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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

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 THE SAWRIDGE TRUST ("Sawridge Trusts")

AND

IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT 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 ("Four Sawridge Trustees")
DOCUMENT	**WRITTEN BRIEF OF THE RESPONDENT**
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I. OVERVIEW

1. In the interests of costs and efficiency, this brief is filed together by the Trustees of the "1985 Trust" (described more fully below), all represented by Dentons Canada LLP in the 1103 14112 Action ("1103 Action") and by Bryan & Company LLP in the 1403 04884 Action ("1403 Action") for four of the Trustees (excepting Catherine Twinn). We believe that this is cost effective, and will be more efficient for the Court as it will minimize the number of Briefs and Replies that are required.

II. INTRODUCTION

2. Catherine Twinn ("Catherine"), who is one of five Trustees of the 1985 Trust ("Trustees"), is seeking full reimbursement for her previously incurred legal costs, and unqualified, unconditional and advance payment from the 1985 Trust for all of her future legal costs in these and related proceedings. While Catherine is a lawyer, she has hired McLennan Ross LLP to represent her, and it is those fees that are at issue.

3. Catherine, in her Brief, advances this as a case of a trustee seeking reimbursement for a reasonable expense incurred in administering a trust. However, that is not an accurate characterization. Further, that position is not supported by the facts or the law, as will be set out in this Brief.

4. Catherine's legal bill presently stands at a staggering $850,000. This legal bill was not incurred simply as a cost of administering the trust, nor is it reasonable, as she suggests. As will be outlined in detail below, Catherine has brought legal proceedings to challenge trustee decisions with which she disagrees, and then allowed those proceedings to languish for years, except to actively seek costs for them. She has required the Trustees to obtain court orders to take simple administrative steps, when there was no proper basis for her refusal to sign documents. She has supported other litigants in bringing applications that were dismissed by the court as being unmeritorious with costs awarded on a full indemnity basis against those litigants, and has taken other steps that have prolonged or hindered litigation.

5. In short, Catherine is acting as an adversary to the 1985 Trust. The steps she has taken, and her personal intervention in these proceedings, are not necessary to the Trust's administration. Her conduct is incurring substantial, unnecessary fees to the detriment of the beneficiaries. The 1985 Trust should not be called upon to fund conduct that is hindering the efficient determination of its Application for directions, nor should it be called upon to diminish the 1985 Trust assets to pay for steps that are of no benefit to its beneficiaries and are duplicative of the issue before the court.

6. This is particularly so given that Catherine has instructed her legal counsel to take steps and incur fees in the face of repeated Trustee resolutions and warnings that she will not be reimbursed. The Trustees have the authority to make decisions by simple majority, in accordance with the Trust Deeds and the Code of Conduct. Catherine has not advanced

any basis to support a request for the Court to interfere with and overturn that exercise of trustee discretion.

7. Even if Catherine does not agree with the course of action properly decided upon by the majority of Trustees, that does not mean that the Trusts must be called upon to write her a blank cheque for whatever steps she wishes to take to litigate her disagreement, particularly given the history of unproductive and non-beneficial steps taken.

8. There is an increasing trend in case law, from the Alberta Court of Queen's Bench to the Supreme Court of Canada, emphasizing the need to maintain reasonableness and efficiency in litigation. That trend is equally applicable in trust litigation. Reimbursement of litigants from the trust is far from automatic. When litigants take an unsuccessful position, it is increasingly common that not only will they not be paid from the trust, but costs will be awarded against them. In these circumstances, where Catherine takes positions against the Trustees and lends her efforts to support other unsuccessful litigants, costs should be determined in the usual course rather than being predetermined on this Application.

III. <u>STATEMENT OF FACTS</u>

9. There is a long history to the trusts at issue in this, and the related, applications. In the early 1970s, Sawridge Band No. 454, now known as Sawridge First Nation (or "Nation") began investing some of its oil and gas royalties in land, hotels and business assets.

> Affidavit of Paul Bujold, sworn September 12, 2011, paras 6-8 (**"First Bujold Affidavit"**) [Tab 1]

10. As it was unclear whether the Nation had statutory ownership powers, the acquired assets were registered in the names of individuals, who held the property in trust for the Nation. One of these people was then-Chief Walter Patrick Twinn ("Chief Walter Twinn"), who became Chief in 1966 and remained in that position until his death in 1997.

> First Bujold Affidavit, paras 8, 9 [Tab 1]

11. The Sawridge First Nation decided to establish a formal trust for these assets, to enable the Nation to provide long term benefits to its members. On April 15, 1982, a declaration of trust establishing the Sawridge Band Trust (the "1982 Trust") was executed, and all property held in trust by Chief Walter Twinn and others was transferred into it.

> First Bujold Affidavit, paras 9, 10 [Tab 1]

12. Shortly after the 1982 Trust was settled, the *Constitution Act, 1982*, including the *Canadian Charter of Rights and Freedoms*, came into force. Consequential amendments to the *Indian Act*, RSC 1970, c. I-6 (the "1970 *Indian Act*"), including amendments to certain provisions relating to membership for women, were introduced in *Bill C-31*. It was

expected that these changes would result in an increase in the number of individuals included on the membership list of the Sawridge First Nation.

First Bujold Affidavit, para 13 [Tab 1]

13. Due to this anticipated increase in the number of members, the Nation decided to settle a new trust on April 15, 1985 (the "1985 Trust"). The intention was to preserve assets acquired before *Bill C-31* for Nation members as defined by the 1970 *Indian Act* as applicable at that time, and the definition of "beneficiary" was drafted to effectively "freeze" the definition of beneficiaries according to the membership definition at the time. The trustees of the 1982 Trust resolved to transfer all of its assets to the 1985 Trust.

First Bujold Affidavit, paras 14, 15 [Tab 1]

14. After April 15, 1985, no further assets were put into the 1985 Trust. A new Sawridge Band Trust was settled on August 15, 1986 (the "1986 Trust") to hold assets that came into existence after April 15, 1985. The definition of "beneficiary" in the 1986 Trust was drafted to include only those individuals who qualified as members of the Nation post-*Bill C-31*.

First Bujold Affidavit, paras 15- 23 [Tab 1]

15. The issue of who qualifies as a member of the Sawridge First Nation in the 1986 Trust is not an issue in this litigation. The Nation established its own membership code and took over its membership list in 1985, as permitted by the *Bill C-31* amendments to the *Indian Act*. It continues to exercise that control to this day.

16. The issue in the underlying application for advice and directions in the 1103 Action is the definition of "Beneficiaries" in the 1985 Trust. The Trustees seek the Court's direction as to whether this definition is discriminatory. Those particularly affected are women who would otherwise qualify as members but married a non-Indigenous man and thus lost Indian status for themselves and their children. Under the current definitions of "Beneficiaries", those women are beneficiaries of the 1986 Trust but not the 1985 Trust.

First Bujold Affidavit, paras 32- 35 [Tab 1]

17. The Trustees, including Catherine, passed a unanimous resolution to proceed with the application for advice and directions. In fact, Catherine was the one who put forward the motion to approve this course of action. The 1103 Action seeks direction from the Court on whether the definition of "Beneficiary" is discriminatory, and if so, how to amend it. The Trust Deed specifically prohibits amending the beneficiary definition and thus the trustee seeks the Court intervention on a Public policy basis.

18. In 2014, as is explained more fully below, the Trustees filed two applications in the 1403 Action and Catherine Twinn also filed applications in the 1403 Action. When new Trustees were appointed, the Trustees sought to transfer the assets to them. Catherine sought to challenge the appointment of the new Trustees. As Catherine's application in the 1403 Action was a challenge against the remaining four Trustees, they were required

to retain Bryan & Company LLP as counsel to represent them in the 1403 Action, given the potential conflict inherent in the 1985 Trust's lawyers representing the four Trustees in an application filed by Catherine.

A. Trustees and Governance

19. The current Trustees are set out at paragraph 10 of the Affidavit of Paul Bujold attached at Tab 4.

20. The 1985 Trust Deed and the Trustees, or their predecessors, have put in place a number of mechanisms to ensure that the administration of the 1985 Trust runs as smoothly as possible. These include:

(a) Section 13 of the 1985 Trust Deed provides that all decisions are to be made by a vote of a simple majority of Trustees;

Affidavit of Paul Bujold, sworn August 30, 2011, Exhibit "B", Trust Deed, section 13 (**"Second Bujold Affidavit"**) [Tab 2]

(b) Implementing a Code of Conduct. Catherine was involved in drafting that Code of Conduct. The Code of Conduct contains guidance in the preamble, along with the schedules, for the behaviour of the Trustees and sets out a procedure for dispute resolution between the Trustees. Paragraph 5(i) reads:

> Where possible, Trustees should work towards unanimous agreement; where unanimous agreement is not possible; Trustees shall try to come to a consensus; where neither of these is possible Trustees shall reach decisions by simple majority. In all cases, once a decision is made by the Trustees it should be respected and followed by all.

Sawridge Code of Conduct, preamble, para 5(i), Schedule A, Schedule B1 [Tab 3]

Affidavit of Paul Bujold, sworn February 15, 2017, paras 5, 6, 105, (**"Third Bujold Affidavit"**) [Tab 4]

Questioning of Catherine Twinn, September 9, 2016, pp 19, 41-43 (**"First Questioning"**) [Tab 5]

(c) Appointing a Chief Executive Officer ("CEO") for the Trusts. That position was created in 2009 and is currently held by Paul Bujold.

(d) Appointing a Chair of the Board of Trustees ("Board Chair") to provide for proper governance at Trustee meetings. That position is currently held by Brian Heidecker.

21. Catherine agreed during Questioning that she understood that the 1985 Trust stated that decisions could be made by a majority of the Trustees. She also agreed that she was bound by the terms of the Code of Conduct.

First Questioning, pp 41-42 [Tab 5]

22. The four Trustees, with the exception of Catherine, have a good, respectful working relationship with each other, and with the CEO and Board Chair. Catherine is critical and disrespectful throughout her affidavits and Brief of the other Trustees, and of the CEO and Board Chair. The criticism in her Brief of these paid employees of the 1985 Trust is not relevant to Catherine's application for costs, and making such criticism on the public record is disrespectful conduct by a Trustee who is one of their employers.

> Chart outlining inappropriate behaviour of Catherine Twinn, (**"Chart of Catherine Twinn"**) [Tab 6]
>
> Brief of Catherine Twinn, filed September 1, 2017, paras 14, 17, 73 86, 114, 137, 140, 146, 152 (f), 170, 171, 179, 183 (**"Catherine's Brief"**)
>
> Third Bujold Affidavit, paras 81-92, 141-143 [Tab 4]

23. The decision-making procedure set out in the Code of Conduct is consistent with the terms of both Trust Deeds, which each provide for the Trustees to make decisions by simple majority. This mechanism was confirmed for a third time by a Trustee decision made at a meeting held on August 25, 2005. None of the Trustees at that meeting, including Catherine, raised any question about needing consensus or unanimous approval for Trustee decisions.

> Third Bujold Affidavit, paras 4, 57 [Tab 4]

24. Catherine suggests that her involvement in the litigation is necessary to raise issues not being advanced by the four other Trustees. This is not true. The issue of some potential beneficiaries being excluded is front and centre, including whether any potential or current beneficiaries should be "grandfathered", and will be dealt with by the Trustees.

> 1985 Sawridge Trust v Alberta (Public Trustee), 2017 ABQB 377, at paras 31-34 (**"*Sawridge #5*"**) [Tab 7]
>
> Second Bujold Affidavit, para 14 [Tab 2]

B. Properly Passed Trustee Policy

25. There is a policy of the Trustees that they are to obtain prior approval for legal advice and prior approval for expenditure of legal fees.

> Third Bujold Affidavit, para 127-130 [Tab 4]

26. At a meeting of the Trustees in 2013, Catherine requested that a legal fund be set up to provide $15,000 per year for each individual Trustee to obtain independent legal advice. Any funds not used by one Trustee could be used by another (with the result that one Trustee, if none of the others sought advice, could receive up to $75,000 per year for legal fees). None of the other Trustees seconded her motion, and it failed.

> Third Bujold Affidavit, para 128 [Tab 4]

27. Despite that motion failing, Catherine is now seeking over $850,000 in legal fees accumulated in about three years. It is very concerning to the other Trustees that there is such a disparity between her original budget and the actual expenditure, and that she incurred such a bill even after her request for payment by the Trusts was denied.

> Catherine's Brief, para 84
>
> Questioning of Catherine Twinn, November 9 and 10, 2016, pp 148-149 (**"Second Questioning"**) [Tab 8]

28. Catherine is asking this Court to overturn all of these properly passed decisions of the Trustees.

C. Unnecessary Proceedings and Litigious Steps by Catherine

29. Catherine has taken a number of steps in the 1103 Action and the 1403 Action that have delayed proceedings, incurred unnecessary fees, or have not demonstrated respect for the court process, which is all the more troubling, given that Catherine is a lawyer.

30. Those steps include:

(i) She continues to raise issues respecting the membership process of the Nation, despite several decisions by the case management justice that have declared that the Band's membership process is not open for review (see paras 32 to 44 below);

(ii) She has supported, financially and otherwise, applications that were all denied by the Court, and in some cases found to be frivolous and vexatious (see paras 45 to 50 below);

(iii) She refused to sign documents to transfer assets to the new set of Trustees after Everett Justin Twin ("Justin") was appointed, requiring a court application, which was granted (see paras 51 to 55 below);

(iv) Months later, she refused a <u>second</u> time to sign the transfer of assets on Dr. Margaret Ward's ("Margaret") appointment, requiring another court application that, again, was granted (see paras 56 to 60 below);

(v) Catherine filed an application 3 years ago to challenge the appointment of a new Trustee, which cannot succeed and that she has done nothing to advance except to seek payment of her costs (see paras 61 to 63 below);

(vi) She raises the "structural conflict" in the Trusts, without providing any particulars about what she seeks to achieve, and despite the fact that she herself is in the same conflicted position about which she comments (see paras 65 to 71 below);

(vii) She has brought an application to dispute the application of the Code of Conduct, even though she was one of the Trustees at the time the Code was established and signed her approval to it (see paras 72 to 74 below);

(viii) She disrupted the 1103 Application, in which the Trustees sought to impose a settlement on the Public Trustee, by filing a brief taking an oppositional stance, without prior notice, the day before the hearing (see paras 75 to 80 below); and

(ix) She has prolonged Questionings, refused to admit uncontroversial documents (putting the Trustees to increased expense) and has failed to correct representations to the court (see paras 81 to 84 below).

31. In addition to these steps, Catherine has acknowledged that she has failed to comply with a court order, as she has not paid a prior award of costs made against her in the 1403 Action.

> Second Questioning, p. 197 [Tab 8]
>
> Questioning of Catherine Twinn, July 20 and 21, 2017, p 567 (**"Third Questioning"**) [Tab 9]
>
> Order of Justice Thomas dated December 17, 2014 [Tab 10]
>
> *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 436, paras 56, (**"*Sawridge #6*"**) [Tab 12]
>
> *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 548, paras 87-90, (**"*Sawridge #8*"**) [Tab 30]

(i) Raising Membership Issues

32. In her Brief, Catherine identifies certain "concerns" she has with the membership process of the Nation as having "compelled [her] to become involved in [the 1103] Action with the benefit of independent counsel".

> Catherine's Brief, paras 78(c), 86, 102-107, 121

33. Catherine outlines a number of concerns related to membership issues in detail; indeed, at least seven pages of her Brief are devoted to those concerns. These are irrelevant to this Costs application, but more importantly, this Court has given clear and unequivocal direction since at least 2015 that membership issues were <u>not</u> to be raised and litigated in these proceedings. Catherine was asked to remove paragraphs of her affidavit regarding membership and she refused.

> Catherine's Brief, paras 77, 78, 86, 112, 114, 117-143, 146, 195-201
>
> Second Questioning, p. 209 [Tab 8]

34. In *Sawridge #3*, Justice Thomas gave the following direction:

> In *Sawridge #1* 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.
>
> ...
>
> ... 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*, <u>there is no need, nor is it appropriate, for this Court to address this subject</u>. 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.
>
> ...
>
> As Aalto, J. observed in *Poitras v. Twinn*, 2013 FC 910, 438 FTR 264, "[Many] 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....
>
> ...
>
> 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 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. <u>The 1985 Sawridge Trustees</u>, <u>or any of them</u>, likewise <u>have no right to engage in collateral attacks on the SFN's membership processes</u>. Their fiduciary duty (<u>and I mean all of them</u>), is to the beneficiaries of the Trust, and not third parties.
>
> ... While in *Sawridge #1*, I 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*. <u>I repeat that inquiries into the history and processes of the SFN membership are no longer necessary or relevant</u>.

1985 Sawridge Trust v Alberta (Public Trustee), 2015 ABQB 799, paras 33, 35, 50, 54, 69, 70 (**"*Sawridge #3*"**) (emphasis added) [Tab 13]

35. This is a clear direction that continuing to raise issues in these proceedings pertaining to individual decisions by the Nation about membership status is inappropriate. The Order that was issued as a result of the appearance in *Sawridge #3* explicitly states that neither the Public Trustee nor the Sawridge Trustees are to challenge the membership process. Counsel for Catherine signed her consent to that Order. In questioning, Catherine admitted that she was aware of this Order, that the Sawridge Trustees (which includes herself), were not to raise issues of membership, that her counsel had signed the Order and as a result she was bound by it.

Order of Justice Thomas, dated December 17, 2015, paras 3, 15 [Tab 14]

Third Questioning, pp 437-438 [Tab 9]

36. The Court's position on raising membership issues in these proceedings is also clear from its subsequent decisions. In *Sawridge #5*, in which three applications to obtain standing as parties to the litigation were denied, Justice Thomas wrote, in dismissing the application of a non-member to be added as a party:

> 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.

Sawridge #5, para 41 [Tab 7]

37. Costs were awarded against all three parties who attempted to gain standing in *Sawridge #5*. For two of those applicants, costs were awarded on a solicitor and his own client basis.

38. In *Sawridge #6*, Justice Thomas again dismissed an application by a non-member, Maurice Stoney ("Stoney"), to obtain party status and identified one of the grounds for doing so as:

> 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.

Sawridge #6, para 48 [Tab 12]

39. Solicitor and his own client costs were awarded against Stoney, and in *Sawridge #7*, they were ordered equally payable by Stoney's lawyer personally. Justice Thomas identified the persistence in litigating issues about membership in the face of his directions otherwise as a factor in awarding costs against Stoney's lawyer:

> Another aggravating factor is that in *Sawridge [#3]* I concluded at para 35 that this court would not take jurisdiction to review the Sawridge Band membership process. That was the jurisdiction of the Federal Courts. Stoney and Kennedy ignored that instruction by advancing the *Sawridge #6* application.

1985 Sawridge Trust v Alberta (Public Trustee), 2017 ABQB 530, para 147, (**"*Sawridge #7*"**) [Tab 15]

40. In the face of not just the clear language in *Sawridge #3*, but the three subsequent decisions denouncing applications that raised the membership process, Catherine persists in raising membership issues. Her Brief identifies those issues as being one of the central concerns she wishes to advance as a party to the 1103 Action. Further she admitted to obtaining sworn "statements" from individuals about the membership process to put into one of her many affidavits, which is not proper evidence before the court. Indeed, Catherine takes the position that Justice Thomas' determination in *Sawridge #3* applies only to the issue of document production and cannot be interpreted any more broadly. Her Brief ignores *Sawridge #5*, *#6* and *#7*. In addition, she boldly makes clear her intention to continue to advance those issues, indicating that she views it as her duty. In fact, she advances it as a reason to obtain costs in this application.

Catherine Brief, para 143

Third Questioning, pp 437-438, 520-526 [Tab 9]

41. The Trustees submit that it is clear from Justice Thomas' decisions that his direction does not apply only to documentary production. The Trusts should not be called upon to fund Catherine in continuing to raise issues that have been determined to be "inappropriate" and within the jurisdiction of another court. The 1985 Trust should not be called upon to fund a lawyer who refuses to follow the clear direction of the Court on this issue. This Court has awarded solicitor and his own client costs against others who engaged in that very conduct.

42. The membership process is not an issue in Catherine's application in the 1403 Action, either.

43. Catherine repeatedly suggests that Dr. Donovan Waters said that the Trustees must involve themselves in the membership process. However, just as she did not refer the court to the subsequent case management decisions about membership issues, she fails to tell the court that Dr. Waters specifically advised the Trustees that they could <u>not</u> get involved in the membership process, which Catherine admits in her undertakings.

Undertaking of Catherine Twinn from First Questioning, #84 [Tab 16]

44. In sum: Justice Thomas has clearly directed that membership issues have no place in the litigation; it is Catherine's own position that she seeks no remedy in relation to membership; and she admits that membership is determined by the Sawridge First Nation (which is not a party to these proceedings). The membership rules can only be amended by a reference to the whole Nation, not by the Chief and Council and not through these proceedings. Given this, there is no basis upon which Catherine should be indemnified for taking steps before this Court to raise concerns about membership.

Catherine's Brief, para 143(c), 195

(ii) Support for Unsuccessful Positions of Other Litigants

45. Catherine is claiming costs of over $850,000. This includes costs incurred in supporting failed applications. Generally, the court does not award costs to the losing party, and certainly not full indemnity costs.

46. Catherine supported the Public Trustee's failed application for documentary production from the Nation in *Sawridge #3*, including records related to membership processes, past and current applications of adult candidates and records of the application process and associated constitutional litigation. Catherine's support was given despite considerable concerns expressed by the Nation and the Trustees over the costs of the production. The Court denied the application. Justice Thomas held that the Public Trustee's request was "an open-ended 'fishing trip'... outside the scope of the Public Trustee's role in this proceeding".

Sawridge #3, paras 10, 26, 52 [Tab 13]

47. Catherine supported the failed application in *Sawridge #5*, in which three people sought standing as parties and sought advance, full indemnity costs. In fact, Catherine paid for the

retainer for those applicants, being her son, niece, and her late husband's purported daughter. As mentioned above, that application was denied and costs were awarded on a solicitor and his own client basis against two of the applicants on the basis that those applicants would "offer nothing and instead propose to fritter away the Trust's resources to no benefit". Justice Thomas further found that he would not have granted them advance costs even if they were made parties.

Third Questioning, pp 487-489 [Tab 9]

Sawridge #5, para 47 [Tab 7]

48. Catherine supported Stoney's failed application to pursue intervenor status and full indemnity advance costs. She negatively commented on Justice Thomas' decision in a published news article about the hearing regarding costs against Stoney's lawyer, saying to the reporter after attending the hearing, "What happened today to Mr. Stoney and his family is a travesty." The article refers to her as "Catherine Twinn, a Sawridge trustee who disagrees with the band's rejection of Stoney".

Affidavit of Paul Bujold sworn August 30, 2017 para 8, Exhibit "C" (**"Fourth Bujold Affidavit"**) [Tab 17]

49. Catherine's very public comments on Stoney's application are troubling to the Trustees for a number of reasons. First, the Trustees do not support public criticism of the Court's decisions, and also believe that such comments are contrary to Catherine's duties of conduct as a lawyer. Second, the reasons delivered by Justice Thomas in *Sawridge #6* and *#7* rejected Stoney's application on the basis that it was frivolous and vexatious litigation, and awarded solicitor and his own client costs against both Stoney and his lawyer. It is concerning to the Trustees that Catherine would lend her support in any way, let alone such a public and vocal manner, to an applicant whose litigation against the Trust attracted such strong rebuke from this Court. Finally, while Catherine is now taking issue with the Court's treatment of Stoney's application about membership status, she was one of the Electors of the First Nation in 2012 who unanimously rejected Stoney's appeal to the Nation of its decision to deny him membership.

Fourth Bujold Affidavit, para 8, Exhibit "D" [Tab 17]

50. In sum, Catherine has incurred significant costs to support failed applications. She did not seek costs from Justice Thomas in any of those applications. Generally, a losing party is not awarded costs.

(iii) Application to Remove Trustee on Basis of Membership

51. Justin was appointed as a Trustee by a majority vote at a Trustee meeting on January 21, 2014, as a replacement for Walter Felix Twin, who resigned as Trustee due to health concerns.

Third Bujold Affidavit, paras 21-24 [Tab 4]

52. The 1985 Trust requires there to be five Trustees, and there was a pending commercial transaction for that Trust. However, Catherine did not want to vote to replace Walter Felix Twin with Justin. Instead, despite knowing that there was an immediate need to have five Trustees, she wanted a longer selection process thus effectively leaving the trust without the required number of trustees.

Second Bujold Affidavit, Exhibit "B", Trust Deed, section 5 [Tab 2]

53. The other three remaining Trustees voted by majority to appoint Justin. The 1985 Trust only requires a majority vote to appoint a new Trustee. Catherine neither approved nor opposed his appointment, although puzzlingly she also insists she did not abstain from that motion. The Trustees were thus provided with documents to transfer the assets to the Trustees. She refused to sign documents to appoint Justin or to transfer assets from the old set of Trustees to the new group of Trustees. Catherine vocally opposed his appointment because, in her view, he was not a legitimate member of the Sawridge First Nation.

Third Bujold Affidavit, para 26,-28, 35-37 [Tab 4]

First Questioning, p. 20 [Tab 5]

54. As a result of Catherine's continued refusal to sign over the course of months, the Trustees were required to bring a Court application in April 2014, as the commercial transaction drew closer, to seek an Order to transfer the assets to the new Trustees. At the first appearance, Catherine asked for an adjournment so that she could retain legal counsel. (We address the accuracy of this representation to the Court below.) On the next Court date, the Trustees were successful in obtaining an order to transfer the assets. This is another example of a failed application for which Catherine is seeking her costs in this application.

Third Bujold Affidavit, paras 28, 29, 32 [Tab 4]

55. Catherine suggests in her Brief that the Trustees and their lawyers acted inappropriately by seeking relief against her. The only relief sought by the Trustees against Catherine was the costs of the application, which was entirely unnecessary and caused by Catherine's refusal to sign.

Catherine's Brief, paras 27, 39

Originating Application filed April 1, 2014 [Tab 18]

(iv) Refusal to Sign Transfer of Assets to Margaret

56. Clara Midbo, then a Trustee, died in 2014. For the second time that year, a new Trustee had to be appointed. The Trustees met on August 12, 2014 to do so.

Third Bujold Affidavit, para 45-50 [Tab 4]

57. Given Catherine's objections about Justin's appointment, all of the Trustee candidates proposed at the meeting were members of the Nation and beneficiaries under the definition of both the 1985 Trust and 1986 Trust. However, Catherine again disagreed with all proposed replacement Trustees and instead proposed two individuals who lived in British Columbia and Dubai, respectively; were not members of the Nation; and who none of the Trustees (including Catherine) had ever met.

Third Bujold Affidavit, paras 48-51 [Tab 4]

58. While the Trustees listened to Catherine's suggestions, the majority voted to appoint Margaret. She had previously been a trustee-in-training, was a member of the Nation, and a beneficiary of both the 1985 Trust and 1986 Trust. She has a demonstrated interest in indigenous affairs, holding a PhD in Indigenous Education.

Third Bujold Affidavit, paras 50, 51 [Tab 4]

59. Catherine objected to this choice of Trustee, and again refused to sign the necessary transfer of assets. This refusal came despite the previous decision of the Court directing the transfer of the assets. The Trustees were once more forced to bring a costly Court application, and once again the order was granted. Catherine, as a lawyer, would have known the import of precedent and *stare decisis*. Yet, she still refused to take direction from the previous court decision and required the Trust to expend the resources to obtain an order rather than simply signing the transfer.

Third Bujold Affidavit, para 51 and Exhibit "M" [Tab 4]

60. Catherine did not seek her costs at either application dealing with the transfer of assets. She is now seeking reimbursement on a full indemnity basis from the Trust for both of these failed applications.

(v) Catherine's Application to Challenge Trustee Appointment

61. Catherine filed an Originating Notice in the 1403 Action seeking advice and direction seeking the removal of Justin and Margaret as Trustees of the 1985 Trust, and also seeking the appointment of independent Trustees. Catherine is seeking recovery of her legal fees for all steps taken in connection with this application.

62. Catherine has done nothing to advance that proceeding for three years, except to seek to have her legal bills paid. Justin and Margaret have since been reappointed as Trustees since that Application was filed,. If Catherine was genuinely concerned that it was not in the Trusts' interests for them to act as Trustee, it would seem incumbent on her to have advanced her application.

Third Bujold Affidavit, paras 134, 135 [Tab 4]

Second Questioning, p 149 [Tab 8]

63. Catherine's application in the 1403 Action cannot succeed; thus, Catherine should not receive indemnification for her legal fees. It cannot succeed by virtue of the following:

(a) The Trustees are governed by the 1985 Trust Deed. It provides that Trustees can only be removed by death or resignation. Further, the power to fill any vacancy "shall be vested in the continuing Trustees". Any deviation from these terms would require a variation of the Trust Deed, which according to terms of the Trust Deed, would require the consent of 80% of the beneficiaries of the Trust. Catherine has not sought this consent from the known beneficiaries, nor has she requested in her application a variation of the 1985 Trust Deed. See paragraph 5 and 11 of the Trust Deed [Tab 2]

(b) Justin's name has been on the Indian Register since 1982. No protest was filed. According to the wording of the 1985 Trust Deed, Justin is a beneficiary of the 1985 Trust and thus entitled to be one of the Trustees of the 1985 Trust. See Third Bujold Affidavit Exhibit H [Tab 4]

(c) Justin was appointed by the majority of the Trustees. The Trust Deeds allow for decisions to be made by the majority of the Trustees.

(d) Justin's appointment was renewed by a majority of the Trustees in December, 2016. At that time, according to the 1985 Trust, Justin could hold that position as either a beneficiary or non-beneficiary of the 1985 Trust.

(e) Margaret is a beneficiary of both the 1985 and 1986 Trusts. She was appointed as a Trustee by a majority of the Trustees, in accordance with the Trust Deed. At that time, Margaret could hold that position as a beneficiary of the 1985 Trust.

(f) Margaret's appointment was renewed by a majority of the Trustees in December, 2016. At that time, according to the 1985 Trust Deed, Margaret could hold that position as a beneficiary of the 1985 Trust.

(g) The 1985 Trust Deed is clear. The power to appoint Trustees is within the sole discretion of the Trustees, so long as there is a maximum of two non-beneficiary trustees, with the remaining three positions held by beneficiaries of the 1985 Trust.

(h) Subsection 16(1) of the *Trustee Act* provides that an order appointing a new trustee should only be made when it is "inexpedient, difficult or impractical to do so without the assistance of the court". None of those circumstances arise here.

64. Thus, Catherine's application for advice and directions to determine if these appointments were permissible is unnecessary and must fail. In light of these futile arguments, Catherine should not be given advance costs, full indemnity or otherwise.

(vi) Pursuing "Structural Conflict"

65. In her Brief, Catherine also references a desire to address the "structural conflict" of the 1985 Trust, and cites her concern about this "conflict" as another reason she is taking legal steps. Indeed, she says that she "initiated an application, in the pre-existing [1403] Action, for the purpose of seeking judicial direction on, amongst other matters, the inherent structural conflict between those Trustees holding dual roles as both a trustee and an elected official of the First Nation". She asserts, "This is a structural conflict that was also noted as concern (sic) by Justice Thomas in his June 12, 2012 decision in the 2001 Action (Sawridge #1)."

Catherine's Brief, paras 10, 16, 47, 144-149, 180-183

66. However, Justice Thomas did not identify that conflict as an issue that needs to be addressed. Further, he identified the conflict as being broader than just elected officials of the Sawridge First Nation. The discussion in *Sawridge #1* was in the context of deciding whether the Public Trustee should be appointed to represent the interests of the minor beneficiaries of the 1985 Trust. Justice Thomas wrote:

> I conclude that the appointment of the Public Trustee as a litigation representative of the minors involved in this case is appropriate.... The Sawridge Trustees and <u>the adult members of the Sawridge Band</u> (including the Chief and Council) are in a potential conflict between their personal interests and their duties as fiduciaries.
>
> 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 <u>sufficient basis to order that a litigation representative be appointed</u>...

1985 Sawridge Trust v Alberta (Public Trustee), 2012 ABQB 365, paras 28, 29 (**"*Sawridge #1*"**) [Tab 19]

67. Justice Thomas identified <u>all</u> adult members of the Nation as being in a potential conflict, since they all have a potential financial interest in what the definition of "beneficiary" is determined to be. Catherine is one of them.

68. Even if elected officials have a particular conflict, only one of the Trustees holds a position with the Chief and Council. The majority of the Trustees are not elected officials. A simple majority is all that is required for decisions by the Trustees. Thus, the elected officials who sit as Trustees are not in a position to control the Trust.

69. It must also be remembered that Justice Thomas made these comments in the course of determining whether independent representation should be appointed for the minors who are affected by these proceedings. Justice Thomas did not instruct that any steps be taken to address the "structural conflict", nor did he identify it as a basis upon which any of the Trustees should be excluded from acting as such. His identification of it as a

reason for appointing independent counsel for potentially affected minors does not necessitate bringing further legal proceedings to determine if it is proper.

70. It should also be noted that the Code of Conduct of the Trustees specifically deal with instructions and directions on the subject of conflict of interest.

Code of Conduct, s 4, Schedule A, pp 6-9 [Tab 3]

71. Finally, Catherine has not identified any relief or end result that she is seeking by taking steps to raise the "structural conflict". The Trustees do not agree that the Trust should be called upon to fund litigation about the "structural conflict" regarding the Trustees when they do not agree that it is necessary; this Court has not identified it as necessary; and Catherine has not articulated any actual or potential benefit that it might achieve.

(vii) Code of Conduct Proceeding

72. A Code of Conduct was signed by Catherine as a Trustee of the 1985 Trust on January 12, 2009. Catherine acknowledged that she was bound by the Code of Conduct, which provides a process for complaints against a Trustee to be dealt with by way of mediation/arbitration. The four Trustees commenced that process to address complaints about Catherine's conduct. Rather than submitting to the process as set out in the Code of Conduct, Catherine commenced a court action against the four Trustees and the Board Chair (the "1503 Action"). The four Trustees sought a stay of the 1503 Action. Catherine opposed that application, and brought her own application to stay the Code of Conduct process in favour of the 1503 Action. The Trustees were successful in their application to proceed with the Code of Conduct process.

Statement of Claim of Catherine Twinn filed June 19, 2015 [Tab 20]

Twinn v Twinn, 2016 ABQB 553, para 83 ("***Twinn v Twinn***") [Tab 21]

First Questioning, pp 40-46 [Tab 5]

73. It is concerning to the Trustees that Catherine signed the Code of Conduct, agreed to be bound by it, but then chose to sue the Trustees and the Board Chair and incur legal fees in trying to fight the Code of Conduct process, a fight that she ultimately lost.

74. The four other Trustees ultimately agreed to reimburse Catherine's legal fees in respect of the Code of Conduct proceedings. That is mentioned in the Court's decision dismissing Catherine's application for a stay. However, even though those costs are not at issue, her conduct in fighting to be able to proceed in the wrong forum is instructive.

Twinn v Twinn, para 82 [Tab 21]

(viii) Adversarial Positions on the Eve of Hearings

75. On June 12, 2015, the Trustees filed an Application that was returnable on June 30, 2015. The Trustees proposed to have the Court use its *parens patriae* jurisdiction to accept a proposed settlement that benefitted minors.

76. Important to that application is the context. The Public Trustee had been granted advance costs in *Sawridge #1*. After receiving that order, the Public Trustee retained external counsel in Ottawa, whose rates ranged up to $750.00/hour. They were proceeding with that retainer, and at the same time refused a settlement offer that the Trustees believed was not only fair, but generous. The Trustees sought the Court's advice and direction as to whether it was reasonable for the Public Trustee to refuse the settlement agreement. The Public Trustee's legal expenditures were reviewable by the Court, and the Court has inherent jurisdiction over the protection of minors, and as such the Trustees believed it was appropriate to seek Court advice.

77. On June 29, the day before the hearing and without prior notice, Catherine filed a brief opposing the Trustees' application for direction on the settlement. Catherine takes the position that she did so because, in her view, it is her duty to protect the interests of various beneficiaries. She opposed even the settlement with the Public Trustee.

Catherine's Brief, paras 101, 102

78. This rationale ignores the fact that the Public Trustee had been appointed to represent the interests of the minor beneficiaries, and was more than capable of fulfilling its mandate.

79. As a result, the Trustees requested an adjournment on June 30, and at the return hearing in early September 2015, requested that the proposed settlement agreement and litigation plan be withdrawn, as the Trustees needed to deal with the opposition raised.

80. Catherine seeks all of her costs for her involvement in thwarting the settlement, which is somewhat ironic since the settlement likely would have saved considerable costs.

(ix) Conduct on Questioning and Uncorrected Record

81. Catherine was questioned on her Affidavits in this Application over a total of five days. The Questioning was so lengthy as a result of Catherine's repeated failure to answer the questions in a direct manner and her lengthy, unresponsive answers to the questions asked of her in Questioning, in written interrogatories, and in answers to undertakings. The transcripts are also replete with Catherine's opinions on various issues but little in the way of fact. Examples of such non-responsive and lengthy answers can be found in the references set out below.

First Questioning, pp 30, 36, 37, 41, 52-53, 73-74, 88 -92
[Tab 5]

Second Questioning, pp 139-141, 223, 229,-230, 305-307, 310- 311 [Tab 8]

Questioning of Catherine Twinn, July 20 and 21, 2017 p. 567 (**"Third Questioning"**) pp 432, 484-486 , 503-505, 518-519, 524, 562, 564-567 589 -591[Tab 9]

Third Bujold Affidavit, paras 175-188 [Tab 4]

82. Another example of conduct that prolonged the Questioning is her response to questions about simple documents. During her Questioning, she was asked to review Minutes of Trustee meetings, which she had attended. She refused to acknowledge that the Minutes shown to her were the Minutes from the various meetings. As a result, virtually all of the Minutes had to be marked as "Exhibits for Identification". The Trustees were thus required to compile a subsequent Affidavit confirming that they were the Minutes from the various Trustee meetings. She took a similar position with the Constitution of the Sawridge First Nation.

83. In addition to this conduct, there are examples known to the Trustees in which Catherine was wrong or misleading in the evidence provided, or in which she made sworn statements alleging improper conduct about others for which she had no proof or corroboration. A chart citing such examples, and references to the record, is attached as Tab "6". It is disconcerting to the Trustees that Catherine would fail to correct the record, or would make such allegations in a sworn public document with no proof that they were true. In addition to all of the other reasons expressed in this brief, the Trustees do not believe that the Trusts should be called upon to fund litigation conduct of this nature.

84. Catherine has in the course of this litigation, in her affidavits, in her undertakings and in her written interrogatories revealed information that is privileged and confidential to the detriment of the Trust. The Trustees have addressed this with her. The Trustees asked her to sign a confidentiality agreement. She was first asked in March 2017, and then repeatedly thereafter. Catherine and her counsel have simply not responded to the request for a confidentiality order. Catherine seems to put her own interests above that of the Trust and further has not fulfilled her obligations as a lawyer and Trustee to respond to correspondence sent by the other Trustees and their counsel. The affidavit detailing the lack of response is attached at Tab 22.

Affidavit of Annar Hirani sworn September 21, 2017, paras 3-6, Exhibits "A", "B", "C" [Tab 22]

D. History of Inappropriate Expenses

85. This is not the first time that the costs incurred by Catherine in respect of legal proceedings have been an issue before the Courts.

86. Catherine was counsel for the Sawridge First Nation during litigation in the 1990s. During that time, Catherine incurred significant legal expenses. Some of the expenses

incurred include: a trip to Arizona to attend a UN Expert Conference without authorization from the Band; tens of thousands of dollars in legal fees for setting up a data room, for which she did not prepare an account until after her retainer was terminated; and the printing and storing of 685 boxes worth of material in physical format in spite of the fact that all of the documents had been scanned as a digital format.

Twinn v Sawridge Band, 2017 ABQB 366, paras 37-39, 41-42, 55-60 , 90 ("***Twinn v Sawridge***") [Tab 23]

87. Catherine brought an application for review of several accounts that the Nation refused to pay. The Court held that several of the expenses incurred, including the ones outlined above, were not in the scope of her retainer, were not authorized, were unnecessary, and were barred by the *Limitations Act*. This is yet another example of Catherine incurring significant, unnecessary and unauthorized legal fees.

Twinn v Sawridge, paras 123-125 [Tab 23]

88. With this history, and with her conduct to date in the proceedings as described above, the Trustees do not believe that an order for her unexamined costs is appropriate or in the interests of the 1985 Trust.

IV. ISSUES

89. In reviewing the materials, we ask the Court to consider the following issues:

(a) What authority does a court have to overturn properly passed resolutions of a group of trustees? Does a court have a judicial review function for Trustee decisions?

(b) Are costs of litigation a "trustee expense"?

(c) Should the court issue an advance costs award for participation in litigation, particularly given that:

(i) Costs of litigation are generally left to the judge presiding over the hearing of the merits, who will determine what parties are entitled to costs and at what level of reimbursement;

(ii) Costs may be denied to litigants who have not demonstrated appropriate respect to the court and the judicial process, particularly where the litigant is an officer of the court;

(iii) Catherine is not arguing the traditional test for advance costs set by *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, nor does she distinguish its obvious application and binding effect on this Court; and

(iv) Catherine has funded her own costs to date, and has not provided any evidence or assertion that she cannot continue to do so.

90. The Trustees also submit:

(d) Catherine's status as a lawyer further elevates the standard for her conduct; and

(e) The issues of "structural conflict" that Catherine raises are not ones requiring judicial intervention, and thus payment for her to raise them is unnecessary.

V. LAW AND ANALYSIS

A. Exercise of Discretion by Trustees

91. The Trustees have properly exercised their discretion. The case law shows that courts will not interfere in the exercise of a discretionary power conferred on the trustees by a trust deed absent proof that the trustees have acted in bad faith. As long as the trustees have acted in a bona fide manner, courts have been reluctant to interfere with the exercise of a trustee's discretion.

Singer v Singer (1916), 52 SCR 447, 27 DLR 220, paras 43, 45, 48, 49 [Tab 24]

Saunders v Halom, [1986] BCWLD 4660, [1986] BCJ No 1133 at para 33 ("***Saunders***") [Tab 25]

92. The courts may also interfere where the trustees are in a deadlock. However, that cannot be said to be the case in the matter at hand. There is no deadlock of trustees. There is one Trustee, Catherine, acting on her own to challenge the actions of the other Trustees, who have acted on decisions properly made by a majority of them. If the trust deed permits decisions to be made by a majority, as the 1985 Trust Deed does, that majority decision binds the trustees.

Saunders at para 34 [Tab 25]

Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, *Waters' Law of Trusts in Canada*, 4th ed (Thomson Reuters, 2012), p 918, fn 24 ("***Waters on Trusts***") [Tab 26]

B. Catherine's Legal Fees are not Trustee Expenses

93. The reasonableness of a trustee's legal costs is subject to a higher degree of scrutiny than other expenses incurred in the administration of the trust. This could possibly be because the courts "see a special danger in the temptation of the trustee to litigate at the trust fund's expense".

Waters on Trusts, p 1214 [Tab 26]

94. Catherine asserts at paragraph 201 of her Brief that "for the purposes of indemnification she need only establish that her actions are reasonable, as they are clearly related to the trusts". However, that is not the standard when considering legal costs for trustee actions.

95. When a trustee embarks on elective litigation, they personally assume the costs risks of that litigation. It is not enough that a trustee act with a bona fide belief in her position. The standard is higher, and requires trustees to act prudently when engaging in litigation. If the steps taken are not necessary, including where there are alternate avenues to explore the concerns they have raised, the trustee must personally bear the costs.

A.(S.) (Trustee of) v. S.(M.), 2005 ABQB 780 at paras 5, 22, 23, 27, 28, 30 [Tab 27]

96. While Catherine asserts that typically, an application for advice and direction is regarded as a reasonably incurred expense that is not an accurate characterization of the steps that she is taking. There is already an Application for Direction before the Courts, brought by the Trustees. The Public Trustee is engaged to represent the interests of potentially affected minors and adults who were minors. The necessary interests are already represented. Catherine's participation in that litigation is elective, not necessary. There is no need for another set of counsel to be retained. This is especially true when Catherine bring two lawyers to every step of the litigation.

Sawridge #5, paras 31, 32, and 34 [Tab 7]

97. Catherine brought an application to challenge the appointment of one of the trustees, but in three years, has not advanced that litigation except for expending a large sum to seek payment of her costs by the Trust. She filed the 1503 Action and sought stays of the procedure provided for in the Code of Conduct. None of these have been necessary, and none have succeeded. The parties have agreed to deal with those issues through alternate avenues.

98. Catherine's legal fees should be treated in the same manner any other litigant's costs, not as trustee expenses.

C. Costs of Litigation

99. In recent years, there has been a "culture shift" in litigation, including trusts and estates litigation, toward ensuring that litigation is cost-efficient and focused on promoting improved litigation practices. That shift has been recognized by this Honourable Court in earlier costs decisions in these very proceedings.

100. In *Sawridge #5*, costs were awarded against three individuals who sought to obtain standing to participate. Justice Thomas declined to grant standing, for reasons that included redundancy (as the interests of the current beneficiaries were already represented), and the negative impact of creating an even more adversarial process in these proceedings. Justice Thomas again reiterated that this litigation should be

narrowed and "it is not appropriate for this Court to get involved in disputes over membership in the [Nation]".

Sawridge #5, paras 31, 32, 37, 39, 41 [Tab 7]

101. In explaining his decision to award costs against two of the applicants on a solicitor and his own client basis, Justice Thomas reasoned:

> As is apparent from my analysis, I have concluded that [the beneficiary applicants], who are attempting to participate in this process, offer nothing and instead propose to fritter away the Trust's resources to no benefit...
>
> There is a parallel here with estate disputes where an unsuccessful litigation participant seeks to have an estate pay his or her legal costs... Moen J in *Babchuk v Kutz* [citation omitted] 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.
>
> ...
>
> 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).

Sawridge #5, paras 47, 48, 51 [Tab 7]

102. In *Sawridge #7*, Justice Thomas again commented on the "culture shift" in litigation, which is focused on promoting proportionate procedures and the role of costs awards against litigants in shaping and promoting productive behaviours. Costs were awarded on a solicitor and his own client basis against Stoney and his lawyer.

Sawridge #7, paras 47-51 [Tab 15]

103. While Catherine participated in several applications before the Court, in which the applicant was unsuccessful, she did not seek costs. For example, in *Sawridge #5*, costs were awarded in favour of the Trust against the applicants (who were supported by Catherine). Rather than seeking her own reimbursement from the unsuccessful party, as the Trust did, Catherine is now asking for the Trust to pay her costs. Similarly, in *Sawridge #6* and *#7*, costs were again awarded in favour of the Trust against Stoney and his lawyer. Although her $850,000 legal bill includes fees in respect of that proceeding, Catherine did not seek repayment from Stoney. Rather, she is asking for the Trust to pay her costs.

104. In addition to seeking past costs, Catherine is seeking unqualified indemnification for future costs of litigation. However, she is not advancing arguments in accordance with the test for advanced costs of litigation.

Third Questioning, pp 491 [Tab 9]

105. Generally, in litigation, a party must demonstrate the following to be awarded advanced costs:

> 1. The party genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial — in short, the litigation would be unable to proceed if the order were not made.
>
> 2. The claim to be adjudicated is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
>
> 3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue), [2007] 1 SCR 38 at paras 37-44 [Tab 28]

106. In applying this test in the trusts context, there are other issues that may be relevant. In trust litigation, regard must be had to preserving the trust fund for the beneficiaries. There is an obligation to protect the trust from depletion, and particularly to protect it before trial or as the result of an unmeritorious suit.

107. Catherine also does not fall under the broader discretion articulated in *1985 Sawridge Trust v Alberta (Public Trustee)*, 2013 ABCA 226. She does not represent any perspective or interest that is not already before the courts.

108. There is no evidence that Catherine cannot afford to pay for the litigation; indeed, in her Brief, she acknowledges that she has paid her own fees to date. Catherine suggests that she will be silenced if costs are not awarded, and yet she has put forth no evidence to establish this. She is not arguing impecuniosity. In fact, given that she has paid at least $850,000 to her counsel to date, she clearly has resources that are greater than most who come before the court.

109. The issues she seeks to raise, such as membership and "structural conflict", are not issues raised in the 1103 Action. By raising these issues, she would unnecessarily expand the scope of the proceedings. In fact, in the case of membership, the parties are prohibited from raising it. The Trustees intend to respect that direction of this Court. Finally, those issues are not of public importance, insofar as membership has been dealt with before the Federal Court (and that is the proper jurisdiction for doing so). Finally, all of the issues that Catherine proposes to raise, save for membership and structural conflict, are before the Court already.

110. Catherine's application in the 1403 Action is also unnecessary. Justin and Margaret were properly appointed according to the terms of the Trust Deed. Further, the Trust Deed sets out the requirements for Trustee appointments. The Trust Deed is clear and thus Catherine's application is not necessary.

111. The trier of fact in the final determination of the 1103 Action and the 1403 Action should decide the issue of costs in these proceedings. The discretion of the trier of fact should not be fettered in this case. Pre-emptive costs awards are rare and are not granted except in cases where the applicant is likely to succeed, likely to obtain costs at the conclusion of the matters, and there are special circumstances. None of that exists in this case. Catherine is pursuing arguments that are doomed to fail. There are no grounds on which to order costs to Catherine at this time, prospective or otherwise.

Turner v Andrews, 2001 BCCA 76, paras 6, 7, 8, 11, 15, 17 [Tab 11]

D. Elevated Standard as Catherine is a Lawyer

112. Catherine's conduct must also be viewed through the lens of appropriate conduct by a lawyer. As she points out in paragraph 4 of her Brief, Catherine is a longstanding member of the Law Society of Alberta. When a lawyer is a litigant, as an officer of the court, there is a higher standard expected of their conduct, as was affirmed in the recent decision of Justice Thomas in this litigation:

> The professional standards expected of a lawyer as an officer of the court equally apply when a lawyer represents themselves. "[t]he lawyer as Plaintiff stands in a different position than a layman as Plaintiff.": *Botan (Botan Law Office) v St. Amand*, 2012 ABQB 260 at paras 72-77... As Rooke J (as he then was) explained in *Partridge Homes Ltd v Anglin,* [1996] AJ No 768 at para 33 (QL)...:
>
> > ...it is significant that he is a member of the Law Society of Alberta. If he were not, one could apply the standard of conduct of an ordinary citizen, and excuse some conduct for which an ordinary citizen might be ignorant or from which he or she would be otherwise excused. In my view such is not the case for an active practising member of the Law Society of Alberta, who has a standard to meet, regardless of his technical capacity of appearance, merely by virtue of that membership...

Sawridge #7, para 67 [Tab 15]

113. The duties of lawyers are also spelled out clearly in the Law Society of Alberta's Code of Conduct. Rule 5.6-1 requires lawyers to "encourage public respect for and try to improve the administration of justice". According to the commentary, a lawyer "should avoid criticism [of court decisions] that is petty, intemperate or unsupported by a bona fide belief in its real merit". Catherine's comments about Stoney's application cannot be said to be supported by a bona fide belief in its merit, given the reasons issued in *Sawridge*

#6, *#7* and *#8* that describe it as frivolous and vexatious litigation, and given that she voted against Stoney when he appealed his membership application to the Nation.

Law Society of Alberta Code of Conduct, p 90, Rule 5.6-1; Commentary at para [3] [Tab 29]

114. Finally, lawyers should obey orders of the court, including costs awards. Catherine has failed to pay a costs award in the 1403 Action.

Sawridge #6, paras 56, 73 [Tab 12]

Sawridge #8, paras 87-90 [Tab 30]

115. As she is calling on the Trust to fund her actions, which would deplete funds to the detriment of the beneficiaries, the Trustees believe it is relevant to look at the totality of her conduct in the context of her duties as both a Trustee and a lawyer.

116. Justice Thomas identified litigation that is abusive and for which costs may be awarded against a lawyer. He identified collateral attacks, hopeless proceedings and busybody lawsuits in paragraph 9 of *Sawridge #8*. Catherine has exhibited all of this type of litigation in terms of collateral attacks on the membership decisions, hopeless proceedings opposing the appointment of trustees, and the busybody nature of putting "sworn statements" of several individuals forward in her affidavit and funding the application to become a party made by her family members.

Sawridge #8, para 9 [Tab 30]

E. Structural Conflict not in Issue

117. In this section, we do not address raising membership issues, given that it seems clear from the direction of Justice Thomas that they are not to be raised in the 1103 Action that any pursuit of such arguments in these proceedings cannot succeed.

118. While Catherine wishes to raise the "structural conflict", this has not been identified as an issue in these proceedings. Indeed, such "structural conflicts" are not unheard of in the trust context. In trusts such as these, in which the settlor appointed a trustee who holds a dual role that might raise a potential conflict, the ability of the trustee to act in dual roles (including as trustee) can be impliedly determined based on the terms of the trust. This is because it is clear that the intention of the settlor was to permit these dual roles.

Lynton Tucker et al, *Lewin on Trusts*, 19th ed (London: Thomson Reuters, 2015) at 20-181 [Tab 31]

119. This principle has been recognized by Canadian courts. When someone in a fiduciary capacity acts in a dual role, such as that of executor and beneficiary, there must be something more than the existence of the dual role to prove that there has been

improper abuse of power. The mere fact that a person acts in a dual capacity is an insufficient basis for challenging his position in that role.

> *Gillespie Estate, Re.*, [1991] BCJ No 323, 25 ACWS (3d) 765, para 44-45 (BCSC) [Tab 32]

120. Such conflicts within First Nations are unavoidable, as they are inherently full of relationships that can give rise to dual roles. Many, if not most, members of the Nation are related in some way to each other. The Chief and Council are elected from that membership, and thus also are related to many members. Justice Thomas has recognized this, having commented in *Sawridge #3* that "[t]he overlap between some of these parties is established and obvious". In the same paragraph, Justice Thomas expressly directed that it was <u>not</u> for a party to these proceedings to "conduct a general inquiry into potential conflicts of interest between the [Nation], its administration and the [Trustees]".

> *Sawridge #3*, para 36 [Tab 13]

VI. CONCLUSION

121. This Court has not been offered any basis on which to base a decision to award advance full indemnity costs. There is no law advanced by Catherine to support the position that, absent bad faith, a sole trustee who is in the minority should be paid to oppose the majority when there is a "majority rules" clause in the Trust Deed. There is no law cited to suggest that the Court is the forum for overturning properly approved trustee decisions. There is nothing in Catherine's Brief to distinguish the settled law on advance costs.

122. In contrast, there is ample evidence of a litigant who believes that the court decisions do not apply to her. This is evidenced by Catherine's repetitive and adamant advocacy on the membership issue. She has refused to pay court costs that she admits she owes with no explanation for her refusal to abide by a court order.

123. Catherine's belief that she is acting in the best interests of the beneficiaries must be questioned when she requests legal fees of such a magnitude, yet she pursues litigation only to get her own personal fees paid.

124. In the usual course, the Court does not reward a failed litigant. Catherine has supported a great deal of failed litigation and still seeks to be paid full indemnity solicitor client costs for such failed litigation. She has never sought payment of her costs on those failed applications, yet is now seeking to shift the burden of her costs to the 1985 Trust, and by extension to its beneficiaries. Doing so would be a rather extraordinary result and, in the Trustees' submission, would not be consistent with law or policy in respect of costs awards for unsuccessful and unnecessary legal proceedings involving a trust.

VII. RELIEF SOUGHT

125. The Respondents respectfully request that this application be dismissed with solicitor-client costs awarded against the Applicant.

126. In the alternative, the Respondents request a dismissal of this application without prejudice to the Applicant's ability to seek her costs at the conclusion of the litigation, at such time that the trier of fact can view the litigation through the lens of the final determination and in the usual course.

All of which is respectfully submitted

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Doris Bonora
Dentons Canada LLP
Solicitors for the Sawridge Trustees

____

Nancy E. Cumming, Q.C. and Joseph J. Keuber, Q.C.
Bryan & Company LLP
Solicitors for the four Sawridge Trustees

LIST OF AUTHORITIES AND SUPPORTING DOCUMENTS

TAB

1. Affidavit of Paul Bujold, sworn September 12, 2011 ("First Bujold Affidavit")
2. Affidavit of Paul Bujold, sworn August 30, 2011 ("Second Bujold Affidavit")
3. Sawridge Code of Conduct
4. Affidavit of Paul Bujold, sworn February 15, 2017 ("Third Bujold Affidavit")
5. Questioning of Catherine Twinn, September 9, 2016 ("First Questioning")
6. Chart outlining inappropriate behaviour of Catherine Twinn ("Chart of Catherine Twinn")
7. *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 377 ("*Sawridge #5*")
8. Questioning of Catherine Twinn, November 9 and 10, 2016 ("Second Questioning")
9. Questioning of Catherine Twinn, July 20 and 21, 2017 ("Third Questioning")
10. Order of Justice Thomas dated December 17, 2014
11. *Turner v Andrews*, 2001 BCCA 76, 2001 CarswellBC 224
12. *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 436 ("*Sawridge #6*")
13. *1985 Sawridge Trust v Alberta (Public Trustee)*, 2015 ABQB 799 ("*Sawridge #3*")
14. Order of Justice Thomas dated December 17, 2015
15. *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 530 ("*Sawridge #7*")
16. Undertaking of Catherine Twinn from First Questioning, #84
17. Affidavit of Paul Bujold sworn August 30, 2017 ("Fourth Bujold Affidavit")
18. Originating Application filed April 1, 2014

TAB

19. *1985 Sawridge Trust v Alberta (Public Trustee)*, 2012 ABQB 365 ("*Sawridge #1*")

20. Statement of Claim of Catherine Twinn filed June 19, 2015

21. *Twinn v Twinn*, 2016 ABQB 553 (*"Twinn v. Twinn")*

22. Affidavit of Annar Hirani, sworn September 21, 2017

23. *Twinn v Sawridge Band*, 2017 ABQB 366 ("*Twinn v Sawridge*")

24. *Singer v Singer* (1916), 52 SCR 447, 27 DLR 220

25. *Saunders v Halom,* [1986] BCWLD 4660, [1986] BCJ No 1133 ("*Saunders*")

26. Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, *Waters' Law of Trusts in Canada*, 4th ed (Thomson Reuters, 2012) (*"Waters on Trusts*")

27. *A.(S.) (Trustee of) v. S.(M.)*, 2005 ABQB 780

28. *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2007] 1 SCR 38

29. Law Society of Alberta Code of Conduct, Rule 5.6-1

30. *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 548 ("*Sawridge #8*")

31. Lynton Tucker et al, *Lewin on Trusts*, 19th ed (London: Thomson Reuters, 2015)

32. *Gillespie Estate, Re.*, [1991] BCJ No 323, 25 ACWS (3d) 765 (BCSC)

Tab 1

Clerk's stamp:

JUDICIAL CENTRE OF EDMONTON
FILED
SEP 13 2011
Clerk of the Court of Queen's Bench

COURT FILE NUMBER	1103 14112
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
	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")
APPLICANTS	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust
DOCUMENT	**AFFIDAVIT OF PAUL BUJOLD on advice and direction in the 1985 trust**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Reynolds, Mirth, Richards & Farmer LLP 3200 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3W8 Attention: Doris C.E. Bonora Telephone: (780) 425-9510 Fax: (780) 429-3044 File No: 108511-001-DCEB

AFFIDAVIT OF PAUL BUJOLD

Sworn on September 12, 2011

I, Paul Bujold, of Edmonton, Alberta swear and say that:

1. I am the Chief Executive Officer of the Sawridge Trusts, which trusts consist of the Sawridge Band Intervivos Settlement created in 1985 (hereinafter referred to as the "1985

Trust") and the Sawridge Band Trust created in 1986 (hereinafter referred to as the "1986 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 make this affidavit in support of an application for the opinion, advice and direction of the Court respecting the administration and management of the property held under the 1985 Trust.

Issues for this Application

3. At present, there are five trustees of the 1985 Trust: Bertha L'Hirondelle, Clara Midbo, Catherine Twinn, Roland C. Twinn and Walter Felix Twin (hereinafter referred to as the "Trustees").

4. The Trustees would like to make distributions for the benefit of the beneficiaries of the 1985 Trust. However, concerns have been raised by the Trustees:

   a. Regarding the definition of "Beneficiaries" contained in the 1985 Trust.

   b. Regarding the transfer of assets into the 1985 Trust.

5. Accordingly, the Trustees seek the opinion, advice and direction of the Court in regard to these matters.

Background

6. In 1966, Chief Walter Patrick Twinn (hereinafter referred to as "Chief Walter Twinn") became the Chief of the Sawridge Band No. 454, now known as Sawridge First Nation (hereinafter referred to as the "Sawridge First Nation" or the "Nation"), and remained the Chief until his death on October 30, 1997.

7. I am advised by Ronald Ewoniak, CA, retired engagement partner on behalf of Deloitte & Touche LLP to the Sawridge Trusts, Companies and First Nation, and do verily believe, that Chief Walter Twinn believed that the lives of the members of the Sawridge First Nation could be improved by creating businesses that gave rise to employment opportunities. Chief Walter Twinn believed that investing a portion of the oil and gas royalties received by the Nation would stimulate economic development and create an avenue for self-sufficiency, self-assurance, confidence and financial independence for the members of the Nation.

8. I am advised by Ronald Ewoniak, CA, and do verily believe, that in the early 1970s the Sawridge First Nation began investing some of its oil and gas royalties in land, hotels and other business assets. At the time, it was unclear whether the Nation had statutory ownership powers, and accordingly assets acquired by the Nation were registered to the names of individuals who would hold the property in trust. By 1982, Chief Walter Twinn, George Twin, Walter Felix Twin, Samuel Gilbert Twin and David Fennell held a number of assets in trust for the Sawridge First Nation.

Creation of the 1982 Trust

9. I am advised by Ronald Ewoniak, CA, and do verily believe, that in 1982 the Sawridge First Nation decided to establish a formal trust in respect of the property then held in trust by individuals on behalf of the present and future members of the Nation. The establishment of the formal trust would enable the Nation to provide long-term benefits to the members and their descendents. On April 15, 1982, a declaration of trust establishing the Sawridge Band Trust (hereinafter referred to as the "1982 Trust") was executed. Attached as **Exhibit "A"** to my Affidavit is a copy of the 1982 Trust.

10. In June, 1982, at a meeting of the trustees and the settlor of the 1982 Trust, it was resolved that the necessary documentation be prepared to transfer all property held by Chief Walter Twinn, George Vital Twin and Walter Felix Twin, in trust for the present

and future members of the Nation, to the 1982 Trust. Attached as **Exhibit "B"** to my Affidavit is a copy of the resolution passed at the said meeting dated June, 1982.

11. The 1982 Trust was varied by a Court Order entered on June 17, 2003, whereby paragraph 5 of the 1982 Trust was amended to provide for staggered terms for the trustees. Attached as **Exhibit "C"** to my Affidavit is a copy of the Court Order entered on June 17, 2003 varying the 1982 Trust.

12. On December 19, 1983, a number of properties and shares in various companies which had been held by Chief Walter Twinn, Walter Felix Twin, Samuel Gilbert Twin and David Fennell in trust for the present and future members of the Nation were transferred into the 1982 Trust. Attached as **Exhibit "D"** to my Affidavit is an agreement dated December 19, 1983, transferring certain assets into the 1982 Trust. Attached as **Exhibit "E"** to my Affidavit is a transfer agreement dated December 19, 1983 transferring certain assets from the 1982 Trust to Sawridge Holdings Ltd.

Changes in Legislation – The *Charter of Rights and Freedoms* and *Bill C-31*

13. On April 17, 1982, the *Constitution Act, 1982*, which included the *Canadian Charter of Rights and Freedoms* (hereinafter referred to as the "*Charter*"), came into force. Section 15 of the *Charter* did not have effect, however, until April 17, 1985, to enable provincial and federal legislation to be brought into compliance with it.

14. After the *Charter* came into force, the federal government began the process of amending the *Indian Act*, R.S.C. 1970, c. I-6 (hereinafter referred to as the "1970 *Indian Act*"). Following the federal election in 1984, the government introduced *Bill C-31*, a copy of which is attached as **Exhibit "F"** to my Affidavit. *Bill C-31* was introduced to address concerns that certain provisions of the 1970 *Indian Act* relating to membership were discriminatory.

15. It was expected that *Bill C-31* would result in an increase in the number of individuals included on the membership list of the Sawridge First Nation. This led the Nation to settle a new trust, the 1985 Trust, within which assets would be preserved for the Band members as defined by the legislation prior to *Bill C-31*.

Creation of the 1985 Trust

16. Attached as **Exhibit "G"** to my Affidavit is a copy of the 1985 Trust dated April 15, 1985.

17. The 1985 Trust provides that the "Beneficiaries" are:

> "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."

18. The 1985 Trust effectively "froze" the definition of beneficiaries according to the legislation as it existed prior to *Bill C-31*.

19. Attached as **Exhibit "H"** to my Affidavit is a copy of a Resolution of Trustees dated April 15, 1985, whereby the trustees of the 1982 Trust resolved to transfer all of the assets of the 1982 Trust to the 1985 Trust.

20. On April 15, 1985, the Sawridge First Nation approved and ratified the transfer of the assets from the 1982 Trust to the 1985 Trust. Attached as **Exhibit "I"** to my Affidavit is a Sawridge Band Resolution dated April 15, 1985 to this effect.

21. On April 16, 1985 the trustees of the 1982 Trust and the trustees of the 1985 Trust declared:

    a. that the trustees of the 1985 Trust would hold and continue to hold legal title to the assets described in Schedule "A" of that Declaration; and

    b. that the trustees of the 1985 Trust had assigned and released to them any and all interest in the Promissory Notes attached as Schedule "B" of that Declaration.

    Attached as **Exhibit "J"** to this my Affidavit is the Declaration of Trust made April 16, 1985.

22. Based upon my review of the exhibits attached to this my affidavit and upon the knowledge I have acquired as Chief Executive Officer of the Sawridge Trusts, I believe that all of the property from the 1982 Trust was transferred to the 1985 Trust. Further, there was additional property transferred into the 1985 Trust by the Sawridge First Nation or individuals holding property in trust for the Nation and its members.

23. The transfers were carried out by the trustees of the 1982 Trust under the guidance of accountants and lawyers. The Trustees have been unable to locate all of the necessary documentation in relation to the transfer of the assets from the 1982 Trust to the 1985 Trust or in relation to the transfer of assets from individuals or the Nation to the 1985 Trust.

24. It is clear that the transfers were done but the documentation is not currently available. The Trustees have been operating on the assumption that they were properly guided by their advisors and the asset transfer to the 1985 Trust was done properly.

25. The Trustees seek the Court's direction to declare that the asset transfer was proper and that the assets in the 1985 Trust are held in trust for the benefit of the beneficiaries of the 1985 Trust.

26. The 1985 Trust is the sole shareholder of Sawridge Holdings Ltd. I am advised by Ralph Peterson, Chairman of the Board of Directors of the Sawridge Group of Companies, and do verily believe that an approximate value of the 1985 Trust investment in Sawridge Holdings Ltd. as at December 31, 2010 is $68,506,815. This represents an approximate value of the net assets of Sawridge Holdings Ltd., assuming all assets could be disposed of at their recorded net book value and all liabilities are settled at the recorded values as at that date, with no consideration for the income tax effect of any disposal transactions.

27. Taking into account the other assets and liabilities of the 1985 Trust, the approximate value of the net assets of the 1985 Trust as at December 31, 2010 is $70,263,960.

28. To unravel the assets of the 1985 Trust after 26 years would create enormous costs and would likely destroy the trust. Assets would have to be sold to pay the costs and to pay the taxes associated with a reversal of the transfer of assets.

Creation of the 1986 Trust

29. Attached to my affidavit as **Exhibit "K"** is a copy of the 1986 Trust dated August 15, 1986. The beneficiaries of the 1986 Trust included all members of the Sawridge First Nation in the post-*Bill C-31* era.

30. The Sawridge First Nation transferred cash and other assets into the 1986 Trust to further the purposes of the trust. After April 15, 1985 no further funds or assets were put into the 1985 Trust.

31. Effectively, the assets in existence as at April 15, 1985 were preserved for those who qualified as Sawridge members based on the definition of membership that existed at that time. The 1986 Trust was established so that assets coming into existence subsequent to April 15, 1985 could be held in trust for those individuals who qualified as members in accordance with the definition of membership that existed in the post-*Bill C-31* era.

Identification of Beneficiaries Under the 1985 Trust and the 1986 Trust

32. The Trustees have determined that maintaining the definition of "Beneficiaries" contained in the 1985 Trust is potentially discriminatory. The definition of "Beneficiaries" in the 1985 Trust would allow non-members of the Nation to be beneficiaries of the 1985 Trust and would exclude certain members of the Nation (such as those individuals acquiring membership as a result of *Bill C-31*) from being beneficiaries.

33. The Trustees believe that it is fair, equitable and in keeping with the history and purpose of the Sawridge Trusts that the definition of "Beneficiaries" contained in the 1985 Trust be amended such that a beneficiary is defined as a member of the Nation, which is consistent with the definition of "Beneficiaries" in the 1986 Trust.

Current Status

34. The Trustees have been administering the Sawridge Trusts for many years. In December of 2008, the Trustees retained the Four Worlds Centre for Development Learning (hereinafter referred to as "Four Worlds") to conduct a consultation process with the beneficiaries of the Sawridge Trusts. Four Worlds prepared a report identifying the types of programs and services that the Sawridge Trusts should offer to the beneficiaries and

the types of payments the Trustees should consider making from the trusts. Attached hereto as **Exhibit "L"** is a summary chart of recommendations taken from the said report.

35. Having undertaken the consultation process, the Trustees have a desire to confer more direct benefits on the beneficiaries of the Sawridge Trusts. The Trustees require clarification and amendment of the 1985 Trust such that the definition of "Beneficiaries" in the 1985 Trust is varied to make it consistent with the definition of "Beneficiaries" in the 1986 Trust. In this way the members of the Nation are the beneficiaries of both the 1985 Trust and the1986 Trust and the assets that once belonged to the Nation can be distributed through the trusts to the members of the Nation.

SWORN before me at Edmonton
in the Province of Alberta,
on the 12 day of September, 2011.

A Magnan

A Commissioner for Oaths in and for
the Province of Alberta

Catherine A. Magnan
My Commission Expires
January 29, 2012

Paul Bujold

809051_2;September 12, 2011

Tab 2

Clerk's stamp:

COURT FILE NUMBER	1103 14112
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 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")
APPLICANTS	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust
DOCUMENT	**Affidavit of Paul Bujold for Procedural Order**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Attention: Doris C.E. Bonora Reynolds, Mirth, Richards & Farmer LLP 3200 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3W8 Telephone: (780) 425-9510 Fax: (780) 429-3044 File No: 108511-001-DCEB

JUDICIAL CENTRE OF EDMONTON
FILED
SEP 06 2011
Clerk of the Court of Queen's Bench

AFFIDAVIT OF PAUL BUJOLD

Sworn on August 30, 2011

I, Paul Bujold, of Edmonton, Alberta swear and say that:

1. I am the Chief Executive Officer of the Sawridge Trusts, which trusts consist of the Sawridge Band Intervivos Settlement created in 1985 (hereinafter referred to as the "1985 Trust") and the Sawridge Band Trust created in 1986 (hereinafter referred to as the "1986 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 make this affidavit in support of an application for setting the procedure for seeking the opinion, advice and direction of the Court respecting the administration and management of the property held under the 1985 Trust.

3. On April 15, 1982, Chief Walter Patrick Twinn, who is now deceased, executed a Deed of Settlement a copy of which is attached hereto as Exhibit "A" to this my affidavit ("1982 Trust").

4. On April 15, 1985, Chief Walter Patrick Twinn, who is now deceased, executed a Deed of Settlement a copy of which is attached hereto as Exhibit "B" to this my affidavit ("1985 Trust").

5. On August 15, 1986, Chief Walter Patrick Twinn, who is now deceased, executed a Deed of Settlement a copy of which is attached hereto as Exhibit "C" to this my affidavit ("1986 Trust").

6. The Trustees of the 1985 Trust have been managing substantial assets, some of which were transferred from the 1982 Trust, and wish to make some distributions to the Beneficiaries of the 1985 Trust. However, concerns have been raised by the Trustees of the 1985 Trust with respect to the following:

   a. Determining the definition of "Beneficiaries" contained in the 1985 Sawridge Trust, and if necessary varying the 1985 Sawridge Trust to clarify the definition of "Beneficiaries".

   b. Seeking direction with respect to the transfer of assets to the 1985 Sawridge Trust.

7. In order to determine the beneficiaries of the 1985 Trust, the Trustees of the 1985 Trust directed me to place a series of advertisements in newspapers in Alberta, Saskatchewan, Manitoba and British Columbia to collect the names of those individuals who may be beneficiaries of the 1985 Trust.

8. As a result of these advertisements I have received notification from a number of individuals who may be beneficiaries of the 1985 Trust.

9. I have corresponded with the potential beneficiaries of the 1985 Trust and such correspondence is attached hereto as Exhibit "D".

10. I have compiled a list of the following persons who I believe may have an interest in the application for the opinion, advice and direction of the Court respecting the administration and management of the property held under the 1985 Trust:

    a. Sawridge First Nation;

b. All of the registered members of the Sawridge First Nation;

c. All persons known to be beneficiaries of the 1985 Sawridge Trust and all former members of the Sawridge First Nation who are known to be excluded by the definition of "Beneficiaries" in the 1986 Sawridge Trust, but who would now qualify to apply to be members of the Sawridge First Nation;

d. All persons known to have been beneficiaries of the Sawridge Band Trust dated April 15, 1982 (hereinafter referred to as the "1982 Sawridge Trust"), including any person who would have qualified as a beneficiary subsequent to April 15, 1985;

e. All of the individuals who have applied for membership in the Sawridge First Nation;

f. All of the individuals who have responded to the newspaper advertisements placed by the Applicants claiming to be a beneficiary of the 1985 Sawridge Trust;

g. Any other individuals who the Applicants may have reason to believe are potential beneficiaries of the 1985 Sawridge Trust;

h. The Office of the Public Trustee of Alberta (hereinafter referred to as the "Public Trustee") in respect of any minor beneficiaries or potential minor beneficiaries;

(those persons mentioned in Paragraph 10 (a) – (h) are hereinafter collectively referred to as the "Beneficiaries and Potential Beneficiaries"); and

i. Those persons who regained their status as Indians pursuant to the provisions of *Bill C-31* (An Act to amend the *Indian Act,* assented to June 28, 1985) and who have been deemed to be affiliated with the Sawridge First Nation by the Minister of Aboriginal Affairs and Northern Development Canada (hereinafter referred to as the "Minister").

11. The list of Beneficiaries and Potential Beneficiaries consists of 194 persons. I have been able to determine the mailing address of 190 of those persons. Of the four individuals for whom I have been unable to determine a mailing address, one is a person who applied for membership in the Sawridge First Nation but neglected to provide a mailing address when submitting her application. The other three individuals are persons for whom I have reason to believe are potential beneficiaries of the 1985 Trust and whose mother is a current member of the Sawridge First Nation.

12. With respect to those individuals who regained their status as Indians pursuant to the provisions of *Bill C-31* and who have been deemed to be affiliated with the Sawridge First Nation by the Minister, the Minister will not provide us with the current list of these individuals nor their addresses, citing privacy concerns. These individuals are not members of the Sawridge First Nation but may be potential beneficiaries of the 1985 Trust due to their possible affiliation with the Sawridge First Nation.

13. A website has been created and is located at www.sawridgetrust.ca (hereinafter referred to as the "Website"). The Beneficiaries and Potential Beneficiaries and the Minister have

access to the Website and it can be used to provide notice to the Beneficiaries and Potential Beneficiaries and the Minister and to make information available to them.

14. The Trustees seek this Court's direction in setting the procedure for seeking the opinion, advice and direction of the Court in regard to:

    a. Determining the Beneficiaries of the 1985 Trust.

    b. Reviewing and providing direction with respect to the transfer of the assets to the 1985 trust.

    c. Making any necessary variations to the 1985 Trust or any other Order it deems just in the circumstances.

SWORN OR AFFIRMED BY THE DEPONENT BEFORE A COMMISSIONER FOR OATHS AT EDMONTON, ALBERTA ON AUGUST 30, 2011.

PAUL BUJOLD

Commissioner's Name:
Appointment Expiry Date:
MARCO S. PORETTI
Barrister / Solicitor

810070; August 29, 2011
810070;August 30, 2011

This is Exhibit " B " referred to in the Affidavit of
Paul Bujold
Sworn before me this 30 day of August A.D., 20 11
A Notary Public, A Commissioner for Oaths in and for the Province of Alberta
MARCO S. PORETTI

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 <u>Indian Act</u> 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:

Bruce E Thom
NAME

Box 326, Slave Lake, Alta
ADDRESS

A. Settlor [illegible] [redacted]

B. Trustees:

Bruce E Thom
NAME

Box 326, Slave Lake, Alta
ADDRESS

1. [illegible] [redacted]

Bruce E Thom
NAME

Box 326, Slave Lake, Alta
ADDRESS

2. [illegible] [redacted]

Bruce E Thom
NAME

Box 326 Slave Lake, Alta
ADDRESS

3. [illegible] [redacted]

Schedule

One Hundred Dollars ($100.00) in Canadian Currency.

Tab 3

CODE OF CONDUCT

Trustees of The Sawridge Band *Inter Vivos* Settlement and of The Sawridge Trust

WHEREAS:

(1) The Sawridge Band *Inter Vivos* Settlement (the "1985 Trust") was established by Chief Walter P. Twinn by a Deed dated April 15, 1985.

(2) The Sawridge Trust (the "1986 Trust") was established by Chief Walter P. Twinn by a Deed dated August 15, 1986.

(3) The undersigned, Walter Felix Twinn, Bertha L'Hirondelle, Roland Twinn, Catherine Twinn and Clara Midbo, are currently the trustees (the "Current Trustees") of both the 1985 Trust and the 1986 Trust (collectively, the "Trusts"). The trustees of the Trusts from time to time are hereinafter referred to as the "Trustees".

(4) The following additional documents are attached as schedules to this Code of Conduct: (a) a document prepared by Davies Ward Phillips & Vineberg LLP as counsel for the Trustees which is entitled "Responsibilities of Trustees of the Sawridge Trusts" (the "Trustees' Responsibilities document"), which is attached as Schedule A; and (b) Trustees' resolutions dealing with the procedure for Trustee decision-making, which are attached as Schedules B1 and B2.

(5) In order to facilitate the effective administration of the Trusts, the Current Trustees wish to enter this Code of Conduct to which they have all agreed.

NOW THEREFORE the undersigned Current Trustees all agree to the following provisions of this Code of Conduct:

1. General

In order to carry out the Trustees' basic obligation of acting in the best interests of the beneficiaries, the Trustees must act with care, skill and diligence, integrity and impartiality; they must in general avoid conflicts of interest and duty; they must act in a way that enables decisions to be made effectively; they must respect confidentiality; and they must not act in a way which brings the office of Trustee into disrepute. This Code of Conduct will deal with each of these aspects of the Trustees' responsibilities. It will also deal with communications between Trustees and directors and management of the corporations directly or indirectly owned by the Trusts (the "Sawridge Corporations").

This Code of Conduct will also provide a procedure for resolving disputes arising from this Code of Conduct.

2. Care and Diligence

As expressed in the Trustees' Responsibilities document, the applicable general principle is that Trustees are required to exercise the care, skill and diligence of an ordinary prudent person. In particular, this requires that Trustees will:

(a) attend all Trustee meetings except only when unable to do so;

(b) read and consider the agendas for Trustee meetings along with accompanying materials; and

(c) generally give careful consideration to all issues arising for decision by them as Trustees.

3. Communications with Directors and Management of Sawridge Corporations

As expressed in the Trustees' Responsibilities document, the Trustees have adopted an arrangement under which none of them sit on the boards of Sawridge Corporations; instead, the Trustees have elected qualified persons to act as directors. This arrangement rests on two principles. The first is that the Trustees will not interfere in the roles, respectively, of the directors and of the management of the corporations. The second is that the Trustees will have sufficient and timely information about the conduct of the Sawridge Corporations so that, as a group, they are kept fully apprised of the business and affairs of the corporations and where considered advisable communicate any concerns through the Trustees' Chair to the Chair of the Board of Directors.

Two points dealing with the practical application of these principles apply to the conduct of Trustees. These are:

(a) Communications between the Trustees and the directors will ordinarily be made by and to the Trustees collectively only through the Trustees' Chair. Individual communications may occur only at meetings of the shareholders at which directors attend, including at annual shareholder meetings.

(b) Trustees will not interfere with management of the Sawridge Corporations. If any Trustee has any concern relating to management of the corporations that concern must not be communicated to the management but is to be brought to the attention of the Trustees as a group and the Trustees' concern can then be communicated through the Trustees' Chair to the Chair of the Board of Directors.

4. Integrity, Impartiality and Conflict of Interest

Trustees must at all times act honestly in the best interests of beneficiaries and in making decisions as Trustees must make decisions which they honestly believe to be in the beneficiaries' best interests.

Trustees must exercise their functions as trustees free of extraneous and improper influence. This includes obvious circumstances such as receiving bribes but also extends to less obvious circumstances such as making a decision on the basis of personal feelings about a particular beneficiary where such feelings have no relevance to the matter under consideration or where the Trustee has not expressed to the other Trustees the fact that such feelings are affecting his or her decision.

Conflicts of Interest

Avoidance of conflicts of interest is an aspect of the requirements of integrity and impartiality. As stated in the Trustees' Responsibilities document, the Trustees must avoid improperly acting in a position of conflict between self-interest and duty. The following procedure will be followed to deal with such conflicts:

(a) For the purposes of this procedure, there will be considered to be a conflict in the following circumstances:

> "There will be a conflict when a Trustee may obtain some benefit, directly or indirectly, from his or her position as Trustee or when the Trustee is in a position in which his or her decision-making as Trustee may potentially be influenced, directly or indirectly, by his or her personal interests. It will be assumed that a Trustee may obtain such a benefit if the benefit is obtained, not only by the Trustee, but also by the spouse, parent, sibling or child of the Trustee. Similarly, it will be assumed that a Trustee may be influenced if, not only the Trustee, but also the spouse, parent, sibling or child of the Trustee may be affected by the decision."

(b) All possible conflicts must be disclosed by a Trustee to the other Trustees when the possible conflict becomes apparent to him or her. If in doubt about whether there is a conflict, the possible conflict should be disclosed.

(c) Any Trustee, or the Chair if not a Trustee, may raise with the Trustees the issue of a possible conflict affecting any other Trustee.

(d) If a conflict does not arise from the Trustees' dual position of Trustee and beneficiary, the conflict should ordinarily be avoided by the Trustee not entering into the transaction that would give rise to the conflict. For example, a Trustee must not sell his own property to the Trust (without court approval). Such a transaction cannot properly be carried out even if the vendor Trustee does not take part in the decision-making by the Trustees.

(e) When the conflict is expressly dealt with by the terms of the Trust Deeds, the Trustees may, despite the conflict, take part in the applicable decision-making. In particular, the Trust Deeds expressly provide for the Trustees receiving reasonable fees for their services as Trustees. They can, therefore, properly make the decision about their own fees. However, such decisions must not be open to the criticism that the Trustees have abused their position. The fees must therefore be demonstrably reasonable, and this may involve obtaining input from qualified advisors.

(f) When the conflict arises from the Trustees' dual position as Trustee and beneficiary – for example, when consideration is being given to a distribution of trust property to a Trustee/beneficiary, the normal procedure should be for the conflicted Trustee not to be present at the Trustees' consideration of the question and should not vote on the question. In effect, such Trustee should be treated in the same way as a beneficiary who is not a Trustee.

(g) Where possible benefits to Trustees or their relatives from a proposal under consideration by the Trustees arise only because the proposal may benefit all beneficiaries, or a broad category of them, with no particular advantage being conferred upon any Trustee or relative of a Trustee, it would be impractical and unreasonable to disqualify Trustees from consideration of the proposal merely because of such potential benefits. In such cases the potential benefits to Trustees and their relatives will generally be obvious on the face of the proposal, so that there is no hidden advantage to a Trustee or relative which should be disclosed, nor should the Trustee be exposed to criticism or potential liability for having made such a decision on the basis that it would be in the interests of the beneficiaries as a whole, or some significant group of beneficiaries.

(h) When the Trustees decide that there is in fact no conflict in respect of a particular question or transaction but that one or more beneficiaries might nevertheless consider that there is a conflict, it will ordinarily be appropriate for the affected Trustee not to be present at the Trustees' consideration of the matter and not to vote on it.

5. Conduct Involving Decision-Making Process

In order that the decision-making process be fair and effective, it is crucial that communication among Trustees be fair and effective. Therefore, the Trustees shall act in accordance with the following principles:

(a) **Cooperation:** Trustees shall collaborate to serve the best interests of the beneficiaries.

(b) **Tolerance:** each Trustee should seek to fully understand the views and values of the other Trustees in the best possible light and consider whether those views and values might be usefully adopted to guide the ongoing deliberations of the Trustees.

(c) **Inclusion:** Trustees shall use their best efforts to include all Trustees in their deliberations so that each Trustee feels that he/she had a meaningful opportunity to contribute to the discussion and that his/her views and values were given fair and full consideration.

(d) **Compassion:** each Trustee recognizes that the other Trustees are human beings with their own weaknesses and capable of making mistakes. The Trustees agree to show patience, and provide mentorship and caring for each other.

(e) **Relationship:** the Trustees recognize that people live in complex and essential webs of relationship and acknowledge that decisions and actions of individuals and the community unavoidably affect each other. The Trustees shall seek to make their decisions in ways that positively strengthen their relationships and in ways that promote the best consequences for the beneficiaries.

(f) **Honesty in Communication:** Trustees must be fair, open, truthful and sincere when dealing with each other and shall all times avoid attempts to deceive or mislead each other.

(g) **Fair Procedures:** the Trustees agree to proceed with their decisions in accordance with known and fair procedures.

(h) **Assertiveness:** Trustees have an obligation to state their views and concerns openly and clearly for consideration by the other Trustees.

(i) **Consensus:** where possible, Trustees should work towards unanimous agreement; where unanimous agreement is not possible, Trustees shall try to come to a consensus; where neither of these is possible Trustees shall reach decisions by simple majority. In all cases, once a decision is made by the Trustees it should be respected and followed by all.

(j) **Objectivity:** Trustees must base their decisions upon relevant facts and information in a way that is not biased by undisclosed personal feelings or opinions.

(k) **Transparency:** to the extent possible, the Trustees should be able to articulate their reasons for coming to a particular decision.

(l) **Peacefulness & Respect:** Trustees have an obligation to be polite, respectful and courteous in their dealings with other Trustees; they agree to deal with each other in a calm and open manner; and they agree to avoid expressions of anger and personal attacks which may disrupt the harmony of the group.

(m) **Reconciliation:** the Trustees accept that they are morally accountable for their own actions. Where their actions or decisions have, intentionally or unintentionally, caused disharmony, they accept a personal obligation to work towards restoring harmony.

6. Confidentiality

The Trustees shall maintain the confidentiality of the deliberations of the Trustees and of any other confidential information imparted to the Trustees including information received from the Sawridge Corporations and their businesses and affairs.

7. Conduct Bringing Office of Trustee Into Disrepute

It is important that the role of the Trustees be respected by the beneficiaries of the Trusts. Therefore, criminal conduct or other conduct which brings the office of trustee into disrepute is contrary to this Code of Conduct, whether or not such conduct is directly connected to the carrying on of responsibilities as Trustee.

8. Application of the Code of Conduct

The following are the guiding principles applicable to the application of this Code of Conduct:

(a) It is intended that Trustees will abide by this Code of Conduct, along with the Schedules to it, in carrying out their responsibilities as Trustees.

(b) Any Trustee who has any concern about the conduct of another Trustee will ordinarily in the first place raise the concern either privately with the other Trustee or at a meeting of the Trustees, as may be appropriate in the circumstances. It is expected that such concerns will ordinarily be resolved informally without the need for any outside intervention.

(c) Where it is alleged by a Trustee (the "Claimant") that another Trustee has acted inconsistently with this Code of Conduct and the Claimant is not satisfied that his or her concern has been properly resolved in accordance with (b) above, the Claimant may require that an outside person be appointed to act as a mediator and arbitrator to deal with the complaint, as follows:

   (i) Subject to (iii) below, the Claimant will by notice in writing request the Trustees' Chair to arrange the selection of a mediator/arbitrator. Such mediator/arbitrator will be such person as shall be agreed by both the Claimant and the Respondent.

   (ii) Subject to (iii) below, if the disputing Trustees do not, within 30 days from the date of the notice referred to in (i) above, agree on a mediator/arbitrator the Trustees' Chair shall appoint a mediator/arbitrator.

   (iii) If the Trustees' Chair is a Trustee who is a disputing Trustee, the notice referred to in (i) above will be provided to the Trustees who are not the disputing Trustees and the appointment referred to in (ii) above will be made by the majority of the Trustees who are not the disputing Trustees.

(d) The role and authority of the mediator/arbitrator will be as follows:

(i) the mediator/arbitrator shall arrange for a joint meeting with the parties not later than 90 days from the date of the notice referred to in 8(c)(i) above;

(ii) the mediator/arbitrator will first act as a mediator in order to facilitate a resolution of the dispute without the need for any binding direction;

(iii) if the mediator/arbitrator determines that it will not be possible to resolve the dispute without any binding direction, he or she shall act as an arbitrator to resolve the dispute by one or more directions;

(iv) the mediator/arbitrator shall have all the authority, powers and discretion granted to an arbitrator under the Alberta *Arbitration Act*;

(v) if the mediator/arbitrator makes a finding that a Trustee has acted inconsistently with this Code of Conduct the mediator/arbitrator may make one or more directions relating to any of the following:

(A) that a Trustee act or abstain from acting in particular ways;

(B) that a Trustee not be entitled to be paid remuneration to which he or she would otherwise be entitled;

(C) that a Trustee resign as Trustee;

(D) that some or all of the costs and expenses of the dispute resolution process be paid by one or more of the Trustees personally.

(vi) Subject to a direction made by the mediator/arbitrator pursuant to 8(c)(iv) above, the costs and expenses incurred in respect of the dispute resolution process will be paid from the assets of the Trusts.

(vii) There shall be no appeal from a decision of the mediator/arbitrator.

9. Application of Code of Conduct to all Trustees

It is intended that all Trustees will be subject to this Code of Conduct. Therefore, it will be a condition of appointment of a person as Trustee that he or she will agree to become a signatory to the Code of Conduct.

10. Severability

If any provision of this Code of Conduct is determined to be invalid, illegal or unenforceable in any respect, such determination shall not impair or affect the validity, legality or enforceability of the remaining provisions of this Code of Conduct.

11. Amendment of Code of Conduct

This Code of Conduct may be amended from time to time by the unanimous agreement of all of the Trustees at any such time by instrument in writing.

DATED this 12th day of January, 2009.

Witness	Walter Felix Twinn. WFT
Witness	Bertha L'Hirondelle
Witness	Catherine Twinn
Witness	Roland Twinn
Witness	Clara Midbo

SCHEDULE A

Responsibilities of Trustees of the Sawridge Trust

Introduction

This document describes, in a general way, the responsibilities of the trustees (the "Trustees") of the Sawridge Band *Inter Vivos* Settlement (the "1985 Trust") and of the Sawridge Trust (the "1986 Trust") (together, the "Trusts").

Trustees are required to act in accordance with the general law of trusts as modified by the provisions of the document establishing the particular trust.

Beneficiaries

Paragraph 2(a) of the Trust Deed applying to the 1985 Trust defines beneficiaries for the purposes of that Trust as all persons who at any particular time qualify as members of the Sawridge Indian Band pursuant to the provisions of the *Indian Act* as those provisions existed on April 15, 1982.

Paragraph 2(a) of the Trust Deed applying to the 1986 Trust defines beneficiaries for the purposes of that Trust as all persons who at any particular time qualify as members of the Sawridge Indian Band under the laws of Canada in force from time to time including the membership rules and customary laws of the Sawridge Indian Band as they exist from time to time to the extent that such membership rules and customary laws are incorporated into, or recognized by, the laws of Canada.

Number of Trustees

The Trust Deed applying to the 1985 Trust provides that at all times (except for the period pending an appointment) there shall be at least five Trustees. A non-beneficiary may not be appointed if immediately before such appointment there is more than one Trustee who is not a beneficiary. There cannot, therefore, be more than two Trustees who are not beneficiaries (paragraph 5).

The Trust Deed applying to the 1986 Trust provides that at all times (except for the period pending an appointment) there is required to be a minimum of three Trustees and a maximum of seven Trustees. A non-beneficiary may not be appointed if immediately before such appointment there are more than two Trustees who are not beneficiaries (paragraph 5). It would, therefore, be possible to have three Trustees who are not beneficiaries. However, for tax reasons, it is preferable that the two Trusts have the same Trustees.

Basic Obligation of Trustees

The basic obligation of trustees is to act in the best interest of the beneficiaries.

Distribution of Income or Capital of Trusts

Both Trusts provide for the Trustees to have a wide discretion as to the distribution of income or capital of the Trusts, paragraph 6 of each Trust Deed providing (in part) that the,

> "Trustees shall have complete and unfettered discretion to pay or apply al 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."

Although the provision of the Trust Deeds refers to the discretion as "unfettered" and "uncontrolled", it is in fact "fettered" and "controlled" by the requirements of the law of trusts. The point is that since the discretion is exercisable by the Trustees as trustees they must not exercise it arbitrarily but must do so in accordance with the requirements of trust law. These requirements, which have been laid down in case law and are expressed in fairly general terms, can be summarized as follows:

- Trustees must give active consideration to the exercise of their discretionary powers.
- Trustees must act in good faith, in the sense that they must take account of relevant factors and must not take account of irrelevant factors.

The case law does not define what is relevant for these purposes. It depends on the circumstances of each particular trust. However, the basic idea is that trustees should take account of factors relevant to the purposes of the particular trust. They must not, for example, take account of their personal feelings about particular beneficiaries.

Distributions from the Trusts may be made to or for the benefit of the beneficiaries in a variety of ways. These would include providing facilities or programmes generally for the benefit of beneficiaries and by programmes involving distributions to beneficiaries. It is important that the availability of any such facilities or programmes is made known to beneficiaries so that beneficiaries have the opportunity both to take advantage of any facilities or programmes that are generally available for beneficiaries and to apply for any facility or programme that will involve selection among the beneficiaries.

The topic of conflict of interest and duty is relevant to the exercise of the Trustees' discretion to distribute trust property. This is discussed below.

Process of Decision Making

Unlike the law applicable to corporations, trust law does not specify a procedure for trustees to make decisions. Also, trust documents – like the Deeds applicable to the Trusts – do not typically provide detailed guidance for such decision making.

The following should be noted:

- Both Trust Deeds provide for decisions being made by a majority of Trustees. In the case of the 1985 Trust, paragraph 13 of the Deed states that a "majority of fifty percent" of the Trustees shall be required for any decision or action taken on behalf of the Trust This should be interpreted to require a simple majority which is clear when there is an odd number of Trustees, and when there is an even number it should be interpreted as a simple majority. In the case of the 1986 Trust, paragraph 13 of the deed provides as follows:

  > "Any decision of the Trustees may be made by a majority of the Trustees holding office as such at the time of such decision and no dissenting or abstaining Trustee who acts in good faith shall be personally liable for any loss or claim whatsoever arising out of any acts or omissions which result from the exercise of any such discretion or power, regardless whether such Trustee assists in the implementation of the decision."

  Although, as described above, both Trust Deeds provide that the Trustees' decisions may be made by a majority, this does not mean that decisions can properly be made with the involvement of only a majority. In general, all Trustees must take part in the decision-making process, even though ultimately the decision may be made by a majority.

- Although trustees are not required to make decisions by any particular procedure, it is important that they do have a procedure that enables decisions to be made effectively.

Delegation

In general, trustees cannot delegate to others the exercise of their discretionary powers. They can, however, seek professional advice and they can appoint agents to implement their decisions. In fact, when trustees do not have the expertise needed for the making of a particular decision, they should obtain such advice.

Paragraph 8(c) of both Trust Deeds provides for the employment of professional advisors and agents as follows by confirming power,

> "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 payments of professional fees to any Trustee who renders professional services to the Trustees)."

The Trustees must exercise care in the appointment of professional advisors and agents and in monitoring their work appropriately.

Duty of Care

In general, in administering a trust and its property, trustees are required to exercise the care, skill and diligence of an ordinary prudent person. Two aspects of this should be noted, as follows.

Control of Corporations

Where trustees hold sufficient shares of a corporation to enable them to control that corporation, their fundamental obligation is to exercise that control for the benefit of the trust, and in doing so they must act in accordance with the standard of care referred to above. Ordinarily, this requires that:

(1) the trustees obtain appropriate representation on the board of directors and, typically, this will have the result that one or more of the trustees will be directors;

(2) the trustees should obtain and review appropriate information about the corporation's affairs; and

(3) the trustees must exercise their powers as shareholders in order to fully protect the interests of the trust.

The principal assets of the Trusts are the shares in and debt owed by Sawridge Holdings Ltd. and 352736 Alberta Ltd. and their various subsidiaries (the "Sawridge Corporations"). Until the re-organization carried out in 2006, the same persons acted as Trustees of the Trusts and as directors of Sawridge Corporations. Since then, the Trustees have elected qualified persons whom they consider suitable to act as directors, and none of the Trustees has sat on the boards of Sawridge Corporations. In the circumstances of the Trusts and the Sawridge Corporations, this arrangement was considered to be the best method of dealing with the Sawridge Corporations. There are two inter-related aspects to this arrangement. The first is that the Trustees will not individually interfere in the respective roles of the directors and of management of the corporations. The second is that the Trustees have sufficient information about the conduct of the Sawridge Corporations so that they can properly monitor the activities of the corporations and be able to make informed decisions about: their concerns and what should be communicated by the Trustees' Chair to the Chair of the Boards of Directors; the election of the boards of directors; and when it might be necessary – in unusual circumstances – to take a position by communication on a Chair-to-Chair basis regarding the management of the corporations. The following principles are applicable in this context:

(1) The Trustees shall be routinely provided with the same information as is provided by management to directors.

(2) The Trustees shall be routinely and promptly provided with the material received by directors at directors' meetings, including agenda and minutes of meetings.

(3) Generally, the directors will supply any other information requested by the Trustees' Chair as collectively required by the Trustees.

(4) In order that the board of directors will not have concerns about providing confidential information, the Trustees receiving confidential information must respect the confidentiality of the information.

(5) Communication between the Trustees and the directors will occur through the Trustees' positions being expressed collectively and through the Trustees' Chair. However, individual communications may occur at meetings of the Trustees as shareholders of the corporation, including at annual shareholder meetings.

(6) Trustees should not interfere with management. If any Trustee has any concern relating to management, that concern should be brought to the attention of the other Trustees, and if considered by the other Trustees to be sufficiently material the Trustees' concern can then be communicated through the Trustees' Chair to the directors.

<u>Investment</u>

Paragraph 7 of both Trust Deeds gives the Trustees power to invest the Trust Fund in any investments authorized for trustees' investments by the Alberta *Trustee Act*, but the Trustees are not restricted to such investments and they may invest in any investment which they in their discretion think fit.

In dealing with investments, trustees are required to act in accordance with the standard of care described above. The Trusts were established in order to hold the Sawridge Corporations and the businesses carried on by them, and the exercise of the Trustees' investment responsibilities can properly be considered in light of this. However, it is also important for the Trustees to have regard to the principles generally applied, which are as follows:

- Trustees should, in selecting investments, perform an assessment of proposed investments, evaluating both the safety of the capital invested and the potential return from the investment. An assessment of risk, both of achieving the potential return and risk to the safety of the capital investment, should be considered.
- Ordinarily, trustees should diversify the investments of the trust, having regard to the requirements of the particular trust.
- The investment portfolio of the trust should be reviewed periodically as well as when unusual changes affecting the portfolio occur.
- Trustees may obtain expert professional advice on evaluating and selecting investments. Trustees may delegate authority to an agent with respect to the investments, so long as the trustees exercise appropriate care in the selection of the agent; the authority of the agent is clearly and appropriately restricted; and the performance of the agent is appropriately monitored.

<u>Duty to Keep and Render Accounts and to Provide other Information</u>

Under the general law of trusts, trustees have an obligation to maintain proper accounts dealing with the income and capital of the trust and, on request, to provide the accounts for the inspection of beneficiaries. Paragraph 10 of both Trust Deeds provides as follows:

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

In addition to their right to inspect trust accounts, beneficiaries are also entitled to obtain information about the trust and its administration and to inspect trust documents. This includes a right to inspect legal opinions obtained by the trustees in their capacities as trustees. A recent court decision indicates that, at least in some circumstances, beneficiaries do not have an absolute entitlement to obtain trust information and documents but that the court has an overriding ability to control such entitlement. Nevertheless, the Trustees should assume that beneficiaries will, generally, be able to assert a right to obtain trust information and documents.

It is not completely clear to what extent beneficiaries are entitled to information relating to corporations, shares of which are directly or indirectly held in the Trust. It should be assumed that the beneficiaries will be entitled to obtain all information and documents in the possession of the Trustees as trustees or which the Trustees are entitled to obtain as trustees. This will likely include any information or documents relating to any of the Sawridge Corporations, unless the production of such information or documents involves a breach of confidence or otherwise would be improper. Even in this situation, court controlled production of information or documents may permit disclosure to be made in a controlled manner. As was stated in the recent case referred to above:

> "Especially when there are issues as to personal or commercial confidentiality, the court may have to balance the competing interests of different beneficiaries, the trustees themselves and third parties. Disclosure may have to be limited and safeguards may have to be put in place."

It is the orthodox position that trustees cannot be required to provide beneficiaries with the reasons for their exercise of discretionary powers and, similarly, that documents expressing such reasons can be withheld. However, the Trustees should not rely on this orthodox position and should assume that their reasons for decisions (and the documents expressing them) will be scrutinized by beneficiaries and, in the event of a dispute, by the court.

The law is unclear as to trustees' obligations to volunteer information about the trust. As stated above, it is suggested that, at least when the Trustees have adopted a programme involving selection among beneficiaries, the availability of the programme should be made known to the beneficiaries.

Duty of Loyalty: Conflict of Interest and Duty

No Statutory Code

Unlike corporate law, trust law provides no statutory code dealing with the fiduciary obligations of trustees or, in particular, with conflict of interest and duty.

General Principles

The overriding obligation of trustees is to act in the best interests of the beneficiaries, and to prefer the interests of the beneficiaries over their personal interests. This is often described as the duty of loyalty. There are two, overlapping, aspects of the duty of loyalty. First, a trustee must not place himself in a position of conflict between his self-interest and his duty. Second, a trustee must not profit from his position as trustee. In general, a trustee who puts himself in a position of conflict is liable to disgorge any of the gains made from so doing and is liable for losses to the trust flowing from the breach of his trustee obligation. These general principles are applied very strictly against trustees. Liability does not depend on proof that the trustee in fact abused his or her position and the liability to disgorge gains does not require proof that the trust suffered any loss. Also, the liability to disgorge gains extends to those obtained indirectly as well as those obtained directly.

