

COURT OF APPEAL FILE NUMBER: **1603-0026AC**

TRIAL COURT FILE NUMBER: 1103 14112

REGISTRY OFFICE: Edmonton

IN THE MATTER OF THE TRUSTEE ACT,
R.S.A. 2000, c. T-8 AS AMENDED, and

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

APPLICANT: PUBLIC TRUSTEE OF ALBERTA

STATUS ON APPEAL: Respondent

RESPONDENTS: ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN,
BERTHA L'HIRONDELLE and CLARA MIDBO, As Trustees for the
1985 Trust

STATUS ON APPEAL: Respondents

RESPONDENT: SAWRIDGE INDIAN BAND NO. 19, NOW KNOWN AS THE SAWRIDGE
FIRST NATION

STATUS ON APPEAL: Respondent

RESPONDENT: CATHERINE TWINN, As a Trustee of the 1985 Trust

STATUS ON APPEAL: Appellant

DOCUMENT: **FACTUM**

Appeal from the Decision of
The Honourable Mr. Justice D.R.G Thomas
Dated the 17 day of December, 2015
Entered the 17 day of December, 2015

FACTUM OF THE APPELLANT

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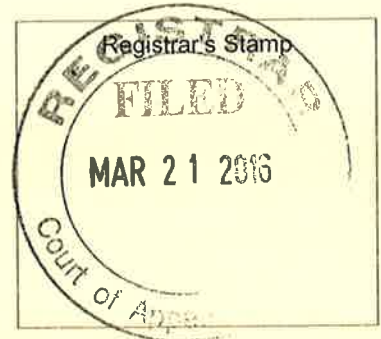
Let the within Factum be filed despite
non-compliance with the following Rules/Practice Directions:

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Dated: March 21, 2016



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Registrar's Stamp

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INTRODUCTION

1. The Appellant, Catherine Twinn in her capacity as a trustee, is one of five trustees of the Sawridge Band Inter Vivos Settlement Created by Chief Walter Patrick Twinn (the "Settlor"), of the Sawridge Indian Band, No. 19, now known as Sawridge First Nation (the "First Nation"), on April 15, 1985 (the "1985 Trust").
2. Court of Queen's Bench Action No. 1103 – 14112 (the "Action"), relates to a proceeding commenced by the trustees of the 1985 Trust (the "Trustees") to seek advice and direction of the Court in relation to, *inter alia*, the definition of "beneficiary" pursuant to the 1985 Trust deed (the "Deed").
3. The trustees of the 1985 Trust commenced the Action without filing a constating application. By Order of Justice D.R. Thomas issued August 31, 2011, the Trustees were directed to file a constating application (the "August 2011 Order"). To date, the Trustees have failed to comply with this direction. As a result, the relief being sought by the Trustees in the Action has been amorphous.
4. The Public Trustee of Alberta ("OPT") was appointed by Order of Justice Thomas issued June 12, 2012 and filed September 20, 2012 to be the litigation representative for the minor children of the First Nation members along with any minors who are children of applicants seeking membership in the First Nation.
5. The Action has been case managed by Justice Thomas since effectively its inception (the "Case Management Judge").
6. The Appellant appeals the decision of the Case Management Judge resulting from a production application brought by the OPT that, *inter alia*, sought records from the First Nation and which was filed on July 16, 2015 (the "Application").
7. The substance of the argument from all parties at the Application mainly related to the obligation of the First Nation to produce records and whether the records were relevant and material to the Court directed mandate of the OPT in the Action or otherwise properly producible.

8. The Case Management Judge issued reasons for decision dated December 17, 2015 (the "Reasons for Decision"). The Reasons for Decision dismissed the Application and also made various orders that were designed to "refocus" the litigation. At the time of filing this Factum, the Reasons for Decision have not been reduced to an Order.
9. Included in the Reasons for Decision were directions on significant matters that were not before the Court, more particularly:
 - (a) Direction on who the beneficiaries of the 1985 Trust are;
 - (b) Directing a distribution of the assets of the 1985 Trust; and
 - (c) Prohibiting inquiry by the Court, the Trustees and the OPT into the First Nation membership process.
10. If the current "beneficiary" designation pursuant to the 1985 Trust Deed is varied or otherwise confirmed to be membership in the First Nation, as directed, this will cause persons who would otherwise be beneficiaries of the 1985 Trust to be excluded and have lasting consequences on their lives and the lives of their descendants for generations to come.
11. In addition, serious concerns in relation to the present membership process employed by the First Nation have been put before the Case Management Judge, and it is imperative that the parties be given due process to fulsomely present their positions on these issues before a decision on beneficiary definition is rendered.
12. Ms. Twinn submits that the Case Management Judge exceeded his jurisdiction, did not provide procedural fairness and made errors in law in the case management directions contained in the Reasons for Decision.

