

Fast Track

COURT OF APPEAL OF ALBERTA

Form AP-5
[Rule 14.87]

COURT OF APPEAL FILE NUMBER: 1703-0173-AC

TRIAL COURT FILE NUMBER: 1103 14112

REGISTRY OFFICE: Edmonton

PLAINTIFF/APPLICANT: PATRICK TWINN, on his behalf,
SHELBY TWINN and DEBORAH
A. SERAFINCHON

STATUS ON APPEAL: Appellants

DEFENDANT/RESPONDENT: ROLAND TWINN, CATHERINE
TWINN, WALTER FELIX TWIN,
BERTHA L'HIRONDELLE, and
CLARA MIDBO, as Trustees for the
1985 SAWRIDGE TRUST (the
"1985 SAWRIDGE TRUSTEE" or
"TRUSTEES"

STATUS ON APPEAL: Respondents

DEFENDANT/RESPONDENT: PUBLIC TRUSTEE OF ALBERTA
("OPTG")

STATUS ON APPEAL: Respondent

DEFENDANT/RESPONDENT: CATHERINE TWINN

STATUS ON APPEAL: Respondent

DOCUMENT: FAST TRACK APPEAL
RECORD

Registrar's Stamp



Appeal from the Order of
The Honourable Mr. Justice D.R.G. Thomas
Dated the 5th day of July, 2017
Filed the 19th day of July, 2017

APPEAL RECORD
Pleadings, Final Documents and Transcripts
(Pleadings (Tabs 1), Final Documents (Tabs 2 to 5) and Transcript (Tab 6) Inclusive)

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The Appeal Record has been prepared in document format

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STATUS ON APPEAL: Respondents

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("OPTG")

STATUS ON APPEAL: Respondent

DEFENDANT/RESPONDENT: CATHERINE TWINN

STATUS ON APPEAL: Respondent

DOCUMENT: **FAST TRACK APPEAL
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Appeal from the Order of
The Honourable Mr. Justice D.R.G. Thomas
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A P P E A L R E C O R D
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(Pleadings (Tabs 1), Final Documents (Tabs 2 to 5) and Transcript (Tab 6) Inclusive)

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TAB 1

1925

COURT FILE NUMBER

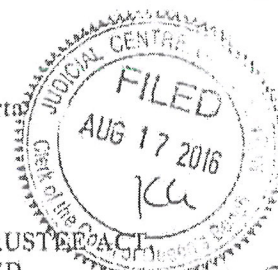
1103 14112

COURT

Court of Queen's Bench of Alberta

JUDICIAL CENTRE

Edmonton

IN THE MATTER OF THE TRUSTEE ACT,
R.S.A 2000, C. T-8, AS AMENDEDIN 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

APPLICANTS

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

DOCUMENT

APPLICATION BY PATRICK TWINN, ON
HIS BEHALF AND ON BEHALF OF HIS
INFANT DAUGHTER, ASPEN SAYA
TWINN, AND HIS WIFE MELISSA
MEGLEY; AND SHELBY TWINN; AND
DEBORAH A. SERAFINCHONCOMPLETE ADDRESS FOR SERVICE
ON THE APPLICANT OF ANY
DOCUMENTS IN THIS ACTION and
DOCUMENTS PREPARED AND
FILED BYBORDEN LADNER GERVAIS LLP
Centennial Place, East Tower
1900, 520 - 3 Avenue SW
Calgary, Alberta T2P 0R3
Attention: Nancy Golding Q.C./Sandi Shannon
Tel: (403) 232-9485/9782
Fax: (403) 266-1395
Email: ngolding@blg.com/sshannon@blg.com
File no. 443395/01

NOTICE TO RESPONDENTS

This application is made against you. You are a respondent.

You have the right to state your side of this matter before the master/judge.

To do so, you must be in Court when the application is heard as shown below:

Date:	August 24, 2016
Time:	10:00 a.m. Case Management Session
Where:	Law Courts Building 1A Sir Winston Churchill Square, Edmonton, Alberta T5J 3Y2
Before Whom:	Justice D.R.R. Thomas

Go to the end of this document to see what else you can do and when you must do it.

Remedy claimed or sought:

1. Patrick Twinn, on his own behalf and on behalf of his infant daughter, Aspen Saya Twinn and his wife Melissa Megley; and Shelby Twinn; and Deborah Serafinchon (collectively, the "Applicant Beneficiaries") are parties affected by the application of Bertha Twin-L'Hirondelle, Clara Twin-Midbo, Catherine Twinn, Roland C. Twinn, and Walter Felix Twin (the "Sawridge Trustees") in the within matter. The Applicant Beneficiaries are asking for an Order that they each be added as Parties to the within Action in order to protect their respective interests and the interests of others in similar circumstances.
2. That the Order adding the Applicant Beneficiaries as Parties to the within Action require the Sawridge Trustees to pay the legal fees associated with representation of the Applicant Beneficiaries out of the funds held by the Sawridge Band Intervivos Settlement (the "1985 Trust").
3. For an Order for an accounting of the 1985 Trust and in the case of Patrick Twinn, in addition for an accounting of the 1986 Trust.
4. Such further and other relief as this Court may deem appropriate.

Grounds for making this application:

History

5. In 1985, Chief Walter Patrick Twinn established the 1985 Trust to hold certain properties in trust for members of the Sawridge First Nation. In 1986, Chief Walter Twinn established the Sawridge Trust, August 15, 1986 (the "1986 Trust") (collectively with the 1985 Trust, the "Sawridge Trusts").
6. Although the Sawridge Trustees have failed to comply with the August 31, 2011 Order of Justice Thomas and have not filed a constating application, it appears that the Sawridge Trustees are seeking the opinion, advice and direction of the Court respecting the

administration and management of the property held under the 1985 Trust (hereinafter referred to as the "Advice and Direction Application") in respect to:

- a. the definition of the term definition of "Beneficiaries" contained in the 1985 Trust and if necessary to vary the 1985 Sawridge Trust to clarify the definition of "Beneficiaries"; and
 - b. the transfer of assets into the 1985 Trust.
7. The Applicant Beneficiaries are or should be Beneficiaries of the 1985 Trust and are affected by the Advice and Direction Application in the within matter and have interests that are not presently represented in the within Action. The Applicant Beneficiaries consent would be required to any variation of the 1985 Trust.

The Applicants

8. The Applicant Beneficiary, Patrick Twinn ("Patrick") is a registered member of the Sawridge First Nation and is a Beneficiary of both Sawridge Trusts.
9. Patrick also makes this application on behalf of his wife Melissa Megley ("Melissa") and their infant daughter, Aspen Saya Twinn ("Aspen"). Melissa and Aspen are both Beneficiaries of the 1985 Trust under the current definition of "Beneficiary".
10. The Applicant Beneficiary Shelby Twinn ("Shelby") is also a Beneficiary of the 1985 Trust under the current definition of "Beneficiary".
11. As Beneficiaries of both Sawridge Trusts, both Patrick and Shelby are entitled to an accounting of the 1985 Trust and in addition Patrick is entitled to an accounting of the 1986 Trust. Despite Patrick's request that the Sawridge Trustees provide an accounting of the 1985 Trust and the 1986 Trust to himself and all the Beneficiaries none has been provided. Shelby has also requested that the Sawridge Trustees provide an accounting of the 1985 Trust for herself and all of the Beneficiaries and none has been provided. The Sawridge Trustees have improperly refused to provide an accounting of the 1985 Trust and the 1986 Trust until this Advice and Direction Application and other related Actions are resolved
12. As Beneficiaries of the 1985 Trust, Shelby and Patrick on his own behalf and on behalf of Melissa and Aspen, are entitled to provide their opinions on the definition of "Beneficiary" contained in the 1985 Trust and the transfer of assets into the 1985 Trust brought forward by the Sawridge Trustees in the Advice and Direction Application, as their interests may be diluted, enhanced or otherwise affected by the Court's decision. Their consent would be required to any variation of the 1985 Trust.
13. Although Beneficiaries under the current definition of "Beneficiary" in the 1985 Trust, neither Melissa nor Aspen are registered members of the Sawridge First Nation (the "Sawridge Band"). Should a definition of Beneficiary tied to Sawridge Band membership, as currently proposed by the Sawridge Trustees be decided by the Court to

be the proper definition, Melissa and Aspen will lose their entitlement and they should have a right to argue against this if they choose.

14. Likewise, Shelby, a Beneficiary under the current definition of "Beneficiary" in the 1985 Trust, is not a registered Sawridge Band member and she would therefore not be a Beneficiary if the definition proposed by the Sawridge Trustees based on Band membership were accepted by the Court. She should have a right to argue against this proposed definition if she chooses.
15. Patrick is aware of a number of persons who have an absolute entitlement to Beneficiary status under both Sawridge Trusts, including by Court Order, who are not registered Sawridge Band members, who will lose their Beneficiary entitlement if the Sawridge Trustees' application to vary the Beneficiary definition to Band membership, as currently proposed succeeds.
16. As non-registered Sawridge Band members who will lose their Beneficiary status if the Sawridge Trustees are successful in their application, Patrick, as representative of Melissa and Aspen, and Shelby's opinions on the Advice and Direction Application are critical to reaching a fair and just determination of the within Advice and Direction Application.
17. The Applicant, Deborah Serafinchon ("Deborah") is the illegitimate child of Chief Walter Patrick Twinn who settled the 1985 and 1986 Trusts. Deborah is not currently a Beneficiary of the 1985 Trust.
18. Deborah's half siblings, including Trustee, Roland C. Twinn, derive their entitlement to Beneficiary status under both Sawridge Trusts solely through the male line, their common father, the late Chief Walter Patrick Twinn. As an illegitimate female child who is the direct descendant in the male line of a Sawridge First Nation member, Deborah Serafinchon is not entitled to be a Beneficiary of the 1985 Trust under current definition of "Beneficiary". Her illegitimate male siblings and legitimate siblings are. Illegitimate female siblings are not. If the definition of Beneficiary under the 1985 Trust is varied to exclude discriminatory language, such as "illegitimate", "male" and "female", Deborah is entitled to be a Beneficiary under the 1985 Trust.
19. Deborah Serafinchon's discriminatory exclusion as a Beneficiary of the 1985 Trust is not remedied if the Sawridge Trustees proposed definition is accepted by the Court. As a person excluded from the 1985 Trust on account of their gender and who will also be excluded if the Sawridge Trustees are successful in their Advice and Direction Application, Deborah Serafinchon's opinion, advice and direction for the definition of "Beneficiaries" contained in the 1985 Trust and the transfer of assets into the 1985 Trust is critical to reaching a fair and just determination of the within Advice and Direction Application.
20. The Sawridge Trustees appear to seek, *inter alia*, an order to vary the definition of the 1985 Trust such that an individual's Beneficiary status will depend entirely on whether the Sawridge First Nation determines that the individual qualifies as a member of the

Sawridge Band under the Membership Rules which are discriminatory and uncertain. The Applicant Beneficiaries represent interests of people that are not currently before the Court as they are not Parties to the Action.

21. The Applicant Beneficiaries represent a variety of interests that are not currently represented in the within Action. However, it is highly unlikely that they are the only Beneficiaries or potential Beneficiaries with similar interests. The Applicant Beneficiaries are aware of individuals falling into other categories whose entitlement will also be lost if the definition of Beneficiary is varied as proposed by the Sawridge Trustees. These Applicant Beneficiaries wish to offer a proposal that is inclusive and non-discriminatory. Accordingly, it is in the public interest that their opinions, advice and direction as to the definition of "Beneficiaries" contained in the 1985 Trust and the transfer of assets into the 1985 Trust brought forward by the Sawridge Trustees in the Advice and Direction Application are heard. It is critical to reaching a fair and just determination of the within Action that they be heard in this Action. Additionally, as the Advice and Direction Application requires the variation of the 1985 Trust the consent of the Beneficiaries is required.
22. The issues raised by the Sawridge Trustees' Advice and Direction Application are potentially complex issues of Trust and Aboriginal law. Further, the Advice and Direction Application affects access to trust property worth over \$60,000,000.00. The acquisition, or loss, of Beneficiary status will have significant financial and social ramifications for the affected, or potentially affected, adults and their issue for the rest of their lives. It is incumbent upon the Trustees to determine who the Beneficiaries are currently before any change or variation is made.
23. There are special circumstances in this case that merit an order to have the legal fees associated with representation of the Applicant Beneficiaries paid by the Sawridge Trusts, including the fact that the Sawridge Trustees, are incapable of effectively representing the interest of the Applicant Beneficiaries due to a conflict of interest and personal animosity. As well, the main Advice and Direction Application raises complex issues which make it extremely difficult, if not impossible, for an individual to effectively be self-represented in the proceedings.

Material or evidence to be relied on:

24. The Affidavit of Shelby Twinn sworn July 26, 2016
25. The Affidavit of Patrick Twinn sworn July 26, 2016
26. The Affidavit of Deborah Serafinchon sworn July 26, 2016
27. Such further and other materials as Counsel may advise and this Honourable Court may allow.

Applicable rules:

28. Alberta Rules of Court 1.4 and 2.11, 3.74 and 6.3

Applicable Acts and regulations:

N/A

Any irregularity complained of or objection relied on:

N/A


How the application is proposed to be heard or considered:

29. This application is to be heard by leave of the Honourable Justice J. Thomas, or at his direction, another Justice, at a special application to be set at the soonest possible date.

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the applicant(s) what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of the form. If you intend to give evidence in response to the application, you must reply by filing an affidavit or other evidence with the Court and serving a copy of that affidavit or other evidence on the applicant(s) a reasonable time before the application is to be heard or considered.

TAB 2

	Clerk's stamp:
COURT FILE NUMBER	1103-14112
COURT OF QUEEN'S BENCH OF ALBERTA JUDICIAL CENTRE	EDMONTON
	<p>IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c. T-8, AS AMENDED</p> <p>IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")</p>
APPLICANTS	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust
DOCUMENT	Order
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	<p>Attention: Doris C.E. Bonora Reynolds, Mirth, Richards & Farmer LLP 3200 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3W8</p> <p>Telephone: (780) 425-9510 Fax: (780) 429-3044 File No: 108511-001-DCEB</p>

Date on which Order Pronounced: August 31, 2011

Name of Justice who made this Order: D. R. C. Thomas

UPON the application of the Trustees of the 1985 Sawridge Trust (the "Applicants" or the "Trustees"); AND UPON hearing read the Affidavit of Paul Bujold, IT IS HEREBY ORDERED AND DECLARED as follows:

Application

1. An application shall be brought by the Trustees of the 1985 Sawridge Trust for the opinion, advice and direction of the Court respecting the administration and management of the property held under the 1985 Sawridge Trust (hereinafter referred to as the "Advice and Direction Application"). The Advice and Direction Application shall be brought:
 - a. To seek direction with respect to the definition of "Beneficiaries" contained in the 1985 Sawridge Trust, and if necessary to vary the 1985 Sawridge Trust to clarify the definition of "Beneficiaries".
 - b. To seek direction with respect to the transfer of assets to the 1985 Sawridge Trust.

Notice

2. The Trustees shall send notice of the Advice and Direction Application to the following persons, in the manner set forth in this Order:
 - a. The Sawridge First Nation;
 - b. All of the registered members of the Sawridge First Nation;
 - c. All persons known to be beneficiaries of the 1985 Sawridge Trust and all former members of the Sawridge First Nation who are known to be excluded by the definition of "Beneficiaries" in the Sawridge Trust created on August 15, 1986, but who would now qualify to apply to be members of the Sawridge First Nation;
 - d. All persons known to have been beneficiaries of the Sawridge Band Trust created on April 15, 1982 (hereinafter referred to as the "1982 Sawridge Trust"), including any person who would have qualified as a beneficiary subsequent to April 15, 1985;
 - e. All of the individuals who have applied for membership in the Sawridge First Nation;
 - f. All of the individuals who have responded to the newspaper advertisements placed by the Applicants claiming to be a beneficiary of the 1985 Sawridge Trust;
 - g. Any other individuals who the Applicants may have reason to believe are potential beneficiaries of the 1985 Sawridge Trust;
 - h. The Office of the Public Trustee of Alberta (hereinafter referred to as the "Public Trustee") in respect of any minor beneficiaries or potential minor beneficiaries; and
 - i. The Minister of Aboriginal Affairs and Northern Development Canada (hereinafter referred to as the "Minister") in respect, *inter alia*, of all those

persons who are Status Indians and who are deemed to be affiliated with the Sawridge First Nation by the Minister.

(those persons mentioned in Paragraph 2 (a) – (i) shall collectively be referred to as the “Beneficiaries and Potential Beneficiaries”)

3. Notice of the Advice and Direction Application on any person shall not be used by that person to show any connection or entitlement to rights under the 1982 Sawridge Trust or the 1985 Sawridge Trust, nor to entitle a person to being held to be a beneficiary of the 1982 Sawridge Trust or the 1985 Sawridge Trust, nor to determine or help to determine that a person should be admitted as a member of the Sawridge First Nation. Notice of the Advice and Direction Application is deemed only to be notice that a person may have a right to be a beneficiary of the 1982 Sawridge Trust or the 1985 Sawridge Trust and that the person must determine his or her own entitlement and pursue such entitlement.

Dates and Timelines for Advice and Direction Application

4. The Trustees shall, within 10 business days of the day this Order is made, provide notice of the Advice and Direction Application to the Beneficiaries and Potential Beneficiaries in the following manner:
 - a. Make this Order available by posting this Order on the website located at www.sawridgetrusts.ca (hereinafter referred to as the “Website”);
 - b. Send a letter by registered mail to the Beneficiaries and Potential Beneficiaries for which the Applicants have a mailing address and by email to the Beneficiaries and Potential Beneficiaries for which the Applicants have an email address, advising them of the Advice and Direction Application and advising them of this Order and of the ability to access this Order on the Website (hereinafter referred to as the “Notice Letter”). The Notice Letter shall also provide information on how to access court documents on the Website;
 - c. Take out an advertisement in the local newspapers published in the Town of Slave Lake and the Town of High Prairie, setting out the same information that is contained in the Notice Letter; and
 - d. Make a copy of the Notice Letter available by posting it on the Website.
5. The Trustees shall send the Notice Letter by registered mail and email no later than September 7, 2011.
6. Any person who is interested in participating in the Advice and Direction Application shall file any affidavit upon which they intend to rely no later than September 30, 2011.
7. Any questioning on affidavits filed with respect to the Advice and Direction Application shall be completed no later than October 21, 2011.
8. The legal argument of the Applicants shall be filed no later than November 11, 2011.

9. The legal argument of any other person shall be filed no later than December 2, 2011.
10. Any replies by the Applicant shall be filed no later than December 16, 2011.
11. The Advice and Direction Application shall be heard January 12, 2012 in Special Chambers.

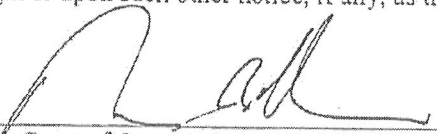
Further Notice and Service Provisions

12. Except as otherwise provided for in this Order, the Beneficiaries and Potential Beneficiaries need not be served with any document filed with the Court in regard to the Advice and Direction Application, including any pleading, notice of motion, affidavit, exhibit or written legal argument.
13. The Applicants shall post any document that they file with the Court in regard to the Advice and Direction Application, including any pleading, notice of motion, affidavit, exhibit or written legal argument, on the Website within 5 business days after the day on which the document is filed.
14. The Beneficiaries and Potential Beneficiaries shall serve the Applicants with any document that they file with the Court in regard to the Advice and Direction Application, including any pleading, notice of motion, affidavit, exhibit or written legal argument, which service shall be completed by the relevant filing deadline, if any, contained in this Order.
15. The Applicants shall post all of the documents the Applicants are served with in this matter on the Website within 5 business days after the day on which they were served.
16. The Applicants shall make all written communications to the Beneficiaries and Potential Beneficiaries publicly available by posting all such communications on the Website within 5 business days after the day on which the communication is sent.
17. The Beneficiaries and Potential Beneficiaries are entitled to download any documents posted on the Website by the Applicants pursuant to the terms of this Order.
18. Notwithstanding any other provision in this Order, the following persons shall be served with all documents filed with the Court in regard to the Advice and Direction Application, including any pleading, notice of motion, affidavit, exhibit or written legal argument:
 - a. Legal counsel for the Applicants;
 - b. Legal counsel for any individual Trustee;
 - c. Legal counsel for any Beneficiaries and Potential Beneficiaries;
 - d. The Sawridge First Nation;
 - e. The Public Trustee; and

f. The Minister.

