

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 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

APPLICANTS

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

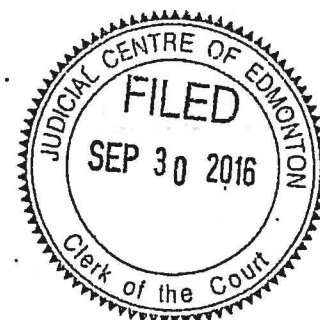
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BRIEF OF ARGUMENT OF THE APPLICANTS
PATRICK TWINN, SHELBY TWINN, AND DEBORAH
A. SERAFINCHON

ADDRESS FOR
SERVICE AND
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I. INTRODUCTION

1. This Brief of Argument is filed on behalf of Patrick Twinn ("**Patrick**"), Shelby Twinn ("**Shelby**"), and Deborah Serafinchon ("**Deborah**") (collectively, the "**Applicant Beneficiaries**") in support of their application to be named as Parties to this Action. 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 (excluding Catherine Twinn, the "Sawridge Trustees") in the within matter.
2. The Sawridge Trustees seek, *inter alia*, an order to determine and vary the definition of "Beneficiary" in the Sawridge Band Intervivos Settlement (the "**1985 Trust**"). The Sawridge Trustees have proposed that the definition be varied 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 applicable Membership Rules from time to time ("**Sawridge Member**").
3. Patrick and Shelby are "Beneficiaries" as currently defined by the 1985 Trust. If the Sawridge Trustees' proposed variation is successful, Shelby will lose their status as "Beneficiary".
4. As Beneficiaries, Patrick and Shelby's consent is required to vary the terms of the 1985 Trust. Although the Beneficiaries agree with the Sawridge Trustees that the definition of Beneficiary in the 1985 Trust is discriminatory and may agree with a variation, they do not consent to varying the definition of "Beneficiary" in the 1985 Trust in the manner proposed by the Sawridge Trustees.
5. Deborah is excluded from the definition of "Beneficiary" under the 1985 Trust as a result of being a female illegitimate child despite the fact that both her biological parents were Sawridge Members and that her male siblings are (and would be whether or not their mothers were Sawridge Members) Beneficiaries. 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.
6. Deborah's discriminatory exclusion as a Beneficiary of the 1985 Trust is not remedied if the Sawridge Trustees proposed variation is accepted by the Court. As a person excluded from the 1985 Trust on account of her gender and legitimacy and who will also be excluded if the Sawridge Trustees are successful in their proposal, Deborah's opinion is critical to reaching a fair and just determination of the within Advice and Direction Application.
7. This Brief of Argument is additionally being filed on behalf of the Applicant Beneficiaries in support of their application to require the Sawridge Trustees to pay the legal fees associated with representation of the Applicant Beneficiaries out of the funds held by the 1985 Trust. The Applicant Beneficiaries position is that, as Beneficiaries to the 1985 Trust seeking to be Parties to an Action

concerning the variation and construction of a trust and not an adversarial matter, they should be entitled to full indemnification from the 1985 Trust.

8. The Application filed by the Applicant Beneficiaries also requests on accounting pursuant to Rule 98 of the Surrogate Rules for Patrick and Shelby, a matter which is being pursued but not required to be addressed in this Brief.

II. MATERIALS

9. The Applicant Beneficiaries rely and refer to the following materials filed in the within action:
 - a. The Affidavit of Shelby Twinn sworn July 26, 2016;
 - b. The Affidavit of Patrick Twinn sworn July 26, 2016; and
 - c. The Affidavit of Deborah Serafinchon sworn July 26, 2016.

III. FACTS

The Trust

10. In 1985, the Canadian Chief of the Sawridge First Nation, Walter Patrick Twinn established the 1985 Trust to hold certain properties in trust for the Sawridge First Nation.
11. Beneficiaries of the 1985 Trust were defined as:

[...] persons who at that time qualify as members of the Sawridge Indian Band No. 19 pursuant to the provisions of the Indian Act R.S.C. 1970, Chapter I-6 as such provisions existed on the 15th day of April, 1982 and, in the event that such provisions are amended after the date of the execution of this Deed all persons who at such particular time would qualify for membership of the Sawridge Indian Band No. 19 pursuant to the said provisions as such provisions existed on the 15th day of April, 1982 [...]

Relevant procedural history

12. Pursuant to the Order of Honorable Justice Thomas dated August 31, 2011 ("Sawridge #1"), the Sawridge Trustees were instructed to bring an application for the opinion, advice and direction of the Court respecting the administration and management of the property held under the 1985 Sawridge Trust and to specifically seek:
 - a. direction with respect to the definition of "Beneficiaries" contained in the 1985 Sawridge Trust, and if necessary to vary the 1985 Trust to clarify the definition of "Beneficiaries"; and

- b. direction with respect to the transfer of assets to the 1985 Sawridge Trust.
13. Despite the Courts direction in Sawridge #1, no application to vary the definition of Beneficiary in the 1985 Trust has ever been filed by the Sawridge Trustees.
14. This Action was commenced over 6 years ago, however, in that time, the matter of whether to vary the definition of Beneficiary in the 1985 Trust as proposed by the Sawridge Trustees has not been specifically addressed to be set down for hearing.
15. At the case management meeting of August 24, 2016 the matter of determining whether to vary the definition of "Beneficiary" was acknowledged by the Court as likely requiring trial and counsel were asked to consider the same for further direction.

**Transcript of Case Management Meeting before Honorable Justice Thomas
dated August 24, 2016, page 7 lines 27-33 [Extracts of Evidence Tab A]**

16. In the 6 years that this Action has proceeded, apart from the Office of the Public Guardian and Trustee (the "OPGT") who represents minor Beneficiaries, no adult Beneficiary who is not also a Sawridge Trustee has been represented in this Action.

The Applicant Beneficiaries

Patrick Twinn

17. The Applicant Beneficiary, Patrick Twinn was born into the Sawridge First Nation on October 22, 1985. His father, Walter Patrick Twinn, was the Canadian Chief of the Sawridge First Nation from 1966 to his death on October 30, 1997 ("Chief Walter Twinn").

Affidavit of Patrick Twinn at para 7

18. Patrick's mother is Sawridge Trustee Catherine Twinn. Catherine Twinn is a Sawridge Member.

Affidavit of Patrick Twinn at para 8

19. Patrick is also a Sawridge Member and therefore remains a Beneficiary even if the Sawridge Trustees are successful in their application to vary the definition of Beneficiary under the 1985 Trust.

Affidavit of Patrick Twinn at paras 9 and 14

20. Although Patrick will maintain his Beneficiary status if the Sawridge Trustees are successful, his interest will be affected either by dilution or enhancement. Further, he believes that the Sawridge Trustees' proposed variation of the definition of Beneficiary under the 1985 Trust will result in the exclusion of many of the current 1985 Trust Beneficiaries and their issue, including his wife Melissa Megley ("Melissa"), and child, Aspen Saya Twinn who is currently represented

by the OPTG pursuant to Sawridge #3 although the OPTG has advised they will not oppose an application for Aspen to be represented by Patrick.

Affidavit of Patrick Twinn at paras 10-11, 13-14 and 18

21. Subsequent to swearing his affidavit, Patrick married Melissa Megley. As a result of their marriage, and as further detailed below, Melissa is a Beneficiary of the 1985 Trust. Melissa is not currently a Sawridge Member and will therefore lose her entitlement if the Sawridge Trustees are successful in their application.

Transcript from Questioning of Patrick Twinn, page 8, lines 12-15 and page 9, lines 9-12 [Extracts of Evidence Tab B]

22. Aspen Saya Twinn born July 10, 2016 (“Aspen”) is the newest known member of the Sawridge First Nation and is the first born daughter of Patrick and Melissa. Like her mother, Aspen is not a Sawridge Member and may lose her entitlement as a Beneficiary of the 1985 Trust if the Sawridge Trustees application to vary is successful.

Affidavit of Patrick Twinn at para 11

Shelby Twinn

23. Shelby Twinn (“Shelby”) was born on January 3, 1992 and was raised on the Sawridge First Nation for the first 5 years of her life. She is the granddaughter of Chief Walter Twinn and the daughter of his son, Paul Twinn. Paul Twinn is a recognized Status Indian with the Canadian Federal Government under the *Indian Act* and is a Sawridge Member. Shelby’s mother was married to Paul Twinn at the time of Shelby’s birth and remained on the Sawridge Indian Reserve until Shelby was five years old.

Affidavit of Shelby Twinn at paras 6, 9 – 11 and 19.

24. Shelby is entitled to and is registered as an Indian. She is not listed as a Sawridge Member and accordingly, will lose her entitlement if the Sawridge Trustees’ application to vary the definition of Beneficiary under the 1985 Trust is successful. Shelby is directly affected by the Sawridge Trustees application.

Affidavit of Shelby Twinn at paras 4 and 9

25. Despite the fact that Shelby is a Beneficiary under the 1985 Trust, apart from Catherine Twinn, no one has contacted Shelby to discuss her being a Beneficiary.

Affidavit of Shelby Twinn at para 14

Deborah Serafinchon

26. The Applicant Beneficiary, Deborah Serafinchon ("**Deborah**") is the daughter of Chief Walter Twinn and Lillian McDermott. Deborah's mother is recognized as a Status Indian with the Canadian Federal Government under the Indian Act. Lillian McDermott's Indian Registry number has the Sawridge Band 454.

Affidavit of Deborah Serafinchon at paras 8 and 9

27. Deborah's biological parents were closely related. She believes that her paternal grandfather, Paul Twin (Nisotesis) and her maternal grandmother or great-grandmother, Amelia Nisotesis, were brother and sister and the children of Charles Nisotesis and Isabelle Courteoreille. Both her parents attended Indian Residential School at Grouard.

Affidavit of Deborah Serafinchon at para 10

28. Deborah was born an illegitimate child and was placed in foster care at birth and was raised in that system. As an adult she was able to locate her biological parents and was able to speak to them before their passing.

Affidavit of Deborah Serafinchon at paras 11 and 12

29. Patrick is Deborah's co-Applicant in the within motion and is her brother. Patrick Twinn and his mother are a Sawridge Member and a beneficiary under both Sawridge Trusts. Patrick is recognized as a Status Indian and is on the Sawridge Band list. Patrick Twinn is a Beneficiary of the 1985 Trust and the 1986 Trust.

Affidavit of Deborah Serafinchon at paras 13

30. Roland C. Twinn ("**Roland**"), Sawridge Trustee and current elected Chief of the Sawridge First Nation, is also Deborah's brother. Roland's mother, Theresa Auger chose to enfranchise for a large per capital pay out and is therefore not a member of the Sawridge First Nation nor a beneficiary of either of the Sawridge Trusts.

Affidavit of Deborah Serafinchon at para 14

31. Deborah is excluded as a Beneficiary of the 1985 Trust as a result of having been born an illegitimate female. Many of Deborah's half siblings, including Sawridge Trustee, Roland C. Twinn, could derive their entitlement to Beneficiary status under both Sawridge Trusts solely through the male line, their common father, the late Chief Walter Patrick Twinn. Her exclusion is discriminatory and it is this

type of discrimination that the Advice and Direction Application should seek to address.

Affidavit of Deborah Serafinchon at para 17

32. 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. Deborah’s discriminatory exclusion as a Beneficiary of the 1985 Trust is not remedied if the Sawridge Trustees proposed definition is accepted by the Court.

Affidavit of Deborah Serafinchon at paras 19 and 20

33. The Applicant Beneficiaries represent interests of people that are not currently before the Court as they are not Parties to the Action. It is highly unlikely that they are the only Beneficiaries or potential Beneficiaries with similar interests. Accordingly, it is in the public interest that their opinions, advice and direction as to the definition of “Beneficiaries” contained in the 1985 Trust are heard. It is critical to reaching a fair and just determination of the within Action that they be heard in this Action.

Affidavit of Patrick Twinn at para 27

Affidavit of Shelby Twinn at paras 23 and 24

Affidavit of Deborah Serafinchon at paras 23 and 24

34. The Applicant Beneficiaries seek advanced costs and full indemnification for costs of this Action from the 1985 Trust. Absent this award, there is no other realistic option for any of the Applicant beneficiaries to bring these issues to Court. Without financial assistance, the Applicant Beneficiaries, the majority of whom stand to lose their entitlement if the Sawridge Trustees proposed variation of the definition of Beneficiary under the 1985 Trust is successful, will not be able to proceed.

Affidavit of Patrick Twinn at para 26

Affidavit of Shelby Twinn at para 22

Affidavit of Deborah Serafinchon at para 22

IV. ISSUES

35. The issues to be determined are as follows:
- a. The addition of the Applicant Beneficiaries as Parties to the within Action; and
 - b. The entitlement of the Applicant Beneficiaries to advance costs and indemnification of legal fees from the 1985 Trust.

V. LAW AND ARGUMENT

A. The Applicant Beneficiaries Should be Added as Parties to the within Action

36. The Applicant Beneficiaries seek to be added as Parties to this Action so as to be able to properly represent their interests and if the definition of Beneficiary is to be varied, to propose alternate definitions and ultimately as beneficiaries, to consent to such a variation of trust proposal to this Court.
37. Allowing the Applicant Beneficiaries to participate as anything but litigation Parties prejudices their ability to properly represent their interests. As limited examples of this as non-parties to this Action: the Parties to this Action are not obligated to include the Applicant Beneficiaries in correspondence including settlement discussions; the Applicant Beneficiaries are not entitled to attend each other's questioning or the questioning of other Parties; and may be barred from seeking a costs award.

The Applicant Beneficiaries Patrick Twinn and Shelby Twinn are Beneficiaries under the current terms of the 1985 Trust

38. Beneficiaries in the 1985 Trust are defined as:

[...] persons who at that time qualify as members of the Sawridge Indian Band No. 19 pursuant to the provisions of the Indian Act R.S.C. 1970, Chapter I-6 as such provisions existed on the 15th day of April, 1982 and, in the event that such provisions are amended after the date of the execution of this Deed all persons who at such particular time would qualify for membership of the Sawridge Indian Band No. 19 pursuant to the said provisions as such provisions existed on the 15th day of April, 1982 [...]

39. The modern principle of statutory interpretation is that "words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".

Rizzo & Rizzo Shoes Ltd (Re), [1998] 1 SCR 27 at para 21. [Authorities Tab 1]

40. Accordingly, statutes are to "be read to give the words their most obvious ordinary meaning which accords with the context and purpose of the enactment in which they occur".

CanadianOxy Chemicals Ltd v Canada (Attorney General), [1999] 1 SCR 743 at para 14. [Authorities Tab 2]

41. Pursuant to section 2(1) of the *Indian Act* R.S.C. 1970, Chapter I-6 as it existed on April 15, 1982 ("1982 Act") a "member of a band" is defined as:

A person whose name appears on a Band list or who is entitled to have his name appear on a Band List [*emphasis added*]

42. "Indian" under the 1982 Act was defined as:

A person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian [*emphasis added*]

43. Pursuant to section 5 of the 1982 Act:

An Indian Register shall be maintained in the Department, which shall consist of Band Lists and General Lists and in which shall be recorded the name of every person who is entitled to be registered as an Indian.

44. Pursuant to section 6 of the 1982 Act:

The name of every person who is a member of a band and is entitled to be registered shall be entered in the Band List for that band, and the name of every person who is not a member of a band and is entitled to be registered shall be entered in a General List

45. Patrick qualifies for membership of the Sawridge Indian Band No. 19 pursuant to 1982 Act:

- a. Pursuant to section 11(1) (b) of the 1982 Act a person is entitled to be registered if that person is a member of a band; Patrick is a Sawridge Member;
- b. Pursuant to section 11(1)(c) of the 1982 Act, a person is also entitled to be registered if that person is a male person who is a direct descendant in the male line of a male person described in 11(1)(b); Patrick is the male descendant of Chief Walter Twinn; and
- c. Pursuant to section 11(1)(d) a person is entitled to be registered if that person is the legitimate child of a male person described in paragraph 11(1)(b). Patrick is the legitimate child of Chief Walter Twinn.

(Emphasis added)

46. Pursuant to section 10 of the 1982 Act:

Where the name of a male person is included in, omitted from, added to or deleted from a Band List or a General List, the names of his wife and his

minor children shall also be included, omitted, added or deleted, as the case may be. [*Emphasis added*]

Indian Act R.S.C. 1970, Chapter I-6 section 2(1), 5, 6, 10, and 11 [Authorities Tab 3]

47. Accordingly, as the wife and child respectively, of a male person who is a Sawridge Member and who is also entitled to be a Band Member pursuant to the 1982 Act, Melissa and Aspen are entitled to be included on the Band List under the 1982 Act and are therefore Beneficiaries of the 1985 Trust.
48. Shelby Twinn also qualifies for membership of the Sawridge Indian Band No. 19 pursuant to the 1982 Act. As Shelby points out in paragraph 19 of her Affidavit, she qualifies pursuant to section 11(1)(d) of the 1982 Act. As stated above, pursuant to section 11(1)(d) a person is entitled to be registered if that person is the legitimate child of a male person described in paragraphs 11(1)(b) or 11(1)(c).
49. Paul Twinn is a Sawridge Member; he is also a male descendant of Chief Walter Twinn and therefore qualifies as a member of the Sawridge Indian Band pursuant to section 11(1)(b) and 11(1)(c).
50. Based on the plain and ordinary reading of the 1982 Act, Patrick, Melissa, Aspen and Shelby are Beneficiaries of the 1985 Trust.

Deborah Serafinchon's exclusion from the 1985 Trust is the result of Discrimination under the 1982 Act

51. As an illegitimate female child who is the direct descendant in the male line of a Sawridge First Nation member, Deborah is not entitled to be a Beneficiary of the 1985 Trust as a result of the language in the 1985 Trust and the 1982 Act. Deborah's male siblings are pursuant to section 11(1)(c) as are her legitimate female siblings pursuant to section 11(1)(d).
52. If the 1982 Act and the 1985 Trust Deed are read to include both male and female offspring of either sexed parent equally, as well as illegitimate and legitimate offspring, then Deborah is entitled to be a Beneficiary under the 1985 Act.
53. Deborah's exclusion from the 1985 Trust is discriminatory. Such discrimination is not remedied by the Sawridge Trustee's proposal; Deborah is not a Sawridge Member and does not expect to be approved by Chief and Counsel to be one. The fact that there is an appeal process for membership applicants who are denied is irrelevant to the fact that Deborah is excluded from the 1985 Trust as a result of discriminatory language.
54. Deborah is the only person in this Action who represents a party that is being excluded as a Beneficiary of the 1985 Trust because of the discriminatory language in the 1985 Trust and the 1982 Act; if the Sawridge Trustees wish to vary the definition of Beneficiary because it is discriminatory, it would seem counterintuitive that they would oppose standing of a Party who is clearly excluded for that very reason.

The Applicant Beneficiaries and Beneficiaries like them are unrepresented in this Action but impacted by the application to vary the 1985 Trust

55. The Applicant Beneficiaries, as adult beneficiaries, are directly affected by any variation of the 1985 Trust.
56. In determining that minor Beneficiaries of the 1985 Trust required independent representation by the Office of the Public Trustee and Guardian, this Court confirmed that “there is some question as to the exact nature of the effects [of the variation proposed by the Sawridge Trustees], although it seems to be accepted by all of those involved on this application that some children presently entitled to a share in the benefits of the 1985 Sawridge Trust would be excluded if the proposed changes are approved and implemented.”

1985 Sawridge Trust v Alberta (Public Trustee), 2015 ABQB 799 at para 4
[Authorities Tab 4]

57. Similarly, there are adult Beneficiaries that will be excluded if the Sawridge Trustees proposal is approved and implemented; they too deserve to have their interests represented in this matter.
58. Although a Beneficiary under the current definition of “Beneficiary” in the 1985 Trust, Shelby is not a Sawridge Member under the current membership rules. 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, Shelby will lose her entitlement. All such persons should have a right to argue against this proposed variation if they choose.
59. The argument that a variation of the definition to be Band Membership does not affect anyone because those Beneficiaries who will be disentitled as a result can re-apply to gain beneficiary status lost through applying for membership (and be put to the cost of a lengthy appeal process) is not supported in law and is inappropriate.
60. As Beneficiaries, and in the case of Shelby, a Beneficiary who stands to lose her entitlement if the Sawridge Trustees are successful in their application, Patrick and Shelby should have a right to propose an alternate definition of “Beneficiary” and provide argument and comments to the Court as to the Sawridge Trustees proposed definition if they choose.
61. As a person excluded from the 1985 Trust on account of her gender and who will also be excluded if the Sawridge Trustees are successful in their Advice and Direction Application, Deborah’s opinion, advice and direction for the definition of “Beneficiaries” contained in the 1985 Trust is critical to reaching a fair and just determination of the within Advice and Direction Application.
62. These Applicant Beneficiaries wish to offer a proposal that is inclusive and non-discriminatory. Accordingly, it is in the public interest that their opinions, as to

the definition of "Beneficiaries" contained in the 1985 Trust brought forward by the Sawridge Trustees in the Advice and Direction Application are heard.

63. The Applicant Beneficiaries are seeking to be added as Parties at an ideal time in these proceedings, as "latecomers". This Action has a protracted procedural history, none of which steps directly addressed the matters that impact the Applicant Beneficiaries interests.
64. Had the Applicant Beneficiaries requested to join this Action in advance of now they would have undoubtedly incurred substantial legal fees, despite that the process thus far have not impacted their rights as Beneficiaries. As the Sawridge Trustees have previously noted:

[...] These proceedings have been extremely costly and time-consuming, and it is respectfully submitted that the cost and delay has not been in the best interests of the beneficiaries of the Trust ...

**Reply Brief of the Trustees for Special Chamber Case Management Meeting
on June 30, 2015, at para 22 filed on June 19, 2015 in the within Action and
posted publically on the Sawridge Trust website**

65. On August 24, 2016 this Court, addressed the next steps required for the determination of the definition of Beneficiary under the 1985 Trust. It is this stage in the proceedings that is relevant to the Applicant Beneficiaries to be Parties and as such a determination on this issue directly impacts the Applicant Beneficiaries and may adversely impact their entitlements.

**Transcript of Case Management Meeting before Honorable Justice Thomas
dated August 24, 2016, page 7 lines 27-33[Authorities Tab A]**

The Applicant Beneficiaries consent is required to vary the trust

66. The Sawridge Trustees apply to vary the definition of "Beneficiary" under the 1985 Trust. Pursuant to section 42(2) of the *Trustee Act* RSA 2000, c T-8, trust terms shall not be varied or terminated except with the approval of the Court of Queen's Bench. Section 42(3)(b)(ii) provides that any variation or termination of a trust provided for in (2) applies to variations or terminations by the consent of the beneficiaries. As per s. 42(6), before a proposed arrangement is submitted to the Court for approval it must have the consent in writing of all other persons who are beneficially interested under the trust and who are capable of consenting to it.
67. The Court does not have the authority to consent on behalf of the Applicant Beneficiaries, or any ascertainable adult Beneficiary pursuant to the *Trustee Act*. This is not an Action which is concerned with whether a class of beneficiaries is ascertainable, but whether the definition is discriminatory and should therefore be varied.

***Trustee Act* RSA 2000 C.T-8, [Authorities Tab 5]**

68. The Applicant Beneficiaries do not consent to varying the Trust in the manner proposed by the Sawridge Trustees. Accordingly, pursuant to the *Trustee Act*, the Sawridge Trustees proposed variation must fail.
69. The Applicant Beneficiaries agree that the definition of Beneficiary under the 1985 Trust may be discriminatory and apply to be added as Parties to this Action so as to propose a more inclusive and non-discriminatory definition of Beneficiary.

B. The Applicant Beneficiaries should be entitled to Advance Costs and full indemnification of legal fees

70. The Sawridge Trustees, the Office of the Public Trustee and Guardian and the Sawridge First Nation's legal fees are being paid from the Sawridge Trusts. As Beneficiaries or potential Beneficiaries, to whom the benefit of the 1985 Trust is actually intended, the Applicant Beneficiaries should be entitled to the same benefit.
71. The Sawridge Trustees have commenced an Action whereby the Beneficiaries of the 1985 Trust are directly affected and where certain of the Beneficiaries, including Shelby, stand to lose their entitlement altogether. It would be highly prejudicial to the Applicant Beneficiaries to allow for the Sawridge Trustees and the Sawridge First Nation to have their legal fees paid from the Sawridge Trusts in this Action and deny the same for the Applicant Beneficiaries.
72. Despite being unaware of the exact cost of proceeding with this matter, each of the Applicant Beneficiaries has testified to a general understanding of the cost of litigation and confirmed that they are not able to proceed without financial assistance. As Shelby stated:

Q So I am going to ask you how can you determine that you can not afford it if you don't know what the cost is?

A Because I am barely managing my personal costs. I guarantee to you an extra \$100 every month is not going to cover what needs to be, costs.

Transcript from Questioning of Shelby Twinn page 25, lines 10-14
See also, Transcript from Questioning of Deborah Serafinchon page 25, lines 13 -17
Transcript from Questioning of Patrick Twinn page 18, lines 1-21[Extracts of Evidence Tab C]

73. The Applicant Beneficiaries need for indemnification is further exemplified by the fact that the parties were required to request assistance from Ms. Catherine Twinn to cover the \$5000.00 retainer to begin this process.

Transcript from Questioning of Patrick Twinn page 15, lines 14-24[Extracts of Evidence Tab C]

74. Further, this matter is not contentious. This is an application by the Trustees for Advice and Direction as it relates to the construction and variation of a trust. In such circumstances the law supports the Applicant Beneficiaries position that their costs should be covered by the 1985 Trust.
75. The general rule is that costs follow the event (determination of the suit) unless, for good cause, the court orders otherwise.

Re Lotzkar Estate 50 D.L.R. (2d) 357 at para 2 [Authorities Tab 6]

76. Such good cause is ordinarily established in non-adversarial matters, for example, where the action is mainly seeking the court's direction on the construction of trust documents.

In Taylor v. A.T.A. 2002 ABQB 554 at para 25 [Authorities Tab 7]
Deans v. Thachuk, 2005 ABCA 368 ("*Dean*") citing *Buckton v. Buckton*, [1907] 2 Ch. 406 (A.C.J.) at para 43 [Authorities Tab 8]

77. It is commonly accepted that where an action is brought by trustees for guidance from the court as to the construction or the administration of a trust "the costs of all parties necessarily incurred for the benefit of the estate will be paid from the fund. In addition, where an action is brought by others relating to some difficulty of construction or administration of a trust that would have justified an application by the trustees, the costs of all parties necessarily incurred for the benefit of the trust will also be paid from the fund.

Deans supra, at para 43 [Authorities Tab 8]

78. The court will also consider whether:
- the order will fetter the trial judge's discretion to award costs;
 - the proceedings are unduly protracted by the beneficiary;
 - the clarification sought will be of importance not only to the party beneficiary(ies) but to other members of the trust; and
 - financial hardship encountered the party beneficiary(ies) in meeting the litigation costs.

Huang v. Telus Corp. Pension Plan (Trustee of) 2005 ABQB 40 at paras 150-152 [Authorities Tab 9]

79. This is not an adversarial action; it is an action for Advice and Direction with respect to varying the definition of Beneficiary contained in the 1985 Trust.
80. The Applicant Beneficiaries are entitled, and in fact obligated to be involved in this Action in that, at the very least, their consent must be obtained for the Court to allow the trust to be varied. Accordingly, it is difficult to envision a scenario whereby the Court would award costs against the Applicant Beneficiaries with

respect to this Action, however, in any event, the Applicant Beneficiaries request for advanced costs and indemnification of their legal fees has no bearing on whether costs could later be awarded against them.

81. Although this Action has been protracted to date, this is certainly not the result of conduct by the Applicant Beneficiaries. To the contrary, as stated above, the Applicant Beneficiaries are requesting to become Parties to this litigation at the first instance where the issue affecting their interests and those of all Beneficiaries are to be heard.
82. There is no prejudice to the Sawridge Trustee in having the Applicant Beneficiaries joined as Parties to this Application. The Applicant Beneficiaries would be highly surprised if the Sawridge Trustees, who are legally obligated to represent their best interests, opposed the Applicant Beneficiaries representing those interests in this matter. Clearly, a determination of whether the definition of Beneficiary is discriminatory and whether as a result it should be varied and how it should be varied is of importance to the Applicant Beneficiaries.
83. Finally, as stated above in paragraph 64 and below, the Sawridge Trustees have candidly commented on the extreme cost of being involved in these proceedings:

...almost 50% of the annual funding provided to the trusts from the companies has been paid in legal fees in this and related litigation.

**Brief of the Trustees - Distribution Proposal for 24 Aug 2016 Application
Tab 2 para. 3, page 5 and posted publically on the Sawridge Trust website**

84. The issues raised by the Sawridge Trustees' Advice and Direction Application are potentially complex issues of trust and aboriginal law and statutory construction. Given the nature of the request, it would be extremely difficult, if not impossible, for an individual to effectively be self-represented in the proceedings or alternatively, fund the litigation out of pocket.
85. Although not the case here, should the Court determine that this matter is adversarial, where litigation involving a trust is determined to be adversarial, beneficiaries of the trust can still seek interim costs from the court. To be entitled to advanced costs and indemnification of costs in adversarial trust litigation, the applicant must establish that:
 - a. The party seeking the order must be impecunious to the extent that, without such an order, that party would be deprived of the opportunity to proceed with the case;
 - b. The claimant must establish a prima facie case of sufficient merit to warrant pursuit that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means;

- c. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases; and
- d. There must be “special circumstances” emphasizing that advance costs should be granted in exceptional cases;

British Columbia (Minister of Forests) v. Okanagan, 2003 SCC 71 at para 36
[Authorities Tab 10]

Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue Agency), 2007 SCC 2 (S.C.C.) at para 37 [Authorities Tab 11]

R. c. Caron (2009), 446 A.R. 362 (Alta. C.A.) at para 19 [Authorities Tab 12]

- 86. With respect to the first requisite element, the Applicant Beneficiaries are impecunious to the extent that without such an order they will be deprived of the opportunity to proceed with this case.

Affidavit of Shelby Twinn at para 22

Affidavit of Patrick Twinn at para 26

Affidavit of Deborah Serafinchon at para 22

- 87. In the alternative, if the Applicant Beneficiaries are not impecunious under the usual test, the complexity of this matter, and its protracted procedural history causing extraordinary legal fees could pose a severe burden to the Applicant Beneficiaries and could lead to impecuniosity.
- 88. The participation of the Applicant Beneficiaries as Parties to the within Action is necessary for the just and fair resolution of this matter. The Applicant Beneficiaries request to propose an alternate arrangement to vary the definition of Beneficiary under the 1985 Trust has merit and it would be contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the Applicant Beneficiaries financial means. A determination of their interests is of public importance and has not been resolved to date.

C. Catherine Twinn

- 89. The involvement of the Applicant Beneficiaries with Catherine Twinn should not impact their ability to be named as Parties nor to be indemnified for their legal fees from the 1985 Trust. In particular, Patrick Twinn is her son. Having Catherine Twinn represented in this Action does not substitute the Applicant Beneficiaries being named and represented by their own counsel.
- 90. How the Applicant Beneficiaries came to know of the Sawridge Trustee’s proposal and its potential impact on them is irrelevant to this proceeding. What is relevant is the fact that Patrick and Shelby are Beneficiaries of the 1985 Trust whose consent is required for the Sawridge Trustees proposal to vary the 1985 Trust to succeed.

91. The Questioning of the Applicant Beneficiaries, which took place on September 22, 2016, exemplified that the Applicant Beneficiaries do not fully comprehend their legal rights and require representation to assist them with this.

VI. CONCLUSION

92. The Applicant Beneficiaries agree with the Sawridge Trustees that the definition of Beneficiary under the 1985 Trust may be discriminatory, and like the Sawridge Trustees, believe that a non-discriminatory definition can be determined. The Applicant Beneficiaries position is that, if the definition is to be varied, then it should be done in a manner that actually resolves the issue of discrimination.
93. It is imperative that the Applicant Beneficiaries be named as Parties in this Action in order to fully participate in this matter that impacts them directly and to which they must consent and it is appropriate and necessary that they be indemnified for their legal costs in such participation.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 30TH DAY OF SEPTEMBER, 2016

BORDEN LADNER GERVAIS LLP

Per: 

Nancy L. Golding Q.C./Sandi Shannon
Counsel to the Applicant Beneficiaries