PART 1 FACTS

The 1985 Trust

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

"all persons who at that time qualify as members of the Sawridge Indian Band No. 19 pursuant to the provisions of the Indian Act R.S.C. 1970, Chapter I-6 as such provisions existed on the 15th day of April, 1982 and, in the event that such provisions are amended after the date of the execution of this Deed all persons who at such particular time would qualify for membership of the Sawridge Indian Band No. 19 pursuant to the said provisions as such provisions existed on the 15th day of April, 1982 and, for greater certainty, no persons who would not qualify as members of the Sawridge Indian Band No. 19 pursuant to the said provisions, as such provisions existed on the 15th day of April, 1982, shall be regarded as "Beneficiaries" for the purpose of this Settlement whether or not such persons become or are at any time considered to be members of the Sawridge Indian Band No. 19 for all or any other purposes by virtue of amendments to the Indian Act R.S.C. 1970, Chapter I-6 that may come into force at any time after the date of this execution of this Deed or by virtue of any other legislation enacted by the Parliament of Canada or by any province or by virtue of any regulation, Order in Council, treaty or executive act of the Government of Canada or any province or by any other means whatsoever; provided, for greater certainty, that any person who shall become enfranchised, become a member of another Indian band or in any manner voluntarily cease to be a member of the Sawridge Indian Band No 19 under the Indian Act R.S.C. 1970, Chapter I-6, as amended from time to time, or any consolidation thereof or successor legislation thereto shall thereupon cease to be a Beneficiary for all purpose of this Settlement"

Appellant's Extracts of Key Evidence, pg. A1 and A76

14. On April 17, 1985, two days after the 1985 Trust was settled, there were meaningful changes made to the *Indian Act*, R.S.C. 1970, c. I-6 as a result of *Bill C-31, An Act to amend the Indian Act*, 33-34 Eliz II c.27 ("*Bill C-31*"). The *Bill C-31* amendments, amongst other matters, affected who would qualify for membership in a band and the band membership process generally. A major change was that a first nation could elect to take control over their own band membership list rather than the list being managed by the Department of Indian Affairs and Northern Development ("DIAND"), as had previously been the practice. Following the *Bill C-31* amendments, the Sawridge First Nation elected to take control of its band list and continues to do so at present.

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

Stoney v. Sawridge First Nation, 2013 FC 509 at para. 4, Appellant's Book of Authorities ("*Stoney*") TAB 2

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

"all persons who at that time qualify as members of the Sawridge Indian Band under the laws of Canada in force from time to time including, without restricting the generality of the foregoing, the membership rules and customary laws of the Sawridge Indian Band as the same may exist from time to time to the extent that such membership rules and customary laws are incorporated into, or recognized by, the laws of Canada".

Appellant's Extracts of Key Evidence, pg. A1 and A76

16. Effectively, the 1985 Trust provided for all persons who would qualify for First Nation band membership pre *Bill C-31* amendments and the 1986 Trust provides for all First Nation band members post *Bill C-31* amendments.

17. At present, there are approximately 474 persons associated with the First Nation at DIAND, but only 44 persons are on the First Nation membership list.

Transcript Volume 1, Tab 3 at page 95, line 16 to 24

Court of Queen's Bench Action No. 1103-14112

18. The Action was commenced by way of the August 2011 Order. The August 2011 Order directed the Trustees of the 1985 Trust to bring an application for advice and direction for the purpose of:

- (a) Seeking direction with respect to the definition of "Beneficiaries" contained in the 1985 Trust, and, if necessary, to vary the 1985 Trust to clarify the definition of "Beneficiaries"; and
- (b) Seeking direction with respect to the transfer of assets to the 1985 Trust.

