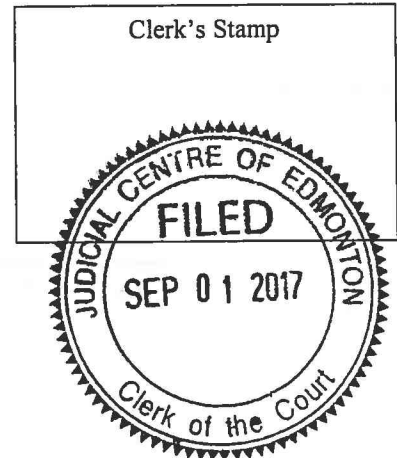


COURT FILE NO. 1103 14112 and 1403 04885

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

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

VOLUME 1 OF 2

DOCUMENT WRITTEN BRIEF OF THE APPLICANT, CATHERINE TWINN



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PART 1 INTRODUCTION

1. This is an application brought by Catherine Twinn ("**Ms. Twinn**") in her capacity as a trustee for indemnification pursuant to the deeds of trust and the common law.
2. Ms. Twinn is one of five trustees (the "**Trustees**") overseeing two large Trusts, the Sawridge Band Inter Vivos Settlement, settled on April 15, 1985 (the "**1985 Trust**") and the Sawridge Trust, settled on August 15, 1986 (the "**1986 Trust**"). Both Trusts were created by Chief Walter Patrick Twinn (the "**Settlor**"), of the Sawridge Indian Band, No. 19, now known as Sawridge First Nation (the "**First Nation**"). The 1985 Trust and 1986 Trust are collectively referred to as the "**Trusts**".
3. Ms. Twinn is one of the original trustees of the 1986 Trust. She has served as a trustee on the 1985 Trust for almost 30 years (appointed December 18, 1986).

Affidavit of Catherine Twinn sworn September 23, 2015, and filed September 30, 2015 in 2011 Action and sworn September 23, 2014, and filed September 3, 2015 in 2014 Action ("**Applicant 2014 Affidavit**"), at para 2.

4. Ms. Twinn sits as an independent trustee on another indigenous trust. Ms. Twinn is also a long standing member of the Law Society of Alberta with a background in indigenous law.

Affidavit of Catherine Twinn sworn May 10, 2017 and filed May 11, 2017 in both Actions ("**Applicant 2017 Affidavit**"), at para 35.

5. A number of issues related to the administration of the Trusts have caused Ms. Twinn significant concern that certain beneficiaries will be deprived of their status as beneficiaries and access to the Trusts. As a result, Ms. Twinn has felt obliged as a fiduciary to these beneficiaries to advance positions to protect their existing rights

contrary to the positions of the other Trustees of the Trust. This has led Ms. Twinn to participate independently in actions commenced in relation to the Trusts to determine the identity of beneficiaries; the validity of definitions within the 1985 Trust and, in Ms. Twinn's view, to deal with inherent and actual conflicts of interest in this process.

6. Ms. Twinn has embarked on this process at significant personal cost, both financially and emotionally. Ms. Twinn's position is that her fiduciary duty obligates her to proceed in this manner despite her position being contrary to her own personal interests.
7. In this application, Ms. Twinn is seeking indemnification for her past and future legal fees as a Trustee of the Trusts and as they specifically pertain to Court of Queen's Bench Action Nos. 1103-14112 ("**2011 Action**") and 1403-04885 ("**2014 Action**") (or collectively referred to as the "**Actions**"). Both actions are directly related to significant issues impacting the administration of the Trusts.
8. To date, while the other Trustees, (herein referred to as the "**Four Trustees**"), have been fully indemnified from the assets of the Trusts for their legal fees incurred as litigants in the Actions, Ms. Twinn's requests for indemnification have been denied. Despite this position, the Four Trustees have elected to indemnify the First Nation large sums in relation to the 2011 Action, even though the First Nation is not a party to the 2011 Action.

Affidavit of Catherine Twinn sworn
December 15, 2015, and filed December 16,
2015 in both Actions ("**Applicant 2015
Affidavit**"), at paras 28, 31 and 33 .

9. Ms. Twinn submits that the Four Trustees are functioning as a unit and effectively (whether intentionally or not) pressuring Ms. Twinn to abandon her fiduciary obligations to the beneficiaries of the Trusts by refusing her access to legal funding and passing resolutions denying her access to relevant Trust information.

10. As a long standing trustee of the Trusts, Ms. Twinn's concerns in relation to the operation and management of the Trusts have grown over time. While these concerns have pertained to various issues, the underlying theme is the inherent conflict between the First Nation's interest in the Trusts' assets and the duty of the Trustees to the beneficiaries of the Trusts. Ms. Twinn is concerned that this conflict is leading to decisions that are not in the best interests of certain beneficiaries. This concern is aggravated by the fact that Roland Twinn is the Chief of the First Nation, as well as a Trustee and that historically many of the Trustees held elected positions with the First Nation. For example, through much of 2014, three of the five Trustees were elected First Nation officials.

Applicant 2014 Affidavit, at paras 9-10.

11. This issue was brought to a head following the inception of the 2011 Action. The 2011 Action seeks judicial direction in regards to the existing definition of "beneficiary" under the 1985 Trust and may give rise to an Order to vary this definition to include only members of the First Nation on the basis that the existing definition is discriminatory. The 2011 Action is very serious as the outcome sought by the Four Trustees is to change the existing group of beneficiaries, the very purpose, for which the 1985 Trust was settled.
12. While the Four Trustees raise concerns regarding the potential discriminatory nature of the existing beneficiary definition of the 1985 Trust, ironically, the effect of their solution is to drastically limit the pool of persons who would qualify as beneficiaries and result in a smaller group of First Nation members obtaining all the benefit.

Applicant 2015 Affidavit, at para 12.

1985 Sawridge Trust v. Alberta (Public Trustee), 2012 ABQB 365 ("Sawridge #1")
at para. 49 TAB 1

13. It is equally concerning to Ms. Twinn that the Four Trustees are not challenging the discriminatory nature of the 1986 Trust which benefits First Nation members. Ms. Twinn

has been advised by Dr. Donovan Waters, a respected authority on trust law, that the First Nation's membership process may not be Charter compliant.

Applicant 2017 Affidavit, at Exhibit H.

14. To date, the Four Trustees have not sought or advocated for full grandfathering of all affected beneficiaries of the 1985 Trust and their issue in the 2011 Action. Ms. Twinn believes this position is putting the First Nation's interests, particularly those of the Chief, over those of the affected beneficiaries.
15. In light of these serious concerns and the life changing impact the 2011 Action could have on the current beneficiaries of the 1985 Trust, Ms. Twinn retained McLennan Ross LLP seeking independent advice on her obligations as a trustee, and subsequently, participate as a litigant in the 2011 Action.

Applicant 2015 Affidavit, at paras 13 and 21.

16. Ms. Twinn also initiated an application, in the pre-existing 2014 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. This is a structural conflict that was also noted as concern by Justice Thomas in his June 12, 2012 decision in the 2011 Action ("Sawridge #1").

Sawridge #1, at para. 29

TAB 1

Application filed by the Applicant in the 2014 Action on September 26, 2014 **TAB 2**

17. Given Ms. Twinn's deep belief that her fiduciary duty compels her to bring her concerns before the Court in the Actions, she has personally funded her involvement to date, incurring significant legal fees, for the purpose of satisfying her fiduciary obligations as a Trustee. Ms. Twinn's involvement serves her no personal benefit and in fact, negatively affects her personal interests, along with the Four Trustees, who would all benefit from a

smaller group of beneficiaries if the relief sought by the Four Trustees in the 2011 Action was successful.

18. Ms. Twinn, is advancing legitimate issues affecting the Trusts in the Actions. She is entitled to indemnification for her legal fees incurred pursuant to both the terms of the Trusts and the test set out in the Common Law to indemnify a Trustee.

PART 2 STATEMENT OF FACTS

The 1985 and 1986 Trusts

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

“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 this 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 purpose of this Settlement”

Applicant 2015 Affidavit, at Exhibit I.

20. On April 17, 1985, two days after the 1985 Trust was settled, there were meaningful changes made to the *Indian Act*, R.S.C. 1970, c. I-6 as a result of *Bill C-31, An Act to amend the Indian Act*, 33-34 Eliz II c.27 (“*Bill C-31*”). The *Bill C-31* amendments,

amongst other matters, affected who would qualify for membership in a band and the band membership process generally. A major change was that a first nation could elect to administer, in accordance with the law, their own band membership list rather than the list being administered by the Department of Indian Affairs and Northern Development (now known as Aboriginal Affairs and Northern Development Canada) ("DIAND"), as had previously been the practice. Following the *Bill C-31* amendments, the First Nation elected to take control of its band list and continues to do so at present.

*Indian Act, RSC 1970, c. I-6, as amended by
SC 1985, c. 27, s. 23(1).* **TAB 3**

*Stoney v. Sawridge First Nation, 2013 FC
509 at para. 4,* **TAB 4**

21. On August 15, 1986, Chief Walter Twinn settled an additional and separate trust (the "1986 Trust") for the benefit of:

"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".

Applicant 2015 Affidavit, at Exhibit J.

22. Effectively, the 1985 Trust provided for all persons who would qualify for First Nation band membership pre *Bill C-31* amendments and the 1986 Trust provides for all First Nation band members post *Bill C-31* amendments.
23. As of January 23, 2015, there were approximately 478 persons associated with the First Nation at DIAND, but only 44 persons are on the First Nation membership list.

Applicant 2015 Affidavit, para 12.

24. At present, and as has been the historical practice, the same people are Trustees of both Trusts.

25. Paul Bujold was hired to be the administrator for the Trusts in 2009. This is a salaried position that is contracted for by the Trustees. Mr. Bujold is not a Trustee.

Applicant 2014 Affidavit, para 7.

26. Brian Heidecker has been the chair of the Trusts since 2010. This is also a position that receives financial compensation. Mr. Heidecker is not a Trustee.

Applicant 2014 Affidavit, para 8.

2011 Action

27. Dentons LLP ("**Dentons**") and Reynolds Mirth Richards & Farmer LLP ("**RMRF**") represent the collective group of Trustees in the 2011 Action, which includes Ms. Twinn. While Dentons and RMRF are counsel to Ms. Twinn, they no longer consult with her, have advanced positions that are contrary to Ms. Twinn and have even advanced applications that are directly adverse to Ms. Twinn, such as commencing the 2014 Action which sought relief against Ms. Twinn. Dentons and RMRF receive their instructions from Mr. Bujold. The adverse relationship between Dentons and Ms. Twinn is clearly evident by Dentons opposition to this particular application.

Applicant 2015 Affidavit, at Exhibit F.

Applicant 2015 Affidavit, at paras. 18, 20 and Exhibit H.

28. The 2011 Action was commenced by way of Order of Justice D.R. Thomas issued August 31, 2011 (the "**August 2011 Order**"). The August 2011 Order directed the Trustees of the 1985 Trust to bring an application for advice and direction for the purpose of:
- a) Seeking direction with respect to the definition of "Beneficiaries" contained in the 1985 Trust, and, if necessary, to vary the 1985 Trust to clarify the definition of "Beneficiaries"; and
 - b) Seeking direction with respect to the transfer of assets to the 1985 Trust.

August 2011 Order

TAB 5

29. An Affidavit filed by the Trustees on September 13, 2011 in support of the relief sought in the 2011 Action was deposed by Mr. Bujold and stated that the Trustees were seeking that the definition of "beneficiary" in the 1985 Trust be amended such that it is consistent with the definition of "beneficiary" in the 1986 Trust. In other words, change the definition of beneficiaries in the 1985 Trust to members of the First Nation.