Variation or Amendment of this Order

19. Any interested person, including the Applicants, may apply to this Court to vary or amend this Order on not less than 7 days' notice to those persons identified in paragraph 17 of this Order, as well as any other person or persons likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

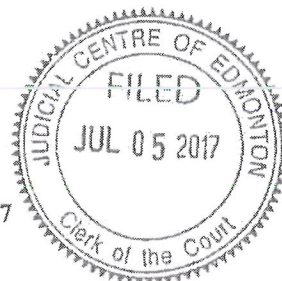

Justice of the Court of Queen's Bench in Alberta
Thomas J

809772:August 31, 2011

TAB 3

Court of Queen's Bench of Alberta

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



**Date: 20170705
Docket: 1103 14112
Registry: Edmonton**

In the Matter of the Trustee Act, R.S.A. 2000, C. T-8, as amended

**And in the matter of the Sawridge Band, Inter Vivos Settlement, created by
Chief Walter Patrick Twinn, of the Sawridge Indian Band, No. 19, now known
as Sawridge First Nation, on April 15, 1985 (the "1985 Sawridge Trust" or "Trust")**

Between:

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

Applicants

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

Respondents (Original Applicants)

- and -

Public Trustee of Alberta ("OPTG")

Respondent

- and -

Catherine Twinn

Respondent

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

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I Introduction

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

II Background

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

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

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

III The Applicants

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

A Patrick Twinn

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

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

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

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

B Shelby Twinn

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

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

C Deborah Serafinchon

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

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

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

IV Positions of the Parties

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

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

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

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

V Issues

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

- a Whether some or all of the Applicants should be made a Party to this Action?
- b Whether the Applicants should be awarded advance costs and indemnification for future legal fees from the 1985 Sawridge Trust?

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

VI Disposition of the Application

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C Should Deborah Sarafinchon be added as a Party?

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

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

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

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

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

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

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

VIII Should the Applicants be entitled to advance costs?

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

IX Costs

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

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

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

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

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

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

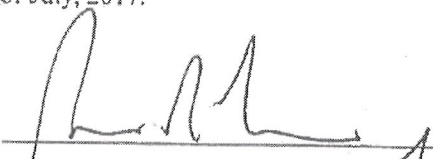
[52] Elevated cost awards are appropriate in a wide variety of circumstances so as to achieve those objectives, as is reviewed in *Brown v Silvera*, 2010 ABQB 224 at paras 29-35, 488 AR 22, affirmed 2011 ABCA 109, 505 AR 196.

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

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

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

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


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

Submissions in writing from:

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

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

J.L. Hutchison
Hutchison Law LLP
for the OPTG

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

Schedule 'A'

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

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

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

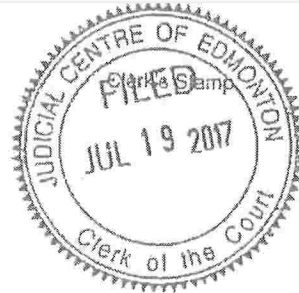
Part II - List of Correspondence

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

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

TAB 4

COURT FILE NUMBER 1103 14112
 COURT: COURT OF QUEEN'S BENCH OF ALBERTA
 JUDICIAL CENTRE: EDMONTON



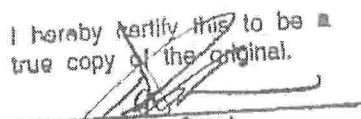
IN THE MATTER OF THE TRUSTEE
 ACT, RSA 2000, c T-8, AS AMENDED

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

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

DOCUMENT ORDER

I hereby certify this to be a
 true copy of the original.


 for Clerk of the Court

ADDRESS FOR SERVICE AND
 CONTACT INFORMATION OF
 PARTY FILING THIS
 DOCUMENT Dentons Canada LLP
 2900, 10180 101 Street
 Edmonton, AB T5J 3V5
 Attention: Doris Bonora
 Telephone: (780) 423-7188
 Facsimile: (780) 423-7276
 File No.: 551880 -1

DATE ON WHICH ORDER WAS PRONOUNCED:

July 5, 2017

LOCATION WHERE ORDER WAS PRONOUNCED:

Edmonton, Alberta

NAME OF JUSTICE WHO MADE THIS ORDER:

Honourable Justice D.R.G. Thomas

UPON THE APPLICATION of Patrick Twinn, Aspen Saya Twinn, Melissa Megley, Shelby Twinn and Deborah A. Serafinchon in respect of being added as parties to the within action and seeking advance full indemnity costs; and Upon hearing from the counsel for The Office of the Public Trustee and Guardian, Sawridge Trustees, Catherine Twinn and Counsel for Patrick Twinn, Shelby Twinn and Deborah A. Serafinchon by written brief and subsequent correspondence; and Upon the decision of The Honourable Mr. Justice D.R.G. Thomas dated July 5, 2017 ABQB 377;

IT IS HEREBY ORDERED THAT:

1. As no submissions were made on the accounting, the claims by Patrick Twinn and Shelby Twinn for an accounting from the Trustees are dismissed on a without prejudice basis.[1, 20]
2. The claims by Patrick Twinn on behalf of his infant daughter, Aspen Saya Twinn and his wife Melissa Megley, have been abandoned and are dismissed. [21]
3. The claims by Patrick Twinn, Shelby Twinn and Deborah Serafinchon to be added as parties are dismissed [22]
4. Patrick Twinn and Shelby Twinn are recognized as Beneficiaries of the 1985 Trust by the Trustees and are hereby declared Beneficiaries of the 1985 Trust by the Court [32, 34 and 39]
5. Patrick Twinn and Shelby Twinn may have ongoing involvement in the litigation by transparent and civil communications with the Trustees and their legal counsel and through a positive dialogue to ensure that their status as beneficiaries is respected. [39]
6. Deborah Serafinchon may monitor the progress of this litigation and review the proposals which the Trustees may make in respect of the definition of 'beneficiary' under the 1985 Trust and provide comments to the Trustees and the Court [43];
7. Costs are awarded against Deborah Serafinchon in favor of the Sawridge Trustees on a party/ party basis [54]
8. Patrick Twinn and Shelby Twinn shall pay solicitor and own client indemnity costs of the Sawridge Trustees in responding to this application. [53]
9. The Public Trustee shall continue to act as litigation representative for the categories of minors the Court has identified as requiring representation, as specifically set out in

000003

Sawridge #3, who have become adults during the course of the litigation. Said representation by the Public Trustee shall be subject to the existing indemnity and costs exemption orders [55]


Honourable Justice D.R.G. Thomas

Thomas J

TAB 5

COURT OF APPEAL OF ALBERTA

Form AP-1
[Rule 14.8 and 14.12]

COURT OF APPEAL FILE NUMBER: 1703 0193AC

TRIAL COURT FILE NUMBER: 1103-14112

REGISTRY OFFICE: Edmonton

PLAINTIFF/APPLICANT: Patrick Twinn, on his behalf,
Shelby Twinn and Deborah A.
Serafinchon

STATUS ON APPEAL: Appellant

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

STATUS ON APPEAL: Respondent

DEFENDANT/RESPONDENT: Public Trustee of Alberta
("OPTG")

STATUS ON APPEAL: Respondent

DEFENDANT/RESPONDENT: Catherine Twinn

STATUS ON APPEAL: Respondent

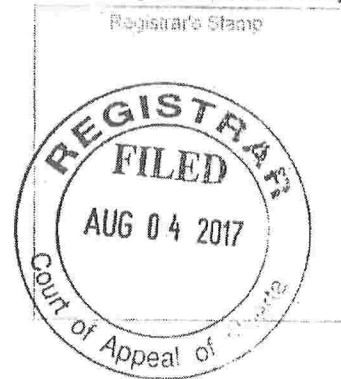
DEFENDANT/RESPONDENT: Patrick Twinn, on behalf of his
infant daughter, Aspen Saya
Twinn, and his wife Melissa
Megley

STATUS ON APPEAL: Not a Party to the Appeal

DOCUMENT: CIVIL NOTICE OF APPEAL

APPELLANT'S ADDRESS FOR
SERVICE AND CONTACT
INFORMATION:

BORDEN LADNER GERVAIS LLP
Centennial Place, East Tower
1900, 520 - 3 Avenue SW
Calgary, Alberta T2P 0R3
Attention: Nancy Golding Q.C./Sandi Shannon
Tel: (403) 232-9485/9782
Fax: (403) 266-1395
Email: ngolding@blg.com
sshannon@blg.com
File no. 443395-000001



WARNING

To the Respondent: If you do not respond to this appeal as provided for in the Alberta Rules of Court, the appeal will be decided in your absence and without your input.

1. Particulars of Judgment, Order or Decision Appealed From:

Date pronounced: July 5, 2017

Date entered: July 19, 2017

Date served: July 19, 2017

Official neutral citation of reasons for decision, if any:

(do not attach copy) 2017 ABQB 377

(Attach a copy of order or judgment: Rule 14.12(3). If a copy is not attached, indicate under item 14 and file a copy as soon as possible: Rule 14.18(2).)

2. Indicate where the matter originated:

☒ Court of Queen's Bench

Judicial Centre: Edmonton

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

On appeal from a Queen's Bench Master or Provincial Court Judge? ☐ Yes ☒ No

Official neutral citation of reasons for decision, if any, of the Master or Provincial Court Judge:
(do not attach copy) _____

(If originating from an order of a Queen's Bench Master or Provincial Court Judge, a copy of that order is also required:
Rule 14.18(1)(c).)

☐ Board, Tribunal or Professional Discipline Body

Specify Body: _____

3. Details of Permission to Appeal, if required (Rules 14.5 and 14.12(3)(a)):

☒ Permission not required, or ☐ Granted

Date: _____

Justice: _____

(Attach a copy of order, but not reasons for decision.)

4. Portion being appealed (Rules 14.12(2)(c)):

- ☒ Whole, or
☐ Only specific parts (if specific part, indicate which part):

5. Provide a brief description of the issues:

The issues in this Appeal are as follows:

- (i) Whether the learned Justice committed a reviewable error in dismissing the Appellants' application to be named as Parties or in the alternative Interveners in Court Action No. 1103-14112 (the "Action");
(ii) If the learned Justice did commit a reviewable error in dismissing the Appellants' application to be added as Parties or in the alternative Interveners in the Action, whether the Appellants are entitled to advance costs; and
(iii) Whether the learned Justice committed a reviewable error by ordering that the Appellants pay the costs of the Trustees in responding to the Application.

6. Provide a brief description of the relief claimed:

The Appellant requests the following relief:

- (i) That the Judgment of the Honourable Justice D.R.G. Thomas of July 19, 2017 dismissing the Appellants' application to be named as Parties or in the alternative Interveners.
(ii) That the costs award against the Appellants be set aside.
(iii) An Order finding that the Appellants be named as Parties or in the alternative Interveners to this Action.
(iv) An Order finding that the Appellants are entitled to advance costs.
(v) Such further and other relief as counsel may advise and this Honourable Court allow.

7. Is this appeal required to be dealt with as a fast track appeal? (Rule 14.14)

- ☒ Yes ☐ No

8. Does this appeal involve the custody, access, parenting or support of a child? (Rule 14.14(2)(b))

- ☐ Yes ☒ No

9. Will an application be made to expedite this appeal?

- ☐ Yes ☒ No

10. Is Judicial Dispute Resolution with a view to settlement or crystallization of issues appropriate? (Rule 14.60)

- ☐ Yes ☒ No

11. Could this matter be decided without oral argument? (Rule 14.32(2))

- ☐ Yes ☒ No

12. Are there any restricted access orders or statutory provisions that affect the privacy of this file?
(Rule 6.29, 14.12(2)(e), 14.83)

☐ Yes ☒ No

If yes, provide details: _____

(Attach a copy of any order.)

13. List respondent(s) or counsel for the respondent(s), with contact information:

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*If specified constitutional issues are raised, service on the Attorney General is required under s. 24 of the
Judicature Act: Rule 14.18(1)(c)(viii).*

14. Attachments (as applicable):

- ☒ Order of judgment under appeal if available (not reasons for decision) (Rule 14.12(3))
☐ Earlier order of Master, etc. (Rule 14.18(1)(c))
☐ Order granting permission to appeal (Rule 14.12(3)(a))
☐ Copy of any restricted access order (Rule 14.12(2)(e))

If any document is not available, it should be appended to the factum, or included elsewhere in the appeal record.

TAB 6

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

2

3 August 24, 2016

Morning Session

4

5 The Honourable

Court of Queen's Bench of Alberta

6 Mr. Justice Thomas

7

8 C.K.A. Platten, Q.C.

For Catherine Twinn

9 C. Osuladini

For Catherine Twinn

10 L. Maj

For the Minister of Aboriginal Affairs and

11

Northern Development

12 J.L. Hutchison

For the Public Trustee of Alberta

13 D.C. Bonora

For Sawridge Trustees

14 A. Loparco

For Sawridge Trustees

15 N.L. Golding, Q.C.

For Patrick Twinn, et al

16 E.H. Molstad, Q.C.

For Sawridge First Nation

17 G. Joshee-Arnal

For Sawridge First Nation

18 S.A. Wanke

For Morris Stoney, et al

19 C. Wilde

Court Clerk

20

21

22 **Discussions**

23

24 THE COURT:

Good morning.

25

26 Are you going to do the introductions?

27

28 MR. MOLSTAD:

I have been assigned that task, Sir.

29

30 THE COURT:

All right.

31

32 MR. MOLSTAD:

We have, representing the Sawridge Trustees,

33 Ms. Bonora and Ms. Loparco.

34

35 We have representing the Public Trustee, Ms. Hutchison. Mr. Meehan is not with us
36 today.

37

38 We have representing Catherine Twinn, Ms. Platten, and Ms. Osualdini.

39

40 We have myself, Sir, and Mr. Joshee-Arnal representing the Sawridge First Nation.

41

1 We have representing Mr. Morris Stoney, et al, Ms. Wanke.

2
3 And we have representing Patrick Twinn, et al, Ms. Golding.

4
5 We also have in attendance from the Minister of Aboriginal Affairs and Northern
6 Development, Ms. Maj from the Department of Justice.

7
8 We -- as you can see from the agenda that was sent to you yesterday, the first item on the
9 agenda is the Rule 5.13 application --

10
11 THE COURT: Yes.

12
13 MR. MOLSTAD: -- on membership and costs. And I'd like to
14 guess that the matters after that are not going to take too long, but that is a guess in terms
15 of the other matters (INDISCERNIBLE).

16
17 THE COURT: Yeah, I saw that revised agenda this morning.
18 Thanks for sending it in. But I think what I'm going to do is I'm going to reorder it,
19 because it looks to me from the revised agenda, the only matter that may take some time
20 is actually your application.

21
22 MR. MOLSTAD: That may be the case.

23
24 THE COURT: So let's see if we can move some of the
25 counsel along here.

26
27 MR. MOLSTAD: Well, I'm -- we're all in your hands, Sir, so. . .

28
29 THE COURT: All right.

30
31 MR. MOLSTAD: What order are you proposing in.

32
33 THE COURT: Oh, I'm proposing just normal chambers
34 process; that is the consent order first, get it resolved and dealt with. That would be --

35
36 MR. MOLSTAD: Number 4?

37
38 THE COURT: Number 4, the consent order. And then we'll
39 deal with these adjournment requests and --

40
41 MR. MOLSTAD: All right. Before I sit down, before we start the

1 Rule 5.13 application, I've had some discussion with my friend and I have a few
2 preliminary comments before we start that.
3

4 THE COURT: All right.
5

6 MR. MOLSTAD: Okay? Thank you, Sir.
7

8 THE COURT: Certainly. And I think I will -- that's useful,
9 because I think I've reviewed that material and I can narrow it down fairly quickly.
10

11 MR. MOLSTAD: Thank you.
12

13 THE COURT CLERK: Sorry, Sir, what was your name?
14

15 THE COURT: Mr. Molstad, Q.C.
16

17 MR. MOLSTAD: Sorry.
18

19 **Submissions by Ms. Bonora**
20

21 MS. BONORA: Sir, you'll recall that in this application, there
22 were basically two issues. One was the beneficiary designation and the second was to
23 confirm that the transfer of assets from the 1982 Trust to the 1985 Trust were -- was
24 appropriate, and that we've put that issue behind us. And through the work of counsel,
25 we've been able to reach agreement on the issue of the transfer of assets.
26

27 I believe, Sir, you received a brief from us and a copy of the consent order.
28

29 THE COURT: I did. And thank you very much for the brief,
30 because it makes it pretty clear --
31

32 MS. BONORA: Yeah. So --
33

34 THE COURT: -- well, what the basis for it is, and I'm
35 certainly satisfied that the consent order is appropriate and properly based in law.
36

37 MS. BONORA: Sir, I will not take any more time then. If
38 you've read the brief, I really have nothing else to add to the submissions that we've
39 made. And so, therefore, I think my friends would like to make a few comments, and I'll
40 just respond to those if there's anything else, unless you have any questions for me.
41

1 THE COURT: All right. I wonder if, counsel, if you wouldn't
2 mind just mentioning your name before you speak just so the clerk can keep track of
3 who's speaking?

4

5 MS. BONORA: Doris Bonora of Dentons just spoke. Thank
6 you, Sir.

7

8 THE COURT: Thanks, Ms. Bonora.

9

10 **Submissions by Ms. Hutchison**

11

12 MS. HUTCHISON: Good morning, My Lord. Janet Hutchison for
13 the Public Trustee of Alberta.

14

15 Very brief comments, My Lord, simply to give the Court some idea of why the OPTT,
16 and I believe Ms. Platten will speak to trustee Twinn, why we weren't able to arrive at a
17 joint brief, as well as a consent order. And it was simply a matter, My Lord, of some of
18 the wording around the facts and the evidence and what evidence was actually available,
19 as well as the final paragraph of the brief. Counsel just really weren't able to quite agree
20 how to characterize some of the issues around accounting.

21

22 The -- the Public Trustee would just like it noted on record that its position on the
23 consent order is that when it -- there is this reference to accounting in the preamble in
24 paragraph 2, that includes an individual accounting, as well as a passing of accounts.
25 And, of course, My Lord, for future reference, the passing of accounts for the five trusts
26 would occur logically within this proceeding, after beneficiary identification is dealt with.

27

28 But that's all we have to say, My Lord.

29

30 THE COURT: All right. Thank you. Ms. Platten?

31

32 **Submissions by Ms. Platten**

33

34 MS. PLATTEN: Sir, I think those are also our submissions, and
35 so we don't really anything further to say.

36

37 THE COURT CLERK: Sorry, your name, for the record?

38

39 MS. PLATTEN: Sorry, Karen Platten for Catherine Twinn.

40

41 **Submissions by Ms. Golding**

1
2 MS. GOLDING: Sir, Nancy Golding from Borden Ladner
3 Gervais in Calgary, and I am new to these -- this matter, acting on behalf of several of the
4 individual beneficiaries.