Appellant's Extracts of Key Evidence, pg. A274

19. The application the Trustees were directed to file by virtue of the August 2011 Order has never been filed.

20. On June 12, 2012, Justice Thomas issued a decision in the Action that, amongst other matters, appointed the OPT as the litigation representative for certain minor children whose parents were or had applied to be members of the First Nation ("**Sawridge #1**").

1985 Sawridge Trust v. Alberta (Public Trustee), 2012 ABQB 365 at para. 33,
Appellant's Book of Authorities

TAB 3

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

Sawridge #1, supra, at paras. 28-29,
Appellant's Book of Authorities

TAB 3

22. In Sawridge #1 the Court took notice that there were allegations that the First Nation membership application and admission process may be "suspect" and that those issues would be reviewed and addressed in the substantive argument on the adoption of a new definition of "beneficiaries" for the 1985 Trust.

Sawridge #1, supra, at para. 29, Appellant's
Book of Authorities

TAB 3

23. The Court in Sawridge #1 went on to find that

"I conclude that it is entirely within the jurisdiction of this Court to examine the Band's membership definition and application processes, provided that:

1. Investigation and commentary is appropriate to evaluate the proposed amendments to the 1985 Sawridge Trust, and

2. The result of that investigation does not duplicate the exclusive jurisdiction of the Federal Court to order "relief" against the Sawridge Band Chief and Council.

Put another way, this Court has the authority to examine the band membership processes and evaluate, for example, whether or not those processes are discriminatory, biased, unreasonable, delayed without reason, and otherwise breach Charter principles and the requirements of natural justice. However, I do not have authority to order a judicial review remedy on that basis because that jurisdiction is assigned to the Federal Court of Canada."

Sawridge #1, supra, at paras. 53-54,
Appellant's Book of Authorities

TAB 3

24. Sawridge #1 was appealed by the Trustees in respect of the costs rulings in favour of the OPT. Sawridge #1 was upheld by the Court of Appeal on June 5, 2013 ("**Sawridge #2**").

25. Since Sawridge #2 was issued, the OPT has proceeded to carry out its mandated investigation into the impact on minors of the proposed variation to the "beneficiary" definition.
26. As part of its investigation, the OPT filed an amended application on July 16, 2015 that, amongst other matters, sought the production of records from the First Nation (the "Application"). The Application was heard over the course of September 2 and 3, 2015 before the Case Management Judge.

Appeal Record, p. P20 to p. P32

27. At the Application, RMRF LLP and Dentons LLP represented the collective group of Trustees of the 1985 Trust. Given that Catherine Twinn represents the dissenting view amongst the Trustee group, McLennan Ross LLP represented Ms. Twinn at the application so that her position would be put forward. In addition to Dentons and RMRF, the majority trustee group also had the benefit of representation by Bryan & Company LLP at the application.
28. At the Application, an unfiled Affidavit of Catherine Twinn was raised in argument. As a result of the submission of the majority Trustee group, Ms. Twinn filed her Affidavit on September 3, 2015 and provided a copy to the Court. The Affidavit, amongst other matters, spoke to Ms. Twinn's concerns about the First Nation membership process based on her first hand observations as a member of the First Nation membership committee, the widow of Chief Walter Twinn and a Trustee (the "Twinn Affidavit").

Transcript Volume 1, Tab 3 at page 142, line
30 to 41 and at page 143, line 1 to 6

Appellant's Extracts of Key Evidence, pg. 162

29. The Reasons for Decision that are the subject of this appeal were issued by the Case Management Judge on December 17, 2015 ("**Sawridge #3**"). At present, the Reasons for Decision have not been reduced to an Order.

PART 2 GROUNDS OF APPEAL

30. The Appellant appeals the decision of the Case Management Judge on three grounds that amount to errors in law:
- (a) It is respectfully submitted that the Case Management Judge overreached his jurisdiction by directly or indirectly granting final relief on matters which were not before the Court;
 - (b) It is respectfully submitted that the Case Management Judge failed to provide procedural fairness in reaching his decision; and
 - (c) It is respectfully submitted that the Case Management Judge incorrectly found as a matter of law, that the definition of "beneficiary" in the 1985 Trust could be varied without the consent of the current beneficiaries who were capable of providing consent;

