominee mediators/arbitrators to Mr. Justice Graesser in a joint letter, with Mr. Justice Graesser to choose the mediator/arbitrator.
>
> c. Any Trustees removed at the Code of Conduct Process will continue to have the right to fully participate in Queen's Bench Actions 1103 14112 and 1403 04885 in the same manner as if they were still a Trustee.

d. All Trustees will be fully indemnified from the Trusts for their future reasonable legal costs of participation in the Code of Conduct Process on a solicitor and client basis. Their Bills of Costs may be submitted on a monthly or other periodic basis to the Arbitrator for approval. The Bills of Costs may be redacted to exclude privileged references. The Mediator/Arbitrator's decision will be final.

84 I do not have jurisdiction to order that the Applicant's disqualification proceedings against two of the trustees be dealt with by arbitration. That appears to be what both sides want, and I encourage them to agree to the terms necessary to include that dispute in the arbitration. That appears efficient and economic.

85 To the extent that trustee qualifications (as raised in the Applicant's disqualification claim) are not agreed to become the subject of Code of Conduct proceedings, they must remain in the Applicant's lawsuit.

86 If the issues raised by the Applicant are agreed be included in Code of Conduct proceedings, Ms. Twinn should amend her complaint against the Respondent trustees accordingly.

87 No manifest unfairness or unequal treatment of the Applicant by reason of the arbitration proceedings have been made out.

88 With respect to the costs of these proceedings to date, I see a difference between Code of Conduct proceedings themselves and litigation to stop or stay the Code of Conduct proceedings. It is manifestly unfair that the Respondent trustees have been reimbursed their legal fees for commencing Code of Conduct proceedings and then abandoning them when the Applicant objected and was required to commence this action to stop them, without the Applicant being reimbursed her costs in opposing the Code of Conduct proceedings. These are costs relevant to this action, and not strictly within the scope of the Code of Conduct proceedings.

89 I conclude that the Applicant should have her legal costs reimbursed for steps taken in the abandoned Code of Conduct proceedings, as well as in this action, to the point of the application before me in December, 2015.

90 I awarded no one costs of the December, 2015 application, finding that the application was an abuse of process. The Applicant has been unsuccessful in this application, but for the concessions made by the Respondent trustees. I do not award her any costs of this application. However, because the Respondent trustees are being reimbursed their legal expenses by the trusts, I do not consider it appropriate that the Applicant be required to reimburse the trusts for any costs expended in opposing this application.

91 If the parties cannot agree on the quantum of the costs I have ordered, they may contact me to discuss a process to resolve any dispute.

92 The above conditions address the Applicant's procedural concerns as to legal costs, hearing the competing complaints at the same time and by the same arbitrator, and as to a fair process for the selection and appointment of the arbitrator.

93 As for amendment of existing complaints and adding additional allegations, the trusts are ongoing entities, and I expect that issues may arise from time to time. The proper place to determine these issues is under the Code of Conduct. For the purposes of the presently contemplated proceedings, it seems to me that the parties should agree on a date by which all amendments will be put forward. If they cannot agree on a date, I will set a date if the arbitrator has not yet been appointed. If the arbitrator has been appointed, procedural issues and deadlines for the arbitration will be in his or her jurisdiction and not mine, subject to the provisions of s 6 of the *Arbitration Act*.

Application dismissed.

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