5
6 I just wanted to comment that my client wasn't involved in this order, and so we don't
7 intend to make any comment on it. However, we do want it noted that our understanding
8 is the order is without prejudice to the rights of our client to request an accounting as it
9 relates to the 1982 and 1985 Trusts, and for any relief that might come from that.

10
11 Thank you, Sir.

12
13 THE COURT: Thank you. Ms. Bonora, any --

14
15 MS. BONORA: Just one --

16
17 THE COURT: Look, I --

18
19 MS. BONORA: -- comment, Sir.

20
21 MS. MAJ: Sorry, sorry.

22
23 MS. BONORA: Oh, my -- my apologies.

24
25 THE COURT: You -- you can say something, but if --

26
27 MS. MAJ: That's all right. It's hard -- it's hard to see me
28 in the back.

29
30 THE COURT: Quite frankly, you are not a party at --

31
32 **Submissions by Ms. Maj**

33
34 MS. MAJ: I was simply going to actually echo
35 Ms. Platten's comments, My Lord.

36
37 THE COURT: Yeah. Well, okay. Well, just echo it and let's
38 get on with it.

39
40 Ms. Bonora?

41

1 **Submissions by Ms. Bonora**

2

3 MS. BONORA:

4 Just one comment. Ms. Hutchison said that the
5 consent order was based on the accounting naturally occurring in this proceeding, and that
6 was not discussed until yesterday morning. So I don't think it is the basis for the consent
7 order, and that is a very live issue in terms of how the accounting will proceed. So I --
8 we just need to -- I'm not sure that you will be hearing that accounting. That is an issue
9 that you'll hear about later in terms of how that's going to happen, so. . .

10 THE COURT:

11 anything to say?

All right. Mr. Molstad, you don't have

12

13 MR. MOLSTAD:

14 Mr. Molstad.

I don't have anything to say. My name is

15

16 **Order (Consent Order)**

17

18 THE COURT:

19 All right. The consent order being sent to me
20 with the brief, as I -- just so it's clear on the record, I did review that brief and it was
21 very helpful to me in terms of providing a legal basis for the consent order. Plus, the
22 Summary of Facts helped put me in the picture again.

22

23 So the consent order is granted, and there it is.

24

25 MS. BONORA:

Thank you, Sir.

26

27 THE COURT:

28 that to Ms. Bonora.

Madam Clerk, if you wouldn't mind handing

29

30 **Submissions by Ms. Bonora (Distribution Proposal Adjournment)**

31

32 MS. BONORA:

33 respect of the distribution proposal next.

Sir, perhaps I'll speak to the adjournment in

34

35 THE COURT:

All right. Sure.

36

37 MS. BONORA:

38 Sir, the -- you'll recall in your December 17th,
39 2015, decision, you asked the Trustees to present a distribution proposal and to have it
40 approved by the Court, and so we, in fact, submitted the distribution proposal to the
41 Court. We then filed a brief in respect of approving that distribution proposal, and briefs
have been filed by the Office of the Public Guardian and Trustee, and by Catherine

1 Twinn.

2
3 Subsequent to the filing of those briefs, we received applications by Morris Stoney and
4 his brothers and sisters, and from Patrick Twinn, and his family Shelby Twinn and Debra
5 Sarafinchin.

6
7 In respect of the standing of those parties and whether they are beneficiaries, we believe
8 that until those applications are heard, that, as beneficiaries, they probably have a right to
9 speak. If they, in fact, are beneficiaries and are going to be treated as parties, that they
10 have a right to speak to distribution, and so we think it appropriate to postpone that issue.
11 It's ready to go once we've determined the standing of the various other parties and -- and
12 it would be our submission that especially with respect to the clients Ms. Golding
13 represents.

14
15 So those are my submissions in respect of the adjournment, and I think all counsel are on
16 board with that adjournment request.

17
18 THE COURT: So both the distribution plan, I'll call it, plus
19 the issue of -- the outstanding issue of who the beneficiaries are?

20
21 MS. BONORA: Yes. So the beneficiary definition is also
22 postponed. Counsel have advised that they believe it would be perhaps a two-day
23 application to deal with that particular issue, and so we still have to determine exactly
24 how we're going to come to bring that issue before the Court. We're still in discussions
25 among counsel on that issue.

26
27 THE COURT: Well, thank you for that, but I'll give you my
28 thinking on that issue. I'm inclined to send that issue to trial, and it won't be me hearing
29 it. It will be some other judge. I'm finding that the estimates of counsel in this matter
30 aren't too accurate, and given the nature of this litigation, I'm thinking -- my thinking is,
31 I'm not making an order, but I'm thinking this is not going to be determined on the basis
32 of affidavit evidence. It's going to go to a trial and get this thing resolved once and for
33 all. So --

34
35 MS. BONORA: Thank you, Sir.

36
37 THE COURT: -- just so you know my thinking on it.

38
39 MS. BONORA: And it --

40
41 THE COURT: And that you might want to start preparing a

1 contingency plan around that approach.

2
3 MS. BONORA: M-hm. That's very helpful to all counsel,
4 because there was some discussion about whether you would, in fact, hear that
5 application, and there was a discussion about whether we needed to make an application
6 about whether you would hear that application. So if, in fact, you are saying perhaps you
7 won't and that it should move to a trial, that gives us some direction in our next
8 discussions about scheduling and moving towards that.

9
10 THE COURT: Okay.

11
12 MS. BONORA: So thank you for those comments.

13
14 THE COURT: Yeah. No, I -- the reason I'm saying it is I
15 really came on to this before we had all sorts of rules around case management in --
16 generally, and specifically in commercial matters. I mean, case managers are meant to
17 deal with process issues, and not substantive disputes. I mean, we deal with a lot of
18 disputes over the appropriate process, but this one is going off in the direction of a more
19 general dispute. So that's why I'm thinking about it, and I -- and clearly if it went to a
20 trial, I would not be the case manager in this case.

21
22 MS. BONORA: Yes, Sir.

23
24 THE COURT: All right?

25
26 MS. BONORA: So perhaps if you could leave the issue of the
27 actual process and whether it would be a trial or whether counsel may be able to agree
28 that it could proceed by affidavit evidence, and whether we could maybe discuss that
29 before you made a decision about that and we could make some -- even if we just did it
30 by way of written submissions to you, that would be helpful to all of us, I think, to have
31 us consider that and consult with our clients.

32
33 THE COURT: That would be satisfactory to me.

34
35 MS. BONORA: Thank you. Mr. Molstad just asked me if you
36 were talking about trials of other issues on the agenda, but I think you're just talking
37 about --

38
39 THE COURT: No, I'm --

40
41 MS. BONORA: -- the definition of beneficiary, which was the

1 original issue in our action.

2

3 **Order (Distribution Proposal Adjournment)**

4

5 THE COURT:

6 That's -- well, I think it -- my goal here has
7 been to try and get this litigation focussed, or refocussed in some cases, and it does seem
8 that the issues are narrowing, which is sort of the function of a case manager. We're
9 down to the -- well, the distribution plan, I'll call it, appears to be generally acceptable,
10 subject to some latecomers having a look at it. Whether they'll have anything to say is
11 yet to be decided, but my thinking is that the distribution plan looks like it's -- I mean,
12 I've read it. It seems quite reasonable. It looks like that issue is going to get swept off
13 the table. The -- so the one outstanding issue is the -- the scope of the beneficiary group.

14 MS. BONORA:

Thank you, Sir.

15

16 THE COURT:

17 So your request for an adjournment on the
18 distribution proposal application and -- is adjourned *sine die*.

18

19 **Submissions by Ms. Bonora (Standing)**

20

21 MS. BONORA:

Thank you, Sir.

22

23 Perhaps, Sir, we could deal with number 3 on the list, because I don't believe Ms. Wanke
24 has any other matters that she would be attending to. I don't know that for sure, but
25 the -- so the application with respect to Mr. Stoney is an application for standing, an
26 application to be determined as a beneficiary. We're asking that matter to be adjourned.
27 We just got served with it. Obviously, there needs to be some discussion around exactly
28 what's going to happen with that, and questioning. And I don't think there's any
29 opposition to that request to adjourn, but I will leave it for Ms. Wanke to speak, and
30 Mr. Molstad would like to address it, as well.

31

32 THE COURT:

33 All right. Well, Ms. Wanke, you're the
34 applicant -- representing the applicant, so if you'd like to speak first?

34

35 **Submissions by Ms. Wanke (Standing)**

36

37 MS. WANKE:

38 I am, My Lord. We have no issue with
39 Ms. Bonora's request to adjourn the matter. She had proposed that counsel have a
40 conference and come to you with a proposal in terms of timelines and how the matter will
41 be heard, and we think that's reasonable. And we think counsel can certainly do that by
42 consent.

1
2 We have some concerns that matters will be decided in this proceeding before the issue of
3 our application is determined if our application doesn't move forward in a timely manner,
4 and we're wondering if it would be appropriate to suggest that our application would be
5 determined first, before any more matters of -- that effect Mr. Stoney and his brothers and
6 sisters are heard and determined, or, in the alternative, at the very least if we could be
7 added to the service list while their application is pending so we receive notice of what's
8 going on in this proceeding.
9

10 Sir, I'd --
11

12 THE COURT:

Okay.

13
14 MS. WANKE:

I'd also like to speak briefly to Mr. Molstad
15 speaking. I understand that Mr. Molstad wants to speak today. I appreciate that there's
16 likely hardly anything of substance that's going to be said or determined on the
17 adjournment application, since nothing of -- no merit decision is being made, but as a
18 matter of precedent we think it's important to note that the Sawridge First Nation was, in
19 your decision in 2015, expressly noted not to be a party to these proceedings, and rights
20 and benefit flow and obligations flow from being a party. Since they're not a party or a
21 respondent to our application, our position is they would first need to seek standing to
22 make any submissions. And, again, nothing of merit or substance is being determined
23 today, but for precedent, I think it's important that prior to Sawridge First Nation having a
24 say on anything to do with our application, they first satisfy the Court they have standing
25 to speak.
26

27 THE COURT:

Mr. Molstad, as an active participant?

28
29 **Submissions by Mr. Molstad (Standing)**
30

31 MR. MOLSTAD:

Well, we haven't been named as a respondent.
32 However, my friend's application sets out as one of the grounds that Mr. Stoney and his
33 siblings are members of the Sawridge First Nation. So it is a matter that directly affects
34 the Sawridge First Nation.
35

36 We can tell you that we will be making an application to intervene in this matter and
37 participate because of this allegation. And also you may or may not be aware that this
38 issue has been litigated before a number of courts previously, including the Federal of
39 Court of Appeal, the Federal Court and the Canadian Human Rights Commission.
40

41 THE COURT:

Thank you.

1
2 MS. WANKE: But the issue that's been litigated is a different
3 issue.
4
5 THE COURT: Well --
6
7 MS. WANKE: The issue of being a beneficiary of the Trust --
8
9 THE COURT: Okay. Well, look --
10
11 MS. WANKE: -- versus being a present day member.
12
13 THE COURT: -- I'm not going to get into it.
14
15 MS. WANKE: And it -- it simply -- you're right. It simply
16 isn't a matter for --
17
18 THE COURT: Well, let me --
19
20 MS. WANKE: -- to be determined.
21
22 **Order (Standing)**
23
24 THE COURT: Let me -- I'll give you some direction right
25 now.
26
27 You can make your application in writing, with a written brief, serve it on all of the
28 participants who are here today. They can respond, or not, and you can include in that the
29 Sawridge First Nation application for intervenor status. This matter will be dealt with in
30 writing. It will not be the subject of court appearance. You can stand in line for a
31 decision, because it may take some time to get dealt with, but that's the way it will
32 proceed. Okay?
33
34 MR. MOLSTAD: In terms of timing, Sir. We would just ask for
35 a reasonable period of time to prepare and file.
36
37 THE COURT: Well, certainly. Well, let's just pick dates. So
38 pick end dates.
39
40 MR. MOLSTAD: Pardon me?
41

- 1 THE COURT: The -- the applicant Stoney will have a -- well,
2 they've got an application, or -- all I've got is a Notice of Motion or --
3
- 4 MR. MOLSTAD: Right.
5
- 6 THE COURT: So, but the -- no affidavit ever made it to me,
7 my desk. So all materials, including a written brief in respect of this application to be
8 joined as a party by Maurice Stoney shall be completed, filed and served by September
9 30th, 2016, and the respondents, including a proposed intervenor, the Sawridge First
10 Nation, by October 31st.
11
- 12 MR. MOLSTAD: But we'll be making an application to
13 intervene. Should -- is that October 31st for us?
14
- 15 THE COURT: Well, you can put it in right -- yeah, just be --
16 you're a without-prejudice respondent, all right? Sawridge First Nation, you're to be
17 served with this application.
18
- 19 MR. MOLSTAD: Okay.
20
- 21 THE COURT: So double up on the response to the application,
22 and put in your intervenor response.
23
- 24 MR. MOLSTAD: So --
25
- 26 THE COURT: Or position.
27
- 28 MR. MOLSTAD: -- I just want to make sure I understand, Sir.
29 When do we file our application to intervene? September 30th --
30
- 31 THE COURT: You can do it --
32
- 33 MR. MOLSTAD: -- or October --
34
- 35 THE COURT: Well, do it by September 30th.
36
- 37 MR. MOLSTAD: All right. Thank you.
38
- 39 THE COURT: Okay?
40
- 41 MR. MOLSTAD: Yeah.

1
2 THE COURT: And then we'll give you until mid-November,
3 November 15th, for the Maurice Stoney applicant to respond in turn in writing to those,
4 and in particular the intervention application.
5

6 MS. WANKE: My Lord, my only concern with the proposed
7 schedule is that Ms. Bonora had requested to question on the affidavit last week, and we
8 provided her -- admittedly, it was right before this application -- we provided her with
9 three dates before today, and those weren't acceptable. So if questioning is to take place,
10 I wonder if we could have a commitment? I know that Mr. Stoney will make himself
11 available. Can we have a commitment from Ms. Bonora that any questioning that will
12 take place will take place before September 10th?
13

14 THE COURT: Well, why don't you work that out with
15 counsel?
16

17 MS. WANKE: Well, my fear is that it will happen after.
18

19 THE COURT: Well, I'm not going to get into it. Work it out
20 with counsel. We're not going to stand this litigation still while, you know, the
21 latecomers get their act together. You can deal with her.
22

23 MS. WANKE: Thank you, My Lord.
24

25 THE COURT: I'm not going to intervene in it.
26

27 Now, we've got another matter, another similar latecomer.
28

29 **Submissions by Ms. Golding (Scheduling)**
30

31 MS. GOLDING: That is correct, Sir. And, Sir, I had actually
32 prepared an order that I had provided to counsel and have comments on, and it is
33 (INDISCERNIBLE) in accordance with those comments.
34

35 Sir, my application and my order in terms of the scheduling just indicated that our
36 application would be adjourned to allow counsel to schedule a hearing of the matter.
37 And, in fact, Ms. Bonora and I may be able to come to an agreement in terms of the
38 standing part of that, although perhaps not the costs part. And then we had put into this
39 order that until the hearing date, and without prejudice to the actual decision that gets
40 made, that we would be considered to be parties and would have standing to make
41 submission, and that any documents that are to be served on our clients could be served

1 on our office, Sir. And as I've indicated, counsel have all approved the order.
2
3 THE COURT CLERK: Sorry, can you state your name for the record?
4
5 MS. GOLDING: Sorry, I apologize. Nancy Golding.
6
7 THE COURT: I take it when you say all counsel, it includes
8 the Sawridge First Nation and Mr. Molstad?
9
10 MS. GOLDING: I did talk with Mr. Molstad about it --
11
12 MR. MOLSTAD: We're not --
13
14 MS. GOLDING: But he'd indicated --
15
16 MR. MOLSTAD: -- a party to this.
17
18 MS. GOLDING: -- he's not a party to this.
19
20 THE COURT: Yeah, I know you're not party, but have you
21 seen this?
22
23 MR. MOLSTAD: Well, I haven't seen it, no. Sorry.
24
25 MS. GOLDING: I -- I tried to show it to him, but he didn't want
26 to look at it.
27
28 MR. MOLSTAD: It appears that this is simply an adjournment
29 and deems them to be parties until it's decided, and that seems reasonable, Sir.
30
31 THE COURT: I'm just wondering about -- again, I keep
32 clogging this litigation up with additional parties who really don't -- I mean, on the face
33 of it I'm not seeing what Mr. Patrick Twinn and -- who is already a beneficiary. . .
34
35 MS. GOLDING: That's correct, Sir.
36
37 **Order (Standing)**
38
39 THE COURT: I'm just concerned about clogging this litigation
40 up with unnecessary parties. I'm not saying Mr. Twinn and his relations are unnecessary
41 parties, but the more lawyers and the more people that get added into this litigation

1 simply make it more difficult to bring to a conclusion, and I'm not sure at this stage that
2 there aren't enough people involved in this to raise all the issues that should be raised.

3
4 I'm not prepared to grant this order. I'm prepared to -- you -- I'm not prepared to grant
5 it, and I'm just going to -- Patrick Twinn and company, I'm going to -- you can proceed
6 in the same way as Mr. Stoney.

7
8 MS. GOLDING:

Thank you, Sir.

9
10 THE COURT:

11 writing. All right? Same timelines?

In terms of we'll deal with their application in

12
13 MS. GOLDING:

That -- that's fine, Sir. Thank you, Sir.

14
15 THE COURT:

16 In include Sawridge First Nation in terms of the
17 receipt of the materials, and you can decide whether or not you want the band -- pardon
18 me, the Sawridge First Nation can decide whether they want to take a position on
19 intervention.

20 MS. GOLDING:

Thank you, Sir.

21
22 THE COURT:

23 All right? So otherwise that is -- you're
24 adjourned *sine die*. Your matter's adjourned *sine die* as of --

25 MS. GOLDING:

Thank you, Sir.

26
27 THE COURT:

28 Madam Clerk, I'm just going to pass that
29 proposed consent order back.

30 Okay. Madam Clerk, I've moved along fairly quickly. Would you like to -- are you okay
31 with -- everything's adjourned? You've got notes?

32
33 All right. We're -- you're the only application outstanding.

34
35 **Submissions by Mr. Molstad (Application)**

36
37 MR. MOLSTAD:

38 Just I have a couple of preliminary comments
39 before my friend makes her submissions in relation to this matter, and we're really in
40 your hands in terms of the procedure, but the comments are very brief.

41 When we referred in our brief to the decision of *Francis Kutee (phonetic)* as a decision of

1 the Supreme Court of British Columbia, we did not indicate that it was reversed by -- on
2 the merits by the BC Court of Appeal, and this was an unintentional oversight on our
3 part. We do say, Sir, that the comment of the trial judge is consistent with the law in
4 Alberta, and will make submissions in that regard when we make our submissions.
5

6 We also spoke to our friend and there was an unintentional error in their brief, which is
7 the written submissions of the Public Trustee of Alberta in response to Sawridge First
8 Nation's costs submissions at page 6.
9

10 THE COURT:

Sorry, which one of the briefs?

11
12 MR. MOLSTAD:

It's the written submissions of the Public
13 Trustee of Alberta in response to the Sawridge First Nations costs submissions.
14

15 THE COURT:

Okay. The August 19th -- filed August 19th?

16
17 MR. MOLSTAD:

August 19th, that's correct.

18
19 THE COURT:

Okay.

20
21 MR. MOLSTAD:

And in paragraph 20, my friend has written that
22 at the September 2nd and 3rd hearing, Thomas, J ordered the SFN would prepare and
23 serve an Affidavit of Records. That's a typographical error.
24

25 THE COURT:

Sorry, I'm still getting the paragraph.

26
27 MR. MOLSTAD:

Sorry.

28
29 THE COURT:

Twenty?

30
31 MR. MOLSTAD:

Paragraph 20.

32
33 THE COURT:

On page 6?