Remuneration as Trustees

The general principles dealing with conflict of interest and duty are subject to modification by the terms of a particular trust. Paragraph 9 of each of the Trust Deeds provides for the Trustees to receive reasonable fees for their services as trustees in the administration of the Trusts.

Application of General Principles

Clear examples of conflict occur if:

- a trustee makes use of trust property for his personal benefit;
- a trustee sells her own property to the trust;
- a trustee purchases property from the trust;
- a trustee establishes for herself personally a business competing directly with an established business of the trust; and
- a trustee takes advantage of a "maturing business opportunity" of the trust. For example, if trustees were negotiating to obtain some business opportunity for the trust, it would be improper for a trustee to obtain such business opportunity for himself or herself.

It is not clear whether a trustee may obtain for himself a business opportunity obtained otherwise than through his position as trustee in the circumstances that the business opportunity is of a type that the trust has adopted a policy of attempting to obtain.

It is not clear to what extent and in what circumstances the conflict principles apply where a benefit is obtained by the spouse or other close relative of the trustee. However, the Trustees should assume that the conflict principle will be applied in respect of any benefit that may be obtained indirectly by the Trustee, including where the benefit is obtained by the spouse or close relative.

Application of Principles Where Trustees are Also Beneficiaries

The application of the general principles discussed above gives rise to some difficulty when the same persons are both trustees and beneficiaries since a conflict will often be inevitable in such circumstances. Some conflict is inherent in the two Trusts. In particular, the 1985 Trust requires that at least two Trustees be beneficiaries. Also, although it would be possible to have three Trustees of the 1986 Trust who are non-beneficiaries, for tax reasons it is preferable to have the same Trustees of the two Trusts.

As stated above, both of the Trusts give the Trustees a wide discretion to distribute income or capital of the respective Trusts to one or more of the beneficiaries. Obviously, the Trustees may be in a position of conflict – one created by the Trust arrangements and not one they have put themselves into – in exercising their discretion in a way that might benefit themselves as beneficiaries. This conflict is not acute if the policy is adopted of making distributions from the Trusts that are of general benefit for the beneficiaries, for example, if a distribution of a particular amount was distributed to each and every beneficiary or if funds were expended in creating facilities or programs available for the general benefit of beneficiaries. However, the conflict may be problematic if a policy is adopted involving the exercise of discretion to make distributions – either by way of grant or by way of loan – to particular beneficiaries. There is an obvious danger that the Trustees could be accused of acting improperly if their powers are used to benefit one or more of their own number, particularly if applications for assistance are denied to other beneficiaries.

There are two possible ways in which the inherent conflict in which the Trustees may find themselves can be managed. They are as follows:

(1) One possibility would be for Trustees (and perhaps others closely connected to them, such as spouse and other close relations) to be excluded from benefit from any programs that involve choice among beneficiaries. However, this appears to be unfair to persons who choose to take on the responsibility of being trustees and may be an inappropriate disincentive. It must be remembered in this context that the terms of the trust instrument clearly contemplate that not only may the same person be both a trustee and a beneficiary but, particularly in the case of the 1985 Trust, it is required that some trustees must be beneficiaries.

(2) Another possibility is to permit trustees to benefit from programmes of the sort under consideration but to manage the conflict arising from that by the use of arrangements such as the typical provisions applicable to corporations. For example, section 120 of the *Canada Business Corporations Act* contains a scheme applicable to directors under which directors are required to disclose their interests when they have a personal interest in a matter involving the corporation and they are then excluded from voting on any resolution of the board of directors relating to such matter.

The second alternative is not perfect since trust law does not contain any provision or other rule absolving a trustee from responsibility with regard to a decision affecting a matter in the circumstances described in the second alternative. Nevertheless, in the special circumstances of the Sawridge Trusts this is the better of the two alternatives and should provide the most appropriate method of minimizing the conflict to the extent reasonably possible.

Dealing with Conflict

Certain preliminary points should be emphasized. First, although a "working definition" of a conflict will be set out below, and although there are situations in which it is clear that there will be an improper conflict, there will be many other situations in which it will not be possible to determine with certainty whether it would be considered there was an improper conflict. Second, the relevant principles of trust law are typically applied strictly against trustees. Therefore, when in doubt the safe course is for trustees to avoid acting in a way that could be characterized as putting themselves into a position of conflict. This presumption in favour of caution is particularly applicable to the Trustees as the Trustees must be particularly careful not to attract the criticism that they may be improperly taking advantage of their position as Trustees to benefit themselves.

In order to deal with the management of conflicts, the following is a useful "working definition" of a conflict:

> There will be a conflict whenever a Trustee may obtain some benefit, directly or indirectly, from his or her position as Trustee or when the Trustee is in a position in which his or her decision-making as Trustee may potentially be influenced, directly or indirectly, by his or her personal interests. It will be assumed that a Trustee may obtain such a benefit if the benefit is obtained, not only by the Trustee, but also by the spouse, parent, sibling or child of the Trustee. Similarly, it will be assumed that a Trustee may be influenced if, not only the Trustee, but also the spouse, parent, sibling or child of the Trustee may be affected by the decision.

Not every conflict literally falling within this definition is necessarily problematic. Where a decision of the Trustees will benefit a group of beneficiaries that may include some or all of the Trustees who are themselves beneficiaries, or other beneficiaries related to them, as long as there is no ulterior purpose of conferring advantages on Trustees or their relatives under the guise of a scheme purportedly for the benefit of a broader category of beneficiaries, the fact that Trustees or their relatives may incidentally benefit should not preclude the Trustees from making such a decision. As previously noted, the terms of the Trusts require some Trustees to be beneficiaries, so that it cannot have been the intention that decisions of the Trustees be disinterested in the sense of there being no possible interest of any Trustee in the administration of the Trusts.

SCHEDULE B1

THE SAWRIDGE BAND INTER VIVOS SETTLEMENT

Resolution of Trustees: Process of Decision-Making

WHEREAS:

(1) The Sawridge Band Inter Vivos Settlement (the "Trust") was settled by Chief Walter P. Twinn on April 15, 1985.

(2) The undersigned, Bertha L'Hirondelle, Walter Felix Twinn, Roland Twinn, Catherine Twinn and Clara Midbo, are the present Trustees of the Trust.

(3) Paragraph 13 of the Deed applying to the Trust provides that any decision of the Trustees may be made by a majority of 50% of the Trustees.

(4) The Trustees, subject to the provisions of the Trust, wish to regulate the manner of making decisions by them as Trustees.

NOW THEREFORE BE IT RESOLVED THAT:

1. **Chair of Trustee Meetings**

   (a) Ronald Ewoniak shall be invited to attend meetings of the Trustees and shall act as chair (the "Chair") of such meetings, provided that the Trustees may terminate such arrangement on reasonable notice to Ronald Ewoniak and shall from time to time appoint one of the Trustees or some other person to act as Chair.

2. **Meetings of Trustees**

   (a) Subject to paragraph 3 below, all decisions of the Trustees shall be made at meetings of the Trustees.

   (b) The Trustees shall meet at least once every quarter.

   (c) The Chair shall be responsible for calling the regularly scheduled quarterly meetings of the Trustees and additional meetings which may be called by the Chair on 48 hours' notice to the Trustees.

   (d) Meetings in addition to the regularly scheduled meetings may be called by the Chair or any Trustee on 48 hours' notice to the Chair (if not calling the meeting) and to the other Trustees.

   (e) Notice may be given in writing, by e-mail, fax or telephone or in person.

   (f) Any person may participate in a meeting by means of telephone, electronic or other communication facility as permits all persons participating in the meeting to communicate with each other simultaneously and instantaneously.

(g) A majority of the Trustees shall constitute a quorum of Trustees.

(h) A reasonable time before each meeting, the Chair shall circulate to all Trustees an agenda to which shall be attached all relevant documents for consideration by the Trustees at the meeting.

(i) The Trustees present at a meeting shall appoint one of the Trustees or some other person to act as the secretary of the meeting and to record the minutes of the meeting, including decisions of the Trustees.

3. **Resolutions of Trustees**

A decision of the Trustees may be also made by a resolution in writing signed by all of the Trustees.

DATED this 12th day of January, 2009.

B. L'Hirondelle
Bertha L'Hirondelle

Walter Felix Twin
Walter Felix Twinn #WFT

Roland Twinn

Catherine Twinn
Catherine Twinn

Clara Midbo
Clara Midbo

SCHEDULE B2

THE SAWRIDGE TRUST

Resolution of Trustees: Process of Decision-Making

WHEREAS:

(1) The Sawridge Trust (the "Trust") was settled by Chief Walter P. Twinn on August 15, 1986.

(2) The undersigned, Bertha L'Hirondelle, Walter Felix Twinn, Roland Twinn, Catherine Twinn and Clara Midbo, are the present Trustees of the Trust.

(3) Paragraph 13 of the Deed applying to the Trust provides that any decision of the Trustees may be made by a majority of the Trustees holding office as such at the time of such decision and no dissenting or abstaining Trustee who acts in good faith shall be personally liable for any loss or claims whatsoever arising out of any acts or omissions which result from the exercise of any such discretion or power, regardless whether such Trustee assists in the implementation of the decision.

(4) The Trustees, subject to the provisions of the Trust, wish to regulate the manner of making decisions by them as Trustees.

NOW THEREFORE BE IT RESOLVED THAT:

1. **Chair of Trustee Meetings**

(a) Ronald Ewoniak shall be invited to attend meetings of the Trustees and shall act as chair (the "Chair") of such meetings, provided that the Trustees may terminate such arrangement on reasonable notice to Ronald Ewoniak and shall from time to time appoint one of the Trustees or some other person to act as Chair.

2. **Meetings of Trustees**

(a) Subject to paragraph 3 below, all decisions of the Trustees shall be made at meetings of the Trustees.

(b) The Trustees shall meet at least once every quarter.

(c) The Chair shall be responsible for calling the regularly scheduled quarterly meetings of the Trustees and additional meetings which may be called by the Chair on 48 hours' notice to the Trustees.

(d) Meetings in addition to the regularly scheduled meetings may be called by the Chair or any Trustee on 48 hours' notice to the Chair (if not calling the meeting) and to the other Trustees.

(e) Notice may be given in writing, by e-mail, fax or telephone or in person.

(f) Any person may participate in a meeting by means of telephone, electronic or other communication facility as permits all persons participating in the meeting to communicate with each other simultaneously and instantaneously.

(g) A majority of the Trustees shall constitute a quorum of Trustees.

(h) A reasonable time before each meeting, the Chair shall circulate to all Trustees an agenda to which shall be attached all relevant documents for consideration by the Trustees at the meeting.

(i) The Trustees present at a meeting shall appoint one of the Trustees or some other person to act as the secretary of the meeting and to record the minutes of the meeting, including decisions of the Trustees.

3. Resolutions of Trustees

A decision of the Trustees may be also made by a resolution in writing signed by all of the Trustees.

DATED this 12th day of January, 2008. CT RY WFT

Bertha L'Hirondelle

Walter Felix Twinn WFT

Roland Twinn

Catherine Twinn

Clara Midbo

Tab 4

Clerk's stamp:

COURT FILE NUMBER	1403 04885
COURT OF QUEEN'S BENCH OF ALBERTA	EDMONTON
JUDICIAL CENTRE	
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c. T-8, AS AMENDED IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT and THE SAWRIDGE TRUST ("Sawridge Trusts")
APPLICANTS	ROLAND TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, EVERETT JUSTIN TWIN, as Trustees for the Sawridge Trusts
RESPONDENT	CATHERINE TWINN
DOCUMENT	**AFFIDAVIT OF PAUL BUJOLD**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Bryan & Compay LLP 2600 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3V5 Attention: Nancy Cumming Telephone: (780) 420-4733 Fax: (780) 428-6324

I, Paul Bujold, of Edmonton, Alberta, make oath and say that:

1. 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 September 30, 2015 (the "September 30 Affidavit") and wish to provide by this affidavit my response to the

evidence provided in the September 30, affidavit. I also wish to respond to other evidence provided by Catherine in the course of litigation in the 1103 14112 ("1103") and 1403 04885 ("1403") actions.

History of the trusts

3. I have provided the history of the Sawridge 1985 Trust and the 1986 Trusts in my affidavits filed in action 1103. Attached hereto and marked as Exhibit "A" are such affidavits.

4. In both the 1985 Trust Deed and the 1986 Trust Deed, the Trustees are to make decisions by majority. This is set out in paragraph 13 of both Trust Deeds (Exhibit "A").

Code of Conduct

5. A Code of Conduct was instituted by the Trustees to govern both the 1985 and 1986 Trusts. The Code of Conduct sets a procedure for the resolution of disputes and provides guidance for behaviour of the Trustees. The Code of Conduct says that majority decision governs in Schedules A, B1 and B 2. The Code of Conduct is attached hereto at Exhibit "B".

6. Paragraph 5 (f) of the Code of Conduct reads as follows:

> Where possible, Trustees should work towards unanimous agreement; where unanimous agreement is not possible, Trustees shall try to come to a consensus; where neither of these is possible Trustees shall reach decisions by simple majority. In all cases, once a decision is made by the Trustees it should be respected and followed by all.

Value of the Trusts

7. In respect of paragraph 3 of the September 30 Affidavit, I disagree with Catherine's assessment of the value of the 1985 and 1986 Trusts. Based on information that I have received from the companies, I believe that the value of the two Trusts was approximately $140 million in 2015. The Trusts' assets are heavily dependent on the oil and gas industry and have been negatively affected by the present economic downturn

and the reduction in oil and gas activity. The Trusts have few liquid assets that are not earmarked for reinvestment in the Trusts' assets.

Composition of Family Groups

8. In respect of paragraph 5 of the September 30 Affidavit, I agree with the composition of the family groups, however, only one descendant is a minor. The descendants are as follows:

   (a) 32 Twin(n) descendants;

   (b) 8 Potskin descendants; and

   (c) 5 Ward descendants.

Definition of beneficiary

9. In respect of paragraph 6 of the September 30 Affidavit, the Trustees have not determined their position about amending the definition of "beneficiary" of the 1985 Trust because the Trustees have sought the direction of the Court. The Trustees have taken the following steps in resolving this definition:

   (a) They were advised by their legal advisors that the current definition of beneficiary in the 1985 Trust is discriminatory;

   (b) The Trust Deed prohibits amendment of the definition of beneficiaries. Thus it was necessary to seek the direction of the Court on whether the definition is discriminatory and seek the Court's direction on how to remedy the discriminatory provisions;

   (c) It was appealing to the Trustees to request the Court to change the definition to the "members" of the Sawridge First Nation ("SFN") as they understood from many sources that the intention of the settlor of the Trust was that the trust funds were for the benefit of the members. The 1982 Trust defined beneficiaries as members as does the 1986 Trust;

(d) Some thought was given to having the Trustees determine membership but the Trustees were advised that they have no legal authority to be involved in the determination of the membership of individuals in SFN;

(e) Catherine makes reference to requiring a process for the determination of the beneficiaries but no process would be necessary to determine the 1985 Trust beneficiaries if the definition is changed to "members".

Elected Officials as Trustees

10. In respect of paragraph 9 of the September 30 Affidavit, there is only one Trustee who is an elected official, the Chief of SFN, Roland Twinn. The Trustees as of January 31, 2017 are:

(a) Catherine Twinn ("Catherine")

(b) Bertha L'Hirondelle ("Bertha");

(c) Roland Twinn (Chief of the Nation) ("Roland");

(d) Justin Twin ("Justin"); and

(e) Margaret Ward ("Margaret").

11. A review of the history of the Trusts shows that the Chief has always been a Trustee. Catherine was appointed by her husband, Chief Walter Twinn, who was then the Chief and a Trustee. Chief Walter Twinn continued to include elected officials as trustees until his death. Following the death of Chief Walter Twinn, Catherine appointed Bertha as a Trustee when Bertha became Chief and Catherine appointed Roland, a Band Councillor, who later became Chief of SFN. This is a small community and thus, the Chief knows the needs of its members and as the Trusts provide for the members of SFN, it is important for the Chief to be involved in the Trusts as a Trustee.

12. It is useful to have an elected official who can report on the needs of SFN to the Trustees. The Chief being a Trustee is in keeping with the long tradition of the Trusts in which Chief Walter was a Trustee until his death.

13. Catherine suggests that it is a conflict to have elected officials as Trustees. However, it was the settlor of the Trusts who set the provisions in the Trusts in respect of who should be Trustees. The Settlor did not prohibit elected officials as trustees. He set the standard and the practice of having elected officials involved in the Trusts.

14. Further:

    (a) For many years, the Trustees of the 1985 Trusts were: Bertha and Clara (Chief Walter's sisters), Catherine (his widow), Roland (his son) and Walter Felix (his cousin). Catherine would have been involved in appointing all of these individuals. Catherine took no steps to change the long established practice of appointing elected officials as Trustees.

    (b) The original Trustees of the 1986 Trust were Catherine, Chief Walter Twinn, and his brother George Twin (Trustee until his death 8 August 1997). Catherine did not object. George was also an elected official.

    (c) The original Trustees of the 1985 Trust were Chief Walter Twinn and his brothers George and Samuel (Trustee until 28 June 1986). George was also an elected official during his time as a Trustee. Catherine was appointed in 1986 after Samuel died. Catherine was appointed along with Chief Walter Twinn's cousins Walter Felix Twin, a Band Councillor (Trustee until 2014) and Chester Twinn (Trustee until his death 22 January 1996). I have not seen any records which would suggest Catherine objected to the elected officials being appointed as Trustees.

    (d) SFN has a small population. As a result, it is hard to find people to take on roles. Thus, suggesting that those who are elected in any position including the position of elder cannot be a Trustee removes a large number of eligible qualified candidates from acting as Trustees.

Independent Trustees

15. I understand that Catherine now believes that the Trusts should change to have an independent Board of Trustees partially on the basis that such is the current trend in First Nation trusts. It is true that some First Nation trusts have independent trustees.

However, that is not universally true. I have learned that some First Nation leaders and trust experts indicate that complete independence may lead to the needs of the First Nation not being understood or met when the First Nation members are not involved in the Trusts. I attended a conference on First Nations trusts (National Aboriginal Trust Officers Association Conference), during which the speakers emphasized that it was important that the First Nation should not give up control and that the First Nation needed to keep a connection to the Trust. Severing that connection was not recommended.

16. There is no historical support for this position. The initial Trustees were members of SFN. The 1982 Trust had only elected members of SFN and thus the tradition is for members of or people connected with SFN to be appointed as Trustees.

17. I am advised by the Chief that there does not appear to be any support from the community for independent Trustees.

18. In respect of paragraph 11 of the September 30 Affidavit, prior to 1982, some assets were not necessarily held under trust deeds. At various times, assets were held individually in a bare trust by the lawyers for SFN and the Chief and other Band Councillors. This was the case especially when SFN was not considered a legal entity.

19. In respect of paragraph 12 of the September 30 Affidavit, Chief Walter Twinn was the settlor of the Trusts. However, he was not necessarily the settlor of the Trusts due to his position as Chief. As the Chief he would have had a direction from SFN Council on disbursement of funds. Funds from SFN were transferred to Chief Walter Twinn to hold in trust. The Funds were then transferred to the Trusts.

20. To have Trustees who are entirely independent of SFN would require an amendment of the Trust Deeds which requires the agreement of 80% of the beneficiaries. The Trustees believe that the beneficiaries do not want the Trusts to be run by outside Trustees who are not part of the community. As far as I know, Catherine has not undertaken any public attempt to obtain 80% agreement from the beneficiaries for an amendment to the Trusts.

<u>Resignation of Walter Felix Twin ("Walter Felix") and Appointment of Justin Twin</u>

21. In respect of paragraph 15 of the September 30 Affidavit, prior to Walter Felix's resignation, the Trustees were aware that Walter Felix was experiencing health problems and had difficulties continuing in his role as a Trustee. His resignation was expected among the Trustees, including Catherine. Catherine approached Brian Heidecker (the "Chair") and me 6 months before Walter Felix's resignation to ask if we could find a way to get Walter Felix to resign because she had concerns about Walter Felix's health and mental aptitude. She also knew that Walter Felix had had surgery to install a shunt to allow blood to flow to his brain since his carotid arteries were partially blocked.

22. Catherine says that she was not aware that Walter was planning to resign. She asked if we could postpone his resignation so she could bring other names forward as proposed replacement Trustee. She was basically asking to retain an incapable Trustee.

23. Catherine received notice of Walter Felix Twin's resignation at the same time that the other Trustees did. These other Trustees did not ask for extra time to bring forward names.

24. In respect of paragraph 16 of the September 30 Affidavit, documents in relation to the appointment of a new Trustee were sent out in advance to all the Trustees. Attached as Exhibit "C" is my email to Catherine dated January 8, 2014. At the meeting of the Trustees on January 21, 2014, no original motions were prepared in advance. Rather the following occurred:

(a) Some preliminary work had been completed by Brian Heidecker (the "Chair"), the other Trustees and me in advance of the meeting to look for a replacement, as Walter Felix had been experiencing difficulty acting as a Trustee. His resignation was imminent and known to everyone. The issue of Trustee succession was a topic that had been discussed at previous Trustee meetings.

(b) At the January 21, 2014 meeting the Trustees discussed the resignation and proposed Justin Twinn as a replacement. The Trustees felt that Justin was well qualified as he was considered to be a competent SFN councillor, he lived on the reserve, was well liked and had business experience. He was enrolled in management training courses.

(c) At the January 21, 2014 meeting, all of the motions were drafted on a computer with input from all the Trustees in real time. For motions of importance, we use a system in which a draft motion is projected on a screen so that the Trustees can actually see the motion, and make any necessary amendments before voting on it. The motion to accept the resignation of Walter Felix and the motion to appoint a replacement Trustee were typed by me under the direction of the Trustees and displayed on the screen during the meeting. Prior notice is seldom given to the Trustees of motions that may be considered at meetings unless the motion requires specific legal wording and is drafted by the Trusts' lawyers.

(d) There was some urgency to appoint a replacement for Walter Felix Twin because of a pending commercial transaction involving the 1985 Trust that would have required dealing with the assets of the 1985 Trust. The 1985 Trust requires there to be 5 trustees. This was explained to all the Trustees. Three of the four remaining Trustees understood the need for the immediate appointment of a replacement trustee.

(e) Catherine was not prepared to vote in favor of Justin. She wanted a drawn-out selection process. The Trustees advised Catherine that they would consider the process in the future but that they needed to appoint someone immediately to have a valid number of 5 Trustees and would work on the process at a later meeting. The other Trustees were prepared to discuss succession and Catherine's proposal but were not prepared to entertain the idea of developing a succession plan at the last minute. Trustees had been working on a succession plan for some time but had not yet agreed on a process. In any event, a Trustee needed to be elected at this meeting.

(f) Catherine's initial argument opposing the appointment of Justin at the January 21, 2014 Trustee meeting was that he was, at the time, an elected official and that his appointment had not received the unanimous consent of the remaining Trustees.

25. At the February 25, 2014 meeting, Catherine argued that she should be given the opportunity to first meet in private with Justin before giving her consent to his appointment and sign the transfer of asset documents. Because of the urgency, Catherine was given until March 3, 2014 to meet with Justin.

26. Justin has advised me that during his meeting with Catherine, she indicated that she felt that Justin was not a legitimate member of SFN and not a beneficiary to the 1985 Trust and therefore he could not be appointed as a Trustee because the replacement Trustee needed to be a beneficiary of both Trusts. I obtained information from the Band Administrator that Justin was a member of SFN at the time of his birth and was therefore both a member of SFN and a beneficiary of both Trusts. Bertha and Roland, who know Justin and his family very well, both agreed that Justin was a proper member of SFN and also a beneficiary.

27. The Trust Deeds only require majority vote to appoint a new trustee and the Trustees voted by majority vote to appoint Justin. Catherine neither opposed nor abstained from the motion. She refused to sign the motion to appoint Justin and refused to sign the motion to transfer the assets from the current Trustees to the new set of Trustees. The Trustees hold the assets of the Trusts jointly. As a result, when a new Trustee is appointed, the Trust assets must be transferred from the old Trustees to the new Trustees.

28. The Trustees had received an opinion that even if a Trustee voted against a motion, the dissenting Trustee could still sign legal documents relating to the motion to transfer assets. There would be no liability in doing so. Catherine refused to sign the documents to appoint Justin and refused to sign the documents to transfer the assets from the old set of Trustees to the new set of Trustees. As a result, the Trustees were forced to proceed with a Court application to seek an Order to transfer the assets to the new Trustees.

29. Catherine has suggested that she was prepared to sign the transfer of assets but her actions do not suggest that is true. In the first appearance in Court, Catherine asked for the application to be adjourned so that she could seek legal counsel. In the next Court appearance, there was a direction to have the assets transferred. In addition, the

Trustees agreed to allow Catherine to proceed with an action to attempt to set aside the appointment of Justin. All of this could have been agreed to without a Court Application.

30. In respect of this Court application, Catherine was not directed by the Court to sign the transfer. The Court directed the transfer to occur. Attached and marked as Exhibit "D" is the transcript of the hearing, the Application, Affidavit and the Court Order in respect of the hearing.

31. Attached hereto as Exhibit "E" and Exhibit "F" are the Minutes of the January 21, 2014 Trustee meeting and the February 25, 2014 Trustee meeting.

32. Catherine says that she was taken aback by Justin's appointment and taken aback by the legal document to transfer assets. However, the Trustee meeting took place in January 2014 and the Court application took place in April 2014. She had ample time to sign the transfer document. She refused to do so. Finally, when a pending commercial transaction became an emergency, the Trustees were forced to go to Court and even in Court, Catherine would not agree. This Court application was at great cost to the Trusts.

33. Catherine had not, in the past, opposed Justin's membership in SFN nor his being member of SFN Council during the entire time he was on SFN Council. Catherine had the same documents given to all Trustees in advance of the January 21, 2014 meeting. They were not presented for the first time at the meeting as she suggests. Catherine did not call me, the Chair or any of the other Trustees to ask any questions prior to the meeting. She suggests the decision to appoint Justin was predetermined. This is not true.

34. There was a good discussion by the Trustees at the meeting in regards to replacing Walter Felix. In the deed of appointment there was no name inserted. It had to be determined at the January 21, 2014 meeting.

35. Catherine says that in relation to the January 21, 2014 meeting, she was unable to fully participate and Brian tried to compel her to sign. This is not true. The Trustees only needed a majority to appoint Justin. It was the asset transfer that required signatures of all the Trustees. Catherine was uncooperative. She attacked Justin. She attacked his membership which is not an appropriate thing to do in SFN. She failed to abide by the Code of Conduct to respect decisions made by a majority of Trustees.

36. From January to April, 2014, Catherine refused to sign the deed to transfer the assets. In the meeting of April 15, 2014 the business proposal was put forward and the urgency of the asset transfer was again reiterated and still Catherine refused to sign the transfer documents. The following is an extract of the Minutes of the April 15, 2014 meeting:

Extract from the 15 April 2014 meeting:

> **Company Issues and Chair's Report**
>
> Brian presented the Company's proposal to invest in property development and to set up a new partnership to manage this venture along with the Telford Lake developments (See attached Appendices). He pointed out that having the Trustees approve these proposals required that the asset transfer be completed. He asked Catherine if she would be willing to sign the Deeds at this time. Catherine indicated that she was not prepared to sign the Deeds at this time. Brian indicated that there was some time urgency to these proposals and that the question of the asset transfer could not be dragged out into June.

37. Attached hereto and marked as Exhibit "G" are the Minutes of the April 15, 2014 meeting.

38. Catherine has stated that she refused to sign the deed of transfer because she said it had not been done before. However, the Trustees received legal advice that this had to be done but Catherine refused to listen to this advice.

<u>Justin's Eligibility</u>

39. In respect of paragraph 19 of the September 30 Affidavit, Catherine did not raise any concerns regarding Justin Twin's eligibility as a legitimate 1985 Trust beneficiary and as a SFN member, until her private meeting with Justin immediately prior to March 3, 2014. Catherine never raised this question with the Trustees prior to that date. In response to Catherine's concern, the Trustees undertook research in order to ascertain Justin's status. Michael McKinney, Barrister and Solicitor and the Sawridge First Nation's Executive Director, provided a letter outlining Justin's membership status. This letter is attached as Exhibit "H". The following summarizes the information about Justin's status:

(a) Justin made an inquiry with Indian and Northern Affairs Canada regarding his status in SFN. In response to his inquiry, a letter was received from the Superintendent of Indian Affairs stating that Justin was a legal member of SFN and had been since his birth on September 23, 1982 and that his name had been on the list of members transferred to SFN in October 1985. This letter is attached as Exhibit "I";

(b) The information regarding Justin's membership was not the subject of a vote by SFN Council. Justin was put on SFN membership list by Indian and Northern Affairs Canada and there was no protest; and

(c) No person has been removed from SFN membership list after being put on the list.

40. In respect of paragraph 20 of the September 30 Affidavit, the Trustees relied on information from Michael McKinney and from Indian and Northern Affairs Canada regarding Justin's membership status and thus his eligibility to be a beneficiary of the 1985 Trust.

41. Catherine did not accept the information provided by Michael McKinney and instead incurred the cost of obtaining her own "expert", Larry Gilbert, on the status of Justin. She is now seeking to have the Trusts pay for those costs. To date, Catherine refuses to provide the underlying evidence relied upon by Mr. Gilbert to form his opinion. The opinion contains a number of flaws.

42. I have the following concerns regarding Exhibit "B" of the September 30 Affidavit, the opinion of Mr. Gilbert:

(a) Mr. Gilbert states that he was asked to provide a legal opinion without the benefit of any records and thus bases his opinion on speculation.

(b) He misinterprets paragraph 6 of the Trust Deed as suggesting that illegitimate children of female members are not entitled to benefits. The Trust Deed states that the Trustees can choose not to give them a benefit, not that they are not entitled to benefits.

(c) He concludes that Chief and Council decided Justin was entitled to be a beneficiary, declared him a beneficiary and then appointed him as a Trustee. This is incorrect. The Chief and Council do not have the authority to decide if Justin is a beneficiary, nor do they have the authority to appoint him as a Trustee.

(d) His conclusion that Justin cannot be a Trustee is flawed because Justin could be a Trustee who is either a beneficiary or a non-beneficiary of the Trusts.

(e) I am advised by Mr. McKinney that Mr. Gilbert's opinion suggests Indian Affairs presumed that the father of an illegitimate child of a female Indian was a non-Indian, and therefore would not register the child without evidence of paternity. Mr. McKinney believes that this assumption is not correct. SFN has several instances in which paternity was not acknowledged and the illegitimate child was registered with SFN. Mr. McKinney states that if there is any uncertainty about Justin's paternity, Justin would be saved by the *Indian Act* of 1985 (after Bill C-31). In Section 11(1)(a) it states that a person is entitled to be on a Band List if the name of that person was entered on the Band List immediately prior to April 17, 1985. SFN took the Band List maintained by the department as the starting point and Justin was on that list. Justin is likely also saved by section 7 and 9 of the previous *Indian Act*. Section 7 gave the Registrar power to add names and Section 9 allowed for an appeal of the added name but within a very short time frame. In one case (involving Samson Cree Nation) the Court disallowed protests that were commenced out of time and declared that the protested persons were entitled to be placed on the Band List despite the fact that they may not have been originally entitled to be placed on the Band List.

(f) I am advised by Roland that once someone is a member and is on the membership list, SFN accepts them and SFN does not attack its members. The community is viewed as a family. It is hurtful and disrespectful of Catherine to attack the membership rights of a member on the Band List. Roland describes it as suggesting that you could kick someone out of your family.

(g) Since the 1985 Trust is based on the previous *Indian Act* as at 1982, and the *Indian Act* in 1982 was interpreted in a way that did not permit correction of alleged errors after the protest period, it is unlikely that a protest or correction now would be permitted.

(h) Gilbert was of the opinion that Justin would not have qualified as a Trustee of the 1985 Trust since there were already two non-beneficiary Trustees. Gilbert does not address the fact that this situation would have been corrected by the death of Clara Midbo ("Clara") on July 13, 2014, after which Justin would have qualified in any case as a non-beneficiary Trustee.

(i) Mr. Gilbert does not address the fact that his opinion only relates to the 1985 Trust and not the 1986 Trust, as the 1986 Trust can have more than two non-beneficiaries as Trustees.

43. It is clear that Mr. Gilbert was given flawed information in terms of forming his opinion and thus has given a flawed opinion.

44. Catherine says that Dentons Canada LLP prepared a letter of opinion on the eligibility of Justin. There is no such letter.

Appointment of Margaret Ward

45. In respect of paragraph 22 of the September 30 Affidavit, Catherine suggests that the Trustees had knowledge of Clara's death that they did not share with Catherine. Clara's death was unexpected. Clara was in attendance at the June 10, 2014 Trustee meeting and she did not address her health. She passed away on July 13, 2014, following a brief hospital stay.

46. It was a complete surprise to everyone that Clara died. She had advised that she was ill but she did not say that her death was imminent. This is another example of Catherine thinking that "everyone is out to get her" and making Clara's death about her. Clara's death was sudden. The Trustees had to take immediate action to deal with her replacement.

47. In respect of paragraph 24 of the September 30 Affidavit, I received an email from Catherine and responded by telephone. I advised Catherine that no candidates had been proposed yet and that that this would be done at the Trustees' August 12, 2014

meeting in the same manner as Justin's appointment. I advised her that names would be put forward at the meeting just as had occurred at Justin's appointment.

48. Given the problems raised by Catherine in respect of the appointment of Justin, I thought that the Trustees may want to consider appointing a beneficiary as a Trustee. Clara was not a beneficiary of the 1985 Trust. Justin's beneficiary status was being challenged by Catherine and thus, if Clara was replaced with a beneficiary, the Trustees would have a Trustee board in which it would not matter whether Justin was a beneficiary or not.

49. On July 22, 2014, I provided a package to the Trustees, in preparation for the August, 2014 Meeting. Attached as Exhibit "J" is the July 22, 2014 email and attachments.

50. At the August 12, 2014 Meeting, the Trustees chose to appoint Margaret Ward ("Margaret"), citing that she had once been a trustee-in-training, and that she was a beneficiary of both the 1985 and 1986 Trusts. Her résumé shows she is very qualified. Her résumé is attached hereto as Exhibit "K".

51. In respect of paragraph 25 of the September 30 Affidavit, at the August 12, 2014 Meeting, Catherine provided a proposal to appoint independent, outside trustees, with no advance warning of such a proposal being provided. At the same time, Catherine also provided the names of two people who she proposed as replacement Trustees. The individuals were not SFN members or beneficiaries of either Trust, did not live in Alberta and of whom she had little knowledge. The following occurred at the August 12, 2014 Meeting:

(a) There was a discussion about the need to appoint a replacement for Clara;

(b) The Trustees listened to Catherine present her proposal and said that it was difficult to consider because she had not provided her proposal in advance of the meeting. Roland stated that, in his view, the beneficiaries may not be open to outsiders being appointed as Trustees. He mentioned the sale of the Slave Lake Hotel by the Directors as an example of how the members felt betrayed by outside directors. The Trustees offered to consider Catherine's proposal for an independent board of Trustees at the October Trustee meeting;

(c) I observed that the Trustees were respectful of Catherine and her proposal and wished to have harmony and thus offered to discuss her proposal for succession at a future meeting;

(d) The Trustees asked Catherine to participate in proceeding with the appointment of a Trustee to replace Clara in order to ensure that five Trustees were appointed as required by the 1985 Trust Deed. Catherine refused to participate in a process to replace Clara unless the Trustees appointed one of the people that Catherine suggested. All of the Trustees knew Margaret Ward. None of the Trustees knew the two people suggested by Catherine, including Catherine;

(e) The 1985 Trust Deeds do not permit a Board of Trustees with less than five members therefore, failing to elect a Trustee would not allow the Trustees to carry on the business of the 1985 Trust;

(f) Catherine also refused to sign the necessary transfer of assets from the 'old' group of Trustees to the 'new' group of Trustees. The Chair pleaded with Catherine to sign the transfer of assets to avoid Court costs. Catherine had previously objected to appointing Justin because she thought he was incapable of sitting as a beneficiary Trustee. There was no such impediment to appointing Margaret, as she was undisputedly a beneficiary of both Trusts. Yet Catherine would not approve Margaret as a Trustee, nor would she sign the transfer of assets;

(g) As a result of Catherine's refusal to sign, the other Trustees were forced to bring another Court application to have the assets transferred. After the application involving Justin was successful, it was difficult to have Catherine once again force the Trustees to take a matter to court. Catherine is a lawyer and would know the value of a Court precedent. This was a waste of Trust resources;

(h) The Minutes of the August 12, 2014 Meeting are attached as Exhibit "L". The transcript and the resulting Court Order are attached as Exhibit "M". Also attached are the Application and Affidavit filed in support of the application as Exhibit "N".

52. Catherine says that the Trustees and I told Margaret not to speak to Catherine. This is not true. I have spoken to Margaret and she also denies this. I did not tell Margaret not to speak to Catherine. I have asked the Trustees and they did not tell Margaret not to speak to Catherine. Margaret was told about Catherine's meeting with Justin and how that meeting caused confusion in Justin's mind. She was told that the choice was hers to make regarding a meeting with Catherine and that she could bring any questions arising out of any such meeting to the Trustees or the Administrator.

53. Catherine says that she does not know if the Trustees knew Margaret because Catherine's use of the word "know" is different than anyone else's. The Trustees were familiar with Margaret. She has been a SFN member for a long time. She has been involved in the Indigenous community. To a certain extent she was involved in SFN. Her studies and professional practice in Native communities is well known, including by Catherine.

54. When I was first hired, Catherine told me to contact Margaret, as Margaret had done some research on Indigenous education for the Trustees and written a paper. She was aware that Margaret had extensive experience in Indigenous education and that she had a PhD in that field. She was a Trustee-in-Training and therefore sat at the Trustee table with Catherine for two years.

55. In respect of paragraph 28 of the September 30 Affidavit, the Trustees, including Catherine, had learned of Margaret's relevant experience. The Trustees determined her appointment to be in the best interests of the Trusts:

    (a) In 2004 there was a selection process for "Trustees-in-Training" initiated by Catherine and approved by all the Trustees. Four candidates were considered: Justin, David Midbo, Deana Morton and Margaret. After a long selection process, the two chosen candidates were Deana Morton and Margaret.

    (b) All of the other Trustees were aware of Margaret's background, in addition to the fact that Margaret is also a beneficiary for both the 1985 and 1986 Trusts; and

    (c) The Trustees considered what Catherine presented and offered to discuss it another day. When Catherine refused to postpone her proposal to a future meeting, the Trustees rejected the proposal. The Trustees also knew that appointing Margaret fixed any potential problem with Justin as it no longer mattered if he was a beneficiary. Margaret was a beneficiary of both Trusts. Bertha could be the non-beneficiary Trustee of the 1985 Trust. Justin could sit as a beneficiary or non-beneficiary of the 1985 Trust.

Reappointment of Justin and Margaret and Ratification

56. At the December 21, 2016 meeting of the Trustees, the Trustees appointed Justin for a second three-year-term and also appointed Margaret for a second three-year-term. The Trustee board is properly constituted. The Trustees have four beneficiaries of the 1985 Trust as Trustees. Even if it was determined that Justin was not a beneficiary of the 1985 Trust, the Trust would have the required three beneficiaries. In an abundance of caution, the Trustees also ratified all decisions made after Justin was appointed until Margaret was appointed, to ensure that all the decisions were properly made. The Minutes of the December 21, 2016 meeting are attached as Exhibit "O". Catherine voted against the Motions.

Majority Rules Decision Making

57. On August 25, 2005, the Trustees decided that all of their decisions would be by majority rule in conformity with the Trust Deeds. There was no mention of consensus or decisions by unanimous approval, including from Catherine. There were no other discussions about consensus in the August, 2005 Minutes. Attached and marked as Exhibit "P" to this my affidavit are the Minutes from the August 25, 2005 meeting of Trustees. Both Trust Deeds clearly state that decisions will be made by majority vote. See paragraph 13 of the 1985 and 1986 Trust deeds. The Trustees have never had a practice of consensus or unanimity to arrive at decisions.

58. In respect of paragraph 18 and Exhibit "A" of the September 30 Affidavit, Exhibit "A" was a draft of notes for a planning document that was never approved by the Trustees and was instead only a step in the long-term planning process, which included the succession plan mentioned above.

59. Catherine suggests that the tradition for the Trusts is for consensus to be the method by which decisions are made. However, the Trusts were drafted by the Settlor and state

that a majority decision governs. The Code of Conduct says that majority decision governs in Schedules A, B1 and B 2. It seems Catherine accepted this until she started to not get her way. She then created this concept of a tradition of consensus.

60. Maurice Cullity of Davies, Ward and Beck (now Davies Ward Phillips and Vineberg) drafted the 1985 and the 1986 Trust Deeds as well as the 1982 Trust Deed and its 'amendment', the 1983 Trust Deed. He was a well known accomplished trust lawyer.

61. In the September 30, 2014 affidavit, Exhibit "A" to the affidavit is a flip chart. This is just a method of recording discussion. Any decision from this flip chart would have been recorded as a proper motion if it was approved. The flip charts were not approved and really became the agenda of a planning meeting. They were meant to record free flowing information and exchange of ideas.

62. Catherine produced a "consensus document" to the Trustees. Catherine did not give the Trustees a chance to review the document or properly consider it. Catherine is prone to springing ideas or concepts on the Trustees without prior notice and if they do not immediately agree with her, she becomes upset, loses patience, and refuses to give the other Trustees time to consider any concept. She simply refuses to work through things. She expects the Trustees to just agree with her. When she did not bring the consensus document back for reconsideration, the matter was dropped.

Concerns Related to Political Interference

63. In respect of paragraph 29 of the September 30 Affidavit, I believe that Catherine's concerns about political interference are unfounded for the following reasons:

    (a) Chief Walter Twinn was the settlor of the Trusts and was also the elected Chief. Until his death, he held a Trustee position. During his tenure as a Trustee, he appointed other elected Councillors as Trustees. Catherine was appointed a Trustee in 1986. She was present and approved the appointment of elected officials and did not take any action to suggest there was political interference until her Court action in 2014;

(b) I have not been aware of any political or personal agendas relating to the Trusts and I am unaware of any payments related to political or personal agendas. Payments have been made from the 1985 Trust for tax purposes;

(c) Catherine held an appointed position on the membership committee of SFN. As a member of the Committee she could have recommended admission of members, and thus of beneficiaries. She never suggested that this created a conflict with her role as a Trustee of the Trusts. She has been a Trustee longer than any other Trustee. Prior to the present matter, the Trustees advise me that they do not recall Catherine ever discussing any such conflicts or issues of political interference with the Trustees.

Ascertaining the Beneficiaries of the 1985 Trust

64. In respect of paragraph 29(a) of the September 30 Affidavit, the issue of ascertaining the beneficiaries of the 1985 Trust has been an on-going issue faced by the Trustees since at least 2009 when I was hired. The legal advice that the Trustees received on a number of occasions indicated that it would be wise to seek the advice and direction of the Court on the matter, or face possible future lawsuits by those who were not identified as beneficiaries by the Trustees, or face lawsuits on the basis that people were excluded on the basis of the 1985 Trust being discriminatory. The Trustees have been involved in the following steps in ascertaining the beneficiaries of the 1985 Trust:

(a) In November 2009, I made a presentation to the Trustees respecting the approval of a list of beneficiaries of the 1985 Trust provided to me by Catherine. The Trustees decided that they could not certify the list until further actions were taken. They believed that they should ask anyone who felt they had an interest in the 1985 Trust to come forward. The Trustees embarked on a process involving advertising for potential beneficiaries to come forward. The advertising was placed in all known weekly local newspapers and the major daily newspapers in Alberta, British Columbia, and Northwest Territories, and resulted in approximately 149 responses. Many of the responses came from individuals who would not be beneficiaries as they had enfranchised or were members of a family who had enfranchised;

(b) Catherine proposed that the Trustees establish a process to determine the beneficiaries of the 1985 Trust and proposed appointing a tribunal to determine the beneficiaries, including dealing with the responses I received from the newspaper advertisements. Initial oral legal advice received by the Trustees was that the Court would first have to approve such a tribunal. Nonetheless, the Trustees approved proceeding with that plan. Later, Catherine proposed that the tribunal also be used by SFN to select members. This latter proposal was rejected by SFN;

(c) Catherine says no process is in place to determine the beneficiaries of the 1985 Trust. However, the whole application in 1103 concerns beneficiary determination and, in fact, the Minutes show that there were many attempts to determine a list of beneficiaries of the 1985 Trust, and that the Trustees finally decided to first get the 1985 Trust definition settled. The application in 1103 is to get advice and direction on this issue. Catherine wants a tribunal before the Court gives advice and direction.

(d) There were other processes attempted by the Trustees that proved problematic so they decided to go to Court.

(e) Catherine says that Roland said he would lose his position if he allowed a tribunal to decide membership in SFN. Roland did not say that in my presence and he denies ever saying that. He said that SFN had fought hard through the Constitutional Challenge of Bill C-31 for control of selecting its own members and that this right would not be given up. I interpreted what he said as meaning that the members of SFN do not want to give up the right to select future SFN members and if he is representing the members of SFN, then he cannot support that position.

(f) Oral legal advice indicated that, since both Trust Deeds refer to "members of the Sawridge Band" as a qualification for beneficiary status, the Trustees could not themselves select beneficiaries but had to rely on the determination of membership given by SFN or seek the advice and direction of the Court. This information partly resulted in the Trustees' decision to proceed with the 1103 Application.

Membership Process

65. In respect of paragraph 29(b) of the September 30 Affidavit, Catherine criticizes the membership process. However, she was a member of the membership committee for many years and further, as a member of SFN, had a say in the process at least in terms of the election of council and in terms of voting if an appeal of a membership application comes to the electors. Mike McKinney advises that Catherine was instrumental in drafting the SFN membership application along with Moe Litman, Maurice Cullity and Mike McKinney, all of whom are respected lawyers. While she criticizes people for having a dual role in the membership process, Catherine has had a dual role for many years. In addition, I am advised by Mike McKinney, that Catherine was instrumental in drafting the Membership Rules of SFN. The Court has determined that membership will not be addressed in the 1103 action and thus none of these issues should be relevant. However, Catherine has kept these issues in her affidavit and thus they must be addressed.

66. SFN only considers completed applications. I am advised that many applications are submitted with significant deficiencies. In reviewing the transcript of the Questioning of Elizabeth Poitras and in reviewing my responses to undertakings, I believe that many applications are submitted but are incomplete and therefore cannot proceed through the application process.

67. In respect of paragraph 29(c) of the September 30 Affidavit, there have been instances in which applications were not processed. However, I am advised that this occurred largely because the applications were incomplete.

68. In respect of paragraph 29(d) of the September 30 Affidavit, Catherine's allegations are not true. A simple review of the 1103 Application shows that the Trustees have specifically sought the direction of the Court to determine what they should do.

69. The Trustees have not sought to restrict SFN membership. Membership is determined by SFN which must adhere to its Membership Rules.

70. In respect of paragraph 10 of the September 30 Affidavit, elected officials are able to determine membership at the first level of determination of membership. Any rejected applicant has the right to appeal to the whole of the electors of SFN. Catherine was on

the membership committee and had ample opportunity for many years to change the membership process if she thought it was flawed, but she did not do so.

71. If beneficiaries need to be members of SFN, then there is already a process for determining members and there is no reason to create another process.

72. If the Trustees must determine the membership under the 1982 *Indian Act* definition, there are several problems as the 1982 Act has antiquated concepts which no longer are in force. The 1982 Act had the concept of enfranchisement and protesting illegitimate children, which no longer exists. The 1982 Act continues the discrimination against women who did not marry a man who had First Nation status and discriminates against their children. It discriminated against all kinds of people. To determine the beneficiaries under the 1982 *Indian Act* definition, by its nature, requires the Trust to function in a discriminatory manner.

73. In response to paragraph 29(e), of the September 30 Affidavit, while there may be a list of potential beneficiaries, the final determination of the Court is necessary. It may be that the Court determines that the definition should be "members" and thus no further process is necessary.

74. The 1982 Trust defined the beneficiaries as "members" of SFN.

75. My investigation shows that the goal of the Settlor of the 1985 Trust had been to switch back to "members" of SFN as beneficiaries and combine the 1985 and 1986 Trusts once the result of Bill C-31 was known.

76. I do not think that Chief Roland Twinn was the only one not to engage in the process set up by Catherine referred to in Exhibit "D" of the September 30 Affidavit.

77. In respect of paragraph 29(f) of the September 30 Affidavit, membership is the responsibility of SFN as has been the case since SFN took control of its membership in 1985. When the Settlor set up the Trusts, he could have given the Trustees control over who would be beneficiaries but he did not do so.

78. In respect of paragraph 29(g) of the September 30 Affidavit, the Trustees have concluded that SFN membership is the jurisdiction of SFN and not the Trustees. This determination is supported by:

(a) Justice Thomas in his Reasons for Judgement on December 17, 2015 stated that he was satisfied that the membership process for SFN should not be litigated in the 1103 action, and

(b) The legal opinion that the Trustees should not interfere in the membership process, even though they have to rely on it to determine beneficiaries of the Trusts.

Payments to Beneficiaries

79. In respect of paragraph 29(g) of the September 30 Affidavit, regarding beneficiaries of the 1985 Trust and discrimination, the decision to extend benefits only to the beneficiaries of the 1986 Trust was made on the advice of legal counsel who noted that the Trustees could not extend benefits to non-beneficiaries or to the potential beneficiaries of the 1985 Trust until a determination of the definition of beneficiaries could be made. There was a concern that payments made from a discriminatory trust may create liability for the Trustees. Thus, the application was made for advice and direction. The Court may decide to make the 1985 Trust beneficiaries and the 1986 Trust beneficiaries the same, in which case additional steps may not be required.

Potential List of Beneficiaries

80. The "potential" list of beneficiaries that I have is based on a list provided to me by Catherine, which has been analyzed by Mike McKinney based on rules for membership in SFN from the *Indian Act*, 1970. It is a larger list than the current membership list. However, the "potential" list is discriminatory because it necessarily excludes women married to non-Indians and their children, among other discriminatory elements.

Catherine's Behavior at Trustee Meetings

81. In respect of paragraph 29(j) of the September 30 Affidavit, I have observed Catherine speak without restraint at a number of Trustee and other meetings. I also have observed that she often monopolizes the meetings and prevents others from speaking. As well, she has been known to filibuster meetings, ignore requests from the Chair to let others speak, and refuse to allow any business to be carried out that is not directed by

her. The Chief has advised me that he denies all allegations that he has threatened reprisals. I have not observed any threats directed towards Catherine at Trustee meetings.

82. Catherine acts in a biased way against SFN. The story of Tracey Poitras Collins relayed in this my affidavit is an example of Catherine trying to paint things done by SFN as bad.

83. Catherine has stated at Trustee Meetings that she thinks the Trustees are incompetent and wants to replace them. She has stated that she thinks that Donovan Waters, who is a well recognized trust scholar and who has provided legal opinions to the Trustees is incompetent. She yelled at him and berated him at a meeting and wanted him replaced. She has expressed repeatedly that she believes that I am incompetent and need to be replaced.

84. She has been very vocal at meetings that the Chair, Brian Heidecker, is biased and cannot do his job and should be replaced. She does not respect his position as Chair. There appears to be no one that meets Catherine's standards. She has stated that only she is good enough to stay on as a Trustee.

85. I am confident that both the Chair and I are qualified for our positions. The résumés of Brian Heidecker and me are attached hereto as Exhibit "Q" and Exhibit "R".

86. Catherine works by intimidation and she thinks it will work with anyone. She intimidates the Trustees in many ways but one of them is by simply staring at them. Even during the Questioning on affidavit, Catherine attempted to intimidate me by staring at me, staring at Brian, and staring at the lawyers. These are long glaring stares that are very uncomfortable.

87. Catherine often gets involved in matters that are not relevant for the Trustees. Catherine says she has a duty to act if SFN is not acting in accordance with the law. The Trustees do not get involved in SFN business and SFN is not to get involved in Trustee business. They are to remain separate. Besides, if SFN is not acting in accordance with the law, Catherine has not done anything about it. She was on the membership committee for 20 years and did nothing to change the membership process. She says that she has an oversight duty towards SFN. I am not sure where this oversight duty comes from but it does not come from the Trusts.

88. Catherine suggests that there is conflict and problems at the Trustee table. However, it is Catherine that causes the conflict. There is no other conflict at the Trustee table. The other Trustees respect each other. They do not always agree. They disagree with me and with Brian. But they do not yell. They do not show disrespect. Catherine is disrespectful of almost everyone. She is rude to all Trustees, me, Brian and all advisors.

89. An important skill of a Trustee is to listen. It is important for a Trustee to listen to the other Trustees, listen to the Chair, listen to the advisors, listen to the beneficiaries and listen to the Administrator. Catherine often refuses to listen. She loves to talk but she shows a complete lack of respect for the other Trustees, complete rudeness and outright hostility to the Chair and the Administrator and she has worked to destroy the strategy of the legal team. She actively works against most people involved in the Trusts. The other Trustees try to continue to show her respect. They allow her to speak even when she will filibuster for hours. She does not show any respect to the other Trustees. She actively tries to make them feel as though they are stupid and do not know what they are doing.

90. I believe that Catherine has breached the Code of Conduct in many ways.

91. The letters of complaint filed by the four Trustees in the Code of Conduct proceedings are attached hereto as Exhibits “S”, “T”, “U”, “V” and “W”.

92. There are many examples of poor Trustee behaviour on the part of Catherine which I have not cited herein but which will be the subject of the arbitration proceeding under the Code of Conduct.

<u>Document Production</u>

93. Catherine has repeatedly told the Trustees that she has a container of Trust documents. We have asked her to produce them and she has refused. I asked if I could attend at the container to catalogue them and she refused. I asked if I could copy them at the expense of the Trusts and she refused. Catherine knows that the Trusts did not have good administration and document record keeping while her husband was the Trustee and while she was a Trustee, yet she will not release the Trust documents in her possession. I gave an undertaking to ask Catherine about documents during my

Questioning by the Office of the Public Guardian and Trustee and she did not answer this request for documents.

94. In the production of undertakings from the Questioning of Catherine, Catherine produced documents from her records that I have not seen before and thus I am concerned that she may have other records of the Trust that she has not shared to date, despite many requests.

95. In respect of paragraph 29(m) of the September 30 Affidavit, Catherine speaks about a fire that destroyed documents that belonged to the Trusts. An investigation was undertaken to determine what, if any, records were destroyed. It was determined that these records were 'bar chits' from the liquor services at the Sawridge Inn-Slave Lake from the late 1970s and that these had no relevance since the financial information was contained in the Company financial statements for the Trusts. From the time that I was hired, I have worked to gather and catalogue the documents of the Trusts. I have stated that my search is exhausted. SFN has been cooperative throughout the process.

96. Catherine is the longest serving Trustee. She is also a lawyer. However, the administration for the Trusts and documentation for the Trusts was lacking. Before 1997, the Trusts had few administration documents that were generated and maintained by the Trusts.

97. There are several references in the Minutes to dealing with documents in the August 2009, November, 2009 and December, 2009 Minutes. These Minutes are collectively attached as Exhibit "X".

98. In these Minutes there are references to the collection of records. The Chair and I have both had numerous conversations with Catherine and the other Trustees regarding providing copies of any records in their possession to the Trusts' Office. In addition, the Chair offered to send a truck to a container in Camrose that Catherine said contained records of the Trusts. The Trusts' Office offered to pay Catherine's son, Cameron, to help sort through these records. Catherine has never provided access to this container.

99. At several Trustee meetings Catherine was to provide copies of documents. She has never provided any of these documents. The Meeting Minutes read as follows:

1103-004	Catherine will provide a copy of the Court transcript of the evidence presented by Chief Walter Twinn before Justice Muldoon in 1993-94 to Paul who will provide Doris with a copy.

She did not provide the transcript. Eventually it was provided by Mike McKinney.

1309-002	Catherine will provide Paul with copies of the counselling self-assessments she has collected.

Never provided.

1309-004	Catherine will provide a draft of suggested changes to the language in Section 8 b) iii) of the Scenarios Plan.

Never provided.

1309-005	Catherine will provide links to the YouTube videos on the need to separate political and economic spheres, on per capita distributions and on the need to have discussions from the PBLI workshop she attended recently in Vancouver.

Never provided.

1403-002	Brian requested that Catherine submit her questions on the Application for Advice and Direction on Asset Transfer in writing as soon as possible.
1403-003	Brian asked that Catherine submit in writing notice that she will withdraw her threat of legal action against the Trustees.
1403-004	Brian asked that Catherine submit in writing notice that she will comply to the Code of Conduct.

Never provided.

1410-007	Paul asked that Catherine share her copy of the original manual so that it can be scanned into the Trust Archives.
1410-008	Catherine will undertake some research into different methods of evaluation.

Never provided.

1504-002	Catherine will provide a list of web links with source information on health for the next meeting.

Never provided.

Conflict of Interest

100. Catherine continues to try and suggest that our legal team is in a conflict. She must know that a change in the legal team would be a huge expense to the Trusts.

101. In respect of paragraph 29(l) of the September 30 Affidavit, Marco Poretti was counsel on the Bill C-31 Constitutional Challenge by SFN. Possible conflicts of interest were examined at the time of Marco Poretti's involvement in the Trusts' 1103 application. No conflict was identified. The Trusts, through its Trustees, are separate entities from SFN.

102. In respect of paragraph 33 of the September 30 Affidavit, Justice Thomas has noted that there is an inherent conflict of interests in a First Nation. Catherine has suggested the current structure of the Trusts results in a conflict of interest. This structure has existed since the Trusts were settled. This structure was established by Chief Walter Twinn who was the Settlor of the Trusts.

Community Centre

103. In respect of paragraph 29(n) of the September 30 Affidavit, the Trustees did not support adding SFN as a beneficiary. They had previously opposed such a move by the Companies' Board of Directors, who had received advice from Davies Ward to have SFN declared a municipal government body to enable it to be declared a beneficiary as a tax saving measure.

104. A proposal was explored to fund a community center:

    (a) This was part of an attempt to explore other ways that the Trust could benefit the beneficiaries. It was recognized that Trust funds could not be paid to SFN;

    (b) SFN was proposing to build an office and community center. Since SFN is not a beneficiary, the Trusts could not have provided funding for this project. However, the Chair suggested that perhaps the Companies could find a way to donate the money to SFN for the Community Centre since it would contribute to the community as a whole. One suggestion was that the Companies could pay a franchise fee for the use of the Sawridge name. 25 of 44 members and their families live on or close to the Reserve. Therefore, the Community Center would have been a benefit to the majority of the beneficiaries. In the end, it was never carried out.

Code of Conduct

105. In respect of paragraph 30 of the September 30 Affidavit, Catherine was involved in drafting the Code of Conduct. On two recent occasions, she herself initiated legal proceedings to prevent the Trustees from invoking the Code of Conduct against actions undertaken by her.

106. Currently, the structure of the Trust is the Trustees will make a policy decision, such as the policies that are attached to the distribution scheme, and then let the Administrator make the actual decisions in terms of payment of funds. Thus, the Trustees can make the decision to pay for recreation and then the Administrator receives the request from a beneficiary and pays out the funds based on the policy. In the last year, Catherine and her family have accessed many of the programs.

Misrepresentation of Trustee Fees

107. By way of the Affidavit sworn September 23, 2015, Catherine deposed that there was a "$15,000 plus meeting fee" for the Trustees. I have attempted to determine how Catherine came to this figure and I cannot determine how she arrived at this figure. I am in charge of paying the Trustee fees. Her statement is not accurate.

108. Counsel for the Public Trustee, in written submissions made to the Court on September 25, 2015, interpreted the above statement of Catherine as evidence that each Trustee is paid $15,000 per meeting for a total Trustee fee of $75,000 per meeting.

109. These submissions are not correct. The Trustees do not receive $15,000 per meeting. The Trustees receive $500 per meeting plus a payment of $4,000 per quarter in the event that the Trustee has attended at least half of the meetings in that quarter.

110. Upon review of the submissions, counsel for the Trusts advised counsel for the Public Trustee that the submission was incorrect. This correspondence was copied to Catherine's lawyers. The Trusts' counsel provided the correct information and requested

that counsel for the Public Trustee to correct their submission to the Court to ensure the Court was not misled in respect of the Trustee fees.

111. Catherine provided no response to the Court.

112. I am concerned that the misinterpretation will be misleading to the Court, and in this Affidavit I am correcting the record on the issue of what the Trustees are paid. This problem was created by Catherine and yet she took no steps to correct this misinformation with the Court. This resulted in additional costs.

William MacDonald and Alfred Potskin

113. Catherine makes an argument with respect to William MacDonald that he has an absolute right to be on SFN membership list. She suggests that his application for membership was not properly reviewed. As I understand it, William MacDonald has a complicated set of facts and he has not supplied sufficient information to determine whether he qualifies as a member. The information has been requested of him, but he has not provided it.

114. Catherine mentions Alfred Potskin as an example of someone who was treated badly in the membership process. However, I am advised that, as with many people who are suggesting that they are SFN members, Alfred Potskin had previously enfranchised (May 28, 1952) and therefore the answer to his membership was quite simple. Alfred Potskin made an application for membership but was rejected on the basis of his enfranchisement. He could have appealed the decision to the electors of SFN but he did not appeal the decision.

115. These are but two examples that show that Membership applications need to be left to SFN.

Binding Resolution Process

116. Catherine makes reference to a binding resolution process. This was discussed on a without prejudice basis as a compromise in the hopes Catherine would agree to approve Justin as a Trustee and to sign the transfer of assets documents. It was urgent to have the transfer of assets proceed because there was a commercial transaction pending for

the Trusts. The entire without prejudice negotiation regarding the binding resolution process broke down because Catherine would not compromise on the process or the selection of mediators and thus it could not proceed. This is often the case. Catherine does not compromise. This was a without prejudice conversation. When negotiations broke down, the Trustees needed to go to Court to get the authority to transfer assets to the new Trustees in order to salvage the commercial transaction. In respect of the Court Order, we did not seek any remedy against Catherine. The Trustees obtained an Order that allowed me to take the steps to complete the transfer. Exhibit D is the transcript in which there is no offer by Catherine to just sign the transfer. The transcript also shows that Counsel offered to allow Catherine to proceed with her claim in respect of Justin. Exhibit D includes the Affidavit, Application and Order filed in support of the motion to transfer assets of the Trust.

117. Catherine says she raised the issue of the "biased and unfair process of membership" at the membership committee. However, she has provided no documentary proof that she did so. I am advised by Bertha that Catherine did not raise such an issue. Bertha further advised me that Catherine often did not attend the Membership meetings and thus quorum did not exist and the Committee could not meet. The list that SFN provided showing Catherine had reasonable attendance is skewed because there were many meetings that did not happen because Catherine did not attend, and therefore the meeting could not happen. It is ironic that Catherine is actually suggesting that the membership approval process is flawed when I am advised by Bertha that Catherine was an active participant in the process as it existed.

Tracey Poitras Collins

118. Catherine says that Tracey Poitras Collins was only admitted to membership because Roland did not have his supporters at the meeting. This is an example of the membership process working successfully. Tracey has been elected to Council and thus it is clear that she has won the support of the community twice, once in her appeal for membership and once in being elected to Council.

119. The story of Tracey Poitras Collins is a good news story of a person being admitted to membership and then getting elected to Council. Catherine does not view this as an example of anything good.

Meeting with Directors and Deloitte

120. When the Companies (that are the assets of the Trusts) were turned over to a Board of Directors, a Transfer Agreement was signed that directed that all Trusts-Companies communications were to occur through the respective Chairs. I have been advised that in breach of that agreement, Catherine has had meetings with the Directors of the Companies to discuss the Trusts and suggested to the Directors that the Trusts and the Trustees are dysfunctional. The Trustees are not supposed to do that. This shows a lack of loyalty to the Trusts.

121. I have been advised that there was one occasion between the appointment of the professional Board of Directors (2006) and my arrival (2009), when the Directors spoke to Catherine about interfering with company management and company business. She was told to halt such activities and it was reiterated that the Transfer Agreement channeled all Trusts-Companies communications through the respective Chairs. I believe that that meeting was held at Deloitte's office.

122. Catherine has breached the agreement that all communication will go through the Trustee Board Chair to the Companies Board Chair. Catherine has been told on a number of occasions not to contact the Directors. This is also in the Code of Conduct in paragraph 3 (Exhibit B).

123. A good working relationship between the Companies and the Trustees is important to the proper functioning of the Trusts. Catherine is undermining the establishment of such relationship.

Constitution

124. Catherine speaks of the Constitution. However, there are only 2 parts of the Constitution that impact the Trusts. The first is the inherent right to govern and the second is the declaration of traditions. The Constitution is attached as Exhibit "Y".

Catherine's Motions are Approved

125. Catherine says that the Trustees reject everything she puts forward but this is not true. There are many motions for which Catherine received support.

126. However, Catherine often acts in her own best interests. She moved to amend the life insurance benefit policy for the 1986 Trust so that she could get the life insurance. The policy had been set such that the Trust would provide for the cost of insurance if the beneficiary was under 55 years of age. Catherine was over 55 and Catherine had cashed her life insurance coverage that she had with SFN. She wanted life insurance coverage and so she put forward a motion to amend the Trust life insurance benefit policy so that the insurance could be obtained up to age 60. This is very expensive insurance. The Trustees supported this motion, which benefitted Catherine. The 1986 Trust is paying for life insurance for Catherine. This is one of many examples of Catherine putting a motion forward and that motion getting approved by the other Trustees

Legal Advice for Trustees and Legal Fees

127. Catherine says she was obstructed from obtaining legal advice. Clearly she was not obstructed, as she has obtained legal advice for herself, for her son, for Debra Serafinchon and for Shelby Twinn. The Trustees have a policy that they are to obtain prior approval for legal advice and prior approval for expenditure of fees. Catherine did not obtain that approval.

128. The Trustees discussed a proposal for legal fees for individual Trustees. The following was discussed:

> **6.5 Trustee Legal Fund**
>
> Trustees discussed a proposal from Catherine to set up a Trustee Legal Fund that would provide $15,000 per Trustee for a total of $75,000 per year to permit individual Trustees to obtain legal advice on issues before the Trustees in addition to any advice that the Trustees jointly requested.
>
> In addition, the funds not used by any Trustee could be used by other Trustees.
>
> Brian pointed out that under this Fund, individual Trustees would not need the usual approval of 50% of the Trustees to obtain their own legal advice.

2013-000 Moved by Catherine, that the Trustees establish a Trustee Legal Fund. No second, motion failed.

129. Catherine sought legal advice, despite this motion failing. Despite her suggestion that the Trustees be given $75,000 per year for legal fees, she has spent over $700,000 in legal fees and based on her December 2015 affidavit has spent almost $500,000 in 2016 in legal fees without accounting for the Questioning which took place in 2016.

130. Catherine has not sought prior approval of the Trustees for those legal fees to be paid and in fact has not sought any approval to have her legal fees paid by the Trustees. She has only sought to have her legal fees paid through the Court process.

131. Catherine complains about legal fees but she is part of the reason for legal fees being incurred. She disrupted the 1103 application which sought to impose a settlement on the OPGT by taking an oppositional stance at such Court Application causing the Trustees to withdraw the offer and application. She forced the Trustees to go to Court twice to have the assets transferred when new Trustees were appointed. She went to Court twice to stop Code of Conduct actions against her. She has actively opposed everything the Trustees have approved. In a previous settlement meeting that she attended, she was hostile and basically ended the meeting by yelling about legal fees and releasing privileged information. She is now seeking over $700,000 in legal fees to be paid to her lawyers from the Trusts.

132. In respect of paragraph 29(k) of the September 30 Affidavit, the Trustees agreed to pay the legal fees of SFN when it became clear that considerable work would have to be done by SFN for the Trusts to complete their 1103 application. The Trusts had no records concerning some of the issues that were being raised about membership. Catherine refused access to records that she claimed to have. Catherine has previously indicated support for paying SFN's costs to assist in the recovery of Trust documents stored by SFN. The Trust Deeds permit payment for services rendered for professional services deemed necessary by the Trustees. The Trustees require the services of SFN to deal with its application. SFN is not wealthy and it cannot afford to pay for legal costs to assist the Trusts. The Chief and Council advised the Trusts that if it needed the help of SFN, then the Trusts would need to pay the legal fees required.

133. The Trustees decided that there should be some control on access to the professionals in order to be able to control information and fees. Thus, the Trustees passed a resolution that the conversations with lawyers would pass through me.

Failure to Proceed with Litigation

134. Catherine has created an issue about Justin's appropriateness as a Trustee and has gone to great lengths to reserve the right to pursue having him removed. She then did nothing in her 1403 action for three years, except seek to have her legal bills paid. If she was really concerned about Justin being an inappropriate Trustee and about reserving the right to pursue the matter, then she should have pursued the matter. Again it is about Catherine and her interests first. It is not about the Trusts' interests. In November 2016, Catherine asked if Justin was going to be reappointed in December 2016 and she was told that his reappointment would be on the Agenda for the December 2016 meeting. She did nothing in the December meeting to bring other names forward to vote in as Trustees. She refused to vote in favour of the motion to reappoint Justin and Margaret as Trustees.

135. In the May 16, 2014 application, Karen Platten advised the Court that Catherine wanted to file an affidavit but that she was unavailable. However, that morning and in the days leading to the Court application she must have been in contact with Karen Platten to give instructions to negotiate the settlement deal that we were working on and must have been available to negotiate the terms of the settlement.

Trustee Evaluation Process

136. There is a trustee evaluation process in place but Catherine has not completed any evaluations and has not participated in the process.

137. Catherine has long criticized the other Trustees. In December 2009, I received a letter from then Trustee, Walter Felix Twin, indicating that the Trustees saw the issues raised in Catherine's letter as a way of getting rid of the other Trustees who she considered "dead weight". He wrote the following letter to me:

December 3, 2009

Dear Paul Bujold, Trust Administrator:

At the last Trustee meeting, it was suggested that a re-evaluation of the Trustees be performed. I felt that you got the impression that this was a good idea. I wanted to share an incident with you regarding this matter but wasn't able to as we ran out of time.

The incident was a conversation between Catherine Twinn and David Ward. During this conversation, it was said that they wanted to get rid of three of us Trustees because we were "dead weight". I felt they said this because of our age as three of us are "elders". I was very offended to the term used to describe myself, Bertha and Clara. Although they were offended, they reacted humbly and did not bring it up at the last meeting. This is discrimination and should be addressed.

Also, I heard that Catherine and David Ward hired a Trust lawyer regarding this evaluation and the lawyer stated that he had no say in the matter, this was an issue that needed to be dealt with internally, can you confirm this for me? Thank you for your time.

Sincerely,

Walter F. Twin

138. Catherine mentions a January 19, 2009 letter to David Ward that is basically Catherine's view of the state of affairs with the Trustees. It does not reflect the views of the other Trustees.

139. Catherine has repeatedly stated that she bore most of the "shoveling-up" responsibilities and that the other Trustees did nothing. My observation is that this is not correct. The Trustees create policy and I implement the policy. In fact, Catherine creates a lot of unnecessary work for the Trustees and Administrator of the Trusts.

Customary Laws

140. Catherine produced a letter from David Ward suggesting that the Trustees would be in breach of their duties if they did not follow the customary laws of SFN. The Trust Deed states that these customary laws have to have been incorporated into Canadian law. I

am not aware of any body of customary law recognized by Canadian law as required by the Trust Deed. In addition, following the customary laws will still leave us with a discriminatory Trust as the custom is for females to leave SFN if they marry a non-member.

Attack on Chief Roland Twinn

141. Catherine suggests that Roland has received substance abuse treatment and that makes him an inappropriate Trustee. My observation is that Roland is a careful and participatory Trustee who takes an active interest in the Trusts and the beneficiaries of the Trusts. If he has received treatment that is a personal matter that should not be used against him or even mentioned at the Trustee table unless it affects his performance. This personal attack is indicative of how Catherine treats the other Trustees.

142. In respect of paragraph 29(i) of the September 30 Affidavit respecting the Power of the Chief, I believe that this information is basically incorrect. I do not believe that Chief Roland Twinn feels he has this power to exert. Of the 44 members of SFN, a small fraction is employed by Sawridge Resources. The Chief may have some influence over employment but he denies that he uses it as a threat or for blackmail as Catherine suggests. He is the Chief and this is a company owned by SFN not the Trusts. In respect of other influence of the Chief, he has no influence over hiring in respect of the assets of the Trust.

143. In respect of paragraph 34 of the September 30 Affidavit, Chief Roland Twinn does not unduly influence Trustee decisions. He participates in the meetings. He voices his opinion but he is very clear that he is not a Chief at the Trustee meetings and he tries very hard to separate SFN issues from Trusts issues. He does, however, believe that he represents the concerns of the members of SFN as a Chief traditionally does and brings those concerns to the Trusts if they involve Trusts business. I believe that Catherine tries to influence the Trustees. They have advised me that they fear reprisals from her. Although Catherine states that she finds it difficult to vote against the Chief, she regularly does so.

Procedural Orders

144. Catherine would have been aware of the filing requirements in the Procedural Orders obtained in 2011. She did not file an affidavit according to the Procedural Orders in 2011 and instead waited until 2014 before she took an active adversarial role against the Trustees. She did so without warning and only served a Brief taking an adversarial role the night before an application on the settlement. This delayed the application at additional cost to the Trusts.

145. Catherine says that if people's rights are affected then they should get notice. The Procedural Orders sought the Court's direction on giving notice and the Court determined how to give notice. The Procedural Orders regarding service were followed. Catherine was involved in those early applications. She approved the process and received notice of the Procedural Orders. She now takes a contrary position years after those Procedural Orders were put in place suggesting that proper notice was not given.

Meeting Minutes

146. At every Trustee meeting, the Minutes from the previous meeting are reviewed and approved. Catherine objects to the Minutes being approved but usually does not suggest changes. She does not state the reason for her objection except to occasionally say that she thinks the Minutes are flawed and will not vote for them. She has been taking this approach since March 18, 2014. This protest is obstructionist. She is not being a willing and active Trustee.

147. In 2010 she was approving Minutes or taking an active role in amending the Minutes. During her recent Questioning, she refused to acknowledge any of the Minutes as being the proper Minutes for the meeting. Attached and marked as Exhibit "Z" are all the Minutes of meetings referred to during the Questioning of Catherine and marked only as "Exhibits for Identification". These Minutes reflect what occurred at the meetings as I was present at the meetings. Brian Heidecker, the Chair, and the other Trustees confirm that these Minutes reflect what occurred at the meetings. The Questioning of Catherine was made longer and more expensive because Catherine would not acknowledge any of the Minutes as being the Minutes of the meetings.

148. At the October 15, 2013 meeting, Catherine proposed changes to the September 17, 2013 Minutes. These proposed amendments would have completely changed what the other Trustees felt had happened. Catherine moved to table discussion of these Minutes and the motion passed with Catherine voting in favour and 4 abstentions from the other Trustees. The September 17, 2013 Minutes were approved as originally drafted at the January 21, 2014 meeting with Catherine opposed.

149. At the February25, 2014 meeting, Catherine proposed changes to the January 21, 2014 Minutes so approval of these Minutes was tabled until the Trustees could review Catherine's proposed changes. At the March18, 2014 meeting, both the January 21, 2014 and the February 25, 2014 Minutes were again tabled since Catherine was proposing changes to both sets of Minutes.

150. On April 15, 2014, a majority of the Trustees approved both the January 21, 2014 and the February 25, 2014 Minutes as originally drafted, Catherine opposed.

151. Catherine has opposed approving the Minutes since that date stating that I am biased in taking Minutes and that there should be another person taking Minutes for the Trustee meetings. No other Trustee feels this way.

152. I have reviewed the Minutes and compiled the information about Catherine's voting record into the chart below:

Year	Opposed	Abstain	Oppose/Abstain	Absent	Total Decisions	Percent Oppose/Abstain
2016	15			4	31	48.4
2015	12	3			43	34.9
2014	18		5		49	46.9
2013	2	2			39	10.3
2012	1	1		1	54	3.7
2011					52	0
2010		1			78	1.3

Trusts to Merge

153. At an October 18, 2011 meeting, Catherine referenced a part of the transcript from Chief Walter Twinn's testimony in the constitutional challenge litigation involving SFN suggesting that the two Trusts were not to co-exist; the 1985 Trust was not going to be effective and the 1986 Trust would survive. Catherine is now challenging that concept and suggesting that the Chief Walter Twinn always wanted two Trusts with two sets of beneficiaries.

154. In addition, in 2009, the Companies were lobbying the Trustees to merge the Trusts since the two-trust-situation was impeding business. Donovan Waters even drew up a Trust Deed in 2010 envisioning this merger of the Trusts if the beneficiary definition was changed to be the same in both Trusts. Catherine was involved in this process and approved it.

155. It is clear from the transcript of Chief Walter Twinn that the Trusts were to be merged. I also learned that from a phone call with Maurice Cullity. The relevant portion of the transcript is attached hereto as Exhibit "AA"

December 16, 2015 affidavit of Catherine Twinn

156. Catherine also deposed a further affidavit and filed such affidavit on December 16, 2015 ("December Affidavit"). Much of the evidence in the December Affidavit is a repetition of the evidence in the September 30 Affidavit and thus I will only address my concerns, and contrary evidence, about those matters which are not a repetition.

157. In several of the paragraphs of the December Affidavit, Catherine addresses the need for the Trustees to become involved in the SFN membership process. I believe that the decision of Justice Thomas in December 2015 has determined that it is not appropriate to address membership in the 1103 action. Further, membership is not relevant to the 1403 action. Thus, while I have contrary evidence to the issues as Catherine has raised them in the December Affidavit, I will not set out that evidence in detail as I believe it has now become irrelevant. Specifically, references to SFN membership in paragraphs 4, 6, 7, 10, 11 and 12 of the December Affidavit will not be specifically addressed.

158. Catherine suggests that the Trusts need independent representation so that the management of the assets is not affected by "improper motivations". The Trusts' assets

are managed by an independent Board of Directors.

159. In paragraph 7 of the December Affidavit, Catherine suggests that she was prepared to resign but this is not true. She proposed that she and Clara would stay on as Trustees and that the other three Trustees resign. Clara and Catherine would carry on to put a process in place to appoint Trustees. The Trustees rejected this proposal.

160. In paragraph 11 of the December Affidavit, Catherine mentions a "hurriedly brought forward proposal". This proposal was not hurriedly put together. A great deal of work went into an analysis of proposals to try and settle the 1103 action because the costs of litigation were high and the Trustees thought they should try and settle. I tried to answer all of Catherine's questions. There was no refusal to answer questions. Catherine was simply refusing to participate and became abusive and upset. She yelled at everyone and left the meeting. The meeting carried on since the meeting still had a quorum and Catherine was informed by the Chair that the meeting would continue despite her absence and then she was astounded that the Trustees came to a decision. At the next meeting, she suggested to the Chair that the meeting should have stopped once she left.

161. In response to paragraph 12 of the December Affidavit, Catherine suggests that there was a refusal to disclose the basis for the proposal. This is not true. Catherine suggests that it was clear that ascertainment and inclusion of all beneficiaries would not occur. This is simply not true as the application before the Court seeks exactly that direction.

162. Catherine mentions the affiliates in paragraph 12 of the December Affidavit. The affiliates are people who have been given Indian status and the Federal department has assigned them a number for a First Nation to which they are most closely aligned. These assignments are not done with any precision and in doing a small investigation I am advised that many are incorrect. Thus, the reference to affiliates is largely inflammatory but in an abundance of caution all of the affiliates were served with notice of the 1103 application and thus they have not been excluded.

163. In respect of paragraphs 14-18 of the December Affidavit, most of this has been addressed with my evidence above in relation to the appointment of Justin and Margaret. However, there are a few matters that needs to be refuted. No action was sought against Catherine as alleged in paragraph 15. The application was drafted seeking a transfer of assets. No relief was sought against Catherine personally.

164. In respect of paragraph 15 of the December Affidavit, it was not that Dentons rejected the proposal. The negotiations broke down and no settlement could be reached and thus it was necessary to proceed with a Court Application.

165. Catherine suggests that Dentons is representing the majority of the Trustees. Dentons is acting on behalf of the Trusts based on the decisions of the majority of the Trustees.

166. In respect of providing dates for Questioning, now that Catherine is represented by Counsel, I have responded to her requests for information or we have sent the answers to her lawyer.

167. In respect of paragraph 22 of the December Affidavit, the issue of conflict has been addressed. An application was filed in an abundance of caution as a place holder application. After much consideration, we have determined that no application is necessary.

168. In respect of paragraphs 23 and 24 of the December Affidavit, the Court ultimately agreed that extensive document production was not necessary and thus the Trustees have been able to save considerable costs by the success of that application.

169. In December of 2015 Catherine incurred $170,000 in legal costs. She now advises that her costs are in excess of $700,000. Thus she has incurred a further $450,000 in 2016. She says that only 20% of the fees relate to the 1403 action. I am unable to determine the accuracy of that statement as Catherine has refused to produce unredacted legal bills.

170. The information relayed in paragraph 30 of the December Affidavit in respect of legal fees is wrong, but we maintain solicitor client privilege over the information on the amount spent so it cannot be released.

171. Catherine suggests that the 1970 *Indian Act* is still used and interpreted every day by the Federal Government. I am advised by Mike McKinney that they would occasionally refer to the 1970 *Indian Act* to interpret some of the provisions in the current *Indian Act*. However, the 1970 *Indian Act* membership provisions regarding membership would not be applied as they are not in force.

Conversations with the legal team

172. The Trustees decided that, given the amount of legal fees being spent, there had to be control implemented. Thus, the Trustees passed a resolution that the conversations with lawyers would pass through me. Catherine voted for that resolution. The Trustees also passed a resolution that a Trustee had to get prior approval before they could have legal fees funded.

173. It is only the Trusts' Administrator who can contact the lawyers. The text of that resolution reads:

2012-036	12-09-18	Moved by Roland, seconded by Walter that the Trustees reconfirm their policy that all contact with lawyers, consultants and other advisors be initiated only through the Trusts' Administrator for all work relating to the Trusts for which the Trusts are expected to pay and that all actions with lawyers, consultants and other advisors on behalf of the Trusts first be approved by a majority of the Trustees before being initiated. Paul will send out a letter to the various lawyers, consultants and advisors concerned. Carried, Unanimously.

174. **Undertaking #8 and 56**

Catherine says that the deed of appointment and transfer of assets were only presented at the January 2014 meeting. That is true, but all of the other Trustees were able to read them and agree to sign them. Catherine was asked to sign the documents at subsequent meetings and the Trustees did not proceed to Court until April 2014. It is hard for her to suggest that she did not have proper time to read these documents in the four months between January – April 2014.

The complete facts in relation to the appointment of Justin are relayed above in my Affidavit. In respect of this issue of separating out the transfer of assets, if Catherine only signs the transfer she is indirectly confirming Justin as a Trustee because only the

Trustees can be the owners of the Assets of the Trusts. It was simply obstructionist to suggest that she would not sign the deed because it involved his appointment.

175. **Undertaking #10**

The letter attached as an Answer to Undertaking #10 written by Catherine contains a number of misleading statements and misinterpretations of Justice Thomas' decision. Catherine tries to use her misinterpretations to get her way against the other Trustees by saying that she is the lawyer and therefore they must listen to her. In addition, she threatens to bring a Court application to have them all removed as Trustees. She suggests that the Trustees may be personally liable for the failure to address issues such as Trustee succession.

176. **Undertaking #12**

These notes produced by Catherine in answer to Undertaking #12 are not accurate as reviewed by the Chair, the other Trustees and me. Catherine has really reinvented history.

There is a note on page 167 of the notes that Catherine felt unsafe, disrespected and abused. None of the Trustees, the Chair, nor me noticed any disrespect to Catherine. She was not abused. My observation is that she was very overpowering and abusive to others. All of her notes appear to be intended to paint herself in a better light.

177. **Undertaking #13**

Catherine provides a letter of March 19, 2014 as an answer to this undertaking. Catherine sent the letter of March 19, 2014 to the Chair and he tried to answer all of her questions. Catherine did not accept the answers. I am advised by Doris Bonora that she was not asked by Karen Platten, Catherine's lawyer, to split the deed so that Catherine could just sign the transfer of assets. If one reviews the transcript from the Court application, Catherine's lawyer suggests that the asset transfer be done by majority vote and thus Catherine would not need to sign. The transcript is attached as Exhibit D.

178. **Undertaking #14**

In Undertaking 14, Catherine was to answer whether she made any motions at the January 21, 2014 Trustee meeting. There is a long answer produced in which Catherine again reiterates that she was abused, which is not true, and reinvents what occurred at the Meeting. She then records one motion that she made on which the Chair asked for a seconder and no one seconded the motion.

179. **Undertaking #19**

Catherine produces notes of the Meetings that are cryptic and difficult to read. There is a reason that Minutes are produced. The reason is that such Minutes are the official record of the meeting as determined by the majority of the Trustees. The Chair and I also agree with the contents of the official Minutes. Catherine has a perception of what occurs at meetings that is not always shared by the other Trustees.

180. **Undertaking #24**

The answer to this undertaking is not responsive at all. Catherine was to provide communication regarding the replacement of Clara between Clara's death and the meeting to replace Clara. Catherine produced a number of emails in which she asks for information that is not related to a replacement for Clara and then provides the information that she produced only at the meeting and not before the meeting.

In fact, many of the answers to undertakings are unresponsive to the undertaking given.

181. **Undertaking #35**

The answer to the undertaking #35 shows that Catherine does not respect the members of SFN. She suggests that Tracy Poitras Collins was only made a member because not enough supporters of Roland Twinn showed up. She does not respect the decision of the electors. Even her answer that suggests the Council belongs to Roland shows her lack of respect for the Council of SFN.

182. **Undertaking #36**

Catherine questions who gave direction for advertising for potential beneficiaries. I confirm that the Trustees gave me direction to advertise across Western Canada in a motion moved by Catherine on November 17, 2009 and carried by the Trustees.

183. **Undertaking #37**

Catherine suggests that there is a group of people that she spoke to and then suggests that there are a number of people who have an absolute right to be members of SFN. Catherine was a member of the membership committee for many years and did nothing about this. Further, in taking on this task of speaking to these people she has ignored the direct warning of legal counsel who advised the Trustees that they were not to get involved in SFN Membership.

184. **Undertaking #43**

Catherine continues to be contradictory on the issue of determining beneficiaries. She has produced a list. Then she produces categories of members. She continues to suggest that people have automatic rights to be members yet she did not help them to become members. Presumably people like William MacDonald, who she says had an automatic right to be on the list, would have had such a right when she was on the membership committee and her husband was the Chief. Yet Mr. MacDonald was not made a member during that time.

185. **Undertaking #49**

The four other Trustees, Bertha, Roland, Justin and Margaret, are functional and competent and healthy. They feel that they ask tough questions and manage the Trusts without political interference. If Catherine did not create so much hostility and if the Trusts could get through the legal process then they could just do their job of helping the beneficiaries. During this litigation many beneficiaries of the 1986 Trust have been helped. Good work is being done.

Catherine suggests that "the process of Peggy Ward's appointment was improper and in contravention of the very principles we agreed would govern and measure our decision making". No part of this sentence is true. The appointment of Peggy Ward was made according to the Trust Deeds. It is not in contravention of any principles agreed upon.

Ultimately the undertaking is not answered.

186. **Undertaking #52**

The notes produced are again biased and are not reflective of what the other Trustees agree occurred at the Meeting. On page 31 of the notes, it says "Brian instantly pushed asking Bertha to move. She did" and "CT opposed. No one asked her for reasons". Once a vote is called then no more discussion would take place. It is clear from the notes that a discussion took place. It is interesting that the notes refer to Catherine in the third person as though she were not making the notes. The notes are difficult to read and decipher and therefore difficult to fully comment upon. I was at the meeting and the Chair did not "push" Bertha for a motion.

187. **Undertaking #53**

The answer to the undertaking is not as I remember it. The litigation is costing a lot of money and we are trying to settle the litigation and thus proposals were put forward to give directions for settlement. Bertha, Roland, Justin and Margaret (and Clara when she was alive) were/are interested in settling the litigation and wish to look at proposals. Catherine has been very difficult on the settlement issues and it is my impression that she does not wish to settle the litigation.

188. **Answers to Written Interrogatories**

The answers to the written interrogatories are mostly unresponsive or at least partially unresponsive and contain many insults to individuals. The answers are attached hereto as Exhibit "BB".

Of particular concern are responses as follows:

Questions	Answers
2 Does she have documents other than those provided in these undertakings that relate to the 1985 trust?	Overly broad, unreasonable
1. The undertaking was to produce Minutes, if your client has them, please produce them	Answer "your Client Roland Twinn can produce the Minutes"
12 Who prepared the transcript? Was the transcript edited by Ms. Twinn	not answered at all
15 asking for documentation on a motion	"Typical of the chair, there was no discussion or information provided"
16 Produce background materials previously referenced	Unable to locate any materials
28 produce communications with proposed trustee	Communications will not be produced
30 question to produce entire documents and attachments of documents previously produced	No - irrelevant
47 Catherine says the Chief exerts improper influence because he can hire people in Sawridge resources. She was asked to provide the names of people affected	Irrelevant to these proceedings
49 Catherine suggests that Peggy Ward's appointment is improper and she was asked how it was improper	Not answered at all
51 asked about notes to a meeting	See answer to interrogatory Question 9. There is no question 9
54 Asked to explain her response	Refuses to provide any other explanation
62 asked to identify the documents that respond to the question other than to refer to all the documents produced so far	Refuses to provide any other response

64-66 asked for more information on accounts that are being asked to be paid	Will not provide
67 asked for supporting document expert relied upon	"not reconsidered"
69 provide source documents of expert	"irrelevant"

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

SWORN OR AFFIRMED BY THE DEPONENT BEFORE A COMMISSIONER FOR OATHS AT EDMONTON ALBERTA ON Feb 15, 2017.

Paul Bujold

Commissioner for Oaths in and for the Province of Alberta

KURTIS P. LETWIN
Student-at-Law

Appointment Expiry Date

This is Exhibit " H " referred to in the Affidavit of

Paul Bujold

Sworn before me this 15th day

of February A.D., 2017

A Notary Public, A Commissioner for Oaths in and for the Province of Alberta

TAYLOR J. WATTS
Student-at-Law

Sawridge

Catherine Twinn
EXHIBIT NO. 4
Sept. 9/16
D. WILLIAMS DW

March 5, 2014

Sawridge Trusts
Attention: Paul Bujold

Dear Sir,

RE: EVERETT JUSTIN TWIN

Further to your enquiry, we can advise that Everett Justin Twin ("Justin") was a Member of the Sawridge First Nation since his birth on September 23, 1982. On October 4, 1985 the Minister confirmed that the Sawridge Indian Band had control of its membership. Attached to that letter was a Band List as required pursuant to the Indian Act. The name of Everett Justin Twin was on that Band List. That Band List became the basis for the initial Membership List for the Sawridge Indian Band. We understand that Justin's mother did marry a non-Indian on November 1, 1986. We are not aware of any Protest regarding the inclusion of Justin on the Band List. Justin continues to be a member of the Sawridge First Nation (successor to the Sawridge Indian Band) today.

While it is arguable that under the Indian Act in force in 1982 Justin would have been enfranchised by the Minister under subsection 109(2) at the time of his mother's marriage, this was not done in all cases, and in many cases at Sawridge the children were left on the Band List when the mother subsequently married a non-Indian while that Indian Act was in force.

We trust that you will find this information helpful.

Yours truly,
Sawridge First Nation

Michael R. McKinney, Q.C.
Executive Director/General Counsel

806 Caribou Trail NE • Sawridge I.R. 150G
Box 326, Slave Lake, AB T0G 2A0

Telephone: (780) 849-4331
Fax: (780) 849-3446

This is Exhibit "M" referred to in the Affidavit of

Paul Bujold

Sworn before me this 15th day

of February A.D., 2017

A Notary Public, A Commissioner for Oaths in and for the Province of Alberta

TAYLOR J. WATTS
Student-at-Law

Catherine Twinn
EXHIBIT NO. 10
Nov. 9/16
D. WILLIAMS DW

Action No.: 1403 04885
E-File No.: EVQ14SAWRIDGEBAND2
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, APRIL 15, 1985 (the "1985 Trust") and THE SAWRIDGE TRUST, AUGUST 15, 1986 (the "1986 Trust")

BETWEEN:

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

Applicant

and

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

Respondents

PROCEEDINGS

Edmonton, Alberta
October 1, 2014

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

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

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October 1, 2014	Morning Session
The Honourable Mr. Justice Ackerl	Court of Queen's Bench of Alberta
K. A. Platten, Q.C.	For the Applicant/Respondent
D. C. E. Bonora	For the Respondents/Applicants
E. Compton	Court Clerk

MS. BONORA: Sir, my name is Bonora, initial D. I am with the firm of Dentons Canada and my friend Karen Platten is with McLennan Ross, and we are before you today in respect --

THE COURT: I am sorry. Can I have the names again please?

Submissions by Ms. Bonora (Application)

MS. BONORA: I am sorry. I am sorry, yes. Bonora, Doris Bonora, B-O-N- O-R-A, and my friend's name is Karen Platten, P-L-A-T-T-E-N. And we are before you today with respect to an application involving two Trusts that are involving the Sawridge First Nation.

Sir, I am wondering if you have the file. I'd like to refer -- okay, perfect -- some documents to you in respect of our application. So I will just give you an overview of the nature of what we are seeking and then I will take you through some more detail.

So our application is basically to seek an order to direct that the assets of the Trust be transferred from a group of trustees with one trustee who has died so the remaining four trustees, to a new group of trustees with a newly appointed trustee in it. So assets of Trust are held jointly and so therefore in order to transfer them, it requires the old trustees, I will call them that, to collectively transfer them to the new trustees. And so we have had a trustee who died. The Trusts provide for a majority vote on any decision, including the appointment of trustees. There was a meeting, there was a new trustee appointed by majority. Then the next step after that would be to sign a transfer of assets from the old group of trustees to the new group of trustees and we have one trustee who won't sign. And so we are asking for the Court's direction to transfer the assets to the new group of trustees with this properly appointed new trustee.

THE COURT: Now, you mentioned they'd need the majority approval for appointment of a new trustee. Do you need unanimity to transfer the assets?

MS. BONORA: Yes, because they are jointly held.

THE COURT: Okay.

MS. BONORA: And you may be familiar with the name Donovan Waters who is known as an international expert on Trusts and he actually provided an opinion to these Trusts about the fact that there was a requirement for the jointly held assets to be transferred by the old group of trustees to the new group of trustees.

We had this exact problem earlier this year where we had a trustee who resigned and there was a properly elected new trustee and the same trustee Catherine Twinn, would not sign the transfer of assets. We came before Justice Nelson (sic), Nielsen in May and he approved an order for the transfer of assets, so I can tell you that there's a very recent precedent with respect to the fact that there was a recognition that when you had a properly elected trustee and we had a trustee who simply wouldn't take the administrative step of signing the joint transfer, that the Court did intervene and did grant an order for the transfer of assets. That order is in our materials.

THE COURT: Okay, and Ms. Twinn is the re-elected trustee again, here today?

MS. BONORA: Yes. Yes, Sir.

THE COURT: Okay.

MS. BONORA: And I don't think my friend takes any issue with the fact that the Trusts say that the old -- the trustees who remain, so in this case where we have one trustee die, the trustees who remain can elect a new trustee. I don't think she takes any issue with the fact that that can be done by majority vote and then I will let her tell you why she's here and why she is opposing this.

So Sir, I would suggest to you that if we looked at the Trusts and I will take you through them if you think you need to, but they are at Tab A of the affidavit sworn by Paul Bujold (phonetic) who is the who is the Chief Executive Officer of the Trust and in -- there are two Trusts, there's one in 1985 and 1986 and that's how we refer to them as the 1985, the 1986 Trusts. In paragraphs 5 and 13, of both of those documents it provides for the trustees to appoint a new trustee and for a majority vote to be able to take place to allow that to happen.

If you were to look at Tab D which is Exhibit D of the affidavit -- sorry, Exhibit E of the affidavit, you will find Justice Nielsen's order which shows that he ordered that the assets be transferred from the old group of trustees to the new group of trustees. At that time my friend was here and Catherine Twinn -- Catherine Twinn wanted to challenge the eligibility of the trustee that was appointed at that time and Justice Nielsen granted them the ability to continue with that challenge, but in the meantime there was a properly elected trustee and the assets he determined and ordered that the assets would be transferred. So that action has been out there in terms of the fact that it could be brought. It has only -- so this order was filed in May and took place in May, and my friend has just only recently served me with an application to deal with that issue. So it obviously wasn't a totally pressing issue because it only arose and we were only served with it after we filed this application. And so there are now some other issues that have arisen that Ms. Twinn also wants to raise and certainly we have no issues with her raising them, we just don't think that she can hold the trust for ransom and prevent the transfer of assets.

I'd like to take you to Exhibit F of the affidavit.

THE COURT: If I could stop you there.

MS. BONORA: Mm-hm.

THE COURT: Sorry, Ms. Bonora. Was this order granted in Chambers?

MS. BONORA: It was.

THE COURT: Okay. Thank you.

MS. BONORA: I am going to take you to Exhibit F of the affidavit, and I won't take you through all of the minutes of the meeting, but what I do want to show you is that Catherine Twinn made a proposal at the meeting for many things, including perhaps the appointment of independent trustees, one from Victoria, B.C. and one from Dubai, although she says he was planning to move back to Edmonton. And in the minutes all of her selections, as well as the suggestions for new trustees put forward by the other trustees, were put to a vote, and ultimately or at least they were -- the chairman said, there were four names under consideration, the two by Catherine Ward and the other two trustees, potential trustees that had been, what they call trustees in waiting and ultimately there was a Motion made to appoint Margaret Peggy Ward and that name was carried three in favour with the minutes reflect Catherine opposing. She was appointed for both of the Trusts, and then when Catherine was asked to sign the transfer of assets, she refused and then there was a Motion made to bring this application so that the assets could be transferred.

I'd like to also take you to the resume of Peggy Ward because it is quite stellar, and I think, although you are not here to second guess the choice of the trustees and we are saying that you actually -- there is in fact power in the Trust. Certainly a Trust is created by its deed. It's run by its deed. So while Trusts sometimes are compared to corporations, Trusts only get created by their trusteed and the trusteed is the document that governs them until it is amended or changed. It is the document that governs them.

If you look at Exhibit G you will see that Peggy Ward has quite an outstanding resume in the sense that she has a PhD. Her dissertation was in the Federal Policy Proposed Post-Secondary Support to First Nations. Her Masters was in Indian and Northern Education. She has a Bachelor in Native Studies. She has been the Dean of Academic Affairs at the Maskwacis Cultural College. She's been the head of University Studies Program. She is, by all accounts, a very stellar candidate. She is a member of the Sawridge First Nation. She's a beneficiary of both Trusts, so I think that even if there was some ability by this Court to intervene and look at whether she was a qualified candidate, she certainly is a very qualified candidate to these Trusts.

We had asked -- the documents that Catherine Twinn was asked to sign are attached as Exhibit H and I, which basically approve the appointment and which transfer the assets.

I had said to my friend that I understand that Catherine Twinn has problems with the process and doesn't want to appear on the record as approving the process because she wants to bring actions to change the process on how trustees are appointed. We are simply asking -- her opposition to that issue and the opposition to Peggy Ward, is recorded in the minutes. Now the next step is just to transfer the assets and the asking her to sign transferring the assets, should not be anything but an administrative step at this point because there has been a majority of the properly appointed trustees saying that this should happen and that she should be appointed and therefore the assets should be transferred.

THE COURT: So let me step back for a moment, because I've heard that a majority vote is required, and unanimity is required, so the minutes of the meeting reflect that there was a three to one vote approving Ms. Ward as a trustee. Does the unanimity requirement go simply to the signing of the transfer agreement and unanimity is supposed to automatically compellingly follow the majority vote?

MS. BONORA: Well, once the majority vote is there and the trustees are properly appointed, then the assets need to be transferred, so at that point because they are jointly held, they have to have all of the trustees sign. And so the unanimity really becomes not so much a decision as an administrative step.

THE COURT: Okay.

MS. BONORA: Because it can't be changed. She -- it's not like we can go backwards and change the trustee to say there has to be unanimity on the election of the trustees. The trusteed is very clear, it happens by majority vote. And so in the past this has not been a problem. It's only been a problem now, because Catherine Twinn has taken the position that she voted against this and now she will not take -- go on with those administrative steps. We are suggesting that of course her action with respect to Justin Twin, as directed by Justice Nielsen can continue, but obviously that hasn't happened quickly.

The other thing you should know is that the Trust hold shares in a holding company which has very significant assets. I don't know the number today, but it's somewhere between probably 150 and 200 million dollars. So these are not insignificant Trusts. Business deals are happening all of the time. When we were before Justice Nielsen, there was a business deal pending and there was an annual general meeting that was pending, and so therefore he found that at that time there was significant urgency that it needed to be transferred. Certainly, if there is some delay in this, we would need the opportunity to come back because there will undoubtedly be some urgent need at some point to deal with the transfer of those assets.

THE COURT: Okay. Can you point to any such imminent events?

MS. BONORA: There is no imminent need right at this time. Absolutely, I can't tell you that there is. It will -- if there is a business deal that comes, the businesses will not be able to carry out the business deal because the shareholdings will not be accurate on the books of the corporation. So that is the problem that we had when we were before Justice Nielsen. At this point in time the business records of the corporation are not accurate, because they would still contain a deceased trustee's name.

Certainly you know, in the future I am guessing there will be things that come forward. Perhaps we can come back. I am suggesting that at that time, the answer will be obvious that there needs to be a transfer of assets, perhaps with a reservation for Catherine Twinn to continue her action. Now she has a new action that she also wants to be heard, but allowing these corporations to go forward. Allowing them to run their business should not be held up by one trustee who simply has a different agenda than all of the other trustees. There was a proper vote. That should be upheld and it is very unfortunate that we have to come to Court to deal with, what we see, as a fairly straightforward administrative step once there has been that majority vote in the Trust. And so we are asking this Court to intervene just as Justice Nielsen did earlier this year.

THE COURT: Thank you.

Submissions by Ms. Platten (Application)

MS. PLATTEN: So as the Court has heard we also have an application before the Court today. It's number 4 on your list and I will speak to that in time. That particular application has taken time to bring forward because there are a lot of complicated issues involved.

Ms. Bonora's application is very similar to our application. Our application is to determine the appropriateness of the appointment of Justin Twin as a trustee and also to deal with appointments of trustees in general, so we are suggesting that a Special Chambers Application be made to determine all of the issues.

As Ms. Bonora indicated Justice Nielsen in his order in May reserved to Catherine Twinn the right to pursue an action to determine the eligibility of Justin Twin to be appointed a trustee.