PART 3 STANDARD OF REVIEW

31. Sawridge #3 is the decision of a case management judge.
32. The standard of review depends upon the issues involved - there is not one standard of review for a case management judge.
- Carbone v Whidden*, 2013 ABCA 346 at para. 22, Appellant's Book of Authorities **TAB 5**
33. Questions of law engage the correctness standard.
- Northland Bank v. Wettstein* (1997), 200 A.R. 150 at para. 9 (C.A.), Appellant's Book of Authorities **TAB 6**
34. Exercises of discretion will be reviewed on a reasonableness standard.
- Decock v Alberta*, 2000 ABCA 122 at para. 13, Appellant's Book of Authorities **TAB 7**
35. If a case management judge fails to give sufficient weight to relevant factors, proceeds arbitrarily or on wrong principles or an erroneous view of the facts, or if there is likely to be a failure of justice, appellate intervention is warranted.
- Broeker v. Bennett Jones*, 2010 ABCA 67 at para 13, Appellant's Book of Authorities **TAB 8**

PART 4 ARGUMENT

A. Overreached Jurisdiction

36. The Appellant contends that the Case Management Judge erred in his exercise of discretion by granting final relief in the substance of the Action.
37. It is trite law that a case management judge may not decide the substance of the action and may only grant interlocutory relief or procedural orders.
38. Rule 4.14 of the *Rules of Court* sets out the authority of a case management judge.

Alberta Rules of Court, AR 24/2010, Rule 4.14,
Appellant's Book of Authorities **TAB 9**

39. In *Sawridge #3*, the Case Management Judge denies the Application for production against the First Nation. The Case Management Judge goes on to "refocus" the litigation by providing a four step process that will ultimately culminate in general and residual distributions of the 1985 Trust assets.

Appeal Record, p. F15, para. 26 and p. F16,
para. 37 and p. F17, para. 38.

40. With respect, the refocusing imposed by the Case Management Judge had the effect of granting final relief on one of the two matters brought for advice and direction by the Trustees, and further, providing direction on matters for which advice and direction was never sought.

Appellant's Extracts of Key Evidence, pg. A274

41. The four tasks directed by the Case Management Judge are as follows:
 - (a) Task 1 - Develop a distribution scheme of the 1985 Trust;
 - (b) Task 2 - Examine potential irregularities related to the settlement of assets in the 1985 Trust;
 - (c) Task 3 - Identify pool of potential beneficiaries; and finally
 - (d) Task 4 - Make general and residual distributions of the assets of the 1985 Trust.

Appeal Record, p F16, para. 37

Beneficiary Status

42. In Sawridge #3, the Case Management Judge directed that what is pertinent when determining the pool of potential beneficiaries under Task 3 is to identify the potential recipients of a distribution of the 1985 Trust, which include the following categories:
- (a) Adult members of the First Nation;
 - (b) Minors who are children of members of the First Nation;
 - (c) Adults who have unresolved application to join the First Nation;
 - (d) Children of adults who have unresolved applications to join the First Nation;
 - (e) Adults who have applied for membership in the First Nation but have had that application rejected and are challenging that rejection by appeal or judicial review; and
 - (f) Children of persons in category (e) above.

Appeal Record, p F17, para. 56

43. The categories set out by the Case Management Judge do not consider the current beneficiaries of the 1985 Trust, namely those entitled to band membership pursuant to the pre *Bill C-31* amendments.
44. The effect of the Case Management Judge's refocusing has caused the definition of "beneficiaries" to be varied to membership in the First Nation as it exists today.
45. This is supported by the fact that Sawridge #3:
- (a) Limits the scope of the representative capacity of the OPT to only those persons in categories 42(b) and potentially those in categories 42(d) and 42(f). Significantly, the OPT's authority has not been extended to identifying those minors who would have been entitled to beneficiary status under the original definition;

Appeal Record, p F17, para. 57

- (b) Finds that the current minor beneficiaries of the trust have been ascertained and that the only potential minor beneficiaries are those

whose parents have a pending or unsuccessful application for membership in the First Nation (the "Potential Minor Beneficiaries");

Appeal Record, p F18, para. 48

- (c) Finds that inquiry into litigation, procedures and history of past and resolved membership disputes are not relevant to the proposed distribution of the 1985 Trust; and

Appeal Record, p F18, para. 49

- (d) Finds that the Court's function is not to duplicate or review the manner in which the First Nation receives and evaluates applications for membership.