Affidavit of Paul Bujold sworn and filed February 15, 2017 in both Actions ("**Bujold Affidavit**"), at Exhibit A, para. 33.

30. The application the Trustees were directed to file by virtue of the August 2011 Order has never been filed, and the position of the Four Trustees as set out in Mr. Bujold's Affidavit, if accepted, skirts the requirements of the August, 2011 Order. More particularly, the Order compelled the Trustees to first seek direction on whether the existing definition requires clarification.
31. On June 12, 2012, Justice Thomas issued a decision in the 2011 Action that, amongst other matters, appointed the Office of the Public Trustee ("**OPT**") as the litigation representative for certain minor children whose parents were or had applied to be members of the First Nation with full and advance indemnification for its legal costs incurred in the 2011 Action.

Sawridge #1, at para. 33

TAB 1

32. In Sawridge #1, the Court found that the Trustees and the adult members of the First Nation, including the Chief and Council, were in a potential conflict between their personal interests and their duties as fiduciaries. This created a "structural conflict".

Sawridge #1, at paras. 28-29

TAB 1

33. In Sawridge #1 the Court took notice that there were allegations that the First Nation membership application and admission process may be "suspect" and that those issues

would be reviewed and addressed in the substantive argument on the adoption of a new definition of “beneficiaries” for the 1985 Trust.

Sawridge #1, at para. 29

TAB 1

34. On or about June 12, 2015, and prior to obtaining judicial direction on whether the “beneficiary” definition in the 1985 Trust was discriminatory and if so, whether it required amendment, Dentons filed an application to approve a settlement offer that, if approved, would have the effect of changing the definition of “beneficiary” in the 1985 Trust to membership in the First Nation and would grandfather certain alleged minor beneficiaries of the 1985 Trust. The application was returnable June 30, 2015 (the “Settlement Application”).

Settlement Application

TAB 6

Applicant 2015 Affidavit, at para 20.

35. McLennan Ross LLP (“MR”) appeared at the June 30, 2015 Settlement Application on behalf of Ms. Twinn in her capacity as a Trustee of the 1985 Trust. Since that time, MR has been attending and generally participating in all subsequent proceedings in the 2011 Action on behalf of Ms. Twinn.
36. At present, the majority of the Trustees of the 1985 Trust have approved payment of the following parties’ legal fees in relation to the 2011 Action, in full:

Law Firm	Clients Represented
Dentons/RMRF	Collective group of Trustees of the 1985 Trust
Bryan & Company LLP	All Trustees of the Trusts with the exception of Catherine Twinn
Bennett Jones LLP	Brian Heidecker, Chair of the Board of Trustees of the Trusts (not a Trustee himself)

Parlee McLaws LLP	First Nation
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Applicant 2015 Affidavit, at paras 28, 31 and 33.

Examination of Paul Bujold on Bujold Affidavit and undertakings, conducted March 7 to 10, 2017 and June 20, 2017 ("**Bujold Transcript**"), Page 210, Lines 6-10

37. The Four Trustees have questioned and challenged the reasonableness of a significant legal account of the OPT which has led to a longstanding dialogue between the OPT and Dentons regarding the payment of the OPT's account and lengthy delays in making payment to the OPT for its legal expenses. As of March 2017, not all of the OPT's accounts had been paid.

Bujold Transcript, Page 210-211, Lines 11-3

38. Ms. Twinn requested reimbursement of her legal accounts incurred in relation to the 2011 Action, but payment was refused.

Applicant 2015 Affidavit, at para 34 and Exhibit K.

2014 Action

39. The 2014 Action arises out of the change in composition of the board of Trustees. It was commenced by way of Originating Application filed on April 1, 2014 by Dentons that sought, *inter alia*, the approval of the transfer of assets from the prevailing Trustees to a new Trustee group which included a new Trustee, Everett Justin Twin-McCoy ("**Justin Twin**"). This application sought solicitor-client costs against Ms. Twinn or from the Trusts.

Applicant 2015 Affidavit, at Exhibit F.

40. The change to the Trustee group arose in or around January 2014, when Walter Felix Twin, provided his resignation as a Trustee of the Trusts.

Applicant 2014 Affidavit, at para 15.

41. On or about January 21, 2014, Justin Twin was appointed by the majority of the Trustees (but not Ms. Twinn) as a replacement trustee to fill the vacancy left by Walter Felix Twin.

Applicant 2014 Affidavit, at para 16.

42. At the time of his appointment on January 21, 2014, Justin Twin was a Band Councillor (elected position) with the First Nation and sat on Band Council with Chief Roland Twinn, along with Bertha L'Hirondelle and Clara Midbo who were also elected elders of the First Nation.

Applicant 2014 Affidavit, at para. 9.

43. The application was heard on May 16, 2014 before Justice Neilsen. The application to transfer the assets from the prevailing Trustees to the new Trustee group was granted, subject to Ms. Twinn's right to contest the eligibility of Justin Twin to sit as a Trustee being reserved. At the application, Ms. Twinn disputed the appointment because, amongst other reasons, it was unclear as to whether Justin Twin met the necessary qualifications to be a Trustee pursuant to the 1985 Trust deed and the inadequate process that was utilized to effect Justin Twin's appointment.

Applicant 2015 Affidavit, at Exhibit G.

44. Shortly following the May 16, 2014 application before Justice Neilsen, another Trustee vacancy opened when (Clara Midbo) passed away on July 13, 2014.

Applicant 2014 Affidavit, at para 22.

45. On or about August 12, 2014, Dr. Margaret (Peggy) Ward ("**Dr. Ward**") was appointed by the majority of the Trustees (but not Ms. Twinn) as a replacement trustee to fill the vacancy left by Clara Midbo.

Applicant 2014 Affidavit, at para 27.

46. Ms. Twinn held similar concerns about the process used to appoint Dr. Ward and this resulted in Dentons commencing a similar application on September 10, 2014 in the 2014 Action that sought, *inter alia*, the approval of the transfer of assets from the prevailing Trustees to the new Trustee group which included Dr. Ward.

Application filed by the Four Trustees in the
2014 Action on September 10, 2014 **TAB 7**

47. On September 26, 2014, Ms. Twinn filed an application that sought, *inter alia*, advice and direction in relation to the appointments of Justin Twin and Dr. Ward and direction on trustee appointment and composition generally, with a specific focus on the “structural conflict” arising from Trustees holding dual roles with the First Nation.

Application filed by Applicant in the 2014
Action on September 26, 2014 **TAB 2**

48. Following the filing of Ms. Twinn’s application in the 2014 Action, Dentons ceased to act for the Trustees in the 2014 Action and Bryan & Company LLP (“**Bryan & Company**”) presently represents the Four Trustees.
49. This advice and direction application is still pending before the Courts, however an agreement has been reached between the parties to move certain issues into private arbitration and discontinue the remainder of the relief sought by Ms. Twinn in the 2014 Action.

PART 3 ISSUES

50. The following issues are raised in the application:

- A. *When is a trustee entitled to indemnification?*
- B. *Is Ms. Twinn entitled to indemnification for her legal fees?*
- C. *Is Ms. Twinn entitled to indemnification for future legal fees incurred in the 2011 and 2014 Actions?*

PART 4 ARGUMENT

A. *When is a trustee entitled to indemnification*

51. The common law is settled in relation to when a trustee is entitled to indemnification.
52. A trustee is entitled to reimbursement for out-of-pocket expenses, properly incurred in the execution of the trust. The Courts have developed a three part test for indemnification which requires:
- a) The expenses to arise out of an act or within the scope of the trusteeship duties and powers;
 - b) The expense is reasonable;
 - c) The trustee is duty-bound.

*Waters' Law of Trusts in Canada, 4th ed by
Donovan WM Waters, Mark R Gillen &
Lionel D Smith (Toronto: Carswell, 2014)
("Waters' on Trusts") at 1209* **TAB 8**

53. Reasonable expenses have long been held by Courts to include the costs of an action reasonably defended.

*Geffen v. Goodman Estate, [1991] 2 SCR
353 ("Geffen"), at 390* **TAB 9**

54. The 1985 and 1986 Trust deeds also provide for mandatory indemnification to a trustee for reasonable reimbursement of fees incurred in the administration of the Trusts. Paragraph 9 of both Trusts' deeds are identical and provide that:

"Administration costs and expense 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."
[Emphasis mine]

Applicant 2015 Affidavit, at Exhibits I and J.

55. The Trust deeds are clear that reimbursement for trustee expenses is mandatory, not permissive or a discretionary decision of the majority of Trustees.
56. Ms. Twinn submits that the test for indemnification for trustee reimbursement as set out in the deeds of the Trusts, relaxes the requirements of the common law test and only requires a trustee of the Trusts to demonstrate, on balance, that the expense incurred was:
- a) Reasonable; and
 - b) Incurred in the administration of the Trusts.
57. Typically an application for advice and direction to the Court is regarded as an expense reasonably incurred by a trustee.

The Canada Trust Company v. Russell Browne et. al., 2011 ONSC 4400 ("Browne"), at para. 15 **TAB 10**

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

Browne, at para. 15.

TAB 10

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

Browne, at para. 20.

TAB 10

*Waters' Law of Trusts in Canada, 3rd ed by
Donovan WM Waters, Mark R Gillen &
Lionel D Smith (Toronto: Carswell, 2005) at
1156 [Waters' on Trusts]*

TAB 11

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

Browne, at para. 33.

TAB 10

61. This concept is codified in the *Trustee Act*, which provides:

Liability of trustee

25 A trustee is chargeable only for money and securities actually received by the trustee, notwithstanding the trustee signing any receipt for the sake of conformity, and is answerable and accountable only for the trustee's own acts, receipts, neglects or defaults and not for

(a) those of any other trustee,

(b) any banker, broker or other person with whom any trust money or securities may be deposited,

(c) the insufficiency or deficiency of any securities, or

(d) any other loss, unless it happens through the trustee's own wilful default,

and may reimburse the trustee or pay or discharge out of the trust property all expenses incurred in or about the execution of the trustee's trust or powers.

RSA 1980 cT-10 s25

Trustee Act, RSA 2000, c T-8, s. 25 **TAB 12**

62. Ms. Twinn submits that "reasonableness" standard has been interpreted liberally by the Courts.

63. Ms. Twinn submits that this is a very important principle in law as, without this, trustees would either be unable to afford to fulfill their duty or would not do so because of the costs involved. In addition, without this protection there is risk that a Trustee attempting to fulfill his or her obligations may be stymied from doing so by other trustees who disagree with a position.

64. The Supreme Court of Canada has held that:

In so far as such person [trustee] does not recover his costs from any other person, he is entitled to take his costs out of the fund held by him unless the court otherwise orders; and the court can otherwise order only on the ground that he has acted unreasonably, or in substance for his own benefit, rather than for the benefit of the fund. [Emphasis mine]

Geffen, at 391

TAB 9

General Comments about a Dissenting Trustee Opinion

65. The 1985 Trust requires five Trustees to be appointed at any given time. While there are likely numerous reasons for this requirement, one logical reason is so that there is a variety of viewpoints and perspectives that can be represented at the trustee table.