34
35 MR. MOLSTAD:

Page 6. It says that the Sawridge First Nation,
36 SFN, would prepare and serve an Affidavit of Records according to the rules. That was
37 the Sawridge Trustee, not the Sawridge First Nation.
38

39 THE COURT:

Okay.

40
41 MR. MOLSTAD:

And that was also an unintentional error on the

1
2 MR. MOLSTAD: The body of that brief is attached to our brief
3 of August 16th --
4

5 THE COURT: Yeah. No, I was --
6

7 MR. MOLSTAD: -- as Appendix 1.
8

9 THE COURT: Yeah, I saw that, but I didn't -- it was more the
10 attachments to it that was all about.
11

12 MS. HUTCHISON: Whenever you're ready, My Lord.
13

14 THE COURT: Okay.
15

16 **Submissions by Ms. Hutchison (Application)**
17

18 MS. HUTCHISON: My Lord, I just thought I'd start out with some
19 very brief comments on the 513 assets, or settlement application as we referred to, as
20 both. And that is, of course, the application that was withdrawn, and we simply wanted
21 to confirm that before the Court. Our comments are really directed more at some of the
22 submissions the Sawridge First Nation has on costs. And we'll speak to that more fully,
23 but just in the context of that application, as we've set out for the Court in our briefs, it's
24 important for the Court to realize that the OPGT had started some efforts to try to have
25 cooperative discussions in this matter as early as February. The reality was,
26 unfortunately, on this topic, things did not bear fruit until late in the day. There was a
27 clarification offered by the Trustees on May 14th. Counsel, both for the Public Trustee of
28 Alberta and for Trustee Twinn, I think were quite diligently talking to Ms. Bonora about
29 how to modify that clarification, and ultimately we came to an agreement on the terms of
30 it on July 27th. It's unfortunate that that was also the morning that Paul Bujold was
31 being questioned, My Lord, but Sawridge First Nation was made aware of that withdrawal
32 as the questioning began.
33

34 And so, you know, certainly, My Lord, one might -- one might hope that everything had
35 been resolved at an earlier date, but this was a very important part of this proceeding. It's
36 final relief, it's a critical issue, and we would submit that the Public Trustee of Alberta
37 was simply exercising due diligence, and the timing of the withdrawal should not be held
38 against the Public Trustee in relation to costs.
39

40 In terms of whether the Rule 5.13 assets application was necessary, of course it was filed
41 at the time that there was a broader scope of relevance at play. Once the scope of

1 relevance was narrowed by the consent order, the assets application was withdrawn. And
2 as we will comment later on our -- our submissions on costs, My Lord, the Public Trustee
3 of Alberta would take the position there's no basis to grant costs in relation to the assets
4 application.

5
6 We understand that the Trustees are not seeking costs of that application. It is solely an
7 application by the Sawridge First Nation. Is that correct, Ms. Bonora?

8
9 MS. BONORA:

That's correct, Sir. Yes.

10
11 THE COURT:

Thank you.

12
13 MS. HUTCHISON:

So on to the beneficiary application, My Lord,
14 or the membership 513 application, whichever way the Court wishes to refer to it.

15
16 As indicated in our August 5th brief at paragraph 4, the Public Trustee of Alberta has
17 brought that application to insure the parties have appropriately applied Sawridge 3 to
18 confirm the Court is satisfied that all the evidence it needs to identify potential minor
19 beneficiaries is before the Court, and also to confirm that the Court is satisfied with the
20 form in which the information is being put before the Court. At this point, we have lists.
21 We don't have an affidavit. There is obviously a bit of a question about whether any of
22 that information could be questioned on, or examined on, and who would -- who would
23 be questioned.

24
25 As the Court is aware, and I'm referring the Court here to our August 5th brief at
26 paragraph 7, the Public Trustee of Alberta was appointed, in part, to assist the Court in
27 identifying the beneficiary class of affected minors. As of Sawridge 3, that does include
28 identifying potential but not yet identified minors who are children of Sawridge First
29 Nation members, or membership candidates.

30
31 When the Court explained what was meant by membership candidates, and I'm referring
32 to Sawridge 3, paragraph 37 and paragraph 56 -- and Sawridge 3, My Lord, is available, I
33 think, in almost every brief that's been filed, so I hope the Court can reference it easily --
34 that there were three categories of minors to be represented by the Public Trustee, minors
35 who are children of -- children of members, children of adults with unresolved
36 application, children of adults with rejected applications, so long as there is an intention to
37 challenge the rejection.

38
39 The OPGT has brought this matter forward to the Court because it is obviously the
40 Court's ultimate decision to decide whether or not there's adequate evidence to deal with
41 that beneficiary identification, and there were aspects of both Sawridge First Nation's

1 information which, while very helpful, left some lack of clarity and aspects of Sawridge 3
2 that the OPGT both wanted to ensure was interpreted correctly by the Public Trustee of
3 Alberta and the Sawridge First Nation, but also to ensure that there was not anything
4 requested that the Court did not want requested.

5
6 All of that was done, My Lord, in good faith and very much with the -- with the Public
7 Trustee's intention to carry out the mandate that it's been given. And I realize my friend
8 Mr. Molstad has a different characterization of that. I would firmly say to the Court that
9 the Public Trustee of Alberta has brought this application forward in good faith and with
10 the full intention to meet its mandate appropriately.

11
12 My Lord, then going on, and I'll refer you to our brief at paragraph 26 of the August 5th
13 brief, and Sawridge 3 paragraph 48 to 55. Again --

14
15 THE COURT: Yeah, just I actually want to get -- this is the
16 part that's outstanding.

17
18 MS. HUTCHISON: Yes. Yes.

19
20 THE COURT: So just give me those -- you want to -- I'm
21 starting at paragraph 24 of your brief, sort of what I had my eye on, because it sets out
22 the three categories that I guess you're seeking some direction on.

23
24 MS. HUTCHISON: The start of that discussion is at paragraph 24
25 of our August 5th --

26
27 THE COURT: Yeah.

28
29 MS. HUTCHISON: -- brief, My Lord. It then does go on through
30 to paragraph --

31
32 THE COURT: Well, until we shift to costs.

33
34 MS. HUTCHISON: Until paragraph 30, actually.

35
36 THE COURT: Thirty?

37
38 MS. HUTCHISON: Of that brief. But --

39
40 THE COURT: Yes.

41

1 MS. HUTCHISON: -- the focus of the discussion would be
2 paragraph 24 through to 28 of that paragraph.
3

4 THE COURT: Well, it sounded very useful. Now, that -- I
5 must say when I read it, it didn't read it in relation to that March 5th -- the March 15
6 submission, Sawridge First Nation. But in terms of getting more definition around these
7 categories, or potential categories, the Sawridge First Nation has now in its brief starting
8 at paragraph 39, provided some perspective on at least what Sawridge First Nation
9 believes these terms mean, such as unresolved application.
10

11 Can you focus your -- did you -- have you -- I'm sure you've read them. What's your
12 position in respect to the definition as provided by Sawridge First Nation in their brief --
13 in their brief?
14

15 MS. HUTCHISON: My Lord, and with the greatest of respect, I
16 read quite a bit of Sawridge First Nation's submission around paragraph 39 as simply
17 quoting Sawridge 3 to some degree. I'm not completely certain, My Lord, that it's given
18 us complete insight into how Sawridge First Nation determined what qualified as a
19 pending application. And that said, My Lord, part of our written submissions have been
20 quite clear that if the Court is satisfied that the information now before you does meet all
21 of the questions that you set out in Sawridge 3, and the criteria set out in paragraph 48 to
22 55 of Sawridge 3, the Public Trustee of Alberta accepts that.
23

24 My Lord, the one other -- the one other element of this that I don't believe -- I don't
25 believe there is reference to, Sawridge 3 provides a mandate to only deal with rejected
26 applications, if there is an intention. The Court's word referred to an intention to
27 challenge.
28

29 THE COURT: Okay. Let work through this --
30

31 MS. HUTCHISON: Oh.
32

33 THE COURT: -- in a logical --
34

35 MS. HUTCHISON: Certainly, My Lord.
36

37 THE COURT: -- fashion, if you don't mind. I'm looking at
38 paragraph 24 subparagraph 1 of -- on page 8 of your brief, and you've developed those
39 categories based on Sawridge number 3.
40

41 The first one, minors who are children of the members of the Sawridge First Nation. And

1 then you say, paragraph 25 of your brief in relation to category 1:
2

3 Upon confirmation that the Court does not require anything more
4 formal than the April 5, 2016 list, such as an affidavit, and does
5 not require it to be prepared by Sawridge First Nation, the Public
6 Trustee confirms the Court now has a list of minors who are
7 children of band members up to April 5, 2015, as prepared by the
8 Sawridge trustees.
9

10 MS. HUTCHISON:

And, My Lord, that's another typo. That should

11 be April 5, 2016.
12

13 THE COURT:

Okay.

14
15 MS. HUTCHISON:

The reference was correct at the start of the

16 paragraph, and then --
17

18 THE COURT:

Yeah, okay.
19

20 MS. HUTCHISON:

-- not carried through. My apologies.
21

22 THE COURT:

No problem. Well, I have looked at that
23 material, and I am satisfied with it, so that that category's off the table. Okay?
24

25 MS. HUTCHISON:

Thank you, My Lord. That's very useful

26 direction.
27

28 THE COURT:

All right.
29

30 MS. HUTCHISON:

Thank you. So then, My Lord --
31

32 THE COURT:

Now, let's go on to unresolved applications.

33 That's the one that -- that's the term that's dealt with by Mr. Molstad in the Sawridge
34 First Nation brief at paragraph 39. So I'd just ask you to have a look at that.
35

36 MS. HUTCHISON:

And so, My Lord, the -- the statement that

37 Sawridge First Nation makes is that:
38

39 This confirms that in order to be considered an unresolved
40 application, an applicant must have at least submitted a completed
41 application for membership.

1
2 And, My Lord, as we've indicated in our brief, that is, of course, one of the other terms
3 that I think all the parties would benefit from clarification for. And it may be, My Lord,
4 that you've already answered that question in Sawridge 3. And having told you it's in
5 every brief, I now have to find a copy of it. I just --

6
7 There we go. Yeah.

8
9 So, My Lord, paragraph 51 --

10
11 THE COURT: Yeah. Which tab of which brief are you --

12
13 MS. HUTCHISON: Tab -- tab 7 of the Sawridge August 16th brief.

14
15 THE COURT: Okay. And page?

16
17 MS. HUTCHISON: It's page 12 of Sawridge 3, which is tab 7, at
18 tab 7 of that brief.

19
20 THE COURT: Yeah.

21
22 MS. HUTCHISON: And paragraph 52.

23
24 THE COURT: Got it.

25
26 MS. HUTCHISON: There is a comment, there's an obiter comment,
27 My Lord, about incomplete applications or other potential SFN candidates. And so it may
28 be, My Lord, that the intention is that if Sawridge First Nation has deemed an application
29 complete, that is where the Court -- it's a complete application, deemed complete by the
30 Sawridge First Nation, but not yet -- it has not yet proceeded to the point of a decision.

31
32 THE COURT: M-hm.

33
34 MS. HUTCHISON: That may be all the Court intended to capture
35 by unresolved applications. It was simply the interplay of the various different terms that,
36 frankly, My Lord, was causing the Public Trustee of Alberta to feel it was necessary to be
37 certain that it had captured the full scope of the potential minor beneficiaries.

38
39 THE COURT: Okay. So at least on the category 2 then on the
40 unresolved applications, you simply seek my direction of amplification or clarification of
41 whatever I said in Sawridge number 3 on that subject.

1
 2 MS. HUTCHISON: Correct, My Lord. If we understand
 3 Mr. Molstad's January 19th letter correctly, and we, of course, don't have a full -- full
 4 information about how the lists were developed or who was consulted, but if we
 5 understand them correctly, the pending applications would be applications where Sawridge
 6 First Nation deems the application complete in that it has the information Sawridge First
 7 Nation decides it needs for the -- for the application, but there's been no actual
 8 membership decision. If I understand Sawridge First Nation correctly, that's what they're
 9 saying about pending applications.

10
 11 Of course the Court's aware of this question of what is a complete application or not. We
 12 simply wanted to be certain that that was not included in unresolved applications. If
 13 there's an individual who is waiting for decisions about what else they have to provide, if
 14 there's an individual waiting for decisions about whether what they provided is adequate,
 15 are they within -- and they have minor children obviously, My Lord, are they within the
 16 contemplation of the Public Trustee of Alberta, or is the crystallizing moment when the
 17 Sawridge First Nation says your application is now considered complete? Because there is
 18 this potential time period where something's been submitted and the person is waiting for
 19 a determination on whether they are going forward or not in the membership process.
 20

21 THE COURT: I haven't had time to go back and look at the
 22 membership rules of the Sawridge First Nation, but is there a deeming provision in that
 23 set of rules about if an application's not dealt with within a certain period of time, it's
 24 deemed to be rejected or --
 25

26 MS. HUTCHISON: I don't believe so, My Lord. I didn't bring
 27 those.
 28

29 MR. MOLSTAD: May I help a bit?
 30

31 THE COURT: Yes.
 32

33 MS. HUTCHISON: Absolutely.
 34

35 THE COURT: Certainly.
 36

37 **Submissions by Mr. Molstad (Application)**
 38

39 MR. MOLSTAD: Ms. -- there is not, Sir, but when we sent the
 40 list of the applications to Your Lordship and to my friend, it included one of the names
 41 where the application -- the applicant did not include his address or contact information, so

1 clearly it was incomplete. An inquiry of our in-house counsel, he advises me that that list
2 is every application they've received.

3
4 THE COURT: All right. Thanks.

5
6 MR. MOLSTAD: But notwithstanding that --

7
8 THE COURT: But there's no -- but there's no drop dead date.

9
10 MR. MOLSTAD: Yeah. No, no. And --

11
12 THE COURT: It's not -- not like planning legislation.

13
14 MR. MOLSTAD: And our submissions were based on your
15 decision where you said it should be completed. Sawridge went beyond that.

16
17 THE COURT: Okay.

18
19 **Submissions by Ms. Hutchison (Application)**

20
21 MS. HUTCHISON: And, My Lord, that's very useful clarification, I
22 think, for -- for everyone today.

23
24 THE COURT: Okay. That's great. Thank you.

25
26 So now I think probably we've discussed unresolved enough. What about the third
27 category of rejected?

28
29 MS. HUTCHISON: I think the only -- or the central issue on -- on
30 rejected, My Lord, as long as there is no distinction between rejected and unsuccessful,
31 and the reason that we highlight the different terminology, My Lord, it ties in again to
32 this gray area we were talking about where the potential is somebody submits what they
33 consider to be an application, but then it's not treated as an application for a period of
34 time. Is that unsuccessful, or does there have to be an actual written determination by
35 Sawridge First Nation that there's been a denial of membership status?

36
37 I realize it's a fine point, My Lord, but the Public Trustee of Alberta wanted to --

38
39 THE COURT: Okay.

40
41 MS. HUTCHISON: -- ensure it was on point on that.

1
2 The other element of the rejection category, My Lord, ties into the Court's reference --
3 and I apologize, I just have to find the paragraph I'm looking for in Sawridge 3.
4

5 I apologize, My Lord, for taking this long.
6

7 Paragraph 53 of Sawridge 3, which is at tab 7 of the Sawridge First Nation August 16th
8 submissions.
9

10 THE COURT:

I have that.

11
12 MS. HUTCHISON:

Page 13:

13
14 The Public Trustee is entitled to inquire whether the rejected
15 candidate intends to appeal the membership rejection, or challenge
16 the rejection through judicial review.
17

18 Mr. Molstad's January 19th letter is very clear. He advised that there are no pending
19 appeals or judicial reviews, but the letter doesn't go on to provide a list of everyone that's
20 been rejected. And that may be perfectly appropriate, My Lord. The Court may want
21 that inquiry to end there. It's -- it really turns on this question of does the Public Trustee
22 have an obligation to reach out and find out the intention of every adult applicant who's
23 been rejected who has minor children, or is it only relevant to look at whether or not
24 there's an appeal on the books? And if it's the second one, My Lord, I believe
25 Mr. Molstad has provided us with the information we need. If there is an element of
26 assessing intention, there is a question of whether the Court wants the Public Trustee to
27 go farther than that and contact rejected individuals.
28

29 As the Court is aware, obviously there can be arguments around limitations and the appeal
30 periods. We don't know if that's part of our scope at this time. And that's the sum of
31 our comments on category number 3.
32

33 THE COURT:

Okay.

34
35 MS. HUTCHISON:

36 paragraph 24, My Lord.
37

38 And, My Lord, that really -- that really sums up the clarification element of this matter on
39 the question of the form in which the information has been provided to the Court. The
40 Public Trustee of Alberta is essentially just asking is the Court satisfied with a list
41 attached to a letter from counsel, or do we need something more formal that can be

1 questioned upon?

2
3 And in terms of why that would be necessary, My Lord, it's really a question of whether
4 the Public Trustee has any obligation to try at some point to coalesce all the general
5 information that we have on applicants, and now the named specific information and try
6 to understand that and pull it together. It may prove more difficult to do if there's no
7 ability to question. It may not be impossible, but it may be quite, quite challenging. If
8 the Court has no desire to have that occur, it may be that these lists, in their current form,
9 are all that the Court requires for beneficiary identification.
10

11 THE COURT:

Well, I think the way we'll have to deal with
12 that is I don't have the time or the resources to start plowing through all of this material
13 to see whether or not certain criteria are met. What I can do for you is give you
14 clarification on the scope of these categories, and then -- but I would then remit it back to
15 the Public Trustee to, you know, look at the material you've got, and you're either
16 satisfied or you're not. If you're not, if there is some additional information you think
17 you need to meet the clarified definitions, then I guess the first place to go is Mr. Molstad
18 and Sawridge First Nation, see if you can resolve it on a voluntary out-of-court basis. If
19 there's still some issue outstanding, then you can come back. Okay? But I'm -- I don't
20 want anybody to be under the misapprehension that I'm going to plow through all this
21 material and decide whether or not the definitions or the clarified categories are satisfied.
22 It's going to go back to the parties to -- or participants to resolve. Okay?
23

24 MS. HUTCHISON:

That's very helpful, My Lord. Thank you.

25
26 I think the final comment on -- sorry, just a few very brief comments to respond to a few
27 items my friend has raised.
28

29 Mr. Molstad has raised a concern about lack of specificity or that the Public Trustee has
30 not told Sawridge First Nation exactly what is wanted. The Public Trustee is more than
31 willing to have Sawridge First Nation provide something in a list format to deal with their
32 confidentiality concerns. Frankly, the generality of the application was intended, to some
33 degree, to deal with the confidentiality concerns that were -- that were laid out for us in
34 September which we were not aware of at the time that we filed the amended application
35 my friend has referred to in his materials. It's not the intention of the Public Trustee of
36 Alberta to interfere with the Sawridge First Nation's concerns on that if -- frankly,
37 Sawridge 3 made it clear that that was not appropriate, and the Public Trustee is
38 respecting that.
39

40 In terms of some of the comments about whether -- or the submissions about whether the
41 Public Trustee of Alberta has essentially gone on a fishing expedition, My Lord, and

1 we're certainly extremely sorry if it's come across in that way to anybody, but that's not
2 the case, My Lord. *Kadoura*, although not a 5.13 application, is relevant.
3

4 We know in this proceeding, My Lord, that Sawridge First Nation is the repository and
5 the best source of evidence on all membership matters. They've become involved in the
6 matter by voluntarily helping the Trustees with that information. They really are the
7 source, as it were, for membership information that's required for beneficiary
8 identification, and that is the only motivation for the Office of the Public Trustee's
9 request. It's not at all intended to be a fishing expedition, My Lord.
10

11 Those are my submissions on the substance of the application, My Lord.
12

13 Now, as the Court will be aware, there is a costs application by Sawridge First Nation. I
14 can address that now or I can turn over to Mr. Molstad on substance, and then respond --
15 and then let him deal with his costs application, and I can respond. Completely in the
16 Court's hands.
17

18 THE COURT:

Well, I think let's go that way. It's Sawridge --

19 a Sawridge application.
20

21 MS. HUTCHISON:

Thank you, My Lord.
22

23 THE COURT:

24 Thank you very much. But maybe in -- you
25 know, before you go right into the costs thing, my mind is now focussed on the categories
26 of beneficiaries.