I do have to advise the Court, Sir, that in May we suggested that the appointment of the trustees and the transfer of the assets be split into two separate documents and that Ms. Twinn would sign the transfer of assets, but they have continually appeared to be in one document both for that application and this application, and a transfer of assets to new trustees is necessarily a confirmation of the trustees.

Ms. Bonora indicated that Ms. Twinn has a different agenda than the other trustees. I think that is not an appropriate characterization. I think Ms. Twinn has a different viewpoint and trustees are allowed to have different viewpoints.

In terms of our application, we feel it is critical that we obtain an order restricting access to file, generally known as a sealing order because of the highly sensitive materials in Ms. Twinn's affidavit, and therefore we don't want to proceed with our application until we, at least go through the process of applying for the sealing order.

Ms. Bonora referred to the trustee selection process in August where Ms. Ward was appointed and Ms. Twinn advises me that there were no prior materials given to the trustees. There is no process in place, and she feels that there should be discussion of trustees of the nominees, and some sort of system in place where there would be a determination as to what skill sets the trustees need to compliment the skill sets of the trustees already in place. Ms. Twinn has raised this issue many times in trustee meetings.

Ms. Bonora indicated that the selection of trustees is by majority and the transfer of assets requires unanimous decision. In her materials she suggests that Ms. Twinn is negligent as a trustee in not signing that transfer of assets. As I've explained the document was an approval of the trustee and also the transfer of assets, and I would suggest to the Court if one trustee does not agree, and states their reasons for not agreeing, that is not negligence. It is the trustee trying to fulfill their fiduciary obligation to the beneficiaries and to the Trust. Therefore, we are suggesting that it is a two-part process. The first part being that we apply for the sealing order with respect to our application, and secondly, that a Special Chambers application be set to deal with both Ms. Bonora's and Ms. Twinn's applications. The two applications are similar and intertwined, because confirmation of a trustee appointment and a transfer of assets is part of the process. Ms. Twinn's application deals with the application of Justin Twin, but also the process of trustees being appointed.

THE COURT: When you are suggesting that the matters are intertwined and require a Special Chambers Application, you are referring to the matters before me today as opposed to the matter that was just filed, permitted by Justice Nielsen's earlier decision?

MS. PLATTEN: The matter with respect -- that was reserved by Justice Nielsen in May?

THE COURT: Yes.

MS. PLATTEN: That is what --

THE COURT: Permitting Ms. Twinn --

MS. PLATTEN: Yes.

THE COURT: -- to contest it.

MS. PLATTEN: Yeah, that is part of our application.

THE COURT: Okay, that's -- so you're suggesting that be part of a Special Chambers Application?

MS. PLATTEN: The two issues, Sir, the appointment of trustees and transfer of assets that Ms. Bonora is bringing before you, as well as Ms. Twinn's application which is with respect to the appointment of Justin Twin, but also asking for the Court's advice and direction with respect to appointment of trustees.

THE COURT: And that arises out of clause 3 of Justice Nielsen's order.

MS. PLATTEN: Correct.

THE COURT: That is what I was not quite certain of, so thank you.

MS. PLATTEN: As Ms. Bonora indicated, when we went before Justice Nielsen, there was some urgency to the matter. There is no urgency at this point in time, and I would think that the trustees would want to have these matters determined by a Court so that moving forward, the Trusts and the trustees are operating the way that they should. And these are very complicated matters. The beneficiaries of the 1986 Trust are easily discernible. The beneficiaries of the 1985 Trust, we would suggest, are not as easily discernible, and in fact, have not been discerned to date by the trustees. So the eligibility of people to act as trustees has not been determined.

THE COURT: Okay.

MS. PLATTEN: Those are my submissions with respect to Ms. Bonora's application.

THE COURT: Okay. Thank you.

Further Submissions by Ms. Bonora (Application)

MS. BONORA: Sir, our application, I believe is very straightforward, and very simple in the sense that trustee has already been appointed. There's no suggestion that that was improper. Both Ms. Platten and I forgot her notice of motion, but she confirmed for me this morning that her notice of motion does not seek the removal of Peggy Ward. Does not seek to overturn the decision of the trustees, so the decision that we are asking you to follow this morning, is not even an issue in the application being brought by Ms. Platten.

I can tell you that I believe Ms. Platten's application should be reserved out. We have no difficulty with that. She said to you that the problem Catherine Twinn has with the documents is that they seek to approve the trustee and do the transfer of assets. I believe I said to Ms. Platten on the phone, but I will say it in front of this Court now, that if all she's asking for is to sign a transfer of assets with nothing more, we would absolutely prepare that and redo the documents because that's all we are seeking. So if that's the impediment this morning, I can tell you that we would amend those documents, as long as there was a direction from the Court to have her sign that, because that is not a problem for us. We understand she opposes the appointment, that's on the record.

The documents we drafted were not meant to achieve another agenda in terms of her approving that. We simply wanted that, the transfer.

THE COURT: I thought that invitation might be out there, is that correct?

MS. PLATTEN: Sir, unfortunately we did discuss that, but I was unable to contact my client before today. She was away at meetings and so I was unable to contact her with respect to that.

THE COURT: Okay. I thought you had advised us, that in fact that was a possibility that that was a position you articulated this morning.

MS. PLATTEN: I am sorry, Sir?

THE COURT: I thought you had phrased that as a possibility in your submissions.

MS. PLATTEN: We certainly suggested it in May, Sir, and that was rejected. We just discussed that the other day, I think it was on Monday of this week and as I said, I was unable to confirm with my client that she would in fact sign that. I don't think that she has any objection to signing it, as long as it is a separate document.

THE COURT: Well --

MS. BONORA: Sir, I think that solves the problem for us this morning. As long as there is a direction that she, you know, will sign a transfer of assets, then that's all we need this morning.

THE COURT: Okay.

MS. BONORA: That's all we need. So I just don't want to have it where we go away saying she will sign and then we still have a problem that it's not signed, so perhaps as a solution we can say that she will sign it within a week, otherwise we will be back. I would like to be able to be back in front of you so we don't have to explain it again.

MS. PLATTEN: Sir, I think at this point, it's kind of a moot point whether you sign it, or whether Ms. Twinn signs it. I think -- I believe that she is willing to sign the document.

THE COURT: Well, let's go that route. As you mentioned in fairness, this obviously is a complicated matter. It appears, while there are practical exigencies to running a large Trust, there is not the imminent articulated urgency that existed before Justice Nielsen. It appears there is a workable solution here that, at least, would in the short term, address the needs of all parties, with the other matters being assigned to a Special Chambers Hearing. So Ms. Bonora --

MS. BONORA: Bonora, yes.

Order

THE COURT: -- thank you. I am going to direct that Ms. Twinn sign the transfer of assets. It will be within a relatively short period of time. Ms. Platten what is workable for you in obtaining your client's signature to that transfer, one week?

MS. PLATTEN: It can be done within one week, I think, Sir.

THE COURT: Okay, is that agreeable to you, Ms. Bonora?

MS. BONORA: Absolutely, Sir.

THE COURT: Okay. So that transfer to be signed by October the 8th. Are there details that need to be directed to have that order enforced?

MS. BONORA: No, Sir. We thought last time we needed documents signed, but the order allows -- as long as that is signed the corporate solicitors can do the share transfer.

THE COURT: Okay.

MS. BONORA: So that's all we -- I think we need to --

THE COURT: You will draft the order for my signature?

MS. BONORA: I will, Sir.

THE COURT: Okay. Thank you.

Submissions by Ms. Bonora (Costs)

MS. BONORA: And we had asked for costs. We would like the issue of costs just to be reserved with respect, and deal with in main application.

THE COURT: That seems fair.

MS. BONORA: Thank you.

THE COURT: That seems fair. Now, with respect to the other matters, Ms. Platten, you were the applicant on number 4 certainly.

MS. PLATTEN: Number 4, Sir. Just number 4.

THE COURT: Number 4, so you are asking that that be adjourned to a Special Chambers sitting?

MS. PLATTEN: Yes.

THE COURT: That would also follow with number 3, is that correct?

MS. BONORA: No, number 3 now is solved.

THE COURT: That's the matter before me.

MS. BONORA: Yes.

THE COURT: Thank you. And are there any other matters that need to be combined with that Special Chambers sitting. In other words, does number 4 deal with the issue set out in clause 3 of Justice Nielsen's order?

MS. PLATTEN: That's correct.

THE COURT: Okay. It does.

MS. BONORA: Thank you for your time this morning.

MS. PLATTEN: And thank you, Sir.

THE COURT: Okay, and thank you for encapsuling a complicated matter in a relatively brief period of time for my consideration.

MS. BONORA: Thank you.

THE COURT CLERK: Excuse me, counsel, so the fourth one is that adjourned sine die for now or. . .

MS. PLATTEN: Yeah. We will adjourn number 4 sine die.

MS. BONORA: Yes.

THE COURT CLERK: Okay.

MS. PLATTEN: Thank you.

MS. BONORA: Thank you.

THE COURT: Thank you.

PROCEEDINGS CONCLUDED

Certificate of Record

I, Erik Compton, certify that the recording is the record made of the evidence in the proceedings in the Court of Queen's Bench held in courtroom 316, at Edmonton, Alberta on the 1st day of October, 2014, and that I was the court official in charge of the sound-recording machine during the proceedings.

Certificate of Transcript

I, C. Emblin, certify that

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

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

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Catherine Twinn
EXHIBIT NO. 12
NOV. 9/16
D. WILLIAMS DW

Clerk's stamp:

JUDICIAL CENTRE OF EDMONTON
FILED
OCT 16 2014
Clerk of the Court

COURT FILE NUMBER	1403 04885
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
	IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT and THE SAWRIDGE TRUST ("Sawridge Trusts")
APPLICANTS	ROLAND TWINN, BERTHA L'HIRONDELLE, and EVERETT JUSTIN TWIN, as Trustees for the Sawridge Trusts
RESPONDENT	CATHERINE TWINN
DOCUMENT	**ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Attention: Doris C.E. Bonora Dentons Canada LLP 2900 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3V8 Telephone: (780) 423-7188 Fax: (780) 423-7276 File No: 551860-1-DCEB

I hereby certify this to be a true copy of the original.

for Clerk of the Court

Date on which Order Pronounced: October 1, 2014

Location of hearing or trial: Edmonton, Alberta

Name of Justice who made this Order: Justice L.R.A. Ackerl

UPON the application of the Trustees of the Sawridge Trusts; AND UPON being advised that direction was required to transfer the joint assets of the Sawridge Trusts, although no urgency currently exists; AND UPON being referred to the contents of the Affidavit of Paul Bujold and all Exhibits attached thereto; AND UPON hearing from counsel for the Trustees of the Sawridge

Trusts and counsel for Catherine Twinn, including that Catherine Twinn is willing to sign the Transfer of Assets as a separate document, IT IS HEREBY ORDERED AND DECLARED as follows:

1. Catherine Twinn is hereby directed to sign the amended document necessary to transfer the assets of the Sawridge Band Inter Vivos Settlement and the Sawridge Band Trust ("Sawridge Trusts") from the five previous trustees of the Sawridge Trusts being Catherine Twinn, Roland Twinn, Bertha L'Hirondelle, Clara Midbo and Everett Justin Twinn ("the previous trustees") to the new trustees being Catherine Twinn, Roland Twinn, Bertha L'Hirondelle, Everett Justin Twin and Margaret (Peggy) Ward ("new trustees") without signing the document which appoints Margaret (Peggy) Ward as a new trustee. The documents shall be signed by October 8, 2014.

2. The determination of costs of this application is reserved and may be heard with the application of Catherine Twinn for advice and direction which is adjourned sine die and shall be heard in Special Chambers in the action involving Catherine Twinn and the Trustees of the Sawridge Trusts being Action # 1403 04885.

"L.R.A. Ackerl"

Justice of the Court of Queen's Bench of Alberta

Consented to as to form and content:

[signature]

McLennan Ross LLP
Lawyers for Catherine Twinn

Tab 5

COPY

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

---

QUESTIONING ON AFFIDAVIT OF

CATHERINE MAY TWINN

Held at the offices of Bryan & Company LLP
Edmonton, Alberta

September 9, 2016

Dolores Williams, Court Reporter
(780)238-1157

SCANNED

Appearances:

Ms. C.C. Osualdini, and D. Risling, Esq., McLennan Ross LLP 600, 12220 Stony Plain Road Edmonton, AB T5N 3Y4 (780)482-9200	For the Applicant
Ms. N.E. Cumming, Q.C., Bryan & Company LLP 2600, 10180 - 101 Street Edmonton, AB T5J 3Y2 (780)423-5730	For the Respondents
Ms. D. Bonora, and Ms. A. Loparco, Dentons Canada LLP 2900, 10180 - 101 Street Edmonton, AB T5J 3V5 (780)423-7100	For the Respondents
Ms. D.A. Williams,	Court Reporter

removed by at least 80 percent of the beneficiaries, correct?
A Subject to the Court's power to remove.
Q There's nothing in the trust deed, though, that indicates it's subject to the Court, correct?
A No. Paragraph 5, I would agree with your summary.
Q Thank you. In terms of any vacancies caused by death, resignation or removal, the trust deed also indicates that that ability to fill that vacancy is vested in the continuing trustees, correct?
A Yes, it does.
Q The 1985 Trust Deed, I take it you understood that it required that there be at least five trustees?
A Yes.
Q And that not more than two could be non-beneficiaries, correct?
A That's my understanding.
MS. CUMMING: I'd like to mark the 1985 Trust Deed as the next exhibit.

EXHIBIT NO. 1: 1985 TRUST DEED.

(BRIEF ADJOURNMENT)

Q MS. CUMMING: Next I'd like to move on to the 1986 Trust. I'm giving you a copy of it.
MS. OSUALDINI: Which is Exhibit 'J' in the December, 2015 affidavit.
Q MS. CUMMING: If you prefer to use the exhibit, that's fine.

Registrar maintained the Band lists.
Q And I understand that in July of 1985 the Sawridge First Nation took control over its Band list.
A There was very hastily membership rules that were created always with the intention that those would have to be amended and never were. And I believe it was in July, 1985 that -- I'm going by memory here, so subject to being corrected as this is how long ago, 31 years ago.
I believe that the Indian Act required a referendum or an approval by a majority of the members. Then you submit the rules and the Department would assess those rules to ensure they were in compliance or appeared to be in compliance with the relevant sections of the Indian Act.
Q Well, your memory is quite good. So in terms of the Sawridge First Nation membership rules, those rules had to be passed by a majority of the electors of the Band?
A Yeah.
Q And those rules were then submitted to the Federal Government, correct?
A Correct.
Q And the Federal Government in fact wouldn't turn over control of the Sawridge First Nation Band membership list until the membership rules had been submitted. Is that correct? Is that your recollection?
A More than submitted, assessed, and then there was a --

A The constitution refers to the rules, I believe, but I'm not sure if they're incorporated.
Q Are you familiar with the constitution of the Sawridge First Nations?
A Somewhat.
Q I don't expect you to know it page to page. I'm going to give you a copy.
A Is there something in particular you would like me to direct my mind to in this thick document?
Q Sure, page 7, Article 3, Membership.
A Yes, I see page 7, Article 3.
Q And it appears that under Article 3 the membership code is part of the constitution of the Sawridge First Nation.
A That's a legal conclusion. I'm not prepared to say, but it definitely refers to the membership.
Q The membership code?
A It refers to the membership code and it, in the body, talks about membership rules that were in force immediately before the day. So I'm assuming it's these membership rules.
Q And it says, The membership rules shall thereafter be called the membership code.
A Correct.
MS. CUMMING: Let's mark the constitution as the next exhibit.
MS. OSUALDINI: Are you able to identify this,

Catherine?
A It looks to be the constitution but -- you know, and I've seen it before.
MS. OSUALDINI: I'm more comfortable just marking it for identification then.
MS. CUMMING: Sure. So that's Exhibit B For identification.

EXHIBIT NO. B FOR IDENTIFICATION: CONSTITUTION OF THE SAWRIDGE FIRST NATION.

Q MS. CUMMING: I understand that the Sawridge First Nation had a membership committee.
A Yes.
Q And you sat as a member of that membership committee?
A Yes.
Q Over what years?
A I can't recall. It met very, very irregularly. Roland Twinn was the Chair, and I recall very, very few meetings.
Q Can you give me an approximation as to when you became a member of that committee?
A I can't remember.
Q Was it in the '80s?
A It may have been. There were a lot of committees created and, to my knowledge, many of them did not meet; or if they met, it was extremely irregular.
Q Do you remember being a member of that committee in the '90s?

A I don't recall. I mean, I don't recall the dates.
Q Do you have anything in your records that would help us in terms of the period of time that you sat as a member of the membership committee?
A Your best evidence would be the Band, not me.
Q So you don't have any records dealing with that?
A I really don't know if I do or don't.
Q Did you attend any membership committee meetings?
A I recall attending a committee meeting. It was a joint committee meeting with the Chief and Council and the committee. And I remember -- I think it was in 2013. It was after the June, 2012 decision of Justice Thomas.
And I asked everyone present if they had read the decision, and most of them hadn't. And Bertha didn't say if she had or hadn't. So I asked Mike McKinney, the in-house lawyer, if he would be so kind as to provide a copy to everyone.
He was one of those who I don't think had read it and -- or if he had, I think his answer was maybe. So he did bring copies to everyone, and I suggested that we go through it and see what was being said that was relevant that we should take account of. And people became very, very angry towards me. And at one point, one of the councillors threw the decision on the table and said, Take this away; this is trust business.
Q And which councillor was that? Do you recall?
A Winona Twin. And the conversation stopped.

Q So prior to this June, 2013 meeting, joint meeting --
A No, I didn't say June. I said sometime in 2013.
Q You're right, 2013. So prior to the 2013 joint meeting, did you attend any membership committee meetings?
A I'm sorry. Prior to the what?
Q Prior to 2013, the joint meeting in 2013, did you attend any membership committee meetings?
A I would have if they were being held. I do know that I had concerns because I wasn't being given notice of committee meetings, or if I was, it was inadequate and I could not arrange my schedule.
Q So there were a number of membership committee meetings that you did not attend as they didn't accord with your schedule?
A I wouldn't say a number. There were very few committee meetings, very, very few committee meetings. And I do recall having -- expressing some concern about could we at least regularize a day, the third Tuesday of every month or whatever it was needed to be in order to meet.
I recall at that 2013 meeting that there was conflict between Roland and his sister Arlene. And I believe she had been a Chair of the committee, and I recall there being a gap, a very large gap in committee work. And I think it's at that -- at some point, then, Roland took the Chair. Those committees have been disbanded.

Q So Roland didn't take over as Chair until 2013?
A I don't recall the exact year, but I recall that flow, that there was his sister who had been appointed and he took the role of Chair of the committee. He would come into the room with all the applications that he would put in front of him and select what was going to be discussed.
Q Do you recall attending any membership committee meetings when Arlene Twinn was the Chair?
A Yes, and I referred to that, I think, in my affidavit. Are you done with the constitution? Shall I give that back to you?
Q Yes. I'll probably refer to it later but for now, that's good.
A I'm not sure which affidavit.
Q Just going back to you had said that you had asked that meetings be held on a regular basis --
A Well, just regularize the date so that we -- just as we have with the trustee meetings, you know, third Wednesday of each month.
Q When did you request that the dates be regularized?
A I don't recall that.
Q Was that subsequent to the 2013 joint meeting?
A I don't recall. I just know that it was something I was probably saying more often than not.
Q Do you recall becoming a member of the membership committee in the '80s?

is that the membership committee dealt with applications for membership in the Sawridge First Nations. Is that correct? That was the intent of the committee?

A I believe the intent of the committee was to review applications and make a recommendation to the Chief and Council. Roland, being Chair of the committee, was in fact then recommending to himself as the Chief and Council. And as I described, the committee was not very functional, in my opinion, or effective. And there were backlogs of applications.

Q What did you try to do about that?

A As I've already described, raised my concerns and make suggestions. I do not control other people. They have to take responsibility.

Q If I can refer you to your September 23, 2014 affidavit sworn in the 1403 action.

A 1403, yes.

Q If I can go to Exhibit 'E'.

A Yes, I have the code of conduct.

Q Thank you, and if you can turn to page 8 of that document.

A Yes.

Q That's your signature on that document?

A Yes.

Q And you signed it on January 12th, 2009?

A Yes.

Q Following that is a Schedule 'A'.
A Yes.
Q And Schedule 'B' which was signed by you on January 12th, 2009 as well?
A Schedule 'B', resolution, process of decision-making, January 12th. That's my signature.
Q And that's Schedule 'B-1' and then there's also a Schedule 'B-2', and your signature appears on page 2 of that document as well?
A Yes, it does.
Q I understand that you were involved in the preparation of the code of conduct.
A Yes. I wanted a code of conduct, and I wanted it because I believe it was the year prior Roland Twinn had had a confrontation at the hotel that escalated. And when he and the manager spoke, the manager, Dave Nelson, resigned. And I felt that we needed to have a code of conduct, and this code followed.

I did not hold the pen on the code. The person who held the pen on the code was Tim Youdan from Davies Ward Phillips & Vineberg who had replaced Maurice Cullity as their -- as our trust lawyer. And there was some significant input as well by Dale Dewhurst.

And the code paragraph 5 sets out principles, cooperation, tolerance, inclusion, compassion, relationship, honesty, fair procedures, assertiveness, consensus, objectivity, transparency, peacefulness and respect, reconciliation. And there was a process that -- with the trustees to identify and agree upon those principles.

Q Did you provide any input to Mr. Youdan and Mr. Dewhurst in terms of the wording and preparation of the code of conduct?

A I was involved for sure, and I particularly have a recollection of those principles that I spoke to just now.

Q And you were, by signing the agreement, agreeing to be bound by the code and those principles?

A That's right.

Q The code in terms of the paragraph 5(j), there's a paragraph Consensus.

A Yes.

MS. OSUALDINI: It's (i).

Q MS. CUMMING: Sorry, (i).

A Yeah, paragraph 5(i), Consensus.

Q And that states, Where possible, trustees should work towards unanimous agreement. Where unanimous agreement is not possible, trustees shall try to come to a consensus. Where neither of these is possible, trustees shall reach decisions by simply majority. In all cases, once a decision is made by the trustees, it should be respected and followed by all.

A Yes.

Q I take it that by signing the code of conduct you were

prepared to abide by that section of the code?
A Yes.
Q And, in fact, you wanted that section put into the code of conduct?
A We all did. Or let me rephrase that. I believe we all did.
Q If you turn to Schedule 'A' to the code of conduct.
A Sorry, schedule?
Q 'A', page 2.
A Yes, page 2.
Q At the bottom, there's a section entitled Process of Decision-Making.
A Just -- I'm sorry. Something just caught my attention. Schedule 'A' on page 1. Earlier you had put to me the deed suggesting that there could be three non-beneficiary trustees.
Q Yes.
A I just am pointing out number of trustees in the first paragraph. There cannot therefore be more than two trustees who are not beneficiaries.
Q That's the 1985 Trust, correct?
A Well, I'm just pointing that out. We'll sort that out later, but you wanted me to look at page 2?
Q Well, let's just stay with the number of trustees paragraph first. The second paragraph, that deals with the 1986 Trust?
A Sorry, the second paragraph?

Q Under the heading Number of Trustees.
A Oh, yes, okay.
Q And that states, A non-beneficiary may not be appointed if immediately before such appointment there are more than two trustees who are not beneficiaries. It would, therefore, be possible to have three trustees who are not beneficiaries.
A Yes. I see that now, yes.
Q And you agreed to Schedule 'A' and agreed to be bound by it?
A Yeah.
Q So let's go to the next, Process of Decision-Making.
A Okay, page 2?
Q Yes. And if you turn to the top of page 3 -- sorry, are you on page 3?
A Yeah, I'm here.
Q It says, The following should be noted, and the first bullet, Both trust deeds provide for decisions being made by a majority of trustees. You agree with that?
A Yes, I do.
Q And then if you go further down, it says, Although as described above both trust deeds provide that the trustees' decisions may be made by a majority, this does not mean that decisions can properly be made without the involvement of only a majority. In general, all trustees must take part in the decision-making process even though ultimately the

decision may be made by a majority. So you agreed with that?

A Yes.

Q And the final bullet, Although trustees are not required to make decisions by any particular procedure, it is important that they do have a procedure that enables decisions to be made effectively, and you agreed with that?

A Yes.

Q If you can turn to page 8 of the code of conduct -- sorry, page 8 of Schedule 'A' of the code of conduct.

A I'm on page 8.

Q Actually, sorry, if we could start with page 6.

A Okay, I'm on page 6.

Q And that's a section entitled Conflict of Interest and Duty.

A Not on page 6.

MS. OSUALDINI: It starts with, Duty of Loyalty.

Q MS. CUMMING: Yes, Duty of Loyalty, Conflict of Interest and Duty.

A Yeah. Okay, page 6 at the bottom.

Q And following that deals with principles relating to conflict of interest.

A Yes.

Q And it provides a way to apply principles where trustees are also beneficiaries?

A Which page are you on now?

Q Page 8.
A Yeah.
Q And in fact, you are both a trustee and a beneficiary?
A Yes.
Q And then the page 9 has Dealing With Conflict?
A Yes.
Q And you agreed to all those terms?
A Yes.
Q If you turn to Schedule 'B-1'.
A B-1, yes.
Q The third paragraph in the Whereas section, it says, Paragraph 13 of the deed applying to the trust provides that any decision of the trustees may be made by a majority of 50 percent of the trustees. And you agreed with that?
A Yes.
Q And as well in Schedule 'B-2' which deals with the 1986 Trust, you also agreed with the preamble in the Whereas section, paragraph 3?
A Paragraph 3 of the Whereas?
Q Yes.
A Yes.
Q Thank you. Now, if you can put before you your affidavit sworn on September 23, 2014 in the 1403 action.
A Yes.
Q Can you tell me, where do you presently reside?

A It would have been documents in my possession and -- that I had acquired over the course of time.
Q What type of documents?
A Well, there would be meetings, notes. I would think the financial statements, AGM, conversations. I don't know. A collection of sources.
Q Do you have any understanding as to the present collective asset value of the trust?
A I haven't turned my mind to it recently.
Q So you don't know whether it's more or less than that?
A I haven't -- no, I can't say. I haven't turned my mind to it recently.
Q Paragraph 5 of your affidavit --
A Of the same affidavit?
Q Of the same affidavit, yes. I'm going to be referring pretty well exclusively to this affidavit for the next while. You indicated that only 3 of the 44 Band members are minor children. Is that accurate today?
A I can't speak of today. When people are added to the Band list, we're not -- we, the Band members, are not notified, and we're not notified of when someone applies to the Band for membership.

I learned from Paul Bujold, I believe in August of 2014 when I made inquiries about beneficiaries of the '86 Trust and the Band list which he relies on for -- to ascertain who those beneficiaries are, that two people had been added. I don't know when they were added, but those two new names were Roy Twinn and Alexander Twinn, the children of Roland Twinn.

And when we had an election in -- on February 17th, 2015 which was followed by three runoff elections, and I don't know the exact dates, but I believe the third runoff election was June 2nd, 2015, there were 41 -- at that time, 41 electors meaning adult members out of 44 Band members. So three then were minors.

Since then, I believe that Alexander Twinn has turned 18 and Rainbow Twin, daughter of Winona Twin, has turned 18 which would leave one minor child which would be Star Twin, daughter of Winona Twin.

Q In paragraph 6 of your affidavit, you indicate that the trustees of the trust have taken the position that membership in the Band as determined by Band council is definitive of beneficiary status under the 1986 Trust.

A Correct.

Q Am I correct that the 1986 Trust indicates that to be the case?

A If you -- I'm just going to go to the '86 Trust in my affidavit.

Q It should be paragraph 2(a). Is that what you're looking for?

A Yes, I'm still trying to find it.

MS. OSUALDINI: It's in the December one, I think.

Q MS. CUMMING: Do you want the exhibit? Would

A Okay.
MS. OSUALDINI: That's fine.
UNDERTAKING NO. 6: REVIEW RECORDS AND CONFIRM WHETHER THE MOTION ON PAGE 2 OF 6 OF THE DECEMBER 21, 2010 TRUSTEE MEETING MINUTES, 1 THROUGH 4, WAS MADE BY CATHERINE TWINN.
MS. CUMMING: Let's mark those minutes as the next exhibit, H For Identification.
EXHIBIT NO. H FOR IDENTIFICATION: DECEMBER 21, 2010 TRUSTEE MEETING MINUTES.
Q MS. CUMMING: Next I'm going to take you to the trustee meeting minutes of March 15, 2011. It appears from those minutes, if you turn to page 3 of 5, that there was -- appears to be quite a lengthy discussion about the court application on the determination of the definition of beneficiaries. I'm wondering if you recall much about that meeting. It appears you attended by phone.
A I'll just take a moment to read.
Q Of course.
A Okay, so I've quickly read 5.2.1.
Q That section suggests that there was a discussion about the court application. Is that correct?
A Yes, it does appear to be talking about a proposal that the court application be amended.
Q Clara had moved and you seconded to approve the application to the Court as amended. That's correct?

A It appears from this document, but I'd have to again check my notes. It says that I appeared -- I participated by conference telephone, so I'll have to go back and look at that.
Q If you would do that, please, and let me know if you feel that that wasn't an accurate motion that was seconded by you.

UNDERTAKING NO. 7: ADVISE IF CATHERINE TWINN AGREES THAT THE MOTION MADE ON PAGE 5 OF THE MARCH 16, 2011 TRUSTEE MEETING MINUTES IS ACCURATE.

A And also the legal opinion which I'm sure we had by then of Tim Youdan and Megan about the problems with both trusts in terms of the definitions of beneficiary.
MS. CUMMING: That will be Exhibit 'I'.

EXHIBIT NO. I FOR IDENTIFICATION: MARCH 15, 2011 TRUSTEE MEETING MINUTES.

Q MS. CUMMING: I'm now showing you a resolution, Sawridge Band Inter Vivos Settlement. It's indicating that it's signed the 26th day of April, A.D. 2011. Does your signature appear on that document?
A Yes, it does.
Q By signing that document, you agreed to that resolution?
MS. OSUALDINI: Just give us one second to read it.
A Yeah, thank you.
Q MS. CUMMING: By signing that document, you agreed to the resolution?

A Yes, I would have agreed to that resolution. That was to be the first step in this process of whether or not the definition is ...

Q Uncertain.

A Well, I'm not sure about the word uncertain.

Q Well, that's the word that's in the resolution.

A But that's the word that's in the document. It was really is it invalidated. And because of the amendments and the case law which we had received an opinion from Tim Youdan and Megan McCleese on the definition of beneficiaries. And it dealt with -- if my memory is right, it actually referred to both trusts. But definitely we were focusing on the '85 definition.

I see that the word is uncertain -- determined to be uncertain but what's -- what I understood was are these rules valid or not.

Q What rules are you referring to?

A The rules that are incorporated by the 1985 definition.

Q Are you talking about the rules set out in the trust deeds?

A No, the rules -- the trust deed -- may I have the trust deed, the '85 Trust Deed? So I'm looking at Sawridge Band Inter Vivos Settlement. I'm going to paragraph 2. It says, Beneficiaries at any particular time shall mean all persons who at that time qualify, qualify as members of the Sawridge Indian Band pursuant to the

elected officials, correct?
A Correct.
Q Turning to paragraph 11 of your affidavit, you had indicated that prior to the subject trusts, various assets of the Band were held under prior trust deeds starting in 1982. I'm curious. You've used plural. Was there more than one trust deed starting in 1982?
A Well, I -- there was the '82 Trust, and then I think it was amended by Justice Bowan. So I may have been thinking of those as two, but I'm certainly aware of the 1982 Trust.
And prior to that, it's my understanding that assets -- some assets, anyway, were held in -- for lack of a better term, subject matter trust. That asset is held in trust for -- so it wasn't like an inter vivos trust deed or a 1986 Trust Deed.
Q It's a bare trust?
A That's what I called it, yes.
Q Now, you had indicated in paragraph 12 of your affidavit that your late husband, Walter Twinn, was Chief of the Band and he was also the settlor of the trusts. That's correct?
A That's what the trusts say, yes.
Q And in fact, he choose you -- or appointed you as a trustee to both trusts?
A Yes, that's what I believe the record shows.
MS. OSUALDINI: Just to be clear, on one of them,

it wasn't initially. On '85, she wasn't an initial trustee.
Q MS. CUMMING: Right. You became in '86, yes?
MS. OSUALDINI: So it wasn't the settlor that appointed her. She became a subsequent trustee by trustee appointment.
Q MS. CUMMING: And at that time that you became a trustee by trustee appointment, your husband was one of the trustees of -- well, he was a trustee of both trusts?
A He and others, yes.
Q Right, and it was he and other elected officials, correct?
A Whoever those trustees were, that's correct. I believe the deeds speak for themselves, right?
Q Right. Now, in paragraph 13 of your affidavit, you had indicated that it was your understanding that under the prior trust deeds -- and I'm assuming you're referring to the 1982 Trust Deed?
A Yeah, and that's the one I believe that was amended.
Q You said, Elected officials of the Band were automatically designated as trustees. Am I also correct that in terms of vacancies the trustees could appoint another trustee? And it says, They're hereby empowered to appoint one or more trustees who shall be a member of the Band. Is that your understanding of the '82 Trust, that the trustees had to be members of

the Band?
A May I see the deed?
Q Certainly.
A Thank you. What paragraph were you looking at? It says, paragraph 5, The trustees of the trust fund shall be the Chief and councillors for the Band.
Q No, it's on the next page towards the end of the paragraph.
A For the time being as duly elected. Upon ceasing to be an elected Chief or councillor, a trustee shall ipso facto cease to be a trustee hereunder and shall automatically be replaced by a member of the Band who is elected in his stead and place. In the event that an elected Chief or councillor refuses to accept the terms of this trust and to act as a trustee hereunder, the remaining trustees shall appoint a person registered under the Indian Act as a replacement for the said recusant Chief or councillor which replacement shall serve for the remainder of the term of the recusant Chief or councillors. In the event that the number of elected councillors has increased, the number of trustees shall also be increased, it being the intention that the Chief and all councillors should be trustees. In the event that there are no trustees able to act, any person interested in the trust may apply to a judge of the Court of Queen's Bench of Alberta who is hereby empowered to appoint one or more trustees who

shall be a member of the Band.
Q Okay, thanks. Now, if you can refer to paragraph 14 of your affidavit.
A Yes.
Q You refer to some discussions with your late husband, and you had indicated that he had expressed concerns about having trustees of the trust who were also elected officials of the Band and was attempting to move away from such a practice.
A Yes.
Q Now, from the time that the '85 and '86 Trusts were formed to the time of your husband's death, there were always elected officials as trustees of those two trusts, correct?
A My husband's concern was --
Q I didn't ask you about your husband's concern. I asked you, from the time of inception of the '85 and '86 Trust to the time of your husband's death, there were always elected officials who were also trustees of those two trusts. Is that correct?
A Correct, and not -- but I was never an elected official.
Q But others were?
A But others were. And his concern was going into the future of political influences, political considerations, political demands coming into the economic sphere and, in a sense, influencing decisions

that are made on the economic side.

Q At the time --

A And he had, I think, a growing concern.

Q And that --

A Also, just to give it some context, the process of reconciliation is a process and decolonizing takes time. And Indian communities under the Indian Act were quite accustomed to having their traditional governing structures destroyed by the Indian Act with the consolidation of power and authority into one body, Chief and Council, prior to Indian agent.

So the process of rebuilding is a process. It's an evolution. And in the '80s, as I said, the trust vehicle was not well known, well understood, and well used. And this -- these trusts were, some have said, considered cutting edge at the time, but what you see today is much more advanced and much more evolved.

Q At the time that your husband -- or just before your husband passed away, he was Chief of the Band, correct?

A Correct.

Q He was a trustee of both trusts, correct?

A Yeah. I believe that was his title and he was also a senator, and his plate was absolutely overloaded. He had a heart attack three years before he died, in 1994. And the Band was involved in constitutional litigation in relation to -- may I see the constitution?

MS. OSUALDINI: It's here. I got it.

A In relation to this statement at page 7, The First Nation has the inherent right to control its own membership. And that litigation began in 1986, and I'm not sure exactly when it ended. I think it was more or less concluded by December, 2009. But the inherent right was never declared by the Court.

And the status quo, then, is that the Indian Act confers this delegated authority to a Chief and Council regarding administration of the Band list in accordance with the law.

Q MS. CUMMING: Thank you. Going back to paragraph 14 where you talked about your husband attempting to move away from such a practice, do you have any documents, anything in writing that indicate what attempts he took to move away from that practice?

A Well, my husband said, you know, we're not paper people.

Q So you don't have any paperwork?

A I don't recall that, but I know that he had conversations. He had conversations with me. He was concerned about politicisation that would potentially ruin the economic base. And in fact --

Q But it doesn't appear that he took any formal steps to deal with that.

A Well, I think the trusts, the fact that they're different from the '82 created a vehicle. And it's up to us, I think, to implement best practices.

Q But those trusts that were created in '85 and '86, that was not long after you and your husband married?
A We married in 1984.
Q Sorry, you married in '94.
A 1984.
Q Sorry, '84, yes.
A So not long after.
Q Yes. And yet there were no changes to those trusts from the time of their inception to the date of his death?
A When you say no change, I think the fact that the ownership of the assets was vested in the trust was a very large step, and I'm pretty confident that had he lived he would have moved with the best practices.
Q But he hadn't done that as of the date of his death?
A No, he had not. But one of the things he was noted for, and this is on a video, and I believe the man who said it was Ray Dupres, that Walter was known for surrounding himself with much smarter people than himself; and he would not only listen to other people, he would take their advice and he would act on it. And that is in a video. That was his character.
MS. OSUALDINI: Do you want to take a break, Catherine?
A I'm okay.
Q MS. CUMMING: If we move to paragraph 15 of your September affidavit.

TAB 6

No.	SUMMARY Of BEHAVIOUR	CITATION
1.	**<u>Representations to the Court</u>** Catherine and her counsel have confirmed that she retained McLennan Ross in the fall of 2013 to assist her in her concerns as a Trustee of the Trusts. However, at a court application before Justice Browne on April 9, 2014, Catherine appeared in person and advised the Court that she required time as she needed to retain counsel, receive advice from counsel and instruct legal counsel. At no time did she advise Justice Browne or counsel for the Trusts that she had already retained McLennan Ross Catherine's lawyer wrote to the court and advised there was a signed agreement confirming that we agreed to have Justice Thomas sort out any disagreements. There was no such signed agreement. Catherine admitted there was no signed agreement and advised that no letter was sent to the court to correct the impression left with the court.	Questioning of Catherine Twinn, page **133-134** Questioning of Catherine Twinn Undertakings 60-61
2.	**<u>Unfounded Evidence of Fraud</u>** Catherine swore an affidavit in which she alleges that Mike McKinney and the Chief of the Sawridge First Nation had been paid "large sums" under a "lucrative contract", the implication being that the monies were improperly paid to these individuals. During Questioning, she confirmed that she had never seen the alleged "lucrative contract", had never seen any related documents, and had no records indicating such payments had been made. She says she simply "learned about these things haphazardly" An affidavit sworn by Paul Bujold on August 30, 2017 (his most recent affidavit) states that these allegations are untrue.	Affidavit of Catherine Twinn, sworn May 10, 2017, para 43 Affidavit of Paul Bujold, sworn August 30, 2017, para 9
3.	**<u>Failure to Abide by Court Order</u>** Catherine understands her ethical obligations as a lawyer. Then confirms that she has not paid the costs awarded in the 1403 application before Justice Thomas	Questioning of Catherine Twinn, page 567

4.	**<u>Failure to deal with Evidence</u>** Catherine was asked to confirm that the minutes of the meeting were the actual minutes. Catherine refused to do this even though she was in attendance at the meeting in question, and Catherine further refused to allow any of the minutes to be entered as exhibits – only as exhibits for information Refusing to enter as an Exhibit an identified document	Questioning of Catherine Twinn, page 159 – 161 Undertaking 5 Questioning of Catherine Twinn, page 73-79
5.	**<u>Refusing to Confirm Relief</u>** Catherine was asked if she wanted Peggy Ward removed as that is one matter of relief she has sought. Catherine, instead of answering the question, first took it under advisement and then obfuscated.	Questioning of Catherine Twinn, page 298 Undertaking 49
6.	**<u>Submitting Hearsay Evidence</u>** Catherine attached as Exhibits to her Affidavit dated May 10, 2017 several "sworn" statements of individuals. These are not affidavits and have no real basis in evidence except as being "sworn" statements in her affidavit which are not proper evidence.	Exhibits "O", E AND N, of Catherine Twinn's Affidavit of
7.	**<u>Failing to abide by Court Precedent and *Stare Decisis* and Failing to follow Court Decisions</u>** Catherine failed to abide by the April 2014 Decision requiring Catherine to sign documents to transfer the trust assets when Margaret Ward was appointed. Catherine refused to abide by several Court Decisions that stated clearly that membership is not to be addressed. The Court directed <u>all</u> trustees not to deal with membership. Catherine refused to abide by Court Decisions that stated a conflict is not relevant to the 1103 action.	

No.	SUMMARY Of INFLAMMATORY LANGUAGE IN BRIEF	CITATION
8	Accuses the Chief of putting his interests above those of the beneficiaries because he is not advocating one particular position when asking for the Court's direction on whether and how "beneficiary" should be changed	p4, para 14
9	Alleges that the four Trustees are unduly influenced by the Nation in exercising their duties, and accuses the Nation of attempting to be secretive regarding membership, and attempting to minimize and control the beneficiary pool. There is no evidence of this advanced save for her own assertions.	p27, para 86
10	Again accuses the four Trustees of being unduly influenced by the Nation and of taking positions on membership to further the interests of the First Nation. She accuses the four Trustees of having "designed the litigation process to ensure that the affected beneficiaries are not assured of gaining membership in the First Nation".	p33, para 114-115
11	Accuses the four Trustees of not being candid with the Court about the "deeply flawed" membership process. The four Trustees have never failed to be candid with the Court, and that is a very serious allegation. Rather, the four Trustees have not gone into issues about the membership process with the Court because they are not before this Court.	p39, para 137
12	Takes issue with Paul Bujold failing to object to Dr. Donovan Waters' suggestion that the Sawridge First Nation's lawyer for over 30 years, Mike McKinney, be invited to a meeting at which First Nation membership processes were to be discussed 'so that Chief Roland Twinn would feel more comfortable knowing that he had "his man" with him'. Several concerns arise by this: a) Dr. Waters simply made a suggestion. Paul knew they did not have to follow it. There was no need to tell Dr. Waters it was "inappropriate" nor can anything be read into his failure to do so. b) Seizing on the supposed characterization by Dr. Waters of Mike McKinney as "his	pp 42-43, para 146(d)

	man" [ie, his lawyer], and somehow attributing inappropriateness to the Chief or Mr. McKinney as a result of a third party's innocent comment.	
13	Alleges that there was no work undertaken in advance to determine whether Justin was a proper Trustee candidate, when legal opinions were obtained to determine whether his appointment was appropriate	p 55, para 179(a)
14	Alleges the decision by the Trustees to appoint Justin and Margaret was "motivated through a conflict of interest"	p 57, para 183

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were asked to sign those legal documents and you refused to do so, correct?

A I said that I needed --

Q Correct?

A I said --

MS. OSUALDINI: Which legal documents are you referring to?

MS. CUMMING: The ones attached to the exhibit.

MS. OSUALDINI: The deed of resignation and appointment of trustees?

MS. CUMMING: Yes.

A I said that I needed time, and there were a number of issues. One of them was the way this was constructed was that by signing I was also agreeing to the appointment of Justin Twin which was a problem, and I had concerns about that. I also expressed that I wanted to talk with Justin, and I also wanted to talk with Walter. And you'll also need to know that in the past I had asked for access to legal advice and been denied.

Q MS. CUMMING: Well, I understand from your affidavit sworn on December 15, 2015, according to you, you retained McLennan Ross in the fall of 2013 to assist you with respect to your concerns as a trustee of the trusts and to counsel you.

A Sorry, which paragraph are you referring to?

Q Paragraph 13.

A May I have a moment, please. That's true.
Q So you, according to your affidavit, retained McLennan Ross as your legal counsel in the fall of 2013, and you indicate that was to counsel you on your fiduciary obligations and also assist you in your concerns as trustee of the trusts. Is that correct?
A That is true. And before that, I had asked the trustees twice for access to legal advice. One was by way of a motion that no one seconded and the other was in a meeting. And I was completely hindered and, in effect, obstructed in accessing legal advice unless I went on my own and paid on my own.
Q But in any event, by the time of the January 21, 2014 trustee meeting, according to your own affidavit, you had already retained legal counsel to assist you?
A I was speaking to legal counsel about my duties and about my concerns and trying to sort it out.
Q Okay, thank you.
A This was a new issue that I did not see coming.
Q Now, I understand that there was a further trustee meeting on February 25, 2014.
A February 25, 2014?
Q I'll provide you with a copy of the minutes.
A Okay. So I have read the document.
Q Thank you. In terms of the timeline, you were given the deed of transfer of assets and the deed to limit term of appointment on January 21, 2014, correct?

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

IN THE MATTER OF THE SAWRIDGE BAND INTERVIVOS 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

ACTION NO. 1103 14112 and 1403 04885 **FILE NO. 144194/KAP**

QUESTIONING OF CATHERINE TWINN ON DECEMBER 15, 2016

LIST OF UNDERTAKINGS

U/T NO.	PAGE/LINE	UNDERTAKING & RESPONSE	STATUS
59.	373/6-27 to 374/6-27	Produce any documentation that indicates that Dentons rejected the Proposal, as indicated in Paragraph 16 of Ms. Twinn's Affidavit, and would not engage further in negotiations. **TAKEN UNDER ADVISEMENT** RESPONSE: [Jan-06-2017] Please see the email dated May 12, 2014 between Dentons and McLennan Ross. This document is numbered CT059.001 to CT059.0_____	**Complete**
60.	375/1-27 to 376/1-6	Advise if there was an Agreement signed by the Trustees of the two Sawridge Trusts as of May 8, 2014 and, if so, provide a copy of the same. RESPONSE: [Jan-06-2017] Please be advised that there was not a signed agreement as of May 8, 2014.	**Complete**
61.	376/7-27 to 377/1-9	Advise if a Letter was sent to Justice Thomas indicating that in fact no Agreement had been signed by the Trustees. RESPONSE: [Jan-06-2017] A letter was not sent to Justice Thomas by McLennan Ross advising that there was not a signed agreement because by way of letter dated July 1, 2014 and attached as Exhibit "C" to Ms. Twinn's December 16, 2015 Affidavit, Dentons advised the Court of the same.	**Complete**
62.	383/4-27 to 384/1-14	Review records and produce any other documents setting out Ms. Twinn's concerns regarding the interests of the Impacted Beneficiaries and potential beneficiaries. **TAKEN UNDER ADVISEMENT** RESPONSE: [Jan-06-2017] Ms. Twinn's issues and concerns are addressed in the Pleadings, Briefs and Affidavits in all related matters in Actions 2011, 2014 & 2015 in addition to the documents already produced in these Undertakings and the evidence provided throughout the Questionings.	**Complete**

Form 49
Alberta Rules of Court
Rule 13.19

Clerk's Stamp

JUDICIAL CENTRE OF EDMONTON
FILED
MAY 11 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: Karen A. Platten, Q.C. Telephone: (780) 482-9200 Fax: (780) 482-9102 Email: kplatten@mross.com File No.: 144194

AFFIDAVIT OF CATHERINE TWINN

SWORN ON THE 10 DAY OF MAY, 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

I have done this not to benefit myself, but to discharge my duties as a trustees and to protect those beneficiaries that I believe will be excluded and marginalized as a result of the decisions of the trustees, which I believe are heavily influenced by the SFN and its political objectives. I will receive no personal benefit from the positions I am taking as I am currently a beneficiary of both Trusts and would continue to be even if the definition of "beneficiary" in the 1985 Trust is varied as sought by the majority. Taking these positions has come at a significant personal cost to myself and my family whose future applications for membership in the SFN have likely been jeopardized as a result of me speaking out. In the recent months, I have requested a minor's application form for membership in the SFN for my granddaughter, Aspen Twinn, on two separate occasions from Chief Roland Twinn. He has ignored both of my requests.

42. I have attempted for many years to work with the trustees and the SFN to effect positive change. Despite my efforts, change has not resulted. Attached as **Exhibit "V"** to my Affidavit is summary of telephone call that occurred on December 14, 2009 between David Ward, Tim Youdan, Megan, myself and Mr. Bujold. In this call, Tim Youdan (counsel to the trustees) stated that it was the trustees duty to properly ascertain the beneficiaries of both Trusts. Mr. Bujold acknowledges that I had been trying to obtain trustee cooperation in terms of beneficiary ascertainment, but the trustees "will not listen". This telephone summary was prepared by Mr. Youdan's office and not me.

43. As a trustee I have advocated on several occasions for trustee decisions that were not popular amongst the other trustees, but I believed were solely for the interest of the beneficiaries and critical for the future of the Trusts. In 2003 the Sawridge Group of Companies (the "Companies") (the shares of which are the sole asset of the Trusts) were in financial distress. At the time they were being managed by the SFN under a lucrative contract under which I was later advised by David Ward on December 14, 2009, the "Chief of the Band" and Mike McKinney were paid large sums which should properly be disclosed on a passing of accounts by the Trusts. Mr. Bujold's evidence at questioning that the SFN was simply providing bookkeeping services, is not accurate. As a result of my insistence, management of the Companies was assumed first by an outside management team led by CEO John MacNutt (who I identified and recruited) and then in 2006, by an outside Board of Directors. Many of my efforts to benefit the beneficiaries have come at a great personal cost to me. I faced a great deal of retaliation and hostility for my part in recruiting and implementing outside management and an outside Board of Directors. It is similar to the reaction that I am now experiencing for advocating for independent trustees and as articulated in Mr. Bujold's Affidavit. At the time the outside board was appointed for the Companies, similar arguments were raised that the SFN community did not want "outsiders" managing the Companies. These positions still exist today and are reflected in Mr. Bujold's Affidavit. Following the implementation of the outside CEO and Board, the Companies financially recovered. If it had not been for my insistence and numerous hours expended in implementing this change, the Companies would likely have succumbed to financial pressure and folded.

44. Mr. Bujold gave evidence at his questioning on his Affidavit that I had created tension with the independent Board of Directors of the Companies through my conduct. I deny that this occurred. I enjoy a good working relationship with the Board. Some Directors have indicated their discomfort working with Paul Bujold. The Chair and CEO expressed tension over how Brian Heidecker handled a succession issue wherein an excellent Director, Sid Hanson, was replaced with Mike Percy, Brian Heidecker's connection from the University of Alberta. The Directors are very concerned by the risks to the Companies posed by the other Trustees' management of the 2011 Action in which Paul Bujold and Brian Heidecker are the instructing clients.

45. It is noteworthy that Mr. Bujold does not depose as to the interference of Chief Roland Twinn with the Companies. I am aware that Chief Roland Twinn often interferes with the management of the Companies at an operational level and uses his position as Chief and trustee to create

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

A Yes, the documents speak for themselves.
Q In paragraph 35 of your affidavit, you indicate that you take your ethical obligations as a lawyer seriously.
A Yes.
Q You will recall that in an application before Justice Thomas costs were awarded against you. Do you recall that?
A Are you referring to the December, 2014 application?
Q Yes.
A Yes, I recall that.
Q Have you paid those costs?
A No.
Q Thank you. Now, you've also in paragraph 36 referred to some letters provided by Justice Wachowich. Did Justice Wachowich ever attend any of the trustee meetings?
A No.
Q Did he ever sit in in any Questioning for Discoveries of you?
A No.
Q Was he ever involved in any litigation against you?
A I've known him only as a judge.
Q Now, one of the letters he provided was with respect to your seeking out employment with the government. Is that correct?
A Could be, yes.

Q And it appears that both Peggy Ward and Deana Morton were in attendance.
A Regrets, Deana Morton.
Q Okay. I'm just looking Present, Deana Morton, so it looks like there's an error there, but certainly Peggy Ward was present according to the minutes. Is that correct?
A The document speaks for itself.
MS. CUMMING: Let's mark that as the next exhibit, please.
MS. OSUALDINI: For identification.

EXHIBIT NO. S FOR IDENTIFICATION: TRUSTEE MEETING MINUTES OF FEBRUARY 24, 2005.

Q MS. CUMMING: I'm providing you with some minutes dated Thursday, August 25, 2005.
A Yes.
Q It appears from the minutes that you were in attendance.
A It appears.
Q As was Peggy Ward as trustee-in-training?
A That's what the document says.
Q And that coincides with Mr. Bujold's chart as shown in Exhibit 9?
A August 25th, '05, it shows a payment of 500.
Q On that exhibit, it lists -- I just counted them -- 28 meetings. If the document is accurate that Margaret was present for all those meetings, would you agree

with me that you had ample opportunity to meet
with Margaret Ward and observe her conduct at
these meetings?

A Ample opportunity to meet her and observe her conduct
at these meetings.

Q Well, let's even just break it down to you had ample
opportunity to meet her.

A Not really.

Q So you never took it upon yourself as a trustee to get
to know a trustee-in-training?

A I honestly do not know Peggy Ward, and perhaps you and
I have a different definition of know.

Q Well, you certainly attended a number of trustee
meetings in which Peggy Ward was a trustee-in-training,
correct?

A Yes. According to the document, yes.

Q And one of the purposes of the trustee-in-training
program was to expose a potential future trustee to the
trust meetings and what was required of a trustee. Is
that correct?

A That was one of the purposes.

Q Now, in terms of the --

A There were other purposes but that was one of them.

Q Of course. Now, in terms of the trustee meeting on
August 25, 2005, I'd like you to turn to --

A Sorry, August 25?

Q 2005. The second page, item 3, Decision-making

Criteria, and that item indicates, Majority decision-making will be the criteria. And at the bottom, it says, Catherine, majority of trustees abide by trust document. Do you recall at that meeting that you agreed to abide by the trust documents with respect to the decision-making criteria?
A And there was also a consensus decision-making process document to build consensus.
Q All right, but you would agree with me that the minutes indicate that for you in terms of decision-making criteria, you had indicated, A majority of trustees and to abide by the trust document. Is that correct?
A And the other documents that we had set into place including the consensus document.
Q And you had previously agreed with me that both trust deeds allowed for decisions to be made by a majority of the trustees?
A Yes.
MS. CUMMING: If we could mark that as the next exhibit, please
MS. OSUALDINI: T.

EXHIBIT NO. T FOR IDENTIFICATION: TRUSTEE MEETING MINUTES OF AUGUST 25, 2005.

Q MS. CUMMING: Were you aware that Margaret Ward was a beneficiary of both the '85 and '86 Trusts?
A Yes, I believed her to be a beneficiary of both trusts.
Q Was she also living on the Reserve?

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

ACTION NO. 1103 14112 and 1403 04885 **FILE NO. 144194/KAP**

QUESTIONING ON AFFIDAVIT OF CATHERINE MAY TWINN ON SEPTEMBER 9, 2016

LIST OF UNDERTAKINGS

U/T NO.	PAGE/LINE	UNDERTAKING & RESPONSE	STATUS
4.	57/7-27 to 59/1-27 Revised at Page 66/2	If Ms. Twinn is taking the position that the Minutes are inaccurate in terms of the areas that have been discussed today in the Minutes, advise of the inaccuracy and produce any documentation she may have suggesting that those Minutes are inaccurate. RESPONSE: [Jan-06-2017] Paul Bujold has the raw notes to the Minutes. Catherine Twinn has requested these raw notes and has been denied. One example of suggestions is the Amendments to the Minutes of January 14, 2014. Also attached are the following documents: 1. Copy of Ms. Twinn's Notes from the Meeting held on November 17, 2009. 2. Email to Catherine Twinn from Brian Heidecker, dated March 17, 2014, with attached Amendments to Minutes of January 17, 2014; 3. Trustee Meeting Minutes dated July 20, 2010; 4. C. Twinn's Notes for the Trustee Meeting held on February 22, 2010 5. Email from Paul Bujold to Catherine Twinn, dated January 28, 2014 6. Email from Paul Bujold to Catherine Twinn, dated March 12, 2015 7. Email from Catherine Twinn to Karen Platten, dated July 25, 2014 These documents are numbered CT004.001 to CT004.043. If any further documents are found, they will be produced. Ms. Twinn has requested the raw notes of Paul Bujold and this has been refused.	**Complete**
5.	57/7-27 to 66/1-10	Review records to confirm whether or not the Minutes presented at this Questioning were from the various Trustee Meetings. RESPONSE: [Jan-06-2017] Catherine Twinn was not the person taking the Minutes at the Meeting, therefore she cannot confirm that the these are the actual Minutes of the Meetings. Catherine Twinn confirms that these are the Minutes that she received.	**Complete**

A It appears from this document, but I'd have to again check my notes. It says that I appeared -- I participated by conference telephone, so I'll have to go back and look at that.
Q If you would do that, please, and let me know if you feel that that wasn't an accurate motion that was seconded by you.

UNDERTAKING NO. 7: ADVISE IF CATHERINE TWINN AGREES THAT THE MOTION MADE ON PAGE 5 OF THE MARCH 16, 2011 TRUSTEE MEETING MINUTES IS ACCURATE.

A And also the legal opinion which I'm sure we had by then of Tim Youdan and Megan about the problems with both trusts in terms of the definitions of beneficiary.
MS. CUMMING: That will be Exhibit 'I'.

EXHIBIT NO. I FOR IDENTIFICATION: MARCH 15, 2011 TRUSTEE MEETING MINUTES.

Q MS. CUMMING: I'm now showing you a resolution, Sawridge Band Inter Vivos Settlement. It's indicating that it's signed the 26th day of April, A.D. 2011. Does your signature appear on that document?
A Yes, it does.
Q By signing that document, you agreed to that resolution?
MS. OSUALDINI: Just give us one second to read it.
A Yeah, thank you.
Q MS. CUMMING: By signing that document, you agreed to the resolution?

A Yes, I would have agreed to that resolution. That was to be the first step in this process of whether or not the definition is ...
Q Uncertain.
A Well, I'm not sure about the word uncertain.
Q Well, that's the word that's in the resolution.
A But that's the word that's in the document. It was really is it invalidated. And because of the amendments and the case law which we had received an opinion from Tim Youdan and Megan McCleese on the definition of beneficiaries. And it dealt with -- if my memory is right, it actually referred to both trusts. But definitely we were focusing on the '85 definition.
I see that the word is uncertain -- determined to be uncertain but what's -- what I understood was are these rules valid or not.
Q What rules are you referring to?
A The rules that are incorporated by the 1985 definition.
Q Are you talking about the rules set out in the trust deeds?
A No, the rules -- the trust deed -- may I have the trust deed, the '85 Trust Deed? So I'm looking at Sawridge Band Inter Vivos Settlement. I'm going to paragraph 2. It says, Beneficiaries at any particular time shall mean all persons who at that time qualify, qualify as members of the Sawridge Indian Band pursuant to the

provisions of the Indian Act as those existed April 15th, 1982.

And then it goes on to say, 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, qualify for membership of the Sawridge Indian Band pursuant to the said provisions as such provisions existed on the 15th day of April, 1982.

And then it goes on, And for greater certainty, no persons who would not qualify as members of the Sawridge Indian Band pursuant to those 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 for all or any other purposes by virtue of the amendments to the Indian Act 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 under the Indian Act as amended from 1970, 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 the settlement.

So how I understood this was that you look at the Act that was in force, the Indian Act, which was 1970, you look at any case law, and you take the categories that are set out in the Indian Act for entitlement.

And my understanding is those were found in Section 11. Section 12 set out the disentitlement categories. You take each of those categories and then you ensure that you understand what case law may have modified that category.

For example, there was a category, I believe it was Section 11(1)(c) that said male person of a male Indian is entitled to be registered. But that had also been modified by the Supreme Court of Canada in a case called Martin versus Chapman that said the Registrar was wrong to have interpreted that category to mean legitimate child. It included illegitimate male child of a male Indian.

So, for example, there's a man by the name of William McDonald who's well known to the Sawridge trustees, and he falls under that category. He was born before 1985. He has an absolute entitlement to be on the Band list, but he is not on the Sawridge Band list.

Q Sorry, why do you feel he has an absolute entitlement?

A His father is Chester Twin, and he in my opinion fell into that category, Section 11(1)(c). But until you carve out all of the categories with any case law modifiers and then apply them to each individual facts, you don't really know who qualifies under those rules.

My understanding about William McDonald is that two of the trustees provided, and I don't know this but I've been told this, evidence in support of his paternity that he was the son of Chester. And he has children and his children are not on the Sawridge Band list, nor have they been -- I believe they're on the spreadsheet that Paul Bujold's created in response to what I believe was his January, 2010 letter where there was over 130-some names.

And I know that these people like him, like Shelby Twinn, do not -- have not known what's going on here and that their status, their entitlement, their current entitlement through this process, particularly the offer to settle that was filed by Doris in June of 2015, would exclude them as beneficiaries.

Q I just want to go back to my initial question, but thank you for your explanation. We were talking about what you considered to be the rules, and you referred to paragraph 2(a) of the 1986 Trust.

A I read the inter vivos.

Q Sorry, '85 Trust. I'm sorry.
A So what I tried to explain is how I understood the categories. So you go into the Indian Act and that's where you have your certainty in terms of the categories. And those categories are certain. I mean, for example, Roland Twinn's current status derives from those rules. So does Peggy Ward and so does mine.
Q Sure. I just want to make sure I understand what you mean -- what you're talking about when you say rules, okay?
A Is it clear what I mean?
Q It's clear that you are referring to paragraph 2(a) of the 1985 Trust.
A Which incorporates the Indian Act.
Q Those rules?
A Yeah.

(BRIEF ADJOURNMENT)

MS. CUMMING: If we can mark the April 26, 2011 resolution. I'm presuming I can mark that as a regular exhibit as opposed to an exhibit for identification?
MS. OSUALDINI: I think Catherine identified her signature, but can you identify the resolution as being an accurate copy?
A It appears to be unless I find otherwise.
MS. OSUALDINI: I feel more comfortable with going just for identification since she's not certain.
MS. CUMMING: That's fine. Exhibit 'J', then.

EXHIBIT NO. J FOR IDENTIFICATION: APRIL 26, 2011 RESOLUTION.

Q MS. CUMMING: So Ms. Twinn, we've gone through a number of minutes and resolutions dealing with steps taken by the trustees to attempt to determine potential beneficiaries of the 1985 Trust. Is that correct?
A Yes, the documents are directing towards that, yeah.
Q And finally culminating in a court application for advice and direction that Justice Thomas is presently seized with, correct?
A In the 2011, yes.
Q So if we go back to paragraph 6 of your September affidavit, the second sentence, you had indicated that, There has not been an independent legal determination of the beneficiaries of the 1985 Trust or a process put into place to make this determination. But isn't it correct that steps have been taken by the trustees to move in that direction? You haven't been sitting idle, correct?
A We have been sitting idle for quite some time. When I look at the April 26th, 2011 resolution determined to be uncertain because it may be invalidated by the '85 amendments, the language "determined to be uncertain", I recall having discussion at the trustee table with Roland Twinn who when this issue came up, I would be saying we have to determine who these beneficiaries are under those rules as they are now. And the answer back

Heidecker, they're with the support of the majority of the trustees.
Q So you've never said that, then?
A I have no recollection of uttering such threats that I would be incapable of carrying out. Why would I do that?
Q Based upon your affidavit, you would like to see all elected officials removed as trustees. Is that correct?
A I would like to see a healthy, functional, competent Board of Trustees. I'd like to see independence amongst all the trustees so that they can fearlessly asked difficult questions, they can forcefully distance themselves from personal and political concerns, and they can do their job as trustees to act in the best interests of beneficiaries who are individuals.
Q Do you wish to remove Margaret Ward as a trustee?
A I am not happy with how she was selected. I don't think it was done in a good way.
Q So do you wish to have Peggy Ward removed as a trustee?
A I would have to think about that. I wonder if -- I'd have to think about that.
Q So you think about that and provide me with your answer, please.
MS. OSUALDINI: We'll take that under advisement.

UNDERTAKING NO. 49: ADVISE IF MS. TWINN WOULD LIKE TO HAVE PEGGY WARD REMOVED AS A TRUSTEE -

CATHERINE TWINN, as Trustee for the 1985 Trust and the 1986 Trust v. ROLAND TWINN, BERTHA L'HIRONDELLE, EVERETT JUSTIN TWIN and MARGARET WARD, as Trustees for the 1985 Trust and 1986 Trust ACTION NO. 1103 14112 and 1403 04885 FILE NO. 144194/KAP QUESTIONING OF CATHERINE TWINN ON NOVEMBER 9 & 10, 2016 LIST OF UNDERTAKINGS			
U/T NO.	**PAGE/LINE**	**UNDERTAKING & RESPONSE**	**STATUS**
49.	298/7-27 to 299/1	Advise if Catherine Twinn would like to have Peggy Ward removed as a Trustee. **TAKEN UNDER ADVISEMENT** RESPONSE: [Jan-06-2017] This is not about "liking to have Peggy Ward removed as a Trustee". It's about ensuring there is a proper process in place to appoint a Trustee with agreed upon appropriate skills, qualities and attributes that together with the other Trustees, adds, enhances, balances and strengthens the power and effectiveness of the group. If the Trust assets are to grow, this is required. For a long time, the Trustee group has been weak and dysfunctional, which is one of the reasons why Ms. Twinn worked so hard to many years to install an outside, independent Board of Directors and have the Band's Management Contract over the Corporate assets terminated Ms. Twinn would like to see a healthy, functional, competent Board of Trustees. Ms. Twinn would like to see independence amongst all the Trustees who fearlessly ask the difficult questions, forcefully distance themselves from personal and political concerns and do their job as Trustees, to act in the best interests of all beneficiaries including those under the 1985 Trust who are not band members. The process of Peggy Ward's appointment was improper and in contravention of the very principles we agreed would govern and measure our decision making.	**Complete**

6

Exhibit: E
Date: March 9, 2017
Witness: PAUL BUJOLD
Katie McLeod, Court Reporter

NM

STATEMENT OF LILLY POTSKIN

I, Lilly Potskin, of the Town of Smith, in the Province of Alberta, Say That:

1. I am the mother of Gina Donald (hereinafter referred to as Gina) born September 17, 1979 and her brothers Jonathon and Brent Potskin. They share the same father, Lyle Donald, who is now a registered Indian.

2. At the time I married Lyle Donald, he was not registered as an Indian. When we married May 5, 1979, I was 5 months pregnant with Gina.

3. After Gina's birth, in October, 1979, I was enfranchised by the Department of Indian and Northern Affairs ("INAC") for marriage to a non-Indian and my name was deleted from the Sawridge Band List maintained by INAC.

4. Gina was not listed on my enfranchisement papers. Attached as **Exhibit "A"** are copies of my enfranchisement papers.

5. From the time of her birth, I tried to have Gina registered as an Indian and Sawridge Band Member.

6. After the 1985 amendments to the Indian Act ("Bill C-31") I was entitled to be registered as an Indian and Sawridge Band Member. However the Sawridge Band refused to recognize my entitlement. Government lawyers applied to have my name and the names of others added to the Band List. On March 27, 2003 the Court ordered our names added to the Sawridge Band List without having to apply to the Band.

7. When Gina became an adult, she applied to the Band for membership. Her three applications for membership, hand delivered by me, were given to Donna Dahlgren, then Band secretary.

8. The third application was submitted in 2009. To date, no decision has been made and Gina is not on the Band list maintained by the Band.

9. Roland Twinn is the Chief of the Band, a Sawridge Trustee and up until Band Committees were dissolved March 31, 2016, the Chair of the Membership Committee that recommends or dismisses applicants to the Chief and Council and controls the application process. He holds numerous other roles within the Band system including Director and CEO roles and has signing authority. The Band secretary and Membership Registrar, Fern Homa, reports to Roland Twinn as does Mike McKinney, in house legal counsel for the Band.

10. Roland's two sons, Roy and Alexander with a non-Indian woman, first applied to the Band for membership in 2013 and within months their names were on the Band Membership List. Meanwhile, Gina's 3rd application for membership has been sitting since 2009 without decision.

11. On December 14, 2015 Gina emailed Mike McKinney attaching a letter dated December 6, 2015, which are attached as **Exhibit "B"**.

This is Exhibit " L " referred to in the Affidavit of Catherine Twinn
Sworn before me this 10 day of May A.D. 20 17
Crista C. Os
A Notary Public, A Commissioner for Oaths in and for the Province of Alberta

Crista C. Osualdini
a Notary Public and Commissioner for Oaths in and for the Province of Alberta
My Appointment expires at the Pleasure of the Lieutenant Governor

12. Gina did not receive a response. She then emailed the Band February 5, 2016. A copy of her email is attached as **Exhibit "C"**.

13. Roland Twinn replied by letter dated February 17, 2016, a copy is attached as **Exhibit "D"**.

14. I was stunned by the February 17, 2016 letter and replied with my letter dated and hand delivered March 4, 2016 to the Band office, a copy of which is attached as **Exhibit "E"**.

15. Entering the Band office, I saw Winona Twin, a former Band Councilor speaking with Roland Twinn and felt tension between them. I informed Roland I had a letter for him informing him of the contents of my letter. Gina has been waiting for more than 2 decades for the Band to make a decision on her applications. Winona Twin commented she too felt Roland Twinn had attacked her integrity. She confirmed she had seen Gina's file and applications while on Council and vouched that Gina's applications have been delayed over two decades by the Band's failure to make a decision.

16. After the March 4, 2016 exchange, Roland Twinn wrote me a letter admonishing me for fighting for my daughter, who is an adult and can fight for herself.

17. I'm informed by Gina and do verily believe the Chief Council met the week of May 9th then Gina received a call from Fern Homa to meet June 13, 2016 with the Chief and Council about her 3rd membership application delayed since 2009.

18. I am prepared to swear this as evidence for the Court and for no improper purpose.

WITNESSED BEFORE ME)
At the hamlet of Smith,)
In the Province of Alberta,)
The 26 day of May, 2016)

Lilly Potskin

Samuel Tw

Witness

Form 49
Alberta Rules of Court
Rule 13.19

Clerk's Stamp
This is Exhibit " N " referred to in the Affidavit of Catherine Twinn
Sworn before me this 10 day of May A.D., 20 17
A Notary Public, A Commissioner for Oaths in and for the Province of Alberta
Crista C. Osualdini
a Notary Public and Commissioner for Oaths in and for the Province of Alberta
My Appointment expires at the Pleasure of the Lieutenant Governor

COURT FILE NO.	1403 04885
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT, APRIL 15, 1985 (the "1985 Trust") and THE SAWRIDGE TRUST, 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**

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: Karen A. Platten, Q.C. Telephone: (780) 482-9200 Fax: (780) 482-9102 Email: kplatten@mross.com File No.: 281946

AFFIDAVIT OF ALFRED POTSKIN

SWORN ON THE 26th DAY OF NOVEMBER, 2014

I, Alfred Potskin, of the Town of Slave Lake, in the Province of Alberta, SWEAR AND SAY THAT:

1. I am an individual who is resident in the Town of Slave Lake in the Province of Alberta and, as such, have a personal knowledge of the matters hereinafter deposed to, save where stated to be based upon information and belief, in which case I verily believe the same to be true.

2. I was born on April 26, 1946.

3. I grew up on the Sawridge First Nation Reserve and was a member of the Sawridge Band through my father's status as a Sawridge Band member. My father was a member of the Sawridge Band until he applied to Indian Affairs to enfranchise in or around 1954 due to the social, legal and other circumstances affecting status Indians at that time. As a result of my father's decision to enfranchise, I lost my status as a Sawridge Band member.

4. As a child, my family moved around between the Sawridge First Nation Reserve and another First Nation Reserve in the Lesser Slave Lake area. I often lived with my Uncle Albert and Jean

Potskin on the Sawridge Indian Reserve, I would sometimes live with my parents and sometimes on my own.

5. From approximately 1990 to 1999, with the permission of late Chief Walter Twinn, I lived in my trailer on the Sawridge First Nation Reserve near my Aunt and Uncle who are Sawridge Band members.

6. In or around 1998 or 1999, about two years after the death of Chief Walter Twinn, I was advised through Mike McKinney, legal counsel for the Sawridge Band Council, that I had to move my trailer off the reserve and leave the Sawridge First Nation Reserve because I was not a Band member.

7. I applied to Sawridge Band Council for membership in the Sawridge Band on or around 2011. My cousin Lilly Potskin dropped off my Band membership application to the Band office. I was never called in for an interview or asked to answer any questions or concerns.

8. I received a letter dated December 10, 2013 from Michael McKinney, Executive Director of the Sawridge First Nation, advising me that my application for membership in the Sawridge First Nation had been declined. Attached as **Exhibit "A"** to my Affidavit is the December 10, 2013 correspondence from Mr. McKinney.

9. 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 26 day of November, 2014

Crista C. Osualdini

A Commissioner for Oaths in and
for the Province of Alberta

Alfred Potskin
Alfred Potskin

Crista C. Osualdini
a Notary Public and Commissioner for Oaths
in and for the Province of Alberta
My Appointment expires at the Pleasure
of the Lieutenant Governor

SWORN STATEMENT OF LARRY CARDINAL

I, Larry Cardinal, retiree, and adoptive father of Kieran Cardinal, of the Hamlet of Calling Lake, in the Province of Alberta, do solemnly swear that:

Family Background

1. I am the adoptive father of Kieran Trevor Cardinal, (hereinafter referred to as Kieran) born March 20, 1985.

2. Sandy Cardinal nee Schroder (hereinafter referred to as Sandy) is Kieran's adoptive mother.

3. Kieran was the biological son of Ardell Twinn (hereinafter referred to as Ardell) and Pamela Masuda (hereinafter referred to as Pamela) and given up for adoption at birth.

4. Pamela was 15 years old when she became pregnant and 16 years when she gave birth to Kieran.

5. Pamela lived with Sandy and myself for the last 6 months of her pregnancy. Sandy is Pamela's maternal Aunt and sister to Pamela's mother.

6. Pamela thought of giving up her baby to Children Services but asked us to adopt her baby which we were honored to do and did. Kieran is my only and much loved child.

7. Ardell abandoned Pamela shortly after she became pregnant and thereafter engaged in avoidance and denial patterns. He was enabled by leaders of the Sawridge Band (hereinafter referred to as the "Band") that he was the father of Kieran and his lineage entitled Kieran to be on the Band List.

Sawridge Band Membership

8. At the time of Kieran's birth the 1970 Indian Act rules were in force and had not yet been amended by Bill C-31, enacted on or about June 27, 1985.

9. Kieran as the illegitimate child of a male Indian should have been on the Band list at birth.

10. Kieran's biological mother Pamela is now a registered Indian. Both of Kieran's biological parents are registered Indians and Ardell Twinn is a member of the Band.

11. On July 4, 1985 the Band was given notice by the Minister of then Indian Affairs (hereinafter referred to as "INAC") that the Registrar was transferring the Band List to the Band, thereafter administratively responsible for maintaining the List.

12. I am aware of others not on the Band List who the Court ordered be put on the Band List without having to apply to the Band. Sandy and I talked about this wondering why Kieran had to apply.

13. In December, 1985 Kieran's adoption was finalized.

14. On or about August 16, 1988 I applied to Indian affairs for Kieran's treaty status. I received a letter from INAC requesting Ardell's declaration he was the biological father of Kieran.

This is Exhibit " O " referred to in the Affidavit of
Catherine Twinn
Sworn before me this 10 day
of May A.D., 20 17
Crista C. Os
A Notary Public & Commissioner for Oaths in and for the Province of Alberta

Crista C. Osualdini
a Notary Public and Commissioner for Oaths
in and for the Province of Alberta
My Appointment expires at the Pleasure
of the Lieutenant Governor

22 Years of Avoidance, Denial, Uncertainty

15. From 1988-1999 I tried many different ways to get the declaration from Ardell, all of which failed. The avoidance and denial patterns included:

    a. Ardell being very hard to contact.

    b. Ardell and the Band not returning calls.

    c. When I was able to reach Ardell he claimed the Band did not want him to sign the declaration.

    d. When I contacted the Band, their story was that the Declaration had nothing to do with them and it was Ardell's decision.

16. In June 2000 I hired a lawyer from a law firm, McBean Becker Cochard, to seek a Court order to compel paternity testing.

17. On or about February 15, 2001 the paternity tests were presented to the Court who declared Ardell the biological father.

18. On March 16, 2001 Kieran was finally registered as a Treaty Indian under 6(1)(a) of the Indian Act.

19. In April 2001 I attended the Band office requesting a band membership application form that was some 43 pages long.

20. In May 2001 Sandy had a telephone conversation with then Chief Bertha L'Hirondelle, a Twinn family member, to discuss the membership application form and process. Sandy kept detailed notes which I've reviewed. One topic discussed was the inappropriateness of many questions which requires essays. Kieran was a minor at this time. Bertha L'Hirondelle indicated that the Chief and Council were re-evaluating the application for minors. Bertha L'Hirondelle questioned Kieran's right to membership as he did not know the Twinn family and denied knowledge of occasions when Kieran was in the community. Bertha L'Hirondelle also suggested Kieran did not have a right to be on the Band List, as the Band decides, and we should talk to someone who can inform us of this. Bertha L'Hirondelle refused to offer her support for Kieran's application. Notes of that conversation were documented and retained.

21. In October 24, 2001 I called then Chief Bertha L'Hirondelle about the membership application. I was told we did not need to include the requested passport, birth/death certificates as Chief and Council were familiar with all the parties concerned. That conversation was documented.

22. In February 2003 I hand delivered the completed application and reference letters under a cover letter dated February 24, 2003 signed by Kieran to the Band office. I asked the Band secretary to bring this to Ardell's attention, a Council member, and that it go before the next Council meeting. Attached as **Exhibit A** is Kieran's February 24, 2003 letter to the Band without the enclosures.

23. In July 2003, I spoke to Roland Twinn, now Chief of the Band whose Aunt, Bertha L'Hirondelle, remained on Council, about the status of Kieran's application. Roland Twinn claimed the Band had no knowledge of the application and Ardell did not bring it to Council. I travelled to Slave Lake from Fort McMurray and hand delivered another copy to Roland Twinn.

24. On or about December 10, 2004 Kieran was now an adult and wrote the Band asking for a copy of the Membership Rules and authorizing me to communicate and receive information on his behalf.

25. From July 2003 to May 2006 I and Kieran regularly made inquiries of Ardell, Bertha L'Hirondelle, Roland Twinn and in house lawyer, Mike McKinney about the status of Kieran's application. Again they were virtually impossible to get a hold of. When I did make contact the answer was the same - the Band is busy with other matters and will get to it eventually.

26. In May 2005 I contacted Catherine Twinn out of frustration. She undertook to bring Kieran's application to the attention of Mike McKinney and the Chief and Council and asked a series of questions as to who I had contacted.

27. On or about June 2005 I contacted Catherine Twinn again letting her know I contacted Mike McKinney about a meeting with Kieran and the Chief and Council.

28. From June 2005 forward it was the same pattern – repeated calls and/or communications to the Band with no response.

29. March to April 2006 Kieran and I called the Band many times to check on progress. We always got the same answer – the Chief, Council and Mike McKinney are in meetings or out. We left many messages but not one of them replied. In particular, Kieran called Chief Roland Twinn, his uncle, who did not reply.

30. In April 2006 I again drove to Slave Lake and attended at the Band office. I was told Bertha L'Hirondelle and Roland Twinn were out of town. I ran into Paul Twinn, Ardell's brother, who was on his way to see Ardell. I gave Paul Twinn my card with my cell phone number and asked him to have Ardell call me. Ardell never called me.

31. Kieran had graduated from high school and was interested in taking a management degree and music courses at Mount Royal College, being very talented in music. He was living on his own and discovering how tough it is to be on his own, and simultaneously attend school. I wanted to talk to the Band about what support there might be for Kieran to go to school. I was helping Kieran financially but my capacity to do so was very limited.

32. At this point we were totally frustrated and ready to again take legal action. Four years had passed since the application was submitted. I had incurred significant legal costs in relation to Kieran's paternity and application process. I advised Roland Twinn I did not want to take legal action and was told to "*go ahead, it's just another law suit*".

33. Ardell made no effort to build a relationship with Kieran and had only seen him once, shutting Kieran out, as had influential members of Ardell's family. Kieran tried to communicate with Ardell but gave up. Kieran had lived in Slave Lake for 2 years and no one from the Twinn family talked to him when they saw him.

34. In May, 2006 I again contacted Catherine Twinn apprehensive about involving her but with nowhere else to turn. I was aware Catherine Twinn had invited Kieran to dinner and ordered by Ardell, who had been a Band Councilor, to stay away from Kieran. I explained to her that the Band officials were ignoring us, that we took a lot of time to fill out the 43 page Questionnaire and the Band should have the courtesy of letting Kieran know where he stands. Kieran, Sandy and I fully believed Kieran was entitled to band membership, did not understand why he had to apply and why the process was so difficult. I was ready to go to Court.

35. I was informed by Catherine Twinn she again raised the issue of Kieran's membership with the Band and its advisors.

36. In mid-August, 2006 Kieran got a call from the Band office to set up an interview September 27, 2006. Kieran was now interested in taking an Instrumentation Technologist Program at SAIT.

37. On about September 27, 2006 Kieran was finally granted an interview of about 45 minutes with Mike McKinney, Chief Roland Twinn, Councilor Bertha L'Hirdondelle and a male person. Kieran immediately reported to me that he was not impressed, felt it was a waste of his time driving 6 hours one way and taking time off work and was upset at what had occurred:

- Roland Twinn and Mike McKinney did all the talking, starting off by asking Kieran what he wanted, what he was after, if it was a cheque he wanted;
- Kieran was also asked many questions about me;
- Kieran would have to come back for a 2nd interview with all the band members.

I immediately called Mike McKinney for clarification on questions asked about me, what happens next and a time line. As usual, I never got a reply back but I kept calling leaving messages.

38. In about the second week of January, 2007 Kieran had his second meeting, again immediately reporting to me about what happened as follows:

- Present from the Band was Ardell, his sister Arlene Twinn, Elder Walter Felix Twin, and two other people, including possibly Paul Twinn;
- With the exception of Elder Walter Felix Twinn, Kieran was asked many questions by some of those present. The line of questioning was hurtful and upsetting, rooted in suspicion that he just wanted membership for financial gain;
- He expressed his anger at how he felt he was being treated without respect or open mindedness, as though he was not a human being and not family in any way;
- The absence of relationship they blamed on Sandy's family who allegedly limited Kieran's contact with them.

39. Shortly after this 2nd interview, in mid to late January, 2007 Kieran was asked by the Band for a copy of his birth certificate which he provided.

40. On April 25, 2007 Kieran received a call from Chief Roland Twinn that his application for membership had been accepted.

41. If we had not persisted, spending time, money and resources including hiring lawyers, Kieran's exclusion from birth to then would undoubtedly have continued. It took **22** years of dogged persistence to have his name added to the Band list.

Aftermath of Band Membership and Healing the Trauma

42. By the spring of 2007, with Kieran living in Calgary, we decided to sell our home in Fort McMurray. I received a call from David Midbo asking for help to secure an apprenticeship in Fort McMurray and I helped him. David Midbo is the son of Clara Midbo, Bertha L'Hirondelle's sister and Roland Twinn's Aunt. Clara Midbo and her sister Frieda Draney applied for Band Membership in February 2001 and by April, 2002 were admitted into membership. Their five children applied for band membership in March, 2003 and were admitted into band membership by April, 2003.

43. While Kieran was working as an instrument technician in Calgary, he was taking a fourth class power engineering course on his own and asked the Band for tuition and books fees of $700. He was denied this assistance.

44. In March, 2010 Kieran was hit with a large tax bill for a web based company he ran selling and producing music. This ate up all his savings for school, delaying an April start until at least October, 2010. Kieran was devastated. He now considered enfranchising from the Band like former members, including his biological paternal grandmother, Terry Auger. It was well known that the Band's per capita payouts to then enfranchising Band members exceeded $600,000 in today's dollars.

45. I urged him to carefully consider such a drastic step. However Kieran had lost confidence and trust in the Band's leaders who also ran the Trusts and influenced the Lesser Slave Lake Indian Regional Council. To him, they were a source of trauma he needed to remove from his life. They had unreasonably delayed adding his name to the Band List by engaging in administrative exclusion and discrimination. They had demonstrated they had no interest in supporting, knowing, understanding, including and relating to him.

46. To date, there is no relationship between Kieran and Ardell or members of Ardell's family. Kieran deleted Ardell from his Facebook, as have I.

47. By 2012 Kieran was still considering surrendering his band membership. The Band introduced a Repeal of the Per Capita Pay Out on the Surrender of Membership Act, in October, 2013 which was passed in early 2014.

48. I could not understand – and still don't – why Kieran was not simply put on the Band List by the Band leaders' whose actions demonstrated they were incapable of running the Band's membership affairs. I lost confidence and trust in the Band's handling of membership and feel their misconduct limits whatever right they claim to decide membership. There is no certainty or fairness for applicants like Kieran including those with a clear right to be added to the Band List.

49. Kieran has abandonment and trauma issues from the maltreatment he experienced, before and after birth, including denial and rejection by his biological father and other Twinn family members, because his biological mother was too young to keep him and our traumatizing experience having his name included on the Band list which should have been from birth.

50. He has anxiety and anger as a result of this history which is slowly healing. He is determinedly making his own way forward as an adult. He is gainfully employed, in a committed and loving relationship, has many hobbies, works out regularly, takes care of his health and has assumed home ownership. He receives no help from the Band and very little from the Trusts although he is a beneficiary of both Trusts. He was a beneficiary of the 1985 Trust before his name was added to the Band List but never received benefits from that Trust.

51. I swear this as evidence for the Court and for no improper purpose.

SWORN BEFORE ME at the Hamlet of Calling Lake, in the Province of Alberta the 1st day of April, 2015	)))))	
Clarence Cardinal	))	LARRY CARDINAL
A Commissioner for Oaths in and for the Province of Alberta	)	

Clarence Cardinal
A Commissioner for Oaths
in and for the Province of Alberta
M.D. of Opportunity No. 17
Councillor
Expiry Date: October 2017
Signature:

SWORN STATEMENT OF SHELBY TWINN

I, Shelby Twinn, biological daughter of Paul Twinn, of the City of Edmonton, in the Province of Alberta, do solemnly swear that:

Family Background

1. I am the biological daughter of Paul Twinn, and my paternal grandfather was the late Walter Patrick Twinn, Settlor 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 former Chief of the Sawridge First Nation (hereinafter called the "Band") and, as such, I have personal knowledge of the matters hereinafter deposed to, save where stated to be based upon information and belief.

2. My mother is Kristal, who was married to Paul Twinn and lived on the Sawridge Indian Reserve until I was about 5 years old. She left never to return, except for the funeral of my grandfather on November 4, 1997, taking me and my younger sister, Kaitlin.

3. I was very young when she left but know something about her situation, experience and reasons, including how she had been treated. Her situation was very painful and she chooses not to recall it.

4. My mother avoided all contact with the Twin(n) family and the Band since we moved to Prince George when I was 6 years old.

5. My mother remarried and that man is my father who raised and unconditionally loves and embraces me and my sister Kaitlin, also the biological daughter of Paul Twinn.

6. I have no contact with Paul Twinn who made no effort of any kind to have a relationship with me and my sister Kaitlin. As we were growing up, he did not support us in any way including financially, nor provide support of any kind to my mother. In fact, my mother had to resolve a number of liabilities imposed on her by his conduct such as a motor vehicle accident that saw her sued as a co-defendant.

Sawridge Trusts

7. I first learned of my beneficiary status under the 1985 Trust during a conversation with Catherine Twinn September 27, 2013.

8. Paul Bujold, who I am informed by Catherine Twinn is the Trust Administrator, never contacted me or my mother to explain the application process, my beneficiary status under the 1985 Trust or the Court application process to change the definition of beneficiary of the 1985 Trust to band membership under the 1986 Trust. I have no resources to consult a lawyer or access the Court to ensure my beneficiary status is not compromised.

9. I first learned of my beneficiary status under the beneficiary definition in the 1985 Trust where you do not have to be a Band Member but descend from a male Indian who is a beneficiary. Specifically, you do not need to be a band member as required under the 1986 Trust.

Band Membership

10. Sometime after I moved to Alberta from BC in 2013, I communicated via Facebook with Arlene Twinn, sister to Paul Twinn, who asked me to complete a Membership Application form and indicated I would be admitted into band membership if I applied.

11. I have reservations about applying for band membership and have not acted on Arlene's invitation.

12. I wish to have beneficiary status under the 1985 Trust but not band membership (which gives you beneficiary status under the 1986 Trust). I have educational goals and sponsorship from the 1985 Trust would help greatly.

13. I understand benefits under either Trust are the same and there is no doubling of benefits being a Beneficiary of both Trusts.

14. My reservations about applying for band membership include:

    a. A need to maintain healthy and clear boundaries for my wellbeing, given the history of the family, the addictions, unstable inter-personal relations, factions and personal animosities and dislikes;

    b. My unwillingness to be admitted while others of equal entitlement are denied such as Deborah Serafinchon, blood aunt by birth;

    c. Not alarming my mother and father whose support and love have been unconditional and unwavering;

    d. The need to carefully screen what I chose to bring into my life;

    e. It would be premature to apply until and unless I know the situation fully, have my eyes wide open and have established loving, trustful and safe relationships with members which at this point, does not seem probable;

    f. My lack of commitment to being a participating Band member given my life, interests, relationships and priorities are elsewhere;

15. My sister Kaitlin is three years younger than me. I was born in 1992. Caitlin was born in 1995.

16. I know my sister Kaitlin very well and love her deeply. I would not want her to have to apply for band membership to qualify as a beneficiary of the Trust. She loves to read, enjoys her own company and is more solitary than outgoing and extroverted. She would not want to go through a band membership application process. I know she would not feel comfortable and would never apply.

No Change to 1985 Trust definition of Beneficiaries

17. I believe that like me, Kaitlin has goals and aspirations. Having beneficiary status and access to benefits such as Educational funding would be of great benefit and value.

18. I firmly believe my paternal grandfather, the late Walter Patrick Twinn, who settled these Trusts intended to include us as beneficiaries regardless of our connection to the Band, lack thereof, or band membership status. I oppose changing the rules that define beneficiaries of the 1985 Trust to be the same as the 1986 Trust, namely Band membership.

19. The Band has only 44 members suggesting the membership rules and process are skewered. Persons admitted into membership are those chosen by the Chief and Council. Maintaining the 1985 Trust definition of beneficiaries ensures a larger, more inclusive group beyond those with band membership. In particular, it includes women who marry male band members and their children. Based on what I know of the experience of my mother, Shannon Twinn and Catherine Twinn, if it were up to the Chief and Council, they would never be included as beneficiaries.

20. 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 16 day of April, 2015	)))))	
A Commissioner for Oaths in and for the Province of Alberta	)))	SHELBY TWINN

Marvin Brown
Barrister & Solicitor

SWORN STATEMENT OF HEATHER JACQUELINE POITRAS

I, Heather Jacqueline Poitras, of the City of Edmonton, in the Province of Alberta, SWEAR AND SAY THAT:

Family Background and Roots in the Sawridge Band

1. I am an individual who resides in the City of Edmonton in the Province of Alberta and, as such, have personal knowledge of the matters hereinafter deposed to, save where stated to be based upon information and belief, in which case I verily believe the same to be true.

2. I was born July 24, 1970. I have two older sisters, one late older brother, one younger sister, and two adopted younger brothers. We have the same parents. Elizabeth (Potskin) Poitras (hereinafter called "mother") was legally married when she had all of us.

3. My late father, Homer Poitras, could have been a registered Treaty Status Indian and a member of the Kehewin Cree Nation, but chose not to.

4. The effect of my parent's marriage was to enfranchise my mother from being a Treaty Status Indian and Band Member of the Sawridge Band (hereinafter referred to as the "Band") and to exclude all of us from being recognized as Band Members.

5. My grandmother, Jean Potskin proudly lived on the Band reserve for decades until her death, as did many of my relatives including my grandfather who was a Band Councillor.

6. My grandmother sought my inclusion as a Band Member, despite concerns of reprisal. Her efforts for our inclusion were unsuccessful and certain members of the Band made it well-known that they disliked her. She resisted inequality, unfairness, discrimination and hierarchy that demands silent obedience. She was always spirited this way. For example, she told us the story of the police coming to her home on the reserve to take the children to Indian Residential School which she resisted and prevented.

1985 Bill C-31

7. When Bill C-31 was passed in 1985 I became a registered Treaty Status Indian and was given the Band number. But the Band had control of its Band List and I was never added to the Band List. During this period, my mother applied for all us to be included as Band Members, but was unsuccessful in accomplishing this while we were minors.

8. I am informed by my mother that other children in the same circumstance as me, such as Vera Twin-McCoy, somehow retained their registration as Treaty Status Indians and full Band Membership even though their mothers married non-Indians. At least two of Vera's children were fathered by a non-Indian man yet all three children are Treaty Status Indians and Band Members. Vera McCoy married Jody McCoy who is the father of two of her children. Jody McCoy was a non-Indian with no aboriginal descent. I

wonder why I am treated differently, especially when both my parents are of Aboriginal descent and Cree speaking.

9. My mother and my older sister, Tracey Poitras-Collins, are Band members. I am a Treaty Status Indian, but do not yet have Band Membership even though I applied to the Band after I became an adult.

10. My mother was Court ordered onto the Band List, along with others, by Justice James Hugessen of the Federal Court by Order dated March 27, 2003.

My Experience Applying to the Band for Band Membership

11. As an adult, in the 90's, I requested a Band Membership application form, but did not complete it or submit it because the form was so long, inappropriate, offensive and invasive. A few years ago, I again requested a new application form, because I was informed that the application form changed. I completed it and couried it to the Band office in March 2013.

12. I contacted the Band in September 2013 via a registered letter to notify them of my new home address. In that letter I asked for information on the application process and the status of my application to become a recognized full Band Member.

13. On October 2, 2014, my oldest son, Theoren Gregory Poitras, was murdered. I sent another registered letter to the Band to update my Band Membership application. I have not received any response from the Band Chief or Council, or the Band's legal counsel, Mike McKinney.

14. I recently learned from various band members including my mother, that the Chief's son, Roy Twinn, whose mother is a non-Indian and not of Aboriginal descent:

    - is now a Band member;
    - voted in the February 17, 2015 election;
    - applied for Band Membership in 2013, the same year I submitted my application as an Aboriginal person of descent from both parent's;
    - within months of applying, his application was approved; and,
    - just months before the February 17, 2015 election, was admitted into Band and now has Band Membership and voting rights;

15. There are only three minor children who are Band members and all three are the children of elected Band officials Roland Twinn and Winona Twin. They admitted their children during their 2011-2015 term as Band Chief and Band Councillor. It appears their children did not have to wait. This preferential space and discriminatory system determines who is admitted into band membership and who isn't;

16. The elected Band Chief and Council have refused and/or failed to make a timely, unbiased and fair decision on my completed application, thus denying me the right to be a Band Member and vote in Band elections like their children.

Others In Like Circumstances

17. My two daughters, Anastasia Chanel Poitras (4540019902) and Tamara Jacqueline Poitras (4540019903), are Treaty Status Indians and should belong to the Band. Like my mother, I want my children to be accepted as Band members. I am also proud that my first grand-daughter, Carmella Mary, was born on March 18, 2015. Her father is a Treaty Status Indian, and we want her to become a Band Member too.

18. I am aware of other members of the Potskin family who applied for Band Membership. They too have waited a number of years for a response. During the wait they have received little or no response from the Band or if a decision was made, their application was denied by the Chief and Council.

19. I am aware of at least one case, Alfred Potskin, who was denied membership by the Chief and Council who considered his commitment to and knowledge of the history, customs, traditions, culture and communal life of the Band and his character and lifestyle. The Chief and Council did not give Alfred an interview or any fair process to determine if the subjective criteria they used to deny his application were correct, true and fair. My uncle Alfred was by all accounts a loving, kind, sober and hardworking man. At the time he was denied band membership by the Chief and Council, he was suffering from cancer.

20. I am aware there are 8 or more Potskin family members who have applied including:

I. Crystal Poitras-John;

II. Nicole Poitras;

III. Gina Donald;

IV. Tracey-Poitras Collins submitted a Band Membership application three times, over a 28 year time-frame before she was finally admitted into Band membership after a grueling and biased process:

- The first application was submitted to the Band in 1985. The Band did not acknowledge her application, offered no follow up, and failed to respond to Tracey's inquiries, despite her many calls to the Band office.

- The second application was hand-delivered January 6, 2005 to the Band office with no subsequent response from the Band.

- The third application was submitted in 2012. The Chief and Council denied her application. Tracey's Appeal was heard January 26, 2013, and narrowly succeeded because not enough of the Chief and Council's supporters were present. The Appeal process is limited to members resident on the reserve or who can attend the Appeal in person. This discriminates against members who are not resident, live away from the reserve and do not have the resources to attend the Appeal even though they wish to participate. The Chief and Council participated fully in Tracey's Appeal including the secret voting.

21. Gail O'Connell's Appeal was to be heard with Tracey's Appeal, but Gail's Appeal was adjourned until March 2013. Enough of the Chief and Council's supporters turned out to uphold the decision of the Chief and Council and deny Gail's Appeal. Gail O'Connell is the daughter of Roselna Lindberg, another Court ordered member added to the Band Membership List in March 2003.

22. 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 27th day of April, 2015

A Commissioner for Oaths in and
for the Province of Alberta
Marvin Bruno - Barrister + Solicitor

HEATHER J. POITRAS

SWORN STATEMENT OF DEBORAH SERAFINCHON

I, Deborah Serafinchon, office worker, and daughter of the late Walter Patrick Twinn, of the City of Edmonton, in the Province of Alberta, do solemnly swear that:

Family Background

1. I am the eldest daughter of the late Walter Patrick Twinn, Settlor 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 former Chief of the Sawridge Band (hereinafter called the "Band") 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 was born on October 2, 1961, the illegitimate daughter of my late father Walter Patrick Twinn (hereinafter called "Father") and Lillian McDermott (hereinafter called "Mother") of Faust. Both were Indians and attended Indian Residential School at Grouard.

3. At birth I was placed into foster care and grew up in that system. I never felt I belonged and struggled with knowing my identity, where I came from, who I came from and what caused me to grow up in foster care. I experienced abuse.

4. After I became an adult, I searched for my birth parents.

5. I discovered my biological mother first; who informed me Walter Patrick Twinn was my Father. Both of my parents died young, shortly after I found them. My Father was born March 29, 1934 and died October 30, 1997.

6. I contacted my Father in 1996, the year before he died and we spoke a number of times, but before we could meet, he died suddenly. The day he died, I fell in my bathroom and have been wheel chair bound since. I've had 3 back surgeries.

7. About a year after his death, I was contacted by Catherine Twinn, my Father's widow. I am informed by Catherine Twinn that my Father told her shortly after they married he had fathered a little girl he had no contact with, wondered about and had offered to marry my Mother. My mother independently confirmed the marriage offer.

Taking Action to Establish Meaning and Recognition, Identity, Security & Connectedness

8. Catherine Twinn and I began a relationship. However, I was more interested in building a relationship with my Father's five children, closest in age to me, from his first marriage to Theresa Auger. They are Irene Twinn, Roland Twinn, Arlene Twinn, Ardell Twinn and Paul Twinn. Arlene first contacted me by mail in 2000 and I met Irene Twinn and Ardell Twinn around Christmas 2001.

9. Initially, I had a positive reception from Arlene Twinn and Ardell Twinn and a conflicting reaction from Irene Twinn.

10. My primary relationship was with Arlene Twinn and through her, incidental contact with her twin brother, Ardell Twinn with whom no relationship emerged.

11. I have no relationship with Roland Twinn and only met him once, accidently, in a Toys R Us Store when I was with Arlene Twinn.

12. Paul Twinn refused to be in the same room as me when I was in Arlene Twinn's house. I have never had a relationship or contact with Paul Twinn.

13. I quickly learned they hated Catherine Twinn and had no relationship with her or their young half-brothers.

14. I felt caught in the middle. I felt I had to choose between having a relationship with the first or second family, that the first family would reject me if I had a relationship with the second family.

Irene Twinn

15. Irene Twinn in particular made it clear I could not fence sit – telling me I had to choose one family or the other. Irene Twinn had an extreme hatred towards Catherine Twinn. This made me wonder what was wrong with Catherine Twinn to be so hated.

16. I chose my siblings from the first family and for years tried to build a stable relationship with those of them who were interested.

17. One Christmas I and my 3 children but not my husband stayed with Irene Twinn and her 2 sons. Christmas Eve, Irene Twinn told me that I am not liked by the Twinn family; I am not and never will be a part of the family; I should stop trying to belong; and she is the oldest sibling and protector of her siblings.

18. Christmas morning my daughter Lisa and her brothers woke up very early, accidently awakening Irene Twinn, who became very angry. Irene Twinn verbally attacked me, my parenting skills, and my children she called spoiled rotten and inconsiderate for waking her up.

19. My daughter Lisa called her father who quickly came and took us home. I left crying and never spoke to Irene Twinn again. I was shocked at how cruel Irene Twinn could be while coating cruel words with facial smiles and a pretext of friendliness.

20. I had no further contact with Irene Twinn.

Arlene Twinn

21. My relationship with Arlene Twinn lasted from October 2000 until July 2010.

22. Arlene Twinn was forced to meet me August 2000 before she was ready. I had attended my mother's funeral in August 2000. Elsie Stenstrom was a friend of my mother and Arlene Twinn's mother. At the funeral Elsie Stenstrom gave me a sympathy card from Arlene Twinn. We had corresponded prior but were not ready to meet in person.

23. On October 13, 2000 I went to Slave Lake to put a cross on my father Walter's grave. I stopped at Elsie Stenstrom's home who asked if i wanted to meet Arlene Twinn. I said no, she is not ready. Elsie Stenstrom took me to the restaurant in the Sawridge Truck Stop, left the table and unbeknownst to me, went to the C-Store at the Truck Stop where Arlene Twinn worked and brought her to meet me. That was the first time we met in person.

24. I experienced at least 2 volatile occasions where Arlene Twinn suddenly turned on me, leaving me baffled. Once when Arlene Twinn thought I, unemployed at the time, was trying to get a job with the Sawridge Group of Companies through Catherine Twinn. I had shared with Arlene Twinn that I had given my Resume to Catherine Twinn asking if she knew of any jobs. Arlene Twinn screamed at me assuming I wanted a job with the Sawridge Group. I reassured her I did not want a job with Sawridge Group, had no intention of moving to Slave Lake and was seeking help for a job search in Edmonton, specifically not with the Sawridge Group of Companies.

25. The other occasion I was yelled at by Arlene Twinn remains a mystery. I still do not know what I did but I apologized, and about 1 week later Arlene Twinn called and apologized.