66. Ms. Twinn is an experienced trustee and lawyer. She clearly represents a dissenting view amongst the Trustees in relation to significant matters affecting the administration of the Trusts, mainly the requirement to grandfather existing beneficiaries, including taking steps to identify this group of beneficiaries, in the event changes to the 1985 Trust are made and the process and qualifications for Trustee appointment.
67. It is respectfully submitted that the Court must be careful to ensure a dissenting view is not silenced by the majority through withholding access to paid legal services. This type of conduct has the potential to obstruct the intention of the Settlor and be of disservice to the beneficiaries. This type of conduct is analogous to shareholder oppression.
68. Further, a Trustee has a duty to seek the Court's advice when a legal issue is in question. As such, the majority should not be able to impede a dissenting trustee's ability to meet their duties.
69. Of note, the sole asset of the Trusts are shares in the Sawridge Group of Companies. The existing beneficiaries of the 1985 Trust are the beneficial owners of these shares. Given that the majority of the Trustees are seeking to disentitle many of these beneficiaries from their beneficial interest in these shares, this could create grounds for a shareholder oppression action.

Bujold Transcript, Page 353, Lines 19-24

Business Corporations Act, RSA 2000, c B-9 at s. 242 **TAB 13**

70. The Ontario Court of Appeal in the 2010 decision of *Fedel v. Tan*, found that an oppression remedy is available to a person who is not a registered shareholder including those persons who are beneficial owners of the securities.

Fedel v. Tan, 2010 ONCA 473 at para. 67-71 **TAB 14**

71. Given that Ms. Twinn's positions in the 2011 Action have been primarily focused on ensuring the existing beneficiaries' rights are protected, this is of great assistance to the

1985 Trust. Ms. Twinn advocates to ensure the rights of existing beneficial shareholders are not unfairly or prejudicially affected thus giving rise to a potential oppression claim, including other potential claims, against the Trustees or the Sawridge Group of Companies.

72. Ms. Twinn's position in this litigation is not being advanced for personal benefit. In fact, Ms. Twinn would benefit if the relief sought by the Four Trustees in the 2011 Action was obtained given that she is a member of the First Nation and thus would remain a beneficiary of the 1985 Trust amongst a smaller pool of beneficiaries. In addition, Ms. Twinn has had to use her personal finances to fulfill her duty which has been significant and difficult.
73. Given that all of the other Trustees are also members of the First Nation, Ms. Twinn's dissenting view is especially important, as the other Trustees will all personally benefit if the relief sought by them in the 2011 Action is granted. This is especially so for Bertha L'Hirondelle and was for the late Clara Midbo (and potentially Justin Twinn) who were both member of the First Nation, but did not currently qualify as a beneficiary of the 1985 Trust under the existing definition.

Applicant 2014 Affidavit, at para. 16 and 19.

2011 Action – History and Primary Concerns

74. The relief sought in the 2011 Action by the Four Trustees would have a profound effect on the current beneficiaries of the 1985 Trust. The following submissions highlight that Ms. Twinn's position to protect existing beneficiaries is clearly within the scope of her duties as a trustee, reasonable and should be funded by the Trusts.
75. It is trite law that as a fiduciary Ms. Twinn's duty to the beneficiaries of the Trusts is of the highest order. As a trustee, the whole purpose is to administer property on behalf of another, to hold it exclusively for the other's enjoyment. The Trustees are expected to put the interests of the Trusts and the beneficiaries first whenever exercising the powers, or performing the duties of this office. Ms. Twinn's duty is one of selfless service.

Waters' on Trusts, at 42

TAB 8

76. Many indigenous persons within the current beneficiary group are vulnerable and marginalized. In Ms. Twinn's respectful submission, this amplifies the repercussions of the relief being sought by the Four Trustees in the 2011 Action and should be carefully considered in light of the Trustees' fiduciary duty to the 1985 Trust beneficiaries.

Applicant 2015 Affidavit, at para. 23.

Applicant 2017 Affidavit, at para. 37.

77. The following is a brief summary of circumstances surrounding the initiation of the 2011 Action and the subsequent events that inform Ms. Twinn's independent involvement in the 2011 and 2014 Actions:

- a) 2010 – Trusts advertise for beneficiaries of the 1985 Trust through newsletters, messaging to beneficiaries and indicates that Trustees are in the process of ascertaining beneficiaries so that benefits can start being paid;

Bujold Transcript, Exhibits 1 and 2

- b) 2010/2011 – Trustees retain legal counsel, including Dr. Donovan Waters, Q.C. for the purpose of addressing the issue of beneficiary ascertainment. Dr. Waters provides various opinions and comments to the Trustees, which include the following:

- i. Concerns were expressed by several Trustees to Dr. Waters regarding the membership process of the First Nation, with particular focus on the long delays of the First Nation in making decisions on membership.

Applicant 2017 Affidavit, at Exhibit H.

Bujold Transcript, Page 509, Lines 12-18, Page 320, Lines 2-10, Page 328-329, Lines 12-9

- ii. Dr. Waters provided the Trustees with options on how to address beneficiary ascertainment and concerns with the legality of the existing definition of “beneficiary” in the 1985 Trust;

Applicant 2017 Affidavit, at Exhibit H.

- iii. Dr. Waters advised the Trustees that aspects of the current membership rules of the First Nation are likely discriminatory and not Charter compliant and thus would not withstand scrutiny.

Applicant 2017 Affidavit, at Exhibit H.

- iv. Dr. Waters emphasized that the quality of the First Nation membership code process is crucial for the proper operating of the 1986 Trust.

Bujold Transcript, Exhibit 8

- c) December 21, 2010 – The Trustees resolve to adopt certain recommendations of Dr. Waters in regards to the Trusts, which included initiating the 2011 Action, with the following parameters:
 - i. To proactively work with the First Nation membership committee and the Chief and Council to expedite recommendations to the Legislative Assembly so that applications can be determined within 6 month from the date received; and
 - ii. To work with the Chief and Council to develop proposed amendments to the Sawridge Citizenship Code including outlining legal standards that the decision-making process must meet.

Applicant 2017 Affidavit, at Exhibit H.

- d) December 23, 2010 – Dr. Waters confirms that he will begin preparing what was to become the 2011 Action and states that if the beneficiary definition in the 1985 Trust is to be changed, it will be ensured that “all existing 1985 beneficiaries are grandfathered into the 1986 Trust”.

Bujold Transcript, Exhibit 10

- e) June 21, 2011 - In furtherance to the decision of the Trustees to work with the First Nation to resolve its membership issues, Paul Bujold writes to the First Nation. The First Nation does not respond.

Applicant 2017 Affidavit, at paragraph 13 and Exhibit J

Bujold Transcript, Page 320-321, Lines 23-6

- f) June 12, 2012 – Justice Thomas issues Sawridge #1 that directs the OPT to investigate the First Nation's membership process for the purpose of exploring the proposed change in beneficiary definition. The decision also identifies a structural conflict between those Trustees who hold dual roles with the First Nation and the Trusts.

Sawridge #1

TAB 1

- g) August 2012 – Ms. Twinn raises concerns at a Trustee meeting that the Trustees must address the structural conflict identified by Justice Thomas and work collaboratively with the OPT in their mandate. Mr. Bujold advises the Trustees that their legal advisors have stated that there is no need to investigate the structural conflict and the concerns of Justice Thomas are not meant to identify an issue that needs to be corrected. We note that on questioning, Mr. Bujold refused to undertake to provide a copy of the legal opinion upon which the decision was made not to address the structural conflict.

Applicant 2015 Affidavit, at para 7

Bujold Transcript, Page 331, Lines 8-18 and Undertaking 29 (refused)

- h) September 2012 – Ms. Twinn states at a Trustee meeting that she is concerned about whether the Trustees are meeting their fiduciary duties and seeks approval

for payment for independent counsel to advise her on her duties and obligations as a Trustee. This request was denied by the other Trustees.

Applicant 2015 Affidavit, at para 8

- i) June 12, 2015 – The Four Trustees bring the Settlement Application. If approved by the Court, the settlement would have potentially had the effect of ending the 2011 Action. The settlement did not consider the negative impact of the proposal to current adult beneficiaries, unborn beneficiaries and was not transparent as to how the list of minor beneficiaries had been developed.
- j) January 21, 2016 – A distribution proposal was submitted by the Four Trustees in relation to the December 17, 2015 decision of Justice Thomas in the 2011 Action (**Sawridge #3**) that proposed, amongst other matters, the beneficiary definition to be changed to members of the First Nation (the “Distribution Proposal”).

*1985 Sawridge Trust v. Alberta (Public Trustee),
2015 ABQB 799 (“Sawridge #3”) at para. 40* **TAB 15**

Distribution Proposal submitted by the Four
Trustees on January 21, 2016 **TAB 16**

- k) March 16, 2016 – The Four Trustees pass a resolution restricting Trustee access to Trust records (“**Record Restriction Resolution**”). All Trust records are effectively in the control of Mr. Bujold. The Record Restriction Resolution refers to the release of privileged information at a “without prejudice” meeting with the OPT, the subject matter of the privileged information referred to relates to the amount of legal fees paid to the Trusts’ legal team (Dentons and RMRF) and the Four Trustees refusal to indemnify Ms. Twinn for her legal bills. Mr. Bujold acknowledges in questioning on his Affidavits that the quantum of legal fees spent by the Trustees should not be confidential from the potential minor beneficiaries represented by the OPT, but that its disclosure needs to be controlled and presented with supporting information as otherwise it would simply be a

statement of a huge amount of money spent, “which makes it seem like a huge and lavish undertaking”.

Bujold Transcript, Exhibit 5, Page 204, Lines 2-16
and Page 195-197, Lines 10-10

- l) August 17, 2016 – Patrick Twinn, Shelby Twinn and Deborah Serafinchon apply for party status in the 2011 Action. Patrick Twinn and Shelby Twinn’s are clearly beneficiaries of the 1985 Trust under the existing definition. Shelby Twinn is not a member of the First Nation and would lose her status as a beneficiary of the 1985 Trust if the definition of beneficiary was varied as proposed by the Four Trustees (hereinafter referred to as the “**Beneficiary Application**”).

Application filed on August 17, 2016 in 2011
Action by Patrick Twinn, Shelby Twinn and
Deborah Serafinchon **TAB 17**

Bujold Transcript, Page 354, Lines 16-24 and Page
107, Lines 3-15

- m) September 21, 2016 – Resolution passed at September 21, 2016 Trustee meeting at the suggestion of Mr. Bujold (through advice from the legal team) that information may be withheld from any Trustee in the event the lawyers acting for the Trustees believe its release would be harmful to the 2011 Action (“**Information Restriction Resolution**”). If information is withheld, Mr. Bujold is to advise the Trustees of the general nature of the information withheld. This motion was voted on in the absence of Ms. Twinn and its intent was directed specifically at her.

Bujold Transcript, Exhibit 6 and 9 and page 238-
241, Lines 6-13

- n) 2013 to present – Mr. Bujold is provided even more control to bypass Trustees as the primary point of contact for the Trustees’ legal team and is authorized to provide the legal team with instructions on significant matters in the 2011 Action without obtaining prior instructions from the Trustees, examples include:

- A. Trustee response to June 12, 2015 application by the OPT in relation to various issues, including document production from the First Nation;

Bujold Transcript, Page 368, Lines 15-18 and Pages 504-506, Lines 16-15

- B. Trustee response to Beneficiary Application – Mr. Bujold, in his sole discretion, instructed the legal team to oppose this application and instructed legal counsel to cross examine the beneficiary applicants.

Bujold Transcript, Page 355, Lines 15-18 and Pages 514-516, Lines 15-2

- o) July 5, 2017 – Justice Thomas issues a case management decision in relation to the Beneficiary Application (“**Sawridge #6**”). In his reasons for decision Justice Thomas states that he “cannot foresee a circumstance where the status of Shelby Twinn as a Beneficiary under the 1985 Sawridge Trust will be eliminated”. This infers that the Court assumes full grandfathering of existing 1985 Trust beneficiaries will occur.