27 **Submissions by Mr. Molstad (Application)**
28

29 MR. MOLSTAD:

Yeah, I was --
30

31 THE COURT:

If you wouldn't mind.
32

33 MR. MOLSTAD:

34 I'll give it back. I was going to deal with the -- leave this here.
35

36 THE COURT:

Could we jack it up a little higher for him.
37

38 MR. MOLSTAD:

That would be helpful, too, Sir.
39

40 THE COURT:

We could just pile --
41

1 MR. MOLSTAD:

My name is Mr. Molstad, Madam Clerk.

2
3 We -- I believe you have everything in front of you in terms of what intend to refer to,
4 but the four briefs for -- and I would like to deal with some of the facts in terms of what
5 brings us here today. And I want to go back a bit, because some of this is interrelated in
6 terms of the substance of the application, as well as what we deal with in terms of costs.
7

8 Back on June 15th, 2015, I received on my desk a large box of written material and, in
9 fairness, we were advised later that it was served Friday afternoon, July 12th, 2015.
10

11 This box of material included a motion returnable June 30th, 2015, and we have that
12 attached as tab 2 of our written submissions, August 16th.
13

14 The motion did not name Sawridge First Nation as a respondent. However, as you read
15 that motion, you can see that it sought an order against the Sawridge First Nation. And
16 the relief that it was seeking against the Sawridge First Nation included an order requiring
17 Sawridge First Nation to file an Affidavit of Records, an order requiring the Nation to
18 produce numerous records, including records related to issues referenced in an unfiled
19 affidavit of Catherine Twinn, records related to another Court of Queen's Bench action,
20 documents produced in Federal Court action T6686, which was a Constitutional challenge
21 that Sawridge First Nation advanced with respect to Bill C-31 that went through two trials
22 in the Federal Court, and appeals, and documents produced in Federal Court action
23 T265589, another Federal Court action. And -- and we would encourage you to reread
24 this motion at tab 2 of our authorities, because it is our submission, Sir, that this
25 application was devoid of merit, and procedurally and substantively incorrect. It, in our
26 submission, is demonstrative of an application of a party who has a blank cheque and who
27 takes the position that there will be never any consequences for them in relation to costs.
28

29 The application, tab 2, was filed after the questioning of Mr. Bujold on May 27th and
30 28th, 2014, and after the Sawridge Trustees provided answers to undertakings December
31 1, of 2014. And I would point out that the questioning of Mr. Bujold, as a representative
32 of the Sawridge Trust, and his Answers to Undertakings provided what we would submit
33 was a significant amount of information, not all of the information, but a significant
34 amount regarding both the transfer of the assets to the 1985 Trust, and the identification
35 of the Trust beneficiaries. It's important to keep in mind that that information was
36 provided to the Public Trustee in 2014.
37

38 We would refer you also, Sir, to tab 6 of the Sawridge First Nation written submissions,
39 and this is the brief that was filed in August of 2015 by the Sawridge First Nation. And
40 in paragraph 7 of that brief, on page 2, it sets out that since the matter was commenced,
41 the trial -- that the Trustees of the Sawridge Trust, and with assistance from Sawridge

1 First Nation, had provided the Public Trustee with extensive disclosure. And I encourage
2 you to read all of paragraph 7, over to page 3, in terms of just what that disclosure was.
3 We submit that it was extensive and it was provided in 2014, or earlier.

4
5 Now, we know that the Public Trustee has not questioned Mr. Bujold in relation to his
6 undertakings that were provided on December 1, of 2014.

7
8 In the Public Trustee's response in relation to costs, or it's the -- excuse me, it's the
9 written missions of the Public Trustee in response to Sawridge First Nation's costs
10 submissions.

11
12 In paragraph 14 -- are you with me there, Sir?

13
14 THE COURT: Yeah, I'm just getting there. Thanks.

15
16 MR. MOLSTAD: Yeah. In paragraph 14, they state that on June
17 17th, 2015, Sawridge First Nation requested an adjournment of all matters scheduled for
18 June 30th, 2015. That is not correct. That is not true, Sir. On June 17th, 2015, we wrote
19 to this Court advising that we were requesting an adjournment of all matters that purport
20 to name Sawridge First Nation as respondent. And our letter that was sent to the Court is
21 found at tab 3 of the Sawridge First Nation written submissions.

22
23 THE COURT: And I'm taking it now you're just -- you're
24 always talking about your most recent brief that is filed --

25
26 MR. MOLSTAD: That's right.

27
28 THE COURT: -- August 16th?

29
30 MR. MOLSTAD: Yes, it is.

31
32 THE COURT: Thanks.

33
34 MR. MOLSTAD: It's the most recent August 16th, '16 brief, and
35 tab 3.

36
37 THE COURT: Okay. I've got the June 17 --

38
39 MR. MOLSTAD: Yeah. And that June --

40
41 THE COURT: -- 2015 letter?

1
2 MR. MOLSTAD: ...17 letter, if you read the second paragraph,
3 and this was sent to the Court and to other counsel:
4

5 We have requested an adjournment of all matters that purport to
6 name Sawridge First Nation as a respondent. All of the parties,
7 with the exception of the Public Trustee, Ms. Kennedy has advised
8 that she will not be appearing at this application, have agreed to
9 consent to the adjournment of all matters that purport to name
10 Sawridge First Nation as a respondent.
11

12 We also refer you to your order which is found at tab 4, and we won't read that to you,
13 but in paragraph 1 of that order at tab 4, you make it very clear, Sir, that that's exactly
14 what we were asking for, an adjournment of all matters that were directed at the Sawridge
15 First Nation. And, of course, the transcript of that date is part of the Public Trustee's
16 submissions at tab 4. And at page 5 and 6 of that transcript, that confirms the very same
17 thing.
18

19 Now, on June 24th, of 2015, we appeared before you, and our application for an
20 adjournment was granted and the Public Trustee was ordered to provide the Sawridge
21 First Nation with full particulars of the relief claim as against the Sawridge First Nation,
22 and the grounds. We argued that the Public Trustee's refusal to consent to the
23 adjournment was patently unreasonable and that they should pay for the costs of that
24 adjournment, without indemnification from the Sawridge Trust. And you reserved your
25 decision until the final disposition of the matter.
26

27 Now, on July 17th, 2015, Sawridge First Nation was served with this amended
28 application. It's found at tab 5 of the Sawridge First Nation most recent written
29 submissions. And, again, this motion sought an order requiring Sawridge First Nation to
30 file an Affidavit of Records or, in the alternative, to produce numerous records. H-mm.
31

32 Paragraph 15 of our written submissions, if I could just take you to that briefly.
33

34 THE COURT: Sorry, what paragraph number?
35

36 MR. MOLSTAD: Paragraph 15 of our written submissions.
37

38 THE COURT: Okay.
39

40 MR. MOLSTAD: Filed August 16th. We summarize there some
41 of the records that the Public Trustee sought an order in relation to. And I won't read

1 that to you, Sir, but I encourage you to read it so that you can see the scope of what was
2 being sought again in this application, including records from other actions and from
3 unfiled affidavits.

4
5 Now, on August 14th, of 2015, the Sawridge First Nation filed written submissions in
6 response to the Public Trustee's amended application. And that is found at tab 6 of our
7 written submissions. And it's made clear in this response that the Sawridge First Nation
8 would seek costs from the Public Trustee, without indemnification from the Sawridge
9 Trust.

10
11 The hearing then proceeded on September 2nd and 3rd, 2015, and of course your Reasons
12 for Judgment are found at tab 7 of our written submissions filed most recently.

13
14 This Court in its reasons denied the application, found that the Sawridge First Nation was
15 not a party and stated that any application for production of specific documents would
16 have to be made pursuant to Rule 5.13. And you also directed that the Public Trustee
17 was to refocus in relation to its participation. And if you go to tab 7 of our written brief,
18 in particular paragraph 35, what you said was:

19
20 The same is true for this Court attempting to regulate the
21 operations of First Nations, which are bands within the meaning of
22 the *Indian Act*. The Federal Court is a better forum, and now that
23 the Federal Court has commented on SFN membership process in
24 *Stoney vs. Sawridge First Nation*, there is no need, nor is it
25 appropriate for this Court to address this subject. If there are
26 outstanding disputes on whether or not a particular person should
27 be admitted or excluded from band membership, then that should
28 be reviewed in the Federal Court, and not in this 1985 Sawridge
29 Trust modification and distribution process.

30
31 It follows that it will be useful to refocus the purpose of the Public
32 Trustee's participation in this matter. That will determine what is
33 and what is not relevant. The Public Trustee's role is not to
34 conduct an open-ended inquiry into the membership of the
35 Sawridge Band and historic disputes that relate to that subject.
36 Similarly, the Public Trustee's function is not to conduct a general
37 inquiry into potential conflicts of interest between the SFN, its
38 administration, and the 1985 Sawridge Trustees. The overlap
39 between some of these parties is established and obvious.

40
41 Instead, the future role of the Public Trustee shall be limited to

1 four tasks. One, representing the interest of minor beneficiaries
2 and potential minor beneficiaries so that they receive fair
3 treatment, either direct or incorrect, in the distribution of the assets
4 of the 1985 Trust, two, examining on behalf of the minor
5 beneficiaries, the manner in which the property was placed, settled
6 in the Trust, and, three, identifying potential but not yet identified
7 minors, where children of SFN members are membership
8 candidates. These are potentially minor beneficiaries of the 1985
9 Trust. And, four, supervising the distribution process itself.

10
11 With respect to the future production, what you said in paragraph 45 and 46, again in tab
12 7:

13
14 There have been questions raised as to what assets were settled in
15 the 1985 Trust. At this point, it is not necessary for me to
16 examine those potential issues. Rather, the first task is for the
17 Public Trustee to complete its document requests from the SFN,
18 which may relate to that issue. The Public Trustee shall, by
19 January 29th, 2016, prepare and serve a Rule 5.13(1) application
20 on the Sawridge Band that identifies specific types of documents
21 which it believes are relevant and material to the issue of the
22 assets settle in the 1985 Trust.

23
24 We submit, Sir, that based upon the affidavits of Mr. Bujold, the questioning of
25 Mr. Bujold, the Answers to Undertakings, that the Public Trustee either knew or ought to
26 have known that it had all of the records in the possession of the Sawridge First Nation
27 and the Sawridge Trustees, related to the transfer of assets, that is the settlement of the
28 assets for the 1985 Trust.

29
30 This Court made it very clear that the Public Trustee was representing minors who fell
31 into any one of three categories. And this is found in paragraph 56 of your decision, at tab
32 7. Category 2 was minors who are children of members of Sawridge First Nation,
33 category 4 was children of adults who have unresolved applications to join Sawridge First
34 Nation, and category 6, children of adults who have applied for membership in Sawridge
35 First Nation but have had that application rejected and are challenging that rejection by
36 appeal or judicial review.

37
38 And I emphasize those words, because you used them, Sir, appeal or judicial review.

39
40 The -- you then stated, Sir, and you directed that if the information was not already
41 disclosed:

1
2 Sawridge First Nation shall provide to the Public Trustee by the
3 29th of January, one, the names of individual who have (a) made
4 applications to join the Sawridge First Nation which are pending,
5 category 3, and (b) had applications to join the Sawridge First
6 Nation rejected and are subject to challenge, category 5 and 6, and
7 (2) the contact information for those individuals, where available.
8 This information was provided to the Public Trustee and the Court
9 without any information redacted. It was, of course, included on
10 January 18th, 2016, and a copy of the letter is attached as
11 Appendix D to the Public Trustee written brief.
12

13 You also stated in paragraph 61 of your decision, again found at tab 7:
14

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

30 Category 2 is the minors who are children of members of Sawridge First Nation.
31

32 With respect to the issue of costs at that application, you reserved your decision until you
33 were able to evaluate the Rule 5.13 applications. And in paragraph 71 of your decision,
34 again at tab 7, you stated that as the Court of Appeal observed in Sawridge number 2 at
35 paragraph 29:
36

37 The Public Trustee's activities are subject to scrutiny by this
38 Court. In light of the four task scheme set out above, I will not
39 respond to the SFN's cost argument at this point, but instead
40 reserve on that request until I evaluate the Rule 5.13 applications
41 which may arise from completion of tasks one to three.

1
2 You did make it clear, as it's stated, that the Public Trustee's activities are subject to your
3 scrutiny.
4

5 Now, on January 29th, 2016, we were served with two documents that were entitled the
6 Application by the Office of the Public Trustee of Alberta for Production Under Rule 5.3,
7 and one related to the assets settled in the 1985 trust, and the other related to the
8 beneficiaries.
9

10 I think it's important to note in terms of resolution of this issue, that on March 10th,
11 2016, before we were required to file our written submissions, as you'd indicated that we
12 would file them March 15, we sent a letter to the Public Trustee, and based upon the
13 position that we set out in that letter, we asked whether they would withdraw the 5.13
14 applications in order to avoid having to file written submissions. And that letter is found
15 at tab C-4 of the Sawridge First Nation's brief filed March 15th, of 2016. And I would
16 encourage you, Sir, to read that letter.
17

18 The Public Trustee responded on March 14th, 2016.
19

20 THE COURT:

21 mark it.
22

Sorry, just give that to me again. I just want to

23 MR. MOLSTAD:

24 2016, brief.
25

Yeah. It's found at tab C-4 of our March 15th,

26 THE COURT:

Okay. I'm just trying to find the C. A, B --

28 MR. MOLSTAD:

29 back of the --
30

I just hope it's -- I've got the right -- at the

31 THE COURT:

Yeah. No, I -- I've got --

33 MR. MOLSTAD:

34 10th, 2016.
35

It's a letter from Parlee McClaws dated March

36 THE COURT:

37 finding -- ah, there's C. Okay. C-4?
38

Yeah, I'm just trying -- I'm having trouble

39 MR. MOLSTAD:

Right.

41 THE COURT:

All right. I've got it.

- 1
2 MR. MOLSTAD: In any event, I encourage you to read it.
3
4 The Public Trustee responded on March 15th, 2016, and I encourage you to read this
5 letter, too. It's found at tab 8 of the Sawridge First Nation written submissions.
6
7 THE COURT: The more recent one, correct?
8
9 MR. MOLSTAD: The most recent one.
10
11 THE COURT: Okay.
12
13 MR. MOLSTAD: That's correct, Sir. And I won't take you
14 through them now, but basically the Public Trustee advised that if -- if Sawridge First
15 Nation provided an updated list of the Nation's children and a written response to advise
16 whether any of the individuals noted in Schedule 3 of our January 18th, 2016 letter, with
17 pending membership applications have minor children, then that would satisfy the Public
18 Trustee in relation to the beneficiary application.
19
20 So following that -- I mean, we filed a brief, but following that on April 5th, 2016, the
21 Sawridge Trustees provided the Public Trustee with an updated list of the Sawridge First
22 Nation minors. And that's found at tab F of the written brief of the Public Trustee.
23
24 THE COURT: M-hm.
25
26 MR. MOLSTAD: And with respect to the Public Trustee's other
27 request, we were very confused, because -- and we responded on March 16th, pointing out
28 that the Schedule 3 of our January 18, 2016, letter, which is at tab D of the written brief
29 of the Public Trustee --
30
31 THE COURT: Sorry, there must be a -- is there a second book
32 of attachments to that March 15 brief? Mine -- you said tab F. Mine runs out at tab C.
33
34 MR. MOLSTAD: Sorry, tab D of the brief of the Public Trustee?
35
36 THE COURT: Oh, I'm sorry, you're talking about their brief.
37
38 MR. MOLSTAD: Yeah.
39
40 THE COURT: All right. Got it.
41

1 MR. MOLSTAD: And it's tab D of the brief enclosed, but this is
2 our letter of January 18th.
3

4 THE COURT: Yeah. Got that. Thanks. I'm just --
5

6 MR. MOLSTAD: Now, it -- you know, we were confused by the
7 inquiry because this contains a list of the adult parents, that is Schedule 3 is a list of the
8 adult parents who have made application for their children for membership, and the
9 contact information and the number of children applying. It was not something that we
10 were directed to provide, but we did in order that they had full and sufficient information.
11

12 We asked, in our letter, for an application from the Public Trustee based on this, because
13 we didn't understand their request, and --
14

15 THE COURT: This is your -- you're talking about your April
16 one now.
17

18 MR. MOLSTAD: Yeah.
19

20 THE COURT: Yeah.
21

22 MR. MOLSTAD: Yeah. So -- and we never did get a response to
23 that. But as you have in front of you, when we filed our written submissions on March
24 15th, of 2016, that was based upon your directive that we do so. And we assumed that
25 the Public Trustee ought to have filed written submissions by January 29th, because it
26 seemed to us that if we're filing written submissions as a respondent, we should have
27 something to respond to. However, as you know, the Public Trustee had not done that. It
28 filed simply a Notice of Application setting out the grounds.
29

30 And in April, of 2016, we told the Public Trustee that we took the position that they
31 hadn't complied with your order of December, 2015, as they did not file any written
32 submissions, but what we did say is let's get this on. We made, as I stated earlier, a
33 reasonable assumption that if we have to file written submissions as a respondent, that we
34 have to file it in response to something.
35

36 We any -- in any event, we told the Public Trustee as long as we could agree to a
37 schedule and the Public Trustee would provide particulars of the evidence to be relied
38 upon, with copies, we would be prepared to proceed on the basis that they would make
39 written submissions, we would make a reply. And that procedure was agreed to. It's set
40 out in Exhibit 2 to the questioning that we conducted of Mr. Bujold, and it sets out that
41 they file written submissions, we file a reply, and later on we agreed, because we were

1 dealing with costs, that they could then file a reply in relation to our submission on costs.
2 But it did provide that the Public Trustee would be required to give us particulars of the
3 evidence to be relied upon in both applications by July 7, 2016, as well as copies of the
4 evidence. And on July 7th, the Public Trustee served us with notice of the records it
5 intended to rely upon in relation to its application. And that's found at tab 9 of Sawridge
6 First Nation's written brief.

7
8 And I want to take you to that, because this is July 7th in terms of timing, and these are
9 two applications that relate to both the assets and the beneficiaries that are still fairly
10 broad in terms of what they were seeking. But the evidence on page 2 of their letter,
11 which is the fourth page in, lists the evidence that they will be relying upon in relation to
12 both the membership application and the assets application. And there's transcripts,
13 affidavits, supplementary -- supplemental affidavits, undertakings, and a fairly lengthy list
14 on both, but one of them is the same in both. It's six in one and five in the other. It
15 says:

16
17 Catherine Twinn's affidavit dated September 23rd, 2015, filed in
18 this action on September 30th, 2015, our references will be limited
19 mainly to paragraph 29, period. 29(h) will be referenced in
20 relation to any costs applications made by the respondents.

21
22 The word mainly didn't give us comfort, because the position is that this is evidence
23 before the Court, and if we take issue with it, we have to address it.