26. In July 2010 I and my family went to Slave Lake on Arlene Twinn's birthday and checked into a Motel. Arlene Twinn's son Chase swam with my children during the day. That night I met Arlene Twinn at the Fairgrounds and watched the fireworks. Arlene Twinn did not sit with me, sitting with Haitina Twinn, Roland Twinn's wife. Arlene Twinn made little effort to spend time with me and I felt rebuffed. The next day I called her to say goodbye and felt coldly and angrily dismissed. It was unpleasant. Thereafter, Arlene Twinn deleted me from Facebook and dismissed me from her life. There has been no contact since.

27. My reaching out to my older half siblings led to challenges with my foster family who, hurt, withdrew from me.

28. Today the only members of the Twinn family I have relationships with are Catherine Twinn and her sons, my half-brothers.

DNA Testing, Indian Status, Band Membership & Beneficiary Status

29. During the time Arlene Twinn spoke to me, I had conversations with her whether she, her mother and her siblings would provide blood samples to prove my paternity. I remember washing dishes in Arlene Twinn's kitchen and discussing this. She indicated her Mom was willing however they never acted on it. I bear a striking resemblance to my Father. Because of this, Arlene and Irene Twinn expressed apprehension about me meeting their Mother who they said has negative feelings and thoughts towards my Father.

30. I began to feel it was obvious that the first family would not provide blood samples, so I turned to Catherine Twinn. She and her sons' blood samples proved my paternity, that I am the eldest daughter of Walter Patrick Twinn.

31. Catherine Twinn encouraged me to apply to the Trust and the Band to ascertain my entitlement at birth under the 1970 Indian Act rules that I qualify as a member of the Sawridge Band, being the illegitimate daughter of a male Indian, and a Beneficiary under the 1985 Trust. If I were to apply and be admitted into Band membership I would become a beneficiary of the 1986 Trust.

32. In about 2002 I applied for Indian Status registration through the office of Lesser Slave Lake Indian Regional Council (LSLIRC) governed by a Board of 5 Chiefs, Roland Twinn being one of the Chiefs. The CEO, Al Willier, is Roland Twinn's good friend. I was never registered even though both my parents qualify as Indians. At some point, I was informed by the LSLIRC the DNA result proving Walter was my Father was inadequate and I would need 2 of my Father's sisters to attest I was his daughter. I believed this requirement was impossible and gave up pursuing Indian Status registration.

33. I had raised the issue of applying for Band membership with Arlene Twinn and was led to believe I would never be accepted into membership because the aunties, my Father's sisters, would never allow it. Discouraged, I never applied and/or finalized my application for Indian Status, Band Membership or Beneficiary status. It was evident to me that any application would upset my half siblings and I put relationship ahead of applying.

34. I have not applied to the Trusts and the Trust Administrator has never contacted me. My half siblings, except Cameron Shirt, are members of the Sawridge Band through our Father, Walter Patrick Twinn.

35. I've been informed by Catherine Twinn and do verily believe that Cameron Shirt applied to the Trust for beneficiary status but his status was resisted and he has never received benefits.

36. I have not applied for band membership for the same reason I have not applied to the Trusts. Some of the principal leaders of the Sawridge Band govern the Trusts, and those like Roland Twinn, have made it clear to me I'm not wanted and my application would be denied. I do not have the resources to challenge this and endure a difficult process.

37. As Walter's daughter, I'd like to be equally included as a beneficiary and a band member as are the children of my Father, his brothers and his sisters.

38. Through my Mother, I have direct lineage to the Sawridge Band. My Mother's Indian Registry number had the Sawridge Band 454 number. My Mother and Father were related which is why they did not marry. At the time they became involved, and I was conceived, they did not know they were related. They later learned they were related after my Father offered to marry my Mother. Not knowing they were related was one of many impacts from Indian Residential School, along with addictions and shortened life spans. I am the "*bruised generation*", deeply impacted by Indian Residential School which continues to alter the course of my life and that of my family.

I swear this evidence for the Court and for no improper purpose.

SWORN BEFORE ME at the City of Edmonton, in the Province of Alberta the 1 day of April 2015

A Commissioner for Oaths in and for the Province of Alberta

Marvin J. H. Brown
Barrister + Solicitor.

DEBORAH SERAFINCHON

SWORN STATEMENT OF GAIL O'CONNEL

I, Gail O'Connell, great daughter of Leon Ward and Josephine Cardinal, granddaughter of Elizabeth Mable Ward and daughter of Roseina Ward, of the City of Red Deer, in the Province of Alberta, do solemnly swear that:

Family History and Genealogy

1. I am the daughter of Roseina Lindberg nee Ward (hereinafter referred to as Roseina) who was born October 20, 1935.

2. Roseina, along with others, was Court ordered onto the Band List of the Sawridge First Nation (hereinafter referred to as the "Band") by Justice James Hugessen of the Federal Court by Order dated March 27, 2003. Attached to my Affidavit as **Exhibit "A"** is a true copy of the Court Order.

3. The reason Roseina was Court ordered onto the Band List is because the Band had not added her to the List they administer even though she was entitled, as the Court found, to be on the Band List without having to apply.

4. The Band appealed the Court Decision ordering Roseina and others be added to the Band List but the Band's Appeal failed. Attached as **Exhibit B** is a true copy of the Decision of the Court of Appeal dated January 19, 2004.

5. Roseina Lindberg was the daughter of Elizabeth Mable Ward. Attached as **Exhibit C** is a copy of the Certificate of Birth for Roseina.

6. Elizabeth Mable Ward, my grandmother, married Harry DeJong July 18, 1938, however, Harry DeJong is not my Grandfather. The Registration of Marriage Certificate of Elizabeth Ward who married Harry DeJong does not show her date of birth. It lists her age as 19 (she turned 20 the following month), her father as Leo Ward of Slave Lake, her mother as Josephine Cardinal and her name as Elizabeth Ward. Attached as **Exhibit D** is a copy of the Registration of Marriage Certificate of Elizabeth Ward and Harry DeJong.

7. Elizabeth Mable Ward had Roseina Ward (Lindberg) out of wedlock before she knew Harry DeJong.

8. Attached as **Exhibit E** is a copy of a letter dated September 6, 2000 from Indian Affairs and Northern Development indicating the reason for Roseina's omission from the Indian Register due to non-Indian paternity. It also notes that her parents are Leon Ward and Josephine Cardinal, registered under #7, Sawridge Band.

9. Elizabeth Mable Ward was born **August 18, 1918** and died September 6, 1951, only 33 years old. Attached as **Exhibit F** are true copies of the Baptismal Certificate dated September 7, 1918 and Birth Certificate for Elizabeth Mable Ward. On both documents her date of birth is August 18, 1918 and her parents are Leon Ward and Josephine Cardinal. Elizabeth's older sister, Philomine Ward, is listed as her godmother on the Certificate of Baptism.

10. Elizabeth Mable Ward is the daughter of Leon Ward and Josephine Cardinal, both Sawridge #7. Attached as **Exhibit G** is a true copy of a two page summary of the Band's Pay Lists from

October 3, 1910 to July 11, 1932 showing only Leon Ward as #7, his wife, their children and one copy of an Original Band Pay List dated June 19, 1931. The Band did not provide copies of any original Band Pay List. Through Access to Information, I obtained a copy of the original Band Pay List dated June 19, 1931. Most of the names on the original Pay List are redacted except for the name #7 Ward and #4 Ward. Under remarks, it states the woman is a duplicate of #51 and two boys not accounted for. I assume #4 must also be related to #7 or the name would have been redacted.

Who Is Really Elizabeth's Father?

11. The Band admits that Leon Ward, Josephine Cardinal and their children were members of Sawridge and Leon Ward is listed as #7. The Band disputes that Elizabeth Mable Ward is the child of Leon Ward. Attached as **Exhibit H** is a document prepared by or for the Band titled ""The Issue Is How Is "Elizabeth Ward" Related to Sawridge" (hereinafter referred to as the "**Band Genealogy**"). It concludes that Elizabeth's father was George Hamelin, #51, from the Driftpile First Nation (hereinafter referred to as Driftpile).

12. I am informed by Sam Twinn and do verily believe that when my Appeal first came to the Electors January 5, 2013 an elected Elder and Trustee, Bertha L'Hirondelle, suggested I belonged to Driftpile. Sam Twinn and others requested that a Genealogy be drafted in collaboration with our family prior to the Appeal being heard. The Genealogy would provide facts and relevant information from both sides on contested facts. My Appeal was rescheduled for March 9, 2013 to enable preparation of the collaborative Genealogy to assist the Electors.

13. There was no follow up or outreach to me to confirm or discuss the Band Genealogy by anyone from the Band.

14. The Band Genealogy prepared for my Appeal heard March 9, 2013, I believe, influenced the outcome of my Appeal. The Electors who attended were mostly supporters of the Chief and Council. The electors upheld the Council's decision denying my application for membership. Many of the members voting on my Appeal believed I belong to Driftpile, not Sawridge, because of the Band Genealogy. I am informed by Catherine Twinn and do verily believe she overheard Paul Twinn say about me, "she belongs to Driftpile."

15. The Band Genealogy refers to "Pay Lists" but not the original Pay Lists. It relies on Analyses prepared by the Lesser Slave Lake Indian Regional Council, Treaty and Aboriginal Rights Research, Genealogical Project, 1999-2000. The Band places inordinate weight on these Band Pay List Analyses. The original Pay Lists are notorious for mistakes and vagueness and I understand there was controversy around Indian Agent Harold Laird (1911-1930) of Lesser Slave Lake and his record keeping.

16. The Band Analyses add researcher comments under the Indian Agent column that do not appear in the original Pay list. Attached as **Exhibit "I"** is a copy of the Driftpile Pay List for George Hamelin dated July 5, 1934 and the Band Analysis of that Pay List showing the addition of the researchers comments under the Indian Agent column.

17. The Band Genealogy disputes my great grandfather Leon Ward's paternity of my grandmother Elizabeth Ward. It says, "Among the possible answers is that she is the daughter of Egbert Ward. Or that she is the daughter of Leon Ward. Or none of the above." It dismisses Elizabeth as the daughter of Egbert Ward and Leon Ward and concludes she is the daughter of George Hamelin, #51, from Driftpile.

18. The Band's reasons for concluding my grandmother is the daughter of George Hamelin #51 appear to rest on the following:

a. A Driftpile Pay List for #51 George Hamelin dated October 12, 1920 records "girl born" and the Band researcher's comments are "Elizabeth Ward Hamelin born in 1917";
b. The June 19, 1931 Sawridge Pay List for #7 Ward that says the woman is a duplicate of #51;
c. On October 12, 1920 the Indian Agent, under #51, records "girl born". She is never given a name while under #51. The Researcher later assumes this girl becomes #101, first appearing on the July 5, 1934 Driftpile Pay List until 1940;
d. On June 23, 1939, according to the Driftpile Pay List Analysis, the Indian Agent adds comments to the Driftpile Pay List that #101, Elizabeth Ward Hamelin, age 22, married H. De Gong, a white trader, at Prairie River on June 14, 1938. The 1939 date for the Analysis is incorrect. The actual date for the Pay List is June 23, 1938;
e. She remained on the Driftpile Pay List until June 21, 1940, when she was given "commutation authority" Sept 13, 1939;
f. Her name never appeared on the Sawridge Pay List;

19. The Band Genealogy states "What is clear is that although Elizabeth Ward Hamelin becomes the wife of Harry DeGong, and while it is likely that they are the parent of Fleury DeJong, she never was a member of the Sawridge Band and never appeared on a Sawridge Paylist....If the woman who is the grandmother of Gaile O'Connell is the same person who married Harry DeGong and is the mother of Fleury Degong/DeJong, then the proper First Nation for Gaile O'Connell to direct her application for membership is Driftpile. There is not and never has been any connection with Sawridge."

20. The authorship of this Band Genealogy was not identified at the time of the Appeal and all supporting sources of information in the possession of the Band were not provided to me.

21. I was informed by Catherine Twinn that Mike McKinney, Executive Director/General Counsel to the Band, recently advised that Rarihokwats, Chair of the Appeal Committee (e.g. the Electors), is believed to have authored the Band Genealogy.

22. To dismiss Elizabeth Mable Ward as Leon Ward's daughter, the Band Genealogy ignores the best evidence, makes unsubstantiated assumptions, fails to disclose all relevant evidence and is inherently speculative and biased in selecting information to support a pre-determined conclusion, particulars of which include:
a. The birth and baptismal certificates for Elizabeth Mable Ward, born August 18, 1918 lists her parents as Leon Ward and Josephine Cardinal who are on the Sawridge Pay list;
b. The copy of the Birth Certificate provided to Rarihokwats at the March 9, 2013 Appeal;
c. I do not believe any proper weight was given by the Electors to the Birth Certificate evidence;
d. The Registration of Marriage Certificate for Elizabeth Ward, **Exhibit D**, dated July 18, 1938 naming Leo Ward and Josephine Cardinal as her mother and father;
e. The Band Analyses of the Sawridge Pay Lists, Exhibit **"G"**, for Lion/Leon Ward, #7, from October 3, 1910 to July 11, 1932;
f. The Band did not produce any original Pay Lists or all its Analyses of Band Pay Lists including past 1932 for Leon Ward and his children with Josephine Cardinal;
g. The Band did not produce any birth, baptismal, marriage or other certificates to support its position that George Hamelin, not Leon Ward, fathered Elizabeth Mable Ward;
h. The woman listed on the Driftpile Pay lists as Elizabeth Ward Hamelin, appears to not be the same woman as my Grandmother Elizabeth Mable Ward, for a number of reasons including:
    - My Grandmother's Birth and Baptismal certificates list her birth date as August 18, 1918 and her father as Leon Ward, not George Hamelin;

- My Grandmother's Registration of Marriage lists her father as Leo Ward and my Grandmother's name as Elizabeth Ward, not Hamelin;
- This Marriage Certificate does not identify my Grandmother as Elizabeth Ward Hamelin;
- My grandmother never had the name "Elizabeth Ward Hamelin";
- My Grandmother had a child in 1935 and in 1938. No mention is made on the Driftpile Pay List of those children born during that time period;
- My Grandmother was 19 years old when she married July 18, 1938. The woman named Elizabeth Ward Hamelin is listed as being 22 years old on the June 23, 1939 Driftpile Pay List;

i. Our family oral history told to me by my mother Roseina is that my Grandmother was raised by Bernard and Louisa Halcrow. Elizabeth lived with them for a long period of time. The Halcrows' took care of my grandmother but they did not adopt her;

j. The Band Genealogy says that Leon Ward became #7 Sawridge in 1910. A Sawridge Paylist dated July 14, 1919 showed "Girl Born, Man Died". July 14, 1919 is not the date of Elizabeth Mable Ward's birth. She was, according to her Birth, Baptismal and Marriage Certificates, born August 18, 1918.

k. Elizabeth's August 18, 1918 birth occurred one month after the July 20, 1918 entry to the 1918 Pay List. Elizabeth Mable Ward is the last daughter born to Leon Ward. July 14, 1919 is simply the annual date when the Indian Agent recorded notations onto the Pay List as to what has occurred in the year prior, from the previous entries made to the Pay List July 20, 1918. These facts are contrary to the Band Genealogy that 'she never was a member of the Sawridge Band and never appeared on a Sawridge Paylist'.

l. The Band assumed that the August 10, 1917 Pay List entry "Girl Born", who is transferred the following year to #5, the widow of John Ward (e.g. Leon Ward's father) eventually becomes Mary DeLorme. The Band says that John's widow dies in 1918, the girl is transferred to #15 St Pierre Nesootasis as "other relative" and that from then until 1936 when St. Pierre dies, the girl becomes Mary DeLorme and paid as a girl, even though she is 19 years of age;

m. The Band assumed that the July 14, 1919 entry of "Girl Born" is "Philomene". My mother always stated that Philomene was older than Elizabeth. This is corroborated by Elizabeth's Baptismal Certificate dated September 7, 1918 which names "Philomine Ward" as Elizabeth's godmother;

n. From the July 25, 1921 Pay List the Band states that "in 1921 the 2nd daughter is transferred to #20, Sucker Creek Reserve" and "This daughter is transferred back to Sawridge #41 in 1930...and the "two daughters of Leon's, one #5 Sawridge and the other #41 Sawridge – and neither of them are Elizabeth Ward". The Band Genealogy fails to provide evidence to support this and other assumption and statements;

o. The Band Genealogy assumes that Josephine Cardinal marries George Hamelin, #51 Driftpile, and is listed with a "newborn boy, Norman" on George's Driftpile Pay List July 24, 1918. How could she be giving birth to another newborn, Elizabeth Ward, one month later, August 18, 1918?;

p. The Band suggests that Josephine Cardinal, mother to Elizabeth Ward, married George Hamelin. They point to a woman and new born infant Norman being recorded on the July 24, 1918 Driftpile Pay List under George Hamelin #51. This is one month before Elizabeth Ward was born, while Leon Ward was alive and married to Josephine and both were listed on the Sawridge Pay List;

q. The Band Genealogy identifies the wife of George Hamelin as the daughter of William Giroux #13. This cannot be my great grandmother Josephine Cardinal as her parents were Casimir Cardinal and Sophie Masiniyoneb Willier;

r. The Band provided Driftpile Pay Lists for the period July 24, 1918 to June 24, 1944 for George Hamelin #51. The June 23, 1939 Driftpile Pay List shows "girl born" to George Hamelin#51. If his wife/the mother is Josephine Cardinal, in 1939 she is 48 years old. Giving birth at this age is an inordinately long fertility period;

s. The June 23, 1939 Driftpile Pay List lists the names and ages of George Hamelin's family. He and Josephine Cardinal are listed as 44 years old. My great grandmother Josephine Cardinal was born December, 1891 making her 48 years old;
t. The Driftpile Pay Lists are problematic. Whoever is accepting Treaty money for "Elizabeth Ward Hamelin" allegedly Elizabeth Mable Ward, does not know the correct date when my grandmother married DeJong or that my grandmother had two children prior to the marriage, including my mother Roseina, born October 20, 1935;
u. Pay Lists only indicated where a person was paid at, not where their Band Membership was. If Elizabeth Ward lived near Driftpile her Treaty payments could be made at Driftpile. This does not change her band membership to Driftpile from Sawridge, it just means her Treaty money was paid at Driftpile;
v. Because Elizabeth's father is Leon Ward, not George Hamelin #51, under the Indian Act, her membership was in her father's Band, which is Sawridge;
w. Elizabeth Ward's father died while she was an infant. Elizabeth Ward was given to Bernard and Louisa Halcrow to raise. They did not adopt Elizabeth;
x. The Band failed and/or refused to provide evidence as to which Band Elizabeth Mable Ward, born August 18, 1918, was paid out when she married a non-Indian and was "commuted;
y. In 2003 my mother Roseina Ward Lindberg was Court added to the Sawridge Band List. The Crown lawyer relied on evidence the Court accepted in support of Roseina Ward being added to the Sawridge Band List. None of this evidence was successfully appealed, disclosed to me or provided at my March 9, 2013 Appeal. How can the Band now challenge this?
z. The Band unsuccessfully challenged the paternity of Elizabeth Courtreille, who was also added to the Band List by the same Court Order that added my mother Roseina;

23. The Band Genealogy confuses, disputes and distorts facts including:
    a. the recorded paternity of Elizabeth Mable Ward on her birth, baptismal and marriage certificates;
    b. the entitlement of Leon's children and wife to membership in his Band;
    c. the 1917 and 1919 Sawridge Pay List evidence showing 2 girls born;
    d. the evidence tendered by the Crown, accepted by the Court, adding my mother to the Band List, upheld on Appeal;
    e. Other evidence including that set out in paragraph 22;

24. The Band did not produce all the evidence and none of the original Pay Lists it relied on or other evidence including the Band which paid the per capita share to Elizabeth Mable Ward when she was enfranchised for marrying a non-Indian. It selected some Analyses of Pay Lists. There is some evidence showing that researcher comments were later added to the Pay List Analyses as comments of the Indian Agent.

25. The Band did not make timely disclosure of who authored the Band Genealogy and failed to collaborate with us in creating our Ward family genealogy. Were there other Josephine Cardinal's? Our family research suggests that the Josephine Cardinal who was the widow of Leon Ward was born in December 1891 and baptized January 23, 1892. She married Leon Ward September 9, 1906 and gave birth to their first child in 1908-1910. Her parents were Casimir Cardinal and Sophie Masiniyoneb Willier. The Band document identifies the wife of George Hamelin as the daughter of William Giroux #13. This suggests there is more than one Josephine Cardinal.

The Appeal Ignored Our Family's Oral History Evidence

26. At the time of the 1918 Pay Lists, a flu epidemic killed many people in the Lesser Slave Lake area. I do not have a copy of the Death Certificate for Leon Ward but our family oral history evidence suggests he may have died in that epidemic leaving infant Elizabeth fatherless.

27. Our oral history evidence suggests that following the death of Leon Ward, Josephine Cardinal gave Elizabeth Mable Ward to Bernard and Louisa Halcrow to take care of. This was not a legal adoption. According to my mother, Elizabeth Mable Ward lived with Bernard and Louisa Halcrow.

28. Elizabeth Mable Ward was never a part of the George Hamelin family. Elizabeth Mable Ward never was a Hamelin and never lived with the Hamelins nor is George Hamelin listed on her birth, baptism or marriage certificates.

29. Philomene was Elizabeth's older sister.

30. Attached as **Exhibit J**, is an application for admission to St. Andrews Indian Residential School dated September 14, 1931 by Bernard and Louisa Halcrow as Guardians to Elizabeth Ward. On the backside of that document, there is a Certificate of Health for Elizabeth Ward. Both sides of the application states her age as 13 years old. This further corroborates the birth, baptismal and marriage certificate evidence that Elizabeth was born August 18, 1918 and is the daughter of Leon Ward and Josephine Cardinal.

31. Elizabeth Ward is never listed as a Hamelin on her Marriage Certificate, Baptismal or Birth Certificate or application for admission to school. She was always a Ward and never a Hamelin. The lineage of Elizabeth Mable Ward is that she is the daughter of Leon Ward, which the Court confirmed when it recognized her daughter, Roseina, as belonging to the Sawridge Band.

32. The Band has placed much weight on oral history evidence, however, not our family's oral history evidence or the conclusive and best evidence, the Birth, Baptismal, School Application and Marriage Certificates of Elizabeth Mable Ward, all recording her parents as Leon Ward and Josephine Cardinal.

33. Consistent with the Sawridge Pay Lists, we were told that Leon Ward and Josephine Cardinal had three other children besides Elizabeth Mable Ward. These were:
    a. Norman Ward
    b. John Ward
    c. Philomene Ward

34. The Band did not seek our oral history evidence or other evidence nor did it's author collaborate with us in creating the Band Genealogy. I believe the Band Genealogy influenced those voting on my Appeal, arguing that I belong at Driftpile, not Sawridge.

The Band Membership Application and Process

35. In December 2003, I requested from the Band an application form for Membership.

36. On January 22, 2004 I received a letter from Mike McKinney, Executive Director/General Counsel for the Band, attached as **Exhibit K** with a membership application form of about 43 pages with instructions to return the form with a copy of my status card. In addition, I was to include numerous essays, letters of character reference, and copies of vital documents.

37. On March 25, 2004 the completed application for membership, with required documentation, was sent via registered mail and received by the Band.

38. On November 25, 2004 I placed a phone call to the Band to ask about the status of my application for membership. I spoke to Lorna at the Chief's office and was told my application

had not been reviewed. She undertook to have someone call me as to when I will receive a response. I never received a return call.

39. Between 2004 and 2010 I periodically called the Band office at least once a year. There was no progress on my application. I always received the same type of response. No one wanted to know who I was. When I would express my concern about how long the process was taking, I was told they had a lot of applications to go through.

40. On December 9, 2010 I placed another phone call to the Band inquiring about the status of my application. I was told the Council was going through applications on Tuesday December 14, 2010. The person I spoke to would not take down my name or give me any further information. I asked if there were some sort of statute of limitations and was informed there was not. She was not concerned that my application was dated 2004.

41. I was never informed or given the opportunity to answer any questions or concerns the Band had or to participate in a meeting or interview with the Chief and Council or it's designate.

42. On November 8, 2012, attached as **Exhibit L,** I received a registered letter signed by Mike McKinney, Executive Director/General Counsel to the Band, dated October 31, 2012 advising me the Council had denied my application for membership. Their reasons were:
    a. They do not recognize my connection to Sawridge through my mother, Roseina Lindberg, because they do not recognize my mother's connection to Sawridge. Yet my mother is on the Band List, pursuant to the Court Order by Justice James Hugessen dated March 27, 2003;
    b. I do not have any specific "right" to have my entered on the Band list;
    c. Even if I had shown a connection, they didn't feel it was in the Band's best interests;
    d. They took into account my character and lifestyle without any evidence of the standard set by existing band members if judged on the same subjective criteria.

43. My application demonstrates I am of good character and an absolute family oriented person who has worked hard to teach my children values and morals of a higher standard.

44. On November 13, 2012 I sent a Letter of Appeal to the Band via registered mail.

45. On November 21, 2012 I received, via regular mail, a Notice of Meeting of the Electors to hear my Appeal on January 5, 2013. The notice is dated November 21, 2012, the same date I received it. Attached to this my Affidavit is **Exhibit "M"**, a true copy of the November 21, 2012 Notice.

46. The Band, included their membership processing form in **Exhibit M**, and agreed my character and lifestyle was 'not a detriment'. **Exhibit M** was mailed with the Notice of Appeal to be held January 5, 2013. The form indicates the following:
    - I am employed, debt free;
    - own my own home;
    - no criminal record;
    - no driver's license suspension;
    - hardworking and self-sufficient;
    - good student;
    - positive letters of reference from 3 people who have known me – one reference knew me for 25 years);

47. On December 13, 2012 I received, via Registered mail, a second Notice of Meeting of the Electors to hear my Appeal on January 5, 2013. The notice is dated November 21, 2012. The only difference between the two notices, in my view, is that in the mail out received December 13,

2012, the Membership processing form is now marked "Draft". Attached as **Exhibit "N"** is a true copy of the notice I received December 13, 2012.

48. I decided not to attend the Appeal at Slave Lake on January 5, 2013. I felt it was all just a matter of formality, my exclusion from membership a foregone conclusion. Given the time the process had taken, the lack of a fair process, the denial by Chief and Council using subjective criteria without any interview or effort to fairly assess me or afford me a reasonable chance to address their concerns and questions, no discussion of balanced options such as a probationary period, and other factors, all pointed to a forgone conclusion. I believed there was no point in attending.

49. On February 19, 2013 I received a notice of a new date to hear my Appeal, March 9, 2013 Attached as **Exhibit "O"** are true copies of same.

50. On February 21, 2013 I received the Band Genealogy, attached as **Exhibit H**, dated February 19, 2013 from Donna Brown, administrative assistant, and copies of various pay lists. Information in the Band document, as explained elsewhere, was not in the least accurate, fair or balanced.

51. On March 9, 2013 I attended the Appeal with my mother Roseina and my sister Gina. From the moment we arrived, the hostility, unfriendliness, tension, unease and suspicion was palpable. A person named Rarihokwats, who chaired the Appeal, suggested my mother, an elderly Band Member, wait in the waiting room before the voting occurred even though she had a right as a member to be present. The underlying suggestion was that we did not belong to Sawridge and were not welcome. It was clear that minds were made up.

52. At the Appeal I was taken aback by the suggestion we belong to Driftpile. We have no roots or relatives in the Driftpile First Nation.

53. I became so unnerved by the atmosphere I was hindered in speaking to the 5 pages of documents and other information I had. I gave Rarihokwats the Birth Certificate for my grandmother Elizabeth Mable Ward listing her parents as Leon Ward and Josephine Cardinal. I do not know if copies were given to and read by the Band Members. I believe members who voted against allowing my Appeal may have been influenced by the Band document endorsed by their leaders and professional advisors that Elizabeth Mable Ward was not the daughter of Leon Ward but the daughter of George Hamelin #51 and she belonged to Driftpile, not Sawridge.

54. The March 9, 2013 Appeal including the deliberations of the electors lasted the full day. They were unable to reach a consensus. A secret vote was taken and later I learned my Appeal was denied.

55. Sometime in April, 2013, I received from Ed Molstad, of Parlee McLaws LLP, present at my Appeal as one of the paid professionals, a copy of the Decision from the Appeal Committee chaired by Rarihokwats. My Appeal was denied. This Decision is attached as **Exhibit "P"**.

My Concerns With the Process and Membership Rules

56. The Membership Application form I filled out was about 43 pages and extremely invasive.

57. The decision making process took almost 10 years.

58. The Applicant should not have to "prove" they are worthy or meet some other subjective criteria that can easily be abused. If they are the child of a band member this should be of considerable if not decisive weight. Descent should be conclusive of membership and only in rare circumstances be overruled.

59. There is a power imbalance, lack of fairness and impartiality against applicants inherent in the process. Members who reside close to the Band office and their close family may be unlikely to dissent from the decision of Chief and Council and allow an applicant's Appeal.

60. The process did not allow a fair opportunity to know in advance, present and ask questions on all relevant facts, concerns, reasons and principles both prior to the Chief and Council decision or on Appeal.

61. The decision making process for band membership should ensure that applicants are equally entitled to a fair process and equality of the law like other people in Canada.

62. There should be a period of time before the Decision and the Appeal in which the applicant can meet with Chief and Council and electors one on one, and address any questions or concerns.

63. Issues should be clearly identified in advance of the Decision and Appeal with a fair process to address these.

64. All applicants should have timely and full disclosure of all information the Band has gathered relevant to their application and Appeal.

65. Applicants on Appeal should be given the names and contact information for all electors. All electors should be allowed to vote, not just those who live close by to the Band office or their close family who come to support their family members living on reserve. Some members may be dependent on Band resources and the decisions of Chief and Council for their necessities.

66. A period of probation and/or conditional membership should be granted where existing members and the applicant, through no one's fault, do not know one another. Not knowing one another should not be an excuse to deny someone the same birthright members enjoy.

67. The discriminatory provisions of the Membership Rules should be changed particularly as it impacts children. All applicants should be treated equally, not based on who likes, supports or knows who.

68. Discriminatory thinking and mindsets should not determine membership. I should not be discriminated against because of a circumstance that existed or an action that was taken by my mother, grandmother, the Indian Agent, the Band or others.

69. The rules should provide for certainty based on descent and relationship. Subjective factors such as "character", "lifestyle" and "knowledge of the history and customs" should be re-assessed as these are too subjective.

70. The Chief and Council should not decide membership applications. They have a vested interest in satisfying their current political constituency who arguably have an interest in excluding people from membership to retain control and maintain a larger per capita share of resources. The process needs an independent, impartial and unbiased decision maker like a Tribunal or body with security of remuneration and tenure. I am advised by Catherine Twinn and do verily believe she recommended this but it has not been implemented.

71. Despite Sam Twinn specifically requesting such, the Band did not collaborate with me in building the Band Genealogy for my family and did not take into account critical evidence we provided or had.

72. The "Chair" of the Appeal process should in fact be independent, neutral and impartial. Rarihokwats influenced and controlled the Appeal process under the guise of being an impartial, independent, neutral party. I am informed by Catherine Twinn and do verily believe he is a paid consultant to the Chief and Council, has refused to disclose his compensation and performs multiple paid tasks for the Band including:

- Assisting the Band on litigation;
- Conducting Research;
- Drafting Court documents including the Band's Statement of Claim filed March 31, 2015 in the Court of Queen's Bench as Action 1503-04882 contesting compliance with the First Nations Financial Transparency Act;
- Drafting Laws and the Constitution of the First Nation at the direction of the Chief and Council;
- Drafting Policies for the Band;
- Acting as Speaker of the Sawridge Legislative Assembly to push through the laws he has drafted;
- Supporting the Chief in securing speaking opportunities and making presentations;
- Supporting Mike McKinney the in house Band lawyer on issues including drafting Permit forms so Chief and Council control if spouses, children and others can live with a band member on reserve;
- Recommending a legislative strategy and timetable for Band laws;
- Other;

73. There are no objective criteria in the Band's Rules, just vague, subjective and uncertain criteria such as character and lifestyle with no fair process to assess this. Transparency and disclosure well in advance of any decision should be required including disclosure of information that is being considered with a fair and meaningful opportunity to reply. The process must be fair, reasonable, timely, transparent, accountable, unbiased and non-discriminatory.

Post Appeal

74. There was no honest effort to identify and resolve contested facts in advance of the Chief and Council Decision on my application or my Appeal. There was not a clear and balanced presentation of all the evidence at the March 9, 2013 hearing. Band members were not enabled, even if so motivated, to make a fair, unbiased and informed decision on my Appeal.

75. I was not invited or given a fair opportunity to have input into the Band Genealogy about my grandmother's paternity presented to the Band members March 9, 2013 or collaborate in addressing a fair and balanced presentation of contested facts.

76. The Band is very small, only 44 members. The Band imported outside paid professionals for my Appeal. Rarihokwats chaired the Appeal, led the process, controlled information, inappropriately influenced decision making and without disclosure, authored the Band Genealogy. I consider the paid professionals to have played an enabling role in this gross wrongdoing and obvious manipulation of the vote to deny my Appeal. Their combined conduct enabled the Chief and Council in an improper purpose of unfairly considering and excluding my equal entitlement to membership.

77. The Band Genealogy that is supposedly my family genealogy still makes my head spin and I wonder if that was the author's intention. Being a reasonable person, I could see how assumptions could be made from historical entries, however, the assumptions and conclusions in the Band Genealogy are speculative and unreasonable. The Band should disclose all its research and information it uses with regard to membership applications, which it has not.

78. When I reflect on the whole process including the Appeal, I still feel anxiety, frustration and sadness. Especially when I consider my grandmother and her paternity as Leon's daughter. My grandmother suffered violence in life and now in death.

79. I contacted Aboriginal Affairs and Northern Development Canada (AANDC) a number of times after the March 9, 2013 Appeal hearing to confirm and request information but the process is so slow. Without information, I was not in a position to appeal. As a single parent I did not have money to retain a lawyer and appeal. I have no chance against the notorious resources and litigation muscle of the Band that has spent millions of dollars on litigation to exclude people from membership.

80. I've subsequently learned about other Sawridge women who married non-Indian men and the status of their minor children upon their mother's enfranchisement by marrying a non-Indian man.

81. I am aware that Lilly Potskin, a Band member, attended the wedding of Pauline Twin who married a non-Indian man named Hammers in about 1966. Pauline is sister to Bertha L'Hirondelle and Clara Midbo and mother to Vera McCoy. Vera McCoy's son Justin Twin and daughter Winona Twin were Band Councillors who rejected my application for Band membership.

82. I want the Band to confirm that Pauline Twin was enfranchised as a result of her marriage to a non-Indian and the enfranchisement of her minor daughter, Vera McCoy nee Twin, postponed. Vera McCoy is a Band member. I want to understand why people in the same factual circumstances as me and my family are treated differently. Vera McCoy married a non-Indian man, Jody McCoy, and their two children, Jaclyn Twin and Justin Twin, are Band Members. Justin Twin, up until recently, was a Band Councillor and is a Sawridge Trustee. Jaclyn Twin is an elected official of the Band.

83. I swear this as evidence for the Court and for no improper purpose.

SWORN BEFORE ME at the City of Red Deer, in the Province of Alberta the 21 day of MAY, ~~14-13~~ 20 2015	Gail O'Connell
A Commissioner for Oaths in and for the Province of Alberta — Andrew Phypers, Barrister & Solicitor	GAIL O'CONNELL

Tab 7

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".

Tab 8

COPY

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

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CONTINUATION OF QUESTIONING ON AFFIDAVIT OF

CATHERINE MAY TWINN

Held at the offices of Bryan & Company LLP
Edmonton, Alberta

November 9 & 10, 2016

Dolores Williams, Court Reporter
(780)238-1157

Appearances:

Ms. C.C. Osualdini, and D. Risling, Esq., McLennan Ross LLP 600, 12220 Stony Plain Road Edmonton, AB T5N 3Y4 (780)482-9200	For the Applicant
Ms. N.E. Cumming, Q.C., Bryan & Company LLP 2600, 10180 - 101 Street Edmonton, AB T5J 3Y2 (780)423-5730	For the Respondents
Ms. D. Bonora, Dentons Canada LLP 2900, 10180 - 101 Street Edmonton, AB T5J 3V5 (780)423-7100	For the Respondents
Ms. D.A. Williams,	Court Reporter

And I said, I think the next step is to sit down with the Chair. And that did not happen because the Chair had other plans. He and legal counsel had other plans.
Q You did not sign the deed of transfer, correct?
A Ultimately, my legal counsel -- and I'd have to go back and check, but the deeds were signed and the issue of Justin's appointment was preserved, and on that basis I could sign and did sign. Had that been presented to me at the outset, we would have probably avoided a lot of --
Q Ms. Twinn, as of March 3, 2014, you had not signed the deed, correct?
A As of March?
Q 3, 2014, Mr. Heidecker's deadline.
A No, I had not.
Q In fact, on --
A I can't remember when I met with Justin.
Q That's not important right now.
A Well, it was to me.
Q On April 1, 2014, you were served with a court application to transfer the assets from the former trustees to the current trustees. Is that correct?
A Well, I see it's filed April 1st and, sorry, what date did you say I was served?
Q I'm presuming you were served on April 1st as well.
A The lawyer who was acting for me, Doris Bonora, did arrange to have me served, but I don't recall when that

was.
Q Well, you were eventually served with that court document, correct?
A Correct.
Q And in fact, you appeared in court to deal with that application on April 9, 2014?
A Yes, I did and there's a transcript.
Q Correct. Now, in that transcript on page 3 --
A Yes.
Q -- you appeared on your own behalf, correct?
A At that point, yes.
Q And you indicated to the Court that you were going to be asking for an adjournment, correct?
A Correct.
Q And if you go to page 4, you advised the Court that you hadn't filed material because you needed to access legal counsel and you needed to receive advice from legal counsel. Do you remember telling the Court that?
A I see what the transcript says. It says, Lawyers are very costly. It takes a lot. It takes some time, preparation time for them to come to speed and understand the complexities of this. This is a very complex matter.
Q I'm going to read to you lines 11 to 13. It says, Ms. Twinn, "I haven't filed material because firstly I need to access legal counsel. I need to inform legal counsel. I need to receive advice from legal counsel,

and then I need to give instructions to legal counsel."
A Correct.
Q That's what you told the Court, correct?
A Yes.
Q The Court says, And when is that going to happen? And your response was, Well, I don't know. And then if we go down the Court line 30 --
A Yes.
Q -- the Court says, "But if you want a lawyer, then you hire a lawyer and you give instructions to the lawyer, and they will ask for information if they need it. And presumably if it is a reasonable request, it will be provided. What's the problem?" Your answer was, "There's no problem. I mean, that is what I intend to do but I need time to do that."
A Correct.
Q Ms. Twinn, at any point in time, did you tell the Court that you had retained McLennan Ross to provide you with legal assistance since September of 2013?
A McLennan Ross was providing me legal assistance on the issues that had come out September, 2013; October, 2013; and December, 2013. And I am not a -- those issues were not in relation to this deed. I had hoped that -- Ms. Cumming, you're making faces, and I need to be treated with respect in this room.
Q Well, Ms. Twinn, you're an officer of the court?
A Yes, and I'm under oath and I'm trying to give my

evidence, but this type of facial -- face-making is not helpful. Now, if you want to hear the truth as I understand the truth, as I know the truth, let me tell it.

I had gone to McLennan Ross because Paul Bujold had created lists of 1985 beneficiaries. And at the September, 2013 meeting, the day after I met with Brian Heidecker, I had told Brian Heidecker that I was -- I had gone to the practice adviser to understand -- try to get a better understanding of my duties.

And I told him about my concerns with, first of all, the trustees' failure to properly ascertain the beneficiaries of the 1985 Trust pursuant to the rules that exist in the deed, to do so in a way that was fair, proper, and transparent.

When I questioned Paul Bujold at the September, 2013 meeting, he and Brian Heidecker had brought into the meeting without notice lists saying authorize these lists. We'll use any of these lists to try and go cut a deal with the public trustee in order to shut down the investigation of the Band membership system.

I had been raising concerns about the Band membership system for some time. And I had understood from the Chair that these issues would be addressed, that that system that has huge problems will be corrected before it is brought to the Court to be substituted for the existing '85 definition.

To this date, we still haven't gone to court on the fundamental question. Are these rules discriminatory? Are they invalid? It seems to be -- have been determined -- by whom, I don't know; I assume the lawyers -- that the rules are invalid for the purposes of that trust. But in any event, the beneficiaries under those rules have not been properly ascertained.

And at the September, 2013 meeting when I questioned Mr. Bujold about how these various lists were created, I was met with another wall. And that went on at the October meeting. It went on at the December meeting. And I was treated so abusively at the December meeting that finally at about 2:30 I left. I left the meeting.

Now, prior to my leaving, those lists had come forward again. And I again asked my questions about how these lists were produced; who produced them; what rules were applied; what case law was applied, what happened to all the people that have applied; how were they dealt with? Paul Bujold refused to answer my questions. He and Clara engaged in an attack. And he told me, You wouldn't believe anything, even if it was from God. Now, that's what I was struggling with.

I was also struggling with the June 12th, 2012 decision of Justice Thomas. That's what I was speaking with McLennan Ross about.

give an opinion concerning Justin Twin?
A The -- at this point, it was clear that I had to do my own -- what's the word I'm looking for -- due diligence.
Q So you didn't have prior approval of the trustees?
A No.
Q After you obtained Mr. Gilbert's opinion, did you bring a motion at any trustee meeting to have Justin Twin removed as a trustee?
A No. The -- I don't recall doing that and, in any event, what would be the purpose?
Q All right. So you --
A It would not be approved.
Q So you did not bring a motion to have Justin Twin removed as a trustee, correct?
A I don't believe so.
Q In terms of your Application for Advice and Directions to have Justin Twin removed, have you taken any steps in that action to have Justin Twin removed?
A You're talking about the 2014 action? Is that what you're asking me about?
Q Yes.
A The -- I will have to check on when and what the last action was. As you know, some of those issues have been downloaded into the 2015 action. And I don't know off the top of my head that particular action and also in the context of my complaint letter in the 2015

comments in your affidavits about your concerns with the Sawridge First Nation membership process, correct?
A Can you refer me to my affidavit?
Q Well, you can read paragraphs 29(a), (b), and (c).
MS. OSUALDINI: Which affidavit? The December?
MS. CUMMING: The September affidavit.
MS. OSUALDINI: I note for the record that this affidavit was filed prior to this Court decision.
A Sorry, could you give me those paragraphs again.
Q MS. CUMMING: 29(a), (b), and (c).
A Yes, I've read (a), (b), and (c).
Q And in those paragraphs, you are taking issue with the Band membership application process, correct?
A I am trying to observe the trust deed definition of beneficiary which says that all persons who qualify under the general laws of Canada as these exist from time to time and including Band membership rules and customary laws to the extent that these are recognized and/or incorporated by the general laws of Canada.
Q Well, will you agree with me that Justice Thomas in his December 17, 2015 decision indicated that the 1985 Sawridge trustees were not to engage in any attacks on the Sawridge First Nation membership processes?
MS. OSUALDINI: And I'm objecting for the same reason. The decision says what it says. She's not here to interpret it.
Q MS. CUMMING: Well, Justice Thomas gave a

previous decision, correct?
MS. OSUALDINI: Are you looking for Sawridge No. 1?
Q MS. CUMMING: Yes. You're familiar with the Sawridge No. 1 decision?
A Yes.
Q And in fact, you chose to interpret that decision, correct?
MS. OSUALDINI: Can you point my client to what you're referring to?
Q MS. CUMMING: Well, you provided a letter in January, 2014 to a number of individuals whereby you were quoting and interpreting Justice Thomas's Sawridge No. 1 decision, correct?
A Well, I try to comply and I try to fulfill my duties.
Q But you're not prepared to acknowledge that Justice Thomas in his December, 2015 decision indicated that there were to be no attacks by the trustees on the Sawridge First Nation membership process?
MS. OSUALDINI: On the objection of her counsel, she's not answering those questions.
MS. CUMMING: I'd like to mark Justice Thomas's December 17, 2015 decision as the next exhibit.
MS. OSUALDINI: Is that necessary to do that?
MS. CUMMING: I think so.
MS. OSUALDINI: Sure.

EXHIBIT NO. 13: DECEMBER 17, 2015 DECISION OF JUSTICE THOMAS.

Q MS. CUMMING: I'm providing you with an Order filed June 24, 2015.
A Sorry, December -- oh, filed June. Okay.
Q And --
A I'm sorry. I'm still --
Q I'll let you read it. I'm sorry.
A Yes, I've now read this.
Q Paragraph 3 of the Order indicates that the respondents, being the trustees Twinn, L'Hirondelle, Twinn, and Ward, were entitled to costs of the application in any event of the cause. Have you paid those costs?
A No.
MS. CUMMING: Let's mark that as the next exhibit.

EXHIBIT NO. 14: ORDER FILED JUNE 24, 2015.

Q MS. CUMMING: In the 1403 action, you've brought an Application for Advice and Directions with respect to the removal of Justin Twin as a trustee and, in fact, the removal of all the trustees and replacement with a Board of independent trustees. Is that correct?
A I need to refresh my memory on the application.
MS. CUMMING: Do you have that, Crista?
MS. OSUALDINI: I do. You know what? I don't have the September one with me today.
MS. CUMMING: I think I do. Let me just see. There you go.

A Thank you. So I've read the remedy claimed. I haven't read all of the document. It's been a while.
Q MS. CUMMING: Can you tell me how paragraphs 29(a), (b), and (c) of your September affidavit relate to the 1403 Application for Advice and Directions?
MS. OSUALDINI: That's a legal argument. My client isn't required to do that.
Q MS. CUMMING: So the comments that you make in paragraphs 29(a), (b), and (c), have you expressed any concern in those paragraphs in terms of Justin Twin being a trustee?
MS. OSUALDINI: I think they speak for themselves.
Q MS. CUMMING: In paragraphs 29(a), (b), and (c), you make comments about the Band membership process. Are you suggesting that Margaret Ward has had any role to play in that Band membership process?
A I don't believe I've suggested that in my affidavit.
Q In terms of your comments about your concerns with the Band membership process, what remedy are you seeking?
MS. OSUALDINI: The application speaks for itself. My client is not required to speak to the legal remedies she's seeking or entitled to.
MS. CUMMING: All right. So, Ms. Osualdini, you're suggesting that I simply look at the remedies claimed in the 1403 action in order to understand why 29(a), (b), and (c) are contained in the affidavit?
MS. OSUALDINI: What I'm saying is a legal remedy

being sought is a legal issue. My client is here to speak to facts. She's not here to interpret or reply to law.

Q MS. CUMMING: Well, your legal remedy that you're seeking in your application is to remove Justine Twin and Margaret Ward as trustees, correct? Is that correct?

MS. OSUALDINI: My client is not providing legal argument or opinion on what remedies are being sought. The application is what it is.

MS. CUMMING: Well, certainly your client should have some understanding as to the application she's making and the remedy she's seeking.

MS. OSUALDINI: She has counsel.

MS. CUMMING: Well, especially considering the fact that she's a lawyer herself.

MS. OSUALDINI: Yes, but she's got counsel.

MS. CUMMING: All right.

Q MS. CUMMING: Have you ever commenced a charter challenge with respect to the Sawridge First Nation membership process?

A No.

Q While you sat as a member of the membership committee, did you ever take any steps to change the membership process?

A I made suggestions.

Q Do you have any records showing what suggestions that

Q MS. CUMMING: The assets of the trusts are invested in the companies, the Sawridge Group of Companies, correct?

MS. OSUALDINI: I don't know if that's a fair question, Nancy. The trusts are the shareholder -- they own the shares of the companies. That's their asset.

Q MS. CUMMING: Well, the trusts are shareholders in the Sawridge Group of Companies, correct?

A Correct.

Q And the Sawridge Group of Companies is run by an independent Board of Directors, correct?

A Yes.

Q So that independent Board of Directors basically runs and manages the Sawridge Group of Companies?

A Yes. There's a CEO who reports to the Board of Directors.

Q Right, and the trustees have previously agreed not to interfere with the corporate Board of Directors of the companies, correct?

MS. OSUALDINI: What do you mean by interfere?

A I don't know what you mean.

Q MS. CUMMING: Well, a motion was passed at a Board meeting that if the trustees had any questions about the Sawridge Group of Companies they were to be asked through the Chair, Mr. Heidecker, correct?

A I recall that there was protocol established.

Q So the trustees of the trusts are not involved in the running of the Sawridge Group of Companies, correct?
A I'm not sure what you mean by not involved in the running. I mean, we have oversight. We have a fiduciary duty.
Q But you don't tell them what to do?
A And we have to act like a prudent, reasonable business person. So when you say we don't tell them what to do, there was an incident in 2008 where Roland Twinn went into the Slave Lake Hotel and did not like the food and raised a very strong complaint with the waitress, that went into the kitchen, that then involved whoever was on duty, that then led to the manager at the time, Dave Nelson, being told to go to the Band office and try to repair whatever rupture there was.
That time I was very concerned with that, because Dave Nelson told me himself that when he went to the Band office he was verbally abused by Roland Twinn and his job was threatened. And he resigned and he left the company and he was a good manager.
MS. CUMMING: I'm not going to 4. I'm adjourning right now. We can start in the morning. I'm done for the day.
(QUESTIONING ADJOURNED AT 3:35 P.M., NOVEMBER 9, 2016)
CATHERINE MAY TWINN, RE-SWORN AT 9:30 A.M., NOVEMBER 10, 2016, QUESTIONED BY MS. CUMMING:
Q MS. CUMMING: Ms. Twinn, yesterday, we had

briefly discussed the December 17, 2015 decision of Justice Thomas, his most recent decision. You had indicated that you had read that decision.
A Yes, I have.
Q Are you aware that the membership process is no longer an issue with respect to the 1103 action?
MS. OSUALDINI: Objection.
MS. CUMMING: Why are you objecting?
MS. OSUALDINI: That's a legal conclusion coming from his decision.
Q MS. CUMMING: We had referred yesterday to paragraphs 29(a), (b), and (c) of your September affidavit. I'd like to know in Action 1103, are you prepared to withdraw those paragraphs as they relate to the membership process?
A I'm going to have to consult with my lawyer about that.
Q All right. If you will let me know what your answer is to that question, then, after consulting with your counsel.
MS. OSUALDINI: We'll take that as an undertaking.
MS. CUMMING: Thank you.

UNDERTAKING NO. 32: ADVISE IF MS. TWINN IS PREPARED TO WITHDRAW PARAGRAPHS 29(A), (B), AND (C) AS THEY RELATE TO THE MEMBERSHIP PROCESS IN ACTION 1103 - TAKEN UNDER ADVISEMENT.

MS. OSUALDINI: Just to confirm on the record that, Ms. Cumming, you're acting in the 2014 action not the

2011 action, correct, and you're examining on the affidavit filed in the 2014 action?

MS. CUMMING: Well, as you're aware, the September affidavits are identical in both actions.

MS. OSUALDINI: Correct, but I'm just not clear how in relation to the matter in which you're acting the decision of Justice Thomas in the 2011 matter is relevant given that you're not acting in that action.

MS. CUMMING: That's fine.

Q MS. CUMMING: Are you prepared to withdraw paragraphs 29(a), (b), and (c) as they relate to membership process in respect of the 1403 action?

MS. OSUALDINI: We'll do that as -- I think that requires a legal conclusion on whether she's willing to withdraw, so we'll take that as an undertaking.

MS. CUMMING: Okay. That's fine.

UNDERTAKING NO. 33: ADVISE IF MS. TWINN IS PREPARED TO WITHDRAW PARAGRAPHS 29(A), (B), AND (C) AS THEY RELATE TO THE MEMBERSHIP PROCESS IN ACTION 1403.

MS. BONORA: Can we just go off the record for a second?

MS. CUMMING: Sure.

(DISCUSSION OFF THE RECORD)

MS. CUMMING: Based on our off-the-record discussions, I understand that the undertaking to withdraw paragraphs 29(a), (b), and (c) as it relates if it was Roland Twinn. Perhaps it was his wife but someone, one of the parents, if not both, made application to the Band for membership for the children, correct?

A Applications were made, I understand.

Q And they are entitled as Band members to do that for their children, correct?

A Roland's wife is not a Band member although she's a beneficiary of the 1985 Trust.

Q But Roland Twinn is a Band member?

A Roland Twinn is a Band member.

Q So he's entitled to assist his children in bringing an application for his children to become members of the Band, correct?

A No issue with that.

Q And you have no information to suggest that Roland Twinn somehow influenced anyone on Band council to approve his children for membership, do you?

A Can you repeat your question? It's very strangely worded. I have no what? Evidence?

Q No, I won't ask you about evidence, so I'll ask the question again. What information do you have to indicate that Roland Twinn somehow influenced council or the Band to approve his children for membership?

A Those children queue-jumped ahead of people who had been waiting for years. That's improper.

Q How do you know that? Who did they queue-jump?

A One of them was Gina Donald, but there are other applicants.
Q Do you know whether Gina Donald had a fully-completed application for membership?
A I understand her application was complete and was at the time that Roland's children in 2013 applied, but for some reason, hers was unreasonably delayed and theirs was fast-tracked. And Roland Twinn was also the Chair of the membership committee, and the Chair of the membership committee appeared to me to have control over application -- his selection of applications and the recommendations to Chief and Council himself and his cousin Justin who tends to follow what Roland does.
Q What information do you have that Roland Twinn's children's applications were fast-tracked?
A I've already answered that question.
Q No. I want to know what information you have that Roland Twinn's children's applications were fast-tracked.
A Because their applications were submitted in 2013. One of them was submitted in October, 2013.
Q So you are just assuming that they must have been fast-tracked because of the time from when they applied to when they became Band members?
A All I know is that by the time the summer of 2014 the list I received from Paul Bujold had their names on it.
Q Do you have any other concrete examples of bias?

A I'm sorry? Am I stating what in paragraph what?
Q The last sentence in paragraph 29(b), are you suggesting that minor children have been discouraged from applying?
A I can't answer that question. First of all, the current application form requires many things including essays that minors I don't think are capable of answering.
Q I'm just trying to get clarification --
A But I do --
Q Let me just get clarification here. What you're referring to in the last sentence of 29(b) are adult children?
A Yes, I'm referring to children because when they see favouritism by those in power with control, it is discouraging, especially when they know that applications have been sitting for a very long time, some cases years.
And it's discouraging when people such as Gail O'Connell went through a very, very biased and unfair process. The speaker or the Chair of that appeal process was Rarihokwats whose name is Jerry Gambill. And he both authored a genealogy on the Ward family that, in my opinion, created confusion and distorted the facts, but he also chaired it without disclosing that he had authored a document that had tremendous influence on the people at that appeal. And my son had

asked for a genealogy to be built with the Ward family, not against the Ward family.
Q You had indicated in paragraph 29(b), you had stated, I also note that with the exception of only a few individuals only the children of former and currently-elected Band officials have been granted Band membership. Who are the exceptions that you refer to?
A I think the exception that I was referring to then would have been Tracy Poitras-Collins. Kieran Cardinal is the biological son of Ardell Twinn, and I don't know at this point if Ardell was on council or not but he is Roland's brother. And Kieran was finally admitted but only because of the vigorous effort by his parents.
Q So we've got Tracy, Kieran.
A That's all I can recall.
Q Gina?
A Gina came just recently. Gina came --
MS. OSUALDINI: She couldn't have been referring to her in this.
A I was not referring to Gina because I understand Gina was just admitted.
Q MS. CUMMING: But that is another example?
A That is now another example, and I think that's because of litigation pressure. I don't think without that litigation pressure Gina would have been admitted.
Q And that's your opinion?
A That's my opinion. She could have and should have been

considered.

Q Do you recall the last time you brought a motion forward at a trustee meeting?

A I know I brought forward the motion to establish access for any trustee up to a certain amount to talk to a lawyer if they're uncertain about what their fiduciary duties are. No one approved that. And I believe there's been subsequent motions. I just don't recall at the moment. There was clearly the one back in August, 2014 regarding the trustee process.

Q You had indicated in paragraph 34 that the trustees who are elected officials of the Band have an undue influence at the trustee table. Am I correct that the present group of trustees only has one elected official?

A And two recently former-elected officials and they're very -- they operate in a very close way with each other.

Q But the present composition of the trustees, there's only one elected official?

A Correct.

Q Thank you. In paragraph 34 of your affidavit, you make reference to undue influence. You've made that comment twice in that affidavit. What undue influence do you feel there has been at the trustee table in terms of the administration of the 1986 Trust?

A What undue influence? Is that the --

Q Yes.
A Well, there's a lot of deference given to the Chief, and that's not just Sawridge. I mean, that I think is probably across the board when it comes to First Nations. So it's kind of an unspoken dynamic.
Q The 1986 Trust has a series of programs in place, correct?
A Yes.
Q And those programs can be accessed by beneficiaries of the 1986 Trust?
A Yes.
Q Are you suggesting that there has been some undue influence by any of the trustees in terms of the provision of those programs to beneficiaries?
A I'll give you an example. Paul Bujold and Roland Twinn are close. They're very friendly. They go outside. They smoke together. They talk together, he, Justin, Roland.
Q Is that a bad thing?
A It's common. There was an occasion where there was a ceremony at my home and my stepson, Paul Twinn, came late and it was obvious that he had been drinking. And after the ceremony in the presence of myself and others, he asked me for help with his addiction.
And I immediately contacted Brian Heidecker and Paul Bujold that he wanted to go into a treatment centre and that this time he would follow the treatment

centre's recommendations regarding after-care. And in the past, those recommendations have been do not return to the home community; because if you want to get well, stay sober, you need to stay out of there. You need to stay away. So there was some arrangements made. And the next morning, Paul Twinn with my son Sam Twinn went to B.C. And my son Sam made sure that Paul arrived at the treatment centre.

It wasn't long after that some of the trustees were very angry at me. I don't know why, but I could tell. I could feel it and that was Roland and Bertha and I believe Clara. And later Paul Bujold said I acted without authority which was not true. And helping a beneficiary and immediately calling the Chair and the administrator -- the administrator made the arrangements, I don't think is acting without authority.

But that's what I mean about the dynamics and the politics. It's very oppressive and hard to do the right things, to take the right actions. I have been --

Q Did your son Paul access the program?

A Let me finish. I have been accused in a trustee meeting by Paul Bujold of having brought about the firing of Arlene Twinn which was not true. And John MacNutt would verify that, the CEO. But these things just get said, and it's perpetrating the poison and the

animosities, and it's hard for me to defend myself. And if I try to defend myself, then I'm painted as something unreasonable. But like I say, that's the reality at ground zero. It's not very healthy.
Q You say it's hard for you to defend yourself, but you do in fact make your positions known to the trustees, don't you?
A They don't understand because they don't listen. They don't want to talk with me or listen or hear me.
Q But you feel that you listen to them?
A I try and I'm willing, and I've asked for facilitation. It can't be by Paul Bujold or Brian Heidecker. But I did go through a mediation process with Roland, but when the recommendations came out, he was not prepared to follow them.
Q Have any of the trustees indicated to you that they don't feel able to speak about their positions because of the Chief?
A I'm sorry? Have any of the --
Q Have any of the trustees indicated to you that they are hesitant to speak at trustee meetings because of the presence of the Chief?
A Nothing from Peggy. Nothing from Justin. And with respect to Bertha, Clara, Walter Felix, I remember --
Q Well, let's not talk about Clara and Walter because they're not trustees anymore.
A I remember I was attacked in a meeting at Deloitte's

A Yeah. So I looked up a definition that expresses what I understand by that word. A person who does business for another person or a person who acts on behalf of another. A person or a thing that causes something to happen.

So I'm talking about people. So it's people that basically act for another, does business for another. So, for example, Paul Bujold and Brian Heidecker are agents of the trustees, of the majority of the trustees.

Q What about family of elected officials? Do you feel that family of elected officials should not be trustees?

A I have a -- sorry, family of -- it depends. I mean, how independent is that person in their own thinking and their own critical thinking and decision-making? Are they easily influenced? You know, there's a personal quality to this, and I'll quickly explain what I mean by that, and I hope you don't think I'm rambling but very quickly.

There is a German physicist, I believe, and he tells a story when he was in high school. The teacher took 40 of the students to look through a telescope at a planet and a number of moons around the planet. The first student looked through and said he saw. The second student said I can't see. The teacher came over and said, Here's how you adjust the lens. All the students looked through. All of them said they saw the planet and the moons until the 39th student who said all I can see is black. When the teacher in anger went over to the telescope, he found that the cap was on the lens. No one had seen the planet and the moons.

So at a personal level, you have to, I think, have a lot of independence and critical-thinking skills and other skills.

Q When you make reference to employees of Band officials, are you including in that category anyone who works for Sawridge Resources?

A I don't know. I haven't thought that one through. I was thinking in terms of the Band council, their employees.

Q But Band council can change?

A Yes.

Q With each successive election?

A It can.

Q So if a trustee -- if you have a sitting trustee who isn't an employee or agent of a member of Band council, but then in a subsequent election that existing trustee is an employee or agent of the new Band council, then what do you do? Do you expect that trustee to step down?

A There's -- you're pointing to nuances, and all of these would have to be thought through. But the general proposition is -- as I've stated from my research and

U/T NO.	PAGE/LINE	UNDERTAKING & RESPONSE	STATUS
		2010, with attached documents; 19. Email to Donovan Waters from Catherine Twinn, dated May 30, 2011; 20. Memorandum on the Sawridge Band Membership Code, received June 7, 2011; 21. Letter to Michael from Catherine, dated June 7, 2011, with attachments; 22. Email to Donovan Waters, Paul Bujold, Brian Heidecker, Doris Bonora from Catherine Twinn, dated June 17, 2011; 23. Email to Catherine Twinn from Doris Bonora, dated June 20, 2011; 24. Email to Donna at Sawridge@sawridgefirstnation.com from Catherine Twinn, dated September 27, 2011; 25. Email to Donna at Sawridge@sawridgefirstnation.com from Catherine Twinn, dated October 26, 2011; These documents are numbered CT030.001 to CT030.114 There may be further materials to be provided if discovered.	
31.	205/6-27 to 206/1-27	Review Records and produce the letter Roland Twinn wrote to Gina Donald regarding her membership application. RESPONSE: [Jan-06-2017] Please find attached the letter that Chief Roland Twinn wrote to Gina Donald-Potskin, dated February 17, 2016. This document is numbered CT031.001.	**Complete**
32.	209/11-25	Advise if Ms. Twinn is prepared to withdraw paragraphs 29 (A), (B), and (C) of her September Affidavit, filed in the 2014 Action, as they relate to the Membership Process in Action 1103. **TAKEN UNDER ADVISEMENT** RESPONSE: [Jan-06-2017] Ms. Twinn advised that she is not prepared to withdraw these paragraphs.	**Complete**
33.	209/26-27 to 210/1-20	Advise if Ms. Twinn is prepared to withdraw paragraphs 29 (A), (B), and (C) of her September Affidavit, as they relate to Membership process in respect of the 1403 action. RESPONSE: [Jan-06-2017] Ms. Twinn advised that she is not prepared to withdraw these paragraphs.	**Complete**

Tab 9

COPY

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

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CONTINUATION OF QUESTIONING ON AFFIDAVIT OF

CATHERINE MAY TWINN

Held at the offices of Bryan & Company LLP
Edmonton, Alberta

July 20 & 21, 2017

Dolores Williams, Court Reporter
(780)238-1157

Appearances:

Ms. C.C. Osualdini, and D. Risling, Esq., McLennan Ross LLP 600, 12220 Stony Plain Road Edmonton, AB T5N 3Y4 (780)482-9200	For the Applicant
Ms. N.E. Cumming, Q.C., Bryan & Company LLP 2600, 10180 - 101 Street Edmonton, AB T5J 3Y2 (780)423-5730	For the Respondents
Ms. D.A. Williams,	Court Reporter

MS. CUMMING: I'm entitled to ask my questions.
MS. OSUALDINI: Of course.
MS. CUMMING: And I will continue on to ask my questions.
MS. OSUALDINI: Sure, but I think you're characterizing it unfairly for the witness.
Q MS. CUMMING: Paragraph 10, you're dealing with the SFN membership process, correct?
A That's what the paragraph says, Nancy. It says particular issues raised by Dr. Waters in terms of the SFN membership process where -- so the affidavit is speaking, I think, quite clearly.
Q Paragraph 11, in that paragraph, you're discussing what you believe occurred at the December, 2010 trustee meeting. And again you're discussing the Sawridge membership citizen code and the Sawridge membership process that's discussed in that paragraph, correct?
A I'm sorry. I don't understand your question.
Q Paragraph 11(a) and (b) talks about a resolution dealing with working with the Sawridge First Nation, correct?
A It says what it says, and I don't know what more you want from me.
Q In a number of your paragraphs in your May, 2017 affidavit, you have indicated that you had as a pre-condition to agreeing to a trustee resolution, you wanted the SFN membership process amended. Is that

correct?
A I don't think that's a correct characterization. I think it was recognized at the table that there were problems with the SFN membership system and that was no secret. Although, since then there's been a shape-shifting to try to cover that up.
Q Several paragraphs in your May, 2017 affidavit deal with your position concerning the SFN membership process, correct?
A It deals with what was discussed at the trustee meetings.
Q But you had wanted the SFN membership process to be reformed, correct?
A I think everyone wanted it to be reformed including Donovan Waters and Paul Bujold and Brian Heidecker. But then those people who signed their cheques are the ones who are the SFN leadership so that became problematic.
Q Paragraph 20 of your affidavit attaches as Exhibit 'O' what you say are various sworn statements from individuals who had have problems with the SFN membership process.
A Yes.
Q And those statements that you've attached detail what these people have indicated in terms of problems they've had with the SFN membership process.
A Same kind of messages that Paul Bujold relayed at

trustee meetings.
Q I'm going to go back to Exhibit 'O'. You've attached statements from various people indicating they have had problems with the SFN membership process, correct?
A There are statements attached, yes.
Q And the statements deal with these individuals' problems with the SFN membership process, correct?
A Their statements deal with what they set out in their statements, and some of the statements are fairly long.
Q But they deal with the SFN membership process, don't they?
A I believe so, but I'd have to look at these statements. It's been a little while.
Q Well, did you review your affidavit to prepare for today?
A It's quite a large document, Nancy. I'm doing my best.
MS. OSUALDINI: Are there statements that are unclear that ...
MS. CUMMING: Stop interfering.
MS. OSUALDINI: I'm not interfering.
Q MS. CUMMING: Did you review your affidavit in order to prepare for your Questioning today?
A The -- I'm not answering that question. I am going to look at the Exhibit 'O', and I'm going to look at the statements. And I will go through each one if you like and tell you what it's dealing with. I'd have to do that to be accurate, and I want to be accurate.

Q I'm going to ask you the --
A I hope that that is what you want as well.
Q Well, I'm going to ask you the question again. Did you review your affidavit in preparation for your Questioning today?
A I have reviewed this affidavit. I've reviewed the information in this affidavit.
Q Thank you.
A So what is your question about Exhibit 'O'?
Q Are you relying upon Exhibit 'O' in support of your application for costs in both of these actions?
A Exhibit 'O' is attached, and I've already told you that this affidavit and its exhibits I'm relying on in support of my indemnification application in both actions.
Q Thank you. Ms. Twinn, you are familiar with the constitution of the Sawridge First Nation?
A Yes, I am familiar with it.
Q And 3(1) of Article 3, Membership, states and I'll quote, "The First Nation has the inherent right to control its own membership in accordance with its own laws, codes, customs, practices, traditions, and traditional values and principles". You're aware of that clause in the constitution?
A Well, you've read it, so I assume you've read it accurately.
Q And you were aware of that clause at the time you swore

this affidavit?

A I'm aware of the constitution, and I'm aware of Chief Roland Twinn's position about the inherent right of self-government. I'm also aware of the trust deeds and the definitions. And the definition in the 1986 Trust, for example, begins with, All persons who qualify under the general laws of Canada as these exist from time to time including membership rules and customary laws to the extent that these are recognized by the laws of Canada. If they are discriminatory or there's procedural unfairness or other flagrancies, then I believe that the laws, the highest law of Canada will prevail.

Q Ms. Twinn, I asked you a specific question and you proceeded --

A And I --

Q Just let me finish, please. You gave me a very long answer that was not responsive to the question.

A I'm sorry.

Q Are you going to be responsive to my question, or should we adjourn right now so that your counsel can speak to you about your answers?

MR. RISLING: Well, we have a problem, though, Nancy with you getting into does this document say what it says.

MS. CUMMING: No, I asked her if she was familiar with that portion of the documents, Mr. Risling.

MR. RISLING: Familiar with which portion? Section 3 of the constitution?
MS. CUMMING: Section 3, yes.
MR. RISLING: How is it relevant?
MS. CUMMING: The May, 2017 affidavit sworn by your client talks about the SFN membership process in virtually all paragraphs. So I think I'm entitled to ask her questions about the SFN membership process and who controls that process.
MR. RISLING: We're going to argue, I guess, about the legal consequence of that. You don't get to ask the witness about the legal consequence of it. The constitution says what it says. The trusts say what they say. The affidavit says what it says. Why are we arguing about the law here and its applicability?
MS. CUMMING: We're not. I'll just continue on.
Q MS. CUMMING: Ms. Twinn, I read you Article 3(1) of the constitution of the Sawridge First Nation, and I simply want you to confirm whether you were familiar with that clause.
A I'm aware of that clause. I've already answered that question.
Q And you are also aware that the SFN has Sawridge membership rules?
A Yes, I'm aware of that.
Q And those Sawridge membership rules are part of the constitution?

A They're also delegated authority under the Indian Act.
Q But they're part of the constitution as well?
A They've been referred to in the constitution.
Q Ms. Twinn, you have indicated in your affidavit that you're a lawyer and you've been a member of the Law Society since 1980. Is that correct?
A Where is that in my affidavit?
Q Paragraph 35.
A Yes, that's true.
Q As a lawyer, you are no doubt familiar with reading case law?
A Yes.
Q You are aware of and familiar with Justice Thomas's decision in the 1103 action filed December 17, 2015?
A Yes.
Q I'm just going to read you paragraph 54. It states and I'll quote, "This Court's function is not to duplicate or review the manner in which the Sawridge Band receives and evaluates applications for Band membership". You were familiar with Justice Thomas's statement?
A I'm familiar with the decision.
Q Are you also familiar with the portion of his decision where he states, "The 1985 Sawridge trustees, or any of them, likewise have no right to engage in collateral attacks on the SFN's membership processes". You were familiar with that portion of Justice Thomas's

decision?
A Yes.
Q In fact, your counsel signed an Order on your behalf indicating in paragraph 15 and I'll quote, "The Sawridge trustees shall not engage in collateral attacks on SFN's membership processes". You were aware that that was a term of the Order?
A I am aware of the decision. I'm aware of the Order, and I'm aware of what followed in terms of my appeal which I agreed to discontinue on the basis of terms of settlement.
Q The Justice Thomas Order was signed by McLennan Ross, your counsel?
A Would you like to show me the document?
Q Sure.
MR. RISLING: If it saves you any time, Nancy, I don't think we're going to be objecting to -- at the application to us signing any Orders.
MS. CUMMING: It wasn't my point.
A Yes, I looked at the signature pages, and I see the signature of McLennan Ross.
Q MS. CUMMING: And you understood that you were bound by the terms of that Order?
A Absolutely.
MS. CUMMING: I'd like to mark that Order as the next exhibit, please.

EXHIBIT NO. 15: ORDER OF JUSTICE THOMAS DATED

DECEMBER 27, 2015.

Q MS. CUMMING: Ms. Twinn, would you agree with me that the opinion of Donovan Waters was that, I'll quote, "The Band is the body with legal authority to decide who shall be Band members"?

MS. OSUALDINI: Can you refer her to what you're reading from?

Q MS. CUMMING: It's Exhibit 'G' to your affidavit.

A He makes a number of statements in this document that I'm referring to, Exhibit 'G'.

Q Right, and in fact one of those statements is that the Band is the body with legal authority to decide who shall be Band members. Is that correct?

A Yes, in accordance with the law. It's delegated authority.

Q Did Donovan Waters also provide the trustees with an opinion that although the trustees can make their views known to the Band in terms of membership processes, they had no right as trustees to demand that the Band do anything about the membership processes?

A The Band council is a fiduciary just as much as we the trustees are fiduciary.

Q Ms. Twinn, that wasn't my question.

A I'm trying to answer your question, Nancy. So if you would stop being so aggressive and hostile to me so I can answer the question, I would appreciate it.

Q And I would appreciate the same from you.

A I'm doing my best, and I don't think I've been disrespectful to you at all, but you have been to me and I'm asking you to stop.
Q And I'm asking you to answer my questions, Ms. Twinn.
A I'm trying to answer the question, but you cut me off.
Q I'll go to my question again. Did Donovan Waters provide the trustees with an opinion that the trustees could not demand that the Band do something about its membership rules and processes? Did he provide that opinion to the trustees? Yes or no?
A I'm not going to answer a yes or no to a question that is not a yes or no question. There was a commitment by the Band, by the chief who's a trustee, who's a double fiduciary, that to work on improving the Sawridge First Nation membership system. And it was on that basis, it was on that representation that we went down this road. And I don't have control as a trustee over the chief but the law does. And I would hope that his words and his commitments do.
Q Did Donovan Waters provide an opinion to the trustees that the legal authority to determine who qualifies for Band membership is the Band?
A Do you have a document you would like to show me?
Q I want you to tell me. In your discussions with Donovan Waters, in materials that have been provided to you including the ones you've put in your affidavit, did Donovan Waters convey to the trustees that the

and there were incredible disruptions taking place in our lives.
MS. CUMMING: Why don't we take a short break.
(QUESTIONING ADJOURNED AT 11:50 A.M.)
(QUESTIONING RESUMED AT 1:15 P.M.)
Q MS. CUMMING: Ms. Twinn, you acknowledge you're still under oath?
A Yes.
Q If you could turn to paragraph 14 of your May 2017 affidavit.
A Yes, I've read it.
Q In 14(d), you indicate that you were assured that the 1985 Trust would avoid adversarial litigation.
A That's right.
Q Have you contributed to the adversarial litigation?
A I have stood for what we agreed to and for the protection of the beneficiaries of the 1985 Trust. I have offered many, many exit ramps from the litigation. None of those have been accepted.
Q Well, tell me what you have put forth in terms of settling the 1103 action.
A Well, for example, in the binding issue resolution process which I signed, I also offered a process prior to that. And I've remained ready to resolve with the trustees and there's been nothing.
Q Perhaps I can be more specific because I'm not referring to process. I'm asking you, have you put

forth any suggestions in terms of how to resolve the 1103 Application for Advice and Directions as it relates to the definition of beneficiary as set out in the 1985 Trust?

MS. OSUALDINI: Can we just hold on here for a second. Go off the record.

(DISCUSSION OFF THE RECORD)

Q MS. CUMMING: Ms. Twinn, I take it that you are aware of the trustees bringing an application or what's called a settlement application before the Court?

A I don't know what you're referring to. You have a document in front of you. Is it something you want me to look at?

Q Well, you'll recall that the trustees did file an application before Justice Thomas to settle the 1103 action. Do you remember that occurring?

A Can you give me a time frame, please?

Q That was in June, 2015.

A Yes, I recall that.

Q Do you recall that the application was set for June 30th, 2015?

A Yes, I recall some June dates but I'm not -- without checking, I can't say under oath that it was June 30th but I recall June, 2015.

Q Do you recall that counsel on your behalf filed and served a written submission opposing the settlement application and they served the application on the parties on June 29, 2015, the night before the application? Do you remember that?

A The record will speak for itself. As I told you already, I've already answered the question.

Q Is it your understanding that the June 30th settlement application had to be adjourned as a result of the late filing of your counsel's affidavit?

MS. OSUALDINI: I'm going to object to that. We dealt with this in the first round of Questioning.

MS. CUMMING: I don't believe so.

MS. OSUALDINI: I'm quite confident we did. I remember you going through this application and talking about the brief and when it was served. I remember that.

MS. CUMMING: Okay.

Q MS. CUMMING: But in any event, the application had to be adjourned, correct?

A I believe so, but I'm going from some -- I'm going from memory. And I don't know if it had to be adjourned, but I do know that it didn't proceed.

Q In terms of that trustee settlement application, did you oppose the settlement that the trustees proposed?

A What I stood for always clearly is ascertain properly who the beneficiaries are; do not exclude them. There was to be a process that was followed which your clients have not followed at all.

Q I'll ask the question again. Did you oppose the

settlement that the trustees proposed in that settlement application?
A It -- the document speaks for itself. What was filed by my counsel speaks for itself.
Q So you're not going to answer the question?
MS. OSUALDINI: She just has. It's in the court record, her position.
A I have answered the question.
Q MS. CUMMING: The brief filed by your counsel opposed the settlement application, correct?
MS. OSUALDINI: Well, there's your answer.
A There's your answer. Read the brief.
Q MS. CUMMING: In the course of the 1103 action, I understand that the office of the Public Trustee commenced an application for production of documents in the possession of the Sawridge First Nation. Is that correct?
A I'm sorry? In the context of what? I didn't understand the first part of the question.
Q In terms of the 1103 action, in that action, my understanding is the office of the Public Trustee brought an application to compel production of documentation from the Sawridge First Nation.
A Yes.
Q And you were aware of that application being brought by the Public Trustee?
A I'm aware of that application.

MS. OSUALDINI: I just interject to you once again that it's on the Court record that we filed submissions in regards to it.
Q MS. CUMMING: And you supported that application?
A The record will speak for itself.
Q Is it your understanding that the application on behalf of the Public Trustee was denied by the Court?
MS. OSUALDINI: The Court record will speak for itself.
A The Court record will speak for itself.
Q MS. CUMMING: Well, I'm just going to continue on. In terms of the Court record, that includes an appeal by you to the Court of Appeal?
A That's part of the record.
Q You are also aware of an application in 1103 brought by Patrick Twinn on his own behalf and on behalf of his infant daughter, Aspen Twinn, his wife Melissa Megley (phonetic), Shelby Twinn, and Deborah Serafinchon. Were you aware of that application?
A I'm aware of the application.
Q And that application was to allow these individuals to be added as parties to the 1103 action. Is that correct?
A Read the documentation.
Q But is that your understanding?
A My understanding is what is in the documentation.
Q You're a lawyer so you clearly understood the

documentation?

MS. OSUALDINI: I'm just going to interject. I fail to see the relevance of this. The Court record is quite clear on what happened and what the parties were seeking.

MS. CUMMING: Well, Ms. Osualdini, your client swore in her affidavit that the 1985 Trust would avoid adversarial litigation. I think that I can put to your client the various pieces of litigation that have come up in 1103 and whether she supported those applications.

MS. OSUALDINI: Were they her applications?

MS. CUMMING: It doesn't matter.

MS. OSUALDINI: And the Court record speaks for her position. She's got briefs filed on all of them.

Q MS. CUMMING: In terms of the intervenor application commenced by members of your family, did you --

MS. OSUALDINI: Excuse me? They brought an intervenor application?

MS. CUMMING: Sorry, to be added as a party to the 1103 action.

MS. OSUALDINI: Because that one I wasn't aware of.

MS. CUMMING: No, that's what I'm referring to.

Q MS. CUMMING: I'll just start again. The application for some members of your family to be added as parties to the 1103 action, I understand that you

paid their lawyer the retainer to proceed with that action.
A I didn't personally pay. Yes, carry on.
Q So you did not provide any funds to Patrick, Aspen, Melissa, Shelby's lawyer?
A Deborah Serafinchon is my late husband's daughter. She is a beneficiary of his estate. Patrick Twinn is a beneficiary of his estate. They had an entitlement under that estate.
Q So you paid the retainer through your late husband's estate?
A I paid some monies.
Q I take it that you are aware of the fact that the application was not successful?
A I'm aware.
Q In the decision of Justice Thomas which is Sawridge Number 5, he indicates in his decision that the application was supported by Sawridge trustee Catherine Twinn. Is that accurate?
A The record speaks for itself.
Q Well, I want to make sure that Justice Thomas wasn't mistaken. So was that accurate?
MS. OSUALDINI: My client is not answering that.
A I'm not answering.
Q MS. CUMMING: Are you familiar with the Justice Thomas decision Sawridge Number 5? Have you read it?
A I've gone through it. It arrived relatively recent

while I was away.
Q But you've gone through it?
A I have. It was instantly e-mailed by Paul Bujold.
Q Were you aware of the application of Maurice Stoney to be added as a party to the 1103 action?
A I was aware because we were in court in August, 2016, and I was aware that he -- there was counsel on behalf of Mr. Stoney and I'm not sure who else.
Q Were you aware that Maurice Stoney brought an application to extend the time for filing an appeal with the Court of Appeal?
A I'm not -- I don't know.
Q I'll have to find that Order, but you were aware of his application to be added as a party to the 1103 action?
A I was aware that he had -- they had counsel in the courtroom in August.
Q Did you through your counsel, support Mr. Stoney's application?
MS. OSUALDINI: For what?
Q MS. CUMMING: To be added as a party to the 1103 action.
A Well, the record would speak for itself.
Q In terms of the application of some of your family members to be added as parties to 1103, can you tell me whether your lawyers at McLennan Ross expended any time dealing with that particular application?
MS. OSUALDINI: Objection.

Q MS. CUMMING: You have produced accounts from McLennan Ross which are redacted accounts up to the end of December, 2016. I'd like you to undertake to provide us with all of the McLennan Ross accounts since that point in time.

MS. OSUALDINI: Take that under advisement.

UNDERTAKING NO. 78: PROVIDE ALL OF THE MCLENNAN ROSS ACCOUNTS SINCE DECEMBER, 2016 - TAKEN UNDER ADVISEMENT.

Q MS. CUMMING: If accounts have not been rendered, then I would ask that you produce the McLennan Ross work in progress statements from January, 2017 to present.

MS. OSUALDINI: Under advisement.

UNDERTAKING NO. 79: IF ACCOUNTS HAVE NOT BEEN RENDERED, PRODUCE THE MCLENNAN ROSS WORK IN PROGRESS STATEMENTS FROM JANUARY, 2017 TO PRESENT - TAKEN UNDER ADVISEMENT.

Q MS. CUMMING: Is it your position that any legal fees that you incurred with McLennan Ross dealing with your family's application are to be included in your Application for Indemnification for Costs?

MS. OSUALDINI: I'm going to object to that.

MS. CUMMING: Why are you objecting?

MS. OSUALDINI: It's not relevant. It's a legal issue.

MS. CUMMING: So your position is that the trustees are not entitled to any information as to the work that McLennan Ross did for which your client seeks payment?

MS. OSUALDINI: The position we're taking is we've provided our accounts.

MS. CUMMING: Well, you provided redacted accounts with no detail as to time spent, correct?

MS. OSUALDINI: That's correct. We've produced the sums incurred, and we've provided a record -- there's a record of what Catherine's involvement in the litigation has been.

MS. CUMMING: All right. So --

MS. OSUALDINI: Because the trustees have certainly incurred fees in dealing with those applications, and so Catherine has incurred fees in dealing with those applications. Our positions are on the record, and she doesn't she need to go into detail about what her counsel has done. It's privileged.

MS. CUMMING: Well, I guess we'll have to proceed with a Court application on that, because it's highly relevant.

MS. OSUALDINI: What her views are on indemnification are relevant?

MS. CUMMING: Well, I won't ask for a view, then. I'll ask for this.

Q MS. CUMMING: In terms of your application for indemnification for the McLennan Ross legal fees, does

A Well, I'm using those words, but that was clearly what we all discussed and understood.
Q In fact, notices and advertisements were taken out in different papers in order to determine whether there were any individuals who felt that they may be beneficiaries. Isn't that correct?
A The record will speak for itself in terms of notice requirements. What I am speaking to there is from my notes of this meeting.
Q Well, 14(a) talks about all beneficiaries and potential beneficiaries being properly notified.
A Yes.
Q Is it your position that they have not been properly notified?
A I can't answer your question, because part of the problem here is that in 2004 the trustees made a decision to identify all the beneficiaries of the '85 Trust. And then there was stonewalling that went on.
And then again in February 26, 2009, they passed another resolution. And it was to call for the same thing, that there would be a lawyer who would ascertain based on the personal information gathered by Four Worlds, and there was a privacy policy for individuals to sign. And again, that has been stonewalled.
Q Ms. Twinn --
A Let me finish. How can I answer the question when a proper process to ascertain these beneficiaries has not

been done?

Q Ms. Twinn --

A And I have given evidence on this point before.

Q That's fine. I'm asking you about a June, 2011 meeting, all right? I'm not talking about something that happened in 2004 or 2009. I'm talking about a June, 2011 meeting and what steps would be taken following that meeting.

So what I'm asking you is are you suggesting that other steps could have been taken that haven't been taken yet in order to notify beneficiaries and potential beneficiaries?

A I'm sorry. I don't understand your question.

Q Well, you know that the Court gave an Order indicating the groups of people who should be advised of the court application, correct?

A Yes, you showed me that Order earlier.

MS. OSUALDINI: Can we have the August, 2011 Order out?

Q MS. CUMMING: So the Order of Justice Thomas of August 31, 2011 sets out the individuals who should be provided with notice.

A May I see the Order?

Q Sure.

(DISCUSSION OFF THE RECORD)

(BRIEF ADJOURNMENT)

Q MS. CUMMING: Ms. Twinn, we had been discussing

the August, 31, 2011 Order.
A Yes.
Q Justice Thomas had directed that the trustees would send out a notice to a number of different people and categories of people, correct, in paragraph 2 of the Order?
A May I see the document?
Q Sure.
A What he said is that, An application shall be brought by the trustees for the opinion, advice, and direction of the Court respecting the administration and management of the property held under the 1985 Sawridge trust hereinafter referred to as the Advice and Direction Application. The Advice and Direction Application shall be brought (a) to seek direction with respect to the definition of beneficiaries contained in the 1985 Sawridge trust and if necessary to vary the 1985 Sawridge trust to clarify the definition of beneficiaries and (b) to seek direction with respect to the transfer of assets to the 1985 Sawridge trust. Then paragraph 2 on notice says, The trustees shall send notice of the Advice and Direction Application to the following persons.
Q And you'll agree with me that paragraphs 4 and 5 of that Order speak about a notice letter advising or providing notice of the Advice and Direction Application. So the trustees were directed to send out

A That's correct.
Q When you were on the membership committee, you had occasion to review applications for membership?
A I've already testified about this.
Q All right. Well, as I understand it, the applications contain personal information about the applicant. Is that true?
A The application form would require personal information.
Q Don't you feel that it's important that that information be kept confidential?
A Have I said otherwise?
Q Well, you've indicated that the membership process is shrouded in secrecy, and I'm wondering if you would agree with me that the applications that contain personal information should be kept confidential.
A That's a very separate issue. And in 2009 when Four Worlds was going through an engagement with beneficiaries and potential beneficiaries, any person who may be or was, was asked -- we had a form for them to sign to protect the privacy of the personal information that they provided.
Q If you could turn to Exhibit 'L' in your affidavit. Did you have any involvement in the preparation of this statement?
A Willy Potskin was calling me.
Q I'll ask my question again. Were you involved --

A Can I --
Q Did you assist in the preparation of this statement? That's all I want to know.
MS. OSUALDINI: Can my client answer? She's explaining what her involvement was, if any, but let her answer. Go ahead.
A Lily wanted to help her daughter, Gina Donald, who had three times submitted applications to the Sawridge First Nation. And her third application was deemed complete, yet Roland Twinn's children jumped the application queue in 2013 even though the third application of Gina had been submitted in 2009. And she had documents, and I told her that if she has anything that's relevant she should put it together. And it was witnessed by my son Samuel Twinn.
Q MS. CUMMING: I'm going to ask the question again. Did you assist Lily Potskin in the preparation of the statement that is attached as Exhibit 'L' to your affidavit?
A I just answered the question. I described my involvement. Yes, I would call that assisting.
Q Did you review the statement before she signed it?
A It's not sworn.
Q No, I said did you review the statement before she signed it?
A This was signed by her and it was witnessed by Samuel.
Q I didn't ask you that. I said did you review the

statement before she signed it?
A I don't recall at this moment if I did or I didn't, but the information was assembled from her documents.
Q In terms of assembling the information, did you assist in the preparation of paragraphs 1 through 18?
A I helped her, yes.
Q Thank you.
A And I said that already. I assisted her.
Q You assisted her in the preparation of the statement that is Exhibit 'L'. Is that correct?
A I believe I did, and I certainly told her when she was calling me about these different documents to put them all together and she did that.
Q And Exhibit 'L' is not an affidavit, correct?
A It's a statement of Lily Potskin.
Q It's not an affidavit?
A We've already gone through this, Nancy.
Q No, we haven't.
A Yes, we have. It's clear what it is. It's a signed statement.
Q Is it an affidavit filed in this proceeding? It's not, is it?
A It's a signed statement.
Q And the signed statement you're relying upon in your application?
A I'm relying upon the documents that Lily provided including the February 17th, 2016 letter that's poorly

copied from Roland Twinn.

Q Ms. Twinn, would you agree with me that as a lawyer, it's your understanding that the statement of Lily Potskin which is Exhibit 'L' in your affidavit is hearsay?

A It's not for me --

MS. OSUALDINI: Objection. That's asking for a conclusion.

Q MS. CUMMING: I'm going to put on the record that it's our position that the statement of Lily Potskin which is Exhibit 'L' to your affidavit is nothing more than hearsay. It's not sworn evidence before this Court, and it's improper that the statement form part of your Application for Indemnification for Costs.

MS. OSUALDINI: And I would just put on the record that it's a statement that Catherine received and that it informs her position.

MS. CUMMING: Well, you have my position on the record.

MS. OSUALDINI: That's fine.

Q MS. CUMMING: Next I want you to turn to Exhibit 'N' which is an affidavit of Alfred Potskin.

MS. OSUALDINI: That's not correct.

MS. CUMMING: Yes, it is, Exhibit 'N'.

MS. OSUALDINI: My mistake.

Q MS. CUMMING: It says that there's a clerk's stamp on it, but I don't believe that it was actually

filed in this action. Is that correct?
A The record will say if it was or it wasn't.
Q Were you involved in the preparation of Exhibit 'N' to your affidavit?
A This was the statement of -- the affidavit of Alfred Potskin, and Alfred and I met and he told me his circumstances.
Q All right, and then did you put that into the wording in this affidavit?
A I don't believe I did.
Q Was it prepared by your counsel who commissioned the affidavit?
A It is very clear the signature is Crista Osualdini, and Crista is my counsel.
Q Now, if we can go to Exhibit 'O' to your affidavit.
A Yes.
Q That contains a number of statements from various individuals. We have Larry Cardinal, Shelby Twinn, Heather Jacqueline Poitras, and Gail O'Connell.
A And Deborah Serafinchon and Gail O'Connell, yeah.
Q All of those statements deal with that individual's experience in terms of attempting to become members of the Sawridge First Nation, correct?
A Well, in the case of Keiran, as a matter of law, he was a Band member although not on the list, and he was forced through an application process that took a long time. I don't recall how long it took.

Q But the statements deal with applications for membership in the Sawridge First Nation, correct?
A It deals with entitlement.
Q To membership?
A I believe in the case of Larry Cardinal who is the father of Keiran, it details what his family background was and his entitlement and the process that he went through when he submitted to the Band application process.
Q Did you assist Larry Cardinal in preparing this statement?
A Larry Cardinal contacted me and I assisted him.
Q Did you assist Shelby Twinn in the preparation of her statement?
A I believe I assisted her as well.
Q Did you assist Heather Jacqueline Poitras in preparation of her statement?
A I believe I did.
Q Did you assist Deborah Serafinchon in her application?
A I believe I did.
Q And did you assist Gail O'Connell in preparing her statement?
A I assisted all of them.
Q Now, I noticed that they're commissioned by a Marvin Braun. Do you know Marvin Braun?
A Whose statement are you referring to?
Q Well, all of them, I think, are --

A No, I don't think so.
Q Several of them are commissioned by Marvin Braun. I'm just wondering, do you know this Marvin Braun?
A Marvin Braun is a lawyer.
Q Do you know him?
A Yes, I know him.
Q Did you pay his legal bills in terms of commissioning these statements?
A No.
Q Do you know who typed up the statements?
A I don't recall.
Q Did you?
A It's possible but I don't know. I don't recall.
Q You don't remember typing up statements several pages in length?
A Well, I was assisting people and they were providing their stories, their circumstances, and I was assisting.
Q So you may well have typed up these statements?
A I would have assisted where I could so that they had a voice.
Q Who asked these individuals to sign these statements? Was it you?
A I had been approached by Larry Cardinal back in 2005, and I actually sent a number of e-mails about his -- about Keiran's circumstances to Ed Molstad, the lawyer for the Band who's been paid over $420,000 as a

non-party in this action, and saying that I believe Keiran has an entitlement to be on the Band list and would he please use his influence to help communicate with Roland Twinn and his advisors so that this can be dealt with.
Q Did you ask --
A That would go back to 2005, 2006 and also to Marco Poretti who was the partner with Ed Molstad. I e-mailed both of them.
Q So is everybody against you?
A No.
MS. OSUALDINI: Objection.
A Where does that question come from?
Q MS. CUMMING: The sworn statement of Shelby Twinn, did you ask her to provide a statement?
A I assisted Shelby. Shelby makes her own decisions as do all these people, and I don't know why they're being discredited by the trustees and by the lawyers for the trustees.
Q All of these statements at the end state, I swear this as evidence for the Court and no improper purpose. What court are we talking about?
A Whatever court.
Q Were these sworn in order to assist you in the 1103 action? Is that why they were sworn?
A It would assist the Court in dealing with any matter involving the Sawridge membership system. And as you

know, up until December 15th, 2015, Justice Thomas had said that the membership rules and the decision-making process must meet legal standards, fair, reasonable, timely, unbiased, due process, charter compliant.

Q And you're also aware of Justice Thomas's subsequent decision that indicated that the Sawridge trustees shall not engage in a collateral attack on the Sawridge First Nation membership processes. Is that correct? Are you aware of that?

A Correct. I already answered that question. We've gone through that many times now today.

Q Do you know why the statements in Exhibit 'O' are statements as opposed to sworn affidavits?

A No, I don't. They're statements. They're sworn statements. These are people trying to tell their story.

Q Again, with respect to Exhibit 'O', I am putting on the record that we take the position that these statements are hearsay evidence. They're not affidavits sworn in this application and therefore cannot be relied upon in the Application for Indemnification for Costs.

MS. OSUALDINI: And we maintain the same position as we did on the prior statement.

MR. RISLING: Is that your position with respect to the hearsay in your clients' affidavits as well, Nancy? I just want to make sure.

MS. CUMMING: Well, I'm putting my position on this matter?

MS. CUMMING: Yes, Exhibit 12.

MS. OSUALDINI: Perfect.

Q MS. CUMMING: A few moments ago, you had indicated that you did sign a standalone transfer of assets document. And am I correct that that was the one arising from the Order of Justice Ackerl in terms of the transfer to Dr. Margaret Ward?

A That's my recollection.

Q Thank you.

A And that, if I might add, would have been -- was the approach vis-a-vis Justin as well. But unfortunately, Doris Bonora went to court with no notice to my counsel on that --

Q Ms. Twinn, I've not asked a question about that.

A -- Justin Twin application.

MS. CUMMING: If we can go off the record for a moment.

(DISCUSSION OFF THE RECORD)

Q MS. CUMMING: Ms. Twinn, the transfer of assets document that you did sign transferred the assets of the trust from yourself, Roland Twinn, Bertha L'Hirondelle, Justin Twin, and Clara Midbo over to Roland Twinn, Bertha L'Hirondelle, Justin Twin, Margaret Ward, and yourself?

A I believe that's correct.

Q Thanks. If you could turn to paragraph 31 of your

affidavit.
A Okay, I've read 31.
Q That paragraph indicates that you spoke to John MacNutt, the CEO of the companies.
A Yes.
Q You were aware of the code of conduct provisions indicating that trustees were not to communicate directly with the directors of the companies?
A I'm aware of the code of conduct.
Q But you contacted Mr. MacNutt?
A I spoke to Mr. MacNutt, absolutely.
Q Does the code of conduct apply to you?
A My signature is on the code of conduct. It applies to me.
Q When you spoke to Mr. MacNutt, did you know whether he understood trust law?
A I don't -- that was not the gist of our conversation. My focus as a trustee and to do my due diligence was to determine whether there was any risk or harm pending to the companies as a result of the none -- my not signing the asset transfer.
And unfortunately, because of the way Ms. Bonora handled the matter, the affidavit of Brian Heidecker was never cross-examined on. And so it -- in fact, I recall that I didn't even see it until either shortly before or after the -- I believe it was May 16th when Ms. Bonora went to court.

Q Did you advise Mr. MacNutt during your conversation that the trust required a certain number of trustees in order to be able to carry on the business of the trust?
A I told you the gist of my conversation.
Q So you didn't tell him that?
A I don't recall that and I doubt that I would have raised it because it had nothing to do with my focus which was as I've described.
Q Did you explain to Mr. MacNutt that the trustees held all assets of the trust and that when a new trustee was appointed it was necessary to transfer the assets of the trust from the old trustees to the new trustees? Did you explain that to him?
A The gist of my conversation was purely from is there any negative impact to the companies. That was all.
Q All right. Thank you.
A Mr. MacNutt has been the CEO now since April, 2003 when the Band's $750,000 management contract was terminated. So he does, I think, have some background.
Q Ms. Twinn, my question had nothing to do with a management contract for the Band or when Mr. MacNutt became CEO. So I would ask that when you answer my questions you respond to the questions as opposed to providing extra information that is not responsive to the question. Thank you.
If you can turn to paragraph 32 of your affidavit.
A Yes, I've read paragraph 32.

Q All right. At the time these transactions went through, there were trustees of the trusts who had been trustees for quite some period of time, correct?
A You're referring to the transactions referred to in paragraph 32?
Q Yes.
A Yes, I believe that would be correct.
Q So during those transactions, the trusts weren't dealing with a change in the complement of trustees?
A That would be true.
Q Thank you. At the time these transactions in paragraph 32 went through, was it your recollection that the five trustees held all of the shares of the two trusts, the shares of the companies?
A Well, that's an interesting question, how it was actually held; because I had asked for that information, but I had not been provided it. And I believe -- I'd have to check the record, but I believe it was something that was not forthcoming to me. So I was a little bit in the dark on it.
And as I said, the transfer of assets was a completely new form that had never been done before, and it was done at the last minute. And there was a -- you know, there's a reasonable time frame for things to happen. There was no need in my mind that there had to be an appointment on January 21st, 2014 of a trustee. There were other options available. And the other

options available included giving ourselves a reasonable time to go through a proper process to understand this new form that was being imposed.
Q Did you ever receive a legal opinion to suggest that the transfer of assets was not required?
A I don't know what you're referring to.
Q Well, did you receive any advice to suggest that a transfer of assets was not required when a new trustee was appointed to the trusts?
A There was -- there's a reasonable period of time --
Q That's not my question.
A No. There's a reasonable period of time when someone suddenly resigns or someone suddenly dies and doesn't give notice of their illness to fill the vacancy.
Q Did you ever receive legal advice indicating that a transfer of assets to the new trustees was not required?
A The -- I can't answer that question because the legal advice from persons like Ms. Bonora were going to Paul Bujold. And I haven't seen --
Q I'm just trying to get --
A -- that advice.
Q I'm just trying to get a yes or no answer. Did you or have you received any legal advice which indicates that the transfer of assets from the old trustees to the new trustees was not required?
A I don't recall receiving that advice, but that's a

completely different point. We were not talking about not doing the paperwork to reflect the shareholders. What we're talking about is who -- how were the shareholders represented in any event on those share certificates and other questions in relation to this new form that was being suddenly dropped on us.
Q So the new form was --
A With no discussion.
Q The new form was presented before the January, 2014 trustee meeting, a few days before, correct?
A I would want to confirm that. I believe that I provided evidence already on this point that at the actual trustee meeting on January 21st, 2014 the documents were provided at about 11:30 a.m. And I asked Paul Bujold to e-mail them to me, and he did so at about 12 noon. That was the first time that I saw those.
Q So you saw the document on January 21, 2014?
A That's my recollection at this moment.
Q And the Order of Justice Nielsen was given on May 16, 2014 according to the record.
A Why are you asking me the question? The record speaks --
Q Well, my question for you is that you'd agree with me that that was a period of almost four months from the date you first saw the document to the time that Justice Nielsen ordered the transfer. Is that correct?

A Yes, the documents speak for themselves.
Q In paragraph 35 of your affidavit, you indicate that you take your ethical obligations as a lawyer seriously.
A Yes.
Q You will recall that in an application before Justice Thomas costs were awarded against you. Do you recall that?
A Are you referring to the December, 2014 application?
Q Yes.
A Yes, I recall that.
Q Have you paid those costs?
A No.
Q Thank you. Now, you've also in paragraph 36 referred to some letters provided by Justice Wachowich. Did Justice Wachowich ever attend any of the trustee meetings?
A No.
Q Did he ever sit in in any Questioning for Discoveries of you?
A No.
Q Was he ever involved in any litigation against you?
A I've known him only as a judge.
Q Now, one of the letters he provided was with respect to your seeking out employment with the government. Is that correct?
A Could be, yes.

the duty of loyalty to the beneficiaries, and that includes utmost selflessness. And whatever I have spent on this I have been trying to fulfill my obligations as a trustee which is not to the fellow trustees or to Brian Heidecker and Paul Bujold and belonging to the club. It's about the beneficiaries, period.

Q Just so I'm clear, though, in terms of 41(a) through (e), you were referring to funds that you have spent in the various pieces of litigation?

A Yes. Yes, correct.

Q You're not suggesting or you're not talking about funds spent outside of the litigation?

A No, I'm talking about being forced into the court. You know, the same day that I wrote Brian Heidecker a letter in March 19, 2014, I wrote the trustees a letter saying, I want to work this out with you internally and privately. And here, I've signed my commitment; please sign your signature. Not even a reply, not even a reply. How many times have I offered that? Many. I have reached out.

Q In paragraph 41 of your affidavit, you indicated you requested a minor's application form for membership from Roland Twinn. Did you contact the Sawridge First Nation office and request an application form?

A I have not because his -- he controls this and he's not replied to my requests to even say go and talk to so

and so. It's just been met with silence, and Paul Bujold is aware of this as well.
Q Ms. Twinn, there's nothing stopping you from contacting the office and requesting an application form, is there?
A Why do I have to push the rock up the mountain all the time on everything? Where are the responsibilities of these power-holding people to comply?
Q Ms. Twinn, there's nothing stopping you from contacting the office and obtaining an application?
A I did contact the chief.
Q That's not what I asked you. Have you contacted the office?
A If he gives me direction who to contact in his office, I will gladly do that. He has not replied twice.
Q Have you contacted the office and requested an application form? Yes or no?
A Yes, through Roland Twinn, the chief.
Q Outside of Roland Twinn, have you requested an application form?
A From who? I don't know who to contact.
Q Ms. Twinn, you're a bright woman.
A I've answered your question. I don't know who within his office to contact. He controls these forms. They take their orders from him to give or not to give, to hire or not to hire, to give information or not give information. That's the reality and I know it and you

don't. And I am telling you when I write a simple e-mail to the chief twice to say, Please provide me with a minor's application form, it's a very simple thing to reply and say contact so and so or here it is.