1985 Sawridge Trust v. Alberta (Public Trustee),
2017 ABQB 377 (“**Sawridge #6**”) at para. 37 **TAB 18**

78. In light of the foregoing background, the concerns of Ms. Twinn pertaining to the 2011 Action, which will be set out fulsomely, can briefly be summarized as follows:

- a) The Trustees have failed to properly ascertain the current beneficiaries of the 1985 Trust and do not know all of the people who will lose their status as a beneficiary if the definition changes;
- b) The Trustees have failed to put forward a plan that protects or meaningfully considers the interests of the existing 1985 Trust beneficiaries and propose appropriate grandfathering;

- c) The Trustees have failed to work with the First Nation to resolve the concerns with its membership process, which was the basis upon which the Trustees, including Ms. Twinn, resolved to proceed with the 2011 Action. Ms. Twinn believes that the membership process is still very clearly inadequate and flawed;
- d) The Trustees' decision making may be conflicted by their affiliation with the First Nation and personal interest in seeing the size of the beneficiary pool reduced and under the control of the First Nation;
- e) The Trustees opposed the granting of party status to Shelby Twinn, an individual who would qualify as a beneficiary under the existing 1985 Trust definition, but is not a member of the First Nation and thus she, along with similar beneficiaries, would lose her standing as a beneficiary of the 1985 Trust if the relief sought by the Four Trustees is granted;
- f) The Trustees have improperly delegated their authority to Mr. Bujold, who has been tasked with instructing legal counsel (Dentons) with achieving their objectives in the 2011 Action. Mr. Bujold has made significant litigation decisions without prior Trustee approval, as noted above.

B. *Is Ms. Twinn Entitled to Indemnification from the Trusts*

79. Ms. Twinn submits that in order to establish that she is entitled to indemnification from the Trusts, pursuant to the terms of the Trust Deeds, she must demonstrate that the fees for which she is seeking indemnification and that pertain to the Actions were:
- a) Reasonable; and
 - b) Incurred in the course of the administration of the 1985 or 1986 Trust or Trusts, as the case may be.
80. *Prima facie*, given that the Four Trustees have approved and received full indemnification from the relevant Trust for their legal fees incurred in the Actions, it

would appear that the Four Trustees have taken the position that the litigation pertains to the administration of the Trusts and incurring costs in the circumstances is reasonable.

81. The fact that Ms. Twinn has raised concerns with the other Trustees' positions in these pieces of litigation does not detract from the fact that the concerns are raised as part of the administration of the Trusts and as part of her duties as a Trustee.
82. Given that the relief sought in the 2011 Action goes to the core of the 1985 Trust, Ms. Twinn submits that it informs part of her duty to bring her concerns to the Court as part of the application for advice and direction.
83. The litigation in the Actions, and in particular the 2011 Action, is unique and complex. It is reasonable for a Trustee to bring their questions and concerns to Court for adjudication. This should not be a process where minority views are silenced in order to achieve the objectives of the majority. Especially in light of the obvious conflicts of interest that afflict the Four Trustees and the serious outcome of eliminating beneficiary status if their position is accepted.
84. In terms of quantum, Ms. Twinn's fees incurred collectively between the two Actions are quite modest in comparison to the fees incurred between the collective of Dentons, RMRP and Bryan & Company LLP. From February 2010 to August 2015, the Trusts have paid their legal team in excess of \$1.8 million. By May 2017 this number has grown to almost \$4 million. At present, Ms. Twinn's collective legal fees with MR total approximately \$850,000.00.

Applicant 2015 Affidavit, at para 30

Applicant 2017 Affidavit, at para 53

Examination of Applicant on Applicant 2014 Affidavit, 2015 Affidavit and 2017 Affidavit conducted September 9, 2016, November 9&10, 2016, December 15, 2016 and July 20 & 21, 2017 ("Applicant Transcript"), Undertaking 64

85. Ms. Twinn has not produced invoicing detail of her legal accounts with MR as part of this indemnification application because of concern over disclosure of privileged information, but would propose that in the event this Honourable Court decides that she is entitled to indemnification, the parties can return to the Court to seek direction on the quantum of the accounts if the parties cannot come to an agreement on this issue.
86. Ms. Twinn has attempted to work with the other Trustees and raise her concerns relating to beneficiary ascertainment, conflict of interest, membership process issues and grandfathering in the context of Trustee meetings and outside of the litigation process. Unfortunately, to date, Ms. Twinn has been unable to satisfactorily resolve these concerns in this manner. Ms. Twinn believes that resolution outside the litigation process has been difficult because of the influence of the First Nation on these proceedings and its desire to keep the process for membership in the First Nation secretive, as well as keep the beneficiary pool small and under its control.

Applicant 2015 Affidavit, at paras 4, 7, 10, 12 and
13

87. Given the serious ramifications of the 2011 Action, Ms. Twinn's grave concerns, the Court's directions and statements in Sawridge #1 and Ms. Twinn's fiduciary duty, she was compelled to act.
88. The following will address each of Ms. Twinn's concerns in relation to the 2011 and 2014 Actions and how they interact with her fiduciary duty as a trustee and are reasonable steps warranting an Order to indemnify Ms. Twinn for the expenses she has incurred.

i. **2011 Action – Failure to Ascertain Beneficiaries**

89. Ms. Twinn began advocating for the need to ascertain the beneficiaries of the 1985 Trust well over a decade ago.

Applicant 2017 Affidavit, at paras 38

90. It is a fundamental duty of a trustee to determine and ascertain the members of a class of beneficiaries and then to make reasonable efforts to identify and locate the members of that class.

Barry v. Garden River Band of Ojibway Nation No 14, 1997 CarswellOnt 1812 (CA),
at para 40 **TAB 19**

91. It was acknowledged by the Trustees before the Court in the 2011 Action that the proposed revision to the definition may exclude a *significant* number of persons who presently qualify for beneficiary status, but are not members of the First Nation.

Sawridge #1, para. 49 **TAB 1**

92. In addition to forming part of the their fiduciary obligations, Ms. Twinn submits that as a practical consideration, proper ascertainment of the beneficiary class is essential so that the Trustees understand who the current beneficiaries are, who will be impacted by the relief sought in the 2011 Action and appropriate grandfathering arrangements proposed.

93. In questioning on his Affidavit in opposition to this application, Mr. Bujold deposed that it is his position that no one qualifies as a 1985 Trust beneficiary until the Court provides a ruling on whether the 1985 Trust definition of beneficiary is valid. He further deposed that this was not his position at the outset of the 2011 Action and only became his position when persons started coming forward claiming that they were beneficiaries of the 1985 Trust. Later on in questioning, Mr. Bujold recanted from this position and stated that it had always been his position that the 1985 Trust beneficiaries were not capable of ascertainment until a Court gave a ruling on the matter.

Bujold Transcript, Page 526-527, Lines 11-24 and
Pages 530-536, Lines 25-18

94. With respect, the 1985 Trust beneficiaries are capable of ascertainment. As part of the process in seeking advice on the Trusts from Dr. Waters, even Dr. Waters believed that the 1985 Trust beneficiaries were capable of ascertainment and provided the Trustees an option of utilizing a tribunal to determining the 1985 Trust beneficiary class as opposed

to initiating litigation. Ms. Twinn is also aware of other analogous situations where beneficiary ascertainment was economical and successful.

Applicant 2017 Affidavit, at paragraph 53 and Exhibit H.

95. The issue raised by the Trustees in the 2011 Action is whether the definition is discriminatory because of the effect of the Charter and later judicial consideration of the *Indian Act*. Whether or not the definition fails for public policy reasons, does not change whether the objects (beneficiaries) of the Trust are capable of ascertainment.
96. Ms. Twinn notes that the Trustees apply the rules of beneficiary ascertainment on a regular basis when determining whether there are at least 3 Trustees on the Board that qualify as beneficiaries under the existing 1985 Trust beneficiary definition, which is a requirement of the deed of trust.
97. Any argument of the Four Trustees at this stage to suggest that the 1985 Trust beneficiaries are not capable of ascertainment is a recent strategy and was certainly not the advice they received at the outset of the 2011 Action.

ii. **2011 Action – Failure to Properly Grandfather**

98. At the outset of the 2011 Action, Dr. Waters advised the Trustees that grandfathering of all affected beneficiaries would occur.

Bujold Transcript, Exhibit 10

99. Ms. Twinn agreed to proceed with the 2011 Action, amongst other matters, on this understanding in light of her obligation to protect the interest of existing beneficiaries and the need to pursue options that ensure this protection.
100. By June 2015, Dr. Water's advice and recommendation was apparently forgotten when the Trustees brought the Settlement Application.

101. The Settlement Application sought to resolve the 2011 Action without full grandfathering. The Four Trustees' represented to the Court at an application on June 24, 2015 that they believed the relief sought in the Settlement Application was a complete answer to the 2011 Action. Whereas, Ms. Twinn did not believe it satisfied all matters nor was she satisfied that it complied with their legal obligations to existing beneficiaries.

Transcript from June 24, 2015 Application, Page
10-11, Lines 37-6 **TAB 20**

102. Ms. Twinn's primary concerns with the settlement proposal put forward were:

- a) Failure to fulsomely grandfather affected beneficiaries, as the settlement neglected adult beneficiaries and the unborn who are not members of the First Nation;
- b) The process utilized to develop the list of minor beneficiaries was unclear and may well have been, or was, incomplete. Requests by Ms. Twinn to Mr. Heidecker and Mr. Bujold for information on how the lists were compiled were refused. At the December 17, 2013 Trustee meeting where the proposed settlement lists were being discussed, Mr. Bujold raised his voice with Ms. Twinn and told her something to the effect of "You wouldn't believe anything even if it was from God." ;

Applicant 2015 Affidavit, at paras 11, 12

Bujold Transcript, Pages 580-581, Lines 19-14

- c) The resolution that authorized the settlement was done at a time when only 3 of the 5 Trustees were present, who notably were all elected officials of the First Nation (Walter Felix Twinn and Ms. Twinn were not in attendance, Ms. Twinn left the meeting after the issue of the settlement lists was put off and then later re-discussed and voted on after Ms. Twinn left);

Bujold Transcript, Pages 583-584, Lines 15-4 and
Undertaking 10 and 49.

- d) The offer sought to vary the definition of “beneficiary” was contrary to the provisions of the *Trustee Act*, and required the unanimous consent of all adult beneficiaries capable of providing their consent; and
- e) Ms. Twinn was concerned that a factor in making the settlement offer was to avoid an inquiry into First Nation membership by the OPT, which was not a concern or necessarily in the interest of some beneficiaries.

Applicant 2015 Affidavit, at paras 11, 12

Bujold Transcript, Undertaking 49 and Page 580,
Lines 5-12

Trustee Act, RSA 2000, c T-8, s. 42 and 43 **TAB 12**

103. Shortly following the issuance of Sawridge #1, the Trustees expressed concern about an investigation into membership both in terms of cost and what it might uncover. This concern was reiterated in a legal opinion from RMRF dated July 5, 2012 that stated:

“Second, inquiries into the membership process may reawaken unhelpful controversy for the Sawridge First Nation and potentially the Sawridge trustees, depending on the extent of these investigation and the ultimate decision of Justice Thomas in the main application.”

Bujold Transcript, Page 335, Lines 7-12 and
Exhibit 11

104. The concerns an inquiry into the First Nation’s membership process might uncover are not surprising in light of the history the First Nation has had before the judiciary in regards to its membership. The Federal Court has commented that “many gallons of judicial ink have been spilled” in regards to a particularly lengthy battle with a particular individual who was seeking to have her member status recognized.