24
25 We arranged for questioning of Mr. Bujold, and this occurred on July 27th. When we
26 attended at the questioning of Mr. Bujold, the Public Trustee advised us that they would
27 no longer be proceeding with the settlement application. And as you know, as you've
28 signed the consent order, and we've got a copy of it at tab 10 of our brief, the preamble
29 of this consent order is, in our submission, relevant and indicative of the information that
30 the Public Trustee was in possession of, because what it says is that:

31
32 The Sawridge Trustees have exhausted all reasonable options to
33 obtain a complete documentary record regarding the transfer of the
34 assets from the '82 Trust to the '85 Trust, that the parties have
35 been given access to all document regarding the transfer of the
36 assets, and the Trustees are not seeking an accounting in relation
37 to the transfer of these assets, and noting that the assets from the
38 '82 Trust were transferred to -- into the 1985 Trust.

39
40 And they talk about the little information available.
41

1 I think that my friend, Ms. Bonora, made mention of this in her brief. The purpose of the
2 transfer in '82, '85, in terms of transfer from trust, was to avoid any claim that others
3 might make in relation to these assets after the enactment of Bill C-31. So Sawridge First
4 Nation would be highly motivated to ensure that those that were acting as trustees made
5 the transfer of all assets from the '82 Trust to the '85 Trust. That was the reason. The
6 reason clearly was one where it was in everyone's best interests to make sure the transfer
7 took place.

8
9 I would point out that the resolution of this matter, in accordance with this order, is
10 similar to the resolution that was proposed by the Sawridge Trustees to the Public Trustee
11 on May 13th, 2016. And a copy of that is Exhibit 5 to the questioning of Mr. Bujold.

12
13 When Mr. Bujold was questioned on July 27th --

14
15 THE COURT: I take it that's in the file.

16
17 MR. MOLSTAD: It's been filed.

18
19 THE COURT: Okay. Right.

20
21 MR. MOLSTAD: Yes. The questioning and the exhibits --

22
23 THE COURT: Well, just so --

24
25 MR. MOLSTAD: -- to the questioning.

26
27 THE COURT: Just so you know, of course, I mean, the
28 systems internally have totally broken down. So it never made it to my desk, but. . .

29
30 MR. MOLSTAD: Yeah, yeah. Well, if you have trouble finding
31 it, Sir, we can send you --

32
33 THE COURT: Yeah. No, I just --

34
35 MR. MOLSTAD: -- another copy.

36
37 THE COURT: -- want to get it on the record so. . .

38
39 MR. MOLSTAD: Yeah.

40
41 THE COURT: I'll find it eventually.

1
2 MR. MOLSTAD:

Yeah.

3
4 THE COURT:

Thanks.

5
6 MR. MOLSTAD:

In any event, Mr. Bujold confirmed that, first of all, the Public Trustee has not questioned him in relation to his undertakings. Secondly, that Sawridge Sawridge First Nation have fully cooperated with the Sawridge Trustee Request for Information regarding the beneficiaries and potential beneficiaries of the Trust, that paragraph 9 to 28 of his affidavit sworn in September, of 2011, contained a lot of information related to the settlement of the assets. And this information was obtained from the Sawridge First Nation, and that the Sawridge First Nation was cooperative in providing this information, that the Sawridge First Nation provided the Sawridge Trustees with a number of records related to membership, including a membership application form, a flow chart for the membership application process, the membership rules, letters of acceptance or rejection for membership, and all of these were forwarded to the Public Trustee.

18
19 So that's sort of an overview of some of the facts.

20
21 The application that my friend has in relation to the beneficiaries is the only one that's before you now and, first of all, we adopt our submissions of March 15th, 2016, in response to this and, in particular, in relation to the law as it's recited, dealing with a 5.13 application. And, frankly, it would appear that the Public Trustee does not take issue with the general principles cited in that they -- in our brief. And I refer you to paragraph 20 of the Public Trustee's written brief. And based upon that admission, we respectfully don't know why we're here.

28
29 We say, Sir, that the Public Trustee has not clearly specified any records it seeks production of, and as I read its written brief, it does not indicate it's seeking further production. They would appear to be asking for directions, and we submit that we're here to deal with the 5.13 application, and our submission is that it should be dismissed.

33
34 Now, touching briefly, and you've taken the Public Trustee through this, the Public Trustee's submissions about words used, unresolved and pending, with the greatest of respect, are devoid of merit. And if you look at tab 7 and read paragraph 52 of your decision, what you say in the last sentence:

38
39 Therefore, I will only allow investigation and representation by the
40 Public Trustee of children of persons who have, at a minimum,
41 completed a Sawridge Band Membership Application.

1
2 And as we've stated earlier in our letter of January 18, 2016, found at tab B of the written
3 brief of the Public Trustee, we provided a list which I'm advised was all the persons who
4 had submitted an application, period. And there were 26 names, addresses and
5 telephones, but there was one name without an address or a telephone number, because
6 none had been provided by the applicant. So it was obvious from just looking at the list
7 that there was one that clearly was incomplete.
8

9 With respect to the terms rejected and unsuccessful, we also submit, with the greatest of
10 respect, the Public Trustee's submissions are devoid of merit. And, again, if you look at
11 your decision at tab 7 in paragraph 56 and 57, and I won't read them all, but in the first
12 sentence, you say:
13

14 In summary, what is pertinent at this point is to identify the
15 potential recipients of a distribution of the 1985 Sawridge Trust,
16 which include the following categories.
17

18 And then you list the categories. Those two categories at the bottom:
19

20 5. Adults who applied for membership in the SFN, but have had
21 that application rejected and are challenging that rejection by
22 appeal or judicial review, and children of persons in category 5
23 above.
24

25 The words appeal and judicial review are used.
26

27 Our letter of January 18th, 2016, again -- and I just want to take you to that briefly, tab D
28 of the written brief of the Public Trustee.
29

30 THE COURT:

Okay. Got it.

31
32 MR. MOLSTAD:

It's tab D of the written brief.

33
34 THE COURT:

I've got --

35
36 MR. MOLSTAD:

On the first page at the bottom, what we say is:

37
38 In relation to individuals who have had application to join
39 Sawridge First Nation rejected, Sawridge First Nation advises that
40 the last application for membership in Sawridge First Nation that
41 was denied occurred on December 9th, 2013, and there was no

1 appeal in relation to that decision. Sawridge First Nation
2 Membership Rules provide that when a membership application
3 has been denied, an appeal of such decision to the electors of the
4 band must be initiated by delivering notice in writing to the band
5 counsel at the office of the band within 15 days after
6 communication to him or her of the decision of band counsel.
7 Sawridge First Nation advises that there are no appeals with
8 respect to denial of membership outstanding at this time. Sawridge
9 First Nation also advises that there are no outstanding applications
10 for judicial review of denial of any application for membership
11 decided by the electors of the Sawridge First Nation at this time.
12

13 So paragraph 27 of the Public Trustee's brief, it again raises membership issues. They
14 also tender the affidavit of Ms. Catherine Twinn, and the Public Trustee relies upon that
15 in this motion. They raise both conflict of interest and membership issues in terms of the
16 evidence and their brief.
17

18 THE COURT: Sorry, which one of their briefs are you
19 referring to?
20

21 MR. MOLSTAD: The -- the affidavit of Catherine Twinn --
22

23 THE COURT: Yeah. Good.
24

25 MR. MOLSTAD: -- that the Public Trustee relies upon in this
26 motion, which is found at tab 9 of the Sawridge First Nation. Or, actually --
27

28 THE COURT: Oh, of your -- of your brief. Okay.
29

30 MR. MOLSTAD: No, it's not. I --
31

32 THE COURT: No?
33

34 MR. MOLSTAD: It's tab C of the -- of the Public Trustee's
35 brief. The written brief of the Public Trustee.
36

37 THE COURT: Okay.
38

39 MR. MOLSTAD: Tab C.
40

41 THE COURT: Yeah. The --

1
2 MR. MOLSTAD:

And --

3
4 THE COURT:

That's the August 5th one.

5
6 MR. MOLSTAD:

Yeah, the affidavit of Ms. Catherine Twinn is the affidavit that they served us with notice on July 7th, 2016, that they would be relying on this evidence, and mainly on certain parts of it, but we say that this evidence raises both conflict of interest and membership issues. And rather than take you through the affidavit, we'll give you the paragraph numbers in the affidavit that address conflict of interest; paragraphs 29, 33, 34 and 35. And the paragraphs in the affidavit that raise membership issues are 29(a), 29(b), 29(c), 29(g), (for George), 29(i) and (j).

And what we say, Sir, is that this Court in its decision made some very specific directions. And again back to tab 7 of your -- which is your decision, we refer you to paragraph 35. We read this earlier. The last sentence:

If there are outstanding disputes on whether or not a particular person should be admitted or excluded from band membership, then that should be reviewed in a federal court and not in this 1985 Sawridge Trust modification and distribution process.

Paragraph 36, second line there:

The Public Trustee's role is not to conduct an open-ended inquiry into the membership of the Sawridge Band, and historic disputes that relate to the subject. Similarly, the Public Trustee's function is not to conduct a general inquiry into potential conflicts of interest between SFN, this administration and the 1985 Sawridge Trustees.

Paragraph 54:

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

1
2 Paragraph 69 of your same decision, the second sentence:
3

4 I have already stated that the Public Trustee has no right to engage
5 and shall not engage in collateral attacks on membership processes
6 of the Sawridge First Nation.
7

8 And, lastly, paragraph 70 from your decision, the bottom half on page 15:
9

10 While in Sawridge 1, or Sawridge number 1, I had directed that
11 the Public Trustee may inquire into SFN membership processes at
12 paragraph 54 of that judgment, the need for that investigation is
13 now declared to be over, because of the decision in *Stoney v.*
14 *Sawridge First Nation*. I repeat that inquiries into the history and
15 processes of the SFN membership are no longer necessary or
16 relevant.
17

18 We submit, Sir, that based upon the Court's decision and it's very specific directions to
19 the Public Trustee, the fact that the Public Trustee is making reference to and alleging
20 deficiencies in the Sawridge First Nation membership process and also introducing
21 evidence which alleges deficiencies in the membership process and alleges conflict of
22 interest is inappropriate and we submit should be taken into consideration in relation to
23 costs.
24

25 My friend refers in their written brief to the *RBC v. Canada* decision, and particularly to
26 paragraph 17. Our submission is very brief. This case deals with record production of a
27 party, and an Affidavit of Records. And the Court said that with respect to parties and
28 disclosure, if there are fish, the respondents do not have to go fishing for them. And
29 that's a correct statement of law, but it has no application with respect to an application
30 pursuant to 5.13 as against a non-party.
31

32 We submit, Sir, that in relation to the beneficiary application, the Public Trustee has all of
33 the information that it requires in order to identify the minors that it represents, and we
34 also submit that the Public Trustee has failed to identify any further records or
35 information it requires and, as a result, the beneficiary application should be dismissed.
36

37 I would now turn to my submission on costs.
38

39 THE COURT:

40 Now, when you use the term beneficiary
41 application, you're talking about the section 5.13.

1 MR. MOLSTAD: Right.
2
3 THE COURT: Correct.
4
5 MR. MOLSTAD: I do have submissions I would intend to make
6 on costs. Perhaps this might be a good time to take a break, Sir?
7
8 THE COURT: All right. Well, we'll break.
9
10 MR. MOLSTAD: I'm in your hands. If you want to --
11
12 THE COURT: Yeah. No, it's okay. If you want to -- how
13 long do you think you might be in your submission on this one? There's just some things
14 I have to do over the noon hour. I'm -- I can't get back here until 2 o'clock, so. . .
15
16 MR. MOLSTAD: Well, I'm prepared to carry on, then.
17
18 THE COURT: Okay. Let's go for another --
19
20 MR. MOLSTAD: Yeah. Okay. Sure. Yeah.
21
22 THE COURT: -- ten minutes or so and. . .
23
24 MR. MOLSTAD: The -- at tab 11 of our written brief you will
25 find your order, and in paragraph 2 and 3 of that order on the second page --
26
27 THE COURT: You're talking about the original order way
28 back.
29
30 MR. MOLSTAD: Yeah.
31
32 THE COURT: Okay.
33
34 MR. MOLSTAD: Your order way back. That's correct, Sir. It's
35 at tab 11 of our written submissions. In paragraph 2, you state that:
36
37 The Public Trustee shall receive full in advance indemnification
38 for its costs for participation in the within proceedings, to be paid
39 by the Sawridge Trust.
40
41 And also, you say:

1
2 The Public Trustee will be exempted from my responsibility to
3 pay the costs of the other parties in the within proceeding.
4

5 We submit, Sir, that it is clear that the exemption from responsibility to pay costs is very
6 specifically the costs of the other parties in the within proceedings, and as you know, our
7 position has always been, and continues to be, that the Sawridge First Nation is not a
8 party in the within proceedings. So our submission is that the costs exemption does not
9 apply to the Sawridge First Nation.
10

11 I would point out that when the Public Trustee made their application originally, and I
12 only have one copy of this, but somewhere buried in the court file, to be appointed as a
13 litigation representative. They specifically asked for the terms and conditions of their
14 appointment to include ordering that the Public Trustee shall be exempted from liability
15 for costs to any other party in this proceeding. That was what they asked for, and we
16 submit that's what they got.
17

18 We also submit, Sir, that if the cost exemption does not apply to the Sawridge First
19 Nation, this Court has the jurisdiction to exercise its discretion in relation to awarding
20 costs. We submit that this Court must always be in a position to encourage the
21 reasonable and efficient conduct of litigation.
22

23 At tab 13 page 7, the Court of Appeal affirmed that the advanced costs order would be
24 subject to your oversight and further directions.
25

26 We did refer you to a decision from the Ontario Court of Justice found at tab 5, and it's
27 the *Children's Aid Society* decision. The issue in this case was whether the Ontario office
28 of the children's lawyer, which is referred to, abbreviated the OCL, would be liable for
29 costs in relation to a -- to a necessary multi-day trial. The rule applied to the OCL is
30 described in paragraph 34, and we draw this to your attention because I think my friend in
31 their submissions says that in this case, there was no exemption. We submit that there
32 was a form of an exemption in this case. In paragraph 34, the Court states:
33

34 The relevant provision of Rule 24 are reproduced here.
35

36 And number 24 is:
37

38 There is a presumption that a successful party is entitled to the
39 costs of a motion enforcement case, or appeal.
40

41 And then sub 2:

1
2 The presumption does not apply in a child protection case, or to a
3 party that is a government agency.
4

5 So there is a, although not as extreme, there is a form of an exemption in this case, and
6 Mr. Justice Schnall of the Ontario courts at page -- at, sorry, paragraph 53 and 54 of the
7 same decision, made some what we submit are very relevant comments to this case.
8 Paragraph 53:
9

10 A sense of immunity from costs may blind or desensitize a party
11 or non-party litigant to the fact that other litigants are incurring
12 costs and expenses to be involved in the court process. Immunity
13 from costs could result in a lack of accountability to the court
14 process. No participant in litigation should have carte blanche to
15 pursue litigation that has no focus and no evidentiary basis,
16 without running the risk of being held accountable for wasting
17 time and money and an order to pay compensatory costs to
18 indemnify the other litigants.
19

20 In this case, costs were awarded against the OCL on a full recovery basis.
21

22 We also submit, Sir, that the foundational rule provisions of our Rules found at tab 16 of
23 our written submissions, specifically prohibit, in mandatory language, a party from filing
24 an application or taking proceedings that do not further the purpose and intention of the
25 Rules.
26

27 You, Sir, we submit have the discretion to award costs to the Sawridge First Nation as
28 against the Public Trustee, without indemnification from the Trust.
29

30 Rule 5.13(2) provides that if the applicant is successful, the person requesting the record
31 must pay the person producing the record an amount determined by the Court. So in
32 other words, if my friend is successful with her application and the Sawridge First Nation
33 is compelled to produce a record, they have to pay them.
34

35 We submit, Sir, that in this case, should you decide that they should not be successful, it
36 seems to me to be inequitable not to order that they pay costs. They've proceeded with
37 an application under 5.13 that has a clear obligation on their part to pay costs, if they
38 succeed. If they don't succeed, we submit it is only fair that they be responsible to pay
39 costs. If, of course, you decide that the exemption applies to them, as we stated earlier,
40 we submit that you still have the discretion to award costs on the basis that they not be
41 paid by the Sawridge Trust.

1.
2 The conduct that we submit should be considered as unreasonable and unnecessary
3 includes the following.

4
5 1. The refusal to consent to Sawridge First Nation's application for an adjournment,
6 requiring us to appear and apply for the adjournments. With the greatest of respect, Sir,
7 no lawyer would take that position without talking to his client and telling his client that
8 we might be subjected to a costs award because we're going to oppose this adjournment,
9 or not consent to it, and it's pretty obvious to us that the adjournment's going to be
10 granted. We submit, Sir, that lawyers have a responsibility to reduce the time required to
11 be spent in court by justices, not increase it.

12
13 2. The Public Trustee, in our submission, failed to exhaust obtaining production in
14 accordance with the Rules, before taking this exceptional step of seeking records from a
15 non-party, the Sawridge First Nation. They could have questioned Mr. Bujold on
16 undertakings or just requested the documents. Mr. Bujold testified that Sawridge First
17 Nation had been cooperating completely with any request for the records.

18
19 3. They proceeded with an application for relief, contrary to the Rules, when they either
20 knew or should have known that they were only entitled to make an application against a
21 non-party pursuant to Rule 5.13. You, Sir, agreed with this position and denied the
22 application in December, of 2015.

23
24 4. With respect to the beneficiary application before you now, we submit that it's
25 contrary to Rule 5.13, and the jurisprudence which supports that Rule, and is devoid of
26 merit.

27
28 5. With respect to the settlement application, the Public Trustee's decision to withdraw
29 this application is not based on the production of any documents from us. The Public
30 Trustee has not received any new documents and, as a result, this could have been
31 withdrawn before it was filed in January, of 2016.

32
33 6. The Public Trustee's conduct regarding disclosure of evidence intended to be relied
34 upon was, in our submission, unreasonable and caused unnecessary effort to find out what
35 is required under Rule 6.3. We submit, Sir, that it is a fundamental principle of our
36 system of justice that when you make an application, you're required to file and serve on
37 the respondents the evidence and the material that you intend to rely upon.

38
39 This is codified in Rule 6.13. Trial by ambush is not stepped, and as a non-party,
40 Sawridge First Nation was served with two Notices of Application on January 19th, 2016.
41 Those applications, one of which has been withdrawn, the other of which is before you,

1 that stated under the material or evidence to be relied upon, all relevant materials filed to
2 date in Court of Queen's Bench action 110314112, including all transcripts, affidavits,
3 excerpts of evidence and Answers to Undertakings, and such further and other materials
4 as counsel may advise and this Honourable Court may allow. What a ridiculous
5 proposition, that we, as a non-party, should be required to go to the courthouse and
6 review everything filed, or in this case go to the web site and looking at everything that's
7 been put on that web site, which is really no different than going to the courthouse, except
8 that we perhaps don't have to pay the photocopying costs that the courthouse might
9 charge us.

10
11 We finally received particulars of the evidence to be relied upon on July 7th, of 2016.
12 And even that, we submit, was equivocal in relation to the affidavit of Ms. Catherine
13 Twinn.

14
15 In summary, Sir, Sawridge First Nation's involvement in this proceeding came as a result
16 of the Public Trustee applying for orders, including requiring Sawridge First Nation to
17 prepare an Affidavit of Records and produce documents. We've been required to attend at
18 a number of hearings in person, and essentially respond to these three applications.

19
20 Now, notwithstanding the Public Trustee's extensive requests for records at the outset, it's
21 now decided on its own that it no longer requires any records from Sawridge First Nation.
22 We submit, Sir, that this demonstrates that these applications were both devoid of merit
23 and unnecessary litigation.

24
25 I think it's trite to say, Sir, that the Rules clearly provide that a successful party is entitled
26 to costs, and that you have a broad discretion in relation to those costs. We refer you to
27 Rule 10.33 which sets out a number of factors, and also paragraph 66 of our written brief
28 which highlights some of those factors.