Appeal Record, p F19, para. 54

- 46. The totality of Sawridge #3 confirms that the Case Management Judge has determined that the "beneficiaries" of the 1985 Trust are the members of the First Nation and the only remaining consideration is how to address those persons with pending applications for membership or who have appealed a membership decision.

- 47. Determining the beneficiaries was one of the matters in the Action for which the Trustees were seeking advice and direction as set out in the August 2011 Order.

Appellant's Extracts of Key Evidence, pg. A274

- 48. This case management direction is outside the jurisdiction of the Case Management Judge as it grants final relief on one of the substantive issues in the Action and as such is not a reasonable exercise of discretion.

Essa (Township) v. Guergis, 1993 CarswellOnt 473 (Ont Ct. Js) at para. 51, Appellant's Book of Authorities **TAB 10**

Distribution

- 49. The August 2011 Order does not address advice and direction on a distribution of the 1985 Trust assets to its beneficiaries.

Appellant's Extracts of Key Evidence, pg. A274

50. The 1985 Trust provides for terms of distribution to its beneficiaries and a variation of these terms, or advice and direction on these matters, has never been applied for.

Appellant's Extracts of Key Evidence, pg. A1
and pg. A76

51. It is especially concerning that the distribution scheme proposed in Sawridge #3 appears to contemplate the possibility of a one time distribution to each member of the First Nation and that all further assets of the 1985 Trust will be held for the benefit of future members only.

Appeal Record, p F20, paras. 62-63 and p.
F21, paras. 64

52. This was not what was contemplated by the Settlor as reflected in the terms of the Deed.

53. Such a variation should not be made under the guise of being an ancillary procedural order - it is clearly not. This direction is outside the scope of the jurisdiction of the Case Management Judge and, as such, is not a reasonable exercise of discretion.

B. Failed to Provide Procedural Fairness

54. The Application was for production of records.

Appeal Record, p. P20 to p. P32

55. The Application did not seek advice and direction on the definition of "beneficiaries" and was certainly not seeking judicial assistance with the distribution of the 1985 Trust assets.

56. The "refocusing" of the Action had the effect of providing relief on issues that were not before the Court and in the case of the direction on distribution, were never before the Court.

57. It is a fundamental principle of natural justice that an affected party be given notice of an application and the opportunity to attend and be heard.

Canada (Citizenship and Immigration) v. Ishmael, 2007 FC 212 at para. 20, Appellant's Book of Authorities **TAB 11**

58. While a case management judge has broad authority, they should not stray from the confines of the application before them without notice to the parties.

Watts v Canadian Lawyers Insurance Association, 2014 ABCA 33 at para. 24, Appellant's Book of Authorities **TAB 12**

59. The Appellant submits that this principle is heightened by the fact that a constating application has not been filed, despite the August 2011 Order.

60. In *Sawridge #1* the Case Management Judge himself held that the allegations against the First Nation and their membership process would be reviewed and addressed in the substantive argument on the adoption of a new definition of "beneficiaries" for the 1985 Trust. Yet, in *Sawridge #3*, the Case Management Judge adopts the new definition of beneficiary without any formal review, notice or argument.

Sawridge #1, supra, at para. 29, Appellant's Book of Authorities **TAB 3**

61. Further, the Case Management Judge made directions on the scope of the OPT's and Trustee's ability to review and consider the First Nation membership process without notice that these issues would be before the Court and without permitting the Appellant to make submissions on the same.

Appeal Record, p. F19 at para. 55 and p. F21 at para. 69

62. The ruling of the Case Management Judge held that the OPT, the Trustees and the Court itself are prohibited from reviewing the manner in which the First Nation receives and evaluates applications for membership.

63. This is a marked departure from the ruling in *Sawridge #1* on this subject.

Sawridge #1, supra, at paras. 53-54, Appellant's Book of Authorities **TAB 3**

64. With respect, it was not reasonable for the Case Management Justice to deviate from his findings in Sawridge #1 without notice to the parties that a variance to his prior order in Sawridge #1 was being considered.

65. A 2000 decision of the Alberta Court of Appeal addressed a similar issue. In this decision, a case management judge also varied one of their prior case management orders without notice to the parties that a variation was being considered. The Court of Appeal in this decision held that it:

"was an error on the part of the case management judge to make an order in these circumstances without proper notice to the appellant and without supporting the application with evidence."