Q Ms. Twinn, do you know whether there even exists a minor's application form? Isn't there just one application for membership?

A You would know more than I would.

Q Well, when you were on the membership committee, wasn't there just one application for membership?

A Roland's sister, before she stopped attending the membership committee meetings, had said that she was working on that with Roland. I don't know the status. I've just asked for the form. He can simply say there is no form.

I don't know what form his children who were rapidly processed into membership queue-jumping, what form they filled out. I don't know. There should be a minor's form, you would think.

Q Ms. Twinn, do you know whether there's a minor's form? Yes or no?

A I don't know. I don't know.

Q And you've not contacted anyone at the office outside of Roland Twinn to request an application form, correct?

A Correct.

Q Thank you.

Tab 10

Form 49
Alberta Rules of Court
Rule 9.1

Clerk's Stamp

JUDICIAL CENTRE OF EDMONTON
FILED
JUN 2 4 2015
Clerk of the Court

COURT FILE NUMBER	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, APRIL 15, 1985 (the "1985 Trust") and THE SAWRIDGE TRUST, 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	ORDER
PARTY FILING THIS DOCUMENT	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

This is Exhibit " A " referred to in the Affidavit of

Jessica Niles

Sworn before me this ....

day of .... A.D., 20......

....
A Commissioner for Oaths in and for the Province of Alberta

DATE ON WHICH ORDER WAS PRONOUNCED: December 17, 2014

NAME OF JUSTICE WHO MADE THIS ORDER: The Honourable Justice D. Thomas

UPON THE APPLICATION of the Applicant; AND UPON noting the agreement of the Applicant to adjourn Paragraphs 2, 3, and 4 of her Application; AND UPON the Applicant seeking confirmation of Paragraph 1 of her Application as to whether the Honourable Justice D. Thomas is seized with the matters set out for adjudication in her Application for advice and direction filed in this Action on September 26, 2014; AND UPON hearing representations from counsel for the Applicant and counsel for the Respondent; AND UPON the Honourable Justice D. Thomas noting that he considered himself seized with Action No. 1103 14112, but that he is not presently seized with Action No. 1403 04885, which can be decided at a later date; AND UPON the Respondents' application for an adjournment; IT IS HEREBY ORDER THAT:

1. The within Application shall be adjourned *sine die*;

2. The Applicant is at liberty to bring an application requesting that Justice D. Thomas be seized with this action;

3. The Respondents shall be entitled to costs of this Contested Application as per Schedule C, in any event of the cause.

4. Compliance with Rule 9.5(2) of the Alberta *Rules of Court* is hereby dispensed with.

Mr. Justice D. Thomas

Thomas J

Approved as to Order given:

McLENNAN ROSS LLP

Per: Crista C. Osualdini,
Solicitor for the Applicant

Tab 11

Most Negative Treatment: Distinguished
Most Recent Distinguished: Huang v. Telus Corp. Pension Plan (Trustee of) | 2005 ABQB 272, 2005 CarswellAlta 1047, [2005] A.W.L.D. 2968, [2005] A.W.L.D. 2969, [2005] A.W.L.D. 2972, 19 E.T.R. (3d) 300, 47 C.C.P.B. 53, 144 A.C.W.S. (3d) 788, [2005] A.J. No. 936 | (Alta. Q.B., Apr 11, 2005)

2001 BCCA 76
British Columbia Court of Appeal

Turner v. Andrews

2001 CarswellBC 224, 2001 BCCA 76, 2001 C.E.B. & P.G.R. 8424 (headnote only), [2001] 3 W.W.R. 620, [2001] B.C.W.L.D. 384, [2001] B.C.J. No. 210, 102 A.C.W.S. (3d) 872, 147 B.C.A.C. 305, 197 D.L.R. (4th) 533, 241 W.A.C. 305, 26 C.C.P.B. 313, 38 E.T.R. (2d) 126, 85 B.C.L.R. (3d) 53

Thomas Paul Franklin Turner, on behalf of himself and on behalf of all persons who, at any time after the introduction of the Sales Incentive Plan by BC Tel in or about July 1986, have been employees of BC Tel, members of the Telecommunications Workers Union, participants in the Telecommunication Workers Pension Plan, and who have been remunerated in part in accordance with the Sales Incentive Plan (Plaintiff/Appellant) and Garnet R. Andrews, E.A. Prentice, Robert J. Dardi, John D. Wolff, Rod Hiebert, David Mcelheran, Kathy Pearn and Linda Tait (Defendants/Respondents)

Newbury, Braidwood, Hall JJ.A.

Heard: December 8, 2000
Judgment: February 6, 2001
Docket: Vancouver CA026505

Proceedings: affirming (1999), 23 C.C.P.B. 84, 30 E.T.R. (2d) 126 (B.C. S.C.)

Counsel: *N.J. Garson*, *Q.C.*, and *P. Armitage*, for Appellant.
I.G. Nathanson, *Q.C.*, and *J.C. MacInnis*, for Respondent.

Subject: Corporate and Commercial; Estates and Trusts; Civil Practice and Procedure

Related Abridgment Classifications
Civil practice and procedure

XXIV Costs
XXIV.7 Particular orders as to costs
XXIV.7.n Miscellaneous

Pensions

I Private pension plans
I.5 Practice in pension actions
I.5.d Costs

Headnote
Pensions --- Practice in pension actions — Costs

Plaintiff was employee contributing to pension plan administered by defendant trustees — Pension plan contribution was calculated on basis of total salary, including incentive pay, while distribution of pension plan surplus was based on average earnings, which excluded incentive pay — One-hundred and eighty employees, out of 15,000 plan members, were affected by exclusion — Plaintiff brought action against trustees claiming breach of duty to act even-handedly as between beneficiaries — Plaintiff brought application for pre-emptive costs order requiring payment of his legal fees out of trust fund in advance — Application was dismissed on basis that it was not appropriate to fetter trial judge's discretion as to costs in adversarial proceeding — Plaintiff appealed — Appeal dismissed — Trial judge exercised her discretion on sound principles — Not clear that trial judge would ultimately be bound to make costs order in favour of plaintiff — Fact that plaintiff was alleging "innocent" breach by trustees did not render proceeding non-adversarial in nature — Action was not analogous to derivative action in company law, but to action brought by minority shareholders in effort to promote their particular interests — Interests of justice did not require that prospective costs order be made — If plaintiff could not fund action, he had alternative of proceeding by means of application for court's interpretation of terms of trust — Trust fund would cover cost of application arising as result of difficulty of construction or administration of trust — In alternative, plaintiff could apply to have particular disbursements, necessary to advance his case, paid out of plan.

Table of Authorities

Cases considered by *Newbury J.A.*:

Alsop Wilkinson v. Neary, (sub nom. *Alsop Wilkinson (a firm) v. Neary)* [1995] 1 All E.R. 431 (Eng. Ch.) — applied

Bentall Corp. v. Canada Trust Co. (1996), 13 C.C.P.B. 77, 26 B.C.L.R. (3d) 181, 15 E.T.R. (2d) 274, [1997] 4 W.W.R. 414 (B.C. S.C.) — applied

Biddencare, Re, [1994] 2 B.C.L.C. 160 (Eng. Ch. Div.) — applied

Brown v. Black Top Cabs Ltd. (1997), (sub nom. *Brown v. Black Top Cabs Ltd. (No. 2))* 97 B.C.A.C. 59, (sub nom. *Brown v. Black Top Cabs Ltd. (No. 2))* 157 W.A.C. 59, 43 B.C.L.R. (3d) 76, [1998] 5 W.W.R. 666 (B.C. C.A.) — applied

Buckton, Re, [1907] 2 Ch. 406 (Eng. Ch. Div.) — applied

Discovery Enterprises Inc. v. Ebco Industries Ltd., 1999 BCCA 749, 70 B.C.L.R. (3d) 299, [2000] 3 W.W.R. 31, 50 B.L.R. (2d) 207, 38 C.P.C. (4th) 27, 131 B.C.A.C. 150, 214 W.A.C. 150 (B.C. C.A.) — applied

Edge v. Pensions Ombudsman (1999), [2000] 3 W.L.R. 79, [1999] 4 All E.R. 546, [2000] I.C.R. 748 (Eng. C.A.) — considered

Hockin v. Bank of British Columbia (May 19, 1987), Doc. Vancouver C870459, C870822 (B.C. S.C.) — applied

Hockin v. Bank of British Columbia (May 2, 1989), Doc. Vancouver C870459 (B.C. S.C. [In Chambers]) — referred to

McDonald v. Horn (1994), [1995] 1 All E.R. 961 (Eng. C.A.) — applied

Skidmore v. Blackmore (1995), 2 B.C.L.R. (3d) 201, [1995] 4 W.W.R. 524, 27 C.R.R. (2d) 77, 55 B.C.A.C. 191, 90 W.A.C. 191, 35 C.P.C. (3d) 28, 122 D.L.R. (4th) 330 (B.C. C.A.) — applied

Westdock Realisations Ltd., Re, [1988] B.C.L.C. 354 (Eng. Ch. Div.) — considered

Rules considered:

Rules of the Supreme Court, 1965, S.I. 1965, No. 1776
O. 62, R. 6(2) — referred to

APPEAL by plaintiff from judgment reported at (1999), 23 C.C.P.B. 84, 30 E.T.R. (2d) 126 (B.C. S.C.), dismissing application for prospective order requiring payment of his legal fees and disbursements from pension plan fund.

Editor's Note

This decision contains some interesting analysis of the extent of pension plan participants' right to have their litigation costs covered out of plan assets. With an increasing number of participant and/or pensioner challenges to employer and/or custodian actions finding their way to court in the pension area, it can be anticipated that the source of funding for such challenges will itself become a more frequent issue for judicial resolution.

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

1 The plaintiff Mr. Turner sues as the representative of approximately 170 members of the Telecommunications Workers' Pension Plan. The Plan was established in 1975 for the benefit of employees of the then "BC Tel" group of companies, and now has more than 14,000 members. Of them, approximately 170 are salespersons paid partly in the form of incentive bonuses in accordance with a "Sales Incentive Plan" introduced in 1986. This scheme operates outside the employer's collective agreement and permits salespersons to augment their wages by earning bonuses conditional on attaining sales and other targets. The amount that a salesperson may earn by way of incentives has increased over the years to the present maximum of $75,000 per year.

2 Under the Pension Plan, both employees and the employer contribute to a fund held in trust by eight trustees, four representing the union and four representing the employer. Employees' contributions are based on "Gross Earnings", a term defined to include "wages, incentive payments, differentials, overtime and premium time". It appears to be common ground that the Trustees (who are the defendants herein) have a discretion under the Trust Agreement to define, modify and augment benefits payable under the Plan from time to time. Since 1983, in the purported exercise of that discretion, the Trustees have applied an "Update Process" in order to distribute trust fund surpluses among Plan members. The Update Process allows benefits payable to members to be increased in certain circumstances, based on their "Average Annual Earnings" over the three years prior to retirement. Unlike "Gross Earnings," the term "Average Annual Earnings" does not include bonus payments received by salespersons. The plaintiff alleges that as a result:

> 14. . . . members of the Sales Incentive Plan are less likely to benefit from Trust Fund surpluses, if at all. By contrast, Pension Plan participants who do not earn incentives are much more likely to benefit from Trust Fund surpluses by receiving significantly enhanced accruals by way of the Update Process.

3 The gist of Mr. Turner's action is that in applying the Update Process, the Trustees have breached their "common law and fiduciary duties" to hold an even hand among all beneficiaries of the Plan. The plaintiff claims, among other things, a declaration that the Update Process "has been a breach of the duty of even-handedness", an accounting of "benefit accruals due" to Mr. Turner and other salespersons represented by him, an injunction to restrain further breaches, and special damages.

Costs Application

4 Mr. Turner's claim has not yet come to trial and is indeed still at an early stage. However, he applied to the Supreme Court in the fall of 1999 for an order that his "reasonable legal fees and disbursements to prosecute this proceeding, including such fees and disbursements incurred to date", be paid out of the Plan. (Since the plaintiff's Notice of Motion did not refer to a provisional order, I assume he intended to seek a 'permanent' costs order and would not expect to repay his costs to the Plan if he were ultimately unsuccessful.) The application came on before Madam Justice Allan in Chambers, who dismissed it for Reasons dated October 13, 1999, now reported at (1999), 30 E.T.R. (2d) 126 (B.C. S.C.). It is from that dismissal that Mr. Turner now appeals.

5 In refusing to grant the costs order, Allan J. began her analysis by noting the often-cited English case of *Buckton, Re*, [1907] 2 Ch. 406 (Eng. Ch. Div.), in which a beneficiary under a will applied successfully for a declaration as to his entitlement and then sought costs against the trustees of the will. Kekewich J. suggested that applications for the payment of costs from an estate or fund generally fall into three classes, which Allan J. summarized in the instant case as follows:

> (1) An application made by trustees of a will or settlement, asking the Court to construe the trust instrument for their guidance; to ascertain the interests of the beneficiaries; or to answer a question which arises in the administration of the trusts. In such instances, the costs of all parties, which are necessarily incurred for the benefit of the estate, should be taxed as between solicitor and client and paid out of the estate.
>
> (2) An application made by the beneficiaries as a result of difficulty of construction or administration of the trust which would have justified an application by the trustees. Again the application is necessary for the administration of the trust and the costs of all parties, which are necessarily incurred for the benefit of the estate, are paid out of the estate.
>
> (3) An application made by the beneficiaries who make claims adverse to other beneficiaries. Such litigation is adversarial in nature and, subject to the Court's discretion, the unsuccessful party bears the costs of those whom he or she brings to Court. [para. 8; emphasis added.]

The Chambers judge concluded, at least tentatively, that this case fell within the third, or "adversarial", category, noting that rather than applying to court for an interpretation of the Plan or of the Update Process as it relates to the Plan, the plaintiff had alleged breach of fiduciary duty on the part of the Trustees and had sought, *inter alia*, special damages against them.

6 In connection with the prospective aspect of the application before her, the Chambers judge also referred to a more recent English decision, *McDonald v. Horn* (1994), [1995] 1 All E.R. 961 (Eng. C.A.). There the Court upheld a prospective (or "pre-emptive") costs order over a specified period in an action brought by pension plan members who had alleged breaches of trust and abuse of fiduciary powers on the part of their employers and the plan's trustees. In a judgment concurred in by Hirst and Balcombe L.JJ., Hoffmann L.J. (as he then was) cited and confirmed the classification of cases advanced in *Buckton, supra*, and noted that it is sometimes difficult to decide whether a case falls within the first or second class. However, he said, where it is not clear the trial judge would ultimately be bound to make an order in favour of the applicant, the court "is very reluctant to make a prospective order." (at 971.) Indeed, as Browne-Wilkinson V.-C. had observed in *Westdock Realisations Ltd., Re*, [1988] B.C.L.C. 354 (Eng. Ch. Div.):

> Unless satisfied that after trial a judge would be likely to make an order that the costs of all parties are to come out of the fund, it cannot in general be right to make such an order at this stage. [at 359]

Hoffmann, L.J. in *McDonald* continued:

> I respectfully agree. In fact I would be inclined to put the matter rather more strongly. I think that before granting a pre-emptive application in ordinary trust litigation or proceedings concerning the ownership of a fund held by a

> trustee or other fiduciary, the judge must be satisfied that the judge at the trial could properly exercise his discretion only by ordering the applicant's costs to be paid out of the fund. Otherwise the order may indeed fetter the judge's discretion. . . . Browne-Wilkinson V-C. in *Re Westdock Realisations Ltd.* found very special circumstances which, he said, justified a pre-emptive order despite the fact that the proceedings were hostile litigation in which costs would ordinarily follow the event. The judge's reason . . . is so unlikely to recur that I need not express any view on whether I would regard it as a proper reason or not. [at 971-2; emphasis added.]

Since the case before the Court in *McDonald* was "hostile litigation if there ever was", the plaintiffs could not rely on the applicable English rule, r. 6(2) of Ord. 62.

7 The Court went on to hold, however, that the plaintiffs should receive a pre-emptive costs order, but "by a different route." Their claim was found to be closely analogous to that of the plaintiff in a derivative action brought against a company, alleging injury to the company as a whole. Again in Hoffmann L.J.'s analysis:

> On the other hand, if one looks at the economic relationships involved, there does seem to me a compelling analogy between a minority shareholder's action for damages on behalf of the company and an action by a member of a pension fund to compel trustees or others to account to the fund. In both cases a person with a limited interest in a fund, whether the company's assets or pension fund, is alleging injury to the fund as a whole and seeking restitution on behalf of the fund. And what distinguishes the shareholder and pension fund member, on the one hand, from the ordinary trust beneficiary on the other, is that the former have both given consideration for their interests. . . . The relationship between the parties is a commercial one and the pension fund members are entitled to be satisfied that the fund is being properly administered. Even in a non-contributory scheme, the employer's payments are not bounty. They are part of the consideration for the services of the employee.
>
> Pension funds are such a special form of trust and the analogy between them and companies with shareholders are so much stronger than in the case of ordinary trusts that, in my judgment, it would do no violence to established authority if we were to apply to them the *Wallersteiner v. Moir (No. 2)* [[1975] 1 All E.R. 849 (C.A.)] procedure.
>
> [at 972-3; emphasis added.]

8 The Chambers judge did not find the case at bar to be analogous to *McDonald*. She agreed with the defendants' submission that it was not at all clear whether at the end of the day the plaintiff would be entitled to be indemnified out of the Plan for his costs. Mindful of the policy behind the usual rule that costs should follow the event, she was reluctant to fetter the trial judge's discretion ahead of time. She wrote:

> I agree that the trial judge's discretion to award costs may be influenced by numerous factors relating to both the conduct of the litigation and its outcome. Any pre-emptive order for costs could fetter that discretion even if the trial judge could "reverse" the earlier order. The suggestion that a conditional order for prospective costs could be made, subject to repayment following judgment, is, in my opinion, unworkable. . . .
>
> Prior to the conclusion of the trial of this action, it cannot be determined whether the Court will exercise its discretion to award costs to the plaintiff regardless of the outcome. Whether or not the litigation is "adversarial" in nature (and it is, perhaps, too early to determine that question), the trial judge will retain a discretion to award costs. That discretion would be fettered if this Court granted the plaintiff's application for a pre-emptive order for costs. [paras. 22, 24]

9 At para. 23 of her Reasons, the Chambers judge also observed that it "may have been a factor" in *McDonald* that contingency fee agreements were not permissible in England; thus, she said, a much stronger argument could be made in that case that an award for prospective costs was necessary "to level the playing field." Here, the Chambers judge found no such "apparent impediment".

On Appeal

10 Ms. Garson for the plaintiff first argued on appeal that the Chambers judge was in error on the latter point, since if Mr. Turner succeeds, he and the other salespersons he represents will not receive a "fund" from which they could pay a contingency fee, other than from an award of costs after trial. Counsel pointed to evidence that Mr. Turner is not in a position to fund complex and lengthy litigation from his own pocket, so that unless a prospective order is made, he may be unable to proceed with the action. The Trustees, on the other hand, are entitled under the terms of the Trust Agreement to be indemnified for their costs and expenses from the Plan. Thus a prospective order is needed, Ms. Garson contends, to 'level the playing field'.

11 I will return below to the matter of impecuniosity, but I note parenthetically here that the indemnification clause in the Trust Agreement serves a rather different purpose than would a costs order in the plaintiff's favour. Such clauses are generally required because trustees must act in the interests of their beneficiaries and not in their own interests. Thus they should not be expected to bear personally the costs of litigation properly undertaken in their capacity as trustees. If on the other hand they are found to have breached their duty, they are not necessarily entitled to indemnification: see *Halsbury's Laws of England*, (4th ed. 1995), v. 48, para. 968.

12 With respect to the allegations of breach of trust advanced by her client in this case, Ms. Garson also submitted that although there is a "controversy" as to the appropriateness of the Update Process used by the Trustees in the allocation of surplus, the Trustees themselves do not have a "personal stake" in the litigation. If a breach of trust has occurred, she says, it has occurred "innocently" — i.e., without bad faith or moral turpitude on the Trustees' part. Indeed, she contends that contrary to the Chambers judge's finding, Mr. Turner's prayer for a declaration of breach of trust is analogous to an application to the court for directions — the second class of proceeding referred to in *Buckton*, *supra*.

13 Mr. Nathanson for the defendants characterizes the case very differently. In his submission, the plaintiff's real complaint is the amount of contributions required to be made to the Plan by its members — a matter regularly negotiated as part of the collective agreement between the employer and the union, not the Trustees. More importantly, Mr. Turner is not suing on behalf of the fund or on behalf of the whole group of beneficiaries (as was the case in *McDonald*), but for the benefit of the salespersons as a subset of Plan members. It follows that the action is truly adversarial and that the analogy to derivative actions in company law is not apt: rather, counsel contends, the litigation is like an action brought by minority shareholders in an effort to promote their own particular interests in the face of an exercise of discretion by the company's directors in the interests of the company as a whole — and with a similar likely outcome.

14 Mr. Nathanson also challenges the merits of the plaintiff's action, citing authority to the effect that the duty of a trustee to act even-handedly does not mean all beneficiaries must receive equal benefits; and that the discretion of the Trustees in this case included the discretion to provide benefits to some Plan members to the exclusion of others: see *Edge v. Pensions Ombudsman*, [1999] 4 All E.R. 546 (Eng. C.A.), at 559-60; and Donovan Waters, *The Law of Trusts in Canada* (2nd ed., 1984) at 788. At this stage, however, no more precise assessment can be made of the merits of Mr. Turner's case than to say it does not appear to be frivolous.

15 Both counsel agreed that there is little in the way of appellate authority in Canada considering prospective costs orders, although applications for such orders are being made more frequently than in the past. (See *Discovery Enterprises Inc. v. Ebco Industries Ltd.* (1999), 70 B.C.L.R. (3d) 299 (B.C. C.A.), a decision of this court reversing such an order in a derivative action; and at the trial level, see *Hockin v. Bank of British Columbia* (May 19, 1987), Doc. Vancouver C870459, C870822 (B.C. S.C.) and *Hockin v. Bank of British Columbia* (May 2, 1989), Doc. Vancouver C870459 (B.C. S.C. [In Chambers]); *In the Matter of Westar Mining Retirement Plan* (Vancouver Registry No. A92477, dated April 8, 1994), and *Bentall Corp. v. Canada Trust Co.* (1996), 26 B.C.L.R. (3d) 181 (B.C. S.C.).) In England, there is more jurisprudence directly on point. In addition to *McDonald*, we were referred to *Alsop Wilkinson v. Neary*, [1995] 1 All E.R. 431 (Eng. Ch.), where the trustees under an *inter vivos* settlement were defendants in an action brought by the settlor's creditors impeaching the trust. The trustees sought a pre-emptive costs order. The Court stated that in cases of hostile litigation, four considerations were relevant — the strength of the applicants' case; the likely order for costs at trial; the justice of the application; and "any special circumstances". (At 437, citing *Biddencare, Re*, [1994] 2 B.C.L.C. 160 (Eng. Ch. Div.),

a dispute between the liquidator of a company and its creditors.) The trustees' application in *Alsop* failed on all four grounds. On the question of the likely order at trial, Lightman J. commented that ". . . the usual order in such hostile litigation will be that the trustees (if they actively defend and lose) will have to pay their own and the other party's costs and (as this is a case of a trust dispute) will not be entitled to an indemnity or lien from the trust fund." (at 437.)

16 However, a different result was reached in *Re National Grid Company plc Group of the Electricity Supply Pension Scheme* (Ch. Div, dated May 2, 1997), LEXIS. At issue in *National Grid* was a proposal by an employer to allocate to itself 70 percent of a large actuarial surplus in a pension fund, leaving the balance to fund benefit improvements. The applicants challenged the lawfulness of the proposal and argued that the whole surplus should be applied to the improvement of pension benefits — a position with which the Pensions Ombudsman had agreed. Thus, as Rimer J. noted at the end of his reasons, the litigation was at least *prima facie* for the benefit of all plan members, although some were opposed to the bringing of the action. He referred as well to the four factors enunciated in *Biddencare* and allowed the application notwithstanding his characterization of the case as "hostile". The Court reasoned that the applicants had a "good arguable case", as conceded by the defendants; that the proceeding was akin to the type of case in which, as illustrated by *McDonald*, a pre-emptive order could be made; and that:

> As to whether justice is likely to be better served by making the order rather than by refusing it, I consider that the considerations in favour of making it outweigh those against doing so. The appeals involve substantial sums of money. The questions raised are potentially quite difficult and it is obviously desirable that the applicants should have the opportunity to be properly represented before the court so that their arguments may be put. [at 4]

17 Should similar reasoning be applied in the case at bar? In my view, the nature of the plaintiff's claim militates against the granting of a prospective costs order, whether on the basis of the four factors enunciated in *Biddencare* or the analogy to derivative actions suggested in *McDonald*. This case is truly adversarial in nature, not having been brought for the benefit or in the interests of the Plan as a whole, but for the particular class of Plan members Mr. Turner represents. If he succeeds, other members will necessarily receive less by way of benefits than would otherwise be the case. If he loses, the fund held for the benefit of all members will be diminished (by the amount of his costs) without the prospect of recovery. By the same token, it cannot in my view be said at this point that the interests of justice require that a prospective order be made. Where the justice of this case lies as between Mr. Turner and his group of salespersons on the one hand, and on the other, the Trustees — supported, presumably, by the employer, the union, and perhaps the large majority of Plan members — cannot be predicted with any confidence at this point. The Chambers judge had due regard for this consideration and for the purpose of the usual rule as to costs, which is to encourage the reasonable conduct of litigation: See *Skidmore v. Blackmore* (1995), 122 D.L.R. (4th) 330 (B.C. C.A.). No error in the exercise of her discretion has been shown.

18 Returning finally to the financial difficulty facing Mr. Turner, it should not be assumed he is without legal recourse. It will be apparent that the obstacles in the path of obtaining an order would be diminished if he were to frame his case, if it is possible, so as to come within the second category described in *Buckton*. That type of proceeding could likely be brought more quickly and less expensively than a full-blown trial of the conduct of eight Trustees. Alternatively, he might consider applying to have a particular disbursement or disbursements — e.g., the costs of preparation of an expert's report — paid out of the Plan if the expenditure is necessary to advance his case. Generally, however, it is not open to us, in the absence of legislation to the contrary, to modify the rules of civil procedure by reason of the financial position or impecuniosity of a party: see *Brown v. Black Top Cabs Ltd.* (1997), 43 B.C.L.R. (3d) 76 (B.C. C.A.).

19 I would therefore dismiss the appeal, and in light of the fact that this was something of a case of first impression in this court, I would order that the parties bear their own costs. (This order would not preclude the Trustees from invoking the indemnification terms contained in the Trust Agreement.)

20 We are indebted to counsel for their able arguments.

Appeal dismissed.

End of Document

Tab 12

Court of Queen's Bench of Alberta

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

Date:
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**

Table of Contents

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 <u>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</u>. [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. <u>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</u> ... [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 <u>a collateral attack may be</u>

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 <u>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"</u> ...
>
> 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 <u>the awarding of costs against lawyers personally flows from the right and duty of the</u>

> 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.

Thomas J

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)

Tab 13

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 (Sawridge #3)

Table of Contents

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:

> <u>August 31, 2011</u> - 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 Thomas J
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

Tab 14

COURT FILE NUMBER	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 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")
APPLICANTS:	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust (the "Sawridge Trustees")
DOCUMENT	**ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Dentons Canada LLP** 2900, 10180 101 Street Edmonton, AB T5J 3V5 Attention: Doris Bonora Telephone: (780) 423-7188 Facsimile: (780) 423-7276 File No.: 551880 -1

Clerk's Stamp
JUDICIAL CENTRE OF EDMONTON
FILED
AUG 17 2016
Clerk of the Court

DATE ON WHICH ORDER WAS PRONOUNCED:	December 17, 2015
LOCATION WHERE ORDER WAS PRONOUNCED:	Edmonton, Alberta
NAME OF JUSTICE WHO MADE THIS ORDER:	Honourable Justice D.R.G. Thomas

UPON THE APPLICATION of the Office of the Public Guardian and Trustee of Alberta ("Public Trustee"), and Upon hearing from the counsel for: Sawridge First Nation, the Public Trustee, Sawridge Trustees and Catherine Twinn; and Upon the decision of The Honourable Mr. Justice Dennis R. Thomas dated December 17, 2015 (2015 ABQB 799);

IT IS HEREBY ORDERED THAT:

1. The Public Trustee's application for production of records/information from the Sawridge First Nation ('SFN") is denied.

2. Document production by SFN shall only be compelled pursuant to *Rule* 5.13(1) of the *Alberta Rules of Court*, Alta Reg 124/2010.

3. The Public Trustee shall not conduct an open-ended inquiry into the membership of the SFN and the historic disputes that relate to that subject.

4. The Public Trustee shall not conduct a general inquiry into potential conflicts of interest between SFN, its administration and the Sawridge Trustees.

5. The Public Trustee shall be limited to four tasks:

   (a) 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; and

   (b) Examining on behalf of the minor beneficiaries the manner in which the property was placed/settled in the Trust; and

   (c) Identifying potential but not yet identified minors who are children of SFN members or membership candidates as these are potentially minor beneficiaries of the 1985 Sawridge Trust; and

   (d) Supervising the distribution process itself.

6. The Public Trustee and the Sawridge Trustees are to immediately proceed to complete the first three tasks outlined in paragraph 5 above.

7. The Sawridge Trustees will submit a distribution arrangement by January 29, 2016.

8. The Public Trustee shall have until March 15, 2016 to prepare and serve an application, pursuant to *Rule* 5.13(1), on SFN identifying specific documents 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.

9. If no Rule 5.13(1) application is made in relation to the proposed distribution scheme, submissions on the distribution proposal shall be made by the Public Trustee and Sawridge Trustees at a case management meeting held before April 30, 2016.

10. The Public Trustee shall have until January 29, 2016 to prepare and serve an application, pursuant to *Rule* 5.13(1), on SFN identifying specific documents for production which it believes are relevant and material to the issue of the assets settled in the 1985 Sawridge Trust.

11. 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.

12. SFN shall provide the following to the Public Trustee by January 29, 2016:

    (a) the names of individuals who have:

        (i) made applications to join the SFN which are pending; and

        (ii) had applications to join the SFN rejected and are subject to challenge;

    (b) the contact information for those individuals where available.

13. 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, (Minors who are children of members of the SFN), the Public Trustee shall file a *Rule* 5.13(1) application by January 29th, 2016.

14. The SFN and the Sawridge Trustees shall have until March 15, 2016 to make written submissions in response to any application by the Public Trustee described in paragraph 13 above

15. The Public Trustee shall not engage in collateral attacks on membership processes of the SFN. The Sawridge Trustees shall not engage in collateral attacks on SFN's membership processes.

16. The decision on costs in relation to the Public Trustee's production application is reserved until the Court evaluates any Rule 5.13(1) applications brought by the Public Trustee

"[signature]"

Honourable Justice D.R.G. Thomas

Thomas J

APPROVED AS TO FORM:

Reynolds, Mirth, Richards & Farmer LLP

Per:__________________________

Marco Poretti, Counsel for the Sawridge Trustees

Dentons Canada LLP

Per:__________________________

Doris Bonora, Counsel for the Sawridge Trustees

Hutchison Law

Per:__________________________

Janet L. Hutchison, Counsel for the Office the Public Guardian and Trustee

Parlee McLaws LLP

Per:__________________________

Edward H. Molstad QC, Counsel for Sawridge First Nation

Bryan & Co. LLP

Per:__________________________

Nancy E Cumming QC and Joseph Kueber QC , Counsel for Roland Twinn, Bertha L'Hirondelle, Margaret Ward and E. Justin Twin

McLennan Ross LLP

Per: COsualdi

Karen Platten QC and Crista Osualdini, Counsel for Catherine Twinn

APPROVED AS TO FORM:

Reynolds, Mirth, Richards & Farmer LLP

Per:____________________________

Marco Poretti, Counsel for the Sawridge Trustees

Dentons Canada LLP

Per:____________________________

Doris Bonora, Counsel for the Sawridge Trustees

Hutchison Law

Per:____________________________

Janet L. Hutchison, Counsel for the Office the Public Guardian and Trustee

Parlee McLaws LLP

Per:____________________________

Edward H. Molstad QC, Counsel for Sawridge First Nation

Bryan & Co. LLP

Per:____________________________

Nancy E Cumming QC and Joseph Kueber QC , Counsel for Roland Twinn, Bertha L'Hirondelle, Margaret Ward and E. Justin Twin

McLennan Ross LLP

Per:____________________________

Karen Platten QC and Crista Osualdini, Counsel for Catherine Twinn

Supreme Advocacy LLP

Per: ______________________

Eugene Meehan QC, Counsel for the Office the Public Guardian and Trustee

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Tab 15

Court of Queen's Bench of Alberta

Citation: 1985 Sawridge Trust v Alberta (Public Trustee), 2017 ABQB 530

Date: 20170831
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")

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

Intervenor

Case Management Costs Decision re Lawyer Priscilla Kennedy (Sawridge #7)
of the
Honourable Mr. Justice D.R.G. Thomas

I Introduction

[1] On July 12, 2017 I issued ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2017 ABQB 436 ["***Sawridge #6***"] where I denied an application by Maurice Felix Stoney "and his 10 living brothers and sisters" to be added as interveners or parties to a proceeding intended to settle and distribute the assets of the 1985 Sawridge Trust, a trust set up by the Sawridge Band on behalf of its members.

[2] In brief, Maurice Stoney had claimed he was in fact and law a member of the Sawridge Band, had been improperly denied that status, and therefore is a beneficiary of the Trust, and had standing to participate in this Action.

[3] I denied that application on the basis (para 48) that:

1. Maurice Stoney is estopped from making this argument via his concession in ***Huzar v Canada***, [2000] FCJ 873 (QL), 258 NR 246 (FCA) that this argument has no legal basis.
2. Maurice Stoney made this same argument in ***Stoney v Sawridge First Nation***, 2013 FC 509, 432 FTR 253, where it was rejected. Since Mr. Stoney did not choose to challenge that decision, that finding of fact and law has 'crystallized'.
3. In ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2015 ABQB 799 at para 35, time extension denied 2016 ABCA 51, 616 AR 176, I concluded the question of Band membership should be reviewed in the Federal Court, and not in the Advice and Direction Application by the 1985 Sawridge Trustees.
4. In any case I accept and adopt the reasoning of ***Stoney v Sawridge First Nation***, as correct, though I was not obligated to do so.

[4] I made no findings in relation to Maurice Stoney's "10 living brothers and sisters" because I had no evidence they were actually voluntary participants in the application: ***Sawridge #6*** at paras 8-12.

[5] At the conclusion of ***Sawridge #6***, I ordered solicitor and own indemnity costs against Maurice Stoney (paras 67-68), and that he make written submissions on whether he should be subject to court access restrictions, and, if so, what those court access restrictions should be (paras 53-66). These steps were taken in response to what is clearly abusive litigation misconduct. Also at paras 71-81, I concluded that the activities of Maurice Stoney's lawyer, Ms. Priscilla Kennedy ["Kennedy"], required review.

[6] I therefore ordered that Kennedy appear before me on July 28, 2017 and that the 1985 Sawridge Trust Trustees and the Sawridge Band could enter certain restricted evidence that is potentially relevant to whether she should be personally responsible for some or all of her client's costs penalty.

[7] Prior to the July 28, 2017, hearing the Court received three affidavits relating to whether Maurice Stoney had obtained consent from his siblings to represent them in this litigation. At the hearing itself, Mr. Donald Wilson of DLA Piper represented Kennedy, who is also a lawyer with that firm. Mr. Wilson submitted that a costs award against Kennedy was unnecessary. Counsel

for the Trust and the Sawridge Band argued costs were appropriate either vs Kennedy personally, or against Kennedy and Maurice Stoney on a joint and several basis.

[8] At the July 28, 2017 hearing the issue arose of whether two siblings of Maurice Stoney who had provided affidavit evidence that they authorized Maurice Stoney to act on their behalf should also be subject to the solicitor and own client indemnity costs award which I had ordered in ***Sawridge #6*** at para 67. I rejected that possibility in light of the limited and after-the-fact evidence and the question of informed consent.

[9] I reserved my decision at the end of that hearing concerning Kennedy's potentially paying costs, with reasons to follow. These are those reasons.

II Background

[10] 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". In brief, this litigation involves the Court providing directions on how the property held in an aboriginally-owned trust may be equitably distributed to its beneficiaries, members of the Sawridge Band.

[11] 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***"). A separate attempt by three other third parties to inject themselves into 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, these are the "***Sawridge Decisions***".

[12] Some of the terms used in this decision ("***Sawridge #7***") are also defined in the earlier ***Sawridge Decisions***.

III Evidence and Submissions at the July 28 Hearing

[13] ***Sawridge #6*** provides detailed reasons on why I denied Maurice Stoney's application (paras 32-54) and concluded that Maurice Stoney's siblings should not be captured by the potential consequences of that application (paras 8-12).

[14] I also concluded that the Maurice Stoney application exhibited three of the characteristic indicia of abusive litigation, as reviewed in ***Chutskoff v Bonora***, 2014 ABQB 389 at para 92, 590 AR 288, aff'd 2014 ABCA 444, 588 AR 503:

1. Collateral attack that attempts to revisit 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 an uninvolved third party.

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

[15] This is the litigation misconduct that may potentially attract court sanction for Kennedy as she was the lawyer who represented Maurice Stoney when he engaged in this abusive litigation.

A. Priscilla Kennedy

[16] As noted above, Ms. Kennedy was represented at the July 28, 2017 hearing by Donald Wilson, a partner at the law firm where Kennedy is employed. He acknowledged that a lawyer's conduct is governed by *Rule* 1.2, and that the question of Maurice Stoney's status had been the subject of judicial determination prior to the August 12, 2016 application.

[17] Nevertheless, Mr. Wilson argued that Kennedy should not be sanctioned because Kennedy "... litigates with her heart." She had been influenced by a perceived injustice against Maurice Stoney, and Maurice Stoney's intention to be a member of the Sawridge Band, which "... goes to the totality of his being." If Kennedy is guilty of anything, it is that she "... is seeing a wrong and persistently tried to right that wrong."

[18] Nevertheless, Mr. Wilson did acknowledge that the August 12, 2016 application was "a bridge too far" and should not have occurred. He advised the Court that he had discussed the Sawridge Advice and Direction Application with Kennedy, and concluded Maurice Stoney had exhausted his remedies. The August 12, 2016 application was not made with a bad motive or the intent to abuse court processes, but, nevertheless, "... it absolutely had that effect ...".

[19] As for the "busybody" aspect of this litigation, Mr. Wilson argued that ***Morin v TransAlta Utilities Corporation***, 2017 ABQB 409 involved a different scenario, since in that instance certain purported litigants were dead. The short timeline for this application had meant it was difficult to assemble evidence that Maurice Stoney was authorized to represent his siblings. These individuals were "a little older" and "[s]ome are not in the best of health."

[20] The Court received three affidavits that relate to whether Maurice Stoney was authorized to represent his other siblings in the Sawridge Advice and Direction Application:

1. Shelley Stoney, dated July 20, 2017, saying she is the daughter of Bill Stoney and the niece of Maurice Stoney. She is responsible "for driving my father and uncles who are all suffering health problems and elderly." Shelley Stoney attests "... from discussions among my father and his brothers and sisters" that Maurice Stoney was authorized to bring the August 12, 2016 application on their behalf.
2. Bill Stoney, brother of Maurice Stoney, dated July 20, 2017, saying he authorized Maurice Stoney to make the August 12, 2016 application on his behalf in the spring of 2016.
3. Gail Stoney, sister of Maurice Stoney, dated July 20, 2017, saying she authorized Maurice Stoney to make the August 12, 2016 application on his behalf in the spring of 2016.

None of these affidavits attach any documentary evidence to support these statements. Kennedy has not provided any documentary evidence to support a relationship with these individuals or Maurice Stoney's other siblings.

[21] Mr. Wilson acknowledged the limited value of this largely hearsay evidence.

[22] Kennedy's counsel argued that in the end no costs award against Kennedy personally is necessary because she has already had the seriousness of her conduct "driven home" by the ***Sawridge #6*** decision and the presence of reporters in the courtroom. He said that is equally as effective as an order of contempt or a referral to the Law Society.

B. Sawridge Band

[23] Mr. Molstad Q.C., counsel for the Sawridge Band, stressed that what had occurred was serious litigation misconduct. Kennedy had conducted a collateral attack with full knowledge of the prior unsuccessful litigation on this topic. She at the latest knew this claim was futile during the 2013 Federal Court judicial review that confirmed Maurice Stoney would not be admitted into the Sawridge Band. It is unknown whether Kennedy had any role in the subsequent unsuccessful 2014 Canadian Human Rights Commission challenge to the Sawridge Band's denying him membership, but she did know that application had occurred.

[24] Kennedy had acted in an obstructionist manner during cross-examination of Maurice Stoney. She made false statements in her written submissions.

[25] As in ***Morin v TransAlta Utilities Corporation***, Kennedy acted without instructions from the persons she purported to represent. Informed consent is a critical factor in proper legal representation. Where that informed consent is absent then a lawyer who acts without authority should solely be responsible for the subsequent litigation costs.

[26] The affidavit evidence does not established Kennedy was authorized to act on behalf of Maurice Stoney's siblings. If these persons were participants in this litigation they could be subject to unfavourable costs awards.

[27] The Sawridge Band again confirmed that the ***Stoney v Sawridge First Nation***, 2013 FC 509, 432 FTR 253 costs order against Maurice Stoney remained unpaid. The costs awarded against Maurice Stoney in ***Stoney v 1985 Sawridge Trust***, 2016 ABCA 51, 616 AR 176 also remain unpaid. Kennedy in her written submissions indicated that Maurice Stoney and his siblings have limited funds. Kennedy should be made personally liable for litigation costs so that the Sawridge Band and Trustees can recover the expenses that flowed from this meritless action.

C. Sawridge Trustees

[28] The Sawridge Trustees adopted the submissions of the Sawridge Band. The question of Maurice Stoney's status had been decided prior to the August 12, 2016 application.

[29] Counsel for the Trustees stressed that the Court should review the transcript of the cross-examination of Maurice Stoney's affidavit. During that process Kennedy objected to questions concerning whether Maurice Stoney had read certain court decisions, and Kennedy said Maurice Stoney did not understand what those decisions meant. That transcript also illustrated that Kennedy was "... the one holding the reins."

[30] This meritless litigation was effectively conducted on the backs of the Sawridge Band community and dissipated the Trust. The only appropriate remedy is a full indemnity costs order vs Kennedy.

IV. Court Costs Awards vs Lawyers

[31] *Sawridge #6* at paras 69-77 reviews the subject of when a court should make a lawyer personally liable for costs awarded against their client. *Rule* 10.50 of the *Alberta Rules of Court*, Alta Reg 124/2010 [the "*Rules*", or individually a "*Rule*"] authorizes the Court to order a lawyer pay for their client's costs obligations where that lawyer has engaged in "serious misconduct":

> 10.50 If a lawyer for a party engages in serious misconduct, the Court may order the lawyer to pay a costs award with respect to a person named in the order.

[32] The Supreme Court of Canada in ***Quebec (Director of Criminal and Penal Prosecutions) v Jodoin***, 2017 SCC 26 at para 29, 408 DLR (4th) 581 ["***Jodoin***"] has also very recently commented on costs awards against lawyers, and identified two scenarios where these kinds of awards are appropriate, 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".

[33] Alberta trial courts have often referenced the judgment of ***Robertson v Edmonton (City) Police Service***, 2005 ABQB 499, 385 AR 325 as providing the test for when a lawyer's activities have reached a threshold that warrants a personal award of costs. In that decision Slatter J (as he then was) surveyed contemporary jurisprudence and concluded at para 21:

> ... The conduct of the barrister must demonstrate or approach bad faith, or deliberate misconduct, or patently unjustified actions, although a formal finding of contempt is not needed ...

[34] I conclude this is no longer the entire test. ***Jodoin*** indicates a new two branch analysis. "[D]ishonest or malicious misconduct on his or her part, that is deliberate" is the category identified in ***Robertson v Edmonton (City) Police Service***. The second branch, "unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system", is a new basis on which to order costs against a lawyer.

[35] I believe this is a useful point at which to look further into what is "serious abuse" that warrants a costs penalty vs a lawyer, following the first of the two branches of this analysis. I consider the language in *Rule* 10.50 ("serious misconduct") and ***Jodion*** ("serious abuse") to be equivalent. I use the Supreme Court of Canada's language in the analysis that follows.

[36] In ***Sawridge #6*** at para 78 I indicated five elements that contributed to what I concluded was potentially "serious abuse":

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.

[37] Ms. Kennedy's litigation conduct is a useful test example to evaluate whether her actions represent "serious abuse", and then should result in her being liable, in whole or in part, for litigation costs ordered against her client.

A. The Shifting Orientation of Litigation in Canada, Court Jurisdiction, and Control of Lawyers

[38] Before proceeding to review the law on costs awards vs lawyers I believe it is helpful to step back and look more generally at how court processes in Canada are undergoing a fundamental shift away from blind adherence to procedure and formality, and towards a court apparatus that focuses on function and proportional response. This transformation of the operation of front-line trial courts has not simply been encouraged by the Supreme Court of Canada. Implementing this new reality is *an obligation* for the courts, but also for lawyers.

[39] This has been called a "culture shift" (for example, ***Hryniak v Mauldin***, 2014 SCC 7 at para 2, [2014] 1 SCR 87), but this transformation is, in reality, more substantial than that. Court litigation, like any process, needs rules. The common law aims to develop rules that provide predictable results. That has several parts. One category of rules establishes functional principles of law, so that persons may structure their activities so that they conform with the law. A second category of rules aims to guarantee what is typically called "procedural fairness". Procedural fairness sets guidelines for how information is presented to the court and tested, how parties structure and order their arguments, that parties know and may respond to the case against them, and how decision-makers explain the reasoning and conclusions that were the basis to reach a decision. Much of these guidelines have been codified in legislation, such as the *Rules*. Other elements are captured as principles of fundamental justice, as developed in relation to *Charter*, s 7.

[40] There is little dispute that litigation in Canada is now a very complex process, particularly in the superior courts such as the Alberta Court of Queen's Bench. Justice Karakatsanis in ***Hryniak v Mauldin*** at para 1 observed that meaningful access to justice is now "the greatest challenge to the rule of law in Canada today." What is the obstacle? "Trials have become expensive and protracted." Canadians can no longer afford to sue or defend themselves. That strikes at the rule of law itself. Justice Karkatsanis continues to explain that historic over-emphasis on procedural rights and exhaustive formality has made civil litigation impractical and inaccessible (para 2):

> ... The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.

[41] Thus, the "culture shift" is a movement away from rigid formality to procedures that are *proportionate* and lead to results that are "fair and just". The Supreme Court of Canada in ***Hryniak v Mauldin*** called for better ways to control litigation to ensure court processes serve their actual function - resolving disputes between persons - and to reflect economic realities.

[42] More recently the Supreme Court has in ***R v Jordan***, 2016 SCC 27, [2016] 1 SCR 631 and ***R v Cody***, 2017 SCC 31 stressed it is time for trial courts to develop and deploy effective and timely processes "to improve efficiency in the conduct of legitimate applications and motions"

(***R v Cody***, at para 39). 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 procedural safeguards that protect an accused's rights to make full answer and defence. Both ***R v Jordan*** and ***R v Cody*** stress *all* court participants in the criminal justice process - the Crown, defence counsel, and judges - have an obligation to make trial processes more efficient and timely. This too is part of the "culture shift", and a rejection of "a culture of complacency".

[43] The increasingly frequent appearance of self-represented litigants in Canadian courts illustrates how the court's renewed responsibility to achieve "fair and just" but "proportionate and effective" results is not simply limited to 'streamlining' processes. Chief Justice McLachlin has instructed that the "culture shift" extends to all court proceedings, but "especially those involving self-represented parties": ***Trial Lawyers Association of British Columbia v British Columbia (Attorney General)***, 2014 SCC 59 at para 110, [2014] 3 SCR 31.

[44] As I have illustrated, a key aspect of the "culture shift" means reconsidering how procedural formalities can be an obstacle to "fair and just" litigation. Very recently in ***Pintea v Johns***, 2017 SCC 23 the Supreme Court of Canada endorsed the Canadian Judicial Counsel *Statement of Principles on Self-represented Litigants and Accused Persons* (2006) ["*Statement of Principles*"]. That document and its Principles are important as they illustrate how the traditional formal rules of procedure and evidence bend to the new reality faced by trial courts, and what is required to provide a "fair and just" result for self-represented litigants:

> Principle 2 on page 5:
>
> > Self-represented persons should not be denied relief on the basis of a minor or easily rectified deficiency in their case.
>
> Principle 3 on page 8:
>
> > Judges should ensure that procedural and evidentiary rules are not used to unjustly hinder the legal interests of self-represented persons.

I note these and other instructions to trial judges in the "*Statement of Principles*" are not permissive, but mandatory. See for example: ***Gray v Gray***, 2017 CanLII 55190 (Ont Sup Ct J); ***Young v Noble***, 2017 NLCA 48; ***Moore v Apollo Health & Beauty Care***, 2017 ONCA 383; ***R v Tossounian***, 2017 ONCA 618.

[45] Read plain, this is a substantial rejection by the Supreme Court of Canada of the traditional approach, that rules of procedure and evidence apply the same to everyone who appears before a Canadian court. The reason for that is obvious to anyone who has observed a self-represented person in court. They face a complex apparatus, whose workings are at times both arcane and unwritten.

[46] These objectives are all relevant to how the gate of "access to justice" swings both open and closed. The *Statement of Principles* is not simply a licence for self-represented persons to engage the courts as an exception to the rules. They also have responsibilities: ***Clark v Pezzente***, 2017 ABCA 220 at para 13. What is particularly pertinent to the discussion that follows is how the *Statement of Principles* at p 10 indicate that self-represented litigants should also adhere to standards expected of legal professionals, such as politeness, and not abusing the courts personnel, processes, and resources:

> Self-represented persons are required to be respectful of the court process and the officials within it. Vexatious litigants will not be permitted to abuse the process.

[47] Similarly, the *Statement of Principles* in its commentary at p 5 emphasizes that abusive litigation is not excused because someone is self-represented:

> Self-represented persons, like all other litigants, are subject to the provisions whereby courts maintain control of their proceedings and procedures. In the same manner as with other litigants, self-represented persons may be treated as vexatious or abusive litigants where the administration of justice requires it. The ability of judges to promote access may be affected by the actions of self-represented litigants themselves.

[48] That objective of controlling litigation abuse is a critical facet of the "new reality". This is reflected in recent jurisprudence of this Court. One mechanism to achieve this "culture shift" is interdiction of abusive litigation, for example via vexatious litigant orders issued under this Court's inherent jurisdiction (surveyed in ***Hok v Alberta***, 2016 ABQB 651 at paras 14-25, 273 ACWS (3d) 533, leave denied 2017 ABCA 63, leave to the SCC requested, 37624 (12 April 2017)). Recent Alberta jurisprudence in this strategic direction has stressed how "fair and just" litigant control responses are ones that tackle both caused and anticipated injuries, for example:

1. identifying litigation abuse that warrants intervention in a prospective manner, by investigating what is the plausible future misconduct by an abusive litigant, rather than a rote and reflex response where the Court only restricts forms of abuse that have already occurred (***Hok v Alberta***, at paras 35-37; ***Thompson v International Union of Operating Engineers Local No. 955***, 2017 ABQB 210 at para 61, leave denied 2017 ABCA 193; ***Ewanchuk v Canada (Attorney General)***, 2017 ABQB 237 at para 160-164; ***Chisan v Fielding***, 2017 ABQB 233 at paras 52-54);
2. recognition that certain kinds of litigation abuse warrant a stricter response given their disproportionate harm to court processes (***Ewanchuk v Canada (Attorney General)*** at paras 170-187); and
3. taking special additional steps where an abusive litigant defies simple control in his or her attacks on the Court, its personnel, and other persons (***Re Boisjoli***, 2015 ABQB 629, 29 Alta LR (6th) 334; ***Re Boisjoli***, 2015 ABQB 690).

[49] In many ways none of this should be new. The *Alberta Rules of Court*, *Rule* 1.2 statements of purpose and intention stress both the Court and parties who appear before it are expected to resolve disputes in a timely, cost-effective manner that respects the resources of the Court.

[50] What is new are the *implications* that can be drawn from a lawyer's actions and inactions. They, too, must be part of the "culture shift". If their actions, directly or by implication, indicate that a lawyer is not a part of that process, then that is an indication of intent. The future operation of this and other trial courts will depend in no small way on the manner in which lawyers conduct themselves. If they elect to misuse court procedures then negative consequences may follow.

B. Costs Awards Against Lawyers

1. The Court's Jurisdiction to Control Litigation and Lawyers

[51] Recent jurisprudence, and particularly ***Jodoin***, has clarified the court's supervisory function in relation to lawyers. This is a facet of the inherent jurisdiction of a court to manage and control its own proceedings, which is reviewed in the often-cited paper by I H Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Current Leg Probs 23. The management and control power is a common law authority possessed by both statutory and inherent jurisdiction courts (***Jodoin*** at para 17), that:

> ... flows 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 ... [Citations omitted.]
>
> (***Jodoin*** at para 18.)

[52] ***Jodoin*** at paras 21, 24 discusses two separate court-mediated lawyer discipline mechanisms, contempt of court vs awards of costs. While "the criteria ... are comparable", these two processes are distinguished in a functional sense by the degree of proof, the possibility of detention, and the implications of a sanction on a lawyer's career:

> ... 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 ... the implications for a lawyer of being ordered personally to pay costs are less serious than [a finding of contempt or law society discipline]. 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. ...

[53] Of course, lawyers are also potentially subject to professional discipline by their supervising Law Society. Gascon J in ***Jodoin*** at paras 20, 22, citing ***R v Cunningham***, 2010 SCC 10 at para 35, [2010] 1 SCR 331, is careful to distinguish how professional discipline and court sanction for lawyer misconduct are distinct processes with separate purposes:

> 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. ...
>
> As for law societies, the role they play in this regard is different from, but sometimes complementary to, that of the courts. They have, of course, an important responsibility in overseeing and sanctioning lawyers' conduct, which derives from their primary mission of protecting the public ... However, the

judicial powers of the courts and the disciplinary powers of law societies in this area can be distinguished, as this Court has explained as follows:

> The court's authority is preventative — to protect the administration of justice and ensure trial fairness. The disciplinary role of the law society is reactive. Both roles are necessary to ensure effective regulation of the profession and protect the process of the court.

[54] The Canadian courts' inherent jurisdiction extends to review of lawyers' fees (***Mealey (Litigation guardian of) v Godin*** (1999), 179 DLR (4th) 231 at para 20, 221 NBR (2d) 372 (NBCA)).

[55] Inherent jurisdiction provides the authority for a court to scrutinize and restrict persons who attempt to act as a litigation representative. This usually emerges in relation to problematic layperson representatives. For example, in ***R v Dick***, 2002 BCCA 27, 163 BCAC 62, the British Columbia Court of Appeal evaluated whether an agent with a history of abusive litigation activities should be permitted to act as a representative. The British Columbia Court of Appeal concluded courts have a responsibility to ensure persons who appear before the court are properly represented, and more generally to maintain the integrity of the court process: para 7. Permission to act as an agent is a privilege subject solely to the court's discretion: para 6. A person who is dishonest, shows lack of respect for the law, or who engaged in litigation abuse is not an appropriate agent. Similar results were ordered in ***Gauthier v Starr***, 2016 ABQB 213, 86 CPC (7th) 348; ***Peddle v Alberta Treasury Branches***, 2004 ABQB 608, 133 ACWS (3d) 253; ***R v Maleki***, 2007 ONCJ 430, 74 WCB (2d) 816; ***R v Reddick***, 2002 SKCA 89, 54 WCB (2d) 646; ***The Law Society of B.C. v Dempsey***, 2005 BCSC 1277, 142 ACWS (3d) 346, affirmed 2006 BCCA 161, 149 ACWS (3d) 735.

[56] It seems to me that the same should be true for lawyers. Appellate jurisprudence is clear that courts possess an inherent jurisdiction to remove a lawyer from the record, though this usually occurs in the context of a conflict of interest, see for example ***MacDonald Estate v Martin***, [1990] 3 SCR 1235 at 1245, 77 DLR (4th) 249. I see no reason why a Canadian court cannot intervene to remove a lawyer if that lawyer is not an appropriate court representative. While that is undoubtedly an unusual step, rogue lawyers are not unknown. For example, the Law Society of Upper Canada has recently on an interim basis restricted the access of a lawyer, Glenn Patrick Bogue, who was advancing abusive and vexatious Organized Pseudolegal Commercial Argument ["OPCA"] concepts (***Meads v Meads***, 2012 ABQB 571, 543 AR 215) in a number of court proceedings across Canada: ***Law Society of Upper Canada v Bogue***, 2017 ONLSTH 119. It is disturbing that this vexatious litigation had been going on for over a year.

[57] In relation to control of problematic lawyers I note that the *Judicature Act*, s 23.1(5) indicates that what are commonly called "vexatious litigant orders" cannot be used to restrict court access by a lawyer or other authorized person, provided they are acting as the representative of an abusive and vexatious litigant:

> An order under subsection (1) or (4) may not be made against a member of The Law Society of Alberta or a person authorized under section 48 of the Legal Profession Act when acting as legal counsel for another person.

[58] Arguably, section 23.1(5) is intended to extinguish this Court's inherent jurisdiction to impose some supervisory or preliminary review element to a lawyer's court filings. While I will not continue to investigate the operation of this provision, I question whether *Judicature Act*, s 23.1(5) is constitutionally valid, since it purports to extinguish an element of the Alberta superior court's inherent jurisdiction to control its own processes, but does not provide for an alternative agency or tribunal that can take steps of this kind. Any argument that the Legislature has delegated that task to the Law Society of Alberta fails to acknowledge the distinct and separate court-mediated lawyer-control functionality identified by the Supreme Court of Canada in ***Jodoin*** and its predecessor judgments.

2. The Nuremberg Defence - I Was Just Following Orders

[59] Lawyers are subject to a number of different forms of legal duties and responsibilities. They are employees of their client, and are bound by the terms of that contract. But a lawyer's allegiance is not solely to whoever pays their bills.

[60] When lawyers are admitted to the Alberta Bar a lawyer swears an oath of office that includes this statement:

> That I will as a Barrister and Solicitor conduct all causes and matters faithfully and to the best of my ability. <u>I will not seek to destroy anyone's property. I will not promote suits upon frivolous pretences. I will not pervert the law to favor or prejudice anyone</u>, but in all things will conduct myself truly and with integrity. I will uphold and maintain the Sovereign's interest and that of my fellow citizens according to the law in force in Alberta. [Emphasis added.]

This is not some empty ceremony, but instead these words are directly relevant to a lawyer's duties, and the standard expected of him or her by the courts: ***Osborne v Pinno*** (1997), 208 AR 363 at para 22, 56 Alta LR (3d) 404 (Alta QB); ***Collins v Collins***, 1999 ABQB 707 at para 26, 180 DLR (4th) 361.

[61] This duty is also reflected in the Law Society of Alberta *Code of Conduct*. Though that document largely focuses on lawyers' duty to their clients and interactions with the Law Society, the *Code of Conduct* also requires that a lawyer operate "... honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy and respect.": Chapter 5.1-1. The *Code of Conduct* then continues in Chapter 5.1-2 to identify prohibitions, including that a lawyer may not:

- abuse a tribunal by proceedings that are motivated by malice and conducted to injure the other party (Chapter 5.1-2(a));
- "take any step ... that is clearly without merit" (Chapter 5.1-2(b));
- "unreasonably delay the process of the tribunal" (Chapter 5.1-2(c));
- knowingly attempt to deceive the court by offering false evidence, misstating facts or law, or relying on false or deceptive affidavits (Chapter 5.1-2(g));
- knowingly misstate legislation (Chapter 5.1-2(h));
- advancing facts that cannot reasonably be true (Chapter 5.1-2(i)); and
- failure to disclose relevant adverse authorities (Chapter 5.1-2(n)).

[62] The *Code of Conduct* chapter citations above are to the replacement *Code of Conduct* that came into force on November 1, 2011. Interestingly, I was only able to locate one reported post-2011 Law Society of Alberta Hearing Committee decision that references Chapter 5.1-1 or the 5.1-2 subsections, ***Law Society of Alberta v Botan***, 2016 ABLS 8, where lawyer's abuse of court processes led to a one-day suspension.

[63] Regardless, there is no question that lawyers have a separate, distinct, and direct obligation to the Court. As Justice Gascon recently stated in ***Jodoin*** at para 18:

> ... 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 ...

[64] Similarly ***Law Society of British Columbia v Mangat***, 2001 SCC 67 at para 45, [2001] 3 SCR 113, states that lawyer's status as officers of the court means:

> … they have the obligation of upholding the various attributes of the administration of justice such as judicial impartiality and independence, as well as professional honesty and loyalty.

[65] Gavin MacKenzie in a paper titled "The Ethics of Advocacy" ((2008) The Advocates Society Journal 26) observed that a lawyers duty to his or her client vs the court "... are given equal prominence ...".

[66] The Alberta Court of Appeal has repeatedly indicated that the lawyers who appear in Alberta courts have an independent and separate duty to those institutions. For example, in ***R v Creasser***, 1996 ABCA 303 at para 13, 187 AR 279, the Court stressed:

> ... the lawyer who would practise his profession of counsel before a Court owes duties to that Court quite apart from any duty he owes his client or his profession or, indeed, the public. That these duties are sometimes expressed as an ethical responsibility does not detract from the reality that the duties are owed to the Court, and the Court can demand performance of them. The expression "officer of the Court" is a common if flowery way to emphasize that special relationship. In Canada, unlike some other common law jurisdictions, the Courts do not license lawyers who practise before them, and do not suspend those licences when duties are breached. But that restraint does not contradict the fact that special duties exist. ... [Emphasis added.]

[67] The professional standards expected of a lawyer as an officer of the court equally apply when a lawyer represents themselves. "[t]he lawyer as Plaintiff stands in a different position than a layman as Plaintiff.": ***Botan (Botan Law Office) v St. Amand***, 2012 ABQB 260 at paras 72-77, 538 AR 307, aff'd 2013 ABCA 227, 553 AR 333. As Rooke J (as he then was) explained in ***Partridge Homes Ltd v Anglin***, [1996] AJ No 768 at para 33 (QL), 1996 CarswellAlta 1136 (Alta QB):

> ... it is significant that he is a member of the Law Society of Alberta. If he were not, one could apply the standard of conduct of an ordinary citizen, and excuse some conduct for which an ordinary citizen might be ignorant or from which he or she would be otherwise excused. In my view such is not the case for an active practising member of the Law Society of Alberta, who has a standard to meet,

> regardless of his technical capacity of appearance, merely by virtue of that membership ...

[68] Having countervailing obligations means that a lawyer's obligations to his or her client vs the Court may conflict, and judges have long recognized that fact. This is the reason why courts are cautious about applying potential sanctions again lawyers. As McLachlin J (as she then was) observed in ***Young v Young***, [1993] 4 SCR 3 at 136, 108 DLR (4th) 193, a court should be mindful that sanctions directed to a lawyer may interfere with that lawyer's execution of his or her duties:

> ... courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling.

[69] What this does not mean, however, is that a lawyer can simply point at a client and say abuse of the court is the client's fault, and I am just doing my job. In ***LC v Alberta***, 2015 ABQB 84 at para 248, 605 AR 1 my colleague Graesser J captured this principle in a colourful but accurate manner:

> "I was just following orders" does not work as a defence for lawyers any more than it worked for the Watergate burglars or at Nuremburg. Lawyers also owe a duty of candour to their opponents and have duties to the court regarding appropriate professional practices.

[70] I agree. There are kinds of litigation misconduct where responsibility falls not just on the client, but also the lawyer who represents and advocates for that client. This judgment will explore that and chiefly investigate the award of costs against a lawyer on the basis of "unfounded, frivolous, dilatory or vexatious proceeding[s]", rather than the deliberate dishonest or malicious misconduct alternative branch, identified in ***Jodoin*** at para 29.

3. No Constitutional Right to Abusive Litigation

[71] Though there should not have been any doubt on this point, McLachlin CJC has recently in ***Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*** at para 47 confirmed that:

> ... There is no constitutional right to bring frivolous or vexatious cases, and measures that deter such cases may actually increase efficiency and overall access to justice. [Emphasis added.]

[72] I cannot see how this principle would apply differently for a self-represented litigant, or a person represented by a lawyer. A lawyer is a mechanism through which a client interacts with the Court and other court participants. However, a lawyer is not an automaton that does only what the client instructs. The preceding review explicitly indicates lawyers have duties to more than just their clients. They are not required to do whatever they are told.

[73] I stress - there is *no right* to engage in this kind of litigation. Abusive litigation may be blocked, and actions may be taken to punish and control court participants who engage in this kind of litigation misconduct. Steps of that kind are appropriate to enhance access to justice and

protect badly over-taxed court resources. Lawyers have a clear obligation not to promote abuse of court processes.

[74] I therefore conclude any lawyer who acts on behalf of a client who engages in frivolous, vexatious, or abusive litigation is potentially personally subject to a costs award. A lawyer who is the mechanism to conduct frivolous, vexatious, or abusive litigation is not merely acting contrary of his or her obligations to the courts and other litigants. This is also a breach of a lawyer's obligations *to his or her own client*. By facilitating that misconduct the lawyer 'digs a grave for two.'

[75] Restating this point:

1. clients have no right to engage in abusive litigation;
2. lawyers have obligations as professionals and as officers of the court to not misuse court resources and processes.

Combined, lawyers who advance litigation that is an abuse of court have no right to do so. Instead, that is a breach of the lawyer's obligations. Any lawyer who does so is an accessory to their client's misconduct.

4. An Exceptional Step

[76] Appellate jurisprudence that discusses costs awards against lawyers sometimes describes that step as "exceptional", or "rare". For example, in ***Jodoin***, at para 29, Gascon J writes:

> ... an award of costs against a lawyer personally can be justified only on an <u>exceptional</u> basis where the lawyer's acts have seriously undermined the authority of the courts or seriously interfered with the administration of justice. ...

See also ***R v 974649 Ontario Inc.***, 2001 SCC 81 at para 85, [2001] 3 SCR 575.

[77] What these decisions are trying to capture is the fact that most of the time lawyers conduct themselves properly. Costs awards are presumptively awarded in civil litigation anytime a party is unsuccessful in an action or application (*Rule* 10.29(1)), but a lack of success does not necessarily mean actual bad litigation. An additional characteristic, abuse of the court and its processes, is what transforms a simple litigation failure into misconduct that may attract a costs award against a lawyer, personally. Fortunately, that 'added layer' is not a common occurrence. Most lawyers are responsible and responsive to their obligations.

[78] In my opinion this language does not mean that lawyers are subject to a different and reduced standard from other persons who interact with the courts. Saying a costs award against a lawyer personally is "exceptional" does not mean that a lawyer can say that he or she is immune to a costs award because that lawyer may have abused court processes, but that abuse was not "exceptional". Abuse is abuse.

[79] ***Jodoin***, in fact, makes that clear. Paragraph 29 continues to make that point explicit:

> ... <u>This high threshold is met</u> where a court has before it an <u>unfounded, frivolous, dilatory or vexatious proceeding</u> that denotes a serious abuse of the judicial system by the lawyer ... [Emphasis added.]

[80] What constitutes "serious abuse" is a separate question. However Alberta courts have been developing guidelines and principles to test when court intervention is warranted to control

litigant activities. This jurisprudence is also helpful to test when a lawyer has engaged in "serious abuse".

5. Abuse of the Court

[81] Alberta decisions have collected and categorized types of litigation misconduct which are a basis on which to conclude that a litigant is "vexatious". These "indicia" are then each a potential basis to restrict a litigant's access to court. Put another way, these "indicia" are a basis to potentially conclude that a litigant is not a 'fair dealer', and so his or her activity needs to be monitored and controlled.

[82] ***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. These "indicia" are described in detail in ***Chutskoff v Bonora***, however for this discussion it is useful to briefly outline those categories:

1. collateral attacks,
2. hopeless proceedings,
3. escalating proceedings,
4. bringing proceedings for improper purposes,
5. conducting "busybody" lawsuits to enforce alleged rights of third parties,
6. failure to honour court-ordered obligations,
7. persistently taking unsuccessful appeals from judicial decisions,
8. persistently engaging in inappropriate courtroom behaviour,
9. unsubstantiated allegations of conspiracy, fraud, and misconduct,
10. scandalous or inflammatory language in pleadings or before the court, and
11. advancing OPCA strategies.

[83] Subsequent jurisprudence has identified two other categories of litigation misconduct that warrant court intervention to control court access:

1. using court processes to further a criminal scheme (***Re Boisjoli***, 2015 ABQB 629 at paras 98-103), and
2. attempts to replace or bypass the judge hearing or assigned to a matter, commonly called "judge shopping" (***McCargar v Canada***, 2017 ABQB 416 at para 112).

[84] While each of these "indicia" is a basis to restrict court access, reported judgments that apply the ***Chutskoff v Bonora*** have instead reviewed the degree of misconduct in each category to assess its seriousness. For example, in ***644036 Alberta Ltd v Morbank Financial Inc***, 2014 ABQB 681 at paras 71, 85, 26 Alta LR (6th) 153; ***Ewanchuk v Canada (Attorney General)*** at para 136; ***Re Boisjoli***, 2015 ABQB 629 at para 89 the presence of some "indicia" was not, alone, a basis to make a vexatious litigant order. These were, instead, "aggravating" factors.

[85] Similarly, vexatious litigant judgments frequently conclude that the presence of multiple ***Chutskoff v Bonora*** "indicia" cumulatively strengthen the foundation on which to conclude

court intervention is warranted in response to abusive litigation conduct: ***Ewanchuk v Canada (Attorney General)*** at para 159; ***Chutskoff v Bonora*** at para 131; ***Re Boisjoli***, 2015 ABQB 629 at para 104; ***Hok v Alberta*** at para 39; ***644036 Alberta Ltd v Morbank Financial Inc*** at para 91.

[86] In ***R v Eddy***, 2014 ABQB 391 at para 48, 583 AR 268, Marceau J awarded costs against a self-represented litigant in a criminal matter, and used the ***Chutskoff v Bonora*** "indicia" as a way to help test the seriousness of the litigation abuse. These were "aggravating" factors:

> I conclude that the characteristics of vexatious litigation, including those as identified in Judicature Act, s 23(2) and the common law authorities recently and comprehensively reviewed in Chutskoff v Bonora, 2014 ABQB 389 are 'aggravating' factors that favour a cost award against a criminal accused. <u>These indicia form a matrix of traits that are shared by the kind of litigation misconduct that calls for court response and deterrence</u>. [Emphasis added.]

I note ***R v Eddy*** applies a costs award analysis developed in ***Fearn v Canada Customs***, 2014 ABQB 114, 586 AR 23, which is cited with approval in ***Jodoin*** at paras 25, 27.

[87] Similarly, Master Smart in ***Lymer (Re)***, 2014 ABQB 674 at paras 34-35, 9 Alta LR (6th) 57 applied the ***Chutskoff v Bonora*** "indicia" as a way to evaluate whether a litigant had acted in contempt of court. In ***Kavanagh v Kavanagh***, 2016 ABQB 107 at para 99, Shelley J concluded the presence of ***Chutskoff v Bonora*** "indicia" meant she should take additional steps to protect the interests of a potentially vulnerable third party to litigation.

[88] I see the ***Chutskoff v Bonora*** "indicia" as a useful tool to test whether a lawyer's conduct is "serious abuse" warranting that costs be ordered against that lawyer. Each individual abusive conduct category is potentially relevant, and together these factors may operate in a cumulative manner.

[89] In this discussion of the potential application of the ***Chutskoff v Bonora*** "indicia" I acknowledge that Gascon J in ***Jodoin*** is explicit that when a court examines whether a costs award should be made against a lawyer that the court's attention should focus on the specific conduct that has attracted court scrutiny. Justice Gascon 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. A lawyer costs award analysis is not a review of the lawyer's "entire body of work", though external facts may be relevant in certain circumstances: paras 33-34.

[90] This means for the purposes of a ***Jodoin*** lawyer costs analysis the ***Chutskoff v Bonora*** "indicia" will need to be adapted to the specific context. For example, a history of persistent through futile appeals is only relevant to a potential order of costs against a lawyer where the alleged abusive litigation is a persistent abusive appeal. Other ***Chutskoff v Bonora*** "indicia" have broader implications. An action where there is no prospect for success may not, in itself, illustrate a "serious abuse" of the court, but where the action also features scandalous or inflammatory language that may lead a judge to conclude the lawyer is deliberately acting in breach of his or her duties.

[91] I will later discuss how certain kinds of litigation misconduct will, on their own, in most cases represent a basis to order costs against a lawyer. However, first, it is important to consider whether litigation misconduct is deliberate.

6. Knowledge and Persistence

[92] Lawyers make mistakes. They sometimes get the law wrong, miss a key authority, overlook a critical fact, or simply become confused.

[93] What ***Jodoin*** and other decisions indicate is that a misstep such as a "mere mistake or error of judgment" is not a basis, in itself, for an order of costs against a lawyer. Something higher is necessary, for example gross negligence (para 27) or deliberate misconduct (para 29). One way of satisfying a higher standard of proof, even to "beyond a reasonable doubt", is where a court concludes an actor is "willfully blind" to the fact their actions are wrong.

[94] A mistake, in itself, is therefore not often likely to be a basis to order costs against a lawyer, though the presence of ***Chutskoff v Bonora*** "indicia" may lead to a conclusion that a purported mistake was not honest, but instead a stratagem. What is more damning, however, is when a lawyer advances frivolous, vexatious, or abusive litigation in the face of warnings of exactly that.

[95] For example, a costs award would rarely be warranted against a lawyer if:

1. a lawyer had made an argument, application, or proceeding based on a false statement of law, an invalid authority, or other mistake;
2. that error was identified by another party or the court; and
3. the lawyer then acknowledged the error and abandoned the argument, application, or proceeding.

Of course, party and party costs would still be presumptively due against the litigant (*Rule* 10.29(1)), but at least the lawyer had taken steps to conduct 'damage control', and that should be encouraged and respected.

[96] However, where a lawyer persists despite being warned or alerted, then a court may apply the often stated rule that a person may be presumed to intend the natural consequence of their actions: ***Starr v Houlden***, [1990] 1 SCR 1366, 68 DLR (4th) 641. In that context a court may conclude that a lawyer who is breaking the rules knows what the rules are, but has proceeded and broken them anyway. That will create a strong presumption that a costs award is appropriate for a lawyer who engaged in what is, effectively, deliberate misconduct.

7. Examples of Lawyer Misconduct that Usually Warrant Costs

[97] With that foundation in place, I believe it is useful to provide a non-exclusive set of scenarios where a lawyer will likely be a potential valid target for a personal costs award. Again, I stress that anytime a court considers whether to make a costs award of this kind the analysis should be contextual. Exceptional circumstances are no doubt possible. That said, there are some ground rules that any reasonable lawyer would be expected to know and follow. Some of these examples will overlap with the ***Chutskoff v Bonora*** "indicia" because, naturally, neither a lawyer nor litigant should expect a court to stand by and tolerate certain abusive behaviour.

a. Futile Actions and Applications

[98] Conducting a futile action or application is a potential basis for an award of costs against a lawyer, particularly where the court concludes the lawyer has advanced this litigation knowing that it is hopeless, or being willfully blind as to that fact.

[99] A key category of futile action that warrants court sanction is a collateral attack. This is where litigation seeks to undo or challenge the outcome of another court case. A collateral attack is a breach of a cornerstone of the English tradition common law - the principle of *res judicata* - that once a court has made a decision and the appeal period has ended, then that decision is final. This is a basic principle of law taught to every lawyer. Collateral attacks are serious litigation misconduct because they waste court and litigant resources. A collateral attack inevitably fails in the face of *res judicata*.

[100] Similarly, litigation conducted in the face of a binding authority may render that action futile. A court literally cannot ignore *stare decisis*, and any lawyer should know that. Defying identified binding authority leads to the presumption that the lawyer is intending the natural consequence. That said, this does not mean that a lawyer should automatically be subject to a potential costs award if that lawyer has advanced a basis for why an established rule is incorrect, or should be modified, or how this case is somehow factually or legally different. However, simply telling the trial judge to ignore a court of appeal or Supreme Court of Canada decision indicates a bad litigation objective. Similarly, claims to distinguish binding jurisprudence on an arbitrary basis that is unrelated to the principle(s) in play implies an attempt to circumvent *stare decisis*.

[101] Other examples of futile litigation are litigation in the wrong venue, premature appeals or judicial reviews, or actions that seek impossible or grossly disproportionate remedies. A lawyer who seeks general damages near the ***Andrews v Grand & Toy Alberta Ltd.***, [1978] 2 SCR 229, 83 DLR (3d) 452 maximum for a modest injury raises the presumption that the lawyer intended this breach of an obvious and well-established legal rule; overstating the damages claimed was deliberate. That is doubly so if the maximum were exceeded. Courts are permitted to read between the lines and, in the context of the "culture shift", inquire what it means when a client and his or her lawyer advance a dubious, overstated claim.

[102] An application made outside a limitations period and without any explanation is another example of a futile action which puts the lawyer's motivation in doubt.

[103] All of these prior examples should be examined in context. Knowledge (obvious or implied) of the critical defect will often be an important factor. Again, a lawyer who makes a misstep but then corrects it will usually not be liable for litigation costs, personally. The ***Chutskoff v Bonora*** "indicia" may, however, tip the balance.

b. Breaches of Duty

[104] Another category of litigation conduct which will usually attract a costs award against a lawyer is where a lawyer has breached a basic aspect of their responsibility to the courts and clients. As I have previously indicated, the Court's supervisory function includes scrutinizing whether an in-court representative is qualified for that task.

[105] For example, ***Morin v TransAlta Utilities Corporation***, 2017 ABQB 409 involved a lawyer who had conducted litigation on behalf of persons who were not his clients. He had no authority to represent them. Graesser J concluded, and I agree, that this kind of misconduct would almost always warrant costs paid personally by that lawyer. This is a form of "busybody" litigation, one of the ***Chutskoff v Bonora*** "indicia", but for a lawyer this action is in clear violation of both their professional duties and is a basic and profound abuse of how courts trust lawyers to speak in court on behalf of others.

[106] Similarly, a lawyer who is aware of but does not disclose relevant unfavourable jurisprudence or legislation runs the risk of being subject to a personal costs penalty, particularly if the concealed item is a binding authority. This disclosure requirement is an obligation under the Law Society of Alberta *Code of Conduct*, but is even more critically an aspect of a lawyer's role and duties as an officer of the court. The simple fact is that judges rely on lawyers to assist in understanding the law. Intentionally omitting unfavourable case law has no excuse, and does nothing but cause unnecessary appeals, unjust results, and the waste of critical resources.

[107] The same is true for a lawyer who does not discharge their duty to provide full disclosure during an *ex parte* proceeding. It is too easy for a monologue to lead to spurious and unfair results. A judge has no way to test evidence in that context. This scenario creates a special and elevated obligation on a lawyer as an officer of the court, see ***Botan (Botan Law Office) v St. Amand***.

c. Special Forms of Litigation Abuse

[108] Certain kinds of litigation abuse will attract special court scrutiny because of their character and implications.

[109] For example, *habeas corpus* is an unusual civil application that has a priority 'fast track' in Alberta courts. As I explained in ***Ewanchuk v Canada (Attorney General)*** at paras 170-187, abuse of this procedure has a cascading negative effect on court function. Further, the potential basis and remedy for *habeas corpus* is extremely specific and specialized. *Habeas corpus* may only be used to challenge a decision to restrict a person's liberty. The only remedy that may result is release. A lawyer who makes a *habeas corpus* application which does not meet those criteria can expect the possibility of a personal costs award. This kind of application is "serious abuse" because of how it damages the court's effective and efficient functioning.

[110] OPCA strategies, a category of vexatious and abusive litigation that was reviewed by Rooke ACJ in ***Meads v Meads***, are another special form of litigation abuse that will almost certainly be a basis for a costs award against a lawyer. In brief, these are legal-sounding concepts that are intended to subvert the operation of courts and the rule of law. These ideas are so obviously false and discounted that simply employing these concepts is a basis to conclude a party who argues OPCA motifs intends to abuse the courts and other parties for an ulterior purpose: ***Fiander v Mills***, 2015 NLCA 31, 368 Nfld & PEI R 80. The same is true for a lawyer who invokes OPCA concepts.

[111] Another special category of litigation abuse that may attract a costs award against a lawyer personally is the practice of booking a hearing or an application in a time period that is obviously inadequate for the issues and materials involved. For example, a lawyer may appear in Chambers and attempt to jam in an application that obviously requires a full or half day, rather than the 30 minute time slot allotted. The end result will either be an incomplete application, an application that goes overtime and disrupts the conduct of the Chambers session, or that the judge who received the application simply orders it re-scheduled to a future appearance with the appropriate duration.

[112] In criticizing this practice I understand why it happens. The Alberta Court of Queen's Bench is no longer able to respond to litigants in a timely manner due to the now notorious failure of governments to maintain an adequate judicial complement, facilities, and supporting staff. In ***Ewanchuk v Canada (Attorney General)***, at para 178 I reported how long persons must

wait to access this court, for example waiting over a year to conduct a one-day special chambers hearing. While preparing this judgment I checked to see if things have improved. They haven't.

[113] When people attempt to 'game the system', and jump the que, that simply makes things worse. Again, in saying this, I am not denying that I understand the reason why this happens. It is just this ship is riding low in the water, if not sinking. Placing unanticipated pressures on this institution only makes things worse.

[114] Lawyers have a special responsibility in the efficient management and allocation of limited court resources. They are the ones who are best positioned to accurately estimate the time needed for a court procedure, a hearing, or a trial. Lawyers cause great and cascading harm when they try to squeeze large pegs into small holes. The result is the surrounding wood shatters. A lawyer should not be surprised if this Court concludes the lawyer should personally face costs for this pernicious practice. It must stop. In one sense or another, we are all on the same (sinking) ship. Don't make it capsize.

d. Delay

[115] Delay is an increasing issue in both civil and criminal proceedings in Canada. ***R v Jordan*** and ***R v Cody*** challenge the "culture of complacency" which has led to long and unacceptable pre-trial delays. These two decisions demand all court actors take steps to ensure 'justice delayed is not justice denied.'

[116] ***Jodoin*** also makes explicit that when a lawyer represents a client, delays in a civil proceeding may be a basis to order costs are paid by the lawyer. In ***Pacific Mobile Corporation v Hunter Douglas Canada Ltd.***, [1979] 1 SCR 842, 26 NR 453 unnecessary repeated adjournments were one of the bases that Pigeon J identified for the award of costs against lawyers, personally. In ***Jodoin*** at para 29 Gascon J identifies "dilatory" proceedings as a basis for targeting a lawyer for costs:

> ... lawyer may not knowingly use judicial resources for a purely dilatory purpose with the sole objective of obstructing the orderly conduct of the judicial process in a calculated manner. ...

[117] Avoiding delay is clearly a priority in the new post-"culture shift" civil litigation environment, but since this particular factor is not in play in the current costs proceeding I will not comment further on this basis for a potential costs award against a lawyer. This complex subject is better explored in the context of a fact scenario that involves potentially unnecessary or unexplained adjournments, and other questionable procedures that caused delay.

C. Conclusion

[118] The Supreme Court of Canada has now provided clear guidance that Canada's legal apparatus can only operate, provide "access to justice", by refocussing the operation of courts to achieve "fair and just" results, but in a manner that is proportionate to the issues and interests involved. I have reviewed some of the aspects of this "culture shift".

[119] This objective involves many actors. Parliament and the legislatures should design procedures and rules that better align with this objective. Some kinds of disputes, such as family law matters that involve children, are poor matches for the adversarial court context. Judges and courts should develop new approaches, both formal and informal, to better triage, investigate,

and resolve disputes. Judicial review and appeal courts should be mindful to limit their intrusion into the operation of subordinate tribunals.

[120] Litigants and their lawyers have a part in this. ***Hryniak v Mauldin***, ***R v Jordan***, ***R v Cody***, and now ***Jodoin*** indicate that in Canada being in court is a right that comes with responsibilities. Lawyers are a critical interface between the courts and the lay public. Their conduct will be scrutinized in this new reality. The door of "access to justice" swings open or drops like a portcullis depending on how the courts and their resources are used. Personal court costs awards against lawyers are simply a tool to help the court apparatus function, and ultimately that is to everyone's benefit.

V. Priscilla Kennedy's Litigation Misconduct

[121] I reject that 'litigating from one's heart' is any defence to a potential costs award vs a lawyer, or for that matter from any other sanction potentially faced by a lawyer. Lawyers are not actors, orators, or musicians, whose task is to convey and elicit emotions. They are highly trained technicians within a domain called law. A perceived injustice is no basis to abuse the court, breach one's oath of office, or your duties as a court officer.

[122] When a lawyer participates in abusive litigation that lawyer is not an empty vessel, but an accessory to that abuse. Persons are subject to sanctions including imprisonment where they engage in misconduct but are willfully blind to that wrongdoing. Lawyers have responsibilities and are held to a standard that flows from their education and training, and it is on that basis that Canadian courts give them a special trusted status. Abuse of that trust will have consequences.

[123] Turning to Stoney's lawyer, Priscilla Kennedy, there are two main bases on which Ms. Kennedy may be liable for a court-ordered costs award against her, personally.

A. Futile Litigation

[124] First, the August 12, 2016 application filed by Kennedy on behalf of Stoney was clearly an example of futile litigation. This is detailed in ***Sawridge #6*** at paras 38-52.

[125] The August 12, 2016 application seeks to have Stoney added as a beneficiary of Sawridge 1985 Trust because he says he is in fact and law a member of the Sawridge Band. Stoney was refused membership in the Sawridge Band and challenged that result in Federal Court by judicial review, where his application was rejected: ***Stoney v Sawridge First Nation***, 2013 FC 509, 432 FTR 253. The Federal Court decision was not appealed. Kennedy was Stoney's lawyer in this proceeding. I concluded in ***Sawridge #6*** that the August 12, 2016 application was a collateral attack on the Federal Court's decision and authority. It is "... an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.": ***Wilson v The Queen***, [1983] 2 SCR 594 at 599, 4 DLR (4th) 577.

[126] I have previously commented on how a collateral attack is a very serious form of litigation misconduct that is a basis for court intervention and response. Kennedy was perfectly aware of the result in ***Stoney v Sawridge First Nation***. She was Stoney's lawyer in that proceeding. Further, the arguments made against Stoney by the Sawridge Band and the Sawridge 1985 Trust Trustees made clear that Kennedy was attempting to re-litigate on the same ultimate subject.

[127] My review of Stoney's submissions in ***Sawridge #6*** and the reported ***Stoney v Sawridge First Nation*** arguments illustrates that Kennedy's arguments in these two proceedings are effectively the same. Kennedy brought nothing novel to the ***Sawridge #6*** dispute.

[128] It gets worse. Not only was ***Stoney v Sawridge First Nation*** judicial review unsuccessful, but in that decision Justice Barnes at para 16 observed that Maurice Stoney had raised the same claim years earlier, in ***Huzar v Canada***, [2000] FCJ 873, 258 NR 246 (FCA), and in that action at para 4 had acknowledged that Stoney had abandoned that aspect of the appeal because that claim "discloses no reasonable cause of action". Justice Barnes therefore at para 17 concluded (and I agree) that the result in ***Stoney v Sawridge First Nation*** was already barred by issue estoppel - Stoney was attempting to "... relitigate the same issue that was conclusively determined in an earlier proceeding."

[129] Kennedy therefore did not merely engage in a hopeless proceeding before me. The ***Stoney v Sawridge First Nation*** judicial review was also doomed from the start. Both actions were abuse of the courts. Neither Stoney nor Kennedy had any right to waste court and respondent resources in these actions.

[130] Kennedy's counsel admitted this is true, that the August 12, 2016 application was hopeless from the start, and an abuse of court processes.

[131] Acting to advance a futile action such as a collateral attack which proceeds in the face of objections on that ground is a clear basis to find a lawyer has engaged in serious abuse of judicial processes, and to then order costs against the lawyer, personally. The ***Sawridge #6*** application was an unfounded, frivolous, and vexatious proceeding. This was a serious abuse not only because of the character of the misconduct (a futile action), but that misconduct is aggravated because Kennedy had done the same thing with the same client before. There is a pattern here, and one that should be sharply discouraged.

[132] This is the first basis on which I conclude that Priscilla Kennedy should be personally liable for litigation costs in the ***Sawridge #6*** application.

B. Representing Non-Clients

[133] The three affidavits presented by Kennedy do not establish that Maurice Stoney was authorized to represent his siblings. Even at the most generous, these affidavits only indicate that Bill and Gail Stoney gave some kind of oral sanction for Maurice Stoney to act on their behalf. I put no weight on the affidavit of Shelley Stoney. It is hearsay, and presumptively inadmissible.

[134] I note that none of these affidavits were supported by any form of documentation, either evidence or records of communications between Maurice Stoney and his siblings, or between Kennedy and her purported clients.

[135] I make an adverse inference from the absence of any documentary evidence of the latter. The fact that no documentation to support that Kennedy and the Stoney siblings communicated in any manner, let alone gave Kennedy authority to act on their behalf, means none exists.

[136] There is no documentation to establish that Maurice Stoney applied to become a litigation representative or was appointed a litigation representative, per *Rules* 2.11-2.21. This is not a class action scenario where Maurice Stoney is a representative applicant. While Kennedy has argued that Maurice Stoney's siblings are elderly and unable to conduct litigation, then that is not simply a basis to arbitrarily add their names to court filing. Instead, a person who lacks the

capacity to represent themselves (*Rule* 2.11(c-d)) may have a self-appointed litigation representative (*Rule* 2.14), but only after filing appropriate documentation (*Rule* 2.14(4)). That did not occur.

[137] I therefore conclude on a balance of probabilities that Kennedy did not have instructions or a legal basis to file the August 12, 2016 application on behalf of "Maurice Felix Stoney and his brothers and sisters".

[138] I adopt the reasoning of Graesser J in ***Morin v TransAlta Utilities Corporation*** that a costs award against a lawyer is appropriate where that lawyer engages in unauthorized "busybody litigation". This is a deep and fundamental breach of a lawyer's professional, contractual, and court-related obligations.

[139] While at the July 28, 2017 hearing I concluded that no potential costs liability should be placed on Bill and Gail Stoney, I stress the potential deleterious consequences to these individuals for them being gathered into this Action in an uncertain and ill-defined manner. The Sawridge Band and Trustees stressed the importance of *informed* consent, and I have no confidence that sort of consent was obtained for either Bill or Gail Stoney, let alone the other siblings of Maurice Stoney.

[140] In any case, I order costs against Kennedy on the basis of her "busybody litigation", but I believe that the submissions received in this costs application are a further aggravating factor given the potential of putting persons who are operationally non-clients at risk of court-imposed sanctions. This is a second independent basis that I find Kennedy should be liable to pay costs.

C. The Presence of *Chutskoff v Bonora* "Indicia" and other Aggravating Factors

[141] As previously indicated, the presence of ***Chutskoff v Bonora*** "indicia" may assist the court in determining whether or not a lawyer has engaged in abusive litigation that is "serious abuse".

[142] A point that was in dispute at the ***Sawridge #6*** application was whether or not Stoney had outstanding unpaid costs orders. This is a well-established indicium of vexatious litigation: ***Chutskoff v Bonora*** at para 92. This is a useful point to illustrate how, in my opinion, ***Jodoin*** instructs how a court 'quarantines' relevant vs extraneous evidence when the court evaluates a lawyer's potential liability due to litigation abuse. One of the allegations that emerged was that Stoney had not paid the costs awarded against him in ***Stoney v Sawridge First Nation***. If so, then that fact aggravates the fact Kennedy then conducted a collateral attack on the judicial review's outcome. Similarly, Maurice Stoney's failure to pay costs in relation to the ***Stoney v 1985 Sawridge Trust*** appeal of ***Sawridge #3*** is related to the August 12, 2016 application by both subject matter and as it occurred in the same overall litigation. However, if Stoney had, hypothetically, not paid costs awarded in other actions where he was represented by Kennedy then that is of little relevance to this specific decision and the question of whether Kennedy should be liable for the ***Sawridge #6*** costs award.

[143] I conclude that the fact that Kennedy proceeded with the August 12, 2016 application while there were outstanding costs orders in relation to ***Stoney v Sawridge First Nation*** and ***Stoney v 1985 Sawridge Trust*** is an aggravating factor but not, in itself, a basis to order costs against Kennedy.

[144] The Trustees and Band indicated I should consider Kennedy's conduct during cross-examination of her client on his affidavit. While I have reviewed that material I do not think it is

germane to my analysis because Kennedy's obstructionist conduct is distinct from the main bases for my award of costs against Kennedy. Similarly, the degree to which Kennedy was "holding the reins" of this litigation is not actually directly relevant to my analysis. What is critical is that the August 12, 2016 application had no merit. Kennedy's misconduct is essentially the same no matter whether she 'was just following orders', or 'the person behind the wheel'.

[145] Another factor which I conclude is relevant and aggravating is that the Stoney August 12, 2016 application attempts to off-load litigation costs on the 1985 Sawridge Trust. Stoney's application seeks to have his entire litigation costs paid from the Trust. I would consider it a significant indication of good faith litigation intent if Stoney had acknowledged his litigation was 'a long shot', and acknowledged a willingness to cover the consequences to other involved parties. Instead Stoney resisted an application by the Sawridge Band that he pay security for costs.

[146] The attempted 'offloading' of litigation costs in this instance is not in itself a basis to conclude that Kennedy should be liable to pay her client's court costs, but it favours that result. Stoney, whether he won or lost, sought to have the beneficiaries of an aboriginally owned trust pay for his (and his lawyer's) expenses.

[147] Another aggravating factor is that in ***Sawridge #2*** I concluded at para 35 that this Court would not take jurisdiction to review the Sawridge Band membership process. That was the jurisdiction of the Federal Courts. Stoney and Kennedy ignored that instruction by advancing the ***Sawridge #6*** application.

[148] Last, I note that Stoney's application has a special aggravating element. The intended relief was that Stoney be added as a member of an Indian Band. There is no need to review and detail the extensive jurisprudence on the special *sui generis* character of aboriginal title, how aboriginal property is held in a collective and community-based manner, and the unique fiduciary relationship between the Crown and Canada's aboriginal peoples. Suffice to say that membership in an Indian Band brings unusual consequences to both the member and that band member's community.

[149] Put simply, a challenge to that status, and the internal decision-making, self-determination, and self-government of an aboriginal community is a serious matter. If I had been unclear on whether an illegal and futile attempt to conduct a collateral attack on the ***Stoney v Sawridge First Nation*** decision qualified as "serious abuse" then I would have no difficulty concluding the ***Sawridge #6*** application was "serious abuse of the judicial system" in light of the interests involved, combined with the fact the Stoney application had no basis in law or fact.

D. Conclusion

[150] I conclude that Priscilla Kennedy has conducted "an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system" on two independent bases:

1. she conducted futile litigation that was a collateral attack of a prior unappealed decision of a Canadian court, and
2. she conducted that litigation allegedly on behalf of persons who were not her clients on a "busybody" basis.

[151] Each of these are a basis for concluding that Kennedy should be liable for the ***Sawridge #6*** costs, personally. The aggravating factors I have identified simple emphasize that conclusion and result is correct.

E. Quantum of the Costs Award

[152] In certain instances it might be possible to conclude that a lawyer's participation in an abusive application or action is really only related to a part of the problematic events, and on that basis a court might only make a lawyer responsible for a part of the court-ordered costs.

[153] Here, however, Kennedy was involved fully throughout the ***Sawridge #6*** application. The abusive character of that litigation was established from the August 12, 2016 application date, onwards. I therefore conclude that Kennedy and Stoney are liable for the full costs of ***Sawridge #6***, on a joint and several basis.

VI. Conclusion

[154] I order that Kennedy is personally liable for the solicitor and own client indemnity costs that I ordered in ***Sawridge #6*** at paras 67-68, along with her client.

[155] Stoney, Kennedy, the Trustees, and the Sawridge Band may return to the court within 30 days of this decision if they require assistance to determine those costs. Once determined, costs are payable immediately.

[156] In light of my conclusion that Kennedy is responsible for conducting litigation that abused the Alberta Court of Queen's Bench's processes and the other Sawridge Advice and Direction Application participants, Kennedy admitting the same, and the nature and character of that abuse, I direct that a copy of this judgment shall be delivered to the Law Society of Alberta for its review.

Heard on the 28th day of July, 2017.
Dated at the City of Edmonton, Alberta this 31st day of August, 2017.

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

Submissions in writing from:

Donald Wilson
DLA Piper
for Priscilla Kennedy

D.C. Bonora and
Erin M Lafuente
Dentons LLP
for 1985 Sawridge Trustees

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

Tab 16

UT#: 84
OF: Catherine Twinn

CT084.002

om: Catherine Twinn <ctwinn@twinnlaw.com>
Sent: Friday, May 26, 2006 12:28 PM
To: 'Larry Cardinal'
Subject: RE: Kieran's membership and education funding

May 26, 2006

Hi Larry,

Thanks for the information. I am tracking it from the other end in the hopes this can be move forward. I'll do my best. I would like to see you spared the burden of hiring a lawyer to ensure Kieran's application is addressed. Please let Kieran know his Uncles - my sons - were looking forward to meeting him when we invited him to join us for dinner. He never showed up. Ardell called the day of the dinner. I was yelled at and told to stay away from Kieran. Kieran had reached out to us then he vanished. My sons have good hearts. They are Kieran's Uncles. They are open if Kieran cares to know them as human beings.

Best Regards,

Catherine

Catherine M Twinn
Ph: (780) 849-4319
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Email: ctwinn@twinnlaw.com
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Slave Lake, Alberta
T0G 2A0

-----Original Message-----
From: Larry Cardinal [mailto:larrygrasshead@hotmail.com]
Sent: Tuesday, May 09, 2006 8:42 PM
To: Catherine
Subject: RE: Kieran's membership and education funding

Catherin here is the information you requested.

March 20, 1985 Kieran born--Documents available.

April 1985 Bill C-31 Passed-- Doc.available

July 4,1985 Sawridge Band gives notice to the minister for the Bands membership control --Doc. available

December,1985 Kierans adoption finalized.--Doc. available

Elected officials of the Band should not sit as Trustees. There must be a strict separation of political from economic decision makers. Successful First Nation Trusts observe the separation rule. Should the Constitution expressly state these rules that are integral to Good Governance?

I've recommended that an independent Tribunal be authorized to make membership decisions and that the Membership Code be amended. The decision making must meet standards of due process. The body making the Decisions must be independent, impartial, unbiased, conflict free and capable of making decisions expeditiously that are fair, transparent and just.

I recommended a Tribunal structure to the Trustees. Below is a short chronology from Paul Bujold (Trust Administrator) I asked him to prepare relating to the Tribunal as it evolved at the Trustee table. After the Trusts started exploring the Tribunal, Roland Twinn angrily rejected the Tribunal saying the Trusts could not take over the Band's authority to determine membership. I do not agree with Paul's Chronology for a number of reasons including that:

1. It ignores and discounts my efforts and time exploring a Tribunal;
2. It discounts my motion to pursue a Tribunal;
3. It suggests the Tribunal was rejected because of legal advice from Donovan Waters. In fact, Roland strongly objected to the Tribunal. Thereafter the legal opinion issued December 21, 2010 from Donovan Waters which I believe was influenced by the Band's adamant and unreasonable position. Donovan recommended that the determination of beneficiaries be left to the Band since it is the only legal authority able to admit persons into membership to the Sawridge First Nation. This has been taken to mean the Trusts do not have a role in this and I disagree;
4. It ignores the overriding duty of Trustees to ascertain beneficiaries including their obligation to have confidence in the Band's decision making process. If they do not have confidence, and ignore the flaws within the Band's decision making process, what is the liability of Trustees?;
5. It ignores and turns a blind eye to the evidence of flaws and unfairness in the Band's process. I've shared evidence and concerns with Paul Bujold and Brian Heidecker yet they proceed as if they are no flaws. Is this because their contracts are determined by Clara, Bertha and Roland (who constitute a majority of Trustees) and these 3 individuals have opposed an independent Tribunal? These 3 persons are elected officials of the Band and as Justice Denny Thomas, this fact suggests both structural and potential confilict of interest;
6. Brian Heidecker and Paul Bujold have ignored the Conflict findings of Justice Denny Thomas;
7. Indeed, they have brought forward a Proposal seeking authority from the Trustees to negotiate these with the Public Trustee so as to remove the Public Trustee from the application. To me, this is attempting to breach a Court Order;
8. It suggests that Trustees can rely on the Band's decision making process and abdicate from further responsibility;
9. It ignores impacted beneficiaries under the 1985 Trust and duties Trustees owe to these impacted beneficiaries;

- OCTOBER 2009, DISCUSSED BENEFICIARY IDENTIFICATION WITH DAVID WARD. BASED ON HIS RECOMMENDATION, BEGAN WORK ON A NOTICE TO BE PLACED IN NEWSPAPERS IN ALBERTA, BC AND SASKATCHEWAN.
- DECEMBER 2009, NOTICE ISSUED IN NEWSPAPER TO THOSE WHO CONSIDER THEMSELVES BENEFICIARIES TO THE SAWRIDGE TRUSTS.
- JANUARY 2010, BEGAN RECEIVING APPLICATIONS FROM PERSONS WHO CONSIDERED THEMSELVES BENEFICIARIES TO THE SAWRIDGE TRUSTS.
- FEBRUARY 2010, PAUL DISCUSSED WITH TRUSTEES NEED TO HAVE OBJECTIVE WAY TO MAKE BENEFICIARY SELECTION BASED ON APPLICATIONS. TRUSTEES DECIDE TO REVIEW BENEFICIARY APPLICATIONS AND THEN FIND WAY FOR NEUTRAL THIRD PARTY TO MAKE SELECTIONS.
- APPLICATIONS AND THEN FIND WAY FOR NEUTRAL THIRD PARTY TO MAKE SELECTIONS.
- FEBRUARY 2010, BEGIN DISCUSSIONS WITH CATHERINE WAYS TO MAKE BENEFICIARY SELECTION OBJECTIVE USING STANDARDS THAT MEET PRINCIPLES OF ADMINISTRATIVE LAW. A NUMBER OF CANDIDATES RECOMMENDED BY CATHERINE AND PAUL ALSO RESEARCHED OTHERS.
- FEBRUARY 2010, REQUEST TIM YOUDAN TO PROVIDE A LEGAL OPINION ON THE DETERMINATION OF BENEFICIARIES.
- 4 JUNE 2010, TIM YOUDAN PROVIDES EXTENSIVE LEGAL OPINION ON THE DETERMINATION OF BENEFICIARIES.
- 19 JULY 2010 BRIAN AND PAUL MEET WITH JUSTICE WILSON TO DETERMINE IF HE IS INTERESTED IN PARTICIPATING IN A BENEFICIARY SELECTION PANEL.
- 2010-052, JULY 2010, PAUL PREPARED A RECOMMENDATION ON THE PROCESS OF DETERMINING THE BENEFICIARIES BASED ON DISCUSSIONS WITH BILL WILSON. TRUSTEES DECIDE TO GO AHEAD WITH SELECTION PANEL PROCESS INCLUDING JUSTICE BILL WILSON AS CHAIR AS RECOMMENDED BY JUSTICE WACHOWICH.
- JULY 2010, PAUL SPOKE TO POTENTIAL CANDIDATES FOR TRIBUNAL, INCLUDING SPECIALISTS IN NATIVE LEGAL QUESTIONS AND NATURE'S LAW.
- JULY-AUGUST 2010, PAUL PREPARED AN EXTENSIVE BRIEFING PACKAGE FOR BRIAN, DONOVAN AND BILL WITH COPIES FOR POTENTIAL PANEL MEMBERS ON NATURE'S LAW WEBSITE, THE TRUSTS HISTORY, THE TIM YOUDAN OPINION, THE HUGESSEN DECISION, AND NEHĪYĀW LEGAL TRADITIONS.
- ACTION 1008-06, AUGUST 2010, PAUL TO MEET WITH DORIS, DONOVAN AND BILL TO FINALIZE PROPOSAL FOR BENEFICIARY DETERMINATION.
- 30 AUG 2010 BRIAN, DONOVAN AND PAUL MEET WITH BILL WILSON
- 2010-64, SEPTEMBER 2010, TRUSTEES DECIDE THAT PAUL UNDERTAKE AN IMPACT ASSESSMENT ON BENEFICIARIES IN CONSULTATION WITH MIKE MCKINNEY, ROLAND TWINN AND CATHERINE TWINN CONSIDERING THE STATUS QUO, PRE-MCIVOR, POST-MCIVOR AND CUSTOMARY LAW.
- OCTOBER 2010, PAUL REQUEST ASSISTANCE OF MIKE, ROLAND AND CATHERINE TO PROVIDE CATEGORIES UNDER THE INDIAN ACT AND THE BAND MEMBERSHIP CODE FOR MEMBERSHIP TO THE SAWRIDGE FIRST NATION.
- 25 NOVEMBER 2011, CATHERINE PROVIDES SCENARIOS DEVELOPED IN 2004 BY KRISTINE MIDBO FOR TWINN LAW.