29
30 And with respect to enhanced costs, we refer you to the decision of Madam Justice
31 Moreau found at tab 19 where she awarded enhanced costs in relation to a late application
32 for an adjournment of trial.

33
34 In paragraph 63 and 64 of the Public Trustee's submission on costs, and I want to take
35 you to that, Sir, because my friend has suggested that we've mischaracterized the case.

36
37 THE COURT:

So this is in the response brief?

38
39 MR. MOLSTAD:

Yes, this is in their brief, written submissions of
40 the Public Trustee in response to Sawridge First Nation's motion on costs.
41

1 THE COURT:

Got it.

3 MR. MOLSTAD:

In paragraph 63 and 64, the Public Trustee states that SFN has mischaracterized the decision of *Manning vs. Epp*, which is found at tab 17. And then they quote parts of one paragraph that, with the great respect, we submit is a mischaracterization of this decision, and we encourage you read paragraph 64. We'll read to you the full content of what this Court said. And it's found at tab 17 of our written brief, and paragraph 18 of Mr. (Sic) Justice Lax, stated at follows:

The broad language of section 131 does not limit the award of costs to the parties to a proceeding. The cases involving nonparties mainly addresses the question of whether costs can be awarded against them: see, *Gulf Canada Resources*). There does not appear to be a case where costs have been awarded in favor of a non-party, although this was implicitly recognized and in *Friction Division, et al.*

The City of Waterloo sought the right to appear on the motion and to bring its own motion in response to the position taken by the plaintiffs in a Statement of Claim and factum that they delivered in response to the motion to strike the pleading. They asserted that the Epp defendants could not raise the issue of privilege, as any privilege could only be claimed by Waterloo. Having taken this position, it is fair to say that the plaintiff invited Waterloo's motion in order to avoid the risk of being later said to have waived privilege. When Waterloo appeared, the plaintiffs disputed its right to do so.

The plaintiffs take no position on Waterloo's entitlement to costs, and in their written submission, address only the issue of quantum. The motion was necessary to protect Waterloo's claim for privilege, and ensured that the privilege issue, which was important, was before the Court. It was successful in obtaining an order to expunge the pleading. It is appropriate to award Waterloo its costs, but on a partial indemnity scale.

So a no-party was awarded costs in that decision.

In *Kent vs. the Law Society of Alberta*, Mr. Justice Sanderman at tab 20, and in tab 20 of our brief at paragraphs 18 and 19.

1 THE COURT:

I've got it, yeah.

2

3 MR. MOLSTAD:

I won't read you those two paragraphs. I encourage you to read them both, Sir. I'd just read you the last sentence in paragraph 19:

5

6 Unfortunately, in this matter he lacked restraint, another important
7 attribute of a successful litigator. Successful litigators know when
8 there is no case to advance and do not tilt at windmills for tactical
9 reasons when it causes pain to innocent parties.

10

11 In the decision of --

12

13 THE COURT:

Of course that was aimed at Arthur Kent, a non-lawyer, right?

15

16 MR. MOLSTAD:

Right. I understand that Mr. Kent has had much litigation before this Court.

18

19 THE COURT:

Yeah, he actually got successful later on, so. . .

20

21 MR. MOLSTAD:

What's that?

22

23 THE COURT:

He actually succeed in his defamation.

24

25 MR. MOLSTAD:

Oh, did he? Okay.

26

27 The -- in the *Hill v. Hill* decision, the Alberta Court of Appeal, and that's found at tab 21
28 of our written brief, Sir, this decision noted in paragraph 12 that payment by a third party
29 is not a bar to recovery of costs. And I am instructed today, Sir, to tell you on behalf of
30 the Sawridge First Nation that there shall be no double recovery by the Sawridge First
31 Nation. Any award of costs against the Public Trustee on the basis that there be no
32 indemnification from the Sawridge Trust, will either be paid to that Sawridge Trust, or
33 reduce any fee that comes from that Trust.

34

35 In conclusion, Sir, in relation to the issue of costs, we submit that taking into
36 consideration the conduct of the Public Trustee, enhanced costs should be awarded against
37 the Public Trustee on the basis that these costs not be paid by the Sawridge Trust. We
38 submit that the costs be either a multiple of column 5, or a lump sum, and that they
39 should be in relation to; 1, the application for adjournment that was not consented to; 2,
40 the application before this Court on September 2nd and 3rd, including preparing
41 submissions, which application was dismissed; and, 3, this application, including the

1 cross-examination of Mr. Bujold, and the written submissions that were required to be
2 made. And those, Sir, are our submissions in relation to costs.
3

4 THE COURT:

Thank you, Mr. Molstad. I don't have any
5 questions. I think we're just going to keep on going, unless --
6

7 MS. HUTCHISON:

Sure. That's absolutely --
8

9 THE COURT:

There's nothing to deal with after this matter is
10 dealt with, so. . .
11

12 MR. MOLSTAD:

Sorry.
13

14 **Submissions by Ms. Hutchison (Application)**
15

16 MS. HUTCHISON:

It's much later than it looks.
17

18 My Lord, I'll try to respond to Mr. Molstad's comments, which I think some deal with
19 the substantive, some deal with the costs and so there may be a bit of a mix in my
20 comments, but I will just begin, My Lord, with our primary responses on the costs
21 application.
22

23 As the Court will be aware from reviewing our brief of August 19th, 2016, the Office of
24 the Public Trustee is, of course, of the position that it is not liable to pay costs to the
25 Sawridge First Nation in this matter on an enhanced basis, or otherwise.
26

27 First and foremost, My Lord, it's very clear that the costs terms set by Sawridge 1 and
28 Sawridge 2 apply to the Sawridge First Nation.
29

30 I don't have my brief from 2012 with me today, My Lord, but I reviewed it before we did
31 our August 19th brief, and I'm fairly sure my friend mischaracterized our submissions. I
32 believe that they referred to a request for costs for all -- from all -- exemption for costs
33 from all participants. And, in fact, that's referenced in the text of the Sawridge 1
34 judgment.
35

36 And most importantly, My Lord, whatever the order that was signed by this Court says,
37 the costs exemption went up to the Court of Appeal. That was party of what was
38 appealed to the Court of Appeal. And if the Court turns to our brief of August 5th, we
39 have Sawridge 2, as we've termed it, the Court of Appeal's decision, at tab 3 of our
40 authorities. And the question under appeal before the Court of Appeal, in its view was
41 did the chambers judge err in granting exemption from the costs of other participants?

1 And I'm looking at paragraph 30, My Lord.

2

3 THE COURT:

Okay.

4

5 MS. HUTCHISON:

6 Regardless of what anyone said or meant or
7 didn't say or didn't mean at this level, My Lord, the Court of Appeal was dealing with an
8 exemption for costs against all participants. And when one reads paragraph 30, and I
9 certainly encourage the Court to do so, it is completely in line with the rationale being
10 offered by the Court there that an independent litigation representative may be dissuaded
11 from accepting an appointment if subject to liability for a costs award, while the -- and it
12 goes on. And so we also note the exemption for costs, while unusual, is not unknown.

12

13 There's nothing, My Lord --

14

15 While the possibility of award of costs against a party can be a
16 deterrent to misconduct, we are satisfied the Court has ample other
17 means to control the conduct of parties and counsel before it.

18

19 That's reference to a costs award against the OPGT, not a costs award against -- limiting
20 it to other parties.

21

22 So our submission, My Lord, the costs exemption that was granted to the OPGT was very
23 much to deal with all participants. And, indeed, if we look at -- and I'm just going to
24 take you, My Lord, to -- jumping ahead in our submissions. At paragraph 24 and 25 of
25 our written brief dated August 19th, My Lord.

26

27 THE COURT:

Sorry, just say that again. Sorry.

28

29 MS. HUTCHISON:

Paragraph 24 --

30

31 THE COURT:

Of which brief?

32

33 MS. HUTCHISON:

-- 25, and actually 26, My Lord. It's -- it's our

34 August 19th brief.

35

36 THE COURT:

Okay. Got that.

37

38 MS. HUTCHISON:

39 Essentially, what we're putting before the
40 Court, My Lord, is the fact that the very narrow interpretation that Sawridge First Nation
41 is claiming simply can't be supported when the Court looks at the full context of the
indemnity and the exemption. The Court, both in Sawridge 1 and Sawridge 2, explicitly

1 set out the position that was put before it by the OPG, Office of the Public Trustee, My
2 Lord, and I've got two subparagraphs there in paragraph 25 that give you quotes from
3 those two decisions. Sawridge 1 is from paragraph 14, and then the quote from Sawridge
4 2 is at paragraph 30?

5
6 The Public Trustee is firm in stating that it will only represent
7 some or all of the potentially affected minors if the costs of its
8 representation are paid from the 1985 Trust, and it must be
9 shielded from liability for any costs arising from this proceeding.
10 And the OPGT's --

11
12 This is from Sawridge 2, the Court of Appeal:

13
14 The OPGT's willingness to act was conditional on, *inter alia*, the
15 Public Trustee is exempted from liability of the costs of other
16 litigation participants in this proceeding, by an order of the Court.
17
18

19 And as this Court likely remembers, My Lord, by Sawridge 1, Sawridge First Nation was
20 already very actively involved in this matter. They came to the table, with the greatest of
21 respect to my friend, by their own volition. They were not actually obligated to come to
22 the table in Sawridge 1 and make submissions about the OPGT's first application. They
23 did so. Everyone had in contemplation the fact that there were other litigation participants
24 in play, and that is the context in which the costs exemption order was granted, My Lord.
25 In terms -- and I would certainly ask the Court to review our submissions then in
26 paragraph 26 through to 31.
27

28 It is the position of the Office of the Public Trustee that when Sawridge First Nation and,
29 indeed, the Trustees, failed to seek leave to appeal from Sawridge 2, the exemption for
30 costs became immutable. It cannot be overturned, My Lord, and that is -- that is our
31 consistent position.
32

33 It's also been consistent, as you're aware, My Lord, that the Public Trustee has made that
34 a term and a condition of its representation of the minors in this matter.
35

36 In terms of the importance of both the indemnity and the exemption, which I would
37 suggest, My Lord, in some ways Mr. Molstad's application deals with those two items
38 together, and so we'll largely deal with them together. It has to be considered as well that
39 in Sawridge 1 and Sawridge 2, it was recognized that the protection or -- both the
40 exemption and the indemnity were there to ensure that the Public Trustee of Alberta could
41 provide independent representation. And, My Lord, if you look at paragraph 29 of our

1 submission, August 19th, that will take you to paragraph 40 and 42 of Sawridge 1, and
2 paragraph 27, 28 and 30 of Sawridge 2, that refer to the fact that this order for an
3 exemption for costs and indemnity of costs were integrally linked to ensuring that there
4 would be independent representation of the minors.
5

6 Our position, My Lord, is that that exemption and indemnity cannot be interfered with
7 without taking away that independence, or at least undermining the very goals that were
8 being served by those orders in -- when they were initially made, My Lord.
9

10 My Lord, I'm at paragraph 12 of our written submissions of August 19th, and that's
11 dealing with the costs of the adjournment applications. Obviously, My Lord, the Public
12 Trustee is making some submissions in response to the merits of Mr. Molstad's
13 application. It's not a concession that the merits should even be reached. With respect,
14 My Lord, the costs application should be dismissed simply on the basis of Sawridge 1 and
15 Sawridge 2's orders on exemption of costs and indemnity, but we -- we will address a
16 few points so that the Court has our position on this.
17

18 As we explain from paragraphs 12 through to paragraphs 18 of those submissions, My
19 Lord, the OPGT's inability, and we would characterize it as that, not a refusal, but an
20 inability to consent to Sawridge First Nation's request for an adjournment of the
21 production application, and Mr. Molstad is correct about my paragraph 14. It should -- to
22 have been completely clear, should have said SFN requested an adjournments of all
23 matters scheduled regarding SFN. And that was in no way intended to mislead this Court
24 or misstate the facts, My Lord. It was just a lack of clarity.
25

26 In any event, when that request was received, there was much more on the table, as this
27 Court may remember, to be dealt with at the appearance than just the -- the matter of the
28 production application. There was a litigation plan. Most importantly, there was the Offer
29 of Settlement from the Trustees.
30

31 The Public Trustee came to the parties, and then ultimately the Court, to indicate that
32 from its point of view, it was premature to deal with a settlement application until
33 production had been dealt with, and that the Public Trustee viewed staging of those
34 applications as integral to the best interests of the minors in this matter. That was
35 expressed fully to the Sawridge First Nation, not that there was a lack of regard for their
36 request or a lack of desire to accommodate it. The OPGT simply could not, because the
37 Trustees refused to adjourn their settlement application.
38

39 Interestingly, as matters progressed in June, of 2015, and I note, My Lord, in those
40 paragraphs the Public Trustee did try to propose a compromise solution, there was no
41 attempt to be punitive with Sawridge First Nation or ignore their request. Ultimately, by

1 the time we got to the June 30th, 2015 case management meeting, and I'm now, My Lord,
2 at about paragraph 20 of our submissions --

3
4 THE COURT:

M-hm?

5
6 MS. HUTCHISON:

-- the Trustees actually withdrew their
7 settlement application. And so -- and, sorry, that was in September. So the barrier to the
8 Public Trustee's ability to consent to the first adjournment was gone. By the time we
9 were at the September 2nd, 2015, hearing, we'd actually largely achieved the compromise
10 solution the Public Trustee had initially suggested.

11
12 It's not a basis for costs to be awarded, My Lord. The Public Trustee acted in good faith.
13 It has a mandate to represent and protect the interests of the minor beneficiaries. Its
14 position on Sawridge First Nation's request for an adjournment was based entirely on that,
15 and there was ultimately no prejudice to Sawridge First Nation, My Lord. They had three
16 months notice to prepare for the production application, ultimately.

17
18 In terms of my friend's submissions on the application for production, a few comments,
19 and they will be few, My Lord, because I don't wish to reargue those matters, obviously.
20 We would suggest that many of my friend's submissions are asking this Court to view
21 pre-Sawridge 3 events through a Sawridge 3 lens, and that simply cannot be done, My
22 Lord. Sawridge 1 set a broad mandate. We've taken the Court through that in our
23 written submissions. The Public Trustee of Alberta followed that broad mandate in good
24 faith and with the intention solely of ensuring that this Court had the information before it
25 that it required to deal with beneficiary identification for minors in a fulsome manner.

26
27 This Court chose to narrow the scope of relevance from Sawridge 1 and Sawridge 3, and,
28 My Lord, that's the role of the case manager, but to suggest that the Public Trustee should
29 have anticipated that before filing its 215 applications, frankly, My Lord, is simply not
30 reality.

31
32 The Public Trustee has, since Sawridge 3, implemented that narrower focus, it has acted
33 according to that mandate, but it cannot be judged for its 2015 applications on the basis of
34 a decision that was received after those applications were filed and argued.

35
36 My Lord, starting at paragraph 32 of the Public Trustee's written response on costs, which
37 is the August 19th brief, we have our submissions as to why the Public Trustee would
38 take the position that there is no basis to revisit the indemnity order or, indeed, the
39 exemptions order, and indeed, My Lord, no longer the jurisdiction to review that.

40
41 The Public Trustee does not in any way, shape or form, and I'm referring to paragraph 34

1 of the brief, My Lord, suggest that there is not ongoing oversight on the matter of costs.
2 And the Court of Appeal spoke to this in Sawridge 2, but I would ask the Court to read
3 that paragraph very carefully. It's at paragraph 29 of Sawridge 2. It speaks to ongoing
4 oversight about quantum, My Lord. It speaks to ongoing oversight about reasonableness
5 of things like hourly rates, amounts to be paid in advance which, in fact, the Public
6 Trustee has never sought, and other mechanisms for ensuring that the quantum of costs
7 payable by the Trust is fair and reasonable.
8

9 My Lord, that's a very different level of oversight than saying that a statutory body with a
10 right to refuse a litigation representative role, coming to the Court and asking for certain
11 conditions of appointment, and receiving them, and then having those conditions of
12 appointment confirmed fully by a Court of Appeal, can face a situation where those terms
13 can be changed midstream. And our submission, My Lord, is that's not what we're
14 dealing with here. As we say in paragraph 35, the cost -- aside from quantum of costs,
15 the costs indemnity and the exemption themselves became immutable once the limitation
16 to appeal passed.
17

18 And I'm jumping a bit forward in some of my general comments, My Lord.
19

20 I believe I have heard my friend say, or suggest, or perhaps imply, that somehow the
21 Public Trustee of Alberta has acted as if it has a blank cheque, or has acted as if it is not
22 subject to the oversight of this Court. And with the greatest of respect that, My Lord, is a
23 submission that is devoid of merit. The Public Trustee has adjusted its mandate. The
24 Public Trustee, as you can see from the progress made on matters such as a consent order
25 today, has worked to try to achieve some resolution and narrowing of issues, but without
26 ever compromising the best interests of the minors, and that is a difficult balance at times.
27 It's understandable that the Trustees may have different points of view on those issues, or
28 that Sawridge First Nation may have different points of view on those issues. The Public
29 Trustee has no role other than to fulfil the mandate of protecting the interests of the
30 minors, and assisting this Court in doing so, if we understand the scope of our role, My
31 Lord.
32

33 The Courts refined how we're to carry that out, but the overarching theme is that we're
34 here for the children, and I would suggest to you, My Lord, that any submission by
35 Sawridge First Nation to suggest that the Public Trustee has stepped outside of that role is
36 not supported by any evidence and is not supported by the events in this proceeding.
37

38 And I think that's a good point, My Lord, to repeat and remind the Court and my friend
39 what the Public Trustee has said about why we're here on 513 today. And I'm looking at
40 paragraph 4 of our August 5th brief. We're back in front of the Court to make sure that
41 the parties have appropriately applied Sawridge 3. We are back in front of the Court to

1 confirm that the Court is satisfied that all of the evidence needed to identify potential
2 minor beneficiaries is now before the Court, and we're back in front of the Court to
3 ensure that the form of the information, which is an informal form, My Lord, it's a letter
4 in both cases, is satisfactory.

5
6 Those are not unreasonable positions to take, My Lord. Those are not positions taken in
7 bad faith or with an intention to cause an innocent party difficulty, My Lord. Those are
8 positions taken to ensure that when this matter gets before a trial judge, the trial judge has
9 the information that he or she needs to make a final determination in this matter. That
10 is -- that is the only reason, My Lord.

11
12 I think for some of my friend's submissions, My Lord, I'll just refer you to -- there -- my
13 friend has made a number of comments about filing of written submissions and whether
14 the Public Trustee acted appropriately or not in that matter. Our position on that is set
15 out in paragraph 37 through 39 of the brief. We certainly take the position that the Public
16 Trustee has not breached Sawridge 3, nor has it breached any agreed deadlines and, in
17 fact, they've all been honored and followed.

18
19 In terms of my friend's submissions about the OPGT's questioning of Paul Bujold, and
20 we deal with that at paragraph 40 through to paragraph 46, I would simply ask the Court
21 to consider all of those matters in their full context, as opposed to a narrow context, My
22 Lord.

23
24 There was a questioning of Mr. Bujold in 2014. Mr. Bujold did provided Answers to
25 Undertakings, and the Court has those undertakings. They've been filed a number of
26 times. I believe they are in our -- the list of answers, I should say, as opposed to all the
27 documents, are at tab B of our August 5th submission.

28
29 THE COURT:

Yeah. I've got it.

30
31 MS. HUTCHISON:

And if the Court looks through some of the
32 later undertakings, it actually speaks to why the production application ways was -- was
33 originally brought. Many of the questions are answered to say for the Trustees to provide
34 information that they got from Sawridge First Nation. Mr. Bujold is passing on
35 information he got from another party. And then there are the undertakings where the
36 Trustees are unable to provide an answer, because Sawridge First Nation won't provide
37 the information.