Poitras v. Twinn, 2013 FC 910 at para. 1 **TAB 21**

105. Prior to initiating the 2011 Action, the Trustees advertised for potential beneficiaries. As part of that process, many applications were received by the Trustees. In questioning,

Mr. Bujold admitted that the lists presented to the Trustees did not reflect any "new people" who had submitted an application and the Trustees had "never gone through a process of qualifying those applicants".

Bujold Transcript, Page 355-356, Lines 14-27

106. Despite having received application forms from persons who believed they may qualify as a 1985 Trust beneficiary, Mr. Bujold admitted that the applications "basically were received and filed and continue to sit on the file." and nothing really came of them.

Bujold Transcript, Page 357, Lines 7-27

107. Given all of her concerns, Ms. Twinn was compelled to become involved in 2011 Action with the benefit of independent counsel.
108. In questioning on his Affidavit filed in opposition to this application for indemnification, Mr. Bujold acknowledged that the Settlement Application was withdrawn, to the chagrin of the other Trustees, because of Ms. Twinn's opposition.

Bujold Affidavit, at para. 131.

109. As a result of Ms. Twinn's intervention, the interests of those beneficiaries of the 1985 Trust that would have been excluded had the Settlement Application been successful, were protected to that point in time.
110. In Sawridge #6 Justice Thomas provided the litigants with insight into the Court's view on grandfathering. Justice Thomas made a significant statement in that he could not foresee circumstances wherein Shelby Twinn would not remain a beneficiary of the 1985 Trust. This clearly implies that Justice Thomas envisions grandfathering as mandatory for affected beneficiaries, as these comments would be equally applicable to any affected beneficiary.

111. While the Four Trustees have advocated that any affected beneficiary can simply apply for membership in the First Nation as a solution to the disentitlement issue, Ms. Twinn submits that this is neither accurate or appropriate assurances in the circumstances.

Bujold Transcript, Page 107, Lines 3-24

112. During questioning, Mr. Bujold stated that the Trustees had always been concerned that if someone was declared to be a beneficiary of the 1985 Trust that they would use this as a justification for admission to membership in the First Nation and that was why the Trustees were not in favour of grandfathering.

Bujold Transcript, Page 295-296, Lines 4-4

113. Mr. Bujold further stated that part of the reason "we're going through such a convoluted process to try and identify the beneficiaries of the '85 trust" is to avoid giving those beneficiaries any ground or leverage on which to assert that they are entitled to membership in the First Nation.

Bujold Transcript, Page 295-296, Lines 4-4 and
Page 363-367, Lines 7-1

114. It is noteworthy that the Four Trustees take the position that the membership process of the First Nation is an area they shouldn't involve themselves in, except to simply know who is on the membership list, yet in the 2011 Action, make strategic decisions for the purpose of affecting this process to further the interests of the First Nation.

Bujold Affidavit, Para 78

115. Accordingly, the Four Trustees recognize and have even designed the litigation process to ensure that the affected beneficiaries are not assured of gaining membership in the First Nation. Mr. Bujold admitted in questioning that the Trustees accept that there is going to be some "collateral damage" and "winners and losers" as a result of the relief sought in the 2011 Action by the Four Trustees, meaning that some persons will lose their entitlement as a beneficiary.

Bujold Transcript, Page 367, Lines 18-22 and Page 366, Lines 14-15

116. Ms. Twinn submits, those beneficiaries with a currently vested interest, should not have that interest divested based upon the chance that they may be admitted to membership in the First Nation, particularly, in light of the history of concerns with the membership process.

117. In addition to whether membership will be granted to any particular affected beneficiary, there are also a host of social factors that may affect an individual's decision to apply for membership in the First Nation. Mr. Bujold gave evidence that approximately 60% of the First Nation has been affected by addiction issues and, in his view, the First Nation suffers from the effects of intergenerational trauma. That is very significant and may affect an individual's ability and decision to apply for membership, particularly in regards to whether they are able to live on the First Nation.

Bujold Transcript, Page 44-45, Lines 24-9 and Page 51-52, Lines 25-8

118. Ensuring proper grandfathering for affected beneficiaries is the primary reason for Ms. Twinn's involvement in the 2011 Action. Her decision to take a position independent of the Four Trustees is solely related to her duties as a Trustee and contrary to her personal interest.

iii. **2011 Action – Failure to Work with First Nation**

119. The Trustees were advised by Dr. Waters that the quality of the First Nation's membership process was integral to the proper operation of the Trusts.

Applicant 2017 Affidavit, Para 9 and Exhibit F

120. The membership process of the First Nation was and remains governed by a membership code (the "Code"). The Code provides that aside from natural children of parents who are both members of the First Nation, all other applications are subject to the discretion of

Band Council. The Code does not provide any objective criteria upon which the Band Council must ground its exercise of discretion.

Bujold Transcript, Exhibit 7

121. Dr. Waters found the First Nation's membership process to be deficient in that the decision making criteria for membership was too subjective and the delays in processing applications were inappropriate.

Applicant 2017 Affidavit, Para 10 and Exhibit G

122. Further, Dr. Waters advised the Trustees that the Code was likely discriminatory and not Charter compliant.

Applicant 2017 Affidavit, at Exhibit H.

123. The Trustees, and in particular Ms. Twinn, resolved to proceed with the 2011 Action on the basis of promises that the membership process would be improved, specifically in relation to its timeliness and transparency. The amendments that were contemplated in relation to the Code would address Dr. Waters' concerns about its discriminatory nature and enforceability.

124. These concerns were acknowledged and raised by the Trustees, including the Chief of the First Nation himself, Roland Twinn. Ms. Twinn's decision to proceed independently was triggered after the 2011 Action was commenced and she realized the promise to address the concerns with the First Nation membership process was not being seriously pursued and perhaps was never truly the intention of the First Nation.

Applicant 2017 Affidavit, at Exhibit H.

Bujold Transcript, Page 509, Lines 12-18, Page 320, Lines 2-10, Page 328-329, Lines 12-9

125. Correcting the membership process is very important because the Trustees are advocating that the definition of beneficiary be changed to membership in the First Nation and any affected beneficiary can simply apply for membership in the First Nation.

126. The Trustees cannot ask the Court to replace the existing beneficiary definition on the basis that it is discriminatory and then replace it with a new definition that is also discriminatory. Dr. Waters' only suggested that the Trustees initiate the 2011 Action on the basis that the issues, including the discriminatory nature, of the Code and its associated process, be rectified.

127. As stated by Justice Thomas in *Sawridge #1*, an inquiry into the membership process is necessary in order to evaluate the proposed amendment to the beneficiary definition.

Sawridge #1, para. 49 and 55 **TAB 1**

128. Despite the Trustees resolving to proceed with the 2011 Action on the basis that they would work with the First Nation to effect meaningful and appropriate change to the membership process, both the First Nation and the Trustees failed to follow through – both in proposing amendments to the Code or to see that applications were being processed within 6 months.

129. In questioning, Mr. Bujold admitted that he was aware that, at present, not all applications for membership were being processed in six months.

Bujold Transcript, Page 321, Lines 21-26

130. The First Nation's Code remains as it was in December 2010 – no amendments have been made to them since 1987 and concerns regarding transparency and fairness continue to this day. Further, the discriminatory elements of the Code that were noted by Dr. Waters remain.

Bujold Transcript, Page 256, Lines 15-24

131. Despite having this knowledge, Mr. Bujold has instructed Dentons to advocate to the Court that the First Nation membership process is functioning adequately and not to identify Dr. Waters' concerns, which has occurred at various applications over the course of the 2011 Action. Examples of such advocacy include:

- a) June 24, 2015 application before case management Justice in 2011 Action, submissions by Doris Bonora of Dentons on behalf of the Trustees:

...so we believe that evidence is all there in terms of dealing with our settlement offer and the fact that there is enough evidence before this Court to say that that membership process is working.

Transcript from June 24, 2015 Application,
Page 23, Lines 14-17 **TAB 20**

- b) September 2, 2015 application before case management Justice in 2011 Action, submissions by Doris Bonora of Dentons on behalf of the Trustees:

It went to the minister of Indian and Northern Affairs, and these are the rules that are in place, and they set out a process that we would submit is functioning and also certain in the sense that if we chose to change the definition to members, now everyone knows what process needs to be followed.

Transcript from September 2, 2015
Application, Page 80, Lines 28-31 **TAB 22**

And so these rules have not been struck. They are in force, and in this case in fact, there was an application to amend the statement of claim to declare that the rules were discriminatory and exclusionary, and that was struck, and so now it's clear that until these are declared invalid, these are the rules that are in place, and I don't think there's anything unclear about them, and they appear to be functioning.

Transcript from September 2, 2015
Application, Page 81, Lines 28-32 **TAB 22**

132. Ms. Twinn disagrees that the First Nation's membership process is functioning adequately and has provided several examples in her evidence.
133. For example, by way of letter dated December 10, 2013, Alfred Potskin was denied membership in the First Nation after waiting over two years for a response. The reason given for the denial was that it was not in the best interest and welfare of the nation. The denial letter did not give any particulars on why Mr. Potskin's admission would be adverse to the First Nation. This decision was made solely based on Mr. Potskin's paper

application to the First Nation. No face to face interviews of Mr. Potskin were conducted by the First Nation. Mr. Potskin was a former member of the First Nation who lost his membership when he was a child by virtue of his father's decision to enfranchise. The decision to enfranchise was based on social, legal and other circumstances affecting status Indians at that time. Mr. Potskin had resided on the First Nation for a significant part of his life and had been allowed by former Chief Walter Twinn to live in a trailer on the First Nation starting in 1990. In 1999 and subsequent to Chief Walter Twinn's death, Mr. Potskin was asked to vacate the First Nation because he was not a member.

Applicant 2017 Affidavit, at paras 18-19 and Exhibits M and N.

134. Another example of membership problems is a letter dated February 17, 2016 from Chief Roland Twinn to Gina Potskin denying membership in the First Nation because of economic factors. The letter from Chief Twinn acknowledges that it took the First Nation almost four years to advise Ms. Potskin that her application was incomplete.

Applicant 2017 Affidavit, at para 18 and Exhibits K and L.

135. Many additional sworn statements evidencing problems with the application process for membership in the First Nation were provided to Mr. Bujold by Ms. Twinn from various individuals who continued to have difficulties with the First Nation's membership process that arose during the course of the 2011 Action.

Applicant 2017 Affidavit, at para 20 and Exhibit O.

136. The Federal Court of Canada recently commented on the First Nation's membership process. Justice Russell stated that the First Nation has faced numerous disputes in relation to its membership process. He found "Membership is a requirement which is tightly controlled and the process for granting and withholding membership is opaque and secretive. Hence there is scope for abuse and the lack of transparency is bound to give rise to future disputes."

Sam Twinn and Isaac Twinn v. Sawridge First Nation et al., 2017 FC 407 at para 131
Applicant 2017 Affidavit, at Exhibit P

137. Ms. Twinn submits that the First Nation's membership process remains deeply flawed and has not been corrected. The Four Trustees' failure to be candid with the Court about these issues, is demonstrative of the underlying conflict between the interests of the First Nation, the Trustees, and those of the beneficiaries. The direction of the Trustees ought to be to advocate for improvement.
138. If the relief sought by the majority of the Trustees in the 2011 Action was granted, this would mean that the First Nation would have complete autonomy to effectively determine who is a beneficiary of the 1985 Trust.
139. Given the well documented history of issues with the First Nation membership process, this should be of concern to a Trustee.
140. Since the decision of Justice Thomas in Sawridge #3, which was in the context of a case management application dealing with document production from a third party, wherein he restricted the role of the OPT and stated that the litigants were not to engage in collateral attacks on the First Nation membership process, Mr. Bujold has advised the Trustees that they may no longer discuss the First Nation membership concerns at the Trustee table, whether in regards to the 2011 Action or otherwise. This position has taken Sawridge #3 out of context to justify a position that is contrary to the interest of the beneficiaries. Obviously this is in the interest of the First Nation and is frequently the position of Chief Roland Twinn. This position has been taken by Mr. Bujold without the benefit of any legal advice confirming the same and despite the legal advice given by Dr. Waters on this issue in 2010.