Deiure v Deiure, 2000 ABCA 328 at para. 3,
Appellant's Book of Authorities **TAB 13**

66. In *Deiure*, the Court of Appeal set aside the order on appeal.

Deiure, supra, at para. 4, Appellant's Book of
Authorities **TAB 13**

67. Ms. Twinn respectfully submits that it was procedurally unfair for the Case Management Judge to vary his ruling in Sawridge #1 and to determine that the propriety of the First Nation membership process cannot be reviewed by the Trustees without notice to the parties.

68. It is imperative that the Trustees be able to review the First Nation membership process in order to consider the following:

- (a) To consider how the proposed variation will impact the Trustees' ability to meet their fiduciary duties;
- (b) To consider whether the proposed variation is appropriate for the beneficiaries.

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

Barry v. Garden River Band of Ojibway Nation
No 14, 1997 CarswellOnt 1812 (CA), at para
40, Appellant's Book of Authorities **TAB 14**

70. As part of considering the variation, the Trustees must understand whether the First Nation membership process will allow them to fulfill this fiduciary duty.
71. If the First Nation membership process is flawed, this means that those persons who should be beneficiaries of the 1985 Trust may not be reflected on the First Nation membership list.
72. Ms. Twinn submits that if the definition is varied, the Trustees' fiduciary duty requires them to reasonably inform themselves as to whether those persons that should be admitted First Nation members are in fact being admitted. If the Trustees become aware that the membership process is being operated in an arbitrary, unfair or otherwise unlawful manner, it is incumbent upon them to act.
73. Given the obvious "structural" conflict between many of the Trustees' overlapping roles in the First Nation, this should heighten the concerns of the Court and the Trustees.
74. The Trustees are subject to the inflexible rule of not allowing a fiduciary to be in a position where his interest and duty conflict, unless expressly otherwise provided.
Louie v. Louie, 2015 BCCA 247 at para. 23,
Appellant's Book of Authorities **TAB 15**
75. Also, if the First Nation membership process is defective, it is not appropriate for the variation to occur as proposed. It is not appropriate for the Trustees to seek a variation of the Settlor's intent to a new definition that, *ab initio*, utilizes a flawed process. Nor is it appropriate for the Court to approve the same.
76. We respectfully submit, given the significant consequences of the case management directions, it was an unreasonable exercise of discretion for the Case Management Judge to make such directions without notice to the parties.
77. Further, even with the limited evidence before the Court on the functioning of the First Nation membership process, there is a demonstrated concern that heightens the need for procedural fairness.

78. The Case Management Judge found that since Sawridge #1, the Federal Court has ruled on the First Nation membership process in *Stoney v. Sawridge First Nation*. As such, it is presently no longer needed or appropriate, for this Court to address the subject.

Appeal Record, p. F16 at paras. 33 and 35

79. With respect, the *Stoney* decision does not stand for the proposition that the First Nation membership process is operating lawfully. In fact, the Federal Court found that it was unable to find, one way or the other, whether the membership process was biased due to a lack of evidence placed before it.

Stoney, supra, at para. 20, Appellant's Book of
Authorities **TAB 2**

80. In *Stoney*, the Federal Court finds that:

"Indeed, it is surprising that this issue was not fully briefed by the Applicants in their affidavits or in their written and oral arguments. It is of equal concern that no cross-examinations were carried out to provide an evidentiary foundation for this allegation of institutional bias. The issue of institutional bias in the context of small First Nations with numerous family connections is nuanced and the issue cannot be resolved on the record before me."

Stoney, supra, at para. 21, Appellant's Book of
Authorities **TAB 2**

81. As such, to find that because of *Stoney* there is no need, nor is it appropriate, for the Court to address the First Nation membership process, is a clear misapplication of the *Stoney* decision and an error in law.
82. Also, while the Federal Court may have exclusive jurisdiction to adjudicate first nation membership disputes, that does not mean that the jurisdiction of the Alberta Court of Queen's Bench to provide advice and direction on trusts as provided for in the *Trustee Act, RSA 2000, c. T-8 (the "Trustee Act")* and to protect the interests of minors as provided for in the *Public Trustee Act, SA 2004, c P-44.1* is ousted, modified or diminished simply because a first nation membership process is involved.

83. Further, this finding completely fails to consider the evidence that was before the Court on the Application from the Appellant who was a member of the First Nation membership committee and has intimate first hand knowledge of how the membership process is operating.

