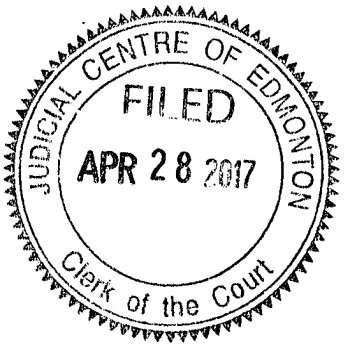

Court of Queen's Bench of Alberta

Citation: 1985 Sawridge Trust v Alberta (Public Trustee), 2017 ABQB 299

Date:
Docket: 1103 14112
Registry: Edmonton

In the Matter of The Sawridge Band *Inter Vivos* Settlement Created by Chief Walter Patrick Twinn, of the Sawridge Indian Band, No. 19, now known as the Sawridge Indian Band, on April 15, 1985 (the "1985 Sawridge Trust")

Between:

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

Original Applicants

- and -

Public Trustee of Alberta

Applicant/Respondent

- and -

Sawridge First Nation

Respondent/Applicant

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

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I Introduction

[1] This decision is the most recent step in a case management process which has the ultimate objective of distributing funds held in the 1985 Sawridge Trust [the "Trust"] to its beneficiaries. The initial step in this process is reported in ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2012 ABQB 365, 543 AR 90 ["***Sawridge #1***"] affirmed 2013 ABCA 226, 553 AR 324 ["***Sawridge #2***"]. The Trust was set up in 1985 by the Sawridge First Nation [the "SFN" or the "Band"] in an attempt to shelter Band property from persons who had been excluded from membership in the SFN because of their gender or the gender of their parent(s).

[2] The proceeding began as an application to the Court by the Trustees for advice as to how to identify the beneficiaries of the Trust and create an equitable distribution scheme for the considerable assets of the Trust. That initial application has since metastasized into a number of areas of disagreement and has expanded as a succession of third parties have attempted to insert themselves into the process. At the outset, the Court invited the Public Trustee of Alberta [the "Public Trustee"] to participate in this proceeding and represent the interests of potential minor recipients of the proposed distribution of assets: ***Sawridge #1***.

[3] On December 17, 2015 I issued a decision which defined a process to identify who may qualify for a part of the distribution and how the distribution would then proceed: ***1985 Sawridge Trust (Trustee for) v Alberta (Public Trustee),*** 2015 ABQB 799 ["***Sawridge #3***"]. ***Sawridge #3*** triggered at least three appeals (***Stoney v 1985 Sawridge Trust***, 2016 ABCA 51 at para 3). Those appeals were apparently either discontinued or denied for late filing. The participants then returned to me for another case management hearing on August 24, 2016.

[4] At that hearing I concluded the case management process was bogged down and, to some extent, futile, and that the best alternative was to move the beneficiary identification issue to trial. However, that conclusion still left a number of issues to be resolved.

[5] This decision responds to two outstanding issues between the Public Trustee and the Band. As noted, the Public Trustee was brought into this proceeding to represent the interests of potential minor beneficiaries. In ***Sawridge #1*** I instructed the Trust to pay for the Public Trustee's litigation costs.

[6] The SFN is not a party to this litigation but has nevertheless observed and participated throughout since Band membership (or being a child of a Band member) is a criterion for being a beneficiary of the Trust.

[7] ***Sawridge #3*** at paras 43, 46 and 61 authorized the Public Trustee to prepare and serve *Alberta Rules of Court*, Alta Reg 124/2010 [the "*Rules*", or individually a "*Rule*"] s 5.13 applications on the Band in relation to specific membership and Trust asset-related questions. The Public Trustee engaged that procedure but, in the meantime, the Band has provided information that related to two of the three issues addressed in ***Sawridge #3***. The Public Trustee did not proceed with the *Rule* 5.13 application which related to the fairness of a proposed distribution scheme.

[8] These developments have left two remaining issues now addressed by this decision:

1. Does information provided by the Band concerning "current and possible" minor beneficiaries satisfy the *Rule* 5.13 inquiry mandated by ***Sawridge #3***?
2. Should the Band receive costs as a consequence of an abandoned 2015 application and the discontinued *Rule* 5.13 motion?

II. "Current and Possible" Minor Beneficiaries

[9] ***Sawridge #3*** at paras 48-61 authorizes the Public Trustee to investigate and identify minor children of persons who have:

1. completed an application for admission to Band membership, and
2. applied for admission to Band membership, had that application denied, but are engaged in a review or appeal process.