Sawridge #3

TAB 15

Bujold Transcript, Page 249, Lines 1-24 and Page 241-242, Lines 20-14

Applicant 2017 Affidavit, at para 9 and Exhibit F.

141. Later in questioning, Mr. Bujold modified his evidence to state that the position not to discuss membership concerns was limited to while the 2011 Action was on-going. Upon

conclusion of that litigation then the Trustees can consider going back to examining membership concerns. Obviously, consideration of concerns at that stage would be made too late if the definition of beneficiary is changed.

Bujold Transcript, Page 275-276, Lines 27-12

142. Counsel for the Four Trustees has asked Ms. Twinn to agree to remove portions of her Affidavit that deal with the First Nation's membership process as being inappropriate in light of Sawridge #3.

Applicant Transcript, Undertaking 32 and 33

143. Ms. Twinn disagrees that Sawridge #3 stands for the proposition that the membership process is no longer relevant to the Trustees, both in the 2011 Action and generally. She takes this position for the following reasons:
- a) The decision in Sawridge #3 was issued in the context of and in relation to a case management application by the OPT for document production from the First Nation. The scope of the decision and the argument before the Court was limited to the issue of production. A case management decision cannot limit the scope of evidence to be received by a trial judge and this was not the intention of the case management Judge, as set out below;
 - b) Since Sawridge #3, Justice Thomas has indicated to the litigants that a trial will be necessary in order to resolve the issues of whether the beneficiary definition is discriminatory and if so, whether the definition should be changed to membership in the First Nation. This position is a departure from the solution proposed by Justice Thomas in Sawridge #3 and recognizes that a Trial Judge will need to evaluate evidence and issue a ruling on these matters;
 - c) The concerns raised by Ms. Twinn in regards to the membership process are not a collateral attack. Ms. Twinn is not seeking any relief from this Court against the First Nation or asking the Court to correct the membership process. Ms. Twinn is

asking the Court to consider the nature of the new beneficiary definition being proposed by the Trustees and what is appropriate in light of all the circumstances and evidence, including whether a change relying on a flawed, discriminatory, not Charter compliant and unfair membership process should occur given the prejudice that would arise to existing beneficiaries.

- d) The proper functioning of the Code remains integral to the proper operation of the Trusts, particularly in regard to Trustees' duty to ensure beneficiaries are properly ascertained and distributed to appropriate recipients. If the Code is not functioning properly, persons who should qualify as beneficiaries will not be reflected on the membership list of the First Nation. It would not be sufficient for the Trustees to simply rely on the membership list as a comprehensive statement of who qualifies as a beneficiary.

Polchies v. Canada, [2007] F.C.J. 667 at para 56 **TAB 23**

Barry v. Garden River Band of Ojibway Nation No 14, 1997 CarswellOnt 1812 (CA), at para 38 and 41-45 **TAB 19**

iv. **2011 Action – Conflict of Interest**

- 144. The Trustees are subject to the inflexible rule of not allowing a fiduciary to be in a position where his interest and duty conflict, unless expressly otherwise provided.

Louie v. Louie, 2015 BCCA 247 at para. 23 **TAB 24**

- 145. Given that the fiduciary obligations of a trustee may at times be in conflict with political agendas, this has been a cause of concern for Ms. Twinn in the 2011 Action.

- 146. Ms. Twinn's concerns relating to conflict are further supported by the following:

- a) The First Nation has had the benefit of representation in the 2011 Action and has fought the OPT's attempts to delve into an investigation of its membership process. Given the First Nation's position that it has complete control over its

membership issues and the history of secrecy surrounding its membership, this is not surprising. The Four Trustees' supported the First Nation's submissions in this regard and approved to indemnify the First Nation's legal fees incurred to advance its position.

Sawridge #3

TAB 15

Bujold Transcript, Page 199, Lines 9-21

- b) The Four Trustees have insisted that, in relation to the 1986 Trust, the Trustees do not have an oversight duty to ensure that the First Nation is administering its membership process in an appropriate manner and that the Trustees need only apply the membership list, as provided by the First Nation, to determine the beneficiaries of the 1986 Trust. Ms. Twinn disagrees with this position as the Trustees have been advised by respected legal counsel, David Ward of Davies, Ward, Phillips & Vineberg LLP that they are required to consider customary law when determining the beneficiaries of the 1986 Trust and Dr. Waters, as previously stated in terms of the quality of the process. In addition, Ms. Twinn believes that as a Trustee she is obligated to oversee that the beneficiaries are appropriately ascertained and that duty is not eliminated because the First Nation has complete authority over its membership process.

Bujold Transcript, Page 374, Lines 19-21

Applicant 2017 Affidavit, at para 7 and Exhibit E.

- c) All of the Trustees are members of the First Nation. They would all personally benefit if the beneficiary definition was amended, as proposed, as the pool of beneficiaries would be significantly reduced and the control of that pool would remain with the First Nation.
- d) The deference that is shown to Chief Roland Twinn given his position as Chief. An example of deference includes a suggestion by Dr. Waters to Mr. Bujold that Mike McKinney, counsel to the Sawridge First Nation, be invited to the

December 2010 Trustee meeting, a meeting wherein problems with the First Nation membership process were slated to be discussed, so that Chief Roland Twinn would feel more comfortable knowing that he had "his man" with him. Despite Mr. Bujold giving evidence that it was not appropriate for Trustees to bring their own legal counsel with them to Trustee meetings, Mr. Bujold did not find it necessary to advise Dr. Waters that this would be inappropriate.

Bujold Transcript, Page 323-325, Lines 27-19 and
Page 272, Lines 9-25 and Exhibit 9

- e) Mr. Bujold acknowledges in questioning that when Ms. Twinn raised candid concerns about the membership process at Trustee meetings, this caused "hurt feelings" and made Trustee meetings difficult because the same persons who were being accused of inappropriate conduct in relation to membership, were also Trustees.

Bujold Transcript, Page 100-101, Lines 25-26

- f) The Trustees received legal advice that when applying the definition of "beneficiary" in the 1986 Trust, customary laws had to be considered. This would mean that the beneficiary class may be broader than just those persons who are on the membership list. Despite Ms. Twinn's insistence that customary laws apply, Chief Roland Twinn and other Trustees objected to considering customary laws and as such, they have never been applied in the 1986 Trust.

Bujold Transcript, Page 376-377, Lines 3-14

- 147. Despite Justice Thomas' concerns raised in regards to the "structural conflict", the Four Trustees did not take any steps to implement any policy changes to address this issue. Ms. Twinn has raised the issue numerous times at Trustee meetings.

Bujold Transcript, Page 331, Lines 2-18

- 148. In questioning, Mr. Bujold deposed that the decision to not take steps to address the "structural conflict" was based on a legal opinion, however when requested to produce

that opinion, the undertaking was refused. Ms. Twinn, despite being a Trustee, has not received a copy of this opinion.

Bujold Transcript, Undertaking 29 (refused)

149. Ms. Twinn has a wealth of experience in addressing the conflicts between the interests of the First Nation and the best interests of its members. For example, the Sawridge Group of Companies were historically managed by the First Nation. By 2003, the companies were facing financial ruin. Ms. Twinn was instrumental in bringing in an outside Board of Directors to manage the companies. As a result, the companies became financially healthy after the change. Unfortunately, change is difficult for many, and Ms. Twinn perceives that she faced a good deal of animosity from First Nation members as a result of her role in this change.

Applicant 2014 Affidavit, paragraph 26

Applicant 2017 Affidavit, paragraphs 38 and 43

Applicant Transcript, at Page 574-575, Lines 22-4

v. **2011 Action – Delegation of Authority**

150. Mr. Bujold was hired to be the Trusts administrator in September 2009. At the time he was hired his two areas of responsibility were to:
- a) Administer the Trust office and assist the Trustees with carrying out their responsibilities, which included gathering documents, administering finances, taking meeting minutes and book keeping, and any other tasks as the Trustees would direct; and
 - b) Help the Trustees put together the benefits packages for and policies for the beneficiaries.

Bujold Transcript, Page 17, Lines 13-22

151. Mr. Bujold has since become the Trustees' primary advisor. He advises the Trustees on their legal duties and is able to access legal advice for the purpose of informing his knowledge on trustee duties without the express approval of the Trustees and without having to share all of this information with the Trustees, as has been well demonstrated by the repeated refusals to undertaking requests of Mr. Bujold in this application to legal opinions, accounts and other documents to which Ms. Twinn has an entitlement to see.

Bujold Transcript, Page 113-114, Lines 11-1 and
Pages 26-27, Lines 11-16

152. Prior to being hired by the Trusts, Mr. Bujold had never worked for a trust before and had no prior experience with trust law.

Bujold Transcript, Page 137-138, Lines 26-3

153. In effect, Mr. Bujold currently has more access to paid legal advice than Ms. Twinn, despite the fact that she is a Trustee.

154. While the Trustees are represented by Dentons and RMRP, it is only Mr. Bujold and Mr. Heidecker who have direct access to counsel and Mr. Bujold is the only individual able to provide them with instructions. Mr. Bujold and Mr. Heidecker are often referred to as "the client" by Dentons.

Bujold Transcript, Page 68-69, Lines 3-25

Transcript from July 28, 2017 Application, Page 2,
Lines 17-18 **TAB 25**

Transcript from examination of Shelby Twinn on
Affidavit by Dentons in 2011 Action on September
22, 2016, Page 27-28, Lines 13-3 **TAB 26**

155. Despite Mr. Bujold being admittedly very busy with the various litigation that the Trusts are involved in, a decision was made approximately 2 years ago to move the Trustee meeting schedule from monthly to quarterly because there was not enough business to transact on a monthly basis. As such, Mr. Bujold provides day to day direction to counsel without first consulting the Trustees.

Bujold Transcript, Page 67-69, Lines 13-15

156. Ms. Twinn has effectively been blocked from instructing or seeking advice from Dentons or RMRF in the 2011 Action and must rely on Mr. Bujold as her primary conduit of information.
157. The extent to which Ms. Twinn was denied access to counsel became apparent when Ms. Bonora of Dentons advised Ms. Twinn on May 28, 2014 that "It was our understanding that the trustees voted that the trustees would not be involved in the litigation (such as approving drafts of affidavits or attending questioning), and that no individual trustee should act on their own in the litigation." This direction obviously completely disregards the fiduciary obligations of the individual trustee and the process obviously allows the majority to silence the individual.

Applicant 2015 Affidavit, at para 18 and Exhibit H

158. This email was sent by Ms. Bonora at a time when Dentons had recently filed a motion in the 2014 Action seeking relief against Ms. Twinn, their alleged client in the 2011 Action. Given that Dentons had taken an adversarial position directly against Ms. Twinn in the 2014 Action, this made further communication with Dentons quite difficult, if not impossible for Ms. Twinn as Dentons' loyalties were clearly opposed to Ms. Twinn's, despite the solicitor/client relationship that existed between them.
159. Further, the Records Restriction Resolution and the Information Restriction Resolution effectively place Mr. Bujold in control of the majority of information pertaining to the Trusts which impedes the Trustees ability to meet their fiduciary duties. Mr Bujold stated at questioning that following the Records Restriction Resolution, he would have to confirm with legal counsel whether he could release a historical Trust record to a Trustee. He would only release such record if the legal team approved it.