C1084.052

- 30 November 2011, Paul emailed Catherine with membership scenarios for review.
- 21 December 2010 Donovan recommends that the determination of beneficiaries be left to the Band since it is the only legal authority able to admit persons into membership to Sawridge First Nation since Trusts do not have a role in this. Trust tribunal idea abandoned but idea recommended to Band Council.
- January 2011, Beneficiary Applicants informed that they need to apply to Sawridge First Nation to be considered as beneficiaries to the Trusts.
- 24 January 2011, Review with Mike McKinney list of members of Sawridge First Nation and dependants against 1985 Trust rules at the request of Doris Bonora for Application to Court for Advice and Direction on Beneficiary definition.
- April 2010, Inform Bill Wilson that his services will no longer be needed upon his return from Arizona.
- February-June 2011, Begin process of Application to the Court for Advice and Direction on the 1985 Trust definition of beneficiaries. Trusts services are offered to Band Council if assistance required to setup process that meets administrative law requirements.

With regard to a Tribunal, I will explore all options including:

1. **Designating an Existing Tribunal (Metis Settlement Appeal Tribunal?) to deal with membership, land, election and conflict issues;**
2. **Creating a Tribunal through the Sawridge Constitution. Below is a link to the web site for Kwanlin Dun First Nation. Their Constitution sets out the following bodies as the Governing Bodies of the First Nation:**
    - **Youth Council**
    - **Elders Council**
    - **General Assembly**
    - **Judicial Council**
    - **Chief and Council**

http://www.kwanlindun.com/judicial_council

It is worth reading their Constitution.

Below are extracts from their Constitution relating to the Judicial Council.

Because Sawridge is so small (46 members?), conflicts so deep rooted, unhealed inter-generational trauma unaddressed and unbiased decision making virtually impossible, qualified, outside persons are needed to enable the good governance of the Community.

Your comment about what is missing from the Sawridge Constitution is well taken. We need to identify what is missing from the Constitution and I will focus on this.

Kwanlin Dun First Nation

The Judicial Council

Tab 17

Form 49
Alberta Rules of Court
Rule 13.19

Clerk's Stamp

FILED
AUG 30 2017
JUDICIAL CENTRE OF EDMONTON
Clerk of the Court

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**

A

C

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 a client argued Friday she shouldn't be made to pay legal costs related to the action.

Lawyer Priscilla Kennedy appeared before Court of Queen's Bench Justice Denny Thomas at a hearing to argue that though 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 become 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's 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 that 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 Twinn, a Sawridge trustee who disagrees with the band's rejection of Stoney, was in court Friday for the proceedings, which she said were a continuation of the injustice. She said Stoney is 75 years old and works as a cab driver in Slave Lake.

"What happened today to Mr. Stoney and his family is a travesty," Twinn said.

Thomas, who reserved his decision until September, also 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

Saturday July 29/17

D

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 26 day
of JUNE A.D. 20 18
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, 2020

{E6177671.DOCX; 1}

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.

{E6177671.DOCX; 1}

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.

Rarihokwats

RARIHOKWATS
CHAIR, APPEAL COMMITTEE

{E6177671.DOCX; 1}

Tab 18

Clerk's stamp:

FILED
APR 01 2014
JUDICIAL CENTRE OF EDMONTON
Clerk of the Court of Queen's Bench

COURT FILE NUMBER	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
	IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT and THE SAWRIDGE TRUST ("Sawridge Trusts")
APPLICANTS	ROLAND TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, EVERETT JUSTIN TWIN, as Trustees for the Sawridge Trusts
RESPONDENT	CATHERINE TWINN
DOCUMENT	Originating **~~APPLICATION~~**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP 2900 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3V5 Attention: Doris C.E. Bonora Telephone: (780) 423-7100 Fax: (780) 423-72764 File No: 551860-001-DCEB

NOTICE TO RESPONDENT

This application is made against you. You are the respondent.

You have the right to state your side of this matter before the judge.

To do so, you must be in court when the application is heard as shown below:

Date: April 9, 2014

Time: 10:00 AM

Where: Law Courts Building, Edmonton, Alberta

Before: Justice in Chambers

Go to the end of this document to see what else you can do and when you must do it.

Relief claimed or sought:

1. An order abridging the time for service of this application and supporting materials, and an order validating service of this application and any supporting materials to be good and sufficient, if necessary.

2. An order directing that the assets of the Sawridge Band Inter Vivos Settlement and the Sawridge Band Trust ("Sawridge Trusts") be transferred from the current trustees of the trusts being Catherine Twinn, Roland Twinn, Bertha L'Hirondelle and Clara Midbo ("the current trustees") to the new trustees being Catherine Twinn, Roland Twinn, Bertha L'Hirondelle, Clara Midbo and Everett Justin Twin ("new trustees").

3. An order directing that the administrator of the trusts to be at liberty to take any and all steps necessary and to execute any and all documents necessary to transfer the assets from the current trustees to the new trustees.

4. Costs of this application payable on a solicitor and client basis by a trustee who required the application be made or payable by the Sawridge Trusts.

5. Such further and other relief as this Honourable Court deems just and appropriate.

Grounds for making this application:

6. Walter Felix Twin, one of the trustees of the Sawridge Band Inter Vivos Settlement and the Sawridge Band Trust, resigned.

7. The Sawridge Band Inter Vivos Settlement requires that there be five trustees of the trust.

8. The selection of the new trustee may be done by majority vote. Everett Justin Twin was selected as a new trustee of the Sawridge Band Inter Vivos Settlement and the Sawridge Band Trust.

9. As the assets in the trust are held jointly by the trustees, it is necessary for the current trustees to transfer the assets of the trusts to the new trustees as a group.

10. The current trustees, with the exception of Catherine Twinn, have signed the necessary documents to effect a transfer of the respective trust assets from the current trustees to the new trustees.

11. Catherine Twinn has refused or neglected to sign the necessary documents to effect the transfer of assets.

12. It is necessary that the assets be transferred and it appears that it is impossible to proceed without the assistance of the Court.

13. The applicant will rely on such further and other grounds as counsel may advise and that this Honourable Court may permit.

Material or evidence to be relied upon:

14. Affidavit of Paul Bujold, filed.

15. Such further and other materials or evidence as counsel may advise and this Honourable Court may permit.

Applicable rules:

16. Alberta Rules of Court.

17. Such further and other rules as counsel may advise and this Honorable Court may permit.

Applicable acts and regulations:

18. Trustee Act, RSA 2000, c. T-8, and regulations and amendments thereto.

19. Such further and other acts and regulations as counsel may advise and this Honourable Court may permit.

How the application is proposed to be heard or considered:

20. In person, with all parties presents.

Warning

If you cannot come to court either in person or by your lawyer, the court may give the applicant what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of the form. If you intend to give evidence in response to the application, you must reply by filing an affidavit or other evidence with the Court and serving a copy of that affidavit or other evidence on the applicants a reasonable time before the application is heard or considered.

Tab 19

F70

Court of Queen's Bench of Alberta

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

Date:
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

F71

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

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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

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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. <u>In this proceeding are the Band membership rules and application processes relevant</u>?

[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) 61 (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

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	Clerk's Stamp:
	JUDICIAL CENTRE OF EDMONTON FILED SEP 20 2012 Clerk of the Court
COURT FILE NUMBER:	1103 14112
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
	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")
APPLICANTS	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust
DOCUMENT	**ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Chamberlain Hutchison #155, 10403 – 122 Street Edmonton, AB T5N 4C1 Attention: Janet Hutchison Telephone: (780) 423-3661 Fax: (780) 426-1293 File: 51433 JLH

Date on which Judgment Pronounced: June 12, 2012

Location of hearing or trial: Edmonton, Alberta

Name of Justice who made this Order: Justice D.R.G. Thomas

UPON the application of the Public Trustee; AND UPON review of the Affidavits filed in this proceeding; AND UPON review of the filed written submissions; AND UPON hearing the submissions of Counsel for the Public Trustee, Counsel for the Sawridge Trustees and Counsel for the Sawridge First Nation; IT IS HEREBY ORDERED AND DECLARED as follows:

1. The Public Trustee is appointed litigation representative for the 31 minors who are children of current Sawridge First Nation members as well as any minors who are children of applicants seeking to be admitted into membership of the Sawridge First Nation.

2. The Public Trustee shall receive full, and advance, indemnification for its costs for participation in the within proceedings, to be paid by the Sawridge Trust.

3. The Public Trustee will be exempted from any responsibility to pay the costs of the other parties in the within proceeding.

4. The Public Trustee may inquire, on questioning on affidavits, into the process the Sawridge Band uses to determine membership, the Sawridge Band membership definition and into the status and number of Band membership applications that are currently awaiting determination.

5. The Public Trustee is granted costs of this application to be calculated on a solicitor and its own client basis, to be paid by the Sawridge Trust.

6. This Order may be consented to in counterpart and by way of facsimile signature.

Mr. Justice D. R. G. Thomas

CONSENTED TO AS TO FORM AND CONTENT:

REYNOLDS MIRTH RICHARDS & FARMER LLP
Per:

Marco S. Poretti
Solicitors for the Trustees

CHAMBERLAIN HUTCHISON
Per:

Janet Hutchison
Solicitors for the Office of the Public Trustee of Alberta

PARLEE McLAWS LLP
Per:

Edward H. Molstad, Q.C.
Counsel for Sawridge First Nation

MYLES J. KIRVAN - DEPUTY ATTORNEY GENERAL OF CANADA
Per:

E. James Kindrake
Solicitors for the Minister of Indian Affairs and Northern Development

DAVIS LLP
Per:

Priscilla Kennedy
Solicitors for Aline Elizabeth Huzar, June Martha Kolosky and Maurice Stoney

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Edward H. Molstad, Q.C.
Counsel for Sawridge First Nation

MYLES J. KIRVAN - DEPUTY ATTORNEY GENERAL OF CANADA
Per:

E. James Kindrake
Solicitors for the Minister of Indian Affairs and Northern Development

DAVIS LLP
Per:

Priscilla Kennedy
Solicitors for Aline Elizabeth Huzar, June Martha Kolosky and Maurice Stoney

Tab 20

Form 10
[Rule 3.25]

Clerk's stamp:

JUDICIAL CENTRE OF EDMONTON
FILED
JUN 19 2015
P.B
Clerk of the Court of Queen's Bench

$250
Advised of rule 13.6(2)

COURT FILE NUMBER	1503 08727
COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	Edmonton
PLAINTIFF(S)	Catherine Twinn
DEFENDANT(S)	Roland Twinn, Bertha L'Hirondelle, Everett Justin Twin, Margaret Ward and Brian Heidecker
DOCUMENT	**STATEMENT OF CLAIM**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	MILLER THOMSON LLP Barristers and Solicitors 2700, Commerce Place 10155-102 Street Edmonton, AB, Canada T5J 4G8 Phone: 780.429.1751 Fax: 780.424.5866 Lawyer's Name: Brian P. Kaliel, Q.C. Lawyer's Email: bkaliel@millerthomson.com File No.: 121435.01

NOTICE TO DEFENDANT(S)

You are being sued. You are a defendant.

Go to the end of this document to see what you can do and when you must do it.

Statement of facts relied on:

The Parties

1. The Plaintiff, Catherine Twinn resides at the Sawridge Indian Reserve near Slave Lake, in the Province of Alberta and at the City of Edmonton, in the Province of Alberta.

2. The Defendants, Roland Twinn, Bertha L'Hirondelle and Everett Justin Twin reside at the Sawridge Indian Reserve near Slave Lake, in the Province of Alberta.

3. The Defendant, Brian Heidecker resides at or near Edmonton, in the Province of Alberta.

4. The Defendant, Margaret Ward, resides at or near Wetaskiwin, in the Province of Alberta.

5. Roland Twinn has been the Chief of the Sawridge Indian Band (the "Band") since 2003. The Defendants, Bertha L'Hirondelle and Everett Justin Twin are former members of the Band Council.

6. The Plaintiff, Catherine Twinn, is 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").

7. The Trusts currently have an estimated gross asset value of $300 million.

8. Catherine Twinn was appointed as a Trustee of the 1985 Trust on December 18, 1986 and of the 1986 Trust on August 15, 1986. She has continuously maintained that position since this appointment.

9. The Defendants, Roland Twinn, Bertha L'Hirondelle, Everett Justin Twin and Margaret Ward are the other current Trustees of the Trusts (the "Defendant Trustees").

10. The Defendant, Brian Heidecker ("Heidecker") is not a Trustee. He is the current Chair of the Trustees and holds the position of "Trustee's Chair".

Ascertainment of Trust Beneficiaries and Conflict of Interest Issues

11. The 1985 Trust defines "beneficiaries", in part, as:

> "All persons who at [April 15, 1982] qualify as members of the Sawridge Indian Band No. 19 pursuant to the provisions of the <u>Indian Act</u>, R.S.C. 1970, Chapter I-6 as such provisions existed on the 15th day of April, 1982..."

12. The 1986 Trust defines "beneficiaries" as:

> "All persons who at that time qualify as members of the Sawridge Indian Band under the laws of Canada in force from time to time including, without restricting the generality of the foregoing, the membership rules and customary laws of the Sawridge Indian Band as the same may exist from time to time to the extent that such membership rules and customary laws are incorporated into, or recognized by, the laws of Canada."

13. In or about August and September of 2011, Bujold filed Affidavits in Queen's Bench Action No. 1103 14112 (the "Trusts Application") seeking the opinion, advice and direction of the Alberta Court of Queen's Bench with respect to the definition of "beneficiaries" contained in the 1985 Sawridge Trust and, if necessary, to vary the 1985 Sawridge Trust to clarify the definition of "beneficiaries" and adopt the definition of "beneficiaries" that exists in the 1986 Trust. These changes would, based on the current practice of the Band, render individuals who are accepted by the Chief and Council as Band members as the only beneficiaries of the 1985 Trust.

14. In Reasons for Judgment dated June 12, 2012 in the Trusts Application, the Honourable Mr. Justice D.R.G. Thomas expressed concerns that persons excluded by the Band from Band membership would thereby also be excluded as beneficiaries of the 1985 Trust if the 1985 Trust adopted the 1986 Trust's definition of beneficiaries; that the Public Trustee should make enquiries into the membership and application processes and practices of the Band; that there is an overlap between the Trustees and the Sawridge Band Chief and

Council; that there is a potential conflict between the personal interests of the Sawridge Trustees (including the Chief and Council) and their duties as fiduciaries under the Trusts, and that the Court of Queen's Bench 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 in breach of Charter principles and the requirements of natural justice".

15. Mr. Justice Thomas directed the appointment of the Public Trustee for the Province of Alberta to represent the interests of children potentially affected by the application with authority to enquire into the Band's processes for admission of individuals as Band members and to report to the Court whether the Band's system is fair, reasonable, timely, unbiased and in accordance with Charter principles and natural justice.

16. The Band currently has 44 Band members, the majority of whom are comprised of the Twin(n) family.

17. The Plaintiff has, for a number of years, expressed concerns with respect to the potential conflict of interest in having elected officials of the Sawridge First Nation act as Trustees; the need to ensure a de-politicized independent Board of Trustees; a Trustee succession plan which involves the appointment of independent and qualified Trustees, and a system for ascertaining beneficiaries which is fair, timely, reasonable and unbiased in accordance with Charter principles and natural justice. The Plaintiff had at various times to no avail, put forward recommendations to fairly ascertain beneficiaries under both Trusts and for an independent Board.

18. On January 17, 2014, the Plaintiff wrote the then Trustees an open letter reminding them of their fiduciary obligations under the Trusts in this regard and urging them to address these issues. The Plaintiff hoped that the letter would bring about a non-litigious resolution.

19. The then Trustees, including the Defendants, Roland Twinn and Bertha L'Hirondelle, and the late Clara Midbo, and Heidecker refused to discuss these issues. On January 21, 2014 the other Trustees appointed a Band Councillor, the Defendant, Everett Justin Twin as a replacement Trustee with no regard to his eligibility.

20. On August 12, 2014, without any prior notice to the Plaintiff, the Defendants, Roland Twinn, Bertha L'Hirondelle and Everett Justin Twin appointed the Defendant, Margaret Ward as a Trustee to replace Clara Midbo who died on or about July 13, 2014.

21. On September 26, 2014, the Plaintiff brought an application in Queen's Bench Action No. 1403 04885 for advice and direction with respect to the eligibility of the Defendant, Everett Justin Twin to be appointed as a Trustee of the 1985 Trust and for assistance from the Court with respect to, among other things, the appointment of an appropriate replacement Trustee for Everett Justin Twin and the deceased Trustee, Clara Midbo.

The Code of Conduct Agreement

22. By virtue of an agreement dated January 12, 2009, the then Trustees of the Trusts agreed to the terms of a Code of Conduct (the "Code of Conduct") which the Trustees affirmed their basic obligation of acting in the best interests of beneficiaries, integrity, impartiality and without conflicts of interest. They also agreed to an elective procedure for resolving disputes arising from the Code of Conduct.

23. The Plaintiff and the Defendant Trustees have all signed and agreed to the terms of the Code of Conduct.

24. Clauses 8(b) and (c) of the Code of Conduct provide as follows with respect to any concerns any Trustee has about the conduct of other Trustees:

> "The following are the guiding principles applicable to the application of this Code of Conduct:
>
> ***
>
> (b) Any Trustee who has any concern about the conduct of another Trustee will ordinarily in the first place raise the concern either privately with the other Trustee or at a meeting of the Trustees, as may be appropriate in the circumstances. It is expected that such concerns will ordinarily be resolved informally without the need for any outside intervention.
>
> (c) Where it is alleged by a Trustee (the "Claimant") that another Trustee has acted inconsistently with this Code of conduct and the Claimant is not satisfied that his or her concern has been properly resolved in accordance with (b) above, the Claimant may require that an outside person be appointed to act as a mediator and arbitrator to deal with the complaint, as follows:
>
> > (i) Subject to (iii) below, the Claimant will by notice in writing request the Trustees' Chair to arrange the selection of a mediator/arbitrator. Such mediator/arbitrator will be such person as shall be agreed by both the Claimant and the Respondent.
> >
> > (ii) Subject to (iii) below, if the disputing Trustees do not, within 30 days from the date of the notice referred to in (i) above, agree on a mediator/ arbitrator the Trustees' Chair shall appoint a mediator/arbitrator.
> >
> > (iii) If the Trustees' Chair is a Trustee who is a disputing Trustee, the notice referred to in (i) above will be provided to the Trustees who are not the disputing Trustees and the appointment referred to in (ii) above will be made by the majority of the Trustees who are not the disputing Trustees..."

25. Pursuant to the Code of Conduct, the Plaintiff and the Defendant Trustees agreed, pledged and committed, expressly or implied, that they would, among other things:

(a) Act in the best interests of the beneficiaries;

(b) Communicate with one another fairly and effectively

(c) Use their best efforts to include all Trustees in their deliberations so that each Trustee felt that he or she had a meaningful opportunity to contribute to the discussion and that his or her views and values were given fair and full consideration;

(d) Be fair, open, truthful and sincere when dealing with each other and at all times avoid attempts to deceive or mislead each other;

(e) Where possible, work towards unanimous agreement and where unanimous agreement is not possible, to try to come to a consensus;

(f) Base their decisions upon relevant facts and information in a way that is not biased by undisclosed personal feelings or opinions;

(g) Have appropriate regard to one another's legitimate interests;

(h) Act with care, skill and diligence, integrity and impartiality;

(i) Avoid conflicts of interest and duty.

The Complaints

26. On February 5, 2015, Heidecker served the Plaintiff with four complaints under the Code of Conduct that were signed by each of the Defendant Trustees (the "Complaints").

27. The Complaints were all prepared in late January or early February of 2015.

28. None of the Defendant Trustees had contacted the Plaintiff privately with respect to the concerns set forth in the Complaints as required by clauses 8(b) and (c) of the Code of Conduct.

29. None of the Defendant Trustees had attempted to resolve any of their concerns informally.

30. None of the Defendant Trustees contacted the Plaintiff as regards the appointment of a mediator/arbitrator after the Complaints were served by Heidecker.

31. The Plaintiff, through her solicitors, advised Mr. Heidecker that the fact that clauses 8(b) and (c) of the Code of Conduct had not been complied with and that the failure to do so deprived Heidecker of any legal authority to appoint a mediator/arbitrator pursuant to the Code of Conduct.

32. Both Heidecker and the Defendant Trustees, through their legal counsel, have ignored this objection. Heidecker has appointed J. Leslie Wallace as a mediator/arbitrator.

33. The Complaints were prepared and submitted collectively. Much of the content of the Complaints is biased and untrue and contains materials which are irrelevant and predate the Code of Conduct or relate to the legitimate conduct of the Plaintiff in the discharge of her fiduciary duties.

Breach of Contract and Fiduciary Duties

34. Heidecker had no authority to appoint a mediator/arbitrator as, among other things, the contractual pre-conditions under clauses 8(b) and 8(c) of the Code of conduct have not been satisfied with respect to the Complaints. The appointment of J. Leslie Wallace to mediate and arbitrate the Complaints is void.

35. It was a reasonable expectation of the Plaintiff and the beneficiaries, both current and potential, pursuant to the Code of Conduct, that any exercise of the Trustees' duties and powers, including bring a complaint, would not be used in bad faith, malice or for purposes not motivated by or in furtherance of the beneficiaries' best interests.

36. At all material times, the Defendant Trustees occupied fiduciary roles as Trustees to the Trusts. Pursuant to their roles as fiduciaries, as well as the provisions agreed to in the Code of Conduct, the Defendant Trustees owed statutory, contractual, common law, and fiduciary duties to the beneficiaries, which they breached, particulars of which include, but are not restricted to, the following:

(a) Creating contrived, irrelevant and biased Complaints motivated by malice for the Plaintiff, for the improper purpose of:

(i) preventing the Plaintiff from performing her fiduciary obligations under the Trusts as it relates to the ascertainment and recognition of Trust beneficiaries and fulfillment of Trust objects by independent Trustees, and

(ii) attempting to silence the Plaintiff from voicing legitimate concerns with respect to the ascertainment of beneficiaries and the independence of the Trustees, which were simply attempts to discharge her fiduciary duties of disclosure and to impartially act for all beneficiaries and individuals who qualified as beneficiaries,

thereby breaching the overarching duty of utmost loyalty to act in a selfless manner while in their capacity as Trustees, for the benefit of the Trusts and its beneficiaries;

(b) Failing to give appropriate regard to the Plaintiff's legitimate interests regarding the Code of Conduct and the Trusts;

(c) Failing to engage in reasonable and fair discussions or consensual decision-making with the Plaintiff pursuant to decisions to be made relating to the Trusts;

(d) Failing to avoid conflicts of interest;

(e) Failing to exercise the degree of care, diligence and skill that a reasonably prudent Trustee would exercise in comparable circumstances;

(f) Failing to discharge their roles as Trustees of the Trusts honestly, in good faith and in the best interests of the beneficiaries, by failing to promote the best interests of the beneficiaries but instead facilitating, assisting or participating in conduct motivated by personal reasons;

(g) Generally, failing to honour the Code of Conduct's true purpose and intent, which was to act cooperatively with integrity and impartiality in managing the Trusts so as to further the beneficiaries' best interests;

(h) Generally, failing to carry out their duties and powers under the Code of Conduct honestly, cooperatively, and in good faith consistent with fair dealing, in an effort to remove the Plaintiff from her position as Trustee, by basing their Complaints on irrelevant information in a way that was biased by undisclosed personal feelings or opinions;

(i) Such further and other breaches of duty as may be proven at the trial of this action.

37. The Defendant Trustees' conduct as outlined above is also in breach of the fiduciary obligations of the Defendant Trustees to individuals who qualify as beneficiaries of the 1986 Trust, but have been improperly refused or delayed Band membership, as well as to those individuals who qualify under the rules in the 1985 Trust, by failing to implement any number of fair processes to apply these rules to individuals to ascertain their beneficiary status.

38. In furtherance of these improper purposes the Defendants improperly used to Trust assets to indemnify the Defendant Trustees for legal costs they incurred to retain a

lawyer in order to assist them in removing the Plaintiff as a Trustee through the mediation/arbitration process under the Code of Conduct.

39. These actions bring the Trusts and the Trustees into disrepute and jeopardize the Trust Assets, by improperly influencing the administration of the Trusts through the political and personal agendas of the Defendant Trustees and their supporters.

Losses

40. The full extent of the Plaintiff's, beneficiaries' and potential beneficiaries' losses and damages remain unknown to the Plaintiff at the time of the delivery of the Statement of Claim.

41. The Defendant Trustees' breaches will cause the Plaintiff to suffer irreparable harm. There is a serious risk of her removal as a Trustee to the Trusts by the mediator/ arbitrator. The Plaintiff is the only Trustee who has advocated for the interests of potential present and future beneficiaries who have been improperly excluded as beneficiaries. The carrying out of these duties affects fundamental aspects of these individuals' lives. This cannot be adequately compensated by damages.

42. Further, the Defendant Trustees' breaches will cause irreparable harm to individuals who qualify as beneficiaries but whose applications for Band membership and beneficiary status have been improperly rejected, hindered or delayed, or not yet ascertained. These breaches will cause irreparable future damage to future generations of potential beneficiaries.

43. The Plaintiff has incurred expenses and damages, including legal and related costs, to protect the interests of individuals who qualify as beneficiaries but whose applications for Band membership or beneficiary status have been improperly rejected, hindered or delayed, and to protect the interests of future generations of potential beneficiaries. It is inequitable for the Trusts to pay the legal costs of the Defendant Trustees for the purpose of defeating this objective. The Plaintiff seeks an Order prohibiting the Defendant Trustees from seeking payment of their legal costs from the Trusts and requiring the Defendants to reimburse the Trusts for all such legal costs paid to date.

44. If the Defendant Trustees are entitled to indemnification for their legal costs under the Trusts, the Plaintiff seeks a declaration that she is also entitled to indemnification from the Trusts for her legal costs on a solicitor and client full indemnity basis.

Jurisdiction

45. The dispute resolution clause provided for in the Code of Conduct is permissive and elective, not mandatory. It is restricted to concerns related to the Code of Conduct. The Plaintiff has redress to this Court for the matters addressed in this Statement of Claim.

46. This Court has inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts, pursuant to *The Constitution Act*, 1867, 30 & 31, Vict, c3, s 96. This Court has inherent jurisdiction as the support of Trustees, protector of the incapacitated, and guardian of the trust.

47. In the alternative, the Court may intervene to decide this matter so as to ensure that the arbitration is carried on in accordance with the Code of Conduct, and/or to prevent

manifestly unfair or unequal treatment of the Plaintiff pursuant to the *Arbitration Act*, RSA 2000, c A-43, s 6(b) and (c).

Remedy sought:

48. An Order and declaration that Brian Heidecker has no authority to appoint a mediator/arbitrator pursuant to the Code of Conduct, as the contractual pre-conditions under clauses 8(b) and 8(c) of the Code of Conduct have not been satisfied with respect to the Complaints, and that the appointment of J. Leslie Wallace to mediate and arbitrate the Complaints is void.

49. Such directions as the Court may think fit or proper pursuant to the provisions of the *Arbitration Act*.

50. An interim and permanent injunction restraining the Defendants from proceeding with the Complaints, or similar complaints.

51. Damages against the Defendant Trustees in such amount as may be proven at trial.

52. An Order directing the Defendant Trustees to reimburse the Trusts for all legal costs received by them or their solicitors with respect to the Complaints and the proposed mediation/arbitration referred to in this Statement of Claim.

53. In the alternative, a declaration that the Plaintiff is entitled to indemnification for her legal costs on a solicitor and client full indemnity basis from the Trusts.

54. A judgment for legal costs against the Defendant Trustees as between solicitor and client on a full indemnity basis.

NOTICE TO THE DEFENDANT(S)

You only have a short time to do something to defend yourself against this claim:

20 days if you are served in Alberta

1 month if you are served outside Alberta but in Canada

2 months if you are served outside Canada.

You can respond by filing a statement of defence or a demand for notice in the office of the clerk of the Court of Queen's Bench at Edmonton, Alberta, AND serving your statement of defence or a demand for notice on the plaintiff's' address for service.

WARNING

If you do not file and serve a statement of defence or a demand for notice within your time period, you risk losing the law suit automatically. If you do not file, or do not serve, or are late in doing either of these things, a court may give a judgment to the plaintiff(s) against you.

Tab 21

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.

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.

Tab 22

Form 49
Alberta Rules of Court
Rule 13.19

Clerk's stamp:

JUDICIAL CENTRE OF EDMONTON
FILED
SEP 21 2017
Clerk of the Court of Queen's Bench

COURT FILE NUMBER	1403 04885 and 1103 14112
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
	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 THE SAWRIDGE TRUST ("Sawridge Trusts")
	AND
	IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT 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 ("Four Sawridge Trustees")
DOCUMENT	**AFFIDAVIT OF ANNAR HIRANI**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	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 AFFIDAVIT OF ANNAR HIRANI
Sworn on the 21st day of SEPTEMBER, 2017

1. I, ANNAR HIRANI, of the City of Edmonton, in the Province of Alberta MAKE OATH AND SAY THAT:

2. I am a legal assistant at the law firm of Bryan & Company LLP, solicitors for Four Sawridge Trustees, and as such I have personal knowledge of the matters hereinafter deposed to, except where stated to be based upon information and belief, and where so stated, I verily believe the same to be true.

3. I am advised by Nancy E. Cumming and do verily believe that a letter enclosing Consent Confidentiality Orders for review was sent to Crista Osualdini of McLennan Ross on March 30, 2017.

4. Attached hereto and marked as Exhibit "A" to this my affidavit is a true copy of the letter to Crista Osualdini of McLennan Ross LLP from Nancy E. Cumming of Bryan & Company LLP dated March 30, 2017 addressing the issues of confidentiality.

5. An email dated March 30, 2017 enclosing for review a form of Consent Confidentiality Order with respect to the 1103 14112 Action ("1103 Action") and a form of Consent Confidentiality Order with respect to the 1403 04885 Acton ("1403 Action") is attached hereto and marked as Exhibit "B" to this my affidavit.

6. I am advised by Nancy E. Cumming and do verily believe that she did not receive a response to the letter or the email sent to McLennan Ross LLP.

7. Attached hereto and marked as Exhibit "C" to this my Affidavit is an email dated August 29, 2017 which also references an email sent August 28, 2017 concerning the matter of the Consent Confidentiality Orders for each of the 1103 Action and the 1403 Action. No response has been received to these emails in terms of McLennan Ross LLP's position on the Consent Confidentiality Orders.

8. I am advised by Nancy E. Cumming that she again requested a response on the Confidentiality Orders when Catherine Twinn released confidential information in her answers to undertakings. Attached hereto and marked as Exhibit "D" is a copy of the email making that request dated September 14, 2017.

9. I am advised by Nancy E. Cumming that she has received no response to her request dated September 14, 2017 in respect of the Confidentiality Orders.

SWORN OR AFFIRMED BY THE DEPONENT BEFORE A COMMISSIONER FOR OATHS AT EDMONTON ALBERTA ON SEPTEMBER 21, 2017.

Leanne MacKenzie

Commissioner for Oaths in and for the Province of Alberta

LEANNE C. MACKENZIE
A Commissioner for Oaths
in and for Alberta
My Commission Expires Apr. 3, 2019

Appointment Expiry Date

Annar Hirani

ANNAR HIRANI

OUR FILE: 29793-1/NEC

YOUR FILE: 281946

DIRECT: 780-420-4733

EMAIL: necumming@bryanco.com

Bryan & Company LLP

March 30, 2017

VIA EMAIL

McLennan Ross LLP
600 West Chambers
12220 Stony Plain Road
Edmonton, AB T5N 3Y4

Attention: Crista C. Osualdini

Dear Madam:

Re: Roland Twinn, Walter Felix Twin, Bertha L'Hirondelle, and Clara Midbo, Everett Justin Twin, as Trustees for the Sawridge Trusts v. Catherine Twinn

I have enclosed Mr. Bujold's Answers to Undertakings and Answers to Written Interrogatories. The documents will be provided shortly.

We also need to come to an agreement with respect to confidentiality. A number of the documents are confidential and should not form part of any document filed with the Law Courts. As a result, I would propose that we agree to a Confidentiality Order. I will provide you with a draft.

Yours truly,

BRYAN & COMPANY LLP

Per: for:
NANCY E. CUMMING, Q.C.
(Signed in the absence of the writer to avoid delay)

NEC/jn
Enclosures

cc: Dentons LLP
Attention: Doris C.E. Bonora,

cc: Paul Bujold

This is Exhibit " A " referred to in the Affidavit of
Annar Hirani
Sworn before me this 21st day
of September A.D., 20 17
Notary Public, A Commissioner for Oaths in and for the Province of Alberta

LEANNE C. MACKENZIE
A Commissioner for Oaths in and for Alberta
My Commission Expires Apr. 3, 20 19

From: Nancy Cumming [mailto:necumming@bryanco.com]
Sent: 30-Mar-17 1:45 PM
To: cosuakdini@mross.com
Cc: Paul Bujold; Bonora, Doris
Subject: Roland Twinn et al as Trustees for the Sawridge Trusts v. Catherine Twinn

I have attached draft Confidentiality Orders. Please advise of your position.

Yours truly

Nancy E. Cumming, Q.C. <image001.jpg>
Partner

EMAIL necumming@bryanco.com

<image003.jpg>
Bryan & Company LLP
2600 Manulife Place 10180 101 Street Edmonton Alberta T5J 3Y2
Direct 780-420-4733 | Toll free 1 800 357 9265 | Fax 780 428 6324
Web www.bryanco.com

Information contained in this communication may be confidential and is intended only for the use of the individual named above subject to solicitor client privilege. If you are not the named addressee you should not disseminate, distribute or copy this e-mail. If you have received this email in error please notify the sender. Bryan & Company LLP and Bryan & Company Calgary LLP are separate partnerships cooperating in providing legal services to the clients of each under the name "Bryan & Company"

This is Exhibit " B " referred to in the Affidavit of
ANNAR HIRANI
Sworn before me this 21st day
of SEPTEMBER A.D. 20 17
A Notary Public, A Commissioner for Oaths in and for the Province of Alberta

LEANNE C. MACKENZIE
A Commissioner for Oaths
in and for Alberta
My Commission Expires Apr. 3, 20 19

Form 31
Alberta Rules of Court
Rule 6.22(4)

Clerk's Stamp

COURT FILE NO.	1103 14112
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
	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 PN APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS	ROLAND TWINN, CATHERINE TWINN, EVERETT JUSTIN TWIN, BERTHA L'HIRONDELLE, and MARGARET WARD, as Trustees for the 1985 Sawridge Trust (the "Trustees")
DOCUMENT	**CONSENT CONFIDENTIALITY ORDER**
PARTY FILING THIS DOCUMENT	ROLAND TWINN, BERTHA L'HIRONDELLE, EVERETT JUSTIN TWIN, and MARGARET WARD as Trustees for the 1985 Trust and the 1986 Trust
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

DATE ON WHICH ORDER WAS PRONOUNCED:

NAME OF JUSTICE WHO MADE THIS ORDER:

UPON THE APPLICATION of ROLAND TWINN, BERTHA L'HIRONDELLE, EVERETT JUSTIN TWIN, and MARGARET WARD as Trustees for the 1985 Trust and the 1986 Trust; AND UPON IT APPEARING THAT the parties ROLAND TWINN, BERTHA L'HIRONDELLE, EVERETT JUSTIN TWIN, and MARGARET WARD as Trustees for the 1985 Trust and the 1986 Trust and

CATHERINE TWINN, as Trustee for the 1985 Trust and 1986 Trust, have consented to this Order by the signatures of their counsel on page 5 of the counterpart pages hereof;

IT IS HEREBY ORDERED THAT:

1. Information contained in any record or thing produced or otherwise created by any party during and for the purposes of the within action, including, but not limited to, documentary production, electronic record production, transcripts, exhibits, answers to undertakings, affidavits, responses to Notices to Admit and experts' reports, together with the documents themselves (collectively, "Information"), except published Information and any non-published Information which is publicly available, may be subject to this Order.

2. "Confidential Information" shall mean any document or any type or classification of information which is designated as "confidential" by any party pursuant to Paragraph 8.

3. Any records produced or otherwise disclosed in the action which have been identified by any party as "Confidential Information" in its List of Documents and any Supplemental List of Documents shall be subject to this Order. However, records produced or otherwise disclosed in this action which may subsequently be identified by any party as "Confidential Information" are also subject to this Order.

4. Only the following persons shall be entitled to receive Confidential Information:

   (a) Counsel of record and their employees;

   (b) The parties to the action;

   (c) Experts, consultants and agents retained by counsel or by a party to assist in the preparation for trial of this action who must be advised by counsel of record that they are bound by the terms of this Order and who in writing acknowledge they have been so advised and agree to abide by this Order prior to receiving or being shown Confidential Information;

   (d) The direct staff of the foregoing persons, who are advised by the Signatories that they are bound by the terms of this Agreement and who in writing adopt this Agreement prior to receiving or being shown Confidential Information; and

(e) The Court dealing with this action.

5. A party tendering Confidential Information to the Court must advise the Court of the terms of this Order and request the Court to receive the Confidential Information in accordance with the terms of this Order.

6. No person receiving Confidential Information shall disseminate, disclose (except to those persons set out in Paragraph 4 of this Order) or otherwise use any such Confidential Information, except for the purposes of the trial preparation and for use at trial in this action and shall not be used by such persons, directly or indirectly, for any commercial or business purpose or for any other action or proceeding.

7. Confidential Information shall be designated and marked "SAWRIDGE TRUSTS CONFIDENTIAL INFORMATION RE: 1103 14112 and 1403 04885" by the party asserting confidentiality. If it is not practical to mark the legend (such as on an electronically stored document), then the asserting party shall take all reasonable steps to notify the other parties that such document is subject to this Order.

8. If any party disagrees with the confidential designation, it may advise the party asserting confidentiality, in writing, that it rejects the confidential designation as to any specified items of information so designated. To the extent that a party rejects the confidential designation, the specific item(s) of information will not be deemed Confidential Information, subject to this Confidentiality Order unless the party asserting confidentiality obtains an Order requiring that such information be treated as Confidential Information within 30 days of receipt of a notice of rejection to the confidential designation. Until an Order of this Court is issued, pertaining to the confidentiality, any confidential designated information shall be treated as Confidential Information subject to the provisions of this Order.

9. In the case of Questioning or Questioning on Undertakings (written or oral), counsel for any party may, at the commencement of such examination, temporarily designate the entire such Questioning as Confidential Information, provided, however, that where an initial designation has been made, such counsel shall, within 30 days after the Questioning transcript or other record containing the answers becomes available to the parties, deliver to counsel for the other parties a written statement listing those portions of the transcript or other record (including any exhibits thereto or answers to

undertakings) which counsel is designating as Confidential Information, thereby rescinding the "confidential" designation of all remaining pages of the transcript or other record. In the event such notice is not received within the 30 day period, no portion of the transcript or other record shall thereafter be protected under this Order unless and until the other parties, or their respective counsel, provide express written notice of the same.

10. If any documents, transcripts of evidence, briefs, or other documents containing material subject to this Order are to be filed with the Court, they shall be filed in a sealed envelope with "CONFIDENTIAL" written on the outside and referring to this Order. The parties reserve the right to request that the Court take additional appropriate action to preserve the confidentiality of any such material that is offered, as evidenced during the trial of this action

11. This Order shall apply during, and to all aspects of, the pretrial process. During the trial of this action, each request for the maintenance of the confidentiality of any information sought to be introduced into evidence, to the extent not therefore determined under the procedures described in Paragraphs 8 or 9, will be determined by the Court.

12. Upon final determination of this action, each party shall, upon the request by any party who has asserted confidentiality, assemble and return all Confidential Information and all copies of Confidential Information. To this end, each party must provide to the party who has asserted confidentiality an account of the numbers of copies made of any Confidential Information and a list of the recipients of any Confidential Information.

13. Nothing in this Order will prejudice any party from seeking amendments hereto, broadening or restricting the rights of access to and use of Confidential Information, or making other modifications, provided, however, nothing in this Order shall affect the scope of the implied undertaking of each party not to use documents and information obtained in this litigation from any other party for purposes other than the conduct of this litigation;

14. Inadvertent production by any party of a document containing information protected by an applicable legal privilege and/or, confidential information, trade secrets, or proprietary information shall not constitute a waiver of privilege or confidentiality. Any such

document and any copies made of it shall be returned to the producing party immediately upon its request.

____

Justice of the Court of Queen's Bench of Alberta

CONSENTED to this ____ day of March, 2017

____

Nancy E. Cumming, Q.C.
Counsel for ROLAND TWINN, BERTHA L'HIRONDELLE, EVERETT JUSTIN TWIN, and MARGARET WARD as Trustees for the 1985 Trust and the 1986 Trust

CONSENTED to this ____ day of March, 2017

____

Crista C. Osualdini
Counsel for CATHERINE TWINN, as Trustee for the 1985 Trust and 1986 Trust

Form 31
Alberta Rules of Court
Rule 6.22(4)

Clerk's Stamp

COURT FILE NO.	1403 04885
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT, APRIL 15, 1985 (the "1985 Trust") and THE SAWRIDGE TRUST, AUGUST 15, 1986 (the "1986 Trust")
APPLICANT	CATHERINE TWINN, as Trustee for the 1985 Trust and 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	**CONSENT CONFIDENTIALITY ORDER**
PARTY FILING THIS DOCUMENT	ROLAND TWINN, BERTHA L'HIRONDELLE, EVERETT JUSTIN TWIN, and MARGARET WARD as Trustees for the 1985 Trust and the 1986 Trust
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

DATE ON WHICH ORDER WAS PRONOUNCED:

NAME OF JUSTICE WHO MADE THIS ORDER:

UPON THE APPLICATION of ROLAND TWINN, BERTHA L'HIRONDELLE, EVERETT JUSTIN TWIN, and MARGARET WARD as Trustees for the 1985 Trust and the 1986 Trust; AND UPON IT APPEARING THAT the parties ROLAND TWINN, BERTHA L'HIRONDELLE, EVERETT JUSTIN TWIN, and MARGARET WARD as Trustees for the 1985 Trust and the 1986 Trust and CATHERINE TWINN, as Trustee for the 1985 Trust and 1986 Trust, have consented to this Order by the signatures of their counsel on page 5 of the counterpart pages hereof;

IT IS HEREBY ORDERED THAT:

1. Information contained in any record or thing produced or otherwise created by any party during and for the purposes of the within action, including, but not limited to, documentary production, electronic record production, transcripts, exhibits, answers to undertakings, affidavits, responses to Notices to Admit and experts' reports, together with the documents themselves (collectively, "Information"), except published Information and any non-published Information which is publicly available, may be subject to this Order.

2. "Confidential Information" shall mean any document or any type or classification of information which is designated as "confidential" by any party pursuant to Paragraph 8.

3. Any records produced or otherwise disclosed in the action which have been identified by any party as "Confidential Information" in its List of Documents and any Supplemental List of Documents shall be subject to this Order. However, records produced or otherwise disclosed in this action which may subsequently be identified by any party as "Confidential Information" are also subject to this Order.

4. Only the following persons shall be entitled to receive Confidential Information:

   (a) Counsel of record and their employees;

   (b) The parties to the action;

   (c) Experts, consultants and agents retained by counsel or by a party to assist in the preparation for trial of this action who must be advised by counsel of record that they are bound by the terms of this Order and who in writing acknowledge they have been so advised and agree to abide by this Order prior to receiving or being shown Confidential Information;

   (d) The direct staff of the foregoing persons, who are advised by the Signatories that they are bound by the terms of this Agreement and who in writing adopt this Agreement prior to receiving or being shown Confidential Information; and

   (e) The Court dealing with this action.

5. A party tendering Confidential Information to the Court must advise the Court of the terms of this Order and request the Court to receive the Confidential Information in accordance with the terms of this Order.

6. No person receiving Confidential Information shall disseminate, disclose (except to those persons set out in Paragraph 4 of this Order) or otherwise use any such Confidential Information, except for the purposes of the trial preparation and for use at trial in this action and shall not be used by such persons, directly or indirectly, for any commercial or business purpose or for any other action or proceeding.

7. Confidential Information shall be designated and marked "SAWRIDGE TRUSTS CONFIDENTIAL INFORMATION RE: 1103 14112 and 1403 04885" by the party asserting confidentiality. If it is not practical to mark the legend (such as on an electronically stored document), then the asserting party shall take all reasonable steps to notify the other parties that such document is subject to this Order.

8. If any party disagrees with the confidential designation, it may advise the party asserting confidentiality, in writing, that it rejects the confidential designation as to any specified items of information so designated. To the extent that a party rejects the confidential designation, the specific item(s) of information will not be deemed Confidential Information, subject to this Confidentiality Order unless the party asserting confidentiality obtains an Order requiring that such information be treated as Confidential Information within 30 days of receipt of a notice of rejection to the confidential designation. Until an Order of this Court is issued, pertaining to the confidentiality, any confidential designated information shall be treated as Confidential Information subject to the provisions of this Order.

9. In the case of Questioning or Questioning on Undertakings (written or oral), counsel for any party may, at the commencement of such examination, temporarily designate the entire such Questioning as Confidential Information, provided, however, that where an initial designation has been made, such counsel shall, within 30 days after the Questioning transcript or other record containing the answers becomes available to the parties, deliver to counsel for the other parties a written statement listing those portions of the transcript or other record (including any exhibits thereto or answers to undertakings) which counsel is designating as Confidential Information, thereby

rescinding the "confidential" designation of all remaining pages of the transcript or other record. In the event such notice is not received within the 30 day period, no portion of the transcript or other record shall thereafter be protected under this Order unless and until the other parties, or their respective counsel, provide express written notice of the same.

10. If any documents, transcripts of evidence, briefs, or other documents containing material subject to this Order are to be filed with the Court, they shall be filed in a sealed envelope with "CONFIDENTIAL" written on the outside and referring to this Order. The parties reserve the right to request that the Court take additional appropriate action to preserve the confidentiality of any such material that is offered, as evidenced during the trial of this action

11. This Order shall apply during, and to all aspects of, the pretrial process. During the trial of this action, each request for the maintenance of the confidentiality of any information sought to be introduced into evidence, to the extent not therefore determined under the procedures described in Paragraphs 8 or 9, will be determined by the Court.

12. Upon final determination of this action, each party shall, upon the request by any party who has asserted confidentiality, assemble and return all Confidential Information and all copies of Confidential Information. To this end, each party must provide to the party who has asserted confidentiality an account of the numbers of copies made of any Confidential Information and a list of the recipients of any Confidential Information.

13. Nothing in this Order will prejudice any party from seeking amendments hereto, broadening or restricting the rights of access to and use of Confidential Information, or making other modifications, provided, however, nothing in this Order shall affect the scope of the implied undertaking of each party not to use documents and information obtained in this litigation from any other party for purposes other than the conduct of this litigation;

14. Inadvertent production by any party of a document containing information protected by an applicable legal privilege and/or, confidential information, trade secrets, or proprietary information shall not constitute a waiver of privilege or confidentiality. Any such document and any copies made of it shall be returned to the producing party immediately upon its request.

Justice of the Court of Queen's Bench of Alberta

CONSENTED to this ____ day of March, 2017

Nancy E. Cumming, Q.C.
Counsel for ROLAND TWINN, BERTHA L'HIRONDELLE, EVERETT JUSTIN TWIN, and MARGARET WARD as Trustees for the 1985 Trust and the 1986 Trust

CONSENTED to this ____ day of March, 2017

Crista C. Osualdini
Counsel for CATHERINE TWINN, as Trustee for the 1985 Trust and 1986 Trust

From: Bonora, Doris [mailto:doris.bonora@dentons.com]
Sent: Tuesday, August 29, 2017 7:32 AM
To: Crista Osualdini <cosualdini@mross.com>; Karen Platten <kplatten@mross.com>
Cc: 'Paul@sawridgetrusts.ca' <Paul@sawridgetrusts.ca>; Brian Heidecker <brian@sawridgetrusts.ca>; Nancy Cumming <necumming@bryanco.com>
Subject: sawridge and Catherine Twin costs application

Crista and Karen
Nancy is having some trouble with her internet. She sent an email yesterday about the confidentiality order. Here is the letter and the orders that she sent to you in March, 2017 to which no response was given as far as I can find. This is an issue that must be addressed given the amount of privileged material that Catherine has released in her affidavits and undertakings.

This is Exhibit "C" referred to in the Affidavit of
ANNAR HIRANI
Sworn before me this 21st day
of SEPTEMBER A.D. 20 17
[signature]
A Notary Public, A Commissioner for Oaths in and for the Province of Alberta

LEANNE C. MACKENZIE
A Commissioner for Oaths in and for Alberta
My Commission Expires Apr. 3, 20 19

Doris

DENTONS
Doris C.E. Bonora
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doris.bonora@dentons.com
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Dentons Canada LLP
2900 Manulife Place, 10180 - 101 Street Edmonton, AB T5J 3V5 Canada

大成 Salans FMC SNR Denton McKenna Long

From: Crista Osualdini [mailto:cosualdini@mross.com]
Sent: Tuesday, August 29, 2017 11:12 AM
To: Bonora, Doris; Karen Platten
Cc: Nancy Cumming; Dave Risling
Subject: RE: sawridge and Catherine Twin costs application

Thanks Doris. As you can appreciate, we are focusing this week on the brief which is due on Friday. In addition, Karen is away until next week.
We will be in touch next week with our client's position on this issue.

Crista Osualdini | Partner | direct 780.482.9239 | toll free 1.800.567.9200 | fax 780.733.9723
McLennan Ross LLP | www.mross.com | BIOGRAPHY
600 McLennan Ross Building, 12220 Stony Plain Road, Edmonton, AB T5N 3Y4

From: Nancy Cumming [mailto:necumming@bryanco.com]
Sent: 14-Sep-17 9:36 AM
To: Crista Osualdini; Bonora, Doris; Karen Platten
Cc: Dave Risling
Subject: RE: sawridge and Catherine Twin costs application

We continue to await your position on the Confidentiality Order. Your client continues to attach confidential information to her affidavits and her answers to undertakings. Is there a reason why your office has not responded to this issue, especially considering the fact that a draft Order was provided to you several months ago?
Please respond.

Nancy Cumming

Nancy E. Cumming, Q.C.
Lawyer

EMAIL necumming@bryanco.com

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Direct 780-420-4733 | Toll free 1 800 357 9265 | Fax 780 428 6324
Web www.bryanco.com

This is Exhibit " D " referred to in the Affidavit of
ANNAR HIRANI
Sworn before me this 21st day
of SEPTEMBER A.D., 20 17

A Notary Public, A Commissioner for Oaths in and for the Province of Alberta

LEANNE C. MACKENZIE
A Commissioner for Oaths
in and for Alberta
My Commission Expires Apr. 3, 2019

Tab 23

2017 ABQB 366
Alberta Court of Queen's Bench

Twinn v. Sawridge Band

2017 CarswellAlta 978, 2017 ABQB 366, [2017] A.W.L.D. 2766, 279 A.C.W.S. (3d) 870

Catherine Twinn (Applicant) and Sawridge Band (Respondent)

Dawn Pentelechuk J.

Heard: March 24, 2017
Judgment: June 7, 2017
Docket: Edmonton 1103-09493

Counsel: Brian P. Kaliel, Q.C., for Applicant
Patty Ko, for Respondent

Subject: Civil Practice and Procedure; Public; Torts

Headnote

Professions and occupations --- Barristers and solicitors — Fees — Accounting and refunding by solicitor — Application for assessment, review, or taxation of account — Entitlement to assessment or review

Lawyer billed First Nation client more than $5 million under retainer agreement from 1984 involving constitutional challenges to Bill C-31, which proposed amendments to membership under Indian Act — Lawyer brought application to permit review of 14 disputed accounts totalling $213,959.29 from 2005 through 2009, involving attendance at conference, set up of second office, and shut down of second office — Reference was held to determine whether accounts were part of retainer or were barred under Limitations Act, and whether client was estopped from contesting liability — Seven invoices were to be remitted to review officer for review — Retainer agreement had no application, as legal entity that signed retainer agreement was different legal entity than this client, basis of billing increased and changed, and full scope of protracted litigation was not contemplated — Lawyer did have form of retainer with client — Limited evidence did not establish that attendance at conference was part of lawyer's retainer, and account was statute-barred — While concept of second office was logical given scope of litigation, term was not implied in retainer that client was responsible for lawyer's disbursements and professional time in setting up second office, and account was statute-barred — Client did not dispute liability for expenses to shut down second office, and these expenses were properly before review officer — Retainer was continual one and accounts issued were characterized as periodic final accounts, so lawyer had two years from date of account to pursue review — Lawyer did not file appointment for review of five invoices relating to shut down of second office until more than two years from date of accounts, so they were statute-barred, other than three accounts in which part payments were made — Client, through its words or conduct, did not represent that it would pay these costs, and lawyer did not rely on these representations to her detriment, so alternative claim of estoppel was dismissed.

REFERENCE to determine issues relating to review of lawyer's accounts.

***Dawn Pentelechuk J.*:**

I. Introduction

1 This matter comes before me by way of a Reference from Review Officer Dennis Pawlowski under Rule 10.18 of the *Alberta Rules of Court*. Catherine Twinn [Ms. Twinn] is a barrister and solicitor in Alberta. On June 10, 2011, she

filed an application before a Master in Chambers to permit a review of 14 accounts she had issued to the Sawridge Band, now Sawridge First Nation [Sawridge].

2 These accounts were part of a retainer dating back to the mid 1980's, involving constitutional and *Charter* challenges to Bill C-31, which proposed amendments to membership under the *Indian Act*, RSC 1985, c I-5 [*Indian Act*]. Between 1999 and 2009, Ms. Twinn billed Sawridge in excess of $5 million on this file. The disputed accounts were issued between October 31, 2005 and October 19, 2009, and total $213,959.29. Sawridge argues the subject of these accounts did not form part of Ms. Twinn's retainer, are barred under the *Limitations Act*, RSA 2000 CL-12 [*Limitations Act*], and are excessive in any event.

3 On June 10, 2011, Ms. Twinn filed an Appointment for Review of the disputed accounts.

4 On July 6, 2011, an order was granted in Master's Chambers permitting review of the accounts.

5 The review was originally scheduled for July 13 and 14, 2011. The parties appeared before Review Officer J.A.B. Christensen. Mr. Christensen suggested that a Reference to the Court might be required. Ultimately, the review was adjourned pending the appeal by Sawridge of the Master's Order.

6 The appeal was heard on November 15, 2011, and dismissed by Browne, J with reasons reported at *Twinn v. Sawridge Band*, 2012 ABQB 44, 531 A.R. 158 (Alta. Q.B.). She held that the *Alberta Rules of Court*, r 10.10(2) (which has since been amended) did not apply to lawyer-initiated reviews. Ms. Twinn's application to permit review was "perhaps wise, but not necessary": at para 62. Browne J held the quantum of the accounts should be decided first, and liability decided by Reference to a Justice of the Court of Queen's Bench.

7 In September 2015, the parties appeared before Review Officer Dennis Pawlowski. The review did not proceed in order to allow for determination of the following issues outlined in his Reference:

1. Did Sawridge Band expressly, impliedly, orally or [in] writing, enter into any agreement with Catherine Twinn to provide the services that are claimed to have been provided by her and, if so, what was the nature and scope of the agreement or agreements?

2. Are any of Catherine Twinn's claims for legal costs barred by the *Limitations Act* (Alberta)?

3. Is Sawridge Band estopped, in any way, from contesting its liability with respect to any of the statements of account in question?

8 The evidence in the application before me consists of the following:

1. Affidavit of Catherine Twinn, sworn June 8, 2011;

2. Transcript of Questioning on the Affidavit of Catherine Twinn on July 11, 2011;

3. Exhibits and Answers to Undertakings arising from Questioning on the Affidavit of Catherine Twinn;

4. Affidavit of Roland Twinn, Chief of Sawridge, sworn October 4, 2011;

5. Transcript of Questioning on Affidavit of Roland Twinn on November 2, 2011; and

6. Exhibits and Answers to Undertakings arising from Questioning on the Affidavit of Roland Twinn.

II. Background Facts

9 Ms. Twinn was admitted to the Law Society of Alberta in 1980, practiced law in various locations in Alberta, and in 1983, opened an office in Edmonton [Lancaster House or Data Room].

10 Ms. Twinn entered into a retainer agreement dated April 13, 1984 with the Lesser SI Slave Lake Indian Regional Council and other parts of Treaty 8, signed by Chief Walter Twinn, in his capacity as President [Retainer Agreement]. Ms. Twinn says this Retainer Agreement governs her retainer with Sawridge. It is agreed that Sawridge is part of Treaty 8.

11 Ms. Twinn married Chief Walter Twinn in November 1984. Walter Twinn died on October 30, 1997. His son, Roland Twinn, was elected as a member of the Sawridge Band Council in September 1997, and in February 2003, became Chief of the Sawridge Band.

12 The parties agree that the 1984 Retainer Agreement pertained to Bill C-47, which proposed various amendments to the *Indian Act*. This Bill died following the federal election in 1984.

13 In 1985, Bill C-31 was tabled. Ms. Twinn acted primarily as "instructing solicitor" in a lawsuit commenced in 1986 in the Federal Court by numerous Indian Bands. The lawsuit involved lengthy *Charter* and constitutional challenges to Bill C-31.

14 The first 79-day trial in Federal Court began in September 1993. Six Bands were named as plaintiffs, including Sawridge. The lawsuit was dismissed, but the plaintiff Bands successfully appealed to the Federal Court of Appeal in 1997. A new trial was ordered based on reasonable apprehension of bias on the part of the trial judge.

15 The second trial was originally scheduled to commence in January 2005 but did not commence until January 2007. By this point, only two plaintiff Bands remained: Sawridge and Tsuu T'ina First Nation. While the date is not clear on the evidence, Sawridge agreed at some point to cover legal fees on behalf of Tsuu T'ina First Nation.

16 Throughout these proceedings, the Twinn Law firm was one of the Counsel of Record on behalf of the plaintiffs. Lead counsel at that time was Philip Healey of Aird & Berlis LLP in Toronto.

17 The claim was extensively case managed. In the course of the second trial, the plaintiffs made a number of controversial and unsuccessful applications, resulting in a cost award against the plaintiff Bands of approximately $1.8 million for their misconduct. The reasons for the costs award are reported at *Sawridge Band v. R.*, 2008 FC 267, 320 F.T.R. 166 (Eng.) (F.C.), aff'd 2009 FCA 123 (F.C.A.), leave to appeal to SCC refused, [2009] S.C.C.A. No. 248 (S.C.C.).

18 In early 2008, the plaintiff Bands advised the Court they were closing their case, would not be calling any further evidence and, based on the pre-trial rulings, would be appealing to the Federal Court of Appeal. The action was dismissed with reasons reported at *Sawridge Band v. R.*, 2008 FC 322, 319 F.T.R. 217 (Eng.) (F.C.).

19 The plaintiffs' appeal to the Federal Court of Appeal was dismissed on April 21, 2009: *Sawridge Band v. R.*, 2009 FCA 123, 391 N.R. 375 (F.C.A.). Leave to appeal to the Supreme Court of Canada was denied on December 10, 2009: *Sawridge Band v. R.*, [2009] S.C.C.A. No. 248, 403 N.R. 393 (note) (S.C.C.).

20 With that background, I will now turn to an analysis of the issues outlined in the Reference.

1. What was the nature and terms of the retainer agreement between the parties?

a) Does the April 13, 1984 Retainer Agreement govern the parties?

21 Ms. Twinn argues that the agreement signed April 13, 1984 governs the retainer between the parties and applies to the disputed accounts.

22 The agreement pertains to "Proposed Membership Amendments To The Indian Act." Ms. Twinn was authorized to "conduct all matters and negotiations required under this retainer and to take any legal steps which may be necessary or desirable in Counsel's sole opinion to protect the Client's interests . . . " and to retain other counsel as she deemed essential.

23 As indicated earlier, the agreement was signed by Chief Walter Twinn in his capacity as President of the Lesser SI Slave Lake Indian Regional Council and other parts of Treaty 8. There is no evidence as to the legal status of the Lesser SI Slave Lake Indian Regional Council or which entities formed Treaty 8 in 1984, although it is agreed that Sawridge was, and continues to be, part of Treaty 8. Nor is there other evidence of whether the six Bands that originally filed the lawsuit in 1986 formed part of Treaty 8.

24 It is agreed that the 1984 Retainer Agreement was executed when the proposed legislation was Bill C-47. However, the lawsuits challenged the subsequently tabled Bill C-31. I heard no evidence as to the degree of similarity between the two bills.

25 There is no evidence that the parties took formal steps to end the Retainer Agreement, either before or after Chief Walter Twinn's passing. No further written retainer agreement was ever executed nor is there evidence before me of any written amendments to this Retainer Agreement.

26 The legal fees outlined in the 1984 Retainer Agreement ($250 per day) increased over time, to $270 per hour, and Ms. Twinn billed not only for the services she provided personally, but for various staff of Twinn Law firm.

27 In a broad sense, proposed amendments to membership under the *Indian Act* were the subject of both the Retainer Agreement and the ensuing litigation, but over time, the fundamental terms of the 1984 Retainer Agreement changed. The legal entity that signed the Retainer Agreement (i.e. the Lesser SI Slave Lake Indian Regional Council) is a different legal entity than Sawridge. The basis of billing not only increased, but changed from a daily flat rate to an hourly rate. Further, in reading the terms of the agreement, it cannot be said that the full scope of this protracted litigation was contemplated. The agreement speaks of negotiation and specifically allows for possible withdrawal of counsel if an application to the court is required.

28 Consequently, I conclude that the Retainer Agreement has no application and does not inform the Review Officer's assessment of the accounts in question.

29 Notwithstanding my conclusion that the 1984 Retainer Agreement does not apply to the parties, there is no question that Ms. Twinn had a form of retainer agreement with Sawridge.

b) What was the scope of the retainer and did it cover the subject of the disputed accounts?

30 The determination of the type of retainer governing the parties and the terms of that agreement is largely a question of fact. In the case of an oral retainer, the onus is on the solicitor to prove its terms and the client's version is more likely to be accepted if the terms of the retainer have not been reduced to writing: *Davis & Co., A Partnership v. Jiwan*, 2006 BCSC 658 (B.C. S.C.) at para 73, 2006 CarswellBC 1094 (B.C. S.C.); *Peterson, Ross v. Kirwood*, [1984] A.J. No. 863 (Alta. Q.B.) at para 71, (1984), 52 A.R. 284 (Alta. Q.B.).

31 Here, the analysis is hampered by limited and rather vague evidence on the part of Ms. Twinn as well as the absence of evidence from Sawridge on the terms of the retainer. The Questioning of Roland Twinn was focused on Ms. Twinn's handling of the case and other issues not before me in this Reference.

32 Ms. Twinn's evidence is that her primary role was to act as "instructing solicitor" for the other firms engaged in representing the plaintiff Bands. She was the lawyer primarily responsible for assembling the legal team, locating and documenting evidence as well as marshalling witnesses, including expert witnesses. She deposed she was heavily involved in managing legal and other research.

33 The scope of Ms. Twinn's retainer was also addressed in her correspondence of October 2005 to the Chiefs of the two plaintiff Bands. She advised that Twinn Law would continue as Solicitor of Record and would be involved in all

aspects of the case, including strategy, research and preparation for interlocutory motions and trial. Ms. Twinn would also lead evidence at trial. [1]

34 Ms. Twinn was also described as "the conduit" through which the various legal counsel on the file were provided with the clients' instructions.

35 The parties agree that the determination of whether or not the subject matter of the disputed accounts fell within the terms of Ms. Twinn's retainer is an issue properly before me.

36 The accounts in question involve fees and expenses charged for the following:

i. Attendance at a UN Expert Conference in Arizona in October 2005;

ii. Set up of Lancaster House (also referred to as Data Room start-up) between June and August 2003;

iii. Data Room shutdown and creation of the "DML index" between February 2003 and February 2004.

i. UN Expert Conference

37 In October 2005, Ms. Twinn travelled to Arizona to meet with Willie Littlechild and attend a UN Expert Conference. She billed Sawridge for 34 hours of her time plus expenses totalling $9,870.15. Ms. Twinn felt attendance at this Conference was part of her duties in connection with Bill C-31. She admits she did not obtain approval from Sawridge to attend the Conference at its expense.

38 After she issued the account dated October 31, 2005, Sawridge refused to pay, stating this trip had not been approved.

39 The limited evidence before me does not establish that attendance at this seminar was part of her retainer and, as will be explained later in these reasons, is now barred under the *Limitations Act*, in any event.

ii. Lancaster House/Data Room set-up

40 In 2003, to facilitate the litigation, Ms. Twinn set up a second office in Edmonton, and staff from her Lac La Biche office began working in Edmonton.

41 Ms. Twinn recorded time spent between February 2003 and February 2004 ($54,735) and expenses incurred between June and August 2003 ($27,204.26) in relation to the Data Room set-up. She did not prepare an account until May 31, 2009, after Sawridge had terminated her retainer. She first presented this account to Sawridge at a "without prejudice" meeting regarding her outstanding accounts, which occurred sometime in October 2009.

42 Following this meeting, Ms. Twinn reduced her account for these services by 30%, from $81,939.26 to $60,943.26. She made hand written changes on the May 31, 2009 account and sent it along with a number of other accounts to Sawridge, on November 20, 2009.

43 Ms. Twinn suggests the Data Room was established to support the second trial. As Sawridge had agreed to pay for an office for the first trial, this formed part of her understanding that the office set-up for the second trial would also be covered.

44 Ms. Twinn's evidence is that this office provided a workspace in Edmonton for lead counsel (based in Toronto), a space to meet and interview witnesses, and a space to store trial production. In July 2005, Edward H. Molstad, QC of Parlee McLaws became Counsel of Record, replacing Phillip Healey.

45 When Questioned on why these expenses were not billed until 2009, Ms. Twinn answered:

> Well, there were discussions with Mr. McKinney and - - which also included discussions with my legal counsel; there were discussions with myself, my accountant with them, with Mr. McKinney and this was a matter that was not resolved. [2]

46 When asked again why these expenses were not included in her June 2003 account, she answered:

> Well, I wanted to have the conversation with the client about the cost of this office that had to be set up, and Samson in their litigation had to set up an office to support the litigation. They retained Terry Munroe and they paid for all the costs associated with that. In the first trial Sawridge also set up an office to support the trial process.
>
> So I was expecting that we would reach some resolution that would be reasonable. [3]

47 Ms. Twinn admits that Sawridge never expressly told her that the time and expenses she incurred in the office set up would be paid, but suggests that based on discussions with Michael McKinney, General Counsel to Sawridge, and Bertha L'Hirondelle, then Chief of Sawridge, she "was left with the clear understanding" these expenses would be covered, because Sawridge recognized the need for the office in Edmonton, and she did what was needed to fulfill her professional obligations.

48 In his letter of April 22, 2010, Mr. McKinney addressed these charges:

> DATA ROOM
>
> We note that $60,943.26 was added to the May 2009 invoice in relation to Data Room start up. We believe that these items and amounts had been the subject of earlier discussions. We have previously advised you of our concerns with respect to these amounts, including the fact that some of these costs are office costs which would normally be incurred by legal counsel on their own account, the fact that the Band may have reduced or avoided these amounts had it been consulted and involved in the set up of the Data Room at a later time, the fact that some of the time included appears to be for the move of your office from the Band Administration building to your residence, the set up of an office at Enoch and the set up of an office at Hobbema and the fact that some of this work was charged at legal rates when it could have been done by others at non-legal rates. These issues have not been addressed.

49 Was this expense an implied term of the retainer?

50 In 2003, lead counsel was based in Toronto. It is logical that Ms. Twinn, as the coordinator and conduit of this litigation, would need space in Edmonton to support the trial. The issue is not whether an Edmonton office was logically required, but whether the resulting expense in establishing it was part of the retainer such that the client is responsible for it.

51 The record before me does not suggest the monthly costs for leasing the space were charged to Sawridge.

52 While it is entirely possible for a client to negotiate such an expense as part of his or her retainer, in this instance, nothing was reduced to writing and the evidence supporting Ms. Twinn's "clear understanding" (that the expenses would be covered) is scant. In the absence of an express agreement, would the client expect to absorb this expense as an incidental part of its retainer, or would it expect that this expense is part and parcel of a lawyer doing business?

53 It is certainly conceivable that a lawyer may spend significant time and money setting up, or adapting their practice in order to serve their client. Absent an express agreement, it does not follow that time and money incurred with administrative functions should be the responsibility of the client. For instance, it cannot be said that a lawyer's time spent in hiring a legal assistant or buying a photocopier, or researching and learning new software programs, is an incidental part of a lawyer's retainer, even if those steps are driven by the retainer.

54 Further, Ms. Twinn's actions disaffirmed her assertion that she understood these expenses would be covered. From inception, she billed her time and disbursements regarding the Data Room to a different file, and never actually sent the account until her retainer ended, some six years later.

55 While the concept of an Edmonton office or "war room" seems entirely logical given the scope of this litigation, I am unable to imply a term of this retainer that Sawridge was responsible not only for Ms. Twinn's disbursements in setting up the office, but significant professional time too. Accordingly, these accounts will not be before the Review Officer.

iii. Office shutdown and DML (June 2008 — September 2008)

56 Sometime in early 2008, after the second trial was dismissed, Ms. Twinn wrote to Mr. McKinney and requested a meeting to discuss facilitating the intervention and winding down of the Data Room. Ms. Twinn requested that her counsel, Mr. Kaliel, Q.C.be present at the meeting.

57 Ms. Twinn suggested that the file contents (685 boxes) be put in a storage container and placed on the Sawridge First Nation. Sawridge did not approve this request.

58 The evidence suggests that all producible documents in the litigation had been scanned through "Summation" software and stored on the Parlee McLaws server.

59 Nonetheless, Ms. Twinn felt it was necessary to organize the 685 boxes of material in order to retrieve hard copies in the event the appeal was successful. She instructed her staff to create a "detailed DML index" or database to accomplish this objective, and billed Sawridge $86,028.07. Although there were negligible disbursements associated with this, the account was almost entirely comprised of Ms. Twinn's staff's time, billed at between $45 and $60 per hour.

60 Ms. Twinn believed preparing the file for storage was part of her retainer, but admits she did not receive instructions from Sawridge to create this data base. She deposed she was trying to have discussions with Mr. McKinney but it was a busy time. She did not advise Sawridge of the cost, as she did not know what the cost would be.

61 In his April 22, 2010 letter, Mr. McKinney questions both the rate and total time charged, but does not dispute liability for these office shutdown expenses or suggest that the expenses were beyond the scope of the retainer. I conclude that these expenses regarding the office shutdown are properly before the Review Officer.

2. Are the claims barred by the Limitations Act?

62 I have determined that the accounts relating to the attendance at the UN Expert Conference and the Data Room start-up did not form part of Ms. Twinn's retainer. Nonetheless, if I am incorrect in this conclusion, I will consider whether any of the accounts are barred by the *Limitations Act*. In order to make this determination, it is necessary to first determine the nature of the retainer agreement between the parties.

63 In this case, I am satisfied that the retainer between Ms. Twinn and Sawridge was a continual one, as defined by Rooke ACJ in *Samson Cree Nation v. O'Reilly & Associés*, 2013 ABQB 350 (Alta. Q.B.) at paras 29, 67, (2013), 564 A.R. 169 (Alta. Q.B.), aff'd 2014 ABCA 268 (Alta. C.A.), that is, where legal counsel start to act and continue to act until the final appeal, or otherwise instructed.

64 Clearly in this retainer, Ms. Twinn issued periodic accounts, usually on a monthly basis. Under a continual retainer, counsel and the client may agree to interim or provisional accounts pending the final account, or a series of final accounts.

65 Whether Ms. Twinn's periodic accounts were interim or final is critical, as this determination informs when the limitation period starts to run.

66 Ms. Twinn argues that the periodic accounts issued were interim and as a result, the limitation period did not start to run until her final account was rendered at the end of the retainer (November 20, 2009).

67 Ms. Twinn's Appointment for Review of the disputed accounts is a claim for a remedial order and subject to the two year limitation period in the *Limitations Act*: *Samson Cree Nation v. O'Reilly & Associés*, 2014 ABCA 268 (Alta. Q.B.) at para 169, (2014), 580 A.R. 181 (Alta. C.A.). The Appointment for Review stops the two year limitation period from running.

68 Ms. Twinn filed her Application for Review of the accounts on June 10, 2011, within two years of the date of her last account. Therefore, she argues, the *Limitations Act* does not preclude review of any of her accounts.

69 Sawridge argues the periodic accounts issued were each final accounts, and therefore, many of the accounts were issued more than two years prior to the Application for Review filed June 10, 2011, and are now barred under the *Limitations Act*.

70 In *Samson Cree*, Rooke ACJ provides a helpful distinction between periodic *interim* and periodic *final* accounts (at paras 45-46):

> Periodic accounts may be interim or final. An interim account is one that is not final, but is issued pending a final account, and may be changed directly at any future time or in the end result between the time it is issued and the final account. It is thus customary that interim accounts are not the subject of taxation individually, but rather only the final account. When the final account is taxed, all the interim accounts issued leading to the final account are taxable.
>
> Final accounts are ones that conclude all truly interim or provisional accounts before them (in which case, as noted, all the interim accounts are part of that taxation), or are final and taxable in themselves, with no regard to other accounts.

71 Ms. Twinn issued in excess of 137 accounts in the course of this retainer. Were these accounts periodic interim or periodic final?

72 In *Samson Cree*, Rooke AJC undertook a comprehensive review of the authorities in determining whether a periodic account is interim or final. Those authorities were succinctly summarized in the later decision of Brown, J (as he then was) in *Lewis Estates Communities Inc. v. Brownlee LLP*, 2013 ABQB 508 (Alta. Q.B.) at para 42, 2013 CarswellAlta 1704 (Alta. Q.B.) [*Lewis Estates*]:

> Taken together, these authorities have focussed on whether the lawyer and the client considered each of the accounts in question to be the lawyer's final account for the work recorded. And, in determining with regard to the dealings of the parties and the circumstances whether the parties intended that each account would be final, they establish that a periodic account is likely to be considered final [where] the parties understand that the lawyer's charges will be based upon hours spent and the lawyers' billable rates, and that the charges will not be adjusted, whether upwards or downwards, upon issuance of a final bill at the conclusion of the matter.

73 It is not disputed that for the most part, Ms. Twinn issued accounts on a monthly basis and, with the exception of the disputed accounts, were paid by Sawridge.

74 Ms. Twinn points to Roland Twinn's evidence that Sawridge reserved the right to question and reduce all legal accounts issued, including those of Ms. Twinn, as a factor suggesting the accounts were periodic interim. In my view, it is entirely appropriate (and expected) that Sawridge would develop an internal account review process. Over the course of this litigation, millions of dollars in legal fees were paid to various lawyers, including to Ms. Twinn. Good governance and an internal review of accounts are not determinative of this issue.

75 There is nothing to suggest that Ms. Twinn's accounts overall, would either increase or decrease depending on the results of the litigation or some other contingency, or that the parties agreed to adjust the accounts up or down at the end of the retainer. Ms. Twinn's accounts included her professional services for a specific period, and were billed according to the time spent at the agreed hourly rates.

76 Based on the conduct of the parties where each of the monthly accounts that pertained to the professional services rendered by Ms. Twinn were paid as due by Sawridge, I conclude that the periodic accounts issued by Ms. Twinn in the course of this very lengthy retainer are properly characterized as periodic final accounts, and were considered to be so by both Ms. Twinn and Sawridge: *Lewis Estates* at paras 44-46.

77 As a result, Ms. Twinn had no more than two years from the date of the account, to pursue a remedial order by way of review.

78 Ms. Twinn concedes that if I find the accounts were periodic final, then her Appointment for Review for the account dated October 31, 2005, in relation to her attendance at the UN Expert Conference, is clearly out of time.

a) The May 31, 2009 Account-Data Room Start-Up

79 In the course of oral argument, I questioned counsel on whether a limitation issue arose from the fact that the time and expenses relating to Lancaster House/Data Room start-up were incurred between 2003 and 2004, but not billed until 2009. This had not been addressed by the parties in their Briefs, as they were focused on limitation issues arising from the date the account was issued.

80 Counsel provided further written submissions on this issue on April 28, 2017.

81 Section 3(1) of the *Limitations Act* provides the limitation period for actions and remedial orders. It states:

> Subject to subsections (1.1) and (1.2) and section 11, if a claimant does not seek a remedial order within
>
> (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
>
> (i) that the injury for which the claimant seeks a remedial order had occurred,
>
> (ii) that the injury was attributable to conduct of the defendant, and
>
> (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,
>
> or
>
> (b) 10 years after the claim arose, whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

82 This section must be applied to the facts of any given case, taking into account the circumstances existing, to determine the starting date for a limitation period. A plaintiff is not required to bring a claim until two years after discovery of the three criteria listed in s 3(1)(a): *Gayton v. Lacasse*, 2010 ABCA 123 (Alta. C.A.) at paras 18-21, (2010), 482 A.R. 179 (Alta. C.A.).

83 The parties agree that the limitation period to bring a claim for services rendered started when Ms. Twinn knew or ought to have known of the injury, that the injury could be attributable to Sawridge and that the injury warranted bringing an action. In the case of agreements, an injury is defined as "non-performance of an obligation": s 1, *Limitations Act*.

84 Ms. Twinn argues that she understood, and her reasonable belief was, that she would be paid her time and the expenses incurred in setting up the Data Room. She argues the Court should not assume that she ought to have known "that the Band intended to be dishonest and deceitful with respect to its intention to pay the claim." She points out there is no evidence to contradict her reasonable belief that the Band, through continued discussions, would agree to pay these costs. Further, she argues, she could not have known Sawridge would refuse to pay until she actually rendered an account. Alternatively, Ms. Twinn argues that Sawridge's failure to pay did not warrant bringing a proceeding until her retainer was terminated, because the stakes were high in this litigation and jeopardizing the Band's position by suing over the relatively small cost of the Data Room set-up was not warranted.

85 Sawridge argues the injury attributable to it occurred when the expense and the work was actually incurred, and Ms. Twinn should have issued invoices in the months the costs were incurred, in keeping with her usual practice.

86 In the circumstances of this case, it is difficult to accept that Ms. Twinn, a barrister and solicitor, did not know and ought not to have known, that the *Limitations Act* applied to her claim for non-performance of Sawridge's obligation to pay.

87 Significantly, in *G.J. White Construction Ltd. v. Palermo* (1999), 2 C.P.C. (5th) 110, 7 C.L.R. (3d) 13 (Ont. S.C.J.) (WL), the evidence before the Court in that case was that the invoice for work done in July and August 1989 was not sent out until December 30, 1994. In light of that circumstance, Nordheimer J commented, at para 20, that it would be improper to use the time when the invoice was *delivered* as the basis for determining when the plaintiff knew, or ought to have known, the material facts giving rise to the cause of action because to "select [the invoice delivery] date would allow the plaintiff to effectively toll the limitation period for as long as it wished by simply withholding delivery of an invoice."

88 Taking Ms. Twinn's evidence at its highest, she relies on a clear belief or a clear understanding she would be paid. With respect, this cannot delay the commencement of the limitation period. She leads no evidence to suggest that Sawridge waived the limitation period or voluntarily entered into some type of standstill agreement. A plaintiff cannot unilaterally impose a standstill agreement for delaying the preparation of an invoice: *Royal Well Servicing Ltd. v. Murphy Oil Co.*, 2016 ABQB 418 (Alta. Q.B.) at para 14 [*Royal Well*].

89 Nor on these facts, is Ms. Twinn justified in issuing the account only after her retainer had been terminated, in light of her argued significant legal and fiduciary duties to the Band. Given the legal principle that a service provider cannot suspend the limitation period by delaying the issuance of an invoice, Ms. Twinn could have issued the account but delayed her request for payment pending discussions with Sawridge, or she could have negotiated a stand-still agreement on review. She did neither. (See *Royal Well* at para 14; *Hugh Munro Construction Ltd. v. Moschuk*, 2012 ONCA 109 (Ont. C.A.) at para 1, 2012 CarswellOnt 1854 (Ont. C.A.)).

90 It is neither fair nor in the interests of justice to issue an account to a client five to six years after the work was done, particularly when the long standing practice was to issue monthly accounts for time and expenses incurred. It is incongruous to permit the lawyer an open-ended period in which to issue an account while imposing on the client, a regulatory limit of six months to review that account: *Alberta Rules of Court*, r 10.10; See also, the Law Society of Alberta, *Code of Conduct*, ch III, 3.6-3, Commentary 2, which stipulates, *inter alia*, that, "[s]ubject to any special agreement with the client, a final account should be rendered within a reasonable time after completion of the services."

91 Further, the inordinate delay by Ms. Twinn in issuing the account for the Data Room start-up puts Sawridge at a distinct disadvantage in being able to recall any discussions surrounding the subject matter of the account. It also thwarts the client's ability to properly budget for and monitor its legal expenses. The modern approach to litigation delay and presumed prejudice, most recently articulated by our Court of Appeal in *Humphreys v. Trebilcock*, 2017 ABCA 116, 2017 CarswellAlta 647 (Alta. C.A.), has, in my view, application to *all* aspects of litigation, including the rendering, enforcement of and challenge to accounts.

92 Consequently, I conclude that the account of May 31, 2009, relating to the Data Room start-up, was issued too late and the Appointment for Review of that account was filed too late. Therefore, I find that the May 31, 2009 Data Room start-up account is barred by s 3(1)(a) of the *Limitations Act*.

b) The Accounts dated June 30, 2008-October 31, 2008 — Data Room shut-down and Creation of DML Index

93 The five invoices in question were sent to Sawridge with Ms. Twinn's letter dated November 20, 2009. Ms. Twinn's Appointment for Review was filed June 10, 2011, more than two years from the date services were provided and more than two years from the date of the accounts. However, the limitation period may be extended by the application of s 8 of the *Limitations Act*, which extends the limitation period if, during the limitation period, there has been an acknowledgment of or part payment toward the claim.

Does Section 8 of the Limitations Act apply to any of the Disputed Accounts?

94 Section 8 of the *Limitations Act* reads as follows:

> (2) Subject to subsections (3) and (4) and section 9, if a person liable in respect of a claim acknowledges the claim, or makes a part payment in respect of the claim, before the expiration of the limitation period applicable to the claim, the operation of the limitation period begins again at the time of the acknowledgment or part payment.
>
> (3) A claim may be acknowledged only by an admission of the person liable in respect of it that the sum claimed is due and unpaid, but an acknowledgment is effective
>
> > (a) whether or not a promise to pay can be implied from it, and
> >
> > (b) whether or not it is accompanied with a refusal to pay.
>
> (4) When a claim is for the recovery of both a primary sum and interest on it, an acknowledgment of either obligation, or a part payment in respect of either obligation, is an acknowledgment of, or a part payment in respect of, the other obligation.

95 Ms. Twinn argues there has been both an acknowledgment and part- payment with respect to the accounts, which would serve to extend the limitation periods.

96 Sawridge, relying on the decision of Verville J in *Dicorp Properties Ltd. v. Zellers Inc.*, 2005 ABQB 399, 381 A.R. 19 (Alta. Q.B.), argues that any acknowledgment or part payment must be in relation to the disputed debt or accounts.

97 In *Dicorp*, the defendant objected to common area expenses assessed by the claimant landlord, raising concerns about the calculation of the common area taxes, but it did not object to the common area expense attributable to a parking lot. Despite making a payment towards those common area expenses it did not question, Verville J concluded that the defendant's correspondence did not constitute an acknowledgement of the common area taxes being claimed.

98 Graesser J, in *John Barlot Architect Ltd. v. 973189 Alberta Ltd.*, 2008 ABQB 458, 73 C.L.R. (3d) 44 (Alta. Q.B.), distinguished *Dicorp*, concluding that the decision turned on the specific wording of the defendant's correspondence and that the case did not otherwise provide guidance as to the nature or necessary form an acknowledgment must take to extend a limitation period.

99 Graesser J held it was not necessary for the acknowledgment to refer to the specific amount of the debt. Citing *Heffren, Re*, [1922] 2 W.W.R. 1038, 68 D.L.R. 766 (Man. K.B.), he concluded that an acknowledgment is sufficient if the words either expressly or by implication amount to an unconditional acknowledgment of the debt, but the acknowledgement must be in writing. See also *Nikel Investments Ltd. v. Gallaher*, 2012 ABQB 276 (Alta. Q.B.) at paras 22-23, (2012), 538 A.R. 373 (Alta. Q.B.) (*per* Manderscheid J).

100 *John Barlot* involved a claim for outstanding architectural fees in relation to three different projects. Graesser J considered the application of s 8 of the *Limitations Act* in relation to the "Haven Project."

101 Graesser J reviewed three pieces of correspondence issued by the client. The first was a letter in July 2004 saying "in follow up with our discussions of July 15, 2004, you have advised me that you will prepare the completion certificates for the Haven [Project]. Once these certificates are completed, please contact me so that I can certify the cheque for final payment . . . "

102 Then, in early 2005, a settlement meeting took place between the parties. The plaintiff asked the client that the proposal be put in writing. The client made an offer in writing to pay the full amount owing under the "Haven Project" and some amount to another project.

103 Finally, on April 20, 2005, the client wrote requesting certain schedules be prepared to obtain completion certificates for the various units and that upon completion of the requested schedules, the client would "prepare a certified cheque in the amount of $87,007.79" being the full amount owing on the "Haven Project."

104 In dismissing the related appeal, the Court of Appeal concluded that the July 2004 letter, the February 2005 settlement offer and the April 2005 letter, either alone or in combination, provided ample support for Graesser J's conclusion that the client had acknowledged the plaintiff's claim respecting the "Haven Project," and therefore extended the limitation period, pursuant to s 8: *John Barlot Architect Ltd. v. 973189 Alberta Ltd.*, 2009 ABCA 307 (Alta. C.A.) at para 15, (2009), 460 A.R. 393 (Alta. C.A.).

105 In reviewing the authorities provided, the following principles emerge:

- "Claim" is defined in s 8(1) as being an "accrued liquidated pecuniary sum";
- For the purposes of s 8, an acknowledgement need not refer to the specific amount of the debt;
- The acknowledgement must be in writing; oral promises to pay are not sufficient;
- The words used must expressly or by implication amount to an *unconditional* acknowledgement of the debt;
- The limitation period may be extended by either an acknowledgment or a part payment.

106 I would add that the analysis is factually driven, and the words used must be assessed in the context of the circumstances existing.

107 In *Dicorp*, the defendant never acknowledged the claim relating to common area taxes, because its correspondence consistently questioned the calculations. The part payments made were found to be made towards amounts not in dispute. In that case, Verville J, at paras 68-69, commented:

> [68] Partial payment, sometimes constituting a form of acknowledgement, may extend a limitation. However, here the Defendant clearly indicated to the Plaintiffs that it would pay only with respect to the separate parking lot, which debt it did not dispute. The Defendant submitted that this was not an acknowledgement of the remainder of the debt.
>
> [69] *Brandon v. Dale*, [1930] 2 D.L.R. 272 (Sask.C.A.) stands for the principle that for a part payment to extend a limitation, it must be made on account of the debt for which the action is brought, and it must appear that the payment was made on account of a greater debt, because unless a payment amounts to an admission that more is due, it cannot be taken as an admission of a still existing debt. There is nothing in the [*Limitations Act*] which indicates that this principle is no longer applicable. I find that the Defendant's payment was on account of the charges with respect to which it admitted liability, not for any of the disputed debt. The payment did not extend the limitation.

108 In *John Barlot*, while the correspondence seemed to tie payment to requests that further services be provided, the defendant nevertheless agreed to pay the entire amount owing.

109 In the matter before me, Ms. Twinn points to a series of communications from Sawridge as evidencing its acknowledgment of her claims. First, a letter from Roland Twinn, dated September 17, 2009, in response to Ms. Twinn's explanatory letter regarding certain contentious invoices. In this letter, Roland Twinn advised that Sawridge would like to resolve all outstanding accounting matters between Ms. Twinn and Sawridge, and requested that she issue accounts for the period July 2008 to September 2008 so that all issues and concerns could be dealt with at one time.

110 In response, Ms. Twinn sent a series of accounts under her cover of November 20, 2009. These accounts included new accounts isolating the DML indexing charges as well as accounts for the period July 2008 to September 2008.

111 Secondly, she relies on Mr. McKinney's letter to her, dated December 1, 2009, advising that Sawridge would be paying $10,000 per month towards the remaining outstanding balance and that he would be reviewing the invoices recently submitted, and advising of any issues or comments.

112 Mr. McKinney's comments and concerns were later outlined in his letter of April 22, 2010.

113 Counsel for Sawridge concedes that part payments were made on three accounts, thus extending the limitation period to allow for review: September 9, 2008 (Inv. 1034.200809), October 31, 2008 (Inv. 1034.200810) and December 31, 2008 (Inv. 1034.200812).

114 Regarding the balance of the invoices that relate to the Data Room shut down and DML Index, Sawridge argues it did not provide an acknowledgement as contemplated by the *Limitations Act*, s 8, because at the time Sawridge issued the letter of September 17, 2009, it had not received the majority of the accounts in issue, and the balance of the correspondence clearly outlined various concerns as well as questions regarding the accounts issued.

115 In *Nikel Investments Ltd*, Manderscheid J referenced the Alberta Law Reform Instititute's December 1989 Report No 55, *Limitations*, discussing the policy reasons for allowing an extension of the limitation period where there is an acknowledgement of the debt by the debtor:

> There are two policy reasons for the common law doctrine of acknowledgement:
>
> 1. If a debtor has admitted his indebtedness and his legal duty to pay the debt, he has, by his conduct, renounced his need for the protection afforded by a limitations system. If he has admitted his legal liability, the reasons for limitations protection based on stale evidence, peace and repose, and economic cost are so reduced that a renewed limitation period is justified;
>
> 2. The second reason is based on estoppel. If the debtor has promised to pay a debt, the creditor should be permitted to rely on this new promise without bringing an action for a renewed limitation period.

116 These stated policy reasons are consistent with the established principle that to extend the limitation period, the acknowledgment must be unconditional.

117 In *Dicorp*, it was clear that the partial payment made by the defendant related only to the debt it did not dispute. In *John Barlot*, the defendant agreed to pay the entire amount owing. Here, the correspondence of September 17, 2009, December 1, 2009 and April 22, 2010 is not clear cut.

118 The letter of April 22, 2010 provides a detailed outline of questions and concerns regarding various accounts covering the period June 2008 to December 2008 and May 2009 through October 2009. While there is no indication that Sawridge was refusing to pay these accounts outright (as was the case with the charges for attendance at the UN

expert seminar) it cannot be said this letter, in isolation or together with the earlier correspondence, viewed contextually, constitutes an unconditional acknowledgment. This is evidenced in the penultimate paragraph of that letter:

> "We note that we are still paying $10,000 per month in respect of the outstanding amounts *which we do not have concerns with . . .* " (Emphasis added)

119 With the exception of the three invoices in which part payments were made, referenced earlier, the invoices dated June 30, 2008 (Inv. DML 200806), July 31, 2008 (Inv. DML 200807) and August 31, 2008 (Inv. DML 200808) are barred by the *Limitations Act* as the Appointment for Review was not filed in time and there was no acknowledgement or a part payment extending the limitation period for these invoices.

3. Estoppel

120 In the alternative, Ms. Twinn argues Sawridge is estopped from relying on the limitation period by reason of representations by Sawridge that it would pay for the costs relating to the Data Room start-up and shut-down that she relied on to her detriment.

121 Words or conduct, combined with detrimental reliance, may estop a party from relying on the *Limitations Act* as a bar to the claim. The common law doctrine of promissory estoppel continues to operate in conjunction with the *Limitations Act*. Whether the words or conduct constitute a representation and whether that representation was relied on to a party's detriment, are findings of fact: *Brar v. Roy*, 2005 ABCA 269 (Alta. C.A.) at para 32, (2005), 371 A.R. 290 (Alta. C.A.).

122 The evidence before me does not establish that Sawridge, through its words or conduct, represented that it would pay these costs, nor does it establish that Ms. Twinn relied on these representations to her detriment. The alternative claim of estoppel is dismissed.

III. Conclusion

123 The account relating to Ms. Twinn's attendance at the UN Expert seminar in Phoenix did not form part of her retainer with Sawridge, and in any event, is barred under the *Limitations Act*.

124 The accounts relating to the Lancaster House/Data Room start-up did not form part of Ms. Twinn's retainer with Sawridge, and in any event, are barred by the *Limitations Act*.

125 The accounts relating to the Data Room shut down and DML index constitute an incidental part of Ms. Twinn's retainer, with the exception of the accounts noted below however, the accounts are barred by the *Limitations Act* as the limitation period to enforce these accounts was not extended by virtue of s 8 of the *Limitations Act*.

126 Therefore the following accounts shall be remitted to a Review Officer for review in accordance with the *Alberta Rules of Court*:

- Invoice 1034.200809 dated September 9, 2008;
- Invoice 1034.200810 dated October 31, 2008;
- Invoice 1034.200812 dated December 31, 2008;
- Invoice 1034.200905 dated June 30, 2009;
- Invoice 1034.200907 dated July 31, 2009;
- Invoice 1034.200909 dated September 9, 2009;

- Invoice 1034.200910 dated October 9, 2009.

Order accordingly.

Footnotes

1 Exhibit A1, Tab 16 from Questioning on Affidavit of Catherine May Twinn on July 11, 2011.

2 Questioning on Affidavit of Catherine May Twinn on July 11, 2011 starting on page 56, line 17.

3 *Ibid*, page 56, line 27 to page 57, line 10.

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Tab 24

1916 CarswellOnt 169
The Supreme Court of Canada

Singer v. Singer

1916 CarswellOnt 169, 27 D.L.R. 220, 52 S.C.R. 447

Moses Joel Singer, Executor of the Estate of Jacob Singer, deceased, and others, Appellants and Annie Singer, Executrix, and others, Respondents

Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

Judgment: December 2, 1915
Judgment: December 3, 1915
Judgment: February 1, 1916

Proceedings: On Appeal from the Appellate Division of the Supreme Court of Ontario.

Counsel: *Dewart K.C.* for the appellant M.J. Singer.
Cowan K.C. and *Rose K.C.* for the other appellants.
Watson K.C. for the respondent Annie Singer.
Holman K.C. for the other respondents.

Subject: Estates and Trusts

Headnote

Estates --- Legacies and devises — Nature of estate created — Life estate — Rights and liabilities

Testator bequeathed to his wife the income from his estate (subject to certain limitations) "for the maintenance of herself and our children". Held, the Court would not interfere if the widow, in a bona fide exercise of her discretion, should determine that the circumstances warranted her withholding maintenance in part or in whole in the case of any child.

Trusts and Trustees --- Express trust — Creation — Three certainties — Intention — Precatory trust

When trust for maintenance created — Bequest to wife -- Bequest of income considered to impose trust for benefit of children rather than gift of corpus.

Per Anglin J.: " ... the cases rather seem to indicate that a bequest of income will more readily be held to impose a trust, especially if given to the mother, than a similarly phrased gift of the corpus. Eversley on Domestic Relations (3 ed.), p. 688. Yet whether she should, or should not, be held to be a trustee, the authorities seem to establish that there is an obligation toward the children imposed upon a widow to whom money is bequeathed for the support of herself and her children, which the court will, under certain circumstances, enforce.... A fortiori, if there be a trust, however wide the discretion, the court will interfere in the event of failure or refusal to exercise it honestly.... [Where testator's] dominant intention was that during the lifetime of the wife, so long as she remained his widow, she should occupy substantially the same position towards the children as he occupied himself ... there would be no trust properly so called. The obligation of the mother would be almost purely moral. The only right enforceable against her in the courts would be the right to support which the law gives to minor children against their father, commensurate with his means and station in life, subject to the further limitation, that the court will not interfere to enforce that right against the mother if she should, in the bona fide exercise of her discretion, determine that the circumstances warrant her withholding maintenance in part or in whole in the case of any child.".

Trusts and Trustees --- Powers and duties of trustees — Powers — Scope — Discretionary powers — Requirement of good faith

A widow was given the income of the estate for her own use absolutely subject to an obligation to provide, in her discretion, for the maintenance of the children. Held, this discretion would not be controlled or interfered with so long as it was exercised in good faith.

***The Chief Justice*:**

1 I am of opinion that this appeal should be dismissed with costs.

***Davies J.*:**

2 The difference of opinion between the trial judge, Middleton J., and the Appellate Division as to the rights of the widow Annie Singer to the net annual income arising from the estate during her widowhood is not very great. After consideration of the arguments advanced at bar on the construction of the provisions of the will and codicil relating to this net annual income, I accept that of the Appellate Division as probably the more correct one.

3 With respect to the construction of the clause providing for advancement to those sons of the testator who reached the age of thirty, I entertained at the close of the argument a good deal of doubt. The reasons given in the dissenting judgment of Mr. Justice Magee are strong and cogent in favour of the construction he adopted that the codicil did not interfere with the provision in the will for payment by way of loan to the sons on attaining the age of thirty years.

4 While I agree that the solution of the question is surrounded with difficulties, I have reached the conclusion that the arguments in favour of the construction adopted by the Appellate Division preponderate, and that the effect of paragraph 10 of the codicil is to postpone the right under the will of the sons who attain the age of thirty to be paid the one-half of their shares except as stated by the Chief Justice

> in so far as it may be precticable to make payments to them out of the personalty and the proceeds of such of the real property as the trustees may have sold.

5 On the whole, I adopt the reasoning and conclusions of Chief Justice Sir William Meredith and would dismiss the appeal.

6 Under the circumstances and the reasonable doubts existing as to the true construction of these clauses of the will taken together with Mr. Justice Magee's dissenting opinion, I would not allow costs against appellants but would let each party pay his own.

***Idington J.*:**

7 The conditions existent in this family are unsatisfactory. I should, however, be sorry to in crease and intensify their troubles and then perpetuate them by substituting the discretion of the court for that of the mother whom the testator had wisely chosen to be head of the family when he was gone. She may make mistakes, but her maternal instincts will probably rectify or ameliorate them. The court substituting itself for her inevitably must make mistakes it never can rectify.

8 The carefully prepared judgment of the learned Chief Justice of Ontario, with which I agree, leaves nothing more for me to say on the question of interference with the mode of the mother's exercising her judgment.

9 The formal judgment of the Appellate Division lays down correctly the lines to be observed and yet as I read it puts no bar in the way of the mother aiding when they deserve it, even those over twenty-one and *forisfamiliated* .

10 On the question arising upon the construction of clause 10 of the codicil I agree with the result reached by the judgment appealed from.

11 The testator by a will made in 1904 directed as follows: —

> I direct my said trustees to pay to each of my sons who shall reach the age of thirty years a sum equal to half that portion of my estate to which such son is entitled under this my will upon the death of his mother, such portion to be valued at the time of each son attaining his thirtieth year, the valuation to be made by my executors and trustees and shall be final. Such payment to be considered as a loan from the estate,

and on 31st October, 1911, two weeks before his death, made a long codicil thereto of which clause No. 10 is as follows: —

> 10. I hereby further direct that my real property shall not be divided among the beneficiaries as directed by my will until after the lapse of ten years from my death, and I further direct that the business of managing my real estate shall be carried on by my sons as it has been carried on heretofore, and I direct that my sons shall receive such salaries as shall seem just in the discretion of my executors in remuneration for their services.

12 And clause No. 14, the last, is as follows: —

> 14. And I further direct that anything mentioned in the aforesaid will which is at variance with the provisions mentioned in this codicil, shall be subservient and subject to this codicil.

13 The estate, at his death, consisted chiefly of over three hundred parcels of real estate in Toronto.

14 Four of his sons had then reached the thirty-year limit.

15 The estate was under mortgages to three-eighths of its value. Much of it was unproductive or in a state of dilapidation, needing repair. These and many other known circumstances must be borne in mind in attempting the interpretation and construction of this codicil. We can say nothing of the unknown which the prudent testator refrains from disclosing and which we cannot appreciate in order to help construction.

16 I should have supposed, but for judicial differences of opinion, the mere reading of this clause No. 10, in light of the surrounding facts and circumstances, restricted as it is to real estate, was so plain as to need no aid. But in effect it is urged that it must have read into it the word "finally" as qualifying the word "divided" therein. For the argument presented by appellant means, if anything, that the distribution provided for by the clause I have quoted from the will, was not in substance a division *pro tanto* , though conditionally subject, however, in case of a shrinkage of the estate to a return or reduction in share, but merely a loan, and that according to some theories put forward, on good security and bearing a good rate of interest; the prospective share in the estate, of course, forming part of the security.