[10] The Public Trustee expresses concern on the form and meaning of language in ***Sawridge #3*** that authorizes the Public Trustee's *Rule* 5.13 inquiries. This resolves to a number of questions on what kind of evidence is adequate to discharge the Public Trustee's obligation to identify and then represent potential minor child distribution recipients. At the hearing I suggested that while I could clarify my instructions in ***Sawridge #3***, the sufficiency of information provided by the Band was a point better discussed by the parties and the Band, with my advice as a subsequent recourse. However, counsel for the Public Trustee clarified it is satisfied to rely on the Band as the best source of evidence on membership questions.

[11] On that basis I make the following findings and instructions.

[12] First, the Public Trustee inquires whether a list of minor children of Band members obtained on April 5, 2016 satisfies the evidentiary requirement for that category of minors. I confirm this information is adequate for that purpose.

[13] Second, the Public Trustee expresses concern that the meaning of a "completed" Band application and/or a "rejected or unsuccessful" Band application is unclear. The Band on January 18, 2016 provided a list of adults with "pending" applications. The Public Trustee inquires whether this category meets the "unresolved" but "completed" Band applications. I confirm that it does. I am satisfied that if the Band deems an application "complete" but has not resolved that application then that individual belongs in "category 3", as defined in ***Sawridge #3***, and their children, if any, fall into "category 4".

[14] The third point on which the Public Trustee sought clarification is whether ***Sawridge #3*** used "rejected" and "unsuccessful" to indicate two different categories. To be clear, this language is operationally synonymous. It captures:

1. persons who have made Band applications prior to this date, had that application rejected, but are challenging that outcome, and

2. persons who have filed completed and unresolved Band applications ("pending" Band applications), who are in the future rejected during the application process, and then challenge that outcome.

The Public Trustee's obligation is to identify these populations, and to also determine whether they have children. I note that both these subgroups will fall into category 5, though some at present may be in category 3.

[15] The Public Trustee also inquires on whether the Band providing information that there are no outstanding appeals or judicial reviews of rejected Band applications is sufficient to define the current category 5 set. In light of the Public Trustee's concession on the Band's expertise and role I conclude that it is.

III. Costs

[16] The Band seeks costs from the Public Trustee, and that these costs not be indemnified by the Trust. This relates to two steps.

[17] First, on June 24, 2015 the Band sought and received an adjournment to applications in this proceeding that named the Band as a respondent. The Band took the position that the Public Trustee's refusal to consent to that adjournment was unreasonable, and should result in a costs award without indemnification.

[18] Second, in the ***Sawridge #3*** decision I directed the Public Trustee to proceed with the *Rule* 5.13 applications, and reserved the question of costs to follow completion of those applications. The Band argues that it was forced to prepare written materials in response. However, the Public Trustee then abandoned a *Rule* 5.13 application. The Band also observes *Rule* 5.13(2) creates a mandatory obligation on the Public Trustee to pay for records produced via that procedure:

> 5.13(2) The person requesting the record must pay the person producing the record an amount determined by the Court.

[19] The Band takes the position that my earlier order which directed that the Public Trustee not be responsible to pay the costs of other parties to the proceedings does not apply to the Band. That is because the Band is not a party to this litigation: ***Sawridge #3*** at para 27. The Band therefore argues that as a non-party it is not captured in my previous instruction.

[20] Beyond that, the Band argues as a general principle of law that this Court retains the jurisdiction to award costs against any party. It cites ***Children's Aid Society of the City of St. Thomas and County of Elgin v LS*** (2004), 46 RFL (5th) 330 at paras 53-54,128 ACWS (3d) 888 (Ont C J) for the proposition that a party should never be "immunized from costs", since litigant accountability is necessary to avoid wasteful, ill-focused court processes. An award of costs is the lever to control that potential abuse.

[21] The Band argues as the successful party the Band presumptively should receive a costs award (*Rule* 10.29(1)) and that the Court should apply the foundational *Rules* 1.1-1.2 to encourage efficient litigation through costs. An award against the Public Trustee is warranted given the 2015 adjournment was inevitable, premature as the Public Trustee had alternative

sources for the information it sought, and the Public Trustee took meritless steps including the abandoned *Rule* 5.13 application. In this case the Band says that enhanced costs are warranted.

[22] The Public Trustee responds that Alberta Court of Appeal in ***Sawridge #2*** at para 30 confirmed my conclusion that the Public Trustee should be immune from any liability for a costs award. The Band has been a *de facto* participant in this matter, no matter that its legal status is as a litigation third party. Ordering costs against the Public Trustee would subvert the basis for the Public Trustee's participation in this proceeding. The Public Trustee has always acted in good faith and adhered to the mandates set by the Court in ***Sawridge #1*** and then in ***Sawridge #3***.

[23] First, I reject the Band's argument that the SFN falls outside the scope of the order I issued which prohibited the Public Trustee from paying costs of "the other parties in the within proceeding", or the Court of Appeal's subsequent confirmation of that direction. The Band, while not a party, is far from a non-participant in this litigation. Further, this strict interpretation of the order that I issued defeats the objective of the framework in which the Public Trustee was invited and agreed to participate in this matter.

[24] That said, I agree with the Band that I retain jurisdiction to make a costs award against the Public Trustee, both on the basis of the principle in ***Children's Aid Society of the City of St. Thomas and County of Elgin v LS***, due to this Court having the ongoing jurisdiction to vary its orders, and also through the Court's inherent jurisdiction to control its own processes and potential abuse of that: I H Jacob, "The Inherent Jurisdiction of the Court", (1970) 23 Current Legal Problems 23, most recently endorsed by the Supreme Court of Canada in ***Endean v British Columbia***, 2016 SCC 42 at para 23, [2016] 2 SCR 162.

[25] Although *Rule* 10.29(1) creates a presumption that the successful party will receive a payment of costs, courts have an exceptionally broad authority to make cost orders as they see fit: *Rules* 10.31, 10.33. Similarly, the very important role that costs awards serve to encourage efficient, timely, and responsive litigation, and create negative consequences for those who misuse the courts and abuse other court participants is well established.

[26] I am going to approach the question of the Public Trustee's activities in a global sense, instead of parsing through individual applications and steps. That is consistent with the general purpose served by cost awards. As noted in ***Sawridge #3*** at paras 32-36, the Public Trustee's activities needed to be "re-focused". I now conclude that objective has been met. While I might otherwise have ordered costs of some kind, this litigation is ultimately intended to benefit the persons who will receive shares of the Trust. This is not so much an adversarial process than one where various organizations are moving to a common goal: to protect the rights of the Trust beneficiaries, and ensure an equitable result is obtained. This is not an instance where a third-party interloper is interfering with a smooth running process, but instead involves a Court-sanctioned participant conducting its statutory function, though that process did require a degree of court management. I therefore decline to order costs against the Public Trustee.

[27] As for whether the *Rule* 5.13(2)'s requirement that "[t]he person requesting the record must pay ... an amount determined by the Court" that is not a basis to order costs. This provision has not been the subject of judicial commentary. The *Rule* uses the words "an amount" to describe the payment that "must" be paid, rather than "costs". I conclude that the intention of *Rule* 5.13 is that where a third party (here the Band) is obliged by court order to produce documents or other materials, then that third party should experience minimal financial

consequences from cooperating with the Court and litigants in the production of relevant evidence.

[28] Normally, I would consider instructing payment of "an amount" under *Rule* 5.13 except for the fact that I have been informed that the Trust is indemnifying the Band for its activities in relation to this proceeding. This means one way or another the Trust will end up 'on the hook' for these litigation activities. Accordingly, I find there is no point in me ordering payment of "an amount" because of the Public Trustee's *Rule* 5.13 activities.

IV. Conclusion

[29] The Public Trustee has now received direction from me in relation to this litigation. The Band's application for costs without indemnification from the Public Trustee is denied.

[30] I pause to add one further observation. I have taken a 'costs neutral' approach to the Trust, the Band, and the Public Trustee in this litigation. That is because all three of these entities in one sense or another have key roles in the distribution process. However, this non-punitive and collaborative approach to costs has no application to third party interlopers in the distribution process as it advances to trial. The same is true for their lawyers. Attempts by persons to intrude into the process without a valid basis, for example, in an abusive attempt to conduct a collateral attack on a concluded court or tribunal process, can expect very strict and substantial costs awards against them (both applicants and lawyers), on a punitive or indemnity basis. True outsiders to the Trust's distribution process will not be permitted to fritter away the Trust assets so that they do not reach the people who own that property in equity, namely, the Trust beneficiaries.

Heard on the 24th day of August, 2016.
Dated at the City of Edmonton, Alberta this 28th day of April, 2017.

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

Appearances:

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

J.L. Hutchison
Hutchison Law LLP
for Public Trustee of Alberta

E. H. Molstad, Q.C. and
G. Joshee-Arnal
Parlee McLaws LLP
for Sawridge First Nation

Attendances:

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

L. A. Maj
Justice Canada
for the Minister of Aboriginal Affairs and Northern Development

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

S. A. Wanke
DLA Piper (Canada) LLP
for Maurice Stoney et al.