38
39 So for the Sawridge -- for the Public Trustee to question Mr. Bujold further on matters
40 where, A, he was simply passing on information from another entity and, B, where it was
41 clear he couldn't compel more information from the other entity, My Lord, we would

1 suggest would have been rather inefficient. It was recognized that the Sawridge First
2 Nation was the repository of all membership ident -- membership information that might
3 be relevant to beneficiary identification. That was the reason for approaching Sawridge
4 First Nation for production in the first place, My Lord.

5
6 And in terms, My Lord, of the -- why the Public Trustee had not gone forward with a
7 questioning on the assets issues, I don't know if that -- that's part of what Sawridge First
8 Nation is taking issue with. As we explain in our brief from paragraph 40 onwards, My
9 Lord, there were ongoing debates about the scope of relevance, and those matters were at
10 one point thought would be resolved before this Court. They were ultimately resolved by
11 agreement, but to proceed with the questioning of Mr. Bujold while there was another
12 procedural fight brewing over relevance, we would suggest, My Lord, would have been
13 inefficient and a waste of resources. The Public Trustee was waiting until the relevance
14 issues were dealt with. We -- we thought originally that would be by application via the
15 513 assets matter. It turned out it was dealt with by way of a consent order. Once the
16 scope of relevance became narrowed, as it has been in the consent order, it wasn't
17 necessary for the Public Trustee to press on about issues relating to settlement of assets in
18 1982.

19
20 My Lord, there were -- if I understood my friend's submissions, there are some
21 suggestions or allegations that -- I'm not entirely clear if the allegation is that the O -- the
22 Public Trustee continues to engage in a collateral attack on membership, or if it was that
23 the production applications were so, but we've responded starting at paragraph 52 through
24 to paragraph 57 of our written submissions, My Lord.

25
26 The Public Trustee would certainly suggest that the mere mention of membership in its
27 materials can't be treated as a collateral attack. Beneficiary identification, whether we
28 like it or not, will be integrally tied to membership, because that is the beneficiary
29 definition that's being proposed. There is nothing in the Public Trustee's materials, My
30 Lord, that asks this Court to go behind the Sawridge Band membership process, and deal
31 with it in the way a Federal Court would deal with it on judicial review. So I -- we're a
32 bit confused about some of those submissions, My Lord, but we can assure the Court we
33 are not engaging in a collateral attack.

34
35 I believe my friend referred quite a bit to the fact that the Public Trustee was relying on
36 Catherine Twinn's affidavit as evidence that the Public Trustee has not honored Sawridge
37 3, or is attempting to go back into issues of conflict of interest. Again, My Lord, we're
38 somewhat confused by that. There is nothing in our materials that refers to the paragraph
39 numbers of Catherine Twinn's affidavit that Mr. -- that Mr. Molstad has taken you to.
40 The paragraph that we refer to, and it's the paragraph we originally referred to in our July
41 7th letter disclosing particulars of the evidence that would be relied on, is Catherine

1 Twinn's -- and I'm looking at our August 5th brief, tab C, page 6, and it's 29(k).

2
3 THE COURT: It's the one you've highlighted in the brief?
4

5 MS. HUTCHISON: That's correct, My Lord. And it just -- it just
6 sets out the fact that Sawridge First Nation's legal fees are being paid by the Trust.
7

8 The Public Trustee has raised that in response to the application for costs, My Lord, and
9 in relation to the double recovery submissions we've made. I'm unaware of anything in
10 the Public Trustee's briefs that would suggest it is seeking some sort of a finding from
11 this Court, directly or indirectly, about conflicts of interests of the Trustees. So that's
12 certainly not our position, My Lord.
13

14 THE COURT: Yeah, just -- I just want to make a note. I
15 don't think I -- I'm looking at your footnote 57, page 16 of your brief.
16

17 MS. HUTCHISON: This is the August 19th?
18

19 THE COURT: The August 19th brief.
20

21 MS. HUTCHISON: Page 16, 57. Yes?
22

23 THE COURT: So I've got the reference to the Catherine
24 Twinn --
25

26 MS. HUTCHISON: Referring --
27

28 THE COURT: -- paragraph 29(k).
29

30 MS. HUTCHISON: Pinpoint cite to that paragraph, My Lord.
31

32 THE COURT: I -- what I don't see, and it's pages 62 to 63 of
33 the questioning of Paul Bujold.
34

35 MS. HUTCHISON: My Lord, I don't believe that we included those
36 as a tab, because we were under the impression that this entire transcript had been filed
37 by Sawridge First Nation.
38

39 THE COURT: Okay.
40

41 MS. HUTCHISON: We can certainly provide those to the Court --

1
2 THE COURT: Okay.
3
4 MS. HUTCHISON: -- with the electronic version of our brief.
5
6 THE COURT: Would you -- would you mind doing that?
7
8 MS. HUTCHISON: Not at all, My Lord.
9
10 THE COURT: Because I went looking, you know, in the
11 material. Again, the filed materials --
12
13 MS. HUTCHISON: My apologies.
14
15 THE COURT: -- never made it to me, just the materials
16 you've sent to me directly.
17
18 MS. HUTCHISON: I apologize, My Lord. I --
19
20 THE COURT: No problem.
21
22 MS. HUTCHISON: We debated it, and did not include it.
23
24 My Lord, I'm just taking a quick look at my -- a few notes responding to Mr. Molstad.
25
26 I -- and, again, it's been a long morning, so if I'm paraphrasing Mr. Molstad at all
27 inaccurately, I apologize, but I believe my friend made some submissions on the costs of
28 the 5.13 assets order, suggesting that some of the wording in the consent order in some
29 way established that the 5.13 application was not necessary. I would simply ask the Court
30 to read that preamble very carefully. That preamble is not drafted as an acknowledgement
31 of fact. The preamble is drafted to set out the representations of the Trustee's counsel
32 upon which the Court and all the parties may rely. So it's not a matter of the preamble
33 referring to affidavit evidence, transcript evidence, undertaking answers. It is a reliance
34 on the representations of Trustee's counsel, and that's a very different animal, I would
35 submit, My Lord, than suggesting that the preamble refers to the evidence before the
36 Court.
37
38 Secondly, My Lord, I believe I heard my friend suggest that the final order entered into is
39 very similar to the May 13th, 2016, clarification that was both -- initially proposed by
40 Dentons.
41

1 The Public Trustee would certainly disagree with that characterization. There was a great
2 deal of time and effort put into admittedly what ended up being short additions, but
3 critical additions, My Lord. They preserve rights for beneficiaries around accounting.
4 They eliminate an entire issue around settlement into the Trust that was a live issue. And
5 I won't take the Court through Mr. Bujold's entire 214 questioning, but Mr. Bujold was
6 questioned in a very preliminary way on some of those topics. So it's been a live issue in
7 this matter since at least 2014. The ultimate order was critically different than the
8 original clarification that was offered, My Lord.

9
10 And if I understood the implication of some of the other submissions, My Lord, it was
11 that Sawridge First Nation perhaps was not expecting the July 27th settlement of the
12 assets consent order the day of Mr. Bujold's questioning. With the greatest of respect, all
13 counsel were involved in the discussions leading up to that order. I think -- I think we
14 were all rather hopeful on the eve of questioning, that that order was about to be finalized.
15 I would -- I would be surprised to hear it was a surprise that that consent order was
16 finalized on that date, but -- and certainly, My Lord, Sawridge First Nation was on notice
17 that the asset issue was completely off the table at the outset of Mr. Bujold's questioning,
18 and if the Court goes through that transcript, I would suggest you'll find that there is
19 almost no time spent on membership issues. There's an extensive amount of time
20 questioning Mr. Bujold on an affidavit he didn't swear, and then there's very little -- or --
21 and then there's the focus on the assets matter. So I believe we've commented on that in
22 our submissions in terms of whether costs would ever be properly awarded for that
23 questioning.

24
25 THE COURT:
26 full transcript of that?

Well, if you wouldn't mind providing me the

27
28 MS. HUTCHISON:

Paul Bujold's questioning?

29
30 THE COURT:
31 this year.

Of Paul Bujold's questions at the end of July of

32
33 MS. HUTCHISON:

By -- would email -- by email, My Lord?

34
35 THE COURT:

Just electronically.

36
37 MS. HUTCHISON:

Yeah.

38
39 THE COURT:
40 get from the --
41

Is it in a searchable form, to -- the format you

1 MS. HUTCHISON: I will have to check, My Lord, but if it's not,
2 I'm -- the reporters can usually provide it.
3

4 THE COURT: Okay.
5

6 MS. HUTCHISON: So we'll certainly get you that.
7

8 MS. BONORA: Sir, it is at tab 4 of our -- the transcript brief
9 that we had filed, if you want it that way.
10

11 THE COURT: Okay. Sorry, of the -- of which brief?
12

13 MS. BONORA: The brief in support of the transfer issue. The
14 whole brief. The whole transcript is attached.
15

16 THE COURT: Oh. Okay. Well, thanks. I don't know where
17 I -- where that ended up. Anyway, send --
18

19 MS. HUTCHISON: I can't -- I can't help.
20

21 THE COURT: -- it to me electronically.
22

23 MS. HUTCHISON: Absolutely.
24

25 THE COURT: And then I've got it.
26

27 MS. HUTCHISON: We will, My Lord. If we can get it in a
28 searchable format, we'll get it to you that way.
29

30 In terms of Mr. -- or my friend's comments about some of the correspondence that was
31 exchanged between the parties in March and April of 2016, My Lord, I believe I heard
32 my friend suggest that the Public Trustee did not respond in any way to the Sawridge
33 First Nation's April 2016 letter. We don't agree with that, My Lord, although the Public
34 Trustee was certainly in the process of an ongoing review of Sawridge 3, and certainly in
35 the process of an ongoing assessment of its mandate under Sawridge 3. Its June 17th,
36 2016 letter, which is tab 10 of our August 16th submission, fully responds to all of the
37 parties and participants about what the Public Trustee intends to do with the two 5.13
38 applications. The explanation on the 5.13 application regarding membership is at page 2
39 of that letter. We would suggest, My Lord, that what is set out there is exactly what the
40 Public Trustee has done. So with the greatest of respect, we would suggest that there was
41 correspondence in response.

1
2 And, My Lord, I -- this is in -- I think this is clear in the materials, but I think we'd best
3 respond. There was some suggestion of trial by ambush by the Public Trustee. Clearly,
4 we would regard that submission as devoid of merit, My Lord. Both parties to this
5 application have had the opportunity to file two written briefs. The Sawridge First
6 Nation, if it had any doubt about the evidence it was going to potentially be confronted
7 with, it was served with it on July 7th, and you've been taken to that letter by
8 Mr. Molstad. All of the evidence is available to all the world on the Trust's web site.
9 And, My Lord, I realize I've given you my March brief.

10
11 There is a reference in Sawridge First Nation's March 15th brief that refers to excerpts of
12 evidence that were filed in June. That was a -- actually a bit of an esoteric little volume
13 that only the parties had. It certainly would strike us, My Lord, that Sawridge First
14 Nation has had high level of access. And we're not asking the Court to bend the rules.
15 The evidence was served.

16
17 There was an element of our friend's position in correspondence almost suggesting that
18 the evidence had to be refiled. We've been unable to file -- find any, any rule that would
19 suggest we can't rely on evidence that's already filed in this proceeding. We do have to
20 notify Mr. Molstad on that -- of that, and serve him with copies. And we would suggest
21 our July correspondence did that, My Lord.

22
23 And as I say, I don't -- I don't think any part or participant in this action can suggest they
24 haven't had ample opportunity to speak to the issues. There has been no trial by ambush.

25
26 My Lord, going back to our brief, you will find our submissions on essentially all the
27 merits of Sawridge First Nation's costs application, outside of the initial exemption and
28 costs indemnity issue from paragraph 58 all the way through to -- well, it's paragraph 58,
29 with subparagraphs.

30
31 Then our closing point, My Lord, has been this issue that Sawridge First Nation is
32 claiming, claiming costs recovery in a situation where the Sawridge Trust has already
33 agreed to pay the legal fees of the Sawridge First Nation. Particularly given the existence
34 of the indemnity, My Lord, we would submit that that makes a costs award in this case
35 highly inappropriate, and impractical. It's -- the funds will be coming from the Trust one
36 way or the other. Sawridge First Nation has already been paid.

37
38 I didn't hear my friend denying that today. We have evidence from both Mr. Bujold and
39 Catherine Twinn and, My Lord, we would suggest that the fact that Sawridge First Nation
40 has already been paid in full does raise real issues as to why we've spent all of this time
41 and money fighting over costs in the first place in light of a very clear order by the Court

1 of Appeal on that point.

2
3 Simply in closing, My Lord, the Public Trustee of Alberta takes the position that granting
4 the Sawridge First Nation's application for costs would be directly contrary to the terms
5 of appointment that the Public Trustee advised, and both level of courts accepted, were
6 preconditions to its acceptance of a role as a litigation representative. They would also be
7 directly contrary to the Court of Appeal's decision which upheld the costs exemption in
8 relation to all participants, not this narrower interpretation of parties.

9
10 An order of that nature would also contradict the Court of Appeal's order for full in
11 advance indemnity, bearing in mind, My Lord, that we're not disputing the Court's
12 ongoing discretion and oversight of matters such as quantum, hourly rates, hours spent, et
13 cetera. Those items are detailed by the Court of Appeal, but they don't extend to the
14 indemnity.

15
16 And finally, My Lord, the costs award sought by the Sawridge First Nation would
17 undermine the costs terms that were put in place to ensure the independence of the Public
18 Trustee of Alberta in this proceeding.

19
20 And finally as well, My Lord, they would essentially punish the Public Trustee of Alberta
21 for efforts that were made in good faith to carry out a mandate to protect the interests of
22 the minors in this matter.

23
24 Subject to the Court's questions, those are our submissions.

25
26 THE COURT: Well, just one -- actually two questions, while
27 I'm thinking of them.

28
29 One, it had taken me some time to sign off on that, the order implementing Sawridge
30 number 3. Do you happen to have a filed copy of that with you, or --

31
32 MS. HUTCHISON: My Lord, I did not bring a copy to court with
33 me. I apologize.

34
35 THE COURT: Okay. Include it in that emailed package,
36 okay?

37
38 MS. HUTCHISON: Absolutely.

39
40 THE COURT: And the other question is I take it that if I were
41 to dismiss the costs application of the Sawridge First Nation, so with the result they're

1 not -- they were unsuccessful, I take it the Public Trustee is not seeking costs against
2 Sawridge First Nation.

3
4 MS. HUTCHISON: No, My Lord. The Public Trustee of Alberta
5 has enough costs issues to address with the Trustees. We don't need to address them with
6 anyone else.

7
8 THE COURT: All right.

9
10 MS. HUTCHISON: We will not seek costs against Sawridge First
11 Nation, My Lord.

12
13 THE COURT: All right. Thank you.

14
15 MS. HUTCHISON: Thank you very much.

16
17 THE COURT: Mr. Molstad?

18
19 **Discussion**

20
21 MR. MOLSTAD: I just had one brief comment, Sir. My friend
22 has made a submission that I have mischaracterized her written submissions. That's not
23 true. Here they are. You can read them yourself, Sir, and they're at page 31, paragraph
24 5.

25
26 THE COURT: All right. Which set of submissions is this?

27
28 MR. MOLSTAD: Those were the original submissions she
29 made --

30
31 THE COURT: Oh, back in 2012.

32
33 MR. MOLSTAD: Yeah, back when -- and I believe Ms. Bonora
34 wishes to make a brief comment.

35
36 MS. BONORA: And I apologize. My Lord, I would just -- I'm
37 sure that that's the last paragraph in the brief, and I can't take a look at it right now. I
38 would ask the Court to look earlier in the brief, because my recollection is that it's in the
39 substantive argument that we refer to complete protection and a complete exemption that's
40 not --
41

1 THE COURT:

Well --

2

3 MS. BONORA:

-- limited to parties.

4

5 THE COURT:

Well, actually, that's sort of my recollection.

6

7 MS. BONORA:

Thank you, My Lord.

8

9 THE COURT:

But, here, I'm going to give this back to you. I

10 no doubt probably have that somewhere in the court record or in my -- while I don't think

11 it's in my parallel set of materials. Would you scan that in and just send it in?

12

13 MR. MOLSTAD:

I will.

14

15 THE COURT:

All right.

16

17 MS. BONORA:

Sir, one brief submission. My friend,

18 Ms. Hutchison, started by saying that she thought all counsel would benefit from the

19 clarification of the definitions. We would submit that we are not in that category. We

20 don't think there was any misinterpretation that could be made of those definitions, and

21 that we want to be very clear that our silence in respect of the costs is not meant to be

22 taken as suggesting we're neutral. We wholly support Sawridge First Nation's application

23 for costs, because we believe this application, in terms of being against a third party, was

24 completely unnecessary.

25

26 If a clarification was required, and I don't begrudge Ms. Hutchison for bringing that
27 application to seek a clarification if she needs it, but we didn't need Sawridge First Nation
28 at that table.

29

30 So the 5.13 application is a request for documents. Her application was a request for
31 clarification, and so we think that was an unnecessary application, and so support the
32 application for costs.

33

34 THE COURT:

All right. Well, I'll let you respond to that.

35

36 MS. HUTCHISON:

My Lord, to be -- and to be clear, we are

37 making a request for documents. We have left it in the discretion of Sawridge First

38 Nation as to the form in which they provide the information.

39

40 We've heard a great deal about confidentiality concerns. If the Court determines
41 additional information is required and a list is the only thing that works for Sawridge First

1 Nation, that is all the Public Trustee is seeking.

2
3 The first question to the Court was a clarification of the categories to determine if
4 additional information is needed. We don't have a list of all of the individuals rejected, so
5 we -- as I mentioned, My Lord, we couldn't go and determine their intent, if that's part of
6 our mandate, and we don't have a list of individuals potentially -- when we get into the
7 discussion of what is complete versus incomplete versus pending, do we need a list of
8 individuals who have submitted application, but have not yet been told what's happening
9 with their application, or if it meets Sawridge First Nation requirements? I -- and I'm
10 taking you back to our first discussion --

11
12 THE COURT: Okay.

13
14 MS. HUTCHISON: -- which I don't really -- and I'm not doing it
15 quite as -- in quite the organized manner we did, My Lord. There's a request for
16 documents. We are content to deal with the documents in the form the Sawridge First
17 Nation presents. Thank you.

18
19 THE COURT: All right. But just again so it's clear, I am not
20 plowing through -- I don't even have all the material. I'm not doing that function. All
21 I'll do for you is clarify, if I decide it's necessary to clarify, some of the those terms in
22 Sawridge number 3, and then it will be back to the Public Trustee and you to take those
23 clarification, if there are any, and --

24
25 MS. HUTCHISON: And determine if additional documents are
26 required.

27
28 THE COURT: Okay.

29
30 MS. HUTCHISON: Okay.

31
32 THE COURT: All right.

33
34 MS. HUTCHISON: Thank you, My Lord.

35
36 THE COURT: All right.

37
38 MS. HUTCHISON: That's very helpful.

39
40 THE COURT: All right. That's it for today. So on that
41 particular I'll say set of applications, I am reserving on it, and you'll be receiving a

1 decision in due course. It may be that it's quite short and to the point. I might just call
2 counsel back and do it orally, rather than go through all the rigamarole of a published
3 decision. All right?
4

5 MS. HUTCHISON: My Lord, I should just mention I'm actually
6 taking a holiday, which never happens, August 27th to September 11th, if you were to --
7

8 THE COURT: Oh, all right. Don't worry -- don't worry about
9 it. This thing's -- it might be 2017 before you get this.
10

11 Anyways, thanks, counsel, for all your help.
12

13 _____
14 PROCEEDINGS CONCLUDED
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1 **Certificate of Transcript**

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