17 If it was in essential characteristics merely a loan, why all this litigation? The parties concerned, over thirty years of age, could possibly borrow in Toronto on their respective shares almost as advantageously as the executors without all this expensive litigation to be paid for, in addition to the usual commissions on such transactions.

18 Plus the contingency of death without issue, possibly insurable against, there is not much difference in the character of the borrowing by the trustees sought herein to be immediately enforced by this proceeding and that obtainable by each of the appellants in respect of his share.

19 For admittedly the trustees of the estate cannot just now in the present state of the market sell its real estate and can only meet the obligations which the construction contended for would involve, by borrowing at a great disadvantage.

20 All this is, it may be said, aside from the question of construction. I agree. I only desire to illustrate the real nature of what is contended for by those relying upon the language used in the clause relative to the advances to be made being merely loans to those attaining thirty years of age.

21 What has happened may, or may not, have been within the contemplation of the testator when making his will, but assuredly it was when making his codicil thereto, and anything in the will at variance therewith is expressly made subservient to the codicil. Such submission extends to the giving, if need be, of an en tirely different shade of meaning to that it might have borne standing alone and amid entirely different surrounding circumstances.

22 I think, however, such advances were merely intended to be *pro tanto* a distribution of the estate, but in order to provide for the contingencies necessary to be kept in view, having regard to the equal division ultimately to be made and contemplated by the testator, should be in such view, but in that only, treated as loans.

23 Assuming any such advance made upon terms only within the language of the clause and without any further stipulation for its return than implied therein, is it at all conceivable that any court would maintain an action for the recovery back of any part thereof, save so far as needed to produce the equal distribution contemplated?

24 If not, then the advance is to the extent not so recoverable neither more nor less than the division in the language of the codicil

> among the beneficiaries as directed by my will.

25 Again, the language of the clause itself presupposes the money in hand; for nowhere is there any direction to sell or mortgage for any such purpose. To imply such an imperative direction in the clause or whole will (to be read now in light of the codicil now dominating its expressions) dealing with such an estate as left at the death of the testator, would be, I think, attributing to him a want of that business sense and foresight which, I think, he was possessed of.

26 If no other question had been raised than one asking the court to compel the trustees to mortgage and pay for such a purpose, would the court have listened to it and acceded to that which might spell ruin for the estate?

27 The testator realizing, as every sane man of experience and foresight must have done in the end of October, 1911, that by the end of a year thence, when his will would have become operative for purposes of partial distributions, and the fruits of real estate speculation would have begun to ripen; and of these a long period of depression in real estate was sure to ensue, provided against such contingencies. He realized the possibly disastrous results of an enforced distribution under such conditions of a large part of his estate. He wisely anticipated all that and what was or might be involved therein and provided against it by clause No. 10 of this codicil.

28 We are invited to frustrate his purpose by putting on his will, and on this codicil, a construction that I venture to think would have surprised him. So far common knowledge, if we use it, can guide us.

29 But in view of the lapse of time between the making of will and codicil, it is not at all improbable, in light of the story unfolded herein by some of those concerned, that in the development of his sons he had found something to warrant him in providing (in a way his earlier hopes in that regard induced him to refrain from) against their possible or probable improvidence or that of some of them.

30 I do not think we are entitled to frustrate the results he aimed at, whatever they were, by placing upon his language used in clause No. 10, and clearly emphasized in clause No. 14, a construction it does not necessarily bear.

31 Moreover, it is quite clear he left to the future developments, that time and chance might bring, the earlier conversion, in the ordinary prudent way, of his real estate into personalty, whereupon the clause for partial distribution would become operative.

32 The power of sale remained intact, save that impliedly it was not to be used in obedience to an enforced demand for distribution within the period of ten years.

33 I need not dwell upon the bearing of other minor considerations such as, the income of the estate belonging to the widow and the consequent results upon it by the construction contended for; and the salaries provided in the codicil for the management of the estate by his sons, and the possibility of the codicil having been drawn by a non-professional hand as the providing for a seal in the execution thereof indicates.

34 The true construction must ever be in the case of a will, the ascertainment of the purposes of the testator to be gathered from the will read in light of the circumstances known to surround him making it and not least of these the condition of the estate.

35 Then its entire scope and purposes must be kept in view and no single feature, unless so expressed as in this codicil, allowed to dominate the rest. So treating will and codicil I do not feel any doubt in the results I have reached.

36 I agree that no compensation is allowable to the executors. The actual labour in that connection is provided for by salaries to be paid the sons in regard thereto. The responsibility evidently was not to be compensated for.

37 I think the appeal should be dismissed with costs.

***Duff J.*:**

38 The important question turns upon the effect of clause ten of the codicil. It is by no means free from doubt, but I think effect may be given to the intention of the testator, as I infer from the admitted facts, without doing violence to the language. The intention unquestionably was, I think, to prohibit a sale of any part of the real estate for a period of ten years.

39 The appeal should be dismissed with costs.

***Anglin J.*:**

40 The first question presented on this appeal is as to the effect of the following provision of the will of the late Jacob Singer: —

> I direct my said trustees to pay to my wife Annie Singer during the term of her natural life and as long as she will remain my widow the net annual income arising from my estate for the maintenance of herself and our children; should, however, my wife remarry, then such annuity shall cease.

41 Middleton J., who heard the case in the first instance on an originating notice, held that: —

> The said Annie Singer is not entitled to the net annual income arising from the said estate to her own use absolutely, but subject to the obligation to use the same not only for her maintenance, but also for the maintenance of the children of the testator, and that the right of any child to maintenance does not cease on attaining majority or marriage;

and he directed a reference to determine what allowance, if any, should be made to each of the children of Jacob Singer out of the income of the estate.

42 The Appellate Division varied this judgment by declaring that: —

> The said Annie Singer is entitled to the net annual income arising from the said estate during her widowhood for her own use absolutely, but subject to an obligation to provide thereout for the maintenance of the children of the

testator or such of them as in her discretion to be exercised in good faith she shall deem to require the same, but such obligation does not extend to any child who has or shall be married or otherwise be forisfamiliated.

43 The appellants contend for the restoration of the judgment of Middleton J. The respondent Annie Singer upholds the judgment of the Appellate Division. The other respondents, represented by Mr. Holman, maintain that the interest of Annie Singer is absolute; that any obligation imposed upon her is not in the nature of a trust, but is purely moral; and that the children have no interest legally enforceable. The difference between the respective orders made by Middleton J. and by the Appellate Division (apart from the exclusion of children married, or otherwise forisfamiliated) would seem to be that, under the latter, the discretion of the mother is wider and enables her, for reasons that seem to her sufficient, to exclude any child from maintenance. Interference of the court is limited to a case of *mala fides* in the exercise of her discretion.

44 With Sir George Mellish L.J.: —

> I do not understand how a Court of Equity can execute a trust where the testator says that he has such confidence in his widow that he wishes her, and not the Court of Chancery, to say what share she shall have and what share the children shall have. *Lambe v. Eames* [1] .

45 According to many authorities language such as that used by the testator does not create a complete trust in the strict sense; *Bond v. Dickinson* [2] ; *Lambe v. Eames* [3] ; *Mackett v. Mackett* [4] ; *Allen v. Furness* [5] ; *Re Shortreed* [6] ; *Atkinson v. Atkinson* [7] . But there are, no doubt, other authorities in which the contrary has been held, *e.g., Scott v. Key* [8] ; *Woods v. Woods* [9] ; *Longmore v. Elcum* [10] . The line is difficult to draw. But the cases rather seem to indicate that a bequest of income will more readily be held to impose a trust, especially if given to the mother, than a similarly phrased gift of the corpus. Eversley on Domestic Relations (3 ed.), p. 688. Yet whether she should, or should not, be held to be a trustee, the authorities seem to establish that there is an obligation toward the children imposed upon a widow to whom money is bequeathed for the support of herself and her children, which the court will, under certain circumstances, enforce. *Allan v. Furness* [11] , and *Booth v. Booth* [12] , are instances in which the court interfered to protect the fund in the interests of the children against creditors of a legatee subject to an obligation of maintenance. *In re G. Infants* [13] is a case in which the court interfered on an admission of obligation made by an immoral mother. *Thorp v. Owen* [14] was a case of admitted trust. But there are other cases in which, without holding that a trust had been created, the courts have, as against the parent, asserted the existence of an obligation in favour of the children which they would enforce. *Re Robertson's Trust* [15] ; *Raikes v. Ward* [16] ; *Castle v. Castle* [17] ; *Browne v. Paull* [18] ; *In re Pollock* [19] . *A fortiori* , if there be a trust, however wide the discretion, the court will interfere in the event of failure or refusal to exercise it honestly.

46 As Theobald says (7 ed.), p. 491: —

> The decisions upon gifts to a parent for the benefit of himself and his children run into fine distinctions.

See cases collected in Lewin on Trusts (10 ed), at p. 157, and Jarman on Wills (10 ed.), pp. 890 *et seq* .

47 After fully considering all the provisions of Jacob Singer's will, I agree with the view expressed by Middleton J., when, speaking of the testator's intention, he said: —

> Mr. Singer undoubtedly had unbounded confidence in his wife. Many expressions in the will point in that direction; and I think that his dominant intention was that during the lifetime of the wife, so long as she remained his widow, she should occupy substantially the same position towards the children as he occupied himself.

48 In that view there would be no trust properly so called. The obligation of the mother would be almost purely moral. The only right enforceable against her in the courts would be the right to support which the law gives to minor children against their father, commensurate with his means and station in life, subject to the further limitation, that the court will

not interfere to enforce that right against the mother if she should, in the *bonâ fide* exercise of her discretion, determine that the circumstances warrant her withholding maintenance in part or in whole in the case of any child. That, I take it, is the measure of the children's right which the judgment of the Appellate Division accords.

49 This wide discretion the mother appears to have under such a provision as that with which we are dealing, which involves determining from time to time and under varying circumstances how much of the income should be used for each and any of the purposes indicated, and it is subject to curial interference or control only when it is shewn that she has not exer cised it fairly and honestly; *Costabadie v. Costabadie*[20] ; *Tabor v. Brooks*[21] ; *Re Roper's Trusts*[22] .

50 I am, with respect, of the opinion that this is the correct interpretation of the disposition made by the testator of the income of his estate. I desire, however, not to be understood as dissenting from the view expressed in the Appellate Division that, under the doctrine *stare decisis* , whatever may be the view now prevailing in England (Theobald (7 ed.), 495; Lewin on Trusts (10 ed.), p. 159), in Ontario the view expressed in *Cook v. Noble*[23] , that married and otherwise forisfamiliated children are not entitled to share in a gift for maintenance such as this should be adhered to. But there is nothing to prevent the mother applying a part of the income for the benefit of adult and married children who may need assistance, if she can do so consistently with her duty to herself and her unmarried minor children.

51 I question the jurisdiction on an originating notice to determine the issue of good or bad faith on the part of the widow. At all events, if such a jurisdiction exists, I think the better course is that which has been taken in the Appellate Division, viz., in the first instance to dispose of the questions of construction and to determine finally the rights of the parties under the will, leaving it to the children, after that has been done, to proceed, if they should deem it necessary and proper, to seek the aid of the court to enforce the rights so declared.

52 I would, for these reasons, maintain the judgment of the Appellate Division on the first branch of the appeal.

53 The next question is whether the provision of the will which directs the trustees

> to pay to each of my sons who shall reach the age of thirty years a sum equal to half that portion of my estate to which that son is entitled under this my will upon the death of his mother, such portion to be valued at the time of each son attaining his thirtieth year, the valuation to be made by my executors and trustees and shall be final. Such payment to be considered as a loan from the estate,

is affected by clause 10 of the codicil.

> 10. I hereby further direct that my real property shall not be divided among the beneficiaries as directed by my will until after the lapse of ten years from my death, and I further direct that the business of managing my real estate shall be carried on by my sons as it has been carried on heretofore, and I direct that my sons shall receive such salaries as shall seem just in the discretion of my executors in remuneration for their services.

54 The will provided for the distribution of the estate on the death or remarriage of the widow, any advances previously made being brought into hotchpot. The appellant contends that it is only to this final distribution that the provision of the codicil applies and that it does not control or affect the right of the sons to advancements under the clause above quoted.

55 The will was made in 1904; the codicil in 1911, a month before the testator died. At his death his estate consisted almost entirely of real property. Up to five years before his death he had carried on the business of a watchmaker, jeweller, and money lender. The capital invested in that business appears upon its discontinuance to have been used in acquiring lands and houses. The condition of the testator's estate, as it existed in 1904, when his will was made, had, therefore, been materially changed when he made the codicil in 1911. Assets of other kinds, no doubt consider able in amount, and out of which the advancements to the sons might have been made, had in the interval been converted into real estate. This circumstance must be borne in mind in considering the effect of the codicil, which not only postpones a division of the real estate for a period of ten years, but directs that the business of managing it shall be carried on as theretofore. I am of

opinion that the dominant purpose disclosed by this codicil was that, saving the power to make sales demanded by good management, the real estate should be kept intact for a period of ten years, and that any provision of the will in favour of beneficiaries, other than specific or pecuniary legatees, inconsistent with that purpose should yield to it. For the purpose of this provision of the codicil advancements to the sons which would entail a disposition of the real estate would, in my opinion, be in the nature of a division which the testator meant to prohibit. It has been suggested that the portions to be advanced might be raised under the trustees' power to mortgage. But, apart from the fact that the existence of mortgage incumbrances on the estate to the extent of $360,000 might well render that method of procuring money impracticable, it might entail the defeat of the very purpose which the testator had in view in making the codicil and would be an indirect method of accomplishing that which I cannot but think he intended to provide against. For these reasons and for those stated by Mr. Justice Middleton and the Chief Justice of Ontario, I would affirm the judgment in appeal on this question.

56 I have no doubt that by the 11th clause of the codicil directing that no salary shall be paid to the execu tors for their services as executors, the testator meant to deprive them of all right to remuneration in any form for their services in the administration of his estate.

57 I would dismiss the appeal with costs. Having had the opinion of two courts against them on the main question — their right to immediate advancements — the appellants should, I think, have been satisfied. The slight difference in opinion between Mr. Justice Middleton and the Appellate Division as to the extent of the widow's discretion and the propriety of curial interference would not, in my opinion, justify our encouraging the carrying of appeals in cases such as this beyond the provincial courts, as we would do were we to award the appellants costs out of the estate or relieve them from payment of the costs of the respondents.

***Brodeur J.*:**

58 After a great deal of hesitation I have come to the conclusion that this appeal should be dismissed.

59 In directing his trustees to pay to his wife the annual income arising from his estate, the testator intended to give her discretion as to the way she would dispose of that money for the maintenance of their children. She is expected to exercise that discretion with impartiality and wisdom. It may be that in the past the mandate imposed upon her has not been discharged in a satisfactory way, but it is expected that she will in the future treat all her children in a most just, equitable and impartial way.

60 On the other point in issue, I agree with the construction put on the will by the Appellate Division.

Appeal dismissed with costs.

Solicitors of record:
Solicitors for the appellant Moses Joel Singer: *Dewart, May & Hodgson.*
Solicitors for the other appellants: *Beatty, Blackstock, Fasken, Cowan & Chadwick.*
Solicitors for the respondent Annie Singer: *Watson, Smoke, Smith & Sinclair.*
Solicitor for the other respondents: *Charles J. Holman.*

Footnotes

1 6 Ch. App. 597, at p. 601

2 33 L.T. 221 .

3 6 Ch. App. 597, at p. 601

4 L.R. 14 Eq. 49.

5 20 Ont. App. R. 34.

6 2 Ont. W.R. 318.

7 80 L.J. Ch. 370-372.

8 35 Beav. 291.

9 1 My. & Cr. 401.

10 2 Y. & C. Ch. 363.

11 20 Ont. App. R. 34.

12 [1894] 2 Ch. 282 .

13 [1899] 1 Ch. 719 .

14 2 Hare 607.

15 6 W.R. 405 .

16 1 Hare 445.

17 1 De G. & J. 352.

18 1 Sim. N.S. 92, at p. 103.

19 [1906] 1 Ch. 146 .

20 6 Hare 410.

21 10 Ch. D. 273 , at p. 277

22 11 Ch. D. 272 .

23 12 O.R. 81 .

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Tab 25

1986 CarswellBC 359
British Columbia Court of Appeal

Saunders v. Halom

1986 CarswellBC 359, [1986] B.C.W.L.D. 4660, [1986] B.C.J. No. 1133, [1987] 1 W.W.R. 557, 25 E.T.R. 186, 2 A.C.W.S. (3d) 191, 32 D.L.R. (4th) 503, 8 B.C.L.R. (2d) 117

SAUNDERS and SAUNDERS v. HALOM

Craig, Hutcheon and Macfarlane JJ.A.

Heard: October 29, 1986
Judgment: November 18, 1986
Docket: Vancouver No. CA004415

Counsel: *P. W. Butler, Q.C.*, and *M. Bray*, for appellants.
G.V. Lauk and *S. Griffin*, for respondent.

Subject: Estates and Trusts

Headnote

Estates --- Legacies and devises — Nature of estate created — Life estate — Powers of life tenant — Encroachment

Wills — Interpretation — Will leaving income of estate to testator's wife for her lifetime — Will constituting wife trustee and giving her power to encroach on all parts of capital to provide such sum as "she in her sole discretion shall deem necessary for the proper care and maintenance" of herself — Wife making encroachments amounting to $609,000 thereby exhausting capital of estate — Court finding will conferring discretion to encroach on subjective basis — Court having no grounds for interfering — Residuary beneficiaries not entitled to accounting.

The testator died in 1965, leaving a net estate of $633,843. His wife and his two nephews survived him. The testator left the income of the estate to his wife during her lifetime and he gave his trustee, his wife, the power to encroach upon all parts of the capital of the estate "to provide such sum as she in her sole discretion [deemed] necessary for [her] proper care and maintenance". The wife made encroachments amounting to $609,641 and by 1980 the estate was exhausted. The testator's two nephews, the residuary beneficiaries under the will, applied for an order requiring an accounting and for an order that the wife be removed as trustee. The application was dismissed and the petitioners appealed.

Held:

Appeal dismissed.

Per MACFARLANE J.A. (CRAIG J.A. concurring): — The testator conferred a very wide power of encroachment on capital. He left it to his wife to decide, in her sole discretion, whether to advance capital from the estate. The discretion was to be exercised on a subjective basis. The purpose of the encroachment was expressed in broad terms. "Proper care" may be equated to the well-being of the wife. By the terms of the will it was her well-being as she perceived it. The court, in seeking to determine whether moneys had been advanced for the "proper care" of the widow, would find itself in a very difficult if not impossible position. It would have to stand in the shoes of the wife and guess what she might have deemed necessary for her proper care and maintenance. For the court to step into the shoes of the trustee and to decide what was necessary and proper for the care and maintenance of the wife, and to ask what she spent, when she spent it, what she purchased, and why she did so, would be to act contrary to the clear intention of the testator that his wife would be unfettered in making that decision, and to impose an unjustified and restrictive regime where none was intended.

Per HUTCHEON J.A. (dissenting): — The words "for the proper care and maintenance of my wife" limit the exercise of the power to encroach to those purposes. As the state of the record is such that it cannot be said that the wide discretion given to the respondent as trustee was exercised for the purpose for which the testator intended, the proper disposition of the appeal is to allow the respondent a period of at least 30 days to file an affidavit dealing with the encroachment. If she is able to swear that an encroachment was made for her care and maintenance, that is the end of the matter, but to the extent that she is not able to swear this, the appeal should be allowed and an order should be made that she account.

Appeal from judgment dismissing petitioner's application for order requiring accounting from trustee appointed under will and removing respondent as trustee of estate.

***Hutcheon J.A.* (dissenting):**

1 I have read the reasons for judgment in draft of Mr. Justice Macfar lane but I am not able to agree at this stage that the court should not interfere in the administration of the estate. As I shall try to explain, the state of the record is such that I cannot say that the wide discretion given to Mrs. Halom, as trustee, was exercised for the purpose for which the testator intended.

2 Briefly stated, the facts are that Stephen Halom died in 1965 leaving a net estate of $633,843. By his will made in 1961, his wife took among other things a life interest with a gift over to his two nephews. The will contained this provision:

> I FURTHER DIRECT that my Trustee may encroach upon all parts of the capital of my estate to provide such sum as she in her sole discretion shall deem necessary for the proper care and maintenance of my wife IRMA HALOM.

Mrs. Halom advanced moneys to herself out of the corpus of the estate in this way:

1967 ...... $ 73,327

1968 0

1969 100,000

1970 231,972

1971 5,664

1972 1,815

1973 5,242

1974 ...... (2,695)

1975 17,608

1976 ...... (744)

1977 74,709

13 I am mindful of the fact that Mrs. Halom would continue to have a right to encroach on capital in the event that any of the capital is restored to the estate. Nevertheless, I think that if restoration of capital is indicated, such an order should be made.

14 In summary, I would reserve final judgment on the appeal pending the filing of an affidavit by Mrs. Halom.

***Macfarlane J.A.* (*Craig J.A.* concurring):**

15 This appeal is from an order of a Local Judge of the Supreme Court pronounced 28th June 1985 dismissing the petitioners' application that Irma Halom, the trustee of the estate of Stephen Halom, account for moneys allocated to herself, under a power to encroach upon capital, and for an order that the respondent be removed as trustee of the estate.

16 Irma Halom sought and obtained a declaration that she was entitled to transfer to herself in her personal capacity the entire capital of the estate. The appellants also appealed that part of the order.

17 The deceased, Stephen Halom, made his last will and testament on 27th January 1961 in which he appointed Irma Halom, his wife of 26 years, as executor and trustee of his estate during her lifetime. The will was made in these circumstances. All of the assets of the family were in the name of Stephen Halom. His wife had no assets in her own name.

18 Stephen Halom left the income of his estate to his wife during her lifetime for her sole use. He gave his trustee, Mrs. Halom, the following power to encroach upon capital:

> I FURTHER DIRECT that my Trustee may encroach upon all parts of the capital of the [sic] my estate to provide such sum as she in her sole discretion shall deem necessary for the proper care and maintenance of my wife IRMA HALOM.

19 The will provided that upon the death of Irma Halom a trust company should act as trustee and should divide the residue of the estate equally between the nephews of the testator, Frank Stephen Saunders (referred to in the will as Frank Szende) and Alexander Michael Saunders.

20 The will provided that if both nephews predeceased Irma Halom, the residue of the estate was to pass to Irma Halom absolutely.

21 The will also provided that if a company, Horvath Investments Ltd., demanded payment on a note given by Stephen Halom to the company, and did so during the lifetime of his wife, that the bequests to the two nephews would lapse and that the residue of the estate would pass to Irma Halom absolutely.

22 The will also provided that if Irma Halom and the two nephews predeceased Stephen Halom, the estate would be divided into two parts, one of which would be paid to the issue of the two nephews, per stirpes, and the other part of which would be paid to the University of British Columbia for medical research. If the nephews died without issue, then the university was to have the whole of the residue.

23 Stephen Halom died on 8th February 1965 leaving a net estate of $633,843. His wife and his two nephews survived him. Mrs. Halom took probate of the will and assumed the position of executrix and trustee. She had the power to appoint a trust company as her agent to administer the estate, but declined to do so.

24 Presumably, Mrs. Halom allocated all of the income from the estate to herself during the administration of the estate. She also exercised her power of encroachment. She advanced moneys to herself in 1967, 1969, 1970, 1971, 1972, 1973, 1975, 1977, 1979 and 1980. The encroachments amounted to $609,641 and by 1980 the capital of the estate was exhausted. The material does not disclose the purpose for which the capital encroachments were made. In an affidavit sworn by Mrs. Halom on 31st May 1985 she stated:

> I believe that my husband's Will granted me a general power of appointment over the whole of his Estate. Between 1966 and 1980 I exercised my general power of appointment by bringing all the capital assets of my husband's Estate into my own name.

25 In dismissing the petition and granting the declaration to which I have referred, the judge gave these reasons:

> From the authorities cited it is clear that the intention of the testator as declared in the words used in the will is to govern. Here the testator made his wife the sole trustee and executrix. He gave her the right to the income of the estate for her lifetime and he directed that as trustee she was entitled to encroach upon all parts of the capital of the estate "to provide such sum as she in her sole discretion shall deem necessary for the proper care and maintenance" of the wife. I find no language in the will creating a limitation on the power to encroach. There is simply a power to encroach and an absolute discretion in the wife to determine what sums she deems necessary for her purposes. In my respectful view the addition of the words "for the proper care and maintenance of my wife" does not impose any limitation. To read some such limitation into the will would be to ignore the clear wish of the testator to confer a complete discretion on his wife. Whether or not the nephews' interests are vested and subject to divestment, or unvested until determination of the life interest, is not determinative. The wife says that she determined that her need extended to the entire estate, and accordingly as trustee she has taken possession of the assets as she was entitled to do. There will be a declaration that Irma Halom, widow of Stephen Halom, deceased, was entitled under the will to transfer to herself the entire capital of the estate as she has done. The respondent is entitled to her costs.

26 The appellants' submission may be stated in this way: The appellants submit that the judge erred in failing to find an intention on the part of the testator to limit the trustee's power of encroachment on capital. It is submitted that the word "encroach" denotes a gradual process, the word "necessary" denotes need, and the words "proper care and maintenance" are words of limitation. It is submitted that the trustee failed to exercise any real discretion, and failed to act fairly and in good faith in deciding to appropriate the whole of the capital of the estate to herself.

27 In particular, the appellants submit the judge erred when he:

> (a) held that there was no language in the will limiting the encroachment power thereby failing to give proper weight and meaning to the words "encroach, necessary, care and maintenance";
>
> (b) held that the will conferred an absolute discretion on the wife to determine what sums she deemed necessary for her purposes without finding that those purposes must be related to necessary care and maintenance;
>
> (c) drew from the will the clear wish of the testator to confer a complete discretion on his wife and that such discretion was not reviewable;
>
> (d) found that there was evidence before him that the respondent had made a determination of need;
>
> (e) failed to find that the respondent as trustee, owed a fiduciary duty to the petitioners (appellants).

28 I agree with the appellants that the power to encroach was not absolute. It was limited to what the trustee, in her sole discretion, deemed necessary for her proper care and maintenance.

29 The judge said in his reasons that "the wife says that she determined that her need extended to the entire estate, and accordingly as trustee she has taken possession of the assets as she was entitled to". Counsel for the respondent, when asked to refer us to the wife's evidence in that respect, directed our attention to the statement referred to in Mrs. Halom's affidavit of 31st May 1985 showing the allocation of capital to Mrs. Halom during the period 1966 to 1980. Counsel for the respondent submits that it is a reasonable inference from that statement that the widow's need extended to the entire estate. Counsel submits that the wife deemed it necessary to make these encroachments and it should be inferred that they were for the purposes described in the will. He concedes that there is no other evidence to support the judge's finding that the respondent had made a determination of need.

30 Some support for that view is found in *Re Shuker's Estate; Bromley v. Reed*, [1937] 3 All E.R. 25 (Ch. D.). In that case the wife of the testator was appointed executrix and sole trustee of his will. She was directed [p. 27]: "... to retain the income thereof for her own use and benefit absolutely with power to convert to her own use from time to time such part or parts as she may think fit of the capital of my said real and personal estate or the investments or sale proceeds thereof". The testator provided that upon the death of his wife certain nephews and nieces would take the residue of the estate. The widow considered that the words of the will gave her a general power of appointment, during her lifetime, over the whole of the residuary estate and she converted the whole estate to her own use. The court held that she was entitled to do so and that she had a general power of appointment. The question then arose whether she had exercised that power. The court held that the fact that she had converted the whole estate to her own use, and her declaration that she had done so made it clear that she had executed the power contained in the will.

31 That case was referred to in *Re Baskin; Can. Trust Co. v. Baskin*, [1954] 2 D.L.R. 748 (B.C.). Mrs. Baskin left a will appointing her husband George Baskin as trustee of her estate. She directed that the trustee [p.749]: "... pay to my dear husband George Baskin in each year during his lifetime and during each year from time to time, as and when he so desires to be paid, an amount of money sufficient for his personal comfort, medical care, transportation or any cost relating to the cost of living". She further provided in her will that [p.750]: "... After the death of my husband, should there be any portion of my estate left ... the Royal Trust Company ... shall become Trustees and ... that the remaining portion of my estate then left be paid over by the said Trust Company to the Winnipeg Foundation". In referring to *Re Shuker*, Mr. Justice Macfarlane observed that in will cases, authorities are not often of binding effect for the language used is seldom the same and the facts are usually different, but the guiding principle is and must always be to find the intention of the testator as expressed in the words he has used. I pause to say that both counsel in this case are agreed on that principle. Mr. Justice Macfarlane did not find any limitation upon the power to encroach on capital in the *Baskin* estate. He concluded by saying [p.753]:

> In this will, I think the language is such as to show that the intention of the testatrix was that her husband was given the general power exercisable during his lifetime to appoint any or all of the estate of Annie Eleanor Baskin to himself. I would find also that he did so and I would hold therefore that there is no liability on his executor to render any further account.

32 The appellants submit that those cases do not assist the respondent because they involve wills having no words of limitation. The appellants submit that when there are words of limitation, then the residuary beneficiaries are entitled to have an accounting to determine whether the discretion of the trustee has been exercised for the specific purpose described in the will. They cite *Re Mattick* (1967), 60 W.W.R. 503, 62 D.L.R. (2d) 539 at 544 (B.C.), for the proposition that there must be some foundation in fact and in law for the exercise of such a discretion, and *Re Rutherford*, [1961] O.R. 108 at 111 (H.C.), to show that if the discretion of the trustee is not exercised for the purposes set out in the trust it cannot be exercised for some other purpose, and that the court will prevent the trustee from exercising the power improperly. But neither of those cases was one where the discretion was to be exercised by the same person who was trustee and a beneficiary. The *Mattick* case decided that a co-trustee was entitled to certain information so that it could exercise a bona fide discretion. The *Rutherford* case did not involve exercise of a power by a trustee in favour of himself.

33 The appellants, in effect, ask this court to supervise the administration of this estate. I think counsel for the respondent is correct when he summarizes the effect of the cases in this way. The court is loath to interfere with the discretion exercised by a trustee in a case where the trustee and the beneficiary are the same person. That is so even where there are residuary beneficiaries, and the trustee might exhaust the estate by using all the capital for his or her own purposes if intervention would be inconsistent with the intention of the testator, to draw from the language of the will.

34 The court will intervene in cases where a beneficiary is not the sole trustee and where the trustees are in deadlock: *Re Mattick*, and in cases where it is alleged that the trustee or beneficiary has acted mala fides or has failed to exercise a discretion at all.

35 In this case the appellants do not allege mala fides on the part of the trustee but they do submit that the trustee failed to exercise her discretion within the limits imposed by the terms of the will. They submit that the payment by the trustee to herself of all of the capital of the estate is not an exercise of discretion at all.

36 It is necessary to have regard for the language used by the testator in drawing his will, and to the circumstances surrounding the execution of it to find the intention of the testator. He and his wife had lived together for 26 years. All of the family assets were in his name and his wife had no assets in her name at the date of his death. Even the matrimonial home was in his name. The nephews were, at the date the will was drawn, of majority, of independent means and attracted only the secondary intention of the testator. The dominant intention of the testator was that his widow should receive all of the income of the estate for her own use absolutely during her lifetime, and the whole of the capital of the estate in the event of the occurrence of the contingencies that I have mentioned. She had a very wide power of encroachment on capital. Her husband had left it to her to decide, in her sole discretion, whether to advance capital from the estate. The discretion was to be exercised on a subjective basis. Encroachment was to be made if she deemed it necessary to do so. In considering whether the court ought to intervene to review the exercise of that discretion, it must be kept in mind that no objective standards could be applied to determine whether she had properly exercised the discretion. The testator had prescribed a subjective test. The purpose of the encroachment was expressed in broad terms. "Proper care" may be equated to the well-being of the widow. By the terms of this will it was her well-being as she perceived it. The court, in seeking to determine whether moneys had been advanced for the "proper care" of the widow, would find itself in a very difficult if not impossible position. It would have to stand in the shoes of Mrs. Halom and guess what she might have deemed necessary for her proper care and maintenance.

37 The testator did not appoint a third party or the court to decide to encroach upon capital. He gave his widow the sole discretion to decide that matter. For this court to step into the shoes of the trustee and to decide what was necessary and proper for the care and maintenance of Mrs. Halom, and to ask what she spent, when she spent it, what she purchased, and why she did so would, in my opinion, be to act contrary to the clear intention of the testator that his wife should be unfettered in making that decision, and to impose an unjustified and restrictive regime where none was intended.

38 If the widow had said in her affidavit that she encroached upon capital because she in her sole discretion deemed it necessary for her proper care and maintenance to do then, in the absence of allegations of mala fides or some evidence that she had not appropriated the funds of the estate for the designated purpose, the court would not interfere. There is no basis in the material for suspecting that the encroachments were not made in accordance with the limitations prescribed by the testator. To put it another way, there is no evidence that the trustee did not deem it necessary to make the advances for her proper care and maintenance. The encroachments were made over a period of 14 years. Twenty years have passed by since her husband's death, and she could have encroached upon capital over the whole of that time. The encroachment amounts to approximately $610,000. Over 14 years that is approximately $43,600 a year. Over 20 years, it is approximately $30,500 a year. She is still alive. She was married to a wealthy man. She had no moneys of her own when he died. She was entitled to live in the style to which she had become accustomed, which likely was a high standard of living. The value of a residence of the type that she was accustomed to would be substantial. In any event, she was entitled to choose whatever standard of living she deemed necessary for her well-being. There is no purpose in questioning her to determine whether her tastes involve living in an expensive house, having an expensive automobile, or taking expensive trips. It really does not matter. The testator, by the broad terms of his will, must be taken to have intended that she have whatever she thought necessary for her well-being and for her support. There was no duty on her, and no reason to believe that the testator intended her to preserve the estate for the petitioners, who are adults and are apparently well-to-do. They might not even survive her and, if they did not, she was entitled to the whole of the estate. The fact that the estate was exhausted in the process of encroachment is irrelevant. If the proper care and maintenance of the widow, as she perceived it, resulted in the exhaustion of the capital of the estate, then that was a result which was reasonably to be anticipated under the will.

39 Reference to the relief claimed by the petitioners reveals the extent to which they ask the court to interfere with the exercise of the respondent's discretion under the will. The petitioners apply, inter alia, for an order that the respondent pass her accounts and that:

> 2. Such accounts shall follow normal accounting practise and in particular and without prejudice to the generality of the foregoing such accounts shall contain:
>
> (a) A statement of the assets of the estate as of the date of the accounts and the book value thereof;
>
> (b) Particulars of the disposition of the assets of the deceased;
>
> (c) Particulars of the sales and purchases in the capital account of the estate from the date of death until the date of the accounts;
>
> (d) Statements of the income for the various fiscal periods from the date of death until the date of the accounts and particulars of the disposition thereof;
>
> (e) Copies of all income tax statements filed by the Respondent from the date of death to the date of the hearing.

40 The above relief involves consideration of income received by the respondent from the estate and of her income from all other sources. It raises the question whether, on an objective basis, she required care and maintenance during the relevant periods. It must involve an inquiry into the assets of the estate generally and whether, on an objective basis, those capital assets ought properly to have been applied for the care and maintenance of the widow. Such an inquiry would inevitably lead the court, or an officer of the court, to decide in the place of the trustee whether she should have deemed it necessary, from her point of view, to encroach to the extent that she did for her well-being and her support. In my opinion, that type of inquiry would be completely contrary to the intention of the testator.

41 I would dismiss the appeal.

Appeal dismissed.

Tab 26

Common business practice today puts much more emphasis upon specialization and delegation than was the case one hundred years ago, perhaps in response to the considerably increased sophistication of business and commerce. As a result, the old rule of *delegatus non potest delegare* seems, in effect, to have given way to a new rule which permits delegation subject to the requirement that a fiduciary make the policy decisions himself, and subject also to legislative intervention as concerns investment decisions. If this is so, the current problem is not so much which types of agent expertise the trustee may properly hire, but which items of trust business require the trustee's personal attention and decision.

The scope of delegation justified under modern business practice also throws into relief the need for utter clarity in the law as to the responsibility of a trustee for the agents he employs. As we will see, that clarity does not always exist in Canada.[23]

B. Delegation Between Trustees

Trustees must act together.[24] "Nothing is better settled than that where there are several trustees all must act," said MacLennan J.A. in *Gibb v. McMahon*.[25] Executors, though for many purposes they have the powers and duties of trustees, may act individually and bind the deceased's estate if the assets being dealt with are pure personalty and the executor in question is acting within the scope of his duties, but when the asset is realty, executors also, like trustees, must act jointly.[26] This means that trustees, and sometimes executors, must act jointly or the act is invalid and the trust or estate is not bound.[27]

Whether a trustee may authorize his co-trustees to act on his behalf depends on the nature of the task involved. The principle is that a trustee may only delegate to his co-trustee in cases where a third party agent could have been employed. Certainly a trustee cannot leave the trust duties to his co-trustees with the explanation that he does not want to be bothered. The proper course for such a trustee is to retire, but, if he chooses not to retire, he remains liable where his personal participation as a

cannot delegate that duty – merely administrative functions can be delegated. See *Ahmad v. College of Physicians & Surgeons (British Columbia)* (1970), 18 D.L.R. (3d) 197, [1971] 2 W.W.R. 60 (B.C. C.A.).

23 A thorough investigation of the whole question can be found in B.C. Law Institute, *Statutory Powers of Delegation by Trustees*, Report No. 11 (2000).

24 The common law of Canada, as of England, also requires that they be unanimous in their *decisions*, unless the settlor or testator provides to the contrary (although in England trustees of charitable trusts can act by majority: *Re Whiteley*, [1910] 1 Ch. 600 (Eng. Ch. D.)). Where there is such a provision, it normally permits a majority decision to bind all the trustees. The Quebec *Civil Code* requires only majority decisions, unless the instrument provides otherwise (see C.C.Q., arts. 1278, 1332).

25 (1905), 9 O.L.R. 522 (Ont. C.A.), affirmed (1906), 37 S.C.R. 362 (S.C.C.) at 525 [O.L.R.].

26 *Willcocks v. MacLennan*, [1946] O.W.N. 490 (Ont. C.A.).

27 But see *Theodore I Sherman v. Minister of National Revenue* (1976), 76 D.T.C. 1170 (T.R.B.): the Board has an inherent jurisdiction to hear the appeal launched in the name of less than the full number of trustees, though all had agreed to appeal. Unanimous agreement to appeal to the Board was not therefore necessary. For the purposes of the *Income Tax Act*, the trust "is considered to be a legal entity" (at 1172), and the trustee who brought the action in this case was acting as an agent for the trust.

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of his co-trustees.[28] No express or s
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In British Columbia,[31] Manitob
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C. Delegation of Ministerial

1. Background to the Legislati

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28 In *Dover v. Denne* (1902), 3 O.L.R. 664 (
other than a term of the trust requiring o
to his co-trustee, relieves the trustee fro
were excused from liability on the grou
can exonerate a trustee. See *infra*, Part II

29 In *Mitchell v. Richey* (1865), 12 Gr. 88
trustee was not liable if he accepted the
would receive all rents and profits and a
concern with the matter. The co-trustee
had in mind, however, only the misappr
trustee as an agent for collection purpose
has himself done no wrong, and who was
under such circumstances for the miscon
regarded as wrongly decided.

30 *Ibid.*, at 90-91, *per* Spragge V.C., disagr

31 *Trustee Act*, R.S.B.C. 1996, c. 464, s. 14

32 *Trustee Act*, C.C.S.M., c. T160, s. 36.

33 *Trustees Act*, R.S.N.B. 1973, c. T-15, s.

with particular fact situations that it is hard to discern a clear answer to this question.[27] In principle, if the beneficiary is enriched, he should be liable to meet the expenses of the person who has thus enriched him, and this approach is applied in those cases where the court deems a person a constructive trustee of property for another. The constructive trustee, although he installed the improvements, for instance, thinking or intending to claim that the property in question is his own, will be held entitled to recover what he put into the property.[28] In a sense this is an imposition upon the beneficiary who did not ask for the expenses to be incurred, and had no reason to think they would be incurred, but at least on the security of the work put into the property he can raise money to pay the expenses, so that, even if he is impecunious, he has not to sell the asset in order to be able to reimburse the trustee his expenses. On the other hand, the licensees in *Fultz v. McNeil*[29] did not have to service the loan, though it was undoubtedly to their advantage that it was carried through, and in *Vermont Loan & Trust Co. v. Ennis*[30] the bondholders received moneys from the trustee by way of interest payments, and yet were allowed to put the burden of this improper payment on to the trustee's pocket.

Can a trustee claim interest on money he pays out of his own pocket in order to discharge the trust from a liability which urgency and good business require be met, though at the time the trust did not have sufficient liquid assets? If the trustee thereby saves the trust money, as for instance where the trustee pays mortgage instalments, the courts have been prepared to subrogate the trustee to the mortgagee's rate.[31] In England, somewhat illogically perhaps, the only situation in which the trustee can have interest is when he can be subrogated to a creditor's rights. In Ontario by way of contrast, it is the practice for the courts to allow interest whenever the trustee's advance was in the best interest of the estate, and such circumstances will exist when, for instance, federal and provincial taxes, court fees, and trade creditors are paid.

If a trustee receives quotations from two companies for the completion of work on the trust property, does he act unreasonably if he accepts the higher quotation, given the comparable quality of the work of the two tenderers? There could be an analogy with the trustee who brings or defends an action without having obtained the prior advice of the court, and is then unsuccessful; the court may allow him the costs only of a motion for advice.[32] Should the trustee be allowed only the value of the lower quotation when the accounts are presented? Would the size of the trust fund be a question which the trustee ought to consider, and is it unreasonable for the

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[27] The 5th edition of *Widdifield on Executors' Accounts* (1967) at 102, cited a number of English cases where such a claim was successful. But see *Re Winchester Estate* (1960), 32 W.W.R. 224, (sub nom. *Tellier v. Borchet*) 26 D.L.R. (2d) 205 (Alta. S.C.): even if there is a claim for having benefitted the estate, only the trustee can claim a charge on this basis. The third party, who has completed improvements, cannot.

[28] *Bevis v. Boulton*, *supra*, note 23.

[29] (1906), 38 S.C.R. 198 (S.C.C.).

[30] [1933] 2 W.W.R. 397 (Sask. C.A.).

[31] *Re Seibel*, [1931] 2 W.W.R. 581 (Sask. K.B.).

[32] See the extended discussion in *Royal Trust Co. v. Bonsall*, [1925] 2 W.W.R. 103, [1925] 3 D.L.R. 141 (Sask. K.B. [In Chambers]), *per* Taylor J.

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trustee not to? A trustee with a relatively small fund and beneficiaries who are infants in large measure dependent upon the income and the maintenance of the real capital value may be of the view that the best investment advice possible should be obtained, regardless of the high fees charged. Yet the size of the fund may suggest that much less expensive investment service be accepted. Is a trustee justified in taking a second professional opinion when the trustee has already obtained one professional opinion? It is not merely a question of whether there is evidently room for a difference of view as to what should be done in the circumstances, but that the trustee is aware of the dangers of relying upon a dogmatic opinion when, in fact, professionals would entertain different views on the matter in question and the trustee was expected to have known of this.[33]

These are the sort of questions which cannot be argued except in the setting of particular facts, but they are typical of the daily issues that face a trustee. By and large, beneficiaries want the maximum return from the trust with the minimum expenditure, and they want the advantage of both investment risk and security. The trustee's expenses will be seen after the event and often in the light of its outcome, which may encourage beneficiaries to think that things could have been handled with more economy. Ultimately, therefore, the trustee is reliant upon the courts taking somewhat the same attitude toward the trustee incurring expenses as they take toward the exercise of the trustee's discretions. Namely, could it be said that a person, giving honest attention to the matter, could not have come to such a conclusion?

2. Legal Costs

The trustee is entitled to be indemnified for all the costs, charges and expenses which the trustee has reasonably incurred. The test is always the same, "reasonable expenses which have been incurred in [the trustee's] management of the estate, and these include the costs of an action reasonably defended."[34] But legal costs deserve

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[33] Under the *Trustee Investments Act*, 1961, c. 62, s. 6(1) and (2) (Eng.) (see now the *Trustee Act*, 2000, c. 29, s. 5) the trustee was required to have professional advice on the security of land in which he proposed to invest on mortgage, and to have further professional advice on the advisability of this type of investment against the background of the nature of the particular trust. Would a trustee be negligent who did less, but was not tied to the Act because he has a totally discretionary power of investment? To put the question another way, is this amount of professional advice a criterion for the assessment of what expenses are reasonable?

[34] *Re Dingman* (1915), 35 O.L.R. 51 (Ont. C.A.) at 52. See *Pearce v. Hubic Estate* (1992), 104 Sask. R. 182, 95 D.L.R. (4th) 140 (Sask. Q.B.), additional reasons at (1992), 104 Sask. R. 182 at 195 (Sask. Q.B.), affirmed (1996) 141 Sask. R. 125, 133 D.L.R. (4th) 217, 11 E.T.R. (2d) 97 (Sask. C.A.), leave to appeal refused (1996), 204 N.R. 399 (note) (S.C.C.) as an example of a situation in which an administrator's defence of an action was considered reasonable. See also, e.g., *B. (J.D.D.) (Litigation Guardian of) v. G. (J.E.)* (2000), 32 E.T.R. (2d) 18 (Ont. S.C.J.). For a case in which an action brought by executors was not considered reasonable and they were personally responsible for the expense of the action, see *Kozicki Estate v. Kozicki Farms Ltd.* (2004), [2004] S.J. No. 218, 2004 CarswellSask 235 (Sask. Q.B.); and *A. (S.) (Trustee of) v. S. (M.)*, 2005 CarswellAlta 1499, (sub nom. *Andruchow v. Seniuk*) 383 A.R. 271, 20 E.T.R. (3d) 123 (Alta. Q.B.) (where the trustees were ordered to pay personally the costs of defending a motion that, being made, was successful in striking out part of the

some special mention because of the closer examination to which the courts submit these claims. Why legal costs should be singled out for such special scrutiny is hard to discern; one would have thought that all trustee expenses, in whatever way they are incurred, should receive the same close scrutiny, but perhaps the courts see a special danger in the temptation of the trustee to litigate at the trust fund's expense.[35]

A trustee may retain a solicitor, but, unless he is authorized by the trust instrument, he may not employ the solicitor to carry out those tasks which do not require professional skill, and can be performed by a layman. The position of a professional trustee who is a solicitor, is different; he has a statutory right to a "fair and reasonable" allowance in respect of the "necessary professional services" which he has rendered.[36] What charges of a solicitor employed by the trustees may be imposed on the trust fund depends on such circumstances as the complexity of the trust terms, the ambiguity of its language, and the expenses of litigation. A solicitor is employed by the trustees, there is no such person as the so-called solicitor to the trust, and the solicitor's charges must therefore be presented to the beneficiaries as the trustees' costs. When the relationship is that of trustee and beneficiary, the trustees' litigation costs are payable on a solicitor and client basis,[37] but when it is that of trustee and a third party, his litigation costs are on a party and party basis. It is only when he comes to claim those costs against the trust property that the solicitor and client basis is relevant.[38]

It is the duty of trustees to seek the court's advice whenever they are in doubt as to the construction of the trust instrument, the scope of their duties or powers, or any other legal question. Their costs in connection with applications to the court for advice are therefore normally regarded as properly incurred; the court is only likely to take a different view in those rare circumstances where it considers the answers to the questions put to the court to be well-settled and obvious.[39] However, the

trustees' statement of claim). See also *Moeller Estate v. Sanderson Estate* (May 12, 1986), Doc. Kitchener 12910/83, 13153/ 83, [1986] O.J. No. 1921 (Ont. Dist. Ct.) (in which an administrator of an estate was found personally liable for costs in defending an action); *Robinovitch Estate v. Robinovitch* (1994), 98 Man. R. (2d) 116 (Man. Master) (disallowing legal fees in excess of what was justifiable); and *Re Cleiren Estate* (1999), 30 E.T.R. (2d) 34 (Alta. Surr. Ct.), additional reasons at (2000), 32 E.T.R. (2d) 177 (Alta. Surr. Ct.).

35 *Cummings v. McFarlane* (1851), 2 Gr. 151 (U.C. Ch.).

36 *Trustee Act*, R.S.O. 1990, c. T.23, s. 61(4). See further, *infra*, Part II.

37 But see *Widdifield*, chapter 4, para. 4.5.7, as to the position of a solicitor-trustee under s. 61(4) of the *Trustee Act*, R.S.O. 1990, c. T.23, and similar provisions in the Trustee Acts of Manitoba, Northwest Territories, Nova Scotia, and Yukon.

38 *Royal Trust Co. v. Penny Spruce Mills Ltd.* (1962), 35 D.L.R. (2d) 120 (B.C. C.A.).

39 *Re Vant* (1958), 27 W.W.R. 429 (Man. Q.B.). However, a trustee who seeks the advice of the court under the *Trustee Act* on matters which are essentially within his discretion may be required to carry his own costs: *Re Boukydis*, 60 O.L.R. 561, [1927] 3 D.L.R. 558 (Ont. C.A.) (see also *Montreal Trust Co. of Canada v. James* (1985), 66 B.C.L.R. 265, (sub nom. *Re Lotzkar*) 19 E.T.R. 135 (B.C. S.C.) applying this principle of *Re Boukydis* to an executor). There are several other decisions to the same effect. See, e.g., *Tecumseh Public Utilities Commission v. MacPhee*, 66 O.L.R. 231, [1931] 1 D.L.R. 538 (Ont. C.A.). For refusal of costs to both applicant beneficiary and respondent trustee in an advice and direction application, see *Hinton v. Canada Permanent Trust Co.* (1979), 5 E.T.R. 117 (Ont. H.C.), affirmed (February 1980), (Ont. C.A.) (unreported). *Widdifield* discusses the matter at para. 12.1.

normal allowance of litigation co
recover his costs from the trust eve
which he entered was unsuccessfu
he undertakes or defends an actio
Ontario, he often takes the risk th
did as proper and in the interests o
of the court[41] what costs he is allc
appeals, the allowance of costs out
application to the court for advice
the taking of an appeal was "idle".
or speculative litigation at the trus
and when the authorities refer to
motives institutes or necessitates
trustee who is successfully sued for
there is dishonesty or gross neglec
costs where he is ultimately vindica
of the trust.

B. Lien on the Trust Proper

The right of indemnity of the
property, it is also a first charge on t
The creditors of the trustee may be
trustee has incurred the debts in the
they stand in his shoes, and if his r
is likewise restricted. For instance,

40 *Smith v. Beal* (1894), 25 O.R. 368 (Ont.

41 *Re Dingman*, *supra*, note 34.

42 *Ibid.*

43 *Cummings v. McFarlane*, *supra*, note 35
Gr. 260 (U.C. Ch.): trustee makes consic
declaring the claims to be unjustified; *Ra*
activities making the action more expensi
to come forward with proper accounts a
action.

44 *Burn v. Gifford* (1879), 8 P.R. 44. The tru
"I do not think that varies or detracts fro
alter the rules applicable to trustees." Se
(Ont. S.C.J.) where the trustee was entitle
But see *DeLorenzo v. Beresh*, 2010 Car
trustee was ordered to repay to the estate
litigation and, while it was acknowledge
court ordered the trustee to pay out 80 p
held until a passing of the accounts. See f

Tab 27

2005 ABQB 780
Alberta Court of Queen's Bench

A. (S.) (Trustee of) v. S. (M.)

2005 CarswellAlta 1499, 2005 ABQB 780, [2006] A.W.L.D. 14, [2006] A.W.L.D. 27, [2006] A.W.L.D. 28, [2006] A.W.L.D. 80, [2006] A.W.L.D. 83, [2006] A.W.L.D. 84, 144 A.C.W.S. (3d) 187, 20 E.T.R. (3d) 123, 383 A.R. 271, 55 Alta. L.R. (4th) 184

Brian Robert Andruchow and Donald Joseph Fleming, Trustees and Guardians of the Person and Estate of Stephen Andruchow, a Dependent Adult (Plaintiffs) and Mike Seniuk and Sophie Seniuk (Defendants)

Veit J.

Heard: August 31, 2005
Judgment: October 20, 2005
Docket: Edmonton 0503-03784

Proceedings: additional reasons to *Andruchow (Trustee of) v. Seniuk* (2005), 2005 CarswellAlta 1003, 18 E.T.R. (3d) 1, 2005 ABQB 549, 48 Alta. L.R. (4th) 173 (Alta. Q.B.)

Counsel: Helen R. Ward for Applicants / Defendants
Richard B. Hajduk for Respondents / Plaintiffs

Subject: Estates and Trusts; Civil Practice and Procedure; Public

Headnote

Estates and trusts --- Trustees — Practice and procedure — Costs — General principles

Defendants successfully applied to strike out certain portions of plaintiffs' statement of claim — Defendants sought costs of hearing to be paid by trustees in their personal capacity rather than by estate — Costs would be paid by trustees personally — Contemporary state of law of costs in relation to estates was that personal representatives who embarked on elective litigation personally assumed costs risks of litigation — None of special statutory factors relating to costs had material impact — Opposition by trustees to defendants' application was not frivolous or vexatious — Trustees were not bound to oppose defendants' application — Nothing in law suggested that will of living person could be or should be dealt with by court — Trustees met earlier standard of bona fide but contemporary standard was higher and required trustees to act prudentially — Trustees had alternate avenues for exploring their concerns about relationship between defendants and dependant adult — Trustees must bear costs of hearing.

Estates and trusts --- Estates — Actions involving personal representatives — Practice and procedure — Costs — Liability of estate

Defendants successfully applied to strike out certain portions of plaintiffs' statement of claim — Defendants sought costs of hearing to be paid by trustees in their personal capacity rather than by estate — Costs would be paid by trustees personally — Contemporary state of law of costs in relation to estates was that personal representatives who embarked on elective litigation personally assumed costs risks of litigation — None of special statutory factors relating to costs had material impact — Opposition by trustees to defendants' application was not frivolous or vexatious — Trustees were not bound to oppose defendants' application — Nothing in law suggested that will of living person could be or should be dealt with by court — Trustees met earlier standard of bona fide but contemporary standard was higher and required trustees to act prudentially — Trustees had alternate avenues for exploring their concerns about relationship between defendants and dependant adult — Trustees must bear costs of hearing.

Civil practice and procedure --- Costs — Costs of particular proceedings — Interlocutory proceedings — Motions and applications

Defendants successfully applied to strike out certain portions of plaintiffs' statement of claim — Defendants sought costs of hearing to be paid by trustees in their personal capacity rather than by estate — Costs would be paid by trustees personally — Contemporary state of law of costs in relation to estates was that personal representatives who embarked on elective litigation personally assumed costs risks of litigation — None of special statutory factors relating to costs had material impact — Opposition by trustees to defendants' application was not frivolous or vexatious — Trustees were not bound to oppose defendants' application — Nothing in law suggested that will of living person could be or should be dealt with by court — Trustees met earlier standard of bona fide but contemporary standard was higher and required trustees to act prudentially — Trustees had alternate avenues for exploring their concerns about relationship between defendants and dependant adult — Trustees must bear costs of hearing.

Estates and trusts --- Mental incompetency — Miscellaneous issues

Defendants successfully applied to strike out certain portions of plaintiffs' statement of claim — Defendants sought costs of hearing to be paid by trustees in their personal capacity rather than by estate — Costs would be paid by trustees personally — Contemporary state of law of costs in relation to estates was that personal representatives who embarked on elective litigation personally assumed costs risks of litigation — None of special statutory factors relating to costs had material impact — Opposition by trustees to defendants' application was not frivolous or vexatious — Trustees were not bound to oppose defendants' application — Nothing in law suggested that will of living person could be or should be dealt with by court — Trustees met earlier standard of bona fide but contemporary standard was higher and required trustees to act prudentially — Trustees had alternate avenues for exploring their concerns about relationship between defendants and dependant adult — Trustees must bear costs of hearing.

ADDITIONAL REASONS relating to costs to judgment reported at *Andruchow (Trustee of) v. Seniuk* (2005), 2005 CarswellAlta 1003, 18 E.T.R. (3d) 1, 2005 ABQB 549, 48 Alta. L.R. (4th) 173, 16 C.P.C. (6th) 374, [2006] 1 W.W.R. 342 (Alta. Q.B.).

***Veit J.*:**

Summary

1 The defendants, who were successful in their application to strike out certain portions of the plaintiffs' Statement of Claim, ask for costs of the hearing to be paid by the Trustees in their personal capacity, rather than by the estate. They state that even Trustees must act reasonably. Sophie Seniuk, who is the beneficiary of the dependent adult's current will, also argues that her success at the hearing would be meaningless if costs were paid out of the estate.

2 The Trustees assert that their actions were taken bona fide, in the dependent adult's best interests and therefore the costs should be paid from the dependent adult's estate.

3 The costs will be paid by the trustees personally.

4 In addition to general principles relating to costs (for example, the court has discretion in awarding costs, the successful party usually gets costs, etc.) in this case, the court must also consider the factors identified by the Legislature in the *Dependent Adults Act*, including the financial position of the dependent adult's estate. Here, none of the special

statutory factors relating to costs have a material impact on the costs decision. Although the opposition by the trustees to the defendants' application was not frivolous or vexatious, nor was it prudential.

5 Trustees must act prudentially. In the circumstances here, it was neither necessary nor prudential for the trustees embark upon litigation over what amounts, in law, to a "piece of scrap paper".

Cases and authority cited

6 **By the Applicants/Defendants:** *McCullough Estate v. McCullough*, [1998] A.J. No. 111 (Alta. C.A.); *Kosic v. Kosic*, [2002] A.J. No. 675 (Alta. Q.B.)

7 **By the Respondents/Plaintiffs:** *Andruchow (Trustee of) v. Seniuk*, [2005] A.J. No. 903 (Alta. Q.B.); *Scramstad v. Stannard*, [1997] A.J. No. 302 (Alta. Q.B.); *Smith v. Beal* (1894), 25 O.R. 368 (Ont. C.A.); *Lotzkar, Re* (1965), 50 D.L.R. (2d) 357 (B.C. C.A.); *Walsh v. Cruickshank*, [1948] 1 W.W.R. 264 (Alta. T.D.); *Royal Trust Corp. of Canada v. Clarke*, [1989] B.C.J. No. 340 (B.C. C.A.); I.M. Hull *Power of Attorney Litigation* CCH Canadian Limited

8 **By the court:** *Lotzkar v. Southin* (1965), [1966] S.C.R. 69 (S.C.C.); *Lotzkar v. Southin* (1965), 50 D.L.R. (2d) 338 (B.C. C.A.); *Thompson v. Lamport*, [1945] S.C.R. 343 (S.C.C.); *Jensen Estate, Re*, [2001] A.J. No. 174 (Alta. Q.B.) - where reference is made to another decision involving the Lotzkar estate, but under the citation *Montreal Trust Co. of Canada v. James*, [1985] B.C.J. No. 38 (B.C. S.C.); *Baker v. Baker Estate*, [1993] A.J. No. 1077 (Alta. Q.B.); *Barclays Bank Trust Co. v. Goodman*, [1997] E.W.J. No. 1517 (Eng. Ch. Div.)

1. Background

9 The defendants' application to strike out certain portions of the Statement of Claim was successful: see citation for the underlying substantive decision above.

10 The *Dependent Adults Act* contains the following provisions relative to costs:

> S. 67 The Court of Queen's Bench or the Court of Appeal may order that the costs of any application or report made to it under this act
>
> (a) be paid by all or any of the following:
>
> (i) subject to the regulations, the Crown in right of Alberta;
>
> (ii) the person making the application, where it is satisfied that it would not be a hardship to do so;
>
> (iii) the person in respect of whom the application is made, where it is satisfied that it would not be a hardship to do so;
>
> (iv) the estate of the dependent adult, where it is satisfied that it would not be a hardship to do so;
>
> (b) be paid by a trustee if the trustee has been ordered to reimburse the estate under section 54;
>
> (c) be paid by the person making the application or a person opposing the application, where it is satisfied that the application or the opposition to the application, as the case may be, is frivolous or vexatious.

2. What are the general principles on the award of costs where estates are involved?

a) Costs are always discretionary

11 The respondents point out, and the applicants agree, that a court always has discretion - which must, of course, be exercised judicially - in the matter of awarding costs: *Scramstad*.

b) If the testator's words have caused a problem that must be solved by a court, the costs of the application are typically paid from the estate

12 The parties agree that a costs principle in matters involving the interpretation of wills could be stated thus: In matters involving the interpretation of wills, where the testator's choice of language has caused a problem of interpretation that must be solved by the court, the costs of that hearing are typically borne by the estate.

c) Is there a general rule of costs in estate matters to the effect that a personal representative (be it an executor or a trustee) who has a bona fide belief in a position is entitled to litigate that position and, if unsuccessful, have the estate pay the costs of litigation?

13 The applicants deny that there is any such general rule. On the contrary, they rely on my decision in *Kosic* as representative of case law establishing the following general principles:

- there is no rule that, where an estate is involved in litigation, the estate pays the costs of litigation;
- to the extent that is possible, ordinary costs principles apply to estate litigation;
- whether an executor who has a duty to protect the estate is entitled to an indemnity of costs is a matter of discretion depending on the facts.

14 In summary, the applicants' position is that even a trustee must be reasonable, and that if a trustee's elective litigation is not successful, the trustee must personally pay the costs of that litigation.

15 For their part, the respondents advance the position that, so long as trustees are not guilty of misconduct, that is so long as the litigation was not idle and that costs were not wasted with impunity, their costs should be paid by the estate: *Beal*.

16 The respondents also rely on the following extract from the decision of Sheppard J.A. in *Lotzkar, Re* at which point Sheppard J.A. is quoting with approval from the decision of Gorrell Barnes J. in *Twist v. Tye* [(1901), 18 T.L.R. 211 (Eng. Prob. Ct.)], a 1902 English decision. (It might even be emphasized that the fact that Sheppard J.A. is, in this quotation, giving the unanimous decision of the Court of Appeal on costs is particularly noteworthy because he had dissented from his brethren on the substantive issue that was before the appeal court: *Lotzkar v. Southin*.)

> Speaking generally, there are in this Division two classes of cases n which there should be, and generally is, a departure from the ordinary rule [of costs]: the first is where the litigation has been brought about through the conduct of the testator or testatrix; and the second is where the parties who have failed have reasonably been led into the litigation by a bona fide belief in their case, and have, therefore, felt it desirable to inquire into the testamentary dispositions of the testator or testatrix.
>
> (Emphasis added)

17 This summary which is adopted by Sheppard J.A. is introduced by him in the following language:

> Hence the principle on which the costs are given out of the estate are that the parties were led into the litigation by the conduct of the testator.

18 Sheppard J.A. also referred to an 1827 English decision in *Hillam v. Walker* [(1827), 162 E.R. 510 (Eng. Prob. Ct.)] where the court stated:

> But I act on the principle which always guides this Court in decreeing costs out of the estate, viz. that the party was led into the contest by the state in which the deceased left his papers.

19 On the actual facts in the Lotzkar situation, Sheppard J.A. makes it clear that the situation which required the parties to go to court was the language of the testator. As Sheppard J.A. put it:

> The appeal must be dismissed with costs. I should have been disposed, because the difficulty here is caused by the testator's language alone, to give costs out of the estate.

20 From a technical point of view, therefore, the comments by Sheppard J.A. about costs principles where the testator's language did not necessitate litigation are merely *obiter*, that is not relevant to the conclusion in the specific case.

21 Nevertheless, the respondents would also presumably take comfort from the decision of the Supreme Court of Canada in *Lotzgar Estate* which overturned the decision of the British Columbia Court of Appeal on the substantive issue, but ordered that the costs of all parties who appeared before the Supreme Court of Canada be paid out of the capital of the estate on a solicitor and client basis: see Editorial note in the citation to the Supreme Court of Canada decision.

22 The *Lotzkar* decision referred to an earlier decision of the Supreme Court of Canada in *Lamport.* That decision has been recently referred to by Alberta judges: *Jensen Estate, Re* and *Baker v. Baker Estate*. In *Jensen Estate, Re*, Rooke J. offered a summary of principles which included the following:

> (3) where a personal representative acts imprudently or improperly in bringing an application, the Court will refuse costs and may order the personal representative to pay costs to the beneficiaries based on the principle that the estate should not be wasted on unnecessary applications: Montreal, at para 3;

23 The reference by Rooke J. to "Montreal" is, co-incidentally, to yet another decision in the line of Lotzkar decisions where Spencer J. said the following:

> [para3] The basis of the present application is the allegation that the petitioner acted unreasonably in bringing on its application for the Court to grant it a power not contained in the will. A number of authorities were cited to me for the proposition that where a trustee or executor applies unnecessarily to the Court or acts imprudently or improperly in bringing on a application, the Court will refuse it costs and may order it to pay costs to the beneficiaries. The principle is that the estate should not be wasted on unnecessary applications. In *Thompson v. Lamport* (1945), 2 D.L.R. 545 it was put this way by Rand, J. at p. 52: -
>
>> The general principle is undoubted that a trustee is entitled to indemnity for all costs and expenses properly incurred by him in the due administration of the trust: it is on that footing that the trust is accepted. These include solicitor and client costs in all proceedings in which some question or matter in the course of the administration is raised as to which the trustee has acted prudently and properly.

24 In the situation here, the trustees do not suggest that there is any analogy between their issuance of the Statement of Claim and an executor's need to go to court to interpret words that a testator chose; in my view, they are correct in not drawing any such analogy. The situation here is one where a dependent adult has made a will, but there is no evidence before the court that the dependent adult is unable to make future wills. Therefore, according to law, the dependent adult has the potential capacity to make future wills: s. 65 *Dependent Adults Act*. Since the dependent adult has the potential capacity to make further wills, the court will not deal with the current will because it is only a "piece of scrap paper". The whole argument of the trustees on this motion must be that they acted reasonably in defending the motion, not that they were obliged to contest a will that had not yet come into potency.

25 In this context, because the *Lotzkar* decision is, strictly speaking, only authority for the proposition that costs will be paid out of the estate where the language adopted by the testator has caused a problem which must be resolved by the court, a principle which no one disputes, I thought that it might be useful to try to determine how English courts, at the end of the last century, were interpreting the much broader language of entitlement to costs alluded to in *obiter* by Sheppard J.A. and which is the basis for the trustees' position on this application.

26 In a decision given at the end of the 20th century, *Goodman*, a judge of the Chancery Division observes, not surprisingly, that there has been some development in the English judicial thinking on costs over the last century:

> [para5] What the bank seek are their costs out of the estate on the basis that they come before the court as a party to the proceedings in the capacity of personal representative. Alternatively, they say, on the facts they ought in any event, in all the circumstances and applying the peculiar probate rules as to costs, to have their costs out of the estate by that route.
>
> [para6] The starting point for costs is twofold: one of course is that the costs are always in the discretion of the court; two, unless there is a rule or a practice to the contrary the court will generally exercise its discretion in favour of the result that the loser pays - here the bank is the loser. The bank's first argument turns on O. 62, r. 6(2) where a person who has always been a party to any proceedings in the capacity of trustee, personal representative or mortgagee should be entitled to the costs of those proceedings, so far as they are not recovered from or paid by any other person, out of the fund held by him in that capacity or out of the mortgaged property as the case may be. The court may order otherwise only on the ground that he has acted unreasonably or, in the case of a trustee or personal representative, has in substance acted for his own benefit rather than for the benefit of the fund.
>
> [para7] This rule has a long history. It would seem probable it goes back indeed to the practice of the old Court of Chancery. It certainly goes back to O. 65 of earlier versions of the Rules of the Supreme Court, probably, I suspect, the 1880 version, but certainly those rules that were current, as will be apparent in a minute, in 1926.
>
> [para8] In the case of Re: William Plant deceased CA [1926] Probate 139 the practice was considered. It was a somewhat curious case. It was in fact an appeal from no less a judge than Wright J (as he then was) on circuit trying a probate action at Liverpool Assizes. Much of the difficulty appears initially to have arisen because nobody appearing before that learned judge had any real idea of the practice or the authorities to which they ought to refer. In the event the Court of Appeal sought to straighten the matter out. The judgments of the Court of Appeal are themselves at first sight not particularly easy to follow though to my mind, having been taken through them at some length by counsel, I have not actually much doubt of what they did say. As I view it the conclusion expressed by the Master of the Rolls, Lord Hanworth, was plainly that this rule did apply not only in what might be conventional trust proceedings but also to probate suits.
>
> [para9] He then went on in fact, having decided that and having decided that there was no unreasonableness, to consider what might be described as the peculiar probate rules as to costs which although he considered them helpfully at length, did not in the end affect his conclusion.
>
> [para10] Scrutton LJ I think was entirely at one with the Master of the Rolls on the principle that O. 65 did apply to probate suits and in fact he himself applied it. Where he differed was on the one point that (I should have said this before) the executor propounded both the will and the codicil. The will had succeeded but the codicil had not. Scrutton LJ for his part, though in the minority, would have held differently in respect of the costs of the codicil. Sargant LJ was similarly of the view that the rule applied. He also said this at page 156:
>
>> " . . . nothing is to be gained from cases where the executors named in a will have failed to establish the will, for in such cases they are not executors and have no contractual or quasi contractual rights." He cites two cases Re: Barlow and Ex parte Russell: "The only case which has been cited to us as one in which since the present rule an actual executor has been deprived of costs is In re Speke" 30 Times Law Reports 73. (That being, I paraphrase, a case where it was held that the executors had behaved unreasonably.)
>
> [para11] One of the results of that case was, despite Scrutton LJ's dissent, that the executors who had succeeded in establishing the will but failed on the codicil nonetheless got all their costs out of the estate and the will and the codicil were not treated differently.

[para12] The argument put forward by Mr. Stuart Smith for the bank is that, "So far as the instruments established in this action by the judgment I have just delivered on the merits are concerned, we, the Bank, are executors. True it is we are executors under the April will, not under the May will but that does not matter. We are a party to these proceedings in the capacity of personal representative and therefore we are entitled to our costs out of the estate". He says that this is supported by what actually happened in Re: Plant that although the executors failed on the codicil they were still able, because they had established the will, to get within the rule. Not so, says Mr. Whitaker for the defendant. The way in which Mr. Whitaker puts it seems to me to provide an answer to the whole of the point. The distinction, as I see it, is this. Where you are a party to proceedings in circumstances where you are seeking to establish your title under an instrument where ultimately you fail to establish your title as trustee or personal representative at all then, certainly so far as that part of the proceedings is concerned, you cannot say, as I see it, that you are a party to the proceedings as personal representative because that is actually what you failed to establish.

[para13] The answer, as I see it, to the "codicil" argument is this. Whether the codicil (unless it be a codicil that establishes who is executor, which may be a different point) stands or falls you are still there in front of the court as personal representative establishing what are the trusts of the instrument under which you are personal representative, whether they are varied or unvaried. It is no answer to say, "Having failed to convince the court that the May will turned me into a personal representative". I can nonetheless say that something else did because the litigation in respect of the main will is not litigation brought on the strength of being a personal representative under the April will but it is litigation brought on the strength (now seen to be illusory) of the May will. That being so I cannot for my part see that Mr. Stuart Smith gets himself within the rule at all. Therefore I reject that argument.

[para14] However, that is not of course the end of the case because there is the second limb. The position I think thus far with the bank is this. They are not in any special position under the rules but they are in the position of any other litigant in the probate proceedings who, in the event, has not succeeded. There is no special rule, and this is clear, that affects executors who have no personal interest and find themselves proving a will that fails. In *Rennie v. Massie*, [1866] LR 1 Probate and Divorce at page 118 in a short but very vigorous judgment Lord Penzance made it absolutely plain that if such an executor comes before the court he takes his risk, whatever the risk may be. "He is not bound to propound a paper", said Lord Penzance, "if he does not like to do so".

[para15] So, what are the rules? The authorities have, I think, over the past century or so developed somewhat. As I understand matters they are indeed currently as set out in Chapter 40 in the current Williams, Mortimer and Sunnuchs and are, in effect, four-fold; two of which perhaps do not matter for present purposes. One is where notice to cross-examine has been given and one where litigation has been caused by the conduct of the principal beneficiary; so it can perhaps come down to two: one is where litigation is caused by the conduct of the testator where the general rule (and it is only a general rule) is that costs come out of the estate. The other is where circumstances afford reasonable grounds for opposing. That, of course, is seen from the viewpoint of the unsuccessful opponent of the will. It can perhaps be formulated rather differently from the viewpoint of the unsuccessful would-be executor in *Twist v. Tye*, [1902] Probate 92 (which is cited in Plant) where the basic proposition is reasonable belief by the party propounding the will in the truth of the case that they are putting forward, coupled with, perhaps, some ground for investigation. That is something of a paraphrase that will do for present purposes.

[para16] In those circumstances the general practice today would appear to be not to order costs out of the estate but, in general, to leave the unsuccessful party simply to bear his own costs. None of these rules are totally immutable and, in the end, the court can exercise its discretion I think regardless.

27 Therefore, it appears to me that English decisions from the late 19th century and the early 20th century are no longer as persuasive to Canadian courts, or for that matter to English courts, as once they were. The increase of costs of litigation may well have something to do with the shift of perspective from the relatively permissive re-imbursement standard based on bona fides or lack of misconduct to the more demanding standard of prudential action.

28 In summary, the contemporary state of the law of costs in relation to estates is this: personal representatives who embark on elective litigation personally assume the costs risks of that litigation.

3. How should costs be dealt with here?

29 In addition to general principles relating to costs, in this case the court must also consider the factors identified by the Legislature in the *Dependent Adults Act*, including the financial position of the dependent adult's estate. However, in the circumstances here, none of the special statutory factors relating to costs have a material impact on the costs decision. In that context, I note that the opposition by the trustees to the defendants' application was not frivolous or vexatious.

30 In this case, although clearly the trustees had the capacity to deal with, and the responsibility to protect, the dependent adult's estate they were not bound to oppose the defendants' motion. There was, and is, nothing in the law that suggested that the will of a living person can or should be dealt with by the court. There is no doubt that the trustees meet the earlier standard of bona fide; however, the contemporary standard is higher and requires trustees to act prudentially. To embark on this litigation was not prudential. Moreover, the trustees had alternate avenues for exploring their concern about the relationship between the defendants and the dependent adult. In those circumstances, the trustees, and not the estate, must bear the costs of the hearing.

4. Costs of this hearing

31 If the parties are not agreed on the costs of the costs hearing, I may be spoken to within 30 days of the release of this decision.

Order accordingly.

End of Document

Tab 28

Most Negative Treatment: Distinguished
Most Recent Distinguished: 1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee) | 2013 ABCA 226, 2013 CarswellAlta 1015, 85 Alta. L.R. (5th) 165, [2013] A.W.L.D. 2729, [2013] A.W.L.D. 2730, [2013] A.W.L.D. 2733, [2013] A.W.L.D. 2768, [2013] A.W.L.D. 2801, [2013] A.W.L.D. 2810, 553 A.R. 324, 583 W.A.C. 324, [2013] 3 C.N.L.R. 411, 230 A.C.W.S. (3d) 54 | (Alta. C.A., Jun 19, 2013)

2007 SCC 2
Supreme Court of Canada

Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue Agency)

2007 CarswellBC 78, 2007 CarswellBC 79, 2007 SCC 2, [2007] 1 S.C.R. 38, [2007] B.C.W.L.D. 538, [2007] B.C.W.L.D. 548, [2007] B.C.W.L.D. 612, [2007] S.C.J. No. 2, 150 C.R.R. (2d) 189, 153 A.C.W.S. (3d) 46, 215 C.C.C. (3d) 449, 235 B.C.A.C. 1, 275 D.L.R. (4th) 1, 356 N.R. 83, 37 C.P.C. (6th) 1, 388 W.A.C. 1, 53 Admin. L.R. (4th) 153, 62 B.C.L.R. (4th) 40, 78 W.C.B. (2d) 316, J.E. 2007-211

Little Sisters Book and Art Emporium (Appellant) and Commissioner of Customs and Revenue and Minister of National Revenue (Respondents) and Attorney General of Ontario, Attorney General of British Columbia, Canadian Bar Association, Egale Canada Inc., Sierra Legal Defence Fund and Environmental Law Centre (Interveners)

McLachlin C.J.C., Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein JJ.

Heard: April 19, 2006
Judgment: January 19, 2007
Docket: 30894

Proceedings: affirming *Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue)* (2005), (sub nom. *Little Sisters Book & Art Emporium v. Minister of National Revenue*) 344 W.A.C. 246, 208 B.C.A.C. 246, 249 D.L.R. (4th) 695, [2005] B.C.J. No. 291, 127 C.R.R. (2d) 165, 38 B.C.L.R. (4th) 288, 193 C.C.C. (3d) 491, 7 C.P.C. (6th) 333, 2005 CarswellBC 321, 2005 BCCA 94 (B.C. C.A.); reversing *Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue)* (2004), 31 B.C.L.R. (4th) 330, 2004 CarswellBC 1370, 2004 BCSC 823 (B.C. S.C.)

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Subject: Civil Practice and Procedure; Customs; International; Corporate and Commercial; Constitutional; Family

Headnote

Civil practice and procedure --- Costs — Particular orders as to costs — Miscellaneous orders

Plaintiff was bookstore and art emporium that catered to lesbian and gay community in city — Customs prohibited importation of certain publications as obscene — Plaintiff applied for declaration that legislation was applied in unconstitutional manner — Plaintiff filed notice of constitutional question challenging validity of definition of obscenity previously established by Supreme Court of Canada — Plaintiff's application for order of advance costs was granted in part — Customs successfully appealed, and order was set aside — Plaintiff appealed further — Appeal dismissed — Public interest advance costs orders are to remain special and, as result, exceptional — Such orders must be granted with caution, as last resort, in circumstances where need for them is clearly established — In present case, there was serious issue justifying decision to have matter proceed to trial — However, it was error to hold that public importance requirement was satisfied — "Systemic Review" aspect of claim did not bring case within scope of advance costs remedy; Systemic Review was not necessarily based on prohibition, detention, or even delay of any books belonging to plaintiff — Plaintiff did not provide prima facie evidence that it continued to be targeted — "Four Books Appeal" concerned no interest beyond that of plaintiff, and therefore was not special enough to justify award of advance costs — It is only when public importance of a case can be established regardless of ultimate holding on merits that a court should consider this requirement satisfied.

International trade and customs --- Appraisal of value and determination of tariff classification — Appeal, re-determination or re-appraisal — Appeal to court — Appeal to other courts

Plaintiff was bookstore and art emporium that catered to lesbian and gay community in city — Customs prohibited importation of certain publications as obscene — Plaintiff applied for declaration that legislation was applied in unconstitutional manner — Plaintiff filed notice of constitutional question challenging validity of definition of obscenity previously established by Supreme Court of Canada — Plaintiff's application for order of advance costs was granted in part — Customs successfully appealed, and order was set aside — Plaintiff appealed further — Appeal dismissed — Public interest advance costs orders are to remain special and, as result, exceptional — Such orders must be granted with caution, as last resort, in circumstances where need for them is clearly established — In present case, there was serious issue justifying decision to have matter proceed to trial — However, it was error to hold that public importance requirement was satisfied — "Systemic Review" aspect of claim did not bring case within scope of advance costs remedy; Systemic Review was not necessarily based on prohibition, detention, or even delay of any books belonging to plaintiff — Plaintiff did not provide prima facie evidence that it continued to be targeted — "Four Books Appeal" concerned no interest beyond that of plaintiff, and therefore was not special enough to justify award of advance costs — It is only when public importance of a case can be established regardless of ultimate holding on merits that a court should consider this requirement satisfied.

Constitutional law --- Procedure in constitutional challenges — Costs

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Procédure civile --- Frais — Ordonnances particulières en matière de frais — Ordonnances diverses

Demanderesse exploitait un magasin de livres et d'arts qui desservait la communauté gaie et lesbienne de la ville — Douanes interdisaient l'importation de certaines publications parce qu'elles étaient obscènes — Demanderesse a demandé qu'il soit déclaré que la loi était appliquée de manière inconstitutionnelle — Demanderesse a déposé un

Demanderesse n'a pas démontré de façon prima facie qu'elle continuait d'être ciblée — Seule la demanderesse avait un intérêt dans l' « appel concernant les quatre livres » et, par conséquent, ce dernier n'était pas assez spécial pour fonder l'octroi d'une provision pour frais — Tribunal ne peut considérer que cette exigence est satisfaite que s'il est établi que l'affaire a une importance pour le public peu importe la décision finale au fond.

The plaintiff book store and art emporium catered to the lesbian and gay community in the city. The plaintiff fought a protracted legal battle against Customs over the detaining of obscene material, culminating in a decision of the Supreme Court of Canada ("decision No. 1"). In that case, the Court found that Customs' practices were unconstitutional, but found that the requested remedy of an injunction was not warranted. Having been told that Customs had addressed the institutional and administrative problems in the six years since the trial, but without more detailed information as to measures taken, the Court added that its findings should provide the plaintiff with a platform from which to launch any further action considered necessary.

Subsequently, in 2001, Customs detained several titles. In superior court, the plaintiff sought a reversal of the Customs' obscenity determinations, and a declaration that the relevant legislation was applied in an unconstitutional manner. The plaintiff sought an injunction, damages and special or increased costs. The plaintiff also filed a notice of constitutional question, alleging a breach of s. 2(b) of the Canadian Charter of Rights and Freedoms. The constitutional question broadened the injunction sought to prevent Customs from applying the relevant provisions to anyone or, alternatively, to the plaintiff, until the unconstitutional administration ceased.

The plaintiff applied in superior court for advance costs, claiming it had run out of money to pursue the litigation. The first issue with regard to which advance costs were sought was whether Customs properly prohibited four titles that the plaintiff wanted to import (the "Four Books Appeal"). The second issue was whether Customs had addressed the systemic problems identified in decision No. 1 (the "Systemic Review"). The third issue was whether the definition of obscenity established by the Supreme Court of Canada in a 1992 decision was unconstitutional (the "constitutional question"). The superior court judge determined that the requirements were satisfied with respect to the Four Books Appeal and the Systemic Review, and exercised discretion in favour of ordering advance costs. Customs successfully appealed, and the Court of Appeal set aside the order for advance costs. The plaintiff appealed further.

Held: The appeal was dismissed.

Per Bastarache, LeBel JJ. (Deschamps, Abella, Rothstein JJ. concurring): Public interest advance costs orders are to remain special and, as a result, exceptional. Such orders must be granted with caution, as a last resort, in circumstances where need for them is clearly established. Despite the deference owed to the exercise of a discretion by a trial judge, in this case the trial judge went beyond the applicable boundaries. As found by the trial judge, there was obviously a serious issue justifying a decision to have the matter proceed to trial. However, it was an error to find that the public importance requirement for advance costs was satisfied. The Four Books Appeal was extremely limited in scope, and the plaintiff advanced no evidence that the four books in question were integral or even important to its operations. It could not be concluded that the accused was in the extraordinary position that would justify an award of advance costs in the Four Books Appeal. The same could be said of the Systemic Review. The Systemic Review was not necessarily based on the prohibition, detention, or even delay of any of the plaintiff's books. The plaintiff did not provide prima facie evidence that it continued to be targeted. There was no prima facie evidence that Customs was performing its task improperly, much less unconstitutionally. Because the plaintiff chose to investigate Customs' general operations under the Systemic Review, the Four Books Appeal concerned no interest beyond that of the plaintiff itself, and therefore it was not special enough to justify an advance costs award. Although the plaintiff argued that the dispute was unique because of the constitutional rights involved, what must be proved is that the alleged Charter breach begs to be resolved in the public interest. It is only when the public importance of a case can be established regardless of the ultimate holding that a court should consider this requirement to be satisfied. In this case, it was not necessary to consider the plaintiff's impecuniosity.

Per McLachlin C.J.C. (Charron J. concurring) (concurring): The appeal should be dismissed, although for somewhat different reasons based on a different formulation of the test and a different analysis. The three criteria for an order for advance costs are impecuniosity, a meritorious case, and special circumstances making this extraordinary exercise of the court's power appropriate. This formulation differs from that used by Bastarache and LeBel JJ. in the present case in that the third condition is not merely that the matter be one of public interest, but that it constitute special circumstances.

The evidence supported the trial judge's finding of inability to finance the litigation. The party seeking the order must be impecunious to the extent that without such an order that party would be deprived of the opportunity to proceed with the case. The fact that other plaintiffs are pursuing similar claims might impact the overall assessment of public importance, but does not negate impecuniosity. The threshold set by the prima facie merit criterion is relatively low. The trial judge correctly considered this requirement and found it to be met. The third condition was not met in this case, not because the case entirely lacked public interest, but because it did not rise to level of special circumstances required. As was found by the Court of Appeal, this case was not shown to be special as to its circumstances or to be special by its very nature as a public interest case. At stake was the prospect of not learning how Customs proceeded on the Four Books Appeal and, in the event it proceeded wrongly, not having a remedial order. Possible insight that may be gained into Custom's practices through the prosecution of this case and the limited remedy, while of interest to the plaintiff, did not rise to the level of compelling public importance or demonstrate systemic injustice.

Per Binnie J. (Fish J. concurring) (dissenting): The appeal should be allowed with the award of advance costs reinstated for the Four Books Appeal only, with a maximum potential limit of $300,000. The ramifications of decision No. 1 went to the heart of the present matter. Canada is committed to freedom of expression, to non-discrimination and to government conducted according to law. The issues raised by the plaintiff were of pressing public interest. As the trial judge correctly observed, this case was about Charter compliance. Therefore, it should not be analyzed in business terms. The fight was not just about four books, it was about alleged systemic discrimination exemplified by the Four Books Appeal.

In light of decision No. 1, this was a special case. There was no principled reason to find that public and private interests cannot co-exist in a case that is deserving of advance costs. In this case, the impecuniosity requirement was met. The present issue was whether the rights established in principle had or would become rights in reality. The plaintiff should not have to prove that there is no one else in Canada with a potential interest in the subject matter with pockets deep enough to take up the cause. The issue of public importance was whether Customs had learned the lessons from decision No. 1 and, was performing its mandate without discrimination on grounds of sexual orientation and had lived up to the assurances it gave. A positive answer to these questions would have as much significance as a negative one. The trial judge determined that this case was special enough to rise to the level where the unusual measure of ordering costs would be appropriate. Absent a demonstration that she erred in her appreciation of the facts or the law, her assessment on this point should be upheld. The trial judge erred in principle in ordering advance costs for the extended Systemic Review because there was no such action pending. The error was with regard to the scope of the proceeding, not the appropriateness of its advanced funding. The plaintiff estimated the costs of the Four Books Appeal at $300,000. It was reasonable to cap the maximum potential public contribution at that amount, subject to further order of the trial court. A cap was fair to the public and the plaintiff because it would give notice of the upper limit to which the public purse would potentially finance the litigation.

La demanderesse exploitait un magasin de livres et d'arts qui desservait la communauté gaie et lesbienne de la ville. La demanderesse menait depuis longtemps une bataille juridique contre les Douanes en ce qui concernait des procédures, et non au caractère approprié de son financement au préalable. La demanderesse a estimé que l'appel concernant les quatre livres coûterait 300 000 $. Il était raisonnable de limiter à ce montant la contribution éventuelle du public, sous réserve d'une autre ordonnance du tribunal de première instance. Un tel plafond était juste en regard du public et de la demanderesse, puisqu'il informait du montant maximal de financement public qui pourrait être obtenu pour ce litige.

APPEAL by plaintiff from judgment reported at *Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue)* (2005), (sub nom. *Little Sisters Book & Art Emporium v. Minister of National Revenue)* 344 W.A.C. 246, 208 B.C.A.C. 246, 249 D.L.R. (4th) 695, [2005] B.C.J. No. 291, 127 C.R.R. (2d) 165, 38 B.C.L.R. (4th) 288, 193 C.C.C. (3d) 491, 7 C.P.C. (6th) 333, 2005 CarswellBC 321, 2005 BCCA 94 (B.C. C.A.), allowing appeal from judgment granting, in part, plaintiff's application for advance costs.

POURVOI de la demanderesse à l'encontre de l'arrêt publié à *Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue)* (2005), (sub nom. *Little Sisters Book & Art Emporium v. Minister of National Revenue)* 344 W.A.C. 246, 208 B.C.A.C. 246, 249 D.L.R. (4th) 695, [2005] B.C.J. No. 291, 127 C.R.R. (2d) 165, 38 B.C.L.R. (4th) 288, 193 C.C.C. (3d) 491, 7 C.P.C. (6th) 333, 2005 CarswellBC 321, 2005 BCCA 94 (B.C. C.A.), qui a accueilli le pourvoi à l'encontre du jugement qui avait accueilli en partie sa demande visant à obtenir une provision pour frais.

***Bastarache, LeBel JJ.*:**

1. Introduction

1 The appellant, Little Sisters Book and Art Emporium, is a corporation that operates a bookstore serving the gay and lesbian community in Vancouver. The issue in this appeal is whether it is proper for the appellant to have the costs of its court battle against the respondents (collectively referred to as "Customs") funded by the public purse by means of the exceptional advance (or interim) costs order contemplated in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371, 2003 SCC 71 (S.C.C.). In our view, the appellant cannot succeed.

2 The situation in *Okanagan* was clearly out of the ordinary. The bands had been thrust into complex litigation against the government that they could not pay for, and the case raised issues vital both to their survival and to the government's approach to aboriginal rights. The issue before the Court in that case was whether the bands' inability to pay should have the effect of leaving constitutional rights unenforceable and public interest issues unresolved. Mindful of the serious consequences to the bands and of the contours of the anticipated litigation, this Court decided that a real injustice would result if the courts refused to exercise their equitable jurisdiction in respect of costs and if, as a consequence, the bands' impecuniosity prevented the trial from proceeding.

3 The situation in the present case differs from that in *Okanagan*. A small business corporation is in particular engaging in litigation to gain the release of merchandise that was stopped at the border. On its face, this dispute is no different from any other one that could be initiated by the many Canadians whose shipments may be detained and scrutinized by Customs before they are allowed to receive them. But the history of this case reveals more. Understandably frustrated after years of court battles with Customs over similar issues, this corporation has chosen to enlarge the scope of the litigation and to pursue a broad inquiry into Customs' practices. The appellant wants its present interests, as well as its (and other importers') future interests, settled for good, and it wants to stop Customs from prohibiting any more imports until its complaints are resolved.

4 The question in this appeal is not whether the appellant has a good cause of action, but whether the cost of the corporation's attempt to get Customs to release its merchandise, or the costs of its broad inquiry into Customs' practices, should be borne by the Canadian taxpayer. An exceptional order such as this can be made only in special circumstances, like those in *Okanagan*, subject to stringent conditions and to the appropriate procedural controls. In our opinion, the appellant's application meets none of the requirements developed by the Court in that decision.

5 The fact that the appellant's claim would not be summarily dismissed does not suffice to establish that interim costs should be granted to allow it to proceed. That is not the proper test. Quite unfortunately, financial constraints put potentially meritorious claims at risk every day. Faced with this dilemma, legislatures have offered some responses, although these may not address every situation. Legal aid programs remain underfunded and overwhelmed. Self-representation in courts is a growing phenomenon. *Okanagan* was not intended to resolve all these difficulties. The Court did not seek to create a parallel system of legal aid or a court-managed comprehensive program to supplement any of the other programs designed to assist various groups in taking legal action, and its decision should not be used to do so. The decision did not introduce a new financing method for self-appointed representatives of the public interest. This Court's *ratio* in *Okanagan* applies only to those few situations where a court would be participating in an injustice — against the litigant personally and against the public generally — if it did not order advance costs to allow the litigant to proceed.

2. Facts

6 The appellant is a business corporation that operates the Little Sister's Book and Art Emporium, an establishment that caters to the lesbian and gay community of Vancouver. Book sales represent 30 to 40 percent of the appellant's business. Although the appellant's asset value has grown significantly in recent years, from $218,446 in 2000 to $324,618 in 2003, it still struggles to make a profit. It has never netted more than $25,000 in one year, and in 2003 it lost almost $60,000. Recent losses are at least partly attributable to an embezzlement of $85,000.

7 The appellant's claim for advance costs must be considered in the context of the history of litigation between these two parties. When the present litigation began, the appellant had already fought a protracted legal battle against Customs, which culminated in this Court's decision in *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69 (S.C.C.) ("*Little Sisters No. 1*"). In that case, the appellant, along with its shareholders, James Eaton Deva and Guy Bruce Smyth, challenged the constitutionality of Customs' procedures for detaining obscene material and of the legislative foundation for those procedures. Writing for the majority of this Court, Binnie J. agreed that Customs' practices at the time infringed ss. 2(*b*) and 15(1) of the *Canadian Charter of Rights and Freedoms*. He also determined that the burden of proving obscenity rested with the person alleging it. However, Binnie J. held that the provisions of the *Customs Act* themselves were constitutional.

8 The remedy sought by the appellant and its shareholders in *Little Sisters No. 1* was an injunction whose terms were generally the same as those of the injunction requested by the appellant in the case at bar. Binnie J. felt that a remedy of this nature was not warranted. He wrote the following, at para. 157:

> I conclude, with some hesitation, that it is not practicable to [offer a structured s. 24(1) remedy]. The trial concluded on December 20, 1994. We are told that in the past six years, Customs has addressed the institutional and administrative problems encountered by the appellants. In the absence of more detailed information as to what precisely has been done, and the extent to which (if at all) it has remedied the situation, I am not prepared to endorse my colleague's conclusion that these measures are "not sufficient" (para. 262) and have offered "little comfort" (para. 265). Equally, however, we have not been informed by the appellants of the specific measures (short of declaring the legislation invalid or inoperative) that in the appellants' view would remedy any continuing problems.

He added that the "findings [in that case] should provide the appellants with a solid platform from which to launch any further action in the Supreme Court of British Columbia should they consider that further action is necessary" (para. 158). Costs were awarded to the appellant and its shareholders on a party-and-party basis.

9 The present litigation, the appellant suggests, is the "further action" that Binnie J. anticipated. Counsel for the appellant drew a direct line tracing his client's current legal battle to this Court's refusal to offer injunctive relief back in 2000. Still arguing that it was denied the appropriate remedy nearly six years ago, the appellant seeks to have Customs bear the financial burden of its fresh complaint on these new facts.

10 This dispute over costs is related to litigation spawned by Customs' July 5, 2001 detention of books destined for the appellant. On that date, eight titles — comprising 34 books — were detained by Customs on the basis that they were obscene. The appellant was able to obtain the release of four of these titles within a month. With four titles still being detained, the appellant chose to request a redetermination for only two: *Meatmen*, vol. 18, *Special S&M Comics Edition* and *Meatmen*, vol. 24, *Special SM Comics Edition* (the "Meatmen comics"). Customs again determined that these two titles were obscene. Arguing that they were incorrectly classified, on February 14, 2002, the appellant appealed the redetermination to the British Columbia Supreme Court, as it was entitled to do pursuant to ss. 67 and 71 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.).

11 While the litigation with respect to the Meatmen comics proceeded, Customs detained another shipment of books destined for the appellant. Once again, some of the titles detained by Customs were released without the need for a redetermination. But after a redetermination, Customs still found two titles to be obscene: *Of Men, Ropes and Remembrance — The Stories from Bound & Gagged Magazine* and *Of Slaves & Ropes & Lovers* (the "Townsend books"). On September 26, 2003, the appellant appealed this decision to the British Columbia Supreme Court, seeking the same relief it was seeking with respect to the Meatmen comics.

12 The parties have agreed to have the appeals relating to the Meatmen comics and the Townsend books heard together. The prohibition of these four titles provides the factual basis for the appellant's claim on the merits.

13 In its appeals, the appellant asks for a reversal of the Customs' obscenity determinations, as well as a declaration that Customs has been construing and applying the relevant legislation in an unconstitutional manner. As a remedy, it seeks an injunction restraining Customs from applying certain sections of the *Customs Tariff*, S.C. 1997, c. 36, and the *Customs Act* to its goods. The appellant also requests damages and "[s]pecial or increased costs".

14 On August 14, 2002, the appellant also filed a Notice of Constitutional Question. Alleging a breach of s. 2(*b*) of the *Charter*, it is seeking the same remedies as specified above, but is using the constitutional question to broaden the scope of the injunction it seeks. In its Notice of Constitutional Question, the appellant states that it wants an order preventing Customs from applying the relevant sections of the *Customs Tariff* and the *Customs Act* to "anyone or, in the alternative, to the Appellant, until such time as the Court is satisfied that the unconstitutional administration will cease".

15 Bennett J. of the British Columbia Supreme Court, who is both the presiding judge in this case and the case management judge, defined the scope of the litigation in her ruling of February 6, 2003 ((2003), 105 C.R.R. (2d) 119, 2003 BCSC 148 (B.C. S.C.)). Specifically, she approved the appellant's constitutional question and found that the appeal of Customs' decision to prohibit the appellant's books "gives a factual context to the issues raised by Little Sisters" (para. 24). That decision was not appealed.

16 On January 22, 2004, about a month after this Court released its decision in *Okanagan*, the appellant applied for advance costs, claiming, in the words of Bennett J., that it had "run out of money to pursue the litigation" (para. 6). As James Eaton Deva, a shareholder in the appellant, stated in his affidavit:

> After hearing [the testimony of Anne Kline, the official of Canada Customs who is responsible for making the final determination of obscenity], we were convinced that if her testimony reflected the way Canada Customs approached this issue, then it still had deep systemic problems. If true, then our ten-year battle, and partial victory in the Supreme Court of Canada, had failed to effect any significant change. In that case, a court determination that the *Meatmen* comics were not obscene would not be sufficient. Instead, we became convinced that the only way to rectify the problems in Canada Customs was a systemic remedy, not simply a ruling on individual books. We decided that we had an obligation to seek that remedy.

3. Judicial History

3.1 British Columbia Supreme Court (2004), 31 B.C.L.R. (4th) 330, 2004 BCSC 823 (B.C. S.C.)

17 On the application for advance costs in the British Columbia Supreme Court, Bennett J. ruled in favour of the appellant. She identified three "discrete, yet linked, arguments" being advanced by the appellant (para. 15). The first issue for which the appellant sought an advance costs award was whether Customs had properly prohibited four titles that the appellant wanted to import (the "Four Books Appeal"). The second issue was whether Customs had addressed the systemic problems identified in *Little Sisters No. 1* (the "Systemic Review"). The third issue was whether the definition of obscenity established by this Court in *R. v. Butler*, [1992] 1 S.C.R. 452 (S.C.C.), is unconstitutional (the "Constitutional Question").

18 Focussing first on the question of financial capacity, Bennett J. linked the "prohibitive" cost of appealing prohibition decisions to the fact that so few of them are brought to court (para. 19). In her brief analysis on this point, she applied a test of whether the litigant "genuinely cannot afford to pay for the litigation" and concluded that the appellant could not (paras. 21-22). Bennett J. also found that replacing the appellant's current counsel was not a "realistic option" (para. 24).

19 Bennett J. then turned to apply this Court's analysis from *Okanagan* separately to each of the three issues raised by the appellant. On the *prima facie* merit requirement, Bennett J. found that there was *prima facie* evidence that Customs was not applying the obscenity test from *Butler* correctly (para. 29). She also gave some credence to the argument that Customs' procedures, under which the decision maker in the internal appeal did not look at the materials presented to the adjudicators at first instance, were flawed (para. 30). This convinced her that the Four Books Appeal satisfied the *prima facie* merit prong of the *Okanagan* test. Bennett J. then disposed of this requirement in respect of the Systemic Review and the Constitutional Question, referring, on the former, to her holding on public importance and, on the latter, to changes in the decade since *Butler* (paras. 32-33).

20 Bennett J. turned next to the question of whether the issues raised "[go] beyond individual interests, are of public importance and have not been decided in other cases" (para. 34). For the Four Books Appeal, she concentrated on the detentions that continue to affect the appellant, the "dearth of case law in this area" and the importance of freedom of expression in a democracy (paras. 35-43). She concluded that, if Customs is indeed applying the legal test for obscenity incorrectly, the issue affects all book importers and is therefore of public importance.

21 On the public importance of the Systemic Review, Bennett J. began her analysis by noting the "large magnitude of detentions" by Customs (para. 48). She found that there was "some evidence" of continual targeting of gay and lesbian material, noted that the time requirements for review were not being met, and expressed her concern about some alleged inconsistencies in Customs' detention practices (paras. 49-52). Based on the past litigation between the parties, Bennett J. was sceptical of Customs' claim that it had recently changed its practices (paras. 53-58). In fact, she stated that there was a *prima facie* case that the problems in *Little Sisters No. 1* had not been "sufficiently addressed" (para. 59). Moving from this finding, Bennett J. held that the third requirement of *Okanagan* was satisfied, based on the constitutional issues at stake and the public's interest in knowing whether the government had failed to comply with a court order (para. 61).

22 However, Bennett J. did not find that the public importance requirement had been met with respect to the Constitutional Question. Referring to this Court's decisions in *Butler*, *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2 (S.C.C.), and *Little Sisters No.1*, she held that the Constitutional Question did not raise an issue of public importance that had not been resolved in a previous case, as required by *Okanagan* (paras. 75-87). This holding has not been appealed.

23 Having determined that the three requirements in *Okanagan* were satisfied in respect of the Four Books Appeal and the Systemic Review, Bennett J. exercised her discretion in favour of ordering advance costs (paras. 44 and 63). She left the determination of the structure of the advance costs order and the quantum of the award to a later date (para. 94).

3.2 British Columbia Court of Appeal (2005), 38 B.C.L.R. (4th) 288, 2005 BCCA 94 (B.C. C.A.)

24 Leave to appeal Bennett J.'s advance costs decision to the British Columbia Court of Appeal was initially denied by Prowse J.A., in chambers. Two months later, a three-member panel of the Court of Appeal varied Prowse J.A.'s order and granted leave.

25 Writing for a unanimous court, Thackray J.A. allowed Customs' appeal. He began by commenting upon what he considered to be an "incompleteness" in the process (para. 25). Specifically, he felt that Bennett J.'s failure to consider the structure of the advance costs order and the quantum of the award undermined her order. After Bennett J.'s original order, the parties themselves had reached an agreement on structure and quantum.

26 Turning to the *Okanagan* criteria, Thackray J.A. focussed his attention on the impecuniosity and public importance requirements. On the *prima facie* merit requirement, he simply held that it was satisfied because the "case has attained a status above that of being merely frivolous" (para. 28).

27 Considering the appellant's impecuniosity, Thackray J.A. asked whether it might be possible for the court to hear the Four Books Appeal before the Systemic Review. The effect of doing so would be potentially large cost savings for the public purse, insofar as the result on the Four Books Appeal might shed light on whether the Systemic Review needed to be heard at all and, if so, whether it should be publicly funded (paras. 29 and 45). To the Court of Appeal, the inclusion of the Systemic Review in the litigation represented "an enormous escalation from [the case's] original purpose", making it proper to consider whether an advance costs award — if necessary — could be confined to the Four Books Appeal, at least at first (paras. 36-39 and 44). The Court of Appeal was also reticent to extend this Court's decision in *Okanagan* to a for-profit corporation (para. 41).