Bujold Transcript, Pages 219-221, Lines 4-19

160. Mr. Bujold defined the "legal team" as Dentons and Bryan & Company. This means that legal counsel for the group of Four Trustees, is deciding whether Ms. Twinn has access to a historical record of the Trust. This is entirely inappropriate.

Bujold Transcript, Pages 221, Lines 20-23

161. Ms. Twinn is very concerned that despite the fact that it is only the Trustees who owe a fiduciary duty to the beneficiaries of the Trusts, the Trustees role in the litigation, *vis a vis* legal counsel, has been for all practical purposes fully delegated to Mr. Bujold.
162. The law on the ability of a trustee to delegate its authority is well settled. The rule in relation to delegation is stated in a learned authority as the following:

"As a general rule, trustees may not delegate any of their powers or duties. The maxim puts it succinctly: 'Trustees are to perform personally.' The rationale for this rule is that the settlor selects trustees and, upon accepting office, the trustees agree to perform. If the trustees shift the obligation to perform to others, they have broken their promise. An alternative approach is to say that it is the settlor's prerogative to choose trustees; if the trustees delegate, they have in effect usurped a right that belongs to the settlor.

Delegation is permitted (a) if it is expressly authorized by statute or by the trust instrument; (b) if the duties are not required to be performed personally; (c) if it is clearly necessary, as there is no other practicable way for the trustee to perform; or (d) if it is common business practice to delegate the particular power or duty. The third situation in which delegation is permissible reflects an appreciation of the fact that a trustee cannot be an expert in all things. The ordinary person must often rely on experts in order to properly conduct his business affairs. So, too, the trustee may well require the help of lawyers, accountants, investment managers, and other such experts in order to properly conduct the business of the trust. The last exception recognizes that delegation may be necessary to meet the standard of care, as where, in the ordinary course of affairs, it would be prudent for a person to delegate performance of certain duties to others.

If delegation is permitted, trustees may use agents, but they are still responsible for making all decisions. In other words, ultimate responsibility for decision making rests with the trustees; all they are entitled to do is have the agent perform a particular duty or give advice. Trustees, while permitted to delegate some of their duties, may not delegate all of them, since that would amount to an abdication of responsibility."

The Law of Trusts 3rd Edition by Eilen Gillese
(Toronto: Irwin Law Inc., 2014) at page 159, TAB 27

163. In his learned text, Dr. Waters has stated that personal performance by a trustee is required where the power, discretion, or duty assigned to the trustee requires that a policy decision be made. A policy decision is one which, if dispositive determines how much and at what time a beneficiary takes; if administrative, it directly affects the likelihood of the trust's object or purpose being achieved.

Waters' on Trusts, at 915

TAB 8

164. The Trustees signed a Code of Conduct on January 12, 2009. In Schedule "A" to the Code of Conduct, it specifically provides that Trustees are not permitted to delegate the exercise of their discretionary powers.

Application 2014 Affidavit, Paragraph 30 and
Exhibit E

165. In questioning, Mr. Bujold deposed that he is instructing counsel using a significant amount of discretion. Essentially, his only parameters are to obtain a ruling from the Court on the relief sought in the 2011 Action and how this end is achieved is up to him.

166. Mr. Bujold specifically stated in questioning:

Q. So would you agree with me, then , that there isn't anything in these resolutions that specifically relates to this application?

A. No. I believe that I said in my testimony last time that the trustees have an end goal, and I'm to achieve the end goal in whatever way is necessary. So there isn't specific instruction on every single action that I take.

Bujold Transcript, Page 505, Lines 19-26

167. Ms. Twinn submits that this is an improper delegation of authority to Mr. Bujold given the significant nature of the 2011 Action and the fact that it will affect who will benefit from the 1985 Trust. It is not appropriate to delegate to Mr. Bujold such vast discretion for the following reasons:

- a) The 1985 Trust deed does not authorize such delegation. The Code of Conduct expressly states that delegation of discretionary powers is not permitted;
- b) The *Trustee Act* does not authorize such delegation;
- c) Personal performance of these obligations is required, as the effect of the 2011 Action is to determine who will benefit from the 1985 Trust;
- d) It is clearly not necessary as the Trustees are capable of instructing counsel;
- e) It is not a common business practice given the significant nature of the litigation. This is not a routine piece of litigation wherein delegation may be more efficient. The Trustees should be instructing counsel on all aspects of the 2011 Action and should be entitled to obtain information directly from counsel as they require. Mr. Bujold should not have been delegated the sole authority to make discretionary decisions on significant matters affecting the Trusts in the litigation. Many of the decisions and actions of Mr. Bujold are significant and go to the core of the Trustees' fiduciary duties to act in the best interests of the beneficiaries. For example, Mr. Bujold unilaterally provided instruction to oppose the Beneficiary Application for party status.

168. In addition, Ms. Twinn believes that Mr. Bujold is not a neutral administrator and has become an advocate for the Four Trustees. Ms. Twinn is not comfortable that Mr. Bujold is providing her with unbiased information.

169. Mr. Bujold is the only individual to have sworn an Affidavit in opposition to this application. This is demonstrative that he is an advocate for the Four Trustees rather than a neutral administrator. This is reinforced by examples of biased and inaccurate information that Mr. Bujold deposed to in his affidavit and in his questioning on such affidavit, such as:

- a) Mr. Bujold prepared his affidavit and swore to matters relating to the administration of the Trusts after only consulting with the Four Trustees and Brian Heidecker (Chair of the Trusts). He did not consult with Catherine Twinn. Mr. Bujold did not consult with Ms. Twinn because "this is in response to her – to her affidavit and to her undertakings and responses." He didn't find Ms. Twinn's information necessary to informing his evidence because "Well, there was no – no questions that I had that related directly to, you know, information that I was seeking from Catherine. I was seeking information from the trustees."

Bujold Transcript, Page 6-7, Lines 26-13

- b) Mr. Bujold refers to Bryan & Company as part of the "legal team" that he confers with in relation to, presumably, Ms. Twinn, he certainly does not confer with MR;
- c) Mr. Bujold stated at various times during examination that the Trustees had no position on what the definition of beneficiary should be amended to in the event the existing definition was found to be discriminatory and that the "trustees hadn't put their minds to coming up with the definition". This is despite the fact that the Trustees had in the not so distant past put forward the Distribution Proposal which advocated for the definition to become membership in the First Nation and the fact that Mr. Bujold advocated for this position in a filed Affidavit in the 2011 Action on September 12 2011. In questioning, Mr. Bujold gave the following evidence in this regard;

Q. Okay. So the position the trustees were taking then, when you swore your August – sorry – September 12th 2011, Affidavit would have had the effect, if it had gone through within six months as everyone had hoped, of excluding certain people who currently qualified?

A. No.

Q. How?

A. Because the question that was asked to the Court within the six-month time frame that we're looking at is "Is this beneficiary definition discriminatory?" Second part, "If it is discriminatory, what do we do about it?"

Q. And –

A. There was no proposal –

Q. Well of course there was. In your September 12, 2011 Affidavit in paragraph 33 you make the proposal. That was the end game at that point?

A. Yeah, that's right.

Q. Okay. And then you would agree with me that if that had happened within the six months, as you say the trustees had hoped it would, without Catherine's interference, certain persons who would have been entitled under the 1970 Indian Act definition would be excluded under the new definition being proposed by the trustees?

A. Let me say this: When I swore this affidavit, Catherine was part of the –

Q. Okay. That's not --

A. – group of trustees –

Q. That's not my question.

A. I will answer the question. So when this was proposed, Catherine was onside and promoting this solution –

Q. That's not my question.

A. – and her actions began to affect the outcome and made it way more complicated.

Q. Okay. That's not my question.

A. Okay. Ask the question again.

Court reporter repeats question

A. Yes.

Bujold Transcript, Pages 107-110, Lines 25-13

- d) Mr. Bujold defined Ms. Twinn's concerns about corruption within the First Nation membership process as being "dramatic" and inciting the OPT's investigation, even though he admittedly had no personal knowledge as to whether they were true or not, but instead preferred the explanations of Chief Roland Twinn and Bertha L'Hirondelle (former Chief of the First Nation) as to the state of the membership process. This is despite the fact the that Applicant had been a long standing member of the First Nation's recently disbanded membership committee and would have first-hand knowledge of the operation of the membership process.

Bujold Transcript, Pages 95-96, Lines 25-15 and
Pages 97-99, Lines 11-24

- e) In questioning on his affidavit, he stated that Ms. Twinn calls people stupid, when further questioned on this point, he admitted that she has never actually used this word and that this was only his impression.

Bujold Transcript, Pages 337, Lines 11-23

- f) Fails to acknowledge in his Affidavit the hostility and violence that Ms. Twinn was experiencing from the other Trustees and which was acknowledged by Mr. Heidecker at the May 2011 Trustee meeting, examples include Chief Roland Twinn telling Ms. Twinn at a Trustee meeting that she could "kiss my ***"

Bujold Transcript, Pages 337-338, Lines 26-3 and
Pages 245, Lines 18-25

- g) Despite making many allegations about Ms. Twinn's inappropriate conduct towards other Trustees and despite having knowledge that Chief Roland Twinn has allegedly stated that he "vows to destroy Catherine Twinn" and take away her home on the First Nation, he took no steps to investigate the claim prior to providing his Affidavit.

Bujold Transcript, Pages 338-343, Lines 11-27 and Exhibit 12

- h) Mr. Bujold states at paragraph 64(c) of his Affidavit that Ms. Twinn wants a tribunal before the Court gives advice and direction in relation to the 2011 Action. In questioning he conceded that Ms. Twinn has never taken this position before the Court in the 2011 Action.

Bujold Transcript, Pages 440, Lines 3-27

- i) Mr. Bujold states at paragraph 84 of his Affidavit that Ms. Twinn has stated that only she is good enough to stay on as a Trustee. In questioning he admitted that she has never said that and it was only his assumption based on a proposal that Ms. Twinn made to address the "structural conflict" issue.

Bujold Transcript, Pages 444, Lines 6-27

- j) Mr. Bujold speaks in paragraph 126 of his Affidavit of Ms. Twinn and her family accessing benefits from the 1986 Trust with an implication that this is somehow wrong. In questioning, Mr. Bujold confirmed that these were proper payment to Ms. Twinn and any benefits she accesses as a beneficiary are appropriate.

Bujold Transcript, Pages 458, Lines 12-26

170. It is quite clear from Mr. Bujold's evidence that he is an advocate for the other Trustees in strategizing against Ms. Twinn in terms of this application. He also has characterized his evidence in an unfair fashion as indicated above. It appears given Mr. Heidecker's involvement in the creation of the Affidavit, that he is also an advocate for the Four Trustees.
171. Ms. Twinn submits that given Mr. Bujold's bias against her and the authority which the Four Trustees have bestowed on him, it reinforces her need for independent legal counsel and advice.

172. Mr. Bujold's discretion also extends to approval of legal invoices for payment from Trust funds. Mr. Bujold deposed that he is the first to review legal invoices for approval for payment. The only Trustee that will also see the legal invoice is the one Trustee that has cheque signing authority. The other Trustees do not see invoices prior to being approved for payment.

Bujold Transcript, Pages 560-561, Lines 19-13

173. Mr. Bujold deposed that after he has approved an invoice, there has never been a circumstance where the Trustee with signing authority refused to also approve to the invoice. Further, there has never been a time where a Trustee, other than Ms. Twinn has asked to see the legal invoices of Dentons or RMRF, despite the fact that the Trustees are allegedly concerned about the cost of the 2011 Action.

Bujold Transcript, Pages 569, Lines 9-13 and Pages 564-565, Lines 23-2

174. The only invoices, to date, that Ms. Twinn has any knowledge of being disputed, are the invoices from parties who oppose the Four Trustees or the First Nation. More particularly, her own and the OPT's.
175. Over the course of questioning, both Dentons and Bryan & Company objected to Ms. Twinn's requests for an undertaking to produce Dentons and RMRF's invoices. Bryan & Company also objected to any questions relating to whether the accounts of Dentons or RMRF had ever been challenged by the Trustees. The refusal to provide basic information about the spending of the Trust assets has been the position. Despite the fact that Ms. Twinn, a Trustee, is their client.

Bujold Transcript, Undertaking 44 and 45 and
Objections 14 and 15 and Pages 585-596, Lines 23-15

176. The extent of the authority that has been delegated to Mr. Bujold is entirely inappropriate and in Ms. Twinn's respectful submission, unlawful. The fact that this has occurred, reinforces the need for Ms. Twinn to put forward her positions in the Actions.

177. In summary, Ms. Twinn submits that her involvement in the 2011 Action and the legal fees incurred by her in relation thereto are appropriate and reimbursable from the Trusts as her involvement is not only reasonable but necessary to protect beneficiaries who are not members of the First Nation. The fees incurred clearly relate to the administration of the Trust and the reasonableness of the quantum can be assessed at a later date, if necessary.

2014 Action

178. The 2014 Action was initiated by the majority of the Trustees of the Trusts in response to Ms. Twinn's refusal to acknowledge the validity of Justin Twin's appointment as a trustee.
179. Ms. Twinn's concerns in relation to the appointment of Justin Twin and Dr. Ward are particularized in her Affidavit filed September 3, 2015 in the 2014 Action. However, the concerns can be summarized as follows:
- a) For Justin Twin to have qualified as a trustee of the 1985 Trust, he needed to be a beneficiary of the 1985 Trust as per the terms of the deed. Ms. Twinn was concerned that Justin Twin did not qualify as a beneficiary of the 1985 Trust and no process was undertaken in advance of his appointment to determine the same;
 - b) The nominations of Justin Twin and Dr. Ward were made without adequate notice to Ms. Twinn and without adequate notice to allow for proper consideration of their qualifications to sit as a Trustee. In fact, Mr. Bujold circulated a memo in advance of the meeting proposing that Mr. Heidecker sit as an interim trustee in order to give the Trustees some "breathing room" in which to appoint a replacement. Mr. Bujold realized prior to the January 2014 meeting that Mr. Heidecker could not sit as a trustee because of the technical requirements for a Trustee, yet he did not advise the Trustees of this until the meeting, apparently because he didn't think it was important to correct this in advance of the meeting. To add to this, at the meeting Chief Roland Twinn proposed Justin Twinn as the

replacement without prior notice to Ms. Twinn that this nomination would occur. It appeared to Ms. Twinn that the other Trustees were aware this was going to occur. Justin Twin's nomination and acceptance occurred without even a C.V. being presented to the Trustees about his qualifications.

Bujold Transcript, Pages 350, Lines 10-17, Pages
388-390, Lines 21-6 and Page 399, Lines 23-27

- c) In 2004 the Trustees started a "trustee-in-training" program. There were four candidates considered for the program, which included Justin Twin, but only Dr. Ward and Deana Morton were asked to join the program. Ms. Twinn found it concerning that Justin Twin, was selected by Chief Roland Twinn in priority to Dr. Ward and Deana Morton, both of whom had already gone through the training program.

At the time Justin Twin was selected he sat on Band Council of the First Nation with Chief Roland Twinn. Since becoming a Trustee, Justin Twin has never voted in opposition to Chief Roland Twinn and in the case of one motion, asked to abstain because he disagreed with the position being put forward by Chief Twinn.

Bujold Transcript, Pages 163, Lines 12-21 and
Undertaking 39

- d) The trustee nomination process was generally deficient;
- e) Consideration was not given to an independent trustee, such as a trust company, in order to try and address concerns raised about the structural conflict within the trustee board; and
- f) A Trustee appointment is a significant matter as these Trustees are responsible for managing millions of dollars.

180. Mr. Bujold deposed at questioning that he had advised the other Trustees that it was not necessary to address the “structural conflict”.
181. Given the clear potential for conflict, for which trustees have a well-established duty to avoid, Ms. Twinn had a fiduciary duty that compelled her to bring an application to address this issue given that the other Trustees failed to do so.
182. Commencing this application in conjunction with the issues associated with the appointment of Justin Twin and Dr. Ward created an efficient process for the determination of these issues.
183. Ms. Twinn submits that her concerns regarding the appointments of Justin Twin and Dr. Ward were reasonable and that it is within her purview as a trustee to seek the advice and direction of the Court on the trustee appointment process and the validity of trustee appointments. Especially in the context where Ms. Twinn was concerned that decisions were being made that were motivated through a conflict of interest. Further, despite the passage of over 2 years since the issuance of Sawridge #1, the other Trustees had failed to take any steps to address the “structural conflict” identified by Justice Thomas. As such, Ms. Twinn should be entitled to indemnification for the legal fees incurred in this regard from the Trusts.
184. Ms. Twinn submits that these fees were appropriately incurred in relation to her duties as a Trustee and she should be indemnified for the same. Ms. Twinn notes that most of her legal fees incurred in relation to the 2014 Action pertain to her application to be indemnified.
- C. *Is Ms. Twinn entitled to indemnification for future legal fees incurred in the 2011 and 2014 Actions?*
185. The Trust deeds provide that a Trustee is entitled to indemnification. Ms. Twinn should not be required to proceed unfunded through the litigation process. This creates an uneven playing field and puts the status as well as the rights of existing beneficiaries at risk.

186. The 2011 Action is clearly complex and expensive litigation. Ms. Twinn should not be expected to fund this litigation personally. Any concern with the propriety of Ms. Twinn's positions and actions in the 2011 Action can be addressed by the Trial Judge when costs are determined.
187. Typically, Trustees are entitled to be reimbursed for their expenses incurred in connection with seeking the advice and direction of the Court on a matter that pertains to the administration of the trust. Ms. Twinn's fees should not be treated any differently.
188. For future costs incurred in the 2011 Action, Ms. Twinn should be entitled to immediate payment of her legal accounts incurred therein, in order to create a level playing field. There will not be any further costs incurred in relation to the 2014 Action given the agreement amongst the parties to discontinue the Action and move various issues into private arbitration.
189. If advance indemnification was not granted, then this would require Ms. Twinn to regularly bring applications for reimbursement. This would be an unreasonable cost for the beneficiaries to have to incur when any dispute on future costs incurred by Ms. Twinn can be addressed at the trial of the 2011 Action. This is especially so given the amount of legal resources expended by the Four Trustees in opposing this application. In total, the Four Trustees spent 6 days questioning Ms. Twinn on her Affidavit materials, in addition to preparing a 50 page Affidavit for Mr. Bujold to swear in opposition. This has been an expensive process.
190. Further, as stated by Dr. Waters in his learned text, trustees are not required to make payments out of their own pocket and it is quite proper for expenses to be paid directly from the trust's assets.

Waters' on Trusts, at 1208

TAB 8

191. A similar issue was recently dealt with by Justice Graesser in relation to Court of Queen's Bench Action No. 1503-08727 ("**2015 Action**"). The subject of the 2015 Action

related to Code of Conduct proceedings initiated by the other Trustees against Ms. Twinn. While the other Trustees were being fully indemnified by the Trusts for their participation in the 2015 Action and Code of Conduct proceedings, the same indemnification was not being extended to Ms. Twinn.

192. Justice Graesser recognized that it was “manifestly unfair” that the other Trustees’ legal fees were indemnified for certain actions in relation to the Code of Conduct proceedings, while Ms. Twinn was not. Justice Graesser awarded indemnification to Ms. Twinn in relation to her legal costs incurred in defending against actions taken by the other Trustees in relation to Code of Conduct proceedings.

Twinn v. Twinn, 2016 ABQB 553 at para. 88-89, **TAB 28**

193. Ms. Twinn submits that these principles are equally applicable to her participation in the 2011 Action and 2014 Action and she should be indemnified for her legal costs as they arise.

D. Conclusion

194. In conclusion, Ms. Twinn has fiduciary obligations as a Trustee to the beneficiaries of the Trusts that have motivated the steps she has taken in relation to the litigation and for which she seeks indemnification.
195. To be clear, Ms. Twinn is not requesting that this Court provide a remedy in relation to membership in the First Nation. Ms. Twinn recognizes that membership is determined by the First Nations.
196. However, the expert opinions that were provided at the outset have informed Ms. Twinn, and the other Trustees, that the Trustees must have confidence that the existing beneficiaries will be treated fairly and appropriately by the First Nation membership system. Dr. Waters, David Ward, the Trustees, and even RMRF, recognized that there were concerns with the First Nation’s membership system in 2011-2012.

197. Dr. Donovan Waters recognized the importance of ensuring a properly functioning membership process if the Trustees were to advocate for the revised definition of "beneficiary."
198. The advice of Dr. Waters has been that the Trustees should work with the First Nation to obtain some comfort that the membership process is fair for existing beneficiaries. Unfortunately there is ample evidence that the membership process has not been addressed by the First Nation and it does not appear that they desire to correct these flaws. This includes the recent comments of the Federal Court on the lack of transparency in the membership process, which mirrors the issues identified by Dr. Waters in 2011.
199. The Code governing First Nation membership has not changed for decades. Ms. Twinn knows that the problems that haunted the membership process continue to this day. It is more than reasonable for her as a Trustee to take the steps to protect existing beneficiaries from losing their rights in the event there are changes to the Trust. In this regard alone, Ms. Twinn ought to be indemnified for the steps she has taken to administrate the Trust.
200. In addition, to membership issues, Ms. Twinn has raised many other legitimate concerns that were also identified by Dr. Waters in 2011.
201. In conclusion, Ms. Twinn submits that for the purposes of indemnification she need only establish that her actions are reasonable, as they are clearly related to the Trusts. The Courts have provided direction that only in rare cases should trustees not be indemnified when matters relating to advice and direction are the subject of the indemnification. Ms. Twinn does not need to establish that her concerns are legally meritorious, only that they are reasonable concerns to be brought forward in relation to the Trusts.
202. Had it not been for Ms. Twinn bringing her concerns forward and the Settlement Application approved, many current beneficiaries would have lost their status. She submits that this alone, amply demonstrates reasonableness.

PART 5 REMEDY SOUGHT

203. Catherine Twinn respectfully requests an Order:

- a) Directing her legal fees incurred in relation to the 2011 Action to be reimbursed from the assets of the 1985 Trust;
- b) Directing her legal fees incurred in relation to the 2014 Action to be reimbursed from the assets of the 1985 and 1986 Trusts;
- c) Directing that all future legal fees incurred in relation to the 2011 and 2014 Actions shall be payable from the 1985 and/or the 1986 Trust, as relevant, within 30 days of an invoice being presented to the other trustees of the relevant trust. The invoice may be redacted so as to not disclose privileged information;
- d) Costs of this application on a solicitor and her own client basis from the assets of the Trusts.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at the City of Edmonton, in the Province of Alberta, this 1st day of September, 2017.

McLENNAN ROSS LLP

Per:



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

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