84. The Twinn Affidavit was provided to the Case Management Judge during the Application and provided sworn evidence on the following issues:

- (a) Preferential processing of membership applications for Chief Roland Twinn's children;
- (b) Bias in the First Nation membership decision making process;
- (c) Delay in processing membership applications; and
- (d) Improper use of 1986 Trust assets for the benefit of the First Nation.

Appellant's Extracts of Key Evidence, pg. A1

85. In addition, there were four sworn Statements provided by persons who are potential beneficiaries of the 1985 Trust and they deposed to serious concerns with the functioning of the First Nation membership process (the "Third Party Statements").

Appellant's Extracts of Key Evidence, pg.
A164, A263, A267 and A271

86. The Twinn Affidavit, in conjunction with the Third Party Affidavits, raise serious issues with how the First Nation membership process is functioning. This evidence was not even considered by the Case Management Judge in the Reasons for Decision.

87. In reference to his direction in Sawridge #1 that a fulsome investigation into the First Nation membership process was required, the Case Management Judge stated that: "I knew those words would come back to haunt me".

Transcript Volume 1, Tab 3 at page 18, line 18-19

88. This is an important issue that will impact countless lives. It is important that the Court fulsomely examine this issue, despite the fact that it is a complicated task.

C. Improper Variation

89. The relief granted by the Case Management Judge in an attempt to refocus the Action, had the effect of varying the definition of “beneficiary” set out in the Deed.
90. Section 42 of the *Trustee Act* sets out the legislated requirements when a variation of the terms of a trust is sought. In order to vary a trust, the approval of the Court of Queen's Bench is required.

Trustee Act, s. 42(2)

TAB 16

91. Section 42(6) of the *Trustee Act* provides that prior to submitting an application for approval of a variation to the trust to the Court of Queen's Bench, written approval of all beneficiaries who are capable of consenting must be obtained.

Trustee Act, s. 42(6)

TAB 16

92. Written approval of all beneficiaries who are capable of consenting has not been put before the Court. In fact, the Court has not even been advised of who these people are.
93. The Appellant, who believes she is a beneficiary of the 1985 Trust pursuant to its original definition, does not consent to a variation.
94. Further, Section 42(7) of the *Trustee Act* provides that when exercising its discretion to approve a variation of trust on behalf of those persons enumerated in 42(5) of the *Trustee Act*, the Court may not approve an arrangement unless it is satisfied that the arrangement appears to be for the benefit of, amongst others, minor persons.

Trustee Act, s. 42(5) and (7)

TAB 16

95. As such, given the Court must approve that the arrangement will be of benefit to the minors, the OPT must be able to investigate and report to the Court on what imposing a First Nation membership definition will mean for the affected minors.
96. This does not mean that the OPT or the Trustees are duplicating the role of the Federal Court.

97. If the Trustees are seeking a variation of the “beneficiary” definition to First Nation membership, the Court of Queen’s Bench not only has the jurisdiction, but is required to consider how this new arrangement will impact minors and whether it is of a “justifiable character”.
98. The Appellant submits that it is impossible to evaluate what the new definition will mean for minors (or anyone for that matter) without examining how the First Nation membership process is functioning.
99. This issue should be especially of concern to the Court given the Case Management Judge’s findings that the First Nation has a well-established past practice of “relentless resistance to admission into membership of aboriginal women who had married non-Indian men...”.

Appeal Record, p. F18 at para. 50

100. While investigating the membership process employed by the First Nation is clearly a thorny task, this is all the more reason why this issue cannot be addressed in a perfunctory manner.
101. With respect, the Case Management Judge erred in law by varying the definition of beneficiary without any regard for the variation process mandated by the *Trustee Act* and without considering whether a variation is even necessary.

PART 5 RELIEF SOUGHT

102. The Appellant seeks:
 - (a) an Order setting aside the Case Management Order in Sawridge #3; and
 - (b) an Order awarding the Appellant costs of this appeal on a solicitor-client basis payable from the assets of the 1985 Trust.
103. All of which is respectfully submitted.

Estimate of time required for the oral argument: 45 minutes.¹

¹ Rule 14.32(4) provides that unless the panel otherwise permits, oral argument must not exceed 45 minutes for each separately represented party in the appeal, with any consolidated appeals to be treated as one appeal.

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