28 Thackray J.A. then turned to the public importance requirement. He noted that the Four Books Appeal was a narrow matter that was confined to four specific titles (para. 49). It did not involve broad issues that would affect all book importers.

29 On the Systemic Review, Thackray J.A. canvassed Bennett J.'s reasons in detail. He took issue with the latter's conclusions based on the fact that Customs continues to detain a large number of books, noting that this fact does not indicate that Customs' practices are in any way improper (para. 55). He also observed that the appellant was relying on evidence collected before Customs had purportedly changed its system; at most, such evidence could be relied upon to show how quickly Customs had reacted to *Little Sisters No. 1*, but it could not serve to determine whether all the problems in *Little Sisters No. 1* had eventually been addressed. This "efficiency" question was significantly less important to the public than the question of whether the problems were addressed at all (para. 57).

30 Finally, Thackray J.A. pointed out that Bennett J. had not considered whether the present litigation could be defined as "special" enough to merit advance costs, as opposed to simply being important (para. 60). Freedom of expression, he stated, is always of public interest, but not every freedom of expression case can satisfy the public importance requirement. In the present case, it was worth considering the fact that the communities on which the appellant's claim would have the greatest impact did not view this case as sufficiently important to undertake funding it (para. 63). What is more, Thackray J.A. was hesitant about spending public funds on litigation that could result in a significant award for the applicant (para. 62).

31 In all, the Court of Appeal concluded that the appellant's claim was not of sufficient significance that the public purse should be obligated to help it move forward. Thackray J.A. concluded that "the public has not appointed Little Sisters to this role" as a watchdog, and he was "not satisfied that it is necessary for Little Sisters to be the instrument of reform of Customs" (paras. 72 and 74). Although recognizing the deference owed to Bennett J., the court nonetheless felt that this was an appropriate circumstance to find that the trial judge had erred (para. 66). Accordingly, it set aside her order for advance costs.

4. Analysis

4.1 Rule in Okanagan

32 *Okanagan* concerned logging rights of four Indian bands on Crown land in British Columbia. These bands had begun logging in order to raise funds for housing and desperately needed social services. Contending that they had no

right to do so, the Minister of Forests served them with stop-work orders and then commenced proceedings to enforce the orders. The bands tried to prevent the matter from going to trial, seeking to have it determined summarily by arguing that it would be impossible for them to finance a full trial.

33 An exceptional convergence of factors occurred in *Okanagan.* At the individual level, the case was of the utmost importance to the bands. They were caught in a grave predicament: the costs of the litigation were more than they could afford, especially given pressing needs like housing; yet a failure to assert their logging rights would seriously compromise those same needs. On a broader level, the case raised aboriginal rights issues of great public importance. There was evidence that the land claim advanced by the bands had *prima facie* merit, but the courts had yet to decide on the precise mechanism for advancing such claims — the fundamental issue of general importance had not been resolved by the courts in other litigation. However the case was ultimately decided, it was in the public interest to have the matter resolved. For both the bands themselves and the public at large, the litigation could not, therefore, simply be abandoned. In these exceptional circumstances, this Court held that the public's interest in the litigation justified a structured advance costs order insofar as it was necessary to have the case move forward.

34 In essence, *Okanagan* was an evolutionary step, but not a revolution, in the exercise of the courts' discretion regarding costs. As was explained in that case, the idea that costs awards can be used as a powerful tool for ensuring that the justice system functions fairly and efficiently was not a novel one. Policy goals, like discouraging — and thus sanctioning — misconduct by a litigant, are often reflected in costs awards: see M. M. Orkin, *The Law of Costs* (2nd ed. (loose-leaf)), vol. 1, at § 205.2(2). Nevertheless, the general rule based on principles of indemnity, i.e., that costs follow the cause, has not been displaced. This suggests that policy and indemnity rationales can co-exist as principles underlying appropriate costs awards, even if "[t]he principle that a successful party is entitled to his or her costs is of long standing, and should not be departed from except for very good reasons": Orkin, at p. 2-39. This framework has been adopted in the law of British Columbia by establishing the "costs follow the cause" rule as a default proposition, while leaving judges room to exercise their discretion by ordering otherwise: see r. 57(9) of the Supreme Court of British Columbia *Rules of Court*, B.C. Reg. 221/90.

35 *Okanagan* did not establish the access to justice rationale as the paramount consideration in awarding costs. Concerns about access to justice must be considered with and weighed against other important factors. Bringing an issue of public importance to the courts will not automatically entitle a litigant to preferential treatment with respect to costs: *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69 (S.C.C.); *O.P.E.I.U., Local 378 v. British Columbia Hydro & Power Authority*, [2005] B.C.J. No. 9, 2005 BCSC 8 (B.C. S.C.); *MacDonald v. University of British Columbia* (2004), 26 B.C.L.R. (4th) 190, 2004 BCSC 412 (B.C. S.C.). By the same token, however, a losing party that raises a serious legal issue of public importance will not necessarily bear the other party's costs: see, e.g., *Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4 (S.C.C.) at para. 69; *Valhalla Wilderness Society v. British Columbia (Ministry of Forests)* (1997), 4 Admin. L.R. (3d) 120 (B.C. S.C.). Each case must be considered on its merits, and the consequences of an award for each party must be weighed seriously: see *Sierra Club of Western Canada v. British Columbia (Chief Forester)* (1994), 117 D.L.R. (4th) 395 (B.C. S.C.), at pp. 406-7, aff'd (1995), 126 D.L.R. (4th) 437 (B.C. C.A.).

36 *Okanagan* was a step forward in the jurisprudence on advance costs — restricted until then to family, corporate and trust matters — as it made it possible, in a public law case, to secure an advance costs order in special circumstances related to the public importance of the issues of the case (*Okanagan*, at para. 38). In other words, though now permissible, public interest advance costs orders are to remain special and, as a result, exceptional. These orders must be granted with caution, as a last resort, in circumstances where the need for them is clearly established. The foregoing principles could not yield any other result. If litigants raising public interest issues will not always avoid adverse costs awards at the conclusion of their trials, it can only be rarer still that they could benefit from advance costs awards. An application for advance costs may be entertained only if a litigant establishes that it is impossible to proceed with the trial and await its conclusion, and if the court is in a position to allocate the financial burden of the litigation fairly between the parties.

37 The nature of the *Okanagan* approach should be apparent from the analysis it prescribes for advance costs in public interest cases. A litigant must convince the court that three absolute requirements are met (at para. 40):

> 1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial — in short, the litigation would be unable to proceed if the order were not made.
>
> 2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
>
> 3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

In analysing these requirements, the court must decide, with a view to all the circumstances, whether the case is sufficiently special that it would be contrary to the interests of justice to deny the advance costs application, or whether it should consider other methods to facilitate the hearing of the case. The discretion enjoyed by the court affords it an opportunity to consider all relevant factors that arise on the facts.

38 It is only a "rare and exceptional" case that is special enough to warrant an advance costs award: *Okanagan*, at para. 1. The standard was indeed intended to be a high one, and although no rigid test can be applied systematically to determine whether a case is "special enough", some observations can be made. As Thackray J.A. pointed out, it was in failing to verify whether the circumstances of this case were "exceptional" enough that the trial judge committed an error in law.

39 First, the injustice that would arise if the application is not granted must relate both to the individual applicant and to the public at large. This means that a litigant whose case, however compelling it may be, is of interest only to the litigant will be denied an advance costs award. It does not mean, however, that every case of interest to the public will satisfy the test. The justice system must not become a proxy for the public inquiry process, swamped with actions launched by test plaintiffs and public interest groups. As compelling as access to justice concerns may be, they cannot justify this Court unilaterally authorizing a revolution in how litigation is conceived and conducted.

40 Second, the advance costs award must be an exceptional measure; it must be in the interests of justice that it be awarded. Therefore, the applicant must explore all other possible funding options. These include, but are not limited to, public funding options like legal aid and other programs designed to assist various groups in taking legal action. An advance costs award is neither a substitute for, nor a supplement to, these programs. An applicant must also be able to demonstrate that an attempt, albeit unsuccessful, has been made to obtain private funding through fundraising campaigns, loan applications, contingency fee agreements and any other available options. If the applicant cannot afford all costs of the litigation, but is not impecunious, the applicant must commit to making a contribution to the litigation. Finally, different kinds of costs mechanisms, like adverse costs immunity, should also be considered. In doing so, courts must be careful not to assume that a creative costs award is merited in every case; such an award is an exceptional one, to be granted in special circumstances. Courts should remain mindful of all options when they are called upon to craft appropriate orders in such circumstances. Also, they should not assume that the litigants who qualify for these awards must benefit from them absolutely. In the United Kingdom, where costs immunity (or "protective orders") can be ordered in specified circumstances, the order may be given with the caveat that the successful applicant cannot collect anything more than modest costs from the other party at the end of the trial: see *R. (on the application of Corner House Research) v. Secretary of State for Trade & Industry*, [2005] 1 W.L.R. 2600, [2005] EWCA Civ 192 (Eng. C.A.), at para. 76. We agree with this nuanced approach.

41 Third, no injustice can arise if the matter at issue could be settled, or the public interest could be satisfied, without an advance costs award. Again, we must stress that advance costs orders are appropriate only as a last resort. In *Okanagan*,

the bands tried, before seeking an advance costs order, to resolve their disputes by avoiding a trial altogether. Likewise, courts should consider whether other litigation is pending and may be conducted for the same purpose, without requiring an interim order of costs. Courts should also be mindful to avoid using these orders in such a way that they encourage purely artificial litigation contrary to the public interest.

42 Finally, the granting of an advance costs order does not mean that the litigant has free rein. On the contrary, when the public purse — or another private party — takes on the burden of an advance costs award, the litigant must relinquish some manner of control over how the litigation proceeds. The litigant cannot spend the opposing party's money without scrutiny. The benefit of such funding does not imply that a party can, at will, multiply hours of preparation, add expert witnesses, engage in every available proceeding, or lodge every conceivable argument. A definite structure must be imposed or approved by the court itself, as it alone bears the responsibility for ensuring that the award is workable.

43 For example, the court should set limits on the chargeable rates and hours of legal work, closely monitor the parties' adherence to its dictates, and cap the advance costs award at an appropriate global amount. It should also be sensitive to the reality that work often expands to fit the available resources and that the "maximum" amounts contemplated by a court will almost certainly be reached. As well, the possibility of setting the advance costs award off against damages actually collected at the end of the trial should be contemplated. In determining the quantum of the award, the court should remain aware that the purpose of these orders is to restore some balance between litigants, not to create perfect equality between the parties. Legislated schemes like legal aid and other programs designed to assist various groups in taking legal action do not purport to create equality among litigants, and there is no justification for advance costs awards placing successful applicants in a more favourable position. An advance costs award is meant to provide a basic level of assistance necessary for the case to proceed.

44 A court awarding advance costs must be guided by the condition of necessity. For parties with unequal financial resources to face each other in court is a regular occurrence. People with limited means all too often find themselves discouraged from pursuing litigation because of the cost involved. Problems like this are troubling, but they do not normally trigger advance costs awards. We do not mean to minimize their unfairness. On the contrary, we believe they are sufficiently serious that this Court cannot purport to solve them all through the mechanism of advance costs awards. Courts should not seek on their own to bring an alternative and extensive legal aid system into being. That would amount to imprudent and inappropriate judicial overreach.

4.2 Applying the Rule in Okanagan to the Facts of this Appeal

45 The appellant has asked this Court to award it advance costs with respect to two separate issues it raises in its litigation against Customs. The Four Books Appeal concerns Customs' prohibition of four books imported by the appellant for sale in its store. The Systemic Review, on the other hand, involves a broad investigation of Customs' practices relating to obscenity prohibitions.

46 We will first consider the merit of these claims, and will then discuss their public importance. We want to emphasize that the impecuniosity requirement, though listed first in *Okanagan*, cannot be used to give impecunious litigants a *prima facie* right to advance costs, as some interveners before this Court have suggested. Accordingly, we will consider it last. The question of impecuniosity will not even arise where a case is not otherwise special enough to merit this exceptional award.

4.2.1 Standard of Review

47 A trial judge enjoys considerable discretion in fashioning a costs award. This discretion has two corollaries.

48 First, a plethora of options are available to a judge when rendering a decision on costs. While the general rule is that costs follow the cause, as we have seen, this need not always be the case.

Tab 29

Law Society of Alberta

Code of Conduct

February 3, 2017

5.6 The Lawyer and the Administration of Justice

Encouraging Respect for the Administration of Justice

5.6-1 A lawyer must encourage public respect for and try to improve the administration of justice.

Commentary

[1] The obligation outlined in the rule is not restricted to the lawyer's professional activities but is a general responsibility resulting from the lawyer's position in the community. A lawyer's responsibilities are greater than those of a private citizen. A lawyer should take care not to weaken or destroy public confidence in legal institutions or authorities by irresponsible allegations. The lawyer in public life should be particularly careful in this regard because the mere fact of being a lawyer will lend weight and credibility to public statements. Yet, for the same reason, a lawyer should not hesitate to speak out against an injustice.

[2] Admission to and continuance in the practice of law implies, on the part of a lawyer, a basic commitment to the concept of equal justice for all within an open, ordered and impartial system. However, judicial institutions will not function effectively unless they command the respect of the public, and, because of changes in human affairs and imperfections in human institutions, constant efforts must be made to improve the administration of justice and thereby maintain public respect for it.

[3] **Criticizing Tribunals –** Proceedings and decisions of courts and tribunals are properly subject to scrutiny and criticism by all members of the public, including lawyers, but judges and members of tribunals are often prohibited by law or custom from defending themselves. Their inability to do so imposes special responsibilities upon lawyers. First, a lawyer should avoid criticism that is petty, intemperate or unsupported by a bona fide belief in its real merit, since, in the eyes of the public, professional knowledge lends weight to the lawyer's judgments or criticism. Second, if a lawyer has been involved in the proceedings, there is the risk that any criticism may be, or may appear to be, partisan rather than objective. Third, when a tribunal is the object of unjust criticism, a lawyer, as a participant in the administration of justice, is uniquely able to, and should, support the tribunal, both because its members cannot defend themselves and because, in doing so, the lawyer contributes to greater public understanding of, and therefore respect for, the legal system.

[4] A lawyer, by training, opportunity and experience, is in a position to observe the workings and discover the strengths and weaknesses of laws, legal institutions and public authorities. A lawyer should, therefore, lead in seeking improvements in the legal system, but any criticisms and proposals should be bona fide and reasoned.

Tab 30

Court of Queen's Bench of Alberta

Citation: 1985 Sawridge Trust v Alberta (Public Trustee), 2017 ABQB 548

Date: 20170912
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")

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 –

The Sawridge Band

Intervenor

Case Management Decision re Vexatious Litigant Status of Maurice Stoney (Sawridge #8) of the Honourable Mr. Justice D.R.G. Thomas

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I Introduction

[1] The Action to which this decision ultimately relates was commenced on June 12, 2011 by the 1985 Sawridge Trustees and is sometimes referred to as the "Advice and Direction Application". The 1985 Sawridge Trust applied to this Court for directions on how to distribute the Trust property to its beneficiaries. Members of the Sawridge Band are the beneficiaries of that Trust. The initial application has led to many court case management hearings, applications, decisions, and appeals: ***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***"); ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2017 ABQB 377 ("***Sawridge #5***"); ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2017 ABQB 436 ("***Sawridge #6***"); ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2017 ABQB 530 ("***Sawridge #7***").

[2] On July 12, 2017 I rejected an August 12, 2016 application by Maurice Felix Stoney that he and "his brothers and sisters" should be added as beneficiaries to the 1985 Sawridge Trust: ***Sawridge #6***. In that decision I concluded that Stoney's application was a collateral attack on previously decided issues, hopeless, without merit, and an abuse of court: paras 34-52. I also concluded that there was no evidence to support that Maurice Stoney's "10 living brothers or sisters" were, in fact, voluntary participants in this application: paras 8-12.

[3] I therefore:

1. limited the scope of the August 12, 2016 application to Maurice Stoney;
2. struck out the August 12, 2016 application;
3. ordered solicitor and own client indemnity costs against Maurice Stoney;
4. ordered that Stoney's lawyer, Priscilla Kennedy, appear on July 28, 2017 to make submissions as to whether she should be personally liable for that litigation costs award;
5. concluded that Maurice Stoney's August 12, 2016 application exhibits indicia of abusive litigation, and, therefore, on my own motion and pursuant to the Court's inherent jurisdiction:

   a) put in place an interim court order to restrict Maurice Stoney's initiating or continuing litigation in Alberta Courts, and

   b) instructed that Maurice Stoney, the Sawridge 1985 Trustees, and the intervener Sawridge Band may file written submissions as to whether Maurice Stoney should have his court access restricted via what is commonly called a "vexatious litigant" order.

[4] Written submissions were received from the Trustees on July 26, 2017, the Sawridge Band on July 27, 2017, and Maurice Stoney on August 3, 2017.

[5] On August 31, 2017 I issued ***Sawridge #7***, where I concluded that Priscilla Kennedy and Maurice Stoney were jointly and severally liable for the costs award ordered in ***Sawridge #6***.

[6] This judgment evaluates whether Maurice Stoney should be the subject of restrictions on his future litigation activity in Alberta courts.

II. Abusive Litigation and Court Access Restrictions

[7] The principles and procedure that govern court-ordered restrictions to access Alberta courts are developed in a number of recent decisions of this Court. This Court's inherent jurisdiction to control abuse of its processes includes that the Alberta Court of Queen's Bench may order that a person requires leave to initiate or continue an action or application: ***Hok v Alberta***, 2016 ABQB 651 at paras 14-25, 273 ACWS (3d) 533, leave denied 2017 ABCA 63, leave to the SCC requested, 37624 (12 April 2017); ***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)***, 2017 ABQB 137 at paras 92-96; ***McCargar v Canada***, 2017 ABQB 416 at para 110.

[8] An intervention of this kind is potentially warranted when a litigant exhibits one or more "indicia" of abusive litigation: ***Chutskoff v Bonora***, 2014 ABQB 389 at para 92, 590 AR 288, aff'd 2014 ABCA 444; ***Re Boisjoli***, 2015 ABQB 629 at paras 98-103, 29 Alta LR (6th) 334; ***McCargar v Canada***, 2017 ABQB 416 at para 112. Where a judge concludes these "indicia" are present and control of abusive litigation may be appropriate then the Court usually follows a two-step process prior to imposing court access restrictions, if appropriate: ***Hok v Alberta***, 2016 ABQB 651 at paras 10-11; ***Ewanchuk v Canada (Attorney General)***, at para 97.

[9] ***Sawridge #6***, at para 55 identified three types of litigation abuse behaviour by Maurice Stoney that potentially warranted court access restrictions:

1. Collateral attack that attempts to reopen 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 an uninvolved third party.
3. Initiating "busybody" lawsuits to enforce the rights of third parties, here the recruited participation of Maurice Stoney's "10 living brothers and sisters."

[10] I therefore on an interim basis and pursuant to ***Hok v Alberta***, 2016 ABQB 335 at para 105 restricted Maurice Stoney's litigation activities (***Sawridge #6***, at para 65-66), and invited submissions on whether Maurice Stoney's litigation activities should be restricted, and if so, in what manner (***Sawridge #6***, at paras 63-64).

[11] Subsequently Associate Chief Justice Rooke on July 20, 2017 granted an exception to this interim order in relation to ***Nussbaum v Stoney***, Alberta Court of Queen's Bench docket 1603 03761 (the "Rooke Order").

[12] The current decision completes the second step of the two-part ***Hok v Alberta*** process.

[13] Relevant evidence for this analysis includes activities both inside and outside of court: ***Bishop v Bishop***, 2011 ONCA 211 at para 9, 200 ACWS (3d) 1021, leave to SCC refused, 34271 (20 November 2011); ***Henry v El***, 2010 ABCA 312 at paras 2-3, 5, 193 ACWS (3d) 1099, leave to SCC refused, 34172 (14 July 2011). A litigant's entire court history is relevant, including litigation in other jurisdictions: ***McMeekin v Alberta (Attorney General)***, 2012 ABQB 456 at paras 83-127, 543 AR 132; ***Curle v Curle***, 2014 ONSC 1077 at para 24; ***Fearn v Canada Customs***, 2014 ABQB 114 at paras 102-105, 586 AR 23. That includes non-judicial proceedings, as those may establish a larger pattern of behaviour: ***Bishop v Bishop*** at para 9; ***Canada Post Corp. v Varma***, 2000 CanLII 15754 at para 23, 192 FTR 278 (FC); ***West Vancouver School District No. 45 v Callow***, 2014 ONSC 2547 at para 39. A court may take judicial notice of public records when it evaluates the degree and kind of misconduct caused by a candidate abusive litigant: ***Wong v Giannacopoulos***, 2011 ABCA 277 at para 6, 515 AR 58.

[14] A court may order court access restrictions where future litigation abuse is *anticipated*. As Verville J observed in ***Hok v Alberta***, 2016 ABQB 651 at para 37:

> ... when a court makes a vexatious litigant order it should do so to respond to anticipated abuse of court processes. This is a prospective case management step, rather than punitive. [emphasis in original]

[15] When a court considers limits to future court access by a person with a history of litigation misconduct the key questions for a court are:

1. Can the court determine the identity or type of persons who are likely to be the target of future abusive litigation?
2. What litigation subject or subjects are likely involved in that abuse of court processes?
3. In what forums will that abuse occur?

(***Hok v Alberta***, 2016 ABQB 651 at para 36).

[16] Court access restriction orders should be measured versus and responsive to the anticipated potential for future abuse of court processes. Court access restrictions are designed in a functional manner and not restricted to formulaic approaches, but instead respond in a creative, but proportionate, manner to anticipated potential abuse: ***Bhamjee v Forsdick & Ors (No 2)***, [2003] EWCA Civ 1113 (UK CA).

[17] A vexatious litigant order that simply requires the abusive person obtain permission, "leave", from the court before filing documents to initiate or continue an action is a limited impediment to a person's ability to access court remedies: ***Hok v Alberta***, 2016 ABQB 651 at paras 32-33. Though this step is sometimes called "extraordinary", that dramatic language exaggerates the true and minimal effect of a leave application requirement: ***Wong v Giannacopoulos***, at para 8; ***Hok v Alberta***, 2016 ABQB 651 at paras 32-33.

[18] Other more restrictive alternatives are possible, where appropriate, provided that more strict intervention is warranted by the litigant's anticipated future misconduct: ***Hok v Alberta***, 2016 ABQB 651 at para 34; ***Ewanchuk v Canada (Attorney General)***, at paras 167-68.

III. Submissions and Evidence Concerning Appropriate Litigation Control Steps

A. The Sawridge Band

[19] The Sawridge Band submits that this Court should exercise its inherent jurisdiction and *Judicature Act*, RSA 2000, c J-2 ss 23-23.1 to restrict Maurice Stoney's access to Alberta courts. The Sawridge Band relied on evidence concerning Maurice Stoney's activities that was submitted to the Court in relation to ***Sawridge #6***.

[20] The August 12, 2016 application was futile because Maurice Stoney had continued to repeat the same, already discounted argument. Maurice Stoney had not been granted automatic membership in the Sawridge Band by Bill C-31, and that fact had been either admitted or adjudicated in the ***Huzar v Canada***, [2000] FCJ 873, 258 NR 246 (FCA) and ***Stoney v Sawridge First Nation***, 2013 FC 509, 432 FTR 253 decisions.

[21] Maurice Stoney was allowed to apply to become a member of the Sawridge Band, but that application was denied, as was the subsequent appeal. The lawfulness of those processes was confirmed in ***Stoney v Sawridge First Nation***.

[22] A subsequent 2014 Canadian Human Rights Commission complaint concerning the membership application process again alleged the same previously rejected arguments. The same occurred before the Alberta Court of Appeal in ***Stoney v 1985 Sawridge Trust***, 2016 ABCA 51

[23] Maurice Stoney's persistent attempts to re-litigate the same issue represent collateral attacks and are hopeless proceedings. Stoney has failed to pay outstanding costs orders. His attempts to shift litigation costs to the 1985 Sawridge Trust are an aggravating factor. These factors imply that Maurice Stoney had brought these actions for an improper purpose. The August 12, 2016 application was a "busybody" attempt to enforce (alleged) rights of uninvolved third parties.

[24] Combined, these indicia of abusive litigation mean Maurice Stoney should be the subject of a vexatious litigant order that globally restricts his access to Alberta courts. In the alternative, a vexatious litigant order with a smaller scope should, at a minimum, restrict Maurice Stoney's potential litigation activities in relation to the Sawridge Band, its Chief and Council, the Sawridge 1985 and 1986 Trusts, and the Trustees of those trusts.

[25] Given Stoney's history of not paying cost awards he should be required to pay outstanding costs orders prior to any application for leave to initiate or continue actions, as in ***R v Grabowski***, 2015 ABCA 391 at para 15, 609 AR 217.

B. The Sawridge 1985 Trust Trustees

[26] The Sawridge 1985 Trust Trustees adopted the arguments of the Sawridge Band, but also emphasized the importance of Maurice Stoney's answers and conduct during cross-examination on his May 16, 2016 affidavit. The Trustees stress this record shows that Maurice Stoney is uncooperative and refused to acknowledge the prior litigation results.

C. Maurice Stoney

[27] Maurice Stoney's written submissions were signed by and filed by lawyer Priscilla Kennedy, identified as "Counsel for Maurice Stoney". The contents of the written submissions are, frankly, unexpected. Paragraphs 6 through 13 advance legal arguments concerning Maurice Stoney's status as a member of the Sawridge Band:

1. the ***Huzar v Canada*** decision cannot be relied on as "evidence in this matter";
2. ***Stoney v Sawridge First Nation*** is not a "thorough analysis" of Maurice Stoney's arguments;
3. Maurice Stoney has not attempted to re-litigate the membership issue but rather to set out the legal arguments that address the definition of a beneficiary of the 1985 Sawridge Trust; and
4. "... there have been a number of recent decisions on these constitutional issues that have and are in the process of completely altering the law related to these issues of the membership/citizenship of Indians, in order to have them comply with the *Constitution*." [Italics in original].

[28] Paragraph 14 of the written brief, which follows these statements, reads:

> It is acknowledged that this court has dismissed these arguments and they are not referred to here, other than as the facts to set the context for the matters to be dealt

with as directed on the issue of whether or not the application of Maurice Stoney was vexatious litigation.

[29] I reject that a bald statement that these are "the facts" proves anything, or establishes these statements are, in fact, true or correct.

[30] The brief then continues at paras 16-17, 24, 28 to state:

> As shown by the litigation in the Sawridge Band cases above, the on-going case in [Descheneaux c Canada (Procureur Général), 2015 QCCS 3555] and the decision of the Supreme Court of Canada in [Daniels v Canada (Indian Affairs and Northern Development), 2016 SCC 12, [2016] 1 SCR 99], and the review of the Federal Court of Appeal decision in Huzar and the judicial review in Stoney, it is submitted that this is not a proceeding where the issue has been determined by a court of competent jurisdiction. Nor is this a matter where proceedings have been brought that cannot succeed or have no reasonable expectation of providing relief.
>
> It is submitted that litigation seeking to determine whether or not you qualify as a beneficiary under a trust established on April 15, 1985 is a matter where the issue of membership/citizenship has not been settled by the courts, and this application was not brought for an improper purpose ...
>
> Contrary to the argument of Sawridge First Nation these matters have not been determined in the past Federal Court proceedings. Issues of citizenship and the constitutionality of these proceedings remains a legal question today as shown by the on-going litigation throughout Canada. Plainly, this Court has determined that these arguments are dismissed in this matter and that is acknowledged.
>
> ... No conclusion was made in the 1995 Federal Court proceedings which were struck as showing no reasonable cause of action and the judicial review was concerned with the issue of the Sawridge First Nation Appeal Committee decision based on membership rules post September, 1985.

[31] These are reasons why the August 12, 2016 application was not a collateral attack:

> No disrespect for the court process or intention to bring proceedings for an improper purpose, was intended to be raised by these arguments respecting this time period and the definitions of a beneficiary of this trust.
>
> (Written brief, para 23).

[32] Prior to going any further I will at this point explain that I put no *legal* weight on these statements. If Maurice Stoney wishes to appeal ***Sawridge #6*** and my conclusions therein he may do so. In fact he did file an appeal of ***Sawridge #6*** as a self-represented litigant on August 11, 2017. If Maurice Stoney or his counsel wish to revisit ***Sawridge #6*** then they could have made an application under *Rule* 9.13 of the *Alberta Rules of Court*, Alta Reg 124/2010 [the "*Rules*", or individually a "*Rule*"], however they did not elect to do so. I conclude these statements, no matter how they were allegedly framed in paragraphs 14 and 23 of Stoney's written arguments, are nothing more than an attempt to re-argue ***Sawridge #6***. Again, I put no *legal* weight on these arguments, but conclude these statements are highly relevant as to whether Maurice Stoney is likely to in the future re-argue issues that have been determined conclusively by Canadian courts.

[33] Other submissions by Maurice Stoney are more directly relevant to his potentially being the subject of court-ordered restrictions. He acknowledges that there are unpaid costs to the Sawridge First Nation, but says these will be paid "... as soon as it is possible ...". Stoney indicates he has been unable to pay these costs amounts because of a foreclosure action.

[34] Affidavit evidence allegedly has established that Maurice Stoney was authorized to represent his brothers and sisters, and that Maurice Stoney was directed to act on their behalf. Counsel for Stoney unexpectedly cites *Federal Courts Rules*, SOR/98-106, s 114 as the authority for the process that Maurice Stoney followed when filing his August 12, 2016 application in the Alberta Court of Queen's Bench:

> ... The Federal Court Rules, provide for Representative proceedings where the representative asserts common issues of law and fact, the representative is authorized to act on behalf of the represented persons, the representative can fairly and adequately represent the interests of the represented persons and the use of a representative proceeding is the just, more efficient and least costly manner of proceeding. This method of proceeding is frequently used for aboriginals and particularly for families who are aboriginal. It is submitted that this was the most efficient and least costly manner of proceeding in the circumstances where the claim of all of the living children possess the same precise issues respecting their citizenship.
>
> (Written Brief, para 24.)

Maurice Stoney therefore denies this was a "busybody" proceeding where he without authority attempted to represent third parties.

[35] The written argument concludes that Maurice Stoney should not be the subject of court access restrictions, but if the Court concludes that step is necessary then that restriction should only apply to litigation vs the Sawridge Band and 1985 Sawridge Trust.

D. Evidence

[36] The Trustees and the Sawridge Band entered as evidence a transcript of Maurice Stoney's cross-examination on his May 16, 2016 affidavit. This transcript illustrates a number of relevant points.

1. Maurice Stoney claims to be acting on behalf of himself and his brothers and sisters, and that he has their consent to do that: pp 9-10.
2. Maurice Stoney believes his father was forced out of Indian status by the federal government: p 12.
2. Maurice Stoney and his counsel Priscilla Kennedy do not accept that Maurice Stoney was refused automatic membership in the Sawridge Band by the ***Huzar v Canada***, [2000] FCJ 873, 258 NR 246 (FCA) and ***Stoney v Sawridge First Nation***, 2013 FC 509, 432 FTR 253 decisions: pp 23-27, 30-33.
3. Maurice Stoney claims he made an application for membership in the Sawridge Band in 1985 but that this application was "ignored": pp 37-39. Stoney however did not have a copy of that application: pp 39-40.
4. Maurice Stoney refused to answer a number of questions, including:

- whether he had read the ***Stoney v Sawridge First Nation*** decision (pp 32-33),
- whether he had made a Canadian Human Rights Commission complaint against the Sawridge Band (p 54),
- whether he had ever read the Sawridge Trust's documentation (pp 60-61),
- the identity of other persons whose Sawridge Band applications were allegedly ignored (pp 63-64), and
- the health status of the siblings for whom Maurice Stoney was allegedly a representative (p 66).

5. Maurice Stoney claims that the Sawridge Band membership application process is biased: pp 41-42.

[37] Maurice Stoney introduced three affidavits which he says indicate the August 12, 2016 application was not a "busybody" proceeding and instead Maurice Stoney was authorized to represent his other siblings in the Sawridge Advice and Direction Application:

1. Shelley Stoney, dated July 20, 2017, saying she is the daughter of Bill Stoney and the niece of Maurice Stoney. She is responsible "for driving my father and uncles who are all suffering health problems and elderly." Shelley Stoney attests "... from discussions among my father and his brothers and sisters" that Maurice Stoney was authorized to bring the August 12, 2016 application on their behalf.
2. Bill Stoney, brother of Maurice Stoney, dated July 20, 2017, saying he authorized Maurice Stoney to make the August 12, 2016 application on his behalf in the spring of 2016.
3. Gail Stoney, sister of Maurice Stoney, dated July 20, 2017, saying she authorized Maurice Stoney to make the August 12, 2016 application on his behalf in the spring of 2016.

[38] In ***Sawridge #7*** at paras 133-37 I conclude these affidavits should receive little weight:

> The three affidavits presented by Kennedy do not establish that Maurice Stoney was authorized to represent his siblings. Even at the most generous, these affidavits only indicate that Bill and Gail Stoney gave some kind of oral sanction for Maurice Stoney to act on their behalf. I put no weight on the affidavit of Shelley Stoney. It is hearsay, and presumptively inadmissible.
>
> I note that none of these affidavits were supported by any form of documentation, either evidence or records of communications between Maurice Stoney and his siblings, or between Kennedy and her purported clients.
>
> I make an adverse inference from the absence of any documentary evidence of the latter. The fact that no documentation to support that Kennedy and the Stoney siblings communicated in any manner, let alone gave Kennedy authority to act on their behalf, means none exists.
>
> There is no documentation to establish that Maurice Stoney applied to become a litigation representative or was appointed a litigation representative, per *Rules* 2.11-2.21. This is not a class action scenario where Maurice Stoney is a

> representative applicant. While Kennedy has argued that Maurice Stoney's siblings are elderly and unable to conduct litigation, then that is not simply a basis to arbitrarily add their names to court filing. Instead, a person who lacks the capacity to represent themselves (*Rule* 2.11(c-d)) may have a self-appointed litigation representative (*Rule* 2.14), but only after filing appropriate documentation (*Rule* 2.14(4)). That did not occur.

[39] I come to the same conclusion here and also find as a fact that in this proceeding Maurice Stoney was not authorized to file the August 12, 2016 application on behalf of his siblings.

IV. Analysis

[40] What remains are two steps:

1. to evaluate the form and seriousness of Maurice Stoney's litigation misconduct, and
2. determine whether court access restrictions are appropriate, and, if so, what those restrictions should be.

[41] However, prior to that I believe it is helpful to briefly explore the inherent jurisdiction of this Court to limit litigant activities, vs the authority provided in *Judicature Act*, ss 23-23.1, since these two mechanisms were broached in the submissions of the parties.

A. Control of Abusive Litigation via Inherent Jurisdiction vs the *Judicature Act*

[42] An argument can be made that that Alberta Court of Queen's Bench may only restrict prospective litigation via the procedure in *Judicature Act*, ss 23-23.1. I disagree with that position, though at present this question has not been explicitly and conclusively decided by the Alberta Court of Appeal, or the Supreme Court of Canada.

[43] The most detailed investigation of this issue is found in ***Hok v Alberta***, 2016 ABQB 651, where Verville J at paras 14-25 concluded that one element of this Court's inherent jurisdiction is an authority to restrict prospective and hypothetical litigation activities, both applications and entirely new actions.

[44] In coming to that conclusion Justice Verville rejected a principle found in I H Jacobs often-cited paper, "The Inherent Jurisdiction of the Court" ((1970) 23:1 Current Legal Problems 23 at 43), that UK tradition courts do not have an inherent jurisdiction to block commencement of potentially abusive proceedings:

> The court has no power, even under its inherent jurisdiction, to prevent a person from commencing proceedings which may turn out to be vexatious. It is possibly by virtue of this principle that many a litigant in person, perhaps confusing some substratum of grievance with an infringement of legal right, is lured into using the machinery of the court as a remedy for his ills only to find his proceedings summarily dismissed as being frivolous and vexatious and an abuse of the process of the court. The inherent jurisdiction of the court has, however, been supplemented by statutory power to restrain a vexatious litigant from instituting or continuing any legal proceedings without leave of the court.

[45] Jacobs elsewhere in his paper explains that the inherent jurisdiction of the court flows from its historic operation, and stresses this is an adaptive tool that applies as necessary to address issues that would otherwise interfere with the administration of justice and the court's operations:

> ... inherent jurisdiction of the court may be defined as the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just and equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them. ...
>
> (Jacobs at 51)

[46] However, Jacob's conclusion that courts have no inherent jurisdiction to limit future litigation was based on a historical error, as explained in ***Hok v Alberta***, 2016 ABQB 651, at para 17:

> Two UK Court of Appeal decisions, Ebert v Birch & Anor, (also cited as Ebert v Venvil), [1999] EWCA Civ 3043 (UK CA) and Bhamjee v Forsdick & Ors (No 2), [2003] EWCA Civ 1113 (UK CA), set out the common law authority of UK courts to restrict litigant court access. Some Commonwealth authorities had concluded that UK and Commonwealth courts had no inherent jurisdiction to restrict a person from initiating new court proceedings, and instead that authority was first obtained when Parliament passed the Vexatious Actions Act, 1896. Ebert concludes that is false, as historical research determined that in the UK courts had exercised common law authority to restrict persons initiating new litigation prior to passage of the Vexatious Actions Act, 1896. That legislation and its successors do not codify the court's authority, but instead legislative and common-law inherent jurisdiction control processes co-exist.

[47] Furthermore, the Alberta Court of Appeal has itself issued vexatious litigant orders which do not conform to *Judicature Act* processes. For example, in ***Dykun v Odishaw***, 2001 ABCA 204, 286 AR 392, that Court issued an "injunction" that restricted court access without either an originating notice or the consent of the Minister of Justice and Attorney General of Alberta (then required by *Judicature Act*, s 23.1). Justice Verville concludes (***Hok v Alberta***, 2016 ABQB 651, at paras 19-20, 25), and I agree, that this means Alberta courts have an inherent jurisdiction to take steps of this kind. If the Court of Appeal had the inherent jurisdiction to make the order it issued in ***Dykun v Odishaw***, then so does the Alberta Court of Queen's Bench.

[48] Beyond that, the efficient administration of justice simply requires that there must be an effective mechanism by which the courts may control abusive litigation and litigants. This must, of course, meet the constitutional requirement that any obstacle or expense requirement placed in front of a potential court participant does not "... effectively [deny] people the right to take their cases to court ..." or cause "undue hardship": ***Trial Lawyers Association of British Columbia v British Columbia (Attorney General)***, 2014 SCC 59 at paras 40, 45-48, [2014] 3 SCR 31. As I have previously observed, an obligation to make a document-based application for leave to file is a comparatively minor imposition and obviously does not cause "undue hardship".

[49] The question, then, is whether the *Judicature Act*, ss 23-23.1 procedure is an adequate one, or does the Court need to draw on its "reserve" of "residual powers" to design an effective

mechanism to control abusive litigants and litigation. I conclude that it must. A critical defect in this legislation is that section 23(2) defines proceedings that are conducted in a "vexatious manner" as requiring "persistent" misconduct, for example "persistently bringing proceedings to determine an issue that has already been determined by a court of competent jurisdiction" [emphasis added]: *Judicature Act*, s 23(2)(a).

[50] The Alberta Court of Appeal in certain decisions that apply *Judicature Act*, ss 23-23.1 appears to apply this rule in a strict manner, for example, in ***RO v DF***, 2016 ABCA 170, 36 Alta LR (6th) 282 at para 38 the Court stresses this requirement. Further, the ***RO v DF*** decision restricts the scope of a *Judicature Act*, ss 23-23.1 order on the basis that the vexatious litigant had no "... history of "persistently" ..." engaging in misconduct that involves outside parties. In other words, according to ***RO v DF*** the *Judicature Act*, ss 23-23.1 process operates retrospectively. *Judicature Act*, ss 23-23.1 authorize court access restrictions only after "persistent" misconduct has occurred.

[51] That said, it is clear that the Alberta Court of Appeal does not actually apply that requirement in other instances where it has made an order authorized per the *Judicature Act*. For example, in ***Henry v El*** Slatter JA ordered a broad, multi-court ban on the plaintiff's court activities, though only one dispute is mentioned. There is no or little record of 'persistent history'. ***Henry v El*** does not identify repeated or persistent litigation steps, nor are multiple actions noted. The misconduct that warranted the litigation restraint was bad arguments, and out-of-court misconduct: a need for the target of the misconduct to obtain police assistance, the plaintiff had foisted allegedly binding legal documents on the defendant, the abusive plaintiff was the target of a court ordered peace bond, and the abusive plaintiff posted a bounty for the defendant on the Internet.

[52] In ***Hok v Alberta***, 2016 ABQB 651 at paras 36-37, Justice Verville concluded that an effective mechanism to limit court access should operate in a *prospective* manner - based on evidence that leads to a prediction of future abusive litigation activities. This is also the approach recommended in the UK Court of Appeal ***Ebert v Birch & Anor***, [1999] EWCA Civ 3043 (UK CA) and ***Bhamjee v Forsdick & Ors (No 2)*** decisions.

[53] However, the strict "persistence"-driven approach in the *Judicature Act* and ***RO v DF*** only targets misconduct that has already occurred. It limits the court to play 'catch up' with historic patterns of abuse, only fully reining in worst-case problematic litigants after their litigation misconduct has metastasized into a cascade of abusive actions and applications.

[54] That outcome can sometimes be avoided.

1. Statements of Intent

[55] First, abusive litigants are sometimes quite open about their intentions. For example, in ***McMeekin v Alberta (Attorney General)***, 2012 ABQB 625 at para 44, 543 AR 11, a vexatious litigant said exactly what he planned to do in the future:

> I can write, I can write the judicature counsel, I can write the upper law society of Canada. I got Charter violations. I got administrative law violations. I've got civil contempt. I've got abuse of process. I've got abuse of qualified privilege. I can keep going, I haven't even got, I haven't even spent two days on this so far. And if you want to find out how good I am, then let's go at it. But you know, at the

> end of the day, I'm not walking away. And it's not going to get any better for them.

[56] It seems strange that a court is prohibited from taking that kind of statement of intent into account when designing the scope of court access restrictions. This kind of stated intention obviously favours broad control of future litigation activities.

[57] A modern twist on a statement of intentions is that some abusive litigants document their activities and intentions on Internet websites. For example, ***West Vancouver School District No. 45 v Callow***, 2014 ONSC 2547 at paras 31, 40 describes how an abusive court litigant had, rather conveniently, documented and recorded online his various activities and his perceptions of a corrupt court apparatus.

[58] However, there is no reason why the opposite scenario would not be relevant. Where an abusive litigant chooses to take steps to indicate good faith conduct, then that action predicts future conduct, for example by taking tangible positive steps to demonstrate they are a 'fair dealer' by:

1. voluntarily terminating or limiting abusive litigation,
2. abandoning claims, restricting the scope of litigation, consenting to issues or facts previously in dispute,
3. retaining counsel, and
4. paying outstanding cost awards.

[59] These kinds of actions may warrant a problematic litigant receiving limited court access restrictions, or no court access restrictions at all. Rewarding positive self-regulation is consistent with the administration of justice, and a modern, functional approach to civil litigation.

2. Demeanor and Conduct

[60] Similarly, a trial court judge may rely on his or her perception of an abusive court participant's character, demeanor, and conduct. Obviously, there is a broad range of conduct that may be relevant, but it is helpful to look at one example. Maurice Prefontaine, a persistent and abusive litigant who has often appeared in Alberta and other Canadian courts, presents a predictable in-court pattern of conduct, which is reviewed in ***R v Prefontaine***, 2002 ABQB 980, 12 Alta LR (4th) 50, appeal dismissed for want of prosecution 2004 ABCA 100, 61 WCB (2d) 306.

[61] Mr. Prefontaine presented himself in a generally ordered, polite manner in court. He was at one point a lawyer. He has for years pursued a dispute with the Canada Revenue Agency, and has appeared on many occasions in relation to that matter. Mr. Prefontaine's behaviour changed in a marked but predictable manner when his submissions were rejected. He explodes, making obscene insults and threats directed to the hearing judge and opposing parties. When a person responds to the court in this manner, that conduct is a significant basis to conclude that future problematic litigation is impending from that abusive court participant. Sure enough, that has been the case with Mr. Prefontaine.

[62] Also perhaps unsurprising is that Mr. Prefontaine's conduct is probably linked to his being diagnosed with a persecutory delusional disorder, or a paranoid personality disorder: ***R v Prefontaine***, at paras 8-17, 82, 94-98.

3. Abuse Caused by Mental Health Issues

[63] There are many other examples of how litigation abuse has a mental health basis. For example, the plaintiff in ***Koerner v Capital Health Authority***, 2011 ABQB 191, 506 AR 113, affirmed 2011 ABCA 289, 515 AR 392, leave to SCC refused, 34573 (26 April 2012) engaged in vexatious litigation because her perceptions were distorted by somatoform disorder, a psychiatric condition where a person reports spurious physical disorders (***Koerner v Capital Health Authority***, 2010 ABQB 590 at paras 4-5, 498 AR 109). Similarly, in ***Re FJR (Dependent Adult)***, 2015 ABQB 112, court access restrictions were appropriate because the applicant was suffering from dementia that led to spurious, self-injuring litigation. In these cases future abuse of the courts can be predicted from a person's medical history.

[64] Another and very troubling class of abusive litigants are persons who are affected by querulous paranoia, a form of persecutory delusional disorder that leads to an ever-expanding cascade of litigation and dispute processes, which only ends after the affected person has been exhausted and alienated by this self-destructive process. Querulous paranoiacs attack everyone who becomes connected or involved with a dispute via a diverse range of processes including lawsuits, appeals, and professional complaints. Anyone who is not an ally is the enemy. This condition is reviewed in Gary M Caplan & Hy Bloom, "Litigants Behaving Badly: Querulousness in Law and Medicine" 2015 44:4 Advocates' Quarterly 411 and Paul E Mullen & Grant Lester, "Vexatious Litigants and Unusually Persistent Complainants and Petitioners: From Querulous Paranoia to Querulous Behaviour" (2006) 24 Behav Sci Law 333.

[65] Persons afflicted by querulous paranoia exhibit a unique 'fingerprint' in the way they frame and conduct their litigation as a crusade for retribution against a perceived broad-based injustice, and via a highly unusual and distinctive document style. The vexatious litigants documented in ***McMeekin v Alberta (Attorney General)***, 2012 ABQB 456, 543 AR 132, ***McMeekin v Alberta (Attorney General)***, 2012 ABQB 625, 543 AR 11, ***Chutskoff v Bonora***, 2014 ABQB 389, 590 AR 288, ***Hok v Alberta***, 2016 ABQB 335, and ***Hok v Alberta***, 2016 ABQB 651 all exhibit the characteristic querulous paranoiac litigation and document fingerprint criteria.

[66] Mullen and Grant observe these persons cannot be managed or treated: pp 347-48. Early intervention is the only possible way to interrupt the otherwise grimly predictable progression of this condition: Caplan & Bloom, pp 450-52; Mullen & Lester, pp 346-47. Disturbingly, these authors suggest that the formal and emotionally opaque character of litigation processes may, by its nature, transform generally normal people into this type of abusive litigant: Caplan & Bloom, pp 426-27, 438.

[67] A "persistent misconduct" requirement means persons afflicted by querulous paranoia cannot be managed. They will always outrun any court restriction, until it is too late and the worst outcome has occurred.

4. Litigation Abuse Motivated by Ideology

[68] Other abusive litigants are motivated by ideology. A particularly obnoxious example of this class are the Organized Pseudolegal Commercial Argument ["OPCA"] litigants described in ***Meads v Meads***, 2012 ABQB 571, 543 AR 215. Many OPCA litigants are hostile to and reject conventional state authority, including court authority. They engage in group and organized actions that have a variety of motives, including greed, and extremist political objectives: ***Meads***

v Meads, at paras 168-198. Justice Morissette ("Querulous or Vexatious Litigants, A Disorder of a Modern Legal System?" (Paper delivered at the Canadian Association of Counsel to Employers, Banff AB (26-28 September 2013)) at pp 11) has observed for this population that abuse of court processes is a political action, "... the vector of an ideology for a class of actors in the legal system."

[69] Some OPCA litigants use pseudolegal concepts to launch baseless attacks on government actors, institutions, lawyers, and others. For example:

- ***ANB v Alberta (Minister of Human Services)***, 2013 ABQB 97, 557 AR 364 - after his children were seized by child services the Freeman-on-the-Land father sued child services personnel, lawyers, RCMP officers, and provincial court judges, demanding return of his property (the children) and $20 million in gold and silver bullion, all on the basis of OPCA paperwork.
- ***Ali v Ford***, 2014 ONSC 6665 - the plaintiff sued Toronto mayor Rob Ford and the City of Toronto for $60 million in retaliation for a police attendance on his residence. The plaintiff claimed he was a member of the Moorish National Republic, and as a consequence immune from Canadian law.
- ***Bursey v Canada***, 2015 FC 1126, aff'd 2015 FC 1307, aff'd ***Dove v Canada***, 2016 FCA 231, leave to the SCC refused, 37487 (1 June 2017) - the plaintiffs claimed international treaties and the *Charter* are a basis to demand access to a secret personal bank account worth around $1 billion that is associated with the plaintiffs' birth certificates; this is allegedly a source for payments owed to the plaintiffs so they can adopt the lifestyle they choose and not have to work.
- ***Claeys v Her Majesty***, 2013 MBQB 313, 300 Man R (2d) 257 - the plaintiff sued for half a million dollars and refund of all taxes collected from her, arguing she had waived her rights to be a person before the law, pursuant to the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*. Canada had no authority because Queen Elizabeth II was "... Crowned on a fraudulent Stone and ... violated her Coronation Oath by giving Royal Assent to laws that violate God's Law ...".
- ***Doell v British Columbia (Ministry of Public Safety and Solicitor General)***, 2016 BCSC 1181 - an individual who received a traffic ticket for riding without a helmet sued British Columbia, demanding $150,000.00 in punitive damages, because he is a human being and not a person, and the RCMP had interfered with his right "to celebrate divine service".
- ***Fiander v Mills***, 2015 NLCA 31, 368 Nfld & PEIR 80 - a person accused of fisheries offenses sued the Crown prosecutor, fisheries officer, and provincial court judge, arguing he was wrongfully prosecuted because he had opted out of "having" a "person" via the *Universal Declaration of Human Rights.*
- ***Isis Nation Estates v Canada***, 2013 FC 590, the plaintiff, "Maitreya Isis Maryjane Blackshear, the Divine Holy Mother of all/in/of creation", sued Alberta and Canada for $108 quadrillion and that they "cease and desist all blasphemy" against the plaintiff.

[70] There is little need to explore why these claims are anything other than ridiculous.

[71] OPCA litigants have been formally declared vexatious, for example: ***Boisjoli (Re)***, 2015 ABQB 629, 29 Alta LR (6th) 334; ***Boisjoil (Re)***, 2015 ABQB 690; ***Cormier v Nova Scotia***, 2015 NSSC 352, 367 NSR (2d) 295; ***Curle v Curle***, 2014 ONSC; ***Gauthier v Starr***, 2016 ABQB 213, 86 CPC (7th) 348; ***Holmes v Canada***, 2016 FC 918; ***R v Fearn***, 2014 ABQB 233, 586 AR 182; ***Yankson v Canada (Attorney General)***, 2013 BCSC 2332.

[72] Judicial and legal academic authorities uniformly identify OPCA narratives and their associated pseudolegal concepts as resting on and building from a foundation of paranoid and conspiratorial anti-government and anti-institutional political and social belief. These individuals are sometimes called 'litigation terrorists' for this reason. They may act for personal benefit, but they also do so with the belief they are justified and act lawfully when they injure others and disrupt court processes. Persons who advance OPCA litigation to harm others have no place in Canada's courts. The court's inherent jurisdiction must be able to shield the innocent potential victims of these malcontents. Their next target can be anyone who crosses their path - government officials or organizations, peace officers, lawyers, judges, business employees - and who then offends the OPCA litigant's skewed perspectives.

[73] These individuals believe they have a right to attack others via the courts, they like the idea of doing that, and they view their litigation targets as bad actors who deserve punishment. Waiting for these individuals to establish "persistent misconduct" simply means they just have more opportunities to cause harm.

[74] The plaintiff in ***Henry v El*** was obviously an OPCA litigant engaged in a vendetta. Slatter JA in that matter did not wait for the plaintiff to establish a pattern of "persistently" misusing the courts to attack others. I agree that is the correct approach. If a person uses pseudolaw to attack others as a 'litigation terrorist' then that should be a basis for immediate court intervention to prevent that from recurring. If the *Judicature Act* cannot provide an authority to do that, then this Court's inherent jurisdiction should provide the basis for that step.

5. Persistent Abusive Conduct is Only One Predictor of Future Misconduct

[75] All this is not to say that "persistence" is irrelevant. In fact, it is extremely important. A history of persistent abuse of court processes implies the likelihood of other, future misconduct. Persistence is relevant, but must not be *the only prerequisite* which potentially triggers court intervention. Persistence is a clear and effective basis for a court to predict actions when it cannot ascertain motivation or pathology, and from that derive what is likely and predictable. However, that should not be the only evidence which is an appropriate basis on which to restrict court access.

[76] The reason that I and other Alberta Court of Queen's Bench judges have concluded that this Court has an inherent jurisdiction to limit court access to persons outside the *Judicature Act*, ss 23-23.1 scheme is not simply because the UK appeal courts have concluded that this jurisdiction exists, *but also because that authority is necessary*. ***Sawridge*** *#7* at paras 38-49 reviews how the Supreme Court has instructed that trial courts conduct a "culture shift" in their operation towards processes that are fair and proportionate, without being trapped in artificial and formulaic rules and procedures. This is *an obligation* on the courts. The current *Judicature Act*, ss 23-23.1 process is an inadequate response to the growing issue of problematic and abusive litigation.

[77] Even though the *Judicature Act* is not the sole basis for this Court's jurisdiction to control abusive litigation, that legislation could be amended to make it more effective. One helpful step would be to remove the requirement that "vexatious" litigation involves misconduct that occurs "persistently". Another would be to re-focus the basis for when intervention should occur. Currently, section 23.1(1) permits intervention when "... a Court is satisfied that a person is instituting vexatious proceedings in the Court or is conducting a proceeding in a vexatious manner ...". This again is backwards-looking, punitive language. In my opinion a superior alternative is "... when a Court is satisfied that a person may abuse court processes ...".

[78] The Legislature should also explicitly acknowledge that the *Judicature Act* procedure does not limit how courts of inherent jurisdiction may on their own motion and inherent authority restrict a person's right to initiate or continue litigation.

[79] As Veit J observed in ***Sikora Estate (Re)***, 2015 ABQB 467 at paras 16-19, where a person seeks to have the court make an order that restricts court access then the appropriate procedure is *Judicature Act*, ss 23-23.1. That is a distinct process and authority from that possessed by judges of this Court. Given that the Masters of the Alberta Court of Queen's Bench derive their authority from legislation, another helpful step would be for the Legislature to extend *Judicature Act*, ss 23-23.1 to authorize Masters, on their own motion, to apply the *Judicature Act* procedure to control abusive litigants who appear in Chambers. This is not an uncommon phenomenon; the Masters are in many senses the 'front line' of the Court, and frequently encounter litigation abuse in that role.

B. Maurice Stoney's Abusive Activities

[80] In reviewing Maurice Stoney's litigation activities I conclude on several independent bases that his future access to Alberta courts should be restricted. His misconduct matches a number ***Chutskoff v Bonora*** "indicia" categories and exhibits varying degrees of severity.

1. Collateral Attacks

[81] First, Maurice Stoney has clearly attempted to re-litigate decided issues by conducting the ***Stoney v Sawridge First Nation*** judicial review, the 2016 Canadian Human Rights Commission application, and his attempts to interfere in the Advice and Direction Application litigation via the ***Stoney v 1985 Sawridge Trust***, 2016 ABCA 51 appeal and his August 12, 2016 application. In each case he attempted to argue that he has automatically been made a member of the Sawridge Band by the passage of Bill C-31. He has also repeatedly attacked the processes of the Sawridge Band in administering its membership. My reasons for that conclusion are found in ***Sawridge #6*** at paras 41-52.

[82] This is the first independent basis on which I conclude Maurice Stoney's litigation activity should be controlled. He has a history of repeated collateral attacks in relation to this subject and the related parties. This has squandered important court resources and incurred unnecessary litigation and dispute-related costs on other parties.

2. Hopeless Proceedings

[83] Maurice Stoney's attempts to re-litigate the same issues also represent hopeless litigation. The principle of *res judicata* prohibits a different result. This is a second independent basis on which I conclude Maurice Stoney's litigation conduct needs to be controlled, though it largely overlaps with the issue of collateral attacks.

3. Busybody Litigation

[84] Maurice Stoney appears to have alleged two bases for why I should conclude his purportedly acting in court as a representative of his "living brothers and sisters" is not "busybody" litigation:

1. he has provided affidavit evidence to establish he was an authorized representative, and

2. representation in this manner is authorized by the *Federal Court Rules*, s 114.

[85] As I have previously indicated I reject that the affidavit evidence of Shelley, Bill, and Gail Stoney established on a balance of probabilities that Maurice Stoney was authorized to represent his siblings. As for the *Federal Court Rules*, that legislation has no legal relevance or application to a proceeding conducted in the Alberta Court of Queen's Bench.

[86] "Busybody" litigation is a very serious form of litigation abuse, particularly since it runs the risk of injuring otherwise uninvolved persons. I am very concerned about how the weak affidavit evidence presented by Maurice Stoney represents an after-the-fact attempt to draw Maurice Stoney's relatives not only into this litigation, but potentially with the result these individuals face court sanction, including awards of solicitor and own client indemnity costs. While I have rejected that possibility (***Sawridge #7*** at paras 8, 139), the fact that risk emerged is a deeply aggravating element to what is already a very serious form of litigation abuse. This is a third independent basis on which I conclude Maurice Stoney's court access should be restricted.

4. Failure to Follow Court Orders - Unpaid Costs Awards

[87] Maurice Stoney admitted he has outstanding unpaid cost awards. Maurice Stoney says he is unable to pay the outstanding costs orders because he does not have the money for that. No evidence was tendered to substantiate that claim.

[88] A costs order is a court order. A litigant who does not pay costs is disobeying a court order.

[89] Outstanding costs orders on their own may not be a basis to conclude that a person's litigation activities require control. What amplifies the seriousness of these outstanding awards is that Maurice Stoney has attempted to shift all his litigation costs to a third party, the 1985 Sawridge Trust: ***Sawridge #6*** at para 78. Worse, the effect of that would be to deplete a trust that holds the communal property of an aboriginal community: ***Sawridge #7*** at paras 145-46, 148.

[90] A court may presume that a person intends the natural consequences of their actions: ***Starr v Houlden***, [1990] 1 SCR 1366, 68 DLR (4th) 641. Maurice Stoney appears to intend to cause harm to those he litigates against. He conducts hopeless litigation and then attempts to shift those costs to innocent third parties. If unsuccessful, he says he is unable to pay those costs. In this context Maurice Stoney's failure to pay outstanding costs orders to the Sawridge Band is in itself a basis to take steps to restrict his court access.

5. Escalating Proceedings - Forum Shopping

[91] In ***Sawridge #6*** and ***Sawridge #7*** I noted that Maurice Stoney's dispute with the Sawridge Band has been spread over a range of venues. He acted in Federal Court, and when unsuccessful there he shifted to the Canadian Human Rights Commission. Again unsuccessful, he now

renewed his abusive litigation, this time in the Alberta Court of Queen's Bench and the Alberta Court of Appeal.

[92] I conclude this is a special kind of escalating proceedings, "forum shopping", where a litigant moves between courts, tribunals, and jurisdictions in an attempt to prolong or renew abusive dispute activities. Forum shopping is a particular issue in relation to vexatious litigants because court-ordered restrictions on litigation have a limited scope. For example, I have no authority to order steps that would affect a litigant's access to a court in a different province, or the federal courts.

[93] Abusive litigants can exploit this gap in Canadian court jurisdictions to repeatedly harm other litigants and, in the process, multiple courts. The litigation activities of a British Columbia resident, Roger Callow, are a dramatic example of forum shopping: reviewed in ***West Vancouver School District No. 45 v Callow***, 2014 ONSC 2547; ***Callow v Board of School Trustees, School District No. 45***, 2008 BCSC 778, 168 ACWS (3d) 906.

[94] Callow's dispute began in 1985 as a labour arbitration proceeding in response to Callow's employment being terminated. That led to litigation and appeals in that jurisdiction. The Supreme Court refused leave. More British Columbia lawsuits followed, and by 2003 Callow was declared a "vexatious litigant" in British Columbia. Callow then persisted with multiple appeals and leave applications. That led to a further 2010 order to control his court access. Callow now shifted to the Federal Court, where his actions were struck out as an abuse of process: ***Callow v B.C. Court of Appeal Chief Justice Threfal*** (9 November 2011), Vancouver T-1386-11 (FC), aff'd (2 December 2011), Vancouver T-138611 (FC); ***Callow v Board of School Trustees (#45 West Vancouver)*** (2 February 2015), Vancouver T-2360-14 (FC). In 2012 Callow then sued in Ontario, which led to him being subjected to broad court access restrictions in that jurisdiction as well: ***West Vancouver School District No. 45 v Callow***, 2014 ONSC 2547.

[95] The saga then continued, with Callow next having filings struck out in Quebec (***Callow v Board of School Trustees (S.D. #45 West Vancouver)***, 2015 QCCS 5002, affirmed 2016 QCCA 60, leave to the SCC refused, 36883 (9 June 2016) and Saskatchewan (***Callow v West Vancouver School District No. 45***, 2015 SKQB 308, affirmed 2016 SKCA 25, leave to the SCC refused, 36993 (6 October 2016). I would be unsurprised if Alberta is not at some point added to this list.

[96] Clearly, at least some persistent abusive court participants are willing to 'shop around', and Roger Callow's litigation is an extreme example of the waste that can result. Given the manner in which Canadian court and tribunal jurisdictions are structured there seems little way at present to escape scenarios like this. Academic commentary on the control of abusive litigation has recommended a national "vexatious litigant" registry: Caplan & Bloom at 457-58, Morissette at 22. I agree that would be a useful addition.

[97] Forum shopping by its very nature implies an intent to evade legitimate litigation control processes and legal principles, including *res judicata*. In the case of Maurice Stoney his forum shopping largely overlaps his abusive collateral attack and futile litigation activities, and is a highly aggravating factor to that misconduct.

6. Unproven Allegations of Fraud and Corruption

[98] The May 16, 2016 cross-examination transcript reveals that Maurice Stoney believes he and his relatives are the subjects of fraud and conspiracy that is intended to deny them their

birthright. For example, he says Sawridge Band membership applications have been ignored, though he has no proof of that.

[99] These allegations are not in themselves a basis to restrict Maurice Stoney's court access, however they provide some insight into his litigation objectives and how he views his now longstanding conflict with the Sawridge Band and its administration.

7. Improper Litigation Purposes

[100] The Sawridge Band argues Maurice Stoney's August 12, 2016 application has an improper purpose, or no legitimate purpose. Maurice Stoney's exact objective is not obvious. It may be he intends to pursue his perceived objective no matter the consequences or justification, to disrupt the membership process of the Sawridge Band, to obtain monies from the 1985 Sawridge Trust, or a combination of those motives. However, as I have previously indicated, the combination of futile litigation, unpaid costs awards, costs shifting, forum shopping, and a claim that the abusive litigant lacks the means to pay costs leads to a logical inference. The August 12, 2016 application had no legitimate purpose. Its only effect was to waste court and litigant resources.

[101] This is another independent basis on which I conclude court intervention is warranted to control Maurice Stoney's access to Alberta Courts.

C. Anticipated Litigation Abuse

[102] This decision identifies five independent bases on which this Court should take steps to control future litigation abuse by Maurice Stoney in Alberta Courts. Collectively, that strongly favours court intervention. His litigation history predicts future litigation abuse.

[103] But that is secondary to another fact - that the submissions received in the second stage of the procedure found in ***Hok v Alberta*** shows that Maurice Stoney and his counsel still do not accept that prior decisions mean Maurice Stoney has no right to continue his interference with the Sawridge Band and its membership processes. Instead, Maurice Stoney and his counsel say his arguments are viable, if not correct. Those are "the facts". This is a very strong predictor of future abusive litigation activities. Maurice Stoney's objectives and beliefs remain unchanged.

[104] What remains is to determine the scope of that court access restriction order. The combination of trial, appeal, judicial review, and tribunal activities strongly predicts that Maurice Stoney will not restrict his abusive litigation activities to a particular forum. Instead, his history of forum shopping suggests the opposite.

[105] While I have agreed with many of the Sawridge Band and 1985 Sawridge Trust's arguments, I do not accept that Maurice Stoney's litigation history and apparent intentions means that his plausible future abusive litigation activities cannot be restricted to a particular target group or dispute. Instead, Maurice Stoney's complaint-related activities have a clear focus: his long-standing dispute with the Sawridge Band concerning band membership. I did not receive any evidence or statements that suggest that Stoney's abusive activities will expand outside that target set. I therefore only require Stoney obtain leave to initiate or continue litigation in Alberta courts where the litigation involves:

1. the Sawridge Band,
2. the 1985 Sawridge Trust,

3 the 1986 Sawridge Trust,

4 the current, former, and future Chief and Council of the Sawridge Band,

5. the current, former, and future Trustees of the 1985 Sawridge Trust and 1986 Sawridge Trust,

6. the Public Trustee of Alberta,

7. legal representatives of categories 1-6,

8. members of the Sawridge Band,

9. corporate and individual employees of the Sawridge Band, and

10. the Canadian federal government.

[106] I have defined this plausible target group broadly because Maurice Stoney's allegations of conspiracy against himself and his siblings raises a concern that Maurice Stoney may shift his focus from the Sawridge Band and the Trusts to the individuals who are involved in the prior litigation and Sawridge Band membership-related processes and decisions.

[107] Maurice Stoney's litigation misconduct extends to appeals. Normally that would mean that I would restrict his access to all three levels of Alberta Courts, however in light of the inconsistent Alberta Court of Appeal jurisprudence on control of abusive and vexatious litigation in that forum I do not extend my order to that Court: ***Hok v Alberta***, 2016 ABQB 335; ***Ewanchuk v Canada (Attorney General)***.

[108] I agree that Maurice Stoney's future litigation activities should be made dependent on him first paying outstanding cost awards.

[109] Maurice Stoney's "busybody" activities, and his attempts to justify his purportedly authorized representation activities in this hearing raise the troubling possibility that Stoney will again attempt to draw others into his disputes. Persons have no constitutional right to represent others (***Gauthier v Starr***, 2016 ABQB 213, 86 CPC (7th) 348), and appearing before a court is a privilege solely subject to the court's discretion (***R v Dick***, 2002 BCCA 27, 163 BCAC 62). Maurice Stoney has badly abused that privilege and his arguments concerning his "busybody" activities are highly problematic. He has demonstrated he is an unfit litigation representative. I therefore order that Maurice Stoney is prohibited from representing any person in all Alberta Courts.

D. Court Access Control Order

[110] I therefore order:

1. Maurice Felix Stoney is prohibited, under the inherent jurisdiction of the Alberta Court of Queen's Bench, from commencing, or attempting to commence, or continuing any appeal, action, application, or proceeding in the Court of Queen's Bench or the Provincial Court of Alberta, on his own behalf or on behalf of any other person or estate, without an order of the Chief Justice or Associate Chief Justice, or Chief Judge, of the Court in which the proceeding is conducted, or his or her designate, where that litigation involves any one or more of:

   (i) the Sawridge Band,

   (ii) the 1985 Sawridge Trust,

(iii) the 1986 Sawridge Trust,

(iv) the current, former, and future Chief and Council of the Sawridge Band,

(v) the current, former, and future Trustees of the 1985 Sawridge Trust and 1986 Sawridge Trust,

(vi) the Public Trustee of Alberta,

(vii) legal representatives of categories 1-6,

(viii) members of the Sawridge Band,

(ix) corporate and individual employees of the Sawridge Band, and

(x) the Canadian federal government.

2. Maurice Felix Stoney is prohibited from commencing, or attempting to commence, or continuing any appeal, action, application, or proceeding in the Court of Queen's Bench or the Provincial Court of Alberta, on his own behalf or on behalf of any other person or estate, until Maurice Felix Stoney pays in full all outstanding costs ordered by any Canadian court.

3. The Chief Justice or Associate Chief Justice, or Chief Judge, or his or her designate, may, at any time, direct that notice of an application to commence or continue an appeal, action, application, or proceeding be given to any other person.

4. Maurice Felix Stoney must describe himself, in the application or document to which this Order applies as "Maurice Felix Stoney", and not by using initials, an alternative name structure, or a pseudonym.

5. Any application to commence or continue any appeal, action, application, or proceeding must be accompanied by an affidavit:

(i) attaching a copy of the Order issued herein, restricting Maurice Felix Stoney's access to the Alberta Court of Queen's Bench and Provincial Court of Alberta;

(ii) attaching a copy of the appeal, pleading, application, or process that Maurice Felix Stoney proposes to issue or file or continue;

(iii) deposing fully and completely to the facts and circumstances surrounding the proposed claim or proceeding, so as to demonstrate that the proceeding is not an abuse of process, and that there are reasonable grounds for it;

(iv) indicating whether Maurice Felix Stoney has ever sued some or all of the defendants or respondents previously in any jurisdiction or Court, and if so providing full particulars;

(v) undertaking that, if leave is granted, the authorized appeal, pleading, application or process, the Order granting leave to proceed, and the affidavit in support of the Order will promptly be served on the defendants or respondents;

(vi) undertaking to diligently prosecute the proceeding; and

(vii) providing evidence of payment in full of all outstanding costs ordered by any Canadian court.

6. Any application referenced herein shall be made in writing.

7. The Chief Justice or Associate Chief Justice, or Chief Judge, or his or her designate, may:

   (i) give notice of the proposed claim or proceeding and the opportunity to make submissions on the proposed claim or proceeding, if they so choose, to:

      a) the involved potential parties;

      b) other relevant persons identified by the Court; and

      c) the Attorney Generals of Alberta and Canada.

   (ii) respond to the leave application in writing; and

   (iii) hold the application in open Court where it shall be recorded.

8. Leave to commence or continue proceedings may be given on conditions, including the posting of security for costs.

9. An application that is dismissed may not be made again.

10. An application to vary or set aside this Order must be made on notice to any person as directed by the Court.

[111] This order will be prepared by the Court and filed at the same time, as this Case Management Decision and takes effect immediately. The exception granted in the Rooke Order shall apply to this court access control order.

[112] The interim order made per ***Sawridge #6*** at para 65-66 is vacated.

V. Representation by Priscilla Kennedy in this Matter

[113] I have deep concerns about the manner in which Maurice Stoney's lawyer, Priscilla Kennedy, has conducted herself in this matter. Certain of those issues are reviewed in ***Sawridge #7***, a judgment where I determined that Kennedy should be personally responsible for her client's costs award because of her misconduct. She represented a client who made a hopeless application that was a serious abuse of the Court and other litigants, and involved other third parties without their authorization.

[114] In ***Sawridge #7*** Ms. Kennedy was represented by Mr. Donald Wilson, a partner of the law firm DLA Piper, which is the law firm that employs Ms. Kennedy. I reproduce verbatim certain of Mr. Wilson's submissions to the Court in ***Sawridge #7***:

> ... in these circumstances, I will say that Ms. Kennedy has prosecuted this action on [Maurice Stoney's] behalf further than I would've, further than I think she should've. ...
>
> ... the reason I go through this, Sir, is I think quite candidly I've conceded that Ms. Kennedy prosecuted this action further than I would've, further than I think she ought to have ...
>
> Now, if I'm [counsel for the Sawridge Band], I can tell you that the Band is the person that gets to determine their membership and that is entirely appropriate. And in Mr. Stoney's case they've done that. Appeals were made on two different

> levels. An additional attempt was made at the Human Rights tribunal. And Mr. Stoney has been told, and I know he's been told this because I told him this, he is at the end of his rope with respect to the Sawridge Band and the Court system.
>
> And the reason for that is background and history. It's one of Montgomery's campaigns in World War II, it's a bridge too far. He would've been fine if he'd stopped at bridges, by going for a third bridge the campaign itself stopped. In this instance, had -- if I'd been engaged or consulted, if I read Sawridge 5 ... the fact that the Court is not, unlikely earlier trust litigation where often the trust ends up paying for part of the litigant's costs, the Court could not have been clearer that is not going forward. And the Court indicated interlope. That is, someone does not have a claim on the trust, presumably would make the trial more complicated, more time consuming, higher costs for everyone. ...
>
> Now, I can tell you that in the course of the last week ... I had occasion to speak in depth with Ms. Kennedy. And Ms. Kennedy tried to convince me as to the merits of Mr. Stoney's case. And at a certain point in time, I had to tell her that he has exhausted his remedies in the legal realm with respect to the Sawridges and it's time to move on.
>
> ...
>
> My submission would be the application that resulted in Sawridge 6 should not have been made. It was ill-advised. But was not done with bad motives, an attempt to abuse the process. It had that effect, I have to say in front of my friends it absolutely had that effect ...
>
> ... what the Court is trying to do, as you properly cite in your decision with respect to sanctions, is to change behaviour. It's the same rationale behind torts which is you're giving a tort award so that some other idiot isn't going to follow and do the same thing. And, with respect, I would submit to you that the seriousness of what Sawridge 6 is has been driven home to Ms. Kennedy. And, with respect, it's been driven home as much as an order of contempt or a referral to the Law Society. The decision is out there, we have a courtroom full of reporters here to report on the matter.
>
> And I'm reminded of someone once asked Warren Buffett when he was testifying at the congress as to what was reasonable, and it was on the context of a company he owned and insider trading. And Mr. Buffett to the U.S. congress testified it meets a very easy standard. And the standard is, if they printed the story in your home town and your mother and your father had an opportunity to read it, would you be embarrassed? And, with respect, Ms. Kennedy and the Sawridge 6 decision has brought home the falling of continuing to prosecute the remedy she's seeking for Mr. Stoney. Which, after meeting Mr. Stoney, I understand. But there's a certain point in time the legal remedies have been exhausted. ...
>
> [Emphasis added.]

[115] I believe I am fair when I indicate these submissions say that at the ***Sawridge #7*** hearing Mr. Wilson, on behalf of Ms. Kennedy, had acknowledged that there was no merit to the August 12, 2016 application, and that the legal issues involved in that application had been decided,

conclusively, in a series of earlier court proceedings. Yet, here in her written submissions, Ms. Kennedy on behalf of Maurice Stoney, re-argues the very same points. Her submissions are the law is unsettled, issues remain arguable, despite her counsel's admission on July 28, 2017 that the effect of the August 12, 2016 application was to abuse of the court's process: "... it absolutely had that effect ..." [emphasis added].

[116] Mr. Wilson told me in open court that Ms. Kennedy had learned her lesson. When I read the written brief Kennedy prepared and submitted on behalf of Maurice Stoney, I questioned whether that was true.

[117] In ***Sawridge #7*** at paras 98-99 I explained my conclusion why a lawyer who re-litigates or repeatedly raises settled issues has engaged in serious misconduct that is contrary to the standards expected of persons who hold the title "lawyer". I also observed on how advancing abusive litigation is a breach not merely of a lawyer's professional and court officer duties. It is a betrayal of the solicitor-client relationship, and 'digs a grave for two': para 74.

[118] I am also troubled by Ms. Kennedy relying on a procedure found in the *Federal Court Rules* to explain why Maurice Stoney's August 12, 2016 application was not a "busybody" proceeding. Stating what should be obvious, civil proceedings in front of this Court are governed by the *Alberta Rules of Court*, not the *Federal Court Rules*. I question the competence of a lawyer who does not understand what court rules apply in a specific jurisdiction.

[119] In ***Sawridge #7*** at paras 51-58 I reviewed case law concerning the inherent jurisdiction of a Canadian court to control lawyers and their activities. At para 56 I cited ***MacDonald Estate v Martin***, [1990] 3 SCR 1235 at 1245, 77 DLR (4th) 249 for the rule that courts as part of their supervisory function may remove lawyers from litigation, where appropriate. In that decision representation by lawyers was challenged on the basis of an alleged conflict of interest. However, the inherent jurisdiction of the court is not expressly restricted to simply that:

> ... The courts, which have inherent jurisdiction to remove from the record solicitors who have a conflict of interest, are not bound to apply a code of ethics. Their jurisdiction stems from the fact that lawyers are officers of the court and their conduct in legal proceedings which may affect the administration of justice is subject to this supervisory jurisdiction. ... [Emphasis added.]

[120] In my opinion Ms. Kennedy's conduct raises the question of whether she is a suitable representative for Maurice Stoney, and whether the proper administration of justice requires that Ms. Kennedy should be removed from this litigation.

[121] This judgment represents what I believe should be Ms. Kennedy's final opportunity to participate in the Advice and Direction Application in the Alberta Court of Queen's Bench as a representative of Maurice Stoney. If that were not the case then I would have proceeded to invite submissions from Ms. Kennedy why she and her law firm, DLA Piper, should not be removed as representatives of Maurice Stoney, and prohibited from any future representation of Maurice Stoney in the Advice and Direction Application.

[122] Instead I will send a copy of this judgment to the Law Society of Alberta for review.

VI. Conclusion

[123] I conclude that Maurice Felix Stoney has engaged in abusive litigation activities resulting in him being required to seek leave prior to initiating or continuing litigation in the Alberta Court of Queen's Bench and Alberta Provincial Court that relates to persons and organizations involved with the Sawridge Band and Maurice Stoney's disputes concerning membership in that Band. Maurice Stoney may only seek leave after he has paid all outstanding costs awards.

[124] Maurice Stoney is also prohibited from representing others in any litigation before the Alberta Provincial Court, Alberta Court of Queen's Bench, and Alberta Court of Appeal.

[125] I confirm that I will send a copy of this judgment to the Law Society of Alberta for review in respect to Ms. Kennedy.

Appearances made by written submissions.
Dated at the City of Edmonton, Alberta this 12th day of September, 2017.

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

Thomas J

Submissions in writing from:

Priscilla Kennedy
DLA Piper
for Maurice Felix Stoney (Applicant)

Edward H. Molstad, Q.C.
Parlee McLaws LLP
for the Sawridge Band

D.C. Bonora
Dentons LLP
for 1985 Sawridge Trustees

Tab 31

a conflict is unavoidable. And so the rule

se of successor trustees who might avoid
[539] but original trustees, at least, are not
the settlor or the terms of the trust by
l trustees.[640]

owever, apply to an employer company
ee of its pension scheme, and a latent
n the company becomes insolvent.[641] Nor
involuntary actual conflicts of fiduciary
t cannot be attributed to the settlor or the
ision scheme the employer company was
up of the scheme to augment benefits out
itself entitled to the surplus to the extent
iquidator of the company was held to be
ecause as trustee of the power he owed a
ir consideration to exercising it and as
editors and contributories to secure the
hen bound to interpose.[642]

rule by the terms of the trust

expressly excluded by the terms of the
s from the trust, doubts have been raised
xt of fiduciary dispositive powers.[643] But
le to enable a trustee to benefit from a
vaporate. It is clear that the self-dealing
e trust.[645] It is common for a family trust
ay exercise a particular power such as a
ive powers conferred by the terms of the

[2009] Ch. 32 at [122]. Contrast *Re William Makin*
here Vinelott J. considered that the original trustee
cising the relevant power with the consequence that
preserved. That followed from his statement of the
the present paragraph, but would not follow if the
nsidered in this paragraph.
K. *Pension Plan* [1995] 1 W.L.R. 32 at 40H–41A,
but did not apply it in a case involving successor
he terms of the trust. Nor was the exception applied
and, above, see at [122].
(1990) 68 P. & C.R. 518 at 523.
151 at 167.
] 1 W.L.R. 1587 at 1616–1617; compare *Thrells Ltd*
see § 20–139.
.R. 171 at 176; *Re Drexel Burnham Lambert U.K.*

[2009] Ch. 32 at [114] and [117]–[125]; *McNulty v*
4 I.T.E.L.R. 361 at [40]–[73].

trust or by law, even though any one or more of the trustees has as a beneficiary a direct or indirect personal interest in the mode or result of any such exercise. We consider that such a clause takes effect according to its terms so as to exclude the self-dealing rule expressly and enable trustees to exercise the powers concerned in favour of one or more of themselves.

A provision conferring power on the trustees to enter into any transaction concerning the trust fund notwithstanding that any of the trustees is interested in the transaction other than as one of the trustees has, in the context of the terms of the settlement as a whole and admissible evidence as to the background of the settlement, been broadly construed so as to encompass an addition of a trustee to the class of beneficiaries under a power of addition and a subsequent appointment to that trustee under a power of appointment in favour of the beneficiaries.[646] 20–180

Further, it has now been held in the context of fiduciary dispositive powers that the self-dealing rule (together with the rule concerning profits from the trust) can be excluded, not only by the express terms of the trust, but also by the implied terms where that is necessary in order to give efficacy to the terms of the trust.[647] An example of a case where we consider that the self-dealing rule would be excluded impliedly is where the terms of the trust appoint A and B as trustees, and also confer a power on the trustees, meaning the original trustees or other the trustees for the time being, to appoint among a class consisting of A, C and D. If the self-dealing rule were applied, then the power would become a power for the original trustees to appoint to C and D, but that is not what the settlor provided for. Again the rule may be excluded where a testator appoints his spouse trustee or one of the trustees and gives the spouse a life interest and the trustees a power to advance capital to the spouse.[648] But it is less clear that the self-dealing rule would be excluded if the original trustees were not beneficiaries and a beneficiary was appointed a trustee later on.[649] 20–181

Of course the powers concerned remain fiduciary powers and so trustees must give proper consideration to an exercise of them in favour of other beneficiaries, and cannot simply have regard to their own interests, as is permissible where a donee of a personal power is also an object of it. 20–182

No rescue for bad timing

If neither of the exceptions considered in §§ 20–174 to 20–182 is available, the self-dealing rule might needlessly be engaged as a result of bad timing, but the court will not rescue the trustee from the application of the self-dealing rule for 20–183

646 *Breakspear v Ackland*, above, at [114] and [117]–[125].
647 *Edge v Pensions Ombudsman* [1998] Ch. 512 at 540B–D, affd [2000] Ch. 602, CA. Contrast *Re Z Trust* [1997] C.I.L.R. 248 at 289–290.
648 See *Karger v Paul* [1984] V.R. 161, Vic. SC; *Re Saunders and Malom* (1987) 32 D.L.R. (4th) 503, BC CA. In neither of these cases was it suggested that the self-dealing rule might apply, though the power was not treated as a personal power.
649 As in *Re Drexel Burnham Lambert U.K. Pension Plan* [1995] 1 W.L.R. 32.

Tab 32

1991 CarswellBC 2295
British Columbia Supreme Court

Gillespie Estate, Re

1991 CarswellBC 2295, [1991] B.C.J. No. 323, 25 A.C.W.S. (3d) 765

RE: THE ESTATE OF DAVID ELLIS GILLESPIE, DECEASED, BETWEEN: DANIEL PAUL GILLESPIE, PETITIONER, AND: LUIS ALBERT GILLESPIE, DR. GLENN T. RENECKER, DANIEL E. SALT, PATRICIA A. TOMPKINS, THE REV. RONALD MATTHEWMAN, NOEL C. WITTICK and the PUBLIC TRUSTEE, RESPONDENTS; AND RE: THE ESTATE OF DAVID E. GILLESPIE, A.K.A. DAVID ELLIS GILLESPIE, DECEASED, BETWEEN: LUIS ALBERT GILLESPIE, PETITIONER, AND: DANIEL PAUL GILLESPIE, Executor of the Will and Trustee of the Estate of David E. Gillespie, aka David Ellis Gillespie, deceased, DANIEL PAUL GILLESPIE, GLORIA RUTH SUTTON, DAVID GILLESPIE CHARITABLE TRUST, BELVA GRACE NYLANDER, GILBERT EKLUND, BILL GILLESPIE and the PUBLIC TRUSTEE, RESPONDENTS

Donald J. in Chambers

Judgment: February 13, 1991
Docket: Vancouver A901641, A903000

Counsel: for the Petitioners, Daniel Paul Gillespie, Gloria Ruth Sutton, Belva Grace Nylander, Gilbert Eklund and Bill Gillespie: Gary Wilson
for the Respondent, Luis Albert Gillespie: James Carphin & Jane Dardi
for the Public Trustee: Hugh McLellan

Subject: Estates and Trusts

DONALD, J. (IN CHAMBERS):

REASONS FOR JUDGMENT

INTRODUCTION

1 The beneficiaries of the Estate of Daniel Ellis Gillespie, deceased, have a dispute over a major asset of the estate, Pym Island. Luis Albert Gillespie ("Luis"), the testator's adopted son, wants the island sold so that the income from his life interest will increase. He complains that the maintenance costs related to the island are diminishing his income and that this is unfair because he has no use for the place. Daniel Paul Gillespie ("Daniel"), the testator's brother and executor of the estate, prefers to retain the island for the testator's family, including himself, and proposes for the Court's approval a loan scheme which will address Luis' concerns about the maintenance costs. He is supported by all other members of the family.

2 Luis also applies for an order removing Daniel as executor on a number of grounds, each of which directly or indirectly relates to the Pym Island controversy.

ISSUES

3 The Court must decide whether it has jurisdiction to order either of the alternative remedies proposed. Each side contends that the other's solution to the dilemma amounts to a variation of a trust and the Court has no power to vary a trust without the consent of all the beneficiaries. If jurisdiction is found, then the Court must go on to determine which proposal more closely conforms to the wishes of the testator as expressed in the will and deals fairly with the beneficiaries.

4 Finally, on the application to remove Daniel as executor, the Court must rule on the allegations that he holds an animus against Luis; that he has not kept an even hand between beneficiaries; that he has made an improper investment; that he has failed to give a proper accounting of his administration of the estate; and that his personal interest in keeping Pym Island conflicts with his duties as executor.

FACTS

THE PARTIES

5 In action No. A903000 the respondents, Belva Grace Nylander and Gloria Ruth Sutton are the testator's sisters and the respondents, Gilbert Eklund and Bill Gillespie are his cousins. The respondent, David Gillespie Charitable Trust was created by the testator on December 10, 1984. The trustees of that trust are the respondents, Dr. Glen T. Renecker, Daniel E. Salt, Patricia A. Tomkins, the Rev. Ronald Matthewman and Noel C. Wittick, named in action No. A901641. In a letter to the Court from their solicitors, Lang Michener Lawrence & Shaw, dated November 28, 1990, they indicated that they are taking no position in either petition.

6 Luis Gillespie, now 39 years of age was adopted by the testator approximately three years before his death.

7 The public trustee appears in this matter representing the interests of the unborn and unascertained children of Luis, who should they come into being, would be entitled to benefit from the estate.

THE ESTATE

8 The testator died on August 23, 1987. His will dated April 29, 1987 and codicil dated July 9, 1987 were admitted to probate and letters probate were granted by this Court to Daniel on October 13, 1987.

9 The will directs the Trustee to pay out of the capital of the estate all debts and taxes associated with his death as well as the legal costs incurred in the defence of Luis in criminal proceedings in California. It contains a number of specific bequests and an education trust. The residue is governed by the following provisions:

> 5.1 I GIVE the residue of my estate, including any property over which I may have a general power of appointment, to my Trustee upon the following trusts:
>
> 5.1.1 To hold all my right, title and interest in the property known as Pym Island, together with all articles of personal, domestic and household use or ornament including all boats, automobiles and accessories thereto situated on Pym Island, for the use and enjoyment of my son, my brother, my sisters, my cousins and their families. All taxes, insurance, repairs and any other charges or amounts necessary for the general upkeep of the property and which are not paid out of trusts settled by me during my lifetime, shall be paid by my Trustee out of the capital or income of the residue of my estate or partly out of capital and partly out of income as my Trustee shall consider advisable. If in the opinion of my Trustee Pym Island is no longer required for the use and enjoyment of my family or it is for any other reason advisable to do so, my Trustee may sell Pym Island and any proceeds of sale shall be added to the capital of the residue of my estate;

5.1.2 To invest and keep invested the residue of my estate and to pay one-half of the net income therefrom to my son LUIS ALBERT GILLESPIE for his lifetime and to pay the other one-half of the net income to my brother DANIEL PAUL GILLESPIE for his lifetime;

5.1.3 Upon the death of the first to die of my son and my brother or if either of them should predecease me, to pay the one-half of the net income that would have otherwise been paid to my deceased son or my deceased brother, to the DAVID GILLESPIE CHARITABLE TRUST settled by Declaration of Trust made the 10th day of December, 1984.

10 Paragraph 5.1.4 which distributes the residue upon the last to die of his son Luis, and brother Daniel, was amended by the codicil to provide in that event that the residue be held upon certain trusts for the testator's grandchildren, if any. If there is no grandchild then the residue is to be distributed as follows: $200,000 and Pym Island to the brother's estate and the remainder to the David Gillespie Charitable Trust.

11 The will includes the following as one of the trustee's administrative powers:

4.1.13 To provide for depreciation or depletion reserves to be charged against the net income arising from depreciable or depleting assets held by my estate. The rate of depreciation or depletion to be taken annually shall be such rate as my Trustee may determine. Any sums reserved for depreciation or depletion shall be set aside in each year and shall be deemed to form part of the capital of my estate. Notwithstanding anything herein contained the income arising from my estate shall be the aggregate net income after providing for the aforesaid reserves for depreciation and depletion.

12 Luis claims that Daniel has not properly accounted for certain aspects of the estate. I do not intend to deal with those claims because an order to pass accounts has been made and a registrar's hearing can sort out the quarrels on that subject.

13 The principal ground for alleging that Daniel is prejudiced against Luis relates to Daniel's decision to discontinue monthly allowances to Luis in October, 1990. The payments were advanced on his one-half share of the net income from the residue of the estate. From December, 1988 to July, 1989 the advance on his income share was $3,000.00 a month. It increased to $4,000.00 a month in September, 1989. Luis says that he cannot support himself, his mother and his sister on the earnings from his hair salon business in Los Angeles, California and needs the advances to get by.

14 Daniel denies any animus against Luis. He deposes that he pledged his house for Luis' bail and paid him substantial sums from the estate's income. From August, 1988 (when Luis was released from prison, having successfully appealed his conviction) to the present Daniel paid to him $170,017.13 U.S. and $41,836.30 Can. after tax.

15 He explained that he stopped monthly advances because of this litigation and a U.'S. tax audit. He paid Luis a lump sum of $50,000 U.S. in September, 1990 according to an estimate of the income available for distribution assuming that the 1990 maintenance costs for Pym Island would be covered by the loan scheme, not the estate, and that Luis would approve the scheme. In October, it became obvious that Luis wanted the Island sold. Daniel decided not to pay out any more money until the Court settled the question. Also, since the U.S. tax liability could be as much as $1.5 million he felt it would be prudent to wait until the audit was finished, perhaps in January, of this year. Only then would he then know what was available for the income beneficiaries for 1990. If the Court neither approved the loan scheme nor ordered the Island sold, the costs for the Island would have to be borne by the estate thereby diminishing the income shares from that estimated by Daniel in September, 1990.

16 Daniel has covered the Island's costs from income, although he retired the only mortgage on the property by paying the outstanding balance of $782,605 last February out of capital. He divides the amount spent on the Island into regular maintenance and extraordinary costs. The annual maintenance costs average $105,000; the total costs average $163,000. Luis argues that the latter is the more realistic figure. I find that most of the items listed as "extraordinary",

such as $20,000 for fuel, should be reassigned to the "regular" maintenance category; but several items, such as the cost of laying a submarine cable for $58,320, are true one time expenses.

17 Roughly speaking, there remains $2.8 million of capital in the estate, not counting the Island. Luis makes the point that if the U.S. tax bill is $1.5 million then the cost of keeping the Island will exhaust the estate within a decade and deprive him of the income that the testator intended for him.

18 The testator's wealth came from Core-Mark International Inc. of which he was the Chairman and Chief Executive Officer until shortly before his death. Daniel was its president until June, 1987 and its vice president until December 31, 1989 when he resigned. At the material time the shares of Core-Mark were publicly traded and widely held. Confident of Core-Mark's prospects Daniel invested $2,625,236 of the estate's funds in the company's preference shares. He sold them about a year later for a profit of $2,126,246.89. The estate also earned $792,187.52 in dividends on the shares. Luis argues that Daniel acted improperly by investing in a company with which he was so closely connected.

19 He also complains that Daniel withheld from him financial information pertaining to the estate. The evidence supporting this allegation consists of an exchange of letters between solicitors in the Fall of 1990. I find that the correspondence proves nothing more than that each side was preparing for a Court battle and engaging in a preliminary skirmish.

PYM ISLAND

20 Pym Island lies close to Swartz Bay on Vancouver Island and covers approximately six acres. The testator bought the property in 1980 and completed most of the improvements about four years later. The main residence has a floor area of 8,874 sq. ft. with such luxurious features as a billiard room and indoor pool with spa. The complex includes four fully furnished guest cottages, a caretaker's residence, service outbuildings, tennis court, wharf and float facilities. It was appraised in November, 1990 at $1,750,000.

LOAN SCHEME

21 Daniel and the other family members recognize how expensive it is to maintain the Island. They propose the loan scheme for the Court's approval so that Luis' income will not be diminished by costs associated with its upkeep. Recital E in the preamble to the draft lending agreement states:

> E. In order to avoid depleting the capital or income of the residue of the Estate, the Gillespie family, except for Luis Gillespie, are prepared to make loans to the Estate of the monies required for the payment of all taxes, insurance, repairs and any other charges or amounts necessary for the general upkeep of Pym Island and all levies, rentals and property taxes assessed thereon (hereinafter referred to as the "costs of Pym Island").

22 The mechanism by which this is to be accomplished involves the creation of an *inter vivos* trust to be known as the Gillespie Family Trust. The beneficiaries of the trust, Daniel, its settlor, and the other family members, would contribute enough money to pay the costs of maintaining the Island. The trust would lend the money to the estate under an agreement the terms of which include:

1. no interest;

2. the loans cannot exceed 50% of the fair market value of the island as appraised every two years;

3. loans will be repaid upon the sale of Pym Island or upon the capital of the estate becoming distributable (upon the last to die of Daniel and Luis);

4. the estate may repay the loans at any time;

5. the estate will pay an annual standby fee of $5,000 U.S. to cover administration costs of the trust;

6. the trust has an option to buy the Island at a fair market appraisal with the loans credited against the purchase price; and

7. Daniel will convey his contingent capital interest in the Island to the trust.

ANALYSIS

JURISDICTION

23 I do not consider either proposal - loan or sale - a variation of the trust created by the will. Accordingly, the restrictions on the Court's jurisdiction imposed by the *Trust Variation Act*, R.S.B.C. 1979, c. 413, particularly s. 2, do not apply. The will gives the executor the power to borrow under paragraph 6.1.4 quoted earlier. The loan scheme falls within the scope of that authority. The will also provides that he may sell the Island; paragraph 5.1.1. concludes with these words:

> ... If in the opinion Of my Trustee Pym Island is no longer required for the use and enjoyment of my family or it is for any other reason advisable to do so, my Trustee may sell Pym Island and any proceeds of sale shall be added to the capital of the residue of my estate;

LOAN OR SALE

24 The two contending positions can be reduced to this: Daniel says that the testator's primary intention was to provide Pym Island for the use and enjoyment of his family; Luis says that it was to ensure that he was properly maintained.

25 I am satisfied that the language of the will favours Daniel's interpretation. The testator's words evince a plain intention to create a special place for his family. He spelled that out before he mentioned the distribution of the income on the residue of the estate. He said nothing about keeping Luis according to an accustomed style or standard of living. The testator must have known the magnitude of the costs associated with the Island; his will and codicil were executed only months before his death.

26 He wanted to benefit his adopted son and to realize a dream for the advantage of his family, including Luis.

27 Daniel wisely proposes an arrangement that prevents the necessity of having to make a stark choice as between these two goals.

28 The problem created by Luis' indifference to the Island will be ameliorated by the lending agreement. Except for Luis' share of the standby fee, $2,500, his income will not be affected by the holding of the Island.

29 On the other hand, Luis' sale proposal affords no accommodation for the testator's desire that the family enjoy his uniquely created resort. Luis would have the Court override the executor's discretion whether to keep or sell the Island on the basis that Luis would be considerably better off. That, I find, does not accord with the testator's wishes as expressed in the will nor does it suit the facts of Luis' economic circumstances. He has received large sums from the estate. His claims of hardship have a hollow ring to them.

30 The objections to the loan scheme are that Luis would be no better off in the future than at present and that Daniel will gain a personal advantage which he would otherwise not be entitled to. The first point contemplates a time in the not too distance future when the 50% limit on borrowing has been reached and the estate elects to repay the loan. Luis argues that in those circumstances there will be insufficient income to meet the obligation, capital will have to be encroached upon, and he will receive little or nothing from a depleted estate. The second point posits a different outcome: while he and his as yet unborn issue would not be able to use the Island, Daniel and his issue, through the proposed family trust

will acquire a property interest - realized through an option to purchase - built up by paying maintenance costs. In other words, Daniel will profit from the trust created by the will.

31 I cannot find merit in either objection. The worst outcome for Luis is that today's conflict between his interest and those of the capital beneficiaries will be postponed to a future date. I cannot see that he will be worse off as a result of the loan scheme. On the other hand, the immediate benefits to him are obvious. His problem is that he sees the Island only in terms of a limit on income; a view not shared by the testator when he made his will, nor by the other beneficiaries.

32 Luis is not excluded from using Pym Island under the loan scheme, although he would certainly be expected to contribute to its upkeep if he did. As far as his unborn issue are concerned, the Public Trustee appears for them and approves the scheme.

33 Trust law obliges Daniel to seek court approval for a lending arrangement between himself as executor and the trust he administers for the estate. I consider the loan scheme to be eminently fair: an advantage to Luis, namely, interest free loans allowing more income for him. This advantage is counterbalanced by an option to purchase with the loans credited to the purchase price. It balances the interests of the parties and abides within the spirit of the testator's will, namely, that the island stay within the family.

34 It follows from this analysis that I will not interfere with Daniel's decision not to sell. This is a discretionary matter which the testator placed in his hands. Luis has failed to persuade me that any of the principles governing the proper use of an executor's discretion as enunciated in *Boe v. Alexander* (1987), B.C.L.R. (2d) 106 at 112 (C.A.) have been violated.

REMOVAL OF EXECUTOR

35 I turn now to a consideration of the grounds for removing Daniel as executor.

ANIMUS

36 The history of the relations between Daniel and Luis reveals that but for the dispute over the Island, which came to a head in the Fall of 1990, Daniel assiduously attended to Luis' needs. He was upset in October to learn that Luis rejected the loan scheme because he advanced $50,000 in September on the belief that Luis supported the scheme and calculated the income share accordingly. The discontinuance of the monthly advances was understandable in the circumstances of uncertainty created by the need to go to Court and to await the U.S. tax audit. Rather than risk advancing more income than Luis may ultimately be entitled to, Daniel quite properly discontinued the monthly instalments.

FAILURE TO HOLD AN EVEN BALANCE

37 A trustee is obliged to hold the balance evenly between beneficiaries: see *Boe v. Alexander*, *supra*, at p. 112; and D. Waters *Law of Trusts in Canada* (2d) (Toronto: Carswell's, 1984) who states at p. 762 this priniciple as follows:

> Trustees may be subject to court intervention under (1), [the decision is so unreasonable that no honest or fair dealing trustee could have come to that decision] and their decision be set aside if there has been an improper preference of one class of beneficiaries over another. For instance, a trustee is not in good faith or has not dealt properly between the objects of his discretion if his decision obviously prejudices the income beneficiary to the gain of the capital beneficiary. But in this instance the trustee who so exercises his fiduciary powers has also broken the separate and distinct rule of equity that as a trustee he must act impartially as between the income and capital beneficiaries. The conferment of a discretion does not waive the application of this rule. If he wishes that rule not to apply, the settlor or testator must go on to say so. Consequently, it cannot categorically be said that an unimpartial act or omission constitutes bad faith or lack of fair dealing as required by criterion (1). It all depends on the total language of the instrument.

38 For reasons already given, particularly the order in which matters are put in the will, I find that the testator intended that the costs of the Island are to be a first charge against the income of the estate. I also have regard to paragraph 6.1.13,

quoted earlier, which provides for depreciation and depletion reserves and concludes with the words: "Notwithstanding anything herein contained the income arising from my estate shall be the aggregate net income after providing for the aforesaid reserves for depreciation and depletion. " This supports the contention that the executor must first turn his mind to the maintenance of the Island before considering the interests of the income beneficiaries, one of whom is himself.

39 Luis makes allegations about the charging of mortgage interest against the income of the estate but that is a matter that will be settled on the passing of accounts.

40 In my view, Daniel has assigned the correct priority to the components of the estate and has not acted unfairly within the framework of the will.

CORE-MARK INTERNATIONAL

41 Luis faces the difficult task of seeking to remove an executor for making an investment choice which turned out to be an unqualified success. It could have gone the other way and Daniel may unwisely have exposed himself to criticism, if not liability. But he knew the company well and felt there was an excellent opportunity for the estate to make money. He was right; within a year or so he almost doubled a $2.6 million investment.

42 Because Core-Mark at the time was a public company with the shares held widely, I am unable to see that Daniel obtained any personal advantage from this investment in his capacity as an officer of the company. While personally risky, his behaviour in this matter should not disqualify him as executor.

FAILURE TO ACCOUNT

43 I have already characterized the communications between solicitors in the Fall of 1990 as that between combatants readying themselves for a fight in Court. Those acting for Luis were trying to establish that the executor was misconducting himself, and those acting for Daniel responded defensively. In any event, Luis got the financial information he was asking for prior to the hearing. No bad faith can be imputed to Daniel from this exchange.

CONFLICT OF INTEREST

44 Luis contends that Daniel as trustee and beneficiary is in a conflict of interest and cannot be expected to deal fairly with Luis' interests. I find that contention groundless. Macfarlane J.A. In *Saunders v. Halom* (1986), 8 B.C.L.R. (2d) 117 said at p. 127:

> ... The court is loath to interfere with the discretion exercised by a trustee in a case where the trustee and the beneficiary are the same person. That is so even where there are residuary beneficiaries, and the trustee might exhaust the estate by using all the capital for his or her own purposes if intervention would be inconsistent with the intention of the testator, to draw from the language of the will.

45 Something more than Daniel's dual role must be shown to establish his unfitness to act as executor. None has been placed before me.

CONCLUSION

46 The executor's petition is granted in the terms sought. The petition of Luis Albert Gillespie is dismissed. Costs will follow the event and may be spoken to if